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Against 'Legal Facts'

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Abstract

In recent years, the controversy between legal positivists and their opponents has been reframed as a debate on whether 'legal facts'—aka facts about the 'content of the law'—are determined by social or moral facts. This new framing ought to be resisted, for two reasons. First, it is biased against legal positivism, by making it the default picture that the 'content of the law' is not a set of legal *norms* atomistically individuated—which is essential to positivism—but a set of 'facts' ("the fact that Jones legally ought to pay $35 to Smith") which can then be grounded holistically in moral facts. Second, talk of 'legal facts' has been instrumental in the recent metaphysical turn in jurisprudence, especially in the growing literature on grounding and law. Jurisprudes—of all stripes—should resist it, as it impoverishes and obfuscates many important philosophical questions about law.

In this paper, I set out to argue that we should stop talking about 'legal facts' in general jurisprudence. This goes especially for legal positivists who seem to think that positivism is a theory about the way 'legal facts' depend on—are determined by, supervene on, are grounded in—social or moral facts. This is a very neat way to frame the issues at hand: It is all about facts of various sorts. It is facts all the way down. Neat as it is, I will argue that this framing should be resisted because as such it is a Trojan Horse. The point about the Horse was that it was meant to be *confusing*: The Trojans were legitimately puzzled about what the Horse was for (was it a gift? an offering? a supernatural apparition?) and, out of such confusion, they allowed it in.

I will argue that the same goes for 'legal facts' as they were introduced in jurisprudential debates by prominent non-positivists (especially Mark Greenberg). 'Facts' about law (or facts about the 'content' of law) are of very different kinds. It is reasonable to assume that *some* facts about law can only be ascertained via recourse to moral considerations. So, if positivism is about 'legal facts' and at least some 'legal facts' depend on 'moral facts', then positivism is indefensible. Moreover, 'legal facts' are often used as a Trojan horse for a holistic conception of legal content which is, in fact, incompatible with positivism's core tenets: Positivists are therefore asked to provide a justification for their theses in a framing which is overtly hostile to them. Positivism can be defended as a jurisprudential tenet if and only if we show that it was never about 'legal facts' per se, but about a specific subset of 'facts' about law, and that allowing the issue to be framed in terms of 'legal facts', *period*, is just a self-inflicted blow.

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1. Introduction: On Framing Debates in Legal Philosophy

When you are on the losing end of a debate, a fruitful strategy is to change the way the debate is framed. Your opponent is then faced with the following dilemma: Either argue against the framing itself—and then lose track of the original debate—or try to win the debate on the new terms you just imposed onto it. Whatever they choose, you are more likely than not to win. Contemporary analytical jurisprudence is a good case in point.

For most of the twentieth century, legal positivists of all stripes framed the debate with their opponents in terms of the law being a system of norms—especially normative *rules*—whose existence is explained in terms of their (systemic) *validity*.[1] Now, 'validity' is a very ambiguous word, and there has been a constant disagreement among positivists of various stripes; however, it could be argued that the smallest common denominator meaning of validity is that of 'membership'.[2] Positivists[3] share the core idea that whether a norm belongs to a legal system—and therefore is a *legal* norm—depends on social facts of a certain kind, and is not predicated on the value or merit (moral or otherwise) of said norm.[4] This notion is captured by the Austinian motto: "The existence of law is one thing; its merit or demerit is another."[5] The Austinian maxim is still too vague: the "existence of law" can refer both to the existence of a legal system as well as

1. In this paper I will be talking of *norms*. I realise that there is no universally shared terminology: Typically, Hart and some of his successors talk of *rules*, rather than *norms*. Now, not all norms are rules: There are individual norms, which apply to one specific case, whereas rules seem to have a built-in element of generality. See Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1949) at 38. Conversely, Raz has shown that not all rules are norms, insofar as not all rules aim to give specific reasons for actions. See Joseph Raz, *Practical Reason and Norms,* 2d ed (Oxford University Press, 1999) at 208, n 9. Other stipulative distinctions between rules and norms have been made which will not be dealt with here: see e.g. Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (Humanities Press, 1963) at 6; Mauro Barberis, *Il diritto come discorso e come comportamento* (Giapicchelli, 1990) at 146-50. In what follows I will be talking mainly about general, rule-like norms—or normative rules—while leaving aside issues surrounding individual norms and non-normative rules.
2. For a disambiguation of the notion of validity, and the focus on membership as the smallest common denominator among positivists, see Eugenio Bulygin, *Essays in Legal Philosophy*, ed by Carlos Bernal et al (Oxford University Press, 2015) at chs 6, 10, 17.
3. It should be clear from the outset that I am going to talk only about 'substantive' or 'theoretical' positivism, as a thesis on the nature of law (or, more simply, on what law is). I will not explore the other dimensions of legal positivism: On the Continent, positivism is mainly understood as an *epistemological* and *methodological* claim about legal science as a value-free endeavour. Another strand of positivism can be dubbed 'ideological'—or nowadays 'ethical' or 'normative'—as a bundle of claims about the value of legality. For the disambiguation of these various strands of 'legal positivism', see Norberto Bobbio, *Il positivismo giuridico* (Giappichelli, 1979) at 280; Norberto Bobbio, *Giusnaturalismo e positivismo giuridico* (Laterza, 2011) at 87. See also, more recently, Torben Spaak & Patricia Mindus, "Introduction" in Torben Spaak & Patricia Mindus, eds, *The Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021) 1 at 6-14.
4. As I am going to argue, the best articulation of this thin approach is John Gardner's: see John Gardner, "Legal Positivism: 5½ Myths" in *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 19. I will come back later to Gardner's contribution.
5. John Austin, *The Province of Jurisprudence Determined*, ed by Wilfred E Rumble (Cambridge University Press, 1995) at 157.

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the existence of particular laws (or legal norms). Many, if not all, positivists adopt an atomistic conception of law: The basic story that positivism embraces is that law (the legal system) is made up of a discrete set of norms—or normative rules—identified through specific criteria of validity.[6] The way this story was framed meant that their opponents had to show that moral (or otherwise evaluative) criteria must be used in order to ascertain the membership of legal norms—that is, their *legal* quality, or their character as *laws*.

Non-positivists were to some extent prisoners of such a way to frame the debate. Gustav Radbruch for instance, had to show that the injustice of a given law had, if extreme enough, an impact on its validity.[7] The same goes for Lon Fuller, who went out of his way to show that a legal system's "internal morality" was a key component of the validity of its laws.[8] Robert Alexy, the leading non-positivist on the Continent, frames his typology of non-positivisms (exclusive, inclusive, super-inclusive) in terms of their views regarding the moral components of legal validity.[9]

Some tried to escape this way of framing the debate. John Finnis accepted the basic tenet that immoral laws are still laws, while arguing that it was a trivial, and not quite interesting, fact about law: What was not trivial, in his view, was that law's *point* (as a whole) was to perform a moral function, and that an immoral law, while still being technically legally valid, was otherwise defective in terms of its moral function.[10] As Hart argued, this was all very interesting, but beyond the point: As far as he was concerned, since Finnis granted the basic point about validity, his natural law theory was largely compatible with legal positivism.[11]

Enter Ronald Dworkin. At first, Dworkin tried to attack positivism from within the positivistic picture, so to speak. In the "Model of Rules" I and II, he accepted the basic story put forward by Hart and others, that law was a system of norms; thus, his attack rested on the distinction between two kinds of norms, pedigreed ones (rules) and non-pedigreed ones (principles).[12] The two kinds of

6. I argue below that atomism is a core component of positivism—even if it has also been adopted by many anti-positivists.

7. See Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)", translated by Bonnie Litschewski Paulson & Stanley L Paulson (2006) 26:1 Oxford J Leg Stud 1.

8. Lon L Fuller, *The Morality of Law*, revised ed (Yale University Press, 1969) at 44. Fuller's views are more complex and ambiguous than I make them seem to be. Fuller claims that failure to satisfy the requirements of internal morality entails a "failure to achieve rules at all" (*ibid* at 39), but he seems to locate the failure at the systemic level: a single retroactive, obscure, non-public etc. rule may be valid, but a system in which many rules are defective "is not properly called a legal system" (*ibid*). There is a threshold effect for invalidity which is—or so it seems—not satisfied at the level of individual rules, but Fuller is not quite clear on this issue.

9. See Robert Alexy, "On the Concept and the Nature of Law" (2008) 21:3 Ratio Juris 281.

10. See John Finnis, *Natural Law and Natural Rights,* 2nd ed (Oxford University Press, 2011) at ch XII. Interestingly, the moral function thesis has been endorsed by many a legal positivist: see e.g. Scott J Shapiro, *Legality* (Harvard University Press, 2011) at 213-17.

11. See HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) at 12. Of course, such an account may be resisted if one endorses a thicker version of positivism, including some methodological tenets about legal theory, as a strictly descriptive or conceptual endeavour.

12. See Ronald M Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev 14; Ronald Dworkin, "The Model of Rules II" in Dworkin, *Taking Rights Seriously*, *infra* note 53, 46.

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norms behave differently and only the former fits the positivistic picture. But ultimately, Dworkin realised he had to change course—perhaps because positivists can very well account for the rule/principle distinction[13]—and he sought to reframe the debate altogether. In "No Right Answer?" and in *Law's Empire* (where the rule/principle distinction does not appear once), Dworkin put forward a holistic, amorphous picture of what law is.[14] According to Dworkin, law, being an interpretive concept, is not made up of a discrete set of norms, whose criteria of validity—their 'grounds'—would have to be explained in terms of either their social sources or their moral value. Law is nothing but an interpretation, or rather a chain of interpretations. What makes 'legal propositions' true is not relevant facts about the validity or the content of given norms; it is the best (in terms of both fit and moral value) interpretation of past materials identified as relevant at the pre-interpretive stage.

Now, Dworkin had a lot of followers; but he could not force positivists to accept his framing. Post-Hartian positivists addressed the challenge mounted by Dworkin by refining their key concepts (validity, rule of recognition, etc.); but they did not try to present a positivist version of Dworkinian interpretivism:[15] they just did not accept the framing itself.[16] To some extent, Dworkin was victorious insofar as he managed to push positivists into intestine and byzantine debates (such as the inclusive-versus-exclusive-positivism debate). But his victory was a Pyrrhic one: No positivist agreed interpretivism was a viable metaphilosophical option.

This excursus into the recent history of analytical jurisprudence shows that, until recently, no attack on legal positivism had succeeded in changing radically the terms of the debate. That is, until Mark Greenberg published "How Facts Make Law" (here-after HFML) I and II.[17] In these papers, as well as his more recent ones culminating in the articulation of his moral impact theory, Greenberg presents the issue in a distinctively new way.[18] In HFML I, he introduces the notion that "legal content" (on which more later) depends not only on

13. See e.g. Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81:5 Yale LJ 823.

14. See Ronald Dworkin, "No Right Answer?" (1978) 53:1 NYUL Rev 1 [Dworkin, "No Right Answer"]; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) [Dworkin, *Law's Empire*].

15. Such a version is possible, by the way; it is what Dworkin calls "conventionalism." Dworkin, *Law's Empire*, *supra* note 14 at 114ff. Whether any legal philosopher has embraced such a view or whether it is a straw man remains to be seen.

16. See Andrei Marmor, *Interpretation and Legal Theory,* revised 2nd ed (Hart, 2005).

17. See Mark Greenberg, "How Facts Make Law" (2004) 10:3 Leg Theory 157 [Greenberg, "HFML I"]; Mark Greenberg, "Hartian Positivism and Normative Facts: *How Facts Make Law II*" in Scott Hershowitz, ed, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 265 [Greenberg, "HFML II"].

18. See Mark Greenberg, "The Standard Picture and Its Discontents" in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press, 2011) 39 [Greenberg, "The Standard Picture"]; Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 Yale LJ 1288 [Greenberg, "Moral Impact Theory"]; Mark Greenberg, "The Moral Impact Theory, the Dependence View and Natural Law" in George Duke & Robert P George, eds, *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017) 275.

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"descriptive facts" or "social facts"—that is, facts about specific practices, which he calls "law practices," involving certain social agents, such as legal authorities and officials—but also on "normative" facts or "value facts."[19] Interestingly enough, the phrase "legal facts" appears only once in HFML I, and in a rather cursory way.[20] In HFML II, however, 'legal facts' are everywhere: They are first introduced as the *same thing* as legal content;[21] then as "true legal proposition[s]," and in the same breath as "fact[s] *about* the content of the law."[22] I will come back to these different definitions later. For now, what is important is that, especially in HFML II, Greenberg sets out to use the legal fact/legal content formulation to rephrase central theses in contemporary legal positivism. Thus, the rule of recognition is "understood as constitutive of legal facts: ... a model of how law practices contribute to the content of the law is legally correct in virtue of the existence of a rule of recognition specifying that model."[23] Greenberg nevertheless concedes that "Hart would not put the point this way."[24]

Not only would Hart not put the point that way, but virtually no legal positivist ever put any of their (numerous, sometimes conflicting) points that way. As I will explain further in section 2, some positivists had already used vague and confusing formulations, such as 'the existence and content of law depends on social sources'. But as I will show, even positivists using this kind of formulation did disambiguate it in their writings, usually endorsing the atomistic picture mentioned above. No positivist before HFML II had, to my knowledge, framed the main positivist tenets in terms of the relationship between 'legal facts' and moral or social facts.[25]

This makes it even more puzzling that many self-avowed legal positivists—as well as many people writing about legal positivism—jumped on the 'legal facts' bandwagon. In his 2009 article on the rule of recognition, Scott Shapiro was still using the usual terminology (legal rules, criteria of validity, etc.); two years later, he explicitly endorsed the "legal fact[s]" phrase, expressly attributing its adoption to Greenberg's influence.[26] He then went on to characterize the position of legal positivists as follows: "all legal facts are ultimately determined by social facts

19. Greenberg, "HFML I", *supra* note 17 at 157 [footnote omitted].
20. *Ibid* at 190.
21. See Greenberg, "HFML II", *supra* note 17 at 265.
22. *Ibid* at 267 [emphasis added]. This characterization of facts as propositions was already present in Greenberg, "HFML I", *supra* note 17 at 167.
23. Greenberg, "HFML II", *supra* note 17 at 267, 271.
24. *Ibid* at 271.
25. Some positivists used the phrase 'legal facts' before Greenberg published HFML I and II, but usually in the context of a debate about the objectivity of law, and *not* as a way to frame the debate between positivists and anti-positivists. See Jules L Coleman, "Truth and Objectivity in Law" (1995) 1:1 Leg Theory 33; Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) at 265. It bears noting that in the same book, Leiter squarely frames legal positivism in terms of a theory of *legal norms* (not legal facts): see *ibid* at 66-67.
26. Shapiro, *supra* note 10 at 25 [emphasis removed], citing the influence of Greenberg, "HTML I", *supra* note 17. See also Scott J Shapiro, "What Is the Rule of Recognition (And Does It Exist)?" in Matthew Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the U.S. Constitution* (Oxford University Press, 2009) 235.

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alone."[27] After seeming initially reluctant, Kevin Toh now uses the 'legal facts'-based characterization of legal positivism.[28] So do Jules Coleman,[29] Michael Green (reinterpreting Kelsen),[30] Barbara Baum Levenbook, Gideon Rosen, David Plunkett, Tomasz Gizbert-Studnicki, Samuele Chilovi, Bill Watson, Felipe Jiménez, Mitch Berman, and many others.[31] I think it is a serious mistake, and this paper aims to show why.

I have two main objections, which I am going to spell out in the three main sections of this paper: First, the category of 'legal facts' is overbroad—as it lumps together many types of 'facts' about law, some with a different status with regard to the justifiability of jurisprudential takes on law—and it surreptitiously invites positivists to adopt a holistic conception of law which is alien to core positivistic tenets. Second, the 'legal facts' picture draws not only positivists but all legal philosophers into a dispute which is ultimately metaphysical, inviting them to situate some queer entities ('legal facts') within the broader catalogue of the world. I will argue that such a move is, for positivists, self-defeating—and should be resisted by legal philosophers of all stripes.

2. Varieties of 'legal facts'

2.1. 'Facts' about law

Scott Shapiro has an extensive notion of the kinds of entities that qualify as legal facts: "A legal fact is a fact about either the existence or the content of a particular legal system. It is a legal fact, for example, that Bulgaria has a legal system.

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27. Shapiro, *supra* note 10 at 27 [footnote omitted].

28. See Kevin Toh, "An Argument against the Social Fact Thesis (And Some Additional Preliminary Steps towards a New Conception of Legal Positivism)" (2008) 27:5 Law & Phil 445 at 448-49; *cf* Kevin Toh, "Legal Philosophy à la carte" in David Plunkett, Scott J Shapiro & Kevin Toh, eds, *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press, 2019) 221 at 221ff.

29. See Jules L Coleman, "The Architecture of Jurisprudence" (2011) 121:1 Yale LJ 2 at 44. In fairness, Coleman already pioneered, as we saw in a previous footnote, the use of the phrase 'legal facts' (albeit in a slightly different fashion) before Greenberg made it fashionable.

30. See Michael S Green, "Hans Kelsen's Non-Reductive Positivism" in Mindus & Spaak, *supra* note 3, 272. Green explicitly concedes that "[t]he term 'legal fact' is not one used generally by Kelsen himself" (*ibid* at 285, n 57).

31. See Barbara Baum Levenbook, "How to Hold the Social Fact Thesis—A Reply to Greenberg and Toh" Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press, 2013) 75; Gideon Rosen, "Metaphysical Dependence: Grounding and Reduction" in Bob Hale & Aviv Hoffmann, eds, *Modality: Metaphysics, Logic, and Epistemology* (Oxford University Press, 2010) 109 at 113-14; David Plunkett, "A Positivist Route for Explaining How Facts Make Law" (2012) 18:2 Leg Theory 139; Tomasz Gizbert-Studnicki, "Social Facts and Legal Facts: Perils of Hume's Guillotine" in Mindus & Spaak, *supra* note 3, 419; Samuele Chilovi, "Grounding-Based Formulations of Legal Positivism" (2020) 177:11 Philosophical Studies 3283; Bill Watson "In Defense of the Standard Picture: What the Standard Picture Explains That the Moral Impact Theory Cannot" (2022) 28:1 Leg Theory 59; Felipe Jiménez, "Legal Positivism for Legal Officials" (2023) 36:2 Can JL & Jur 359; Mitchell Berman, "How Practices Make Principles and How Principles Make Rules" (2024) 28:3 J Ethics & Social Philosophy 299.

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Similarly, it is a legal fact that the law in California prohibits driving in excess of 65 miles per hour."[32] I will come back later to the 'existence and content' phrase. But suffice it to say that, according to Shapiro, legal facts are meant to cover both the fact that a given legal system—such as Bulgaria's—and facts about given *laws*—such as the speed-limit rule in California—do exist. Greenberg on the other hand firmly equates legal facts with "the content of the law" or "fact[s] about the content of the law." By that definition, facts about the existence of legal systems are excluded. Now the content of the law "consists at least of all the general legal obligations, rights, privileges, and powers that exist in the legal system (at the time)."[33] It is clear that Greenberg rejects norm-atomism (Shapiro's case is less clear): In the Greenbergian picture, obligations, rights, etc., are not the content (or the result) of *norms*, but free-floating entities of the world.[34] The 'legal fact' category is therefore non-redundant with regard to other jurisprudential categories (such as norms).

Let me be clear from the outset that I do not intend to get into the debates on the metaphysical nature of 'facts'.[35] I will not aim to ascertain whether facts are entities or relations between properties and entities; I will not venture into ascertaining whether facts are true propositions (truth-bearers)[36] or whether they are what make propositions true (truth-makers).[37] With some notable exceptions, people writing about legal facts—even about the metaphysics of such facts—do not spend too much time trying to adjudicate these debates.[38] Dworkin, for instance, arguably conceives "propositions of law" as truth-bearers, but their truth-makers (the so-called "grounds of law") are not facts, but other (more fundamental) propositions.[39] In an analogous vein, Greenberg equates "facts" with "true propositions."[40] On the other hand, Plunkett clearly seems to define facts as truth-makers.[41] For now, I will presuppose a very thin notion of facts as bare truth-makers: Facts are the stuff that makes propositions true. But I will not be enquiring into the exact nature of facts, or even if facts exist, because it would be beyond the point. Although some variants of fact-eliminativism have been emerging,[42] this paper is not going to argue that legal facts do not exist, but rather that 'legal facts' are too broad a category to usefully frame the positivist/anti-

32. Shapiro, *supra* note 10 at 25. The California example is taken from Dworkin, *Law's Empire*, *supra* note 14 at 4 (although the speed limit must have been increased between 1986 and 2011, since, per Dworkin, the California speed limit was 55 mph then, not 65!).
33. Greenberg, "The Standard Picture", *supra* note 18 at 40.
34. *Ibid* at 50ff.
35. For a good overview, see Kevin Mulligan & Fabrice Correia, "Facts" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2021), online: plato.stanford.edu/archives/win2021/entries/facts/.
36. See especially Gottlob Frege, "Thoughts" in Nathan Salmon & Scott Soames, eds, *Propositions and Attitudes* (Oxford University Press, 1988) 33.
37. See e.g. DM Armstrong, *A World of States of Affairs* (Cambridge University Press, 1997).
38. For exceptions, see especially Triantafyllos Gkouvas, *Law's Humility: Enlarging the Scope of Jurisprudential Disagreement* (Hart, 2021).
39. Dworkin, *Law's Empire*, *supra* note 14 at 4-5
40. Greenberg, "HFML I", *supra* note 17 at 167, n 22.
41. See Plunkett, *supra* note 31 at 141.
42. See especially Arianna Betti, *Against Facts* (MIT Press, 2015).

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positivist debate. To be quite explicit: 'Legal facts' are used to allow for a non-atomistic conception of legal content to be used as a *default assumption* in debates between positivists and non-positivists—a strategy that positivists should resist.

Consider the following propositions about law:

(1) It is a fact that legal system S exists.
(2) It is a fact that legal norm N belongs to legal system S.
(3) It is a fact that legal norm-formulation NF belongs to system S.
(4) It is a fact that N provides that thieves ought to be hanged.[43]
(5) It is a fact that NF reads as "thieves ought to be hanged."
(6) It is a fact that (in S) legally, thieves ought to be hanged.
(7) It is a fact that Jones is a thief.
(8) It is a fact that Jones ought to be hanged.

It seems that even if some of these propositions can be *prima facie* thought of as extensionally equivalent, none of them are intensionally equivalent. They mean different things. Therefore, their truth-makers *may* be different ontological kinds.

As propositions (2)-(8) show, there are basically four ways of thinking about legal content: legal content as *norms*, legal content as *norm-formulation*, legal content as *normative content*, and legal content as normative *states of affairs.* I am going to suggest that contrary to what it may seem, these four kinds of facts are not equivalent.

2.1.1. (Facts about) norms

Propositions (2) and (4) are about ***norms***. Since I intend to suggest that classical debates in legal philosophy rest on an atomistic conception of norms, it may not be ill-advised to say a few words about 'norms' *qua* specific entities. Now, I am well aware that the nature of norms has been debated for decades. For instance, deontic logicians and jurisprudes have debated what makes norms the way they are—and especially if what makes them 'normative' is their semantic features (especially the semantic features of deontic operators) or the pragmatic features of norm-formulations. According to an 'expressive' conception of norms, such as that of Alchourrón and Bulygin, norms are speech-acts (such as commands or imperatives) whose propositional content remains identical across pragmatic contexts (descriptive and normative): A norm is a sentence formulated in the imperative, which commands a certain proposition.[44] What makes the norm 'normative' is not its propositional content (which Alchourrón and Bulygin call "norm-content"), but the fact that it has been commanded.[45] Semantic conceptions of norms, on the other hand, treat normative operators as semantically

43. "Provides that" is, of course, much too ambiguous. I will clarify later.
44. See Carlos E Alchourrón & Eugenio Bulygin, "The Expressive Conception of Norms" in Stanley L Paulson & Bonnie Litschewski Paulson, eds, *Normativity and Norms*: *Critical Perspectives on Kelsenian Themes* (Oxford University Press, 1998) 383.
45. *Ibid* at 390.

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sui generis: Norms are propositions, whose normativity is a feature of the very propositional content which makes up the meaning of the normative sentence.[46] According to the semantic conception, norms are distinct kinds of propositions, whose normativity cannot be reduced to the pragmatic factors (whether the sentence's illocutionary force is, for example, imperative rather than merely providing a suggestion). Both conceptions usually agree that norms are typically not *truth-apt.*[47] Whenever a norm is issued (such as the norm which provides that you ought to close the door), the norm may be satisfied but cannot be verified. This is so because they have a world-to-word direction of fit; whether this is due to semantic or pragmatic features of normative formulations is not something I will adjudicate here.

Indeed, I do not intend to settle this debate, or any related debate about the nature of norms. I will assume throughout that norms are at least *related* to propositional entities—something both sides of the debate agree on, even if semantic theories treat norms *as* propositions, whereas expressive conceptions call norms the very speech-acts which 'command' such-and-such proposition (the proposition being itself normatively inert). Rather I intend to avoid this debate altogether by going *oblique*—that is, by focusing on propositions which aim at *describing norms.*[48] One must distinguish between norms—whatever they are—and *normative propositions*—that is, descriptive propositions about norms, such as (2) and (4).[49] Norms are the truth-makers of normative propositions: So (2) and (4) are true if N exists. As Raz puts it (re: rules, but the point can be generalized to norms in general): "[Rules] are things the content of which is described by some normative statements."[50] In what follows, I will adopt such an oblique approach throughout: In order to illuminate the nature of norms and related entities, I will focus on propositions about norms (that is, normative propositions) and about related entities.

Whether normative propositions describe semantically *sui generis* propositions or they describe (semantically) ordinary propositions which happen to have been 'commanded' by a speech act uttered by a legal authority does not make much of a difference here. Let us take a normative proposition (that is, a

46. See Ota Weinberger, "The Expressive Conception of Norms: An Impasse for the Logic of Norms" in Paulson & Litschewski Paulson, *supra* note 44, 411; Jaap Hage, *Studies in Legal Logic* (Springer, 2005) at 17ff.

47. This can be disputed. Whether norms are or are not truth-apt is at the heart of one of the foundational paradoxes of deontic logic: Jörgensen's dilemma. See Jörgen Jörgensen, "Imperatives and Logic" (1937) 7 Erkenntnis 288.

48. I am loosely borrowing the notion of 'oblique analysis' from Allan Gibbard: going oblique means "characterizing normative concepts by describing independently the states of mind that employ them." Allan Gibbard, *Thinking How to Live* (Harvard University Press, 2003) at 185. In our version of it, an oblique analysis of norms focuses on propositions that aim to describe them; it is therefore close to what Here called an 'ought in inverted commas'. See RM Hare, *The Language of Morals* (Oxford University Press, 1952) at 164.

49. See Carlos E Alchourrón, "Logic of Norms and Logic of Normative Propositions" (1969) 12 Logique et Analyse 242; Carlos E Alchourrón & Eugenio Bulygin, *Normative Systems* (Springer Verlag, 1971) at 121.

50. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) at 148.

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descriptive proposition about a norm) such as: "It is obligatory that *p*." According to the semantic conception, this proposition is true if and only if, for example, an authority has uttered a normative sentence whose meaning is the proposition *Op*. According to expressive conception, the normative proposition "it is obligatory that *p*" is true if and only if, for example, an authority has uttered "*p*!"—that is, a speech act commanding *p*. But in both cases, normative propositions describe *some* propositional content, be it complete normative propositions (semantically *sui generis*), or 'norm-contents'—that is, ordinary propositions *qua* commanded via a specific speech act. So, when (especially in section 2.2.) I talk about normative propositions—descriptive propositions about the existence and content of norms—the reader will be free to read into 'norms' their preferred ontology of norms.

2.1.2. Other kinds of 'facts about law'

Propositions (3) and (5) are facts about (legal) *normative formulations*. They stand to norms (or, if you are an expressivist, 'norm-contents') as sentences stand to propositions. It is therefore commonplace to assume that norms are the meaning, or the content, of normative formulations. It does not mean that norms are necessarily language-dependent, but they are language dependent *insofar as* propositions in general are language-dependent.[51] If you are a Fregean about propositions, then you will argue that norms are not language-dependent. However, it makes sense to make norms at least *prima facie* language-dependent, whether you believe norms *are* propositions or—*a fortiori*—whether you think they are speech acts. However, not all norm-formulations are linguistic sentences *stricto sensu*, such as verbal or written utterances (like texts). They encompass all plausible units of (normative) meaning, from gestures to complex practices such as customs. Nevertheless, the most standard way to formulate norms in municipal legal systems remains the issuance of texts (e.g., statutes).

Proposition (6) is about *normative content*. Propositions about normative content *simpliciter* are about general rights, obligations, etc. Normative contents connect a given action—or set of actions—with a deontic operator. Normative contents can be described holistically or atomistically. If one has an atomistic conception of normative contents, then (4) and (6) are extensionally equivalent: Normative contents are always, well, the content of norms—or rather, they are what norms require, even if such contents hold only *pro tanto* and may have to be combined with other normative contents (the contents of other norms) to yield a complete operative content, that is, a complete individuated norm.[52] However, if one

51. The language dependence of norms is a thesis endorsed by many different people. See e.g. Mathieu Carpentier, *Norme et Exception. Essai sur la défaisabilité en droit* (LGDJ/Varenne, 2014) at 48-52.

52. On the *pro tanto* view of normative content, see Hrafn Asgeirsson, *The Nature and Value of Vagueness in the Law* (Hart, 2020) at 14-20. As a view of normative content—and the reasons resulting therefrom—the *pro tanto* view is plausible, but one should keep in mind that the defeating of such content/reasons is part of a *dynamic* process, and is often settled at the

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endorses a non-atomistic, or holistic, notion of normative content, then (4) and (6) are not equivalent, because (4) is either meaningless or false (on an error-theoretic basis). Notably, Dworkin's and Greenberg's strategy involves talking about normative content (the stuff that makes legal propositions true) without individuating *norms*.[53] What makes propositions such as "thieves ought to be hanged" true is *not* the fact referred to in (4) but a holistic interpretation of many different kinds of facts (linguistic, social, and moral), according to criteria of fit and justification. So, it would make sense for a holist such as Dworkin to reduce legal facts to normative content thus understood—a kind of normativity without norms.

Propositions (7) and (8) are about *normative states of affairs.* States of affairs (SOAs) are compositional entities (they are the connexion between a given entity and a property). Whereas facts either obtain or do not obtain, states of affairs can be non-obtaining.[54] For instance, let us suppose that Jones did not steal anything. Then it is *not a fact* that Jones stole something: A fact either obtains or is not a fact. Whereas states of affairs, being mere connections between entities and properties, can be non-obtaining. It is therefore possible to say that "Jones stealing a loaf of bread" is a non-obtaining state of affairs. Normative states of affairs are entailed by either norms or normative contents: That Jones ought to be punished is a state of affairs which may obtain or not. In Kelsenian terms, normative SOAs are SOAs which are *gesollt*.[55] If thieves ought to be punished, and if Jones is a thief, then it is entailed that "Jones ought to be punished."[56] This is not a fact: After all, perhaps Jones is not a thief. In that respect, normative SOAs are *logical consequences* of norms/normative contents: they obtain only on the basis that the premises are true; otherwise, they remain non-obtaining. Both (7) and (8) denote facts about normative SOAs.[57]

I have not discussed (1). Per Greenberg, (1) would not be a legal fact (*pace*, Shapiro). It still is a fact about law, but not a fact about the *content* of law. However, it bears noting that (1) is among the truth-makers of at least some

implementation/application stage: so whether a given *pro tanto* content/reason is defeated or not is usually *not* a matter of fact *prior* to a decision being made on the matter by a law-applying organ. More in section 4 on the dynamic character of the law.

53. As Dworkin observed: "[Raz] says that I pay insufficient attention to the general problem of the individuation of laws. In this he is too generous for it would be more accurate to say that I pay no attention to that problem at all." Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) at 74 [Dworkin, *Taking Rights Seriously*]. When Dworkin wrote this, he was, however, still committed to the idea that law was made up of individuated norms (rules and principles), even if the individuation process itself was of no interest to him. A few years later, in *Law's Empire,* he would adopt a holistic picture which made it impossible to even talk of individuated norms: see Dworkin, *Law's Empire*, *supra* note 14.

54. See Betti, *supra* note 42 at 35.

55. See Kelsen, *infra* note 85.

56. The fact that Jones is a thief is itself a normative state of affairs ('thief' being a legal term) whose obtaining depends on additional conditions (such as "Jones stole something").

57. Alchourrón and Bulygin have claimed that the logical consequences of norms belong to the legal system—a thesis known as the 'deductive closure of legal systems'. See Alchourrón & Bulygin, *supra* note 49 at 185. Showing why the deductive closure thesis is false would take me beyond the scope of this paper. Some arguments can be found (albeit in another context, and with another target) in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994) at 228-29.

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propositions in (2)-(8). If the content of law is *norms*, one must have the concept of a legal system in order to understand how a given norm can be distinctively *legal*.[58] The typical positivist answer is that *legal* norms exist because they belong to a certain system of normative creation. The fact that my own 'norm', according to which "you ought to call me Your Royal and Imperial Highness," is not a *legal* norm is due to the fact that it does not belong to any legal system.[59] The same goes for normative contents and SOAs insofar as (and *only* insofar as) they relate to norms—that is, insofar as normative contents are contents of norms atomistically individuated. A holistic conception of normative content does not need the notion of a legal system—if only metonymically—to denote the persons, times, and places to which the normative content applies. In a holistic conception of (6), one does not need the concept of a legal system (as in, "in S"), except as a shorthand, as "for persons $P_1 \ldots P_n$, in places $L_1 \ldots L_n$", etc., which indicates the jurisdictional factors depending on which (6) is true or not.

2.2. Existence and content

As I have hinted, legal positivism is essentially about the truth-makers of propositions like (2). It is about the existence (or membership) of legal norms, and not about normative content *per se*. I will give my reasons for this claim in the next section. There remain, however, a few issues that need to be clarified in order for it to make sense to defend an atomistic metatheory of the membership of legal norms. In particular, if, as I am going to argue, legal positivism is a thesis—or set of theses—about *membership* rather than *content*, I need a theory of where the distinction lies. I will propose such a theory here, but you do not need to agree with it—other theories of the membership/content distinction are possible—in order to share the basic point that positivism is about membership and not about content.

Before 'legal facts' got centre-stage as the subject matter of legal philosophy, it was often claimed that positivism was the following thesis (or a variant thereof): "The existence and content of law is determined by social facts alone."[60] The phrase "the existence and content of law" is ambiguous. As Jorge Luis Fabra-

58. The same goes for normative formulations and propositions (3) and (5), but I will suggest in subsection 3.1. that what belongs to law is norms, not normative formulations.

59. I will not try to articulate a complete account of what *legal systems* are. I basically share the picture put forward by, for example, Raz and Bulygin, who distinguish between momentary and non-momentary legal systems (Bulygin calls the latter "legal order"): a momentary legal system is the set of all the norms that belong to it according to the system's criteria of membership at a given point in time; a non-momentary legal system (or, per Bulygin, a "legal order") is a sequence of such sets. Eugenio Bulygin, "Time and validity" in Bulygin, *supra* note 2, 171 at 173. See also Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed (Oxford University Press, 1980) at 187ff. On this view the concept of 'membership' is therefore a key component of the concept of a legal system.

60. Among many possible examples, see e.g. Raz, *supra* note 50 at 39-41; Raz, *supra* note 57 at 210; WJ Waluchow, *Inclusive Legal Positivism* (Oxford University Press, 1994) at 82; Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 NYUL Rev 1035; Leslie Green & Thomas Adams, "Legal Positivism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2019), online: plato.stanford.edu/archives/win2019/entries/legal-positivism/.

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Zamora neatly puts it, one must distinguish between the issue of "the existence of a legal system" and that of "the existence of individual legal norms."[61] As for 'content', the content of the legal system is precisely a set of legal norms, whereas the content of *a law* (a legal norm) is about what exactly that law requires. As Fabra-Zamora writes:

> For example, the question "Was there a Roman legal system?" queries the system's existence, while "Did Roman law have a rule compensating property owners for damage caused by third parties?" questions the system's content. In turn, the question "Was *Lex Aquilia* a rule of Roman law?" is a question about a law's existence, while "Did *Lex Aquilia* protect only the property of Roman Citizens?", "Which kind of property did the law protect?", and "Did the law provide compensation for fault only, or did it also allow for strict liability?" are questions about the content of that law.[62]

I basically agree with that cartography of the various issues covered by the ambiguous expression "the existence and content of law." However, it can be challenged, and I want to address such challenges.

First, propositions about the content of a legal system and statements about the existence of the system's legal norms are extensionally equivalent. This is because, as I have argued elsewhere, *membership* is the specific mode of existence of legal norms (as well as *all* norms, but that is beyond the point).[63] A legal norm exists *qua* legal norm insofar as it belongs to a legal system. So it is strictly equivalent to claim that N 'exists' in legal system S and that it belongs to (the content of) S. The questions "Did Roman law have a rule compensating property owners for damage caused by third parties?" and "Was *Lex Aquilia* a rule of Roman law?" are extensionally (though not intensionally) equivalent.

However, the question remains whether propositions about the existence/membership of norms and propositions about their content can really be distinguished. Since I aim to claim that legal positivism is basically about existence (*qua* membership) rather than content, solving this problem is crucial.

The challenge basically runs the following way. Normative propositions, as we saw, aim to describe legal norms. Describing what norm N is, in short, is exactly the same as describing what N prescribes: Norms and normative contents are the same thing. So it seems that (6)[64] is but an expanded formulation of (2): If "N" is only a shorthand for a proposition and that proposition is "thieves ought to be hanged," then it seems that N ≡ thieves ought to be hanged. Therefore, the propositions "there exists a norm N" and "thieves ought to be hanged" are strictly equivalent. As Bulygin puts it,

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61. Jorge Luis Fabra-Zamora, "Legal Positivism as a Theory of Law's Existence: A Comment on Margaret Martin's *Judging Positivism*" (2021) 55 Isonomía 193 at 195.
62. *Ibid.*
63. See Mathieu Carpentier, "Sources and Validity" in Pauline Westerman et al, eds, *Legal Validity and Soft Law* (Springer, 1998) 75 at 86-87.
64. At least if interpreted atomistically.

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> The sentences
>
> [a] You must not park here
>
> and
>
> [b] There is a norm that prohibits parking here
>
> have the same meaning, [b] being an expanded form of [a].[65]

In that respect, (4) above is a synthesis of (2) and (6): The phrase "provides that" in (4) is the metaphorical equivalent of the equivalence operator (≡). On that picture, norms do not exist independently of what they prescribe or require. Let me call this the *thesis of the unity of normative propositions* (UNP). If (UNP) is true, then legal positivism is necessarily a theory of both the existence and content of laws, since asserting the existence of a law (a legal norm) is the same thing as asserting its content. It then makes sense to claim that positivism is about the determinants of legal content (atomistically understood as the content of legal norms), which entails that the reframing of the debate in terms of legal facts is *prima facie* sound.

I aim to suggest that (UNP) is false. One can assert that a norm exists (i.e., that it belongs to a legal system) without making a proposition about the correlated normative content. This is what Georg Henrik von Wright wanted to show when he distinguished between two kinds of normative propositions (that is, descriptive propositions about norms), to wit, "normative statements" (which describe normative contents) and "norm-propositions" (which bear on the existence of norms).[66] Thus, (6) above is an example of what von Wright calls 'normative statements', whereas (2) is an example of a 'norm-proposition'.

According to von Wright (whom Bulygin criticizes in the above quote), norm-propositions (there exists a norm N which provides *p*) are the truth-makers of normative statements.

> By the *truth-ground* of a given normative statement I understand a truthful answer to the question *why* the thing in question ought to or may or must not be done. Let the normative statement be, for example, that I may park my car in front of your house. Why may I do this? The answer could be that there is a regulation according to which I am permitted to do this. The existence of this regulation (norm, prescription, permission) is the truth-ground of the normative statement. . . . The proposition that such and such a norm exists, I shall call a *norm-proposition*.[67]

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65. Eugenio Bulygin, "True or False Statements in Normative Discourse" in Rosaria Egidi, ed, *In Search of a New Humanism: The Philosophy of Georg Henrik von Wright* (Kluwer, 1999) 183 at 184. I have modified the numbering of the sentences in Bulygin's quotation, in order to avoid confusions.

66. Von Wright, *supra* note 1 at 105, 106.

67. *Ibid* at 105-06 [emphasis in original].

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In a nutshell, I think this distinction is sound, but that 'norm-propositions' (propositions about existence) are *only part of* the truth-makers of 'normative statements' (propositions about contents).

Here is why. (Descriptive) propositions about norms are about propositional contents—be it *sui generis* propositions, or 'norm-contents' resulting from speech acts, depending on your preferred ontology of norms—but one can enquire whether a given content exists without trying to figure out what the *content* exactly is (what the content of the content is, so to speak). This is so because the kinds of facts which are the truth-makers of propositions about the existence of a norm (von Wrightian 'norm-propositions') and about its content (von Wrightian 'normative statements') are different. In short, the facts that make the norm-proposition "N exists," such as (2) above, are (per positivists) basically a specific set of social facts about norm-creation, such as enactment, promulgation etc., whereas the facts that make the proposition "it is obligatory to φ," such as (6) above, are linguistic facts about the meaning of the normative formulation(s) which aims at expressing a norm making it obligatory to φ, together with, possibly, other facts (including, as I will suggest later on, possibly moral facts in some contexts). When we ask whether the norm which provides that thieves ought to be hanged exists (that is, belongs to the legal system), the (positivistic) answer will be that certain social facts obtain in virtue of which N exists:[68] For example, the fact that the legislature voted on a given statute (a set of norm-formulations), that the head of state enacted it, and that N can be traced back to such facts. Whereas when we ask how to define 'thief' and 'hanging' in the context of the law, we mean to ascertain the semantic content of linguistic utterances. These are two different operations. Of course, many statements about law will typically perform both operations at the same time (such as (4) above), but they can be broken down into two different kinds of propositions: propositions about content and propositions about membership.

Propositions about the content of norms such as (6)—i.e., von Wright's normative statements—aim to provide a definite description of the propositional content which is being described. For instance, in (6), 'thief' and of 'hanging' can be interchanged *salva veritate* with descriptions of their intensional properties. On the other hand, propositions about norm-membership merely describe the fact that the norm being described belongs to a given legal system. Such propositions will typically use designators such as "N," or "*Lex Aquilia*" or "article 443 of the Penal Code" or "the *Donoghue v Stevenson* rule." The same goes for phrases such as "the norm that provides that thieves ought to be hanged" or the "thieves-ought-to-be-hanged norm." Such normative designators are usually *shorthand for normative contents*; one does not need to have a complete description of these contents to discuss whether they belong to a given legal system. In a sense, these designators behave like proper names in sentences about the existence of the person they denote.[69]

68. In a previous work, I have interpreted 'in virtue of which' in terms of Razian absolute reasons. See Carpentier, *supra* note 63 at 81, 82

69. It does not matter terribly for the present purposes whether normative designators are rigid designators (*à la* Kripke) or whether they are equivalent to definite descriptions of whatever

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This is why two jurisprudes may disagree whether a norm belongs to a legal system without disagreeing on that norm's content. Let us take as an example a truly evil norm (such as: "all redheads ought to be executed"). A Radbruchian non-positivist will claim that such a norm does not belong to the legal system, whereas a positivist will usually claim it does. Their disagreement is not about what counts as 'redhead' for the purposes of the law. A disagreement on what counts as 'redhead' would revolve on competing normative statements about the norm's content, spelling out, for example, the intensional properties of 'redhead' (e.g., does 'light auburn' count as 'redhead'?). *Ex hypothesi*, our two jurisprudes agree that such is the content of the norm. The disagreement is whether such a norm exists in the first place, i.e., whether it belongs to the legal system.

Moreover, it makes sense to ask whether the thieves-ought-to-be-hanged norm belongs to S without having a *complete* idea of the normative content it designates. Let us suppose that in S the legal definition of thief (such as it is formulated in another part of the criminal code) is "someone who steals royal property" (stealing private property is either permitted, or covered by another statute), and that you ignore the existence of this definition. You can still make the true proposition that in S the thieves-ought-to-be-hanged norm exists—i.e., that it belongs to S—while being wildly off the mark when it comes to the normative content itself. You are still referring to the same norm—because it is traceable to the same set of facts—even if the proposition you would have made about the content of the norm would have been partially false. Now suppose that, among the scholars of S, there is widespread disagreement about the content of N—some, for example, claiming that N only applies to someone who steals royal property, whereas others claim that N also applies to someone who steals sacred relics. What we have here is not a debate on the membership of either one of two different norms, since such norms can be traced to the *same social facts*; the disagreement is about the precise content of the *same norm*.

To be sure, we usually are able to differentiate—and individuate—various existing norms based on a (more or less limited) grasp of their content, because among the social facts that make a norm belong to a legal system there is usually the fact that a *text*—a set of normative formulations such as a statutory provision or a judicial ruling—has been adopted, that is, has been agreed upon as expressing a legal norm. So, unless one thinks of legal communication as being radically opaque, one must accept that normative formulations usually give a rough idea of the kind of behaviour prescribed by the norm: When we ask whether S contains a norm providing that thieves ought to be hanged, we will not be satisfied by an answer pertaining to the way the no-vehicles-in-the-park norm was enacted. This rough grasp of normative content allows us to use the right designators

it is they denote. See Saul A Kripke, *Naming and Necessity* (Harvard University Press, 1980). All that matters is that propositions about norm-membership can denote the existence of norms by using such designators without spelling out the norm's definite content. (As I will suggest in section 3, such 'spelling out' is often the result of controversial interpretive processes.) I would like to thank an anonymous reviewer for pressing me on this point.

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in propositions about the existence/membership of norms; the same way that we need to have an idea of who Pierre is when asserting propositions about Pierre, even if such propositions do not aim to give a description of what (or who) Pierre is.

Now, suppose someone asks the following question Q: "whether in S thieves ought to be hanged." There are basically two ways to answer in the negative: (2') 'no, this norm does not exist/belong to S' (i.e., because such a norm was never enacted in S); (4') 'yes, there is such a norm in S, but it only applies to people who steal royal property'. (2') and (4') cannot be true at the same time. Given what we know about S, (4') is a true description of N's content. This entails that propositions about the existence of norms are independent of propositions about normative contents.

One will object that it all depends on the way one individuates the relevant norm.[70] Since 'thief' means "anyone who steals royal property," then the norm is not really about thieves, but about *thieves of royal property*. So, in the end, there is only one way to answer Q: "No, there is no norm in S which provides that *thieves as such* ought to be hanged." Or so the objection goes. But this does not seem remotely as informative as (2') and (4') above: Indeed, (6') 'In S, thieves ought not to be hanged' seems patently false, precisely because information about existence and information about content are two different kinds of information: (6') is false because we know that the "thieves-ought-to-be-hanged norm" belongs to S, even though such information does not tell us much about the exact content of this norm. This is why propositions about membership are only part of the truth-makers of propositions about normative content.

To be clear: I do not claim that all positivists (if any) endorse this way of distinguishing between existence and content. Some do not endorse the distinction, and others frame it quite differently (see section 3.1, below). My only point is that positivism is best understood as being about membership and not content, which presupposes that the two can be presumptively distinguished. What I have been expounding in this subsection is, however, my own way of delineating the distinction.

3. Legal positivism is only about the membership/existence of norms

Legal positivism is about what makes propositions like (2) above true. It is about the criteria of membership of norms within particular legal systems. Hence Gardner's famous definition of legal positivism:

70. To be clear, norms often *must* be individuated from various legal materials (normative formulations): they are seldom expressed by one canonical formulation (even in civil law systems, where legislation is a central case of norm-creation). The only point I am making is that, per positivists, whether a given norm *thus individuated* exists or not depends on its traceability to some social facts, among which there may, or may not, be a single canonical normative formulation; whether the norm thus individuated has such and such content is a *different* question.

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> (LP*) In any legal system, whether a given norm is legally valid, and hence *whether it forms part of* the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).[71]

To put it another way, legal positivists claim that whether a norm belongs to the legal system depends on social facts (or rather a specific set of social facts relating to legislation, custom, precedent, etc.), and not moral considerations.[72] A norm may belong to the legal system even if it is morally unmeritorious, and it may be the case that a morally meritorious norm does not belong to the legal system. This is not to say that this is the only claim that positivists make. Some positivists will typically endorse thicker definitions, but I take (LP*) as the s*mallest common denominator definition* of what legal positivism is about.[73]

The departure from Gardner's framing by the new 'legal facts' crew did not go unnoticed. As David Plunkett noted, Shapiro's embrace of the 'legal facts' framing allowed him to find a common ground for debate with non-atomistic theories of law such as Dworkin's or Greenberg's:

> [S]ome accounts such as Dworkin's and Greenberg's own that understand legal content holistically rather than atomistically are difficult to make good sense of using the idea of a single norm either having the status of legally valid or not. . . . Shapiro's account of what is at stake in the debate over legal positivism gives him a broader definition than Gardner's definition, allowing Shapiro to more smoothly make sense of a range of possible positions in the field.[74]

'Smooth' is an interesting word in this context. As in Michael Jackson's song, legal positivism has "been hit by a [very] smooth criminal."[75] At no point does Plunkett enquire whether a non-atomistic conception of 'legal content' is indeed compatible with legal positivism. For the reasons I will explore in this section, it is, in fact, not compatible. The reason why Gardner frames positivism in an atomistic way is that atomism is an essential or crucial property of positivism. One cannot find common ground in a debate by reframing the terms in such a way that one abdicates central parts of one's own position.[76]

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71. Gardner, *supra* note 4 at 21 [emphasis added]. In what follows, I will not use 'validity' because, as I have suggested above, 'validity' is ambiguous. I will only talk about membership, which is also what Gardner had in mind, as the italicized portion of the quote shows.

72. Sources are best understood as social facts. See Mathieu Carpentier & Torben Spaak, "Sources of law" in Luka Burazin, Kenneth Einar Himma & Giorgio Pino, eds, *Jurisprudence in the Mirror: The Common Law World Meets the Civil Law World* (Oxford University Press, 2024) 241 at 251-52.

73. This is why I will not address the many criticisms Gardner's (LP*) has elicited on behalf of more robust conceptions of legal positivism. See recently Brian H Bix, "John Gardner on the Scope of Legal Positivism" [2024] 1 Analisi e diritto 17; Alejandro Daniel Calzetta, "(LP*) Revisited: On John Gardner's Reduction of Legal Positivism" [2024] 1 Analisi e diritto 27.

74. David Plunkett, "Legal Positivism and the Moral Aim Thesis" (2013) 33:3 Oxford J Leg Stud 563 at 572 [footnote omitted].

75. "Smooth Criminal" (music) Sony/ATV Songs LLC (Non-Rep) Mijac Music, USA 490673662 (31 August 1987) registered.

76. It bears noting that on occasion Greenberg slips back to speaking to the validity of legal norms: see e.g. Greenberg, "The Standard Picture", *supra* note 18 at 45.

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In this section, I will defend Gardner's framing: Of all the 'facts' denoted by (2)-(8) above, legal positivism bears only on (2). As I will suggest, positivism (even exclusive positivism) may allow for 'moral facts' to be among the truth-makers of at least some of propositions (3)-(8). Therefore, framing legal positivism as the thesis that "legal facts are determined by social facts only" is misleading, because every positivist in their right mind ought to acknowledge that this thesis is false.

3.1. Membership of norms or normative formulations?

Let me address here a common challenge to the idea that positivism is about the membership of norms. Such a challenge does not deny that positivism is about *membership*; however, it contends that what belongs to legal systems are *normative formulations*, not norms. This point has been put forward by various iterations of legal realism on the Continent.[77] Its most recent and elegant exposition is by Giovanni Battista Ratti and Luka Burazin.[78] Let us suppose that the meaning of a given normative formulation NF can be either one of two norms, N1 or N2. Depending on the way one interprets NF, the system will either comprise N1 or N2. Both N1 and N2 cannot belong to the system at the same time. Whether it is N1 or N2 that belongs to the system cannot be settled without interpreting NF.

Since norms are meanings or contents of normative formulations, they must be developed via *interpretation*, usually by an authorized interpreter, such as a court. So, unless the membership/content distinction collapses and the rule of recognition[79] incorporates canons of interpretation (which Ratti and Burazin are adamant is not the case, *and I agree*), then what is identified as belonging to a legal system is only a set of normative formulations (which they call "sources").[80] Norms are the result of the application of various canons of interpretation: They do not pre-exist the authoritative interpretation of normative formulations by various officials.

This theory goes even further in the direction at which I have pointed—that is, in distinguishing issues about membership and content: Legal positivism is about the membership of normative formulations, and it remains agnostic on the

77. See e.g. Riccardo Guastini, *L'interpretazione dei documenti normativi* (Giuffrè, 2004) at 99-110; Riccardo Guastini, "Rule-Scepticism Restated" in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press, 2011) 138. See also Michel Troper, "Une théorie réaliste de l'interprétation" in *La théorie du droit, le droit, l'Etat* (Presses universitaires de France, 2001) 69.

78. See Luka Burazin & Giovanni Battista Ratti, "Rule(s) of Recognition and Canons of Interpretation" in Pierluigi Chiassoni & Bojan Spaic, eds, *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism* (Springer, 2021) 123.

79. The rule of recognition is the rule that picks out the system's criteria of membership.

80. Burazin & Ratti, *supra* note 78 at 129. I claim that sources are facts (legality-endowing facts, in virtue of which norms belong to the legal system), not texts (which according to Burazin and Ratti is the very *stuff that belongs* to the legal system: see *ibid* at 126). These are two distinct concepts of sources. In order to avoid confusions, I will only talk about criteria of membership on one hand and normative formulations on the other. On the definition of sources as facts rather than texts, see Carpentier & Spaak, *supra* note 72 at 246-48.

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various ways of deriving normative content. It seems to be a *close ally* of the views I defend in this paper; I nevertheless disagree. Explaining in detail why I disagree would take us beyond the scope of the paper. In a nutshell, legal texts are not the stuff that belong to legal systems, but part of the *stuff in virtue of* which norms belong to legal systems. Basically, on a positivistic theory of norm-membership, norms belong to legal system if and only if they can be traced back to a given set of social facts (usually called 'sources of law'): the fact that a text exists, that Parliament voted on it, that the Head of State promulgated it, etc.[81] The rule of recognition picks out these facts and makes them criteria of membership for legal norms. Sometimes, the existence of a text will not be part of the relevant criteria of validity: Customary norms are not typically created in virtue of the fact that a text has been promulgated.

As I sought to explain in section 2.2, propositions about the existence of norms are not the same thing as propositions about normative contents. So, one can say that a norm belongs to a legal system without having a *complete definite description* of its content, even if the normative formulation usually gives a rough (though possibly incomplete, and as we shall see, indeterminate) notion of the content. This is why I remain unconvinced by the picture put forward by Guastini, Burazin, Ratti, and others, according to which the meaning of norm-formulations is made up of a disjunctive set of discrete norms—that is, of discrete normative contents. Except in cases of pure lexical ambiguity (e.g., "*bats* are forbidden here", on which see *infra*), a normative formulation NF does not typically yield a disjunctive set of discrete norms N1 *or* N2 *or* N3. First, it is not conceptually impossible that NF expresses a single norm N, but whenever it does not, what NF expresses typically is a *cluster of overlapping normative contents* and not a disjunctive set of discrete norms. These contents cannot usually be neatly individuated one from another (as Guastini and others argue they can), because they are made up of sets of overlapping properties, rather than of a disjunctive set of fully individuated norms. This explains why we can make membership-statements about norms (understood as such clusters) prior to any authoritative interpretation while there still remains possible uncertainty about the norm's content (since it is not fully stabilized prior to interpretation, although there will be a 'core' of determinate properties). So a norm-formulation such as "violations of human dignity are prohibited" does not yield distinct norms according to the interpreters' diverging concepts of 'dignity' (or of 'violation'), but a single cluster of overlapping normative contents, where the *decisive* set of properties—the complete description of "violation of dignity"—is left unspecified. As I will intimate in the next section, law rests on a dynamic system of implementation and concretization, performed by various layers of law-applying institutions. Their job is precisely to fix the content of norms they apply, by selecting (among a given cluster) the set of properties which makes up this content.

81. See Carpentier, *supra* note 63.

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Therefore, two questions ought to be distinguished: a) does norm N belong to S? and b) is it possible for me to act on N (does N gives me a reason to act)? Regarding the question a), "N", as we saw, is used as a shorthand designator. We can say that the norm prohibiting *gavagai* belongs to S without having any idea of what *gavagai* is. It does not mean that what belongs to S is the formulation "*gavagai* are prohibited": What belongs to S is the norm that *gavagai* are prohibited (or the *gavagai*-prohibiting-norm) *in virtue of the fact* that there is a norm-formulation reading as "*gavagai* are prohibited" which was enacted in such-and-such way (and possibly additional social facts).

Now regarding the question b): The fact that a norm exists does not necessarily provide its addressees with a reason for action. In the case of the *gavagai*-prohibiting-norm, the addressee will typically not know how to act. In order to do so, they will have to ask what the normative content is: What is *gavagai*? What are the intensional properties of *gavagai*? In other words, they will have to *interpret* the normative formulation in order to grasp what the norm—which exists in virtue of the existence of this formulation *plus* some additional facts—requires. In a nutshell, what interpretation does is not 'posit' or 'create' the norm—the norm existed prior to interpretation, since its existence/membership can be described independently of a complete description of its content. What interpretation does (or at least aims to do) is give a (hopefully complete) definite description of the normative content—that is, of what the norm requires. The fact that interpretation (by officials as well as by private citizens) is required in order to act *on the norm* does not mean that interpretation is required in order to establish that the *norm* itself is part of the legal system.

This is why, although the 'continental realist challenge' does distinguish—as I do—between membership and content, it nevertheless ought to be resisted. Besides, if legal positivism is understood as merely claiming that legal texts exist in virtue of certain social facts, then it is trivially true—and not even remotely informative. Nobody would deny that whether a given text has been written, submitted for approval to Parliament, and then enacted by the head of state is a matter of social fact. What makes positivism controversial is the claim that all legal *norms* exist if and only if they can be traced back to such social facts.

3.2. Legal positivism is <u>not</u> about normative content (nor about normative SOAs)

Granted, some important legal positivists have claimed positivism was a theory about both the existence and content of law/laws. Raz famously claimed about the sources thesis, which he claimed to be central to positivism: "A law is source-based if its existence and content can be identified by reference to social facts alone."[82]

82. Raz, *supra* note 57 at 195. Notice that Raz specifically interprets the vague phrase "existence and content of the law" atomistically—it is about *laws*.

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However, I will argue that there is no direct route from existence (that is, legal membership) to legal content. Establishing the existence of a norm is a matter of social fact—or so classical positivists will argue. The proposition "N belongs to S" can be negated by showing that the social facts picked out by the rule of recognition (RoR) do not obtain. When we ask whether the norm prohibiting infringement on human dignity belongs to the German legal system, we only ask whether social facts obtain such that the 'dignity-protecting-norm' belongs to the legal system without asking what, in fact, are the intensional properties of human dignity. Likewise, even if my own norm-formulation "Swifties ought to be punished" does aim to 'posit' a norm, the social facts do not obtain such that the "Swifties-ought-to-be-punished norm" exists in any legal system.[83] Membership demarcates between the norms which are part of the legal system and those which are not—that is, between *legal* norms and *non-legal* norms. In this respect, not all social facts are relevant: Only the social facts (usually called 'sources') picked out by the rule of recognition are.

What about normative content? It could be objected that if, as I claim, normative content can be severed from norm membership, then one could conceive of the law as being a catalogue of opaque normative designators (for instance, "N_1", "N_2", "N_3", etc.) referring to entities the content of which would be left altogether unspecified. Norms would be individuated atomistically, but normative content could be discovered holistically (or in any possible way, including cartomancy and divination). Of course, I do not suggest such a theory makes sense; it patently does not. Normative content is at least *partially* determined by the content of normative formulations (but 'partially' is key).[84] When people try to ascertain what the law requires of them, they establish the existence of a given norm and then try to discover its content by grasping the meaning of the normative formulation which aims at positing that norm.

Many positivists have insisted, however, that mere semantic and pragmatic facts about normative formulations are often not enough. We can put aside cases in which ambiguity makes it altogether impossible to assign any normative content to a normative formulation—such as cases of homophony: "bats are forbidden in the building" (the normative formulation is such that, if the context of utterance is opaque, there actually are two possible norms). Such cases are rare, and even cases of lexical or syntactic ambiguity rarely make it impossible to establish that a norm exists, albeit with a somewhat indefinite content. In many cases, however, normative formulations will not be enough to allow for a complete definite description of the normative content. Hence Kelsen talked about

83. 'Swifties' are the members of a new cult worshipping a singer—a cult which in my mind poses a grave and imminent danger to the common good of our polities. Still, there is no prohibition against Swifties in any legal system I know of.

84. This is basically what Greenberg denounces as the 'standard picture': see Greenberg, "The Standard Picture", *supra* note 18. I will not defend the standard picture but rather suggest that it is not a picture positivists need to endorse.

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norms as frames, and Hart wrote at length about the open texture of rules.[85] The idea of 'clusters of normative properties' mentioned earlier points to the same direction.

Of course, additional distinctions would have to be made. As Guastini rightly insisted, normative interpretation (the interpretation of normative texts/formulations in order to identify normative contents) and normative subsumption (identifying which cases fall under the scope of the norm at the application stage) are two different operations.[86] In our own parlance, identifying normative content is different from deriving propositions about normative states of affairs. This distinction is important, but it can be occasionally blurred. For instance, (soritical) vagueness is a straightforward extensional problem (a subsumption problem), but Hartian open texture, for instance, is a more complex issue: Although it is mainly an extensional problem (i.e., is token *x* an instance of concept *C*?), it nevertheless stems, as I have argued elsewhere, from a specific kind of intensional indeterminacy or meta-ambiguity, the intension of the open-textured concept being made up of various partially overlapping sets of properties.[87] In cases of open texture—and *a fortiori* in cases of ambiguity—the problem is not only one of subsumption, but also one of interpretation—that is, of fixing the intensional features (the semantic properties) of the normative content.

Now it is undisputed that, in most legal systems, many normative formulations use moral terms. Take article 1.1. of the German *Grundgesetz* ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority")[88] or the former (now repealed) article 1133 of the French Civil code ("A cause [of contract] is unlawful when … it is contrary to good morals or to public order").[89] Giving a complete definite description of the content of such normative formulations does entail some kind of moral reasoning on the relevant properties of 'human dignity' and 'good morals'. Whereas the membership of the norm(s) 'posited' by art. 1.1 of the German Basic Law is a matter of social fact (there is absolutely no doubt that the 'dignity-protecting-norm' belongs to the German legal system), the exact normative content (what the norm actually requires) may be partially determined by moral facts.

Some positivists seem to have been bothered by this. Such is the case of Joseph Raz who, in *The Authority of Law*, reaches the (somewhat 'surprising', as Timothy Endicott puts it) conclusion that whenever a norm-formulation uses a moral concept, such as in the case of a norm forbidding immoral contracts or protecting dignity, it creates a gap in the law—the judge being therefore required to exercise discretion.[90] Whenever a normative formulation uses a moral concept,

85. See Hans Kelsen, *The Pure Theory of Law*, 2nd ed, translated by Max Knight (University of California Press, 1967) at 350-51; HLA Hart, *The Concept of Law*, 3rd ed, (Oxford University Press, 2012) at 124-36.
86. See Guastini, "Rule-Scepticism Restated", *supra* note 77 at 139.
87. Carpentier, *supra* note 51 at 519-24.
88. German constitution: Art 1.1, Basic Law for the Federal Republic of Germany [Basic Law].
89. Art 1133, *Code Napoleon (1807-1814)* [CN].
90. See Raz, *supra* note 50 at 75; Timothy AO Endicott, "Raz on Gaps: The Surprising Part" in Lukas H Meyer, Stanley L Paulson & Thomas W Pogge, eds, *Rights, Culture and the Law:*

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then the law *runs out,* and judges are entrusted with a "directed power" to develop the law.[91] This may be the case: But even if it were not—even if moral reasoning was required to identify a normative content that was 'already there'—it would not be much of a problem for legal positivists.

We can agree that in *hard* cases, the law runs out: When the norm formulation uses moral concepts, and judges are faced with a borderline case of the application of such concepts, then judges are directed to exercise moral deliberation in order to settle the matter before them.[92] But then the normative content is fixed by the judicial decision, which *changes* the law by issuing a *new* norm (applicable to the case at hand and possibly all similar cases).

But what about *easy* cases? When normative formulations use moral concepts, they can still yield easy cases—they do not always entail discretion on the part of law-applying institutions. In easy cases, judges do seem to discover pre-existing law, the law 'already there', so to speak. This normative content seems, then, to be determined by moral facts. Is that a problem for positivists? No.

First, such moral (and, more generally, evaluative) considerations often are somehow embedded in the (social) linguistic rules governing the use of moral concepts: Deferring to a shared evaluation embedded in the conventional rules of language is a success condition of the application of all evaluative concepts, and perhaps of certain non-evaluative concepts as well. Let me take an example: In the United Kingdom, the *Criminal Law Amendment Act of 1885* made it prohibited to engage in acts of "gross indecency."[93] In the middle of the twentieth century, a consensual homosexual relationship would be a clear case of 'gross indecency'. Let us imagine that such a case is brought before a judge who happens to be a liberal devotee of John Stuart Mill. In their own assessment of the case, this judge would never think of the two men's behaviour as grossly indecent; however, unless they are to break the law, they will declare them guilty. In applying the concept of gross indecency, they have not relied on their own straightforward moral evaluation of the case but have only made a proper use of the rules of language (such as existed at the time of ruling), and this use certainly involved a minimal form of moral evaluation. In many cases, even though the law has not *run out*—it is clear that the norm requires punishing the gay couple—the kind of moral evaluation displayed in identifying the normative content (or as is the case in the indecency offence, in qualifying states of affairs normatively) is itself supervenient on social facts (that is, linguistic rules governing the use of evaluative concepts such as 'gross indecency'). In any case, these social facts have no bearing on the membership of the norm at hand: Legal positivism is not about the social nature of normative content, but about a

Themes from the Legal and Political Philosophy of Joseph Raz (Oxford University Press, 2003) 99. I will say more about discretion in the next section.

91. Raz, *supra* note 57 at 250.

92. According to Endicott, moral concepts do not always entail discretion—but they do insofar as they are vague and therefore yield borderline cases: see Endicott, *supra* note 90 at 111. I will set aside issues of 'extravagant vagueness', which complicate the picture somewhat.

93. *Criminal Law Amendment Act of 1885* (UK), 48 & 49 Vict, c 69, s 11.

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specific set of social facts ('sources of law', such as legislation, precedent, custom, etc.) picked out as criteria of membership by the system's rule of recognition.

Second, even if it were the case that more robust moral facts would determine the content of norms (that is, normative contents), it would still not be a threat to positivism, and it would not justify 'softening' positivism. Indeed, some 'inclusive positivists' have claimed that the use of moral concepts in the law (such as article 1.1 of the Basic Law) buttresses inclusive positivist claims.[94] I do not think this is the case. The debate between inclusive and exclusive legal positivists is best understood as a debate about criteria of membership. The mere fact that moral considerations are required (at least in some easy cases) to ascertain the content of moral concepts used in legal normative formulations does not mean that a (moral) norm protecting dignity is part of the German legal system because of its own merits rather than its traceability to social facts.[95] If the dignity-protecting norm belongs to the German legal system, it is squarely in virtue of social facts (the fact of the existence of the constitutional text, plus facts about enactment and promulgation). In some cases, it will be impossible to fix normative contents without engaging in moral deliberation: This is the case, for instance, when normative formulations use 'thin' moral concepts (e.g., "one ought to do what is good"; "consideration of the best interest of the child ought to be paramount"). Determining what is 'good' or what is a child's 'best interest' cannot be settled by the use of linguistic conventions. However, this has no bearing on the reasons why the "do-what-is-good" norm or the "best-interest-of-the-child" norm belong (or do not belong) to a given legal system.

So positivism is not about legal content; positivists should have no qualms accepting that "people involved in existing legal practice such as judges and lawyers actually reason and argue when they try to discover which legal propositions are true, they seem almost inevitably to rely partly on ... normative and evaluative thought."[96] However, positivists insist that in many cases (but not necessarily *all cases*), they do not try to "discover which legal propositions are true," because the law is (relatively) indeterminate, and sometimes the job of judges and other law-applying officials is to make new law. 'Legal content' is not something that is always 'already there', waiting to be 'discovered'. There is, in other words, no direct route from norm membership to normative content: Methods of

94. For such a content-oriented rather than validity-oriented conception of inclusive legal positivism, see e.g. José Juan Moreso, "Legal Defeasibility and the Connection Between Law and Morality" in Jordi Ferrer Beltrán & Giovanni Battista Ratti, eds, *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 225; Jules L Coleman, "Beyond Inclusive Legal Positivism" (2009) 22:3 Ratio Juris 359 at 384.

95. Raz—a proponent of exclusive positivism—has tried to reply to inclusive positivists by showing that article 1.1. of the *Grundgesetz* does not 'incorporate' moral norms into law but merely directs judges to apply those moral norms. See Joseph Raz, "Incorporation by Law" in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 182 at 193. This seems to me an unnecessary circumvolution: inclusive legal positivism is about the 'incorporation' of moral norms through the *rule of recognition*, rather than through positive legal norms (including constitutional norms).

96. Plunkett, *supra* note 31 at 140.

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interpretation, that is, methods for ascertaining normative content, are not part of the criteria of membership picked out by the rule of recognition.[97]

3.3. Atomistic membership

The upshot is: Legal positivism is about what makes a given norm (however indeterminate its content) belong to a legal system, not about normative content. What determines normative contents (that is, what the norm actually requires according to a *complete definite description* of its intensional properties) is—at least partially—a set of social and linguistic facts about the relevant normative formulation plus, possibly, some additional facts, including moral considerations. This is no threat to positivism. Granted, not all positivists would see things that way; I am sure that many would find my distinction between membership of content too coarse.[98] But I think that, as a historical matter, legal positivism (especially in its polemic against natural law) bears mainly on what makes legal norms exist as such—rather than being a specific theory of interpretation or legal reasoning. All that precedes is but an elaboration on this basic idea; as I said earlier, one need not agree with the elaboration to share the basic idea.

Now, as we saw, the notion of norm-membership in a legal system presupposes thinking about norms *atomistically*, even if it does not mean that legal content is itself always *wholly* determined atomistically—that is, by sole reference to the meaning of normative formulations. This is why what Greenberg calls the 'Explanatory Directness Thesis' (EDT)—a key part of the 'standard picture' he wants to refute—is not, in fact, a necessary component of legal positivism.[99] The EDT is defined as follows:

> In the complete constitutive account of the obtaining of a given legal norm: 1) the authoritativeness of the pronouncement is prior in the order of explanation to the obtaining of the legal norm; 2) the authoritativeness of the pronouncement is independent of the pronouncement's (specific) content and consequences; 3) there are

97. If canons of interpretation were part of the rule of recognition, then the rule of recognition could not fulfil the function Hart assigns to it, which is an *epistemic function* (and not, pace Greenberg and many others, a metaphysically *constitutive* function). See Hart, *supra* note 85 at 94: given the defect of *uncertainty* which results from a system purely comprised of primary rules, the rule of recognition allows members of the group to know which norms belong to the legal system—and are therefore legal norms—and which are not. Even though the rule of recognition is open textured, and there may be borderline cases of membership, such ascertainment is usually very routine-like—which is proof that it works. Methods of interpretation, on the other hand, are inherently controversial: if they were part of the rule of recognition, then it would be close to impossible for the legal community to proceed in such a routine-like function.

98. However, for a defense of the distinction between 'questions of content' and 'questions of validity', see Watson, *supra* note 31 at 67.

99. Now, as Greenberg himself acknowledges, the standard picture is endorsed by many anti-positivists as well as positivists: see Greenberg, "The Standard Picture", *supra* note 18 at 62. Nevertheless, he claims (rightly) that it is the result of the positivists framing the debate (as we saw in the first section). In his view, the only alternatives to the standard picture are anti-positivist.

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> no explanatory intermediaries between the authoritative pronouncement's being made and the norm's obtaining.[100]

Insofar as by "the obtaining of a legal norm," Greenberg means the existence of the norm—its membership within a legal system—he is right that the EDT is an important part of what legal positivism is about. Now, if by 'legal norm' Greenberg refers to what determines normative content, it is not true that positivists are necessarily committed to endorse the EDT. Some have endorsed it. But, again, legal positivism is not a theory of interpretation. It is not inconsistent with legal positivism to accept that there are, indeed, explanatory intermediaries between 'the authoritative pronouncement' (the social fact 'positing' the norm) and the resulting normative content. Greenberg is right that atomism—which he defines as the idea "that individual legal norms [by which he means *individuated* legal norms] are explanatorily prior to the content of the law as a whole"—is a "natural consequence" of the EDT: Membership is prior to content.[101] But it is not true that content is solely 'explained' by membership. Content must be in part explained atomistically: Legal content is the meaning of legal normative formulations aiming at 'positing' legal norms.[102] But it does not follow that only social facts (such as social or linguistic facts about normative formulations—or 'authoritative pronouncements') determine normative content; moral facts, determined holistically, may come into account.

Holistic theories such as Greenberg's or Dworkin's, on the other hand, do not distinguish between membership and content: They take a given normative SOA, such as "may Elmer Palmer inherit?", and try to establish how the 'content of the law as a whole' provides the right answer.[103] The 'content of the law as a whole' is a set of legal facts. Normative formulations do not posit any norms; they are just part of the pre-interpretive materials whose integrity-based interpretation is required to ascertain this 'content as a whole' (in Dworkin's view at least), or they are part of the 'relevant actions of legal institutions' which change our moral obligations, the 'content of the law' being nothing more than the set of moral obligations 'impacted' by pronouncements of legal authorities (in Greenberg's view). Framing the issue in terms of legal facts is just a way to make the holistic view the default framing. By accepting it, not only do positivists renounce atomism (which is key to their theories of norm

100. *Ibid* at 44. Notice that Greenberg talks about legal norms here.
101. *Ibid* at 50, 49.
102. That is, aiming at being part of the facts to which a legal norm ought to be traced back if it is to be a *legal* norm.
103. This is a reference to the *Riggs v. Palmer* case, a case on which Dworkin relied heavily in both *Taking Rights Seriously* and *Law's Empire*. The question at hand was whether a person who murders his grandfather can inherit from the deceased. The New York Court of Appeals held that although no statute explicitly barred the grandson from inheriting, the principle according to which no man may profit from his own wrong nevertheless defeated his claim. See *Riggs v Palmer* 115 NY 506 (1889) [*Riggs*]; Dworkin, *Taking Rights Seriously*, *supra* note 53 at 23; Dworkin, *Law's Empire*, *supra* note 14 at 15.

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membership), but they are invited to provide a theory of legal content—which was always, at best, a secondary endeavour.[104] Positivists are now required to defend the idea that legal content is always predicated on social facts—although they were never interested in social facts *per se*, but only in the small subset of social facts (i.e., facts about legislation, precedent, custom, etc.) picked out as criteria of membership by the rule of recognition. In doing so, positivists lose the point that positivism always was about 'membership facts' and never about 'content facts': There is no specifically positivist theory of interpretation, and nothing anti-positivist to a theory of interpretation which accounts for the role moral considerations play in the determination of legal content, if only when judges use their directed powers.

4. Resisting the metaphysical turn in jurisprudence

Let us take stock. If I am right, then the legal positivism versus non- (or anti-) positivism debate cannot be framed in terms of 'legal facts' *simpliciter* (or 'social facts' *simpliciter*, for that matter), because legal positivism is only about a very limited set of such facts: facts about the existence/membership of norms. This is why the category of 'legal facts' will not do: It is overbroad.

One can make the following objection: "Maybe so. But it does not mean that the category of 'legal facts' ought to be abandoned. Rather, it means that we should get rid of the positivism/non-positivism debate altogether." This is a powerful objection. The fact that existing debates are disfigured by a new framing may show that these debates must be abandoned, and that *new* debates about the *new* framing should be part of the research agenda of jurisprudence. In particular, we should accept that the new way to theorize about law is resolutely *metaphysical*—whereas the 'old way' is *conceptual*—and if it does not neatly map onto the parochial and old-fashioned debate between positivism and non-positivism, then so much for that debate. Who cares about 'norm membership' anyway? 'Legal facts' are here to stay; we should talk about 'the content of law as a whole' as if such a thing existed without there being any atomistically individuated norms in the first place. Classical debates in jurisprudence are, after all, uninteresting;[105] metaphysics, on the other hand, is interesting. The metaphysical approach allows jurisprudence to stop being so parochial—and it makes it part of mainstream philosophy—by asking how legal facts fit in our catalogue of the world, in the reality at large. The metaphysical approach makes jurisprudence much more philosophically interesting than dusty old debates about positivism and natural law, which have no philosophical significance whatsoever. Or so the objection goes.

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104. Issues about 'content' do not arise in Hart's *Concept of Law* until chapter 7, or in Kelsen's *Pure Theory of Law* until the very last chapter: see Hart, *supra* note 85; Kelsen, *supra* note 85.

105. See David Enoch, "Is General Jurisprudence Interesting?" in Plunkett, Shapiro & Toh, *supra* note 28, 65.

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In this section I will briefly address this objection by arguing that we should resist the metaphysical turn in jurisprudence. Although I believe that we should—to some extent—go beyond the positivism/antipositivism debate, I do not think metaphysical debates about legal facts are the right way to go. I fully realize I am going against the tide. Grounding is now all the rage; before that, it was supervenience.[106] Greenberg himself attempted to introduce a new metaphysical approach—"rational determination."[107] But what are the alleged benefits? According to Patterson and Tripkovic (who nevertheless ultimately share my skepticism), the main alleged benefit of grounding-based theories of law is "clarifying and recasting some old debates in a common vocabulary"—old debates such as positivism and anti-positivism, for instance.[108] Chilovi claims that:

> Since LP [legal positivism] and AP [anti-positivism] are widely taken to make claims on the determinants of legal facts, since the main candidates for playing the law-determination role other than grounding—causation, supervenience, and necessitation—are ill-suited to the task, and since law-determination essentially does as grounding does, it is very plausible to think of LP and AP as views about grounding.[109]

However, I have been trying to show that metaphysical theories—be they about grounding or any other metaphysical relation—do not help to efficiently clarify or reframe old debates in more precise terms. Since 'grounding' (as well as other metaphysical concepts before it) is mainly about how various facts relate to each other by belonging to more or less fundamental strata of reality, it must operate at a level of generality ('legal facts'). This works well for anti-positivist holistic theories—where there are free-floating legal contents waiting to be grounded in something more fundamental—but it does not work at all for positivists, precisely because positivists never intended to develop a theory of 'legal facts' in the first place. I am not saying that grounding-based reformulations of positivism as a theory of the grounds of legal facts—reformulations such as Plunkett's or Chilovi's—are not interesting.[110] But they have nothing to do with what the great philosophers in the positivist canon (from Kelsen to Ross to Hart to Bobbio to Raz to Bulygin to Gardner) understood themselves to be doing.

Now, let us put the positivism/antipositivism debate behind us—at least for now. What are the downsides of metaphysical approaches in legal philosophy at large?

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106. See e.g. Bartosz Brozek, "Law, Normativity, and Supervenience" in Bartosz Brozek, Antonino Rotolo & Jerzy Stelmach, eds, *Supervenience and Normativity* (Springer, 2017) 123; Enrique Villanueva, "Supervenience, Value, and Legal Content" in Enrique Villanueva, ed, *Law: Metaphysics, Meaning, and Objectivity* (Brill, 2007) 125.

107. Greenberg, "HFML I", *supra* note 17 at 160.

108. Dennis Patterson & Bosco Tripkovic, "The Promise and Limits of Grounding in Law" (2023) 29:3 Leg Theory 202 at 228.

109. Chilovi, *supra* note 31 at 3286

110. See Plunkett, *supra* note 31; Chilovi, *supra* note 31. See also Samuele Chilovi & George Pavlakos, "Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence" (2019) 25:1 Leg Theory 53.

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4.1. The invisibilisation of jurisprudence

First, there is the *invisibilisation* of jurisprudence as a specific set of questions and issues (not all related to the positivism/antipositivism debate—far from it). I fully understand the urge to make jurisprudence more philosophically robust—with the help of technical concepts and apparatuses borrowed from other, more sophisticated, parts of philosophy. Jurisprudence should sometimes be less parochial and more integrated within other philosophical subfields, *insofar* as they can illuminate specific issues about the 'nature' of law—or, if one dislikes essentialist overtones, 'the way law operates'. But hardcore metaphysics are not the right way to proceed. Grounding, for example, presupposes various levels of reality (some more, some less fundamental), with a special relation (grounding) allowing the more fundamental levels to determine the less fundamental. It is very easy to see that 'legal facts' will never be part of the more fundamental levels of reality: Law is an infinitely small, insignificant part of our catalogue of the world. Metaphysicizing about the law is like casting pearls before swine.[111] The grounding of 'legal facts' is no more interesting than the grounding of the fact that my dishwasher is currently broken.

A good illustration of this issue is Gideon Rosen's idea that 'laws' (in general) can figure in grounding explanations—that is, in explaining why certain more fundamental facts ground less fundamental facts.[112] By 'laws', Rosen means logical laws (such as $[\Box \forall\varphi\forall\psi\,(\varphi \supset (\varphi \vee \psi))]$), as well as cases of 'formal' or 'soft' normativity (such as law), and ethical cases (implying a more robust kind of normativity). It seems to me that these are very different kinds of laws. Rosen may be right that laws proper (i.e., legal norms) are required to explain how certain prelegal facts (such as "A killed B") ground legal facts ("A ought to be convicted of murder"). However, since laws are themselves grounded in something more fundamental (for instance the actions of officials, or what Greenberg calls "law practices"),[113] they are to some extent dispensable—whereas, according to Rosen, ethical laws are required to ground ethical facts. But it remains that Rosen's main point is not about law, properly understood (i.e., the legal system), but about all "nomic explanation[s]" of grounding.[114] This is understandable: Why should metaphysicians specifically focus on the law?

Another important feature is that metaphysical explanations such as grounding are inherently controversial among metaphysicians *themselves*. Jurisprudes who

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111. Many proponents are saying that metaphysics is only a part of jurisprudence. Shapiro and Plunkett—both very instrumental in the metaphysicisation of jurisprudence—now claim that jurisprudence is a meta-legal inquiry having metaphysical, but also conceptual, semantic, epistemic components: jurisprudence is about how "general jurisprudence aims to explain how legal thought, talk, and reality fit into reality overall." David Plunkett & Scott Shapiro, "Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry" (2017) 128:1 Ethics 37 at 58. This is fine, but I do not see how the relation of *fit* is anything but metaphysical.

112. See Gideon Rosen, "Ground by Law" (2017) 27:1 Philosophical Issues 279.

113. Greenberg, "HFML I", *supra* note 17 at 160

114. Rosen, *supra* note 112 at 281.

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dabble in legal metaphysics must *first* adjudicate among various understandings of the right metaphysical explanation and *then* try to provide a metaphysical picture of the law. They will ask whether grounding entails (or not) supervenience, whether facts are truth-makers, whether rational determination entails grounding (or supervenience), whether and how grounds, anchors, and enablers differ from one another—very interesting debates to be sure, and yet jurisprudential non-starters.[115]

4.2. The obfuscation of important philosophical issues about the law

Contrary to morality, law is a *dynamic* phenomenon, which involves various institutional apparatuses of implementation and concretization. For any class of cases, whether the relevant legal normative content is *p* or *q* is often not settled before the implementation stage. This is due to many factors—for instance, the generality of law and its relative indeterminacy. Whether *p* or *q* is normatively required is not always (if ever) a matter of fact. This dynamic feature of law raises a vast number of philosophical issues about the law that are impossible to grasp with such a coarse category as 'legal facts'. I am going to take only two examples, which, I think, cut across the positivism/anti-positivism debate: The issue of discretion on the one hand and normative conflicts on the other.

4.2.1. Discretion

Let us examine ***discretion*** (or judicial law-making). As I suggested in the previous section, positivists usually put forward a picture of the interpretation and application processes that gives an important role to discretion—whereas people like Dworkin usually deny that 'strong' discretion is a typical feature of law and adjudication.[116] To my mind, the debate over discretion is nevertheless orthogonal to the positivism/anti-positivism debates: Some positivists disagree on the exact extent of the indeterminacy of the law—and absolute formalism can be compatible with positivism even if no positivist has ever endorsed it;[117]

115. See e.g. Samuele Chilovi, "Grounding entails supervenience" (2021) 198:S6 Synthese 1317; Gkouvas, *supra* note 38 at 42-45; Plunkett, *supra* note 31 at 152; George Pavlakos, "The Metaphysics of Law: From Supervenience to Rational Justification" in Brozek, Rotolo & Stelmach, *supra* note 106, 139.

116. See Dworkin, *Taking Rights Seriously*, *supra* note 53 at 31ff. See also Dworkin, "No Right Answer", *supra* note 14. Incidentally, my critique of the legal-facts picture of discretion may not apply to Dworkin, who appears here solely as a proponent of the no-discretion thesis in the debate around discretion. It also bears noting that in his later work, Dworkin watered down the right-answer thesis by claiming that it was a mere "legal claim" rather than a "philosophical" or "metaphysical" one: Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006) at 42-43. *Cf* Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985): "The argument that I am wrong [about the right-answer thesis] must … be a philosophical argument" (*ibid* at 144).

117. For instance, Raz claims that 'gaps' in the law stem only from vagueness and normative conflicts, but never from the silence of the law, where closure rules operate: see Raz, *supra* note 50 at 74-77. Kelsen agrees that there are no gaps in the law: see Kelsen, *supra* note 85 at 245-50. Bulygin objects that closure rules do not always operate, they are contingent and usually

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conversely, not all anti-positivists endorse the one-right-answer thesis or need to downplay the role of discretion.[118]

Granted, the 'legal facts' picture does not necessarily entail the absolute determinacy of the law. It is to some extent compatible with the acknowledgment that there is *epistemic uncertainty* about the obtaining of a given legal fact, or whether the more fundamental facts (social or moral) ground *this* or *that* legal fact.[119] It is even compatible with the more robust *metaphysical* (and not epistemological) claim that sometimes grounding fails because *reality* is indeterminate (metaphysical indeterminacy).[120] I am not going to argue that metaphysical explanations of 'legal facts' cannot account for the existence of discretion. My point will be that such explanations obfuscate what is at stake in jurisprudential debates about discretion.

Roughly speaking, the issue about judicial discretion is whether in hard cases, judges make 'new law' or whether they apply 'already existing law'. Take the question: "May Elmer Palmer inherit?". If one frames the question in terms of legal facts, then the answer to that question will be grounded in more fundamental facts, as if there was a fact to be grounded in the first place. But it can be argued that the proposition "Elmer Palmer may inherit" had no truth-makers at all (however epistemically inaccessible or metaphysically indeterminate) before the New York court ruled on the *Riggs v. Palmer* case.[121] As I suggested, framing this issue in terms of legal facts does not make it possible to have such an argument in the first place, because it is instrumental in providing a picture of legal content as being *already there*, as it were. A proponent of the legal facts picture can account for the existence of discretion if—and only if—it appears that legal content is underdetermined by its metaphysical determinants (whatever the metaphysical explanation for such underdetermination is). Indeterminate facts remain facts: There must be a fact about Elmer Palmer's right to inherit even though the fact is either epistemically inaccessible (which, I guess, would be Dworkin's position, if he was a metaphysician) or underdetermined by its metaphysical determinants. This begs the question whether such a fact obtains in the first place.

As Patterson and Tripkovic (who have a much more sympathetic view than mine) put it:

> The talk of facts can elide the distinction between these two explanations. A grounding analysis may lead to the view that all legal facts that are established in judgments are existing legal facts, while they may become so only ex post facto.

restricted to some areas of the law—such as criminal law: see Eugenio Bulygin, "The Silence of the Law" in Bulygin, *supra* note 2, 293.

118. See e.g. Finnis, *supra* note 10 at 168.

119. On the distinction between uncertainty and indeterminacy, see Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) at 90-96.

120. See e.g. Bahram Assadian & Jonathan Nassim, "Indeterminacy and the Failure of Grounding" (2019) 85:4 Theoria 276. Greenberg himself allows for such indeterminacy: see Greenberg, "Moral Impact Theory" *supra* note 18 at 1330.

121. See *Riggs, supra* note 103.

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> Law is an inherently dynamic social phenomenon and—at least from the standpoint of positivism—many "facts" acquire their status by retrospective recognition.[122]

I think this is right. Let us assume that judicial discretion is possible. When judges exercise discretion, they will usually have recourse to moral arguments—even if such arguments are usually cloaked under the guise of legal principles ("[t]he judge will wrap his social work in the black robe of principle and precedent").[123] It is usually easy to see through the judge's manoeuvres. If one then has a grounding explanation of the resulting 'legal fact', the *default* position is to make moral facts its main (if not its only) determinant. Although—as I have insisted—it is not a threat per se to positivism, this default framing is nevertheless misleading. If a moral argument is used in finding against Elmer Palmer, or if the judge uses a Dworkinian integrity-oriented interpretation—which is moral through and through—then it seems that the legal fact that Elmer cannot inherit is grounded in the moral fact reflected in the judge's moral deliberation. But *lawmakers* typically have recourse to moral discourse. It is part of law-making; it does not follow that the fact that the resulting law has such-and-such content is determined by moral facts. The same goes for judicial law-making. In some cases (typically the cases in which moral evaluations are embedded in the social linguistic meaning of the normative formulation, as we saw above), moral facts may determine legal content, and judges will, indeed, apply pre-existing law; but in many others, moral deliberation on the part of the judge is at the background of the issuance of a new norm—which is a thoroughly social fact. By failing to distinguish between the two scenarios, talk of 'legal facts'—insofar as it bears on normative content—blurs what is at stake in debates about discretion. The debate is not about whether either epistemic limitations or the metaphysical indeterminacy of the grounding facts give the judge leeway in fixing legal content—that is, in ascertaining that a legal fact, such as the fact that Elmer is entitled to inherit, obtains or not. The debate is whether judges are bound by the norms applicable to the case or whether judges sometimes create new norms. On the pro-discretion view, there is simply *no legal fact* regarding Elmer's right to inherit prior to the judge's decision. The question the judge must answer is not whether it is a fact or not that Elmer has a right to inherit; the question is whether the judge ought (or ought not) to *grant* Elmer such a right, to *make it a fact* that Elmer has a right to inherit. The issue is about the extent of the normative powers of the judge—a question that it does not make much sense to ask if all that is at stake is the epistemic limitations of judges or the metaphysical indeterminacy of pre-existing facts.

4.2.2. Normative conflicts

Take another issue which, though related, is a bit more technical: the issue of ***normative conflicts***. It is close to impossible to frame this issue in terms of legal

122. Patterson & Tripkovic, *supra* note 108 at 226.

123. Roy Sorensen, "How Vagueness Makes Judges Lie" in Geert Keil & Ralf Poscher, eds, *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press, 2016) 297 at 299.

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facts. Normative conflicts occur when contrary, contradictory, or incompatible norms bear on the same case.[124] In order to conceptualize normative conflicts (at least *genuine* normative conflicts), one must have the concept of a norm requiring specific actions or omissions (either from officials or ordinary citizens).[125] It must be the case that it is—at the same time—obligatory to φ and not to φ (*contraries*), or at least obligatory to φ and not obligatory to φ (*contradictories*). Metarules (*Lex posterior, Lex specialis, Lex superior*) can help solve the conflict, but in order for them to intervene, so to speak, there must be a *conflict* in the first place. In a previous work, I have argued that metarules are (Bulyginian) norms of applicability: They direct judges to apply a particular norm in case of a conflict.[126] They have no bearing on the membership of either norm. For instance, I have argued that *Lex posterior* was not to be interpreted in terms of *implicit repeal*: when a citizen is faced with two norms that make it both obligatory to φ and not to φ, for instance; or when a judge is called upon to adjudicate the matter, saying that one of the two norms does not exist is misleading at best. Besides, metarules may themselves conflict with one another.

Take two norms as an example: the norms N1, "One must not cover one's face" (with no exception whatsoever); and N2, "facemasks are compulsory". It is impossible to reduce both norms to one single normative content. But to frame things in terms of 'legal facts', one must *presuppose* the conflict is solved at inception. It must be a legal fact that either Jones ought to wear a facemask or that he ought not to. There is no room for contradictory or contrary facts obtaining at the same time. In that sense, talk of 'legal facts' is inherently irenicist: It must presuppose that the normative conflict is solved beforehand, in order to establish that a given fact obtains. But metarules cannot serve to ground the truth of any of the two conflicting propositions. For example, it is not just the case that *because* N2 is posterior, then *Lex posterior* makes it the case that N1 does not belong to the legal system (if only because the conflict is what Alf Ross calls a "total-partial contradiction"),[127] and that other face coverings than facemasks are *ex hypothesi* clearly forbidden precisely because N1 exists.[128] So, until the judge has

124. See Mathieu Carpentier, "Kelsen on Derogation and Normative Conflicts" in Matthias Jestaedt, Ralf Poscher & Jörg Kammerhofer, eds, *Die Reine Rechtslehre auf dem Prüfstand. Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions* (Franz Steiner Verlag, 2020) 125 at 129–31.

125. Of course, some—including positivists—have claimed that genuine normative conflicts do not exist. Kelsen, for instance, said so in the 2nd edition of the *Pure Theory of Law* (see Kelsen, *supra* note 85 at 205-08), but he had a change of heart a few years later: see Hans Kelsen "Derogation" in *Essays in Legal and Moral Philosophy* (Reidel, 1973) 261. See also Hans Kelsen, *General Theory of Norms,* translated by Michael Hartney (Oxford University Press, 1991) at 123-27.

126. See Carpentier, *supra* note 124.

127. Alf Ross, *On Law and Justice,* translated by Uta Bindreiter, ed by Jakob v H Holtermann (Oxford University Press, 2019) at 149.

128. N1 itself does not belong *pro tanto* to the legal system, because the *pro tanto* aspect of the conflict resolution bears on the normative content, not on membership. Norms either exist or they do not; there is no such thing as *pro tanto* existence. However, norms may be *pro-tanto* inapplicable *modulo* the extent of the conflict between two normative contents.

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adjudicated the matter, there is simply no legal fact which obtains, but merely *potentially non-obtaining* states of affairs.

Making 'legal facts' the object of philosophical analysis about law makes it therefore impossible to philosophically understand situations of normative conflicts. Once again, legal contents are not always 'already there', waiting to be discovered. Unless one renounces the principle of non-contradiction, the fact that facemasks are prohibited and the fact that they are compulsory *cannot obtain* at the same time. Greenberg is quite clear—although he acknowledges that his framing of the issue is tentative—that the relevant moral obligations which are 'impacted' by the actions of lawmakers are *all-things-considered*, and not *pro tanto*, obligations.[129] Legal facts are therefore rationally determined by *all-things-considered* moral obligations such that they are affected by the actions of legal institutions. Although there may be conflicts of *pro tanto moral* obligations, such conflicts are resolved by morality itself. "[T]he contribution of a statute to the content of the law will depend on the on-balance best resolution of conflicts between moral considerations. Morality provides answers to questions of how conflicts between competing considerations are to be resolved"—thus yielding all-things-considered obligations.[130] Therefore, at a metaphysical level, genuine conflicts of legal norms—or of legal contents—are impossible, since legal facts are rationally determined by all-things-considered moral facts.

Of course, it is perfectly possible to dispute that genuine normative conflicts are possible, i.e., that two conflicting norms can belong to a legal system at the same time (for instance, on logical grounds). But the dispute does not even arise in these terms if they are framed in terms of legal facts, because the metaphysical apparatus makes it impossible to yield conflicting all-things-considered legal contents. My points about discretion and normative conflicts are therefore purely meta-theoretical: Although my views on the first-order issue are, I think, clear, my point was merely that adopting a metaphysical stance on 'legal facts' frames these debates in such a way that it tips the balance in favour of one specific side of the debate by obscuring what is really at stake.

Therefore, it makes much more sense to have a norm-first picture than a fact-first picture of the law (as well as of all normative fields). First there are *norms*, which may clash one with another, whose content may be more or less determinate, and which often are not dispositive of any given particular case. These norms belong to the legal system in virtue of social facts. Whether Elmer may inherit cannot be decided before various social processes (interpretive, adjudicative, enforcing-oriented) come into play and fix the norm content, fill potential gaps, solve potential normative conflicts, and exercise discretion. At the end of the process, a decision is taken, and then, Elmer may or may not have a right to inherit. Sometimes—indeed, quite often—the process is quite straightforward. It is possible from the outset to say, "yes (or no), Elmer may (or may not) inherit". At other times, the process is complicated, and various factors—including

129. See Greenberg, "Moral Impact Theory", *supra* note 18 at 1306.
130. *Ibid* at 1330.

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normative conflicts—make the final decision somewhat indeterminate. To put it as plainly as possible, *whether or not Elmer may inherit is not a matter of fact*.

So, we should drop 'legal facts' as the main metaphysical components of law. Law is not made up of *facts*. It is made up of *norms* as well as various institutional and decisional apparatuses aimed at fixing normative content and reaching a decision on given states of affairs falling under the content's scope. As such it is a wholly social phenomenon, a phenomenon which is not in need of any distinctive metaphysical explanation. Of course, law can be used as an example in metaphysical explanations of the social reality—but although this will be of great interest for metaphysicians, it will not necessarily be the same for jurisprudes.

5. Conclusion: Gardner was right

The bulk of the argument I have tried to make in this paper is in sections 2 and 3. The reframing of the main issues in legal philosophy (especially the positivism/anti-positivism debate) in terms of 'legal facts' ought to be resisted, especially by positivists, for two main reasons. First, legal positivism was never a theory of *legal facts* simpliciter, but only a theory about a very specific and distinctive set of facts about law: the fact that certain norms belong to legal systems, and others do not. What makes a given norm exist—or not—qua legal norm is (according to positivists) a matter of social fact. This is the core thesis of legal positivism, as John Gardner rightly insisted. 'Legal facts' are usually defined as facts about the 'content of the law', which is very ambiguous and covers issues completely orthogonal to positivism (such as issues about normative content and interpretation). Since the determination of normative content may, in certain circumstances, rest on moral considerations—without there being any threat to the core claim of legal positivism—it is simply not true that legal positivism is the thesis that legal facts *simpliciter* are always determined by social facts and never by moral facts.

Secondly—and more insidiously—the imprecision of the 'legal facts' framing is a Trojan Horse for holistic theories of normative content which flout the membership/content distinction and do not rest on the existence of norms atomistically individuated. Since positivism is mainly a theory of the existence of legal norms, talk of 'legal facts' distorts the debate with anti-positivists (such as Dworkin and Greenberg) by making it the default picture that the 'content of the law' is not a set of legal norms but a set of 'facts' (such as "the fact that Jones legally ought to pay $35 to Smith"), which can then be grounded holistically in moral facts. This in turn forces positivists to make extreme contortions in order to salvage the thesis that "legal facts are grounded in social facts alone," thus abandoning the atomistic picture of law which is part and parcel of the core thesis of legal positivism. There can be no theory of norm-membership without there being atomistic norms to begin with. This confirms Gardner's idea that the 'problems' that positivists are often called upon to address by modifying their framework "are not problems of

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legal positivism's own making. They are problems of systematic misrepresentation by others."[131]

The fourth section of the paper is, in some sense, subsidiary. Talk of 'legal facts' has been embraced by many positivists (despite the weakening of their theory that it entailed) out of metaphysical appetite. *Facts* are great because, contrary to other entities—for example, norms, whose ontological status has always been disputed—they are perfect for metaphysical treatment. If grounding is about the way some facts determine others, then legal facts are obvious candidates for grounding-based explanations of the law. I have suggested that jurisprudes—of all stripes—should resist this new metaphysical turn in jurisprudence, which impoverishes our common frameworks of conceptual analysis and obfuscates many important philosophical questions about law.

A final word on positivism. Positivism has a *limited domain*. It is mainly a thesis about legal membership—what Gardner calls legal validity. It is not a theory of interpretation or legal reasoning. It is not a theory of what makes states of affairs such as Jones owing Smith 500 euros obtain (or not). It is only a small part of the many interesting philosophical questions that law, as a distinctive phenomenon, raises. "Legal positivism is not a whole theory of law's nature, after all. It is a thesis about legal validity, which is compatible with any number of further theses about law's nature."[132] In this respect, as in many others, Gardner was right.

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131. Gardner, *supra* note 4 at 22.
132. *Ibid* at 33.

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