

NATURAL LAW AND THE
CHALLENGE OF LEGAL POSTIVISM

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by
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NATURAL LAW AND THE
CHALLENGE OF LEGAL POSTIVISM

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Chapter 1: Introduction

In this dissertation I develop and defend a version of a general theory of the nature of law inspired by the classical natural law tradition, with special intellectual debt to the articulation of that tradition by John Finnis. I develop that theory by addressing two major “challenges” to natural law as a theory of law presented by writers in the legal positivist tradition: (1) the claim that theories in the legal positivist tradition are descriptively superior to theories in the natural law tradition, and (2) the claim that theories in the legal positivist tradition are methodologically superior to theories in the natural law tradition. Addressing those two claims, I demonstrate not only that there is significant common ground between the version of natural law as a theory about the nature of law I defend and the most tenable versions of legal positivism but also that the version of natural law I defend possesses explanatory power that even the best versions of legal positivism do not.

More specifically, the general theory of law that I articulate throughout this dissertation, which I call “weak natural law,” states that whether a putative law is a law of a given legal system is a matter of social fact or convention while also providing the normative basis for how and why an individual, valid law qua law can provide an independent reason for action. Weak natural law reaches these two conclusions both by acknowledging that whether a norm is a valid law is a purely descriptive fact and by asserting that a valid law is only a law in the fullest sense of that term by fulfilling a moral standard, or purpose. By defending both of those claims, weak natural law

accommodates the undeniable “positivity” of law without erroneously separating law from its unique role in practical reason.

In this introductory chapter, I explain what I mean by the “challenge” of legal positivism and offer a detailed elaboration of the natural law theory of law that I defend throughout the remainder of this dissertation. I begin with a brief historical introduction of the debate between natural law and legal positivism that demonstrates that the interrelationships between writers in the two traditions are more complicated than generally believed, and then I provide some cautionary remarks on the terminology that I use throughout this dissertation. I follow those introductory remarks with an elaboration of the theory of law that I defend throughout this dissertation, which I call weak natural law. I show, first, that unlike Finnis’s treatment of natural law, in this dissertation I am only concerned with natural law as strictly a theory of the nature of law, and, second, that weak natural law provides the best articulation of a general theory of law that defends a strong relationship between law and morality. I conclude by introducing three common senses of “legal positivism” and explain how two of these usages of legal positivism present the “challenges” that are the subjects of subsequent chapters.

1.1: The “Challenge” of Legal Positivism

The received view of general theories of law, theories about the nature of law rather than the law of a particular legal system, divides these theories into two camps: those that find a necessary relationship between the nature of law and morality, and those that view law as a social artifact, conceptually divorced from morality, whatever their contingent similarities may be. Theories that affirm a necessary relationship between law and morality are called “natural law” theories, while theories that emphasize the social

creation of law fall under the appellation “legal positivism.” On the received view, natural law and legal positivism are mutually exclusive and jointly exhaustive; the proper version of one, but only one, of those theories accurately describes the nature of law. Natural law and legal positivism are often contrasted in the strongest of terms: either moral standards, or morality more generally, matters to the nature of law or it does not. There is no need to search for a middle ground, as the theories themselves do not allow for one.¹

Despite such rhetoric, even a cursory review of the historical roots of general theories of law demonstrates that the supposed battle lines between these two camps often blurred. For instance, commentators often identify Thomas Aquinas as both the seminal and paradigmatic figure in the natural law tradition, but no fair study of Aquinas’s theory of law could ignore his emphasis on the importance of “positive law.”² Aquinas’s theory of law recognizes four different categories of law: “eternal law,” “divine law,” “natural law,” and “positive” or “human law.”³ Eternal law, known only by God, is largely irrelevant for either theoretical or practical judgment, while divine law,

¹ The perpetuation of received views is often the province of introductory texts. Consider, for example, Jeffery G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, revised edition (Boulder, Colorado: Westview Press, 1990). According to Murphy and Coleman, “[n]atural law theories maintain that there is an essential (conceptual, logical, necessary) connection between law and morality,” while the “starting assumption” of legal positivism “is that . . . a sharp distinction is to be drawn between law and morality.” *Ibid.*, 11 & 19.

² See, e.g., Thomas Aquinas, *Summa Theologica*, I-II q. 95 aa. 1, 2, & 4; II-II q. 57 aa. 2 & 3, reprinted in Paul E. Sigmund ed. *St. Thomas Aquinas on Politics and Ethics* (New York: W.W. Norton & Company, 1988).

³ Thomas Aquinas, *Summa Theologica*, I-II q. 91, aa. 1, 2, 3, & 4.

known only through revelation, contributes nothing to a rationally created theory of law. Relevant to a general theory of law, Aquinas distinguishes between the natural law, consisting of those moral truths knowable through “right reason,” and positive law. Aquinas argues that for a given norm, inclusion among those norms comprising the natural law is neither a necessary nor a sufficient condition for its inclusion among those norms comprising positive law.⁴ Inclusion in the natural law is not a sufficient condition because “human law does not prohibit every vice from which virtuous men abstain.”⁵ Inclusion in the natural law is not a necessary condition because human laws can exist as laws, albeit without the full normative force of the natural law, when unjust or when the human law is not specifically dictated by the principles of natural law.⁶ Thus, the most prominent figure in the natural law tradition considered positive law to be a conceptually distinct category without which one cannot fully account for the nature of law.⁷

⁴ According to Mark Murphy, “Aquinas explicitly denies that a norm’s status as part of the natural law is sufficient to make it part of human law . . . and explicitly affirms that legal norms can properly go beyond what is dictated by the natural law alone.” Mark C. Murphy, “Natural Law Jurisprudence,” *Legal Theory* 9 (2003) 243 n.15.

⁵ Thomas Aquinas, *Summa Theologica*, I-II q. 96, a. 2.

⁶ Ibid., I-II q. 92 a. 1, q. 95, a. 2 and q. 96 a. 4. For further defense of the claim that, despite indications to the contrary, Aquinas maintained that human laws could be laws, at least in a “corrupted” sense of the term, even if those laws contradicted the natural law, see Norman Kretzman, “*Lex Inisusta Non Est Lex: Laws on Trial in Aquinas’s Court of Conscience*,” *The American Journal of Jurisprudence* (1988) 99-122, and John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) 363-68.

⁷ See John Finnis, “The Truth in Legal Positivism,” in Robert P. George ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996) 195. See also, John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) 266-74.

The actual relationship between law and morality remains muddled when considering the late-modern fathers of the legal positivist tradition: Jeremy Bentham and John Austin.⁸ Undoubtedly, Bentham and Austin rejected natural law legal theory as they understood it. For example, Bentham considered the related notion of natural rights to be not merely nonsense but “nonsense on stilts.”⁹ Bentham and Austin, however, largely contested Blackstone’s theory of natural “legality,” which lacked much of the subtlety found in Aquinas’s classical expression of the theory.¹⁰ On utilitarian grounds, Bentham and Austin argued for the positive moral value of posited law. For Bentham and Austin, law had moral value simply because it was posited, and, as such, a posited legal norm could provide practical direction regardless of the value or merit of that norm’s content. But, as Robert McLaughlin argues, Bentham and Austin both agreed that the moral value of positive law qua positive law was still subject to the principal of

⁸ See generally, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in John Bowring ed., *The Works of Jeremy Bentham*, vol. 1 (Edinburgh: William Tait, 1843) 1-155; John Austin, *The Province of Jurisprudence Determined*, Wilfred E. Rumble ed. (Cambridge: Cambridge University Press, 1995).

⁹ Jeremy Bentham, “Anarchical Fallacies: Being an Examination of the Declarations of Rights Issued During the French Revolution,” in John Bowring ed., *The Works of Jeremy Bentham*, vol. 2 (Edinburgh: William Tait, 1843) 491-534.

¹⁰ For example, Blackstone states that, “This law of nature being coeval with mankind and dictated by God himself is of course superior in obligation to any other. . . . No human laws are of any validity if contrary to this, and such of them as are valid derive their force and all of their authority, mediately or immediately, from this original.” William Blackstone, I *Commentaries* 41. This quote illustrates Blackstone’s willingness to slide from a law’s lack of authority to that law’s lack of validity. Bentham and Austin rightly criticized Blackstone for the slide, which I will show is rejected by the more nuanced articulation of natural law legal theory I defend in this dissertation.

utility.¹¹ That is, a posited law that was “so harmful that the suffering occasioned by its breach is less than that would result from its fulfillment” lacked the moral justification, and normative value, possible for positive law.¹² In this regard, Bentham and Austin agreed with Aquinas that a posited law could still exist as a human law but without the moral force such law has the potential to bear.¹³

Although even this cursory comparison of the origins of the natural law and legal positivist traditions demonstrates noteworthy agreement regarding the relationship between law and morality, the received view remains. Given the supposed opposition of natural law and legal positivism, one may be shocked to find many recent writings on the subject that range from the conciliatory to the irenic. This holds especially true regarding the theory of one of natural law’s most ardent defenders, John Finnis. For instance, H.L.A. Hart asserts, “Finnis’s flexible interpretation of natural law is in many respects

¹¹ Robert N. McLaughlin, “On the Similarity Between Natural Law Theories and English Legal Positivism,” *The Philosophical Quarterly* 39 (1989) 445-62.

¹² Ibid., 456. McLaughlin argues that Austin, echoing Bentham, maintained that there was a general moral obligation to obey positive law “whether or not these laws produce the best result from the point of view of their general utility and therefore whether or not, considered simply as rules of behavior, they are morally desirable.” Rather, the fact that a law was posited is so beneficial that the law should be obeyed unless it is “so seriously wrong that the general good can be served by resistance, even when the pain and suffering which will inevitably result from such resistance are taken into account.” Ibid., 451-52.

¹³ McLaughlin concludes that Aquinas, Bentham, and Austin all agreed that “there is a group of pre-legal prescriptions and permissions, inconsistency with which deprives positive laws of the obligatory status,” though the relevant standards for moral obligation vary between Aquinas and the utilitarians. Ibid., 446. I believe that McLaughlin is largely correct, but throughout this paper will largely ignore whether there is a general obligation to obey the law. Rather, I will concern myself with the broader issue of law’s normativity, understood as law’s ability to provide reasons for action.

complementary to rather than a rival of positivist legal theory.”¹⁴ Joseph Raz points to Finnis’s theory as “vindicating my claim that it is a mistake to think that the legal positivist and the natural law traditions are inherently incompatible.”¹⁵ Likewise, Finnis’s work significantly contributes to Neil MacCormick’s conclusion that “the issue of mutual opposition [between positivism and natural law] is now closed and unfruitful.”¹⁶ To all of this, Finnis adds that there are, “some important truths in legal positivism.”¹⁷ As I expand upon in Chapter 2 below, Finnis’s acceptance of the fact that within a given legal system what makes a putative law an actual law of that legal system are the social facts underlying the creation of the law explains the perceived acceptability of his theory by these otherwise self-professed legal positivists.¹⁸

If such noteworthy proponents of opposing sides in the supposed intellectual blood war between positivism and natural law admit the compatibility of the two theories,

¹⁴ H.L.A. Hart, “Introduction,” in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983) 10.

¹⁵ Joseph Raz, “The Morality of Obedience,” *Michigan Law Review* 83 (1985) 739. This article is a book review of Philip Soper, *A Theory of Law* (Cambridge, MA: Harvard University Press, 1984).

¹⁶ Neil MacCormick, “Natural Law and the Separation of Law and Morals,” in Robert P. George ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992) 105.

¹⁷ John Finnis, “The Truth in Legal Positivism,” 195.

¹⁸ For a more detailed overview of how these and other theorists approach the legal positivism and natural law debate, see Brian Bix, “On the Dividing Line Between Natural Law and Legal Positivism,” *Notre Dame Law Review* 75 (2000) 1613 and “Natural Law: The Modern Tradition,” in Jules Coleman and Scott Shapiro ed., *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford, Oxford University Press, 2002) 95-100.

one may only wonder what remains of this debate. Finnis’s willingness to admit that the proper social origin is required for a norm to be a law of a particular legal system – the aspect of his theory that Hart, Raz, and others find compatible with positivism – prompts Brian Leiter to wonder whether there are “any natural law theories that present a genuine challenge to [legal] positivism.”¹⁹ For instance, Leiter states that Finnis “denies that natural lawyers are committed to affirming that morality is necessarily a criterion of legal validity, a doctrine which would state an actual dispute with positivism.”²⁰ In fact, Leiter appears elated at Finnis’s “concession” that legal positivism gives an adequate account of intra-systemic legal validity, implying that this “concession” should be grounds for an “admission of natural law theory’s demise.”²¹

One may rightly wonder, however, whether Leiter correctly characterizes the debate. It would appear that a given theory A “challenges” another theory B only when A purports to offer most if not all of the epistemic virtues of B while also providing some additional theoretical merit, such as “evidentiary adequacy (‘saving the phenomena’), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth.”²² For one theory to actually “challenge” another, it does not appear sufficient for the challenger to merely

¹⁹ Brian Leiter, “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” *American Journal of Jurisprudence* 48 (2003) 28.

²⁰ Ibid.

²¹ Ibid. (citing John Finnis, “On the Incoherence of Legal Positivism,” *Notre Dame Law Review* 75 (2000) 1611).

²² Although merely illustrative, I borrow this list from Leiter. Ibid., 34-35.

offer a different account of the subject matter in question. Rather, the challenger must offer something more epistemically promising than the theory it supposedly challenges.

Understood this way, Leiter contends that a natural law theory, a theory that insists the nature of law cannot be fully explained without providing some relationship to morality, possesses no more epistemic merit than legal positivism. But natural law theorists, especially Finnis, understand their theories to explain something about the nature of law that legal positivism cannot: the ability for a valid law to provide a reason for action. The self-identified legal positivists quoted above may see no debate between their theories and Finnis's because Finnis's theory accommodates the positivists' claim that the conditions that determine which norms are laws need not possess moral tests. Natural law only differs because it offers to explain something more.²³ But by attempting to explain a further feature of law, law's unique normativity, natural law theories offer theoretical merit lacking in theories that cannot provide such an explanation. As I argue throughout this dissertation, none of the most plausible theories of legal positivism explain law's normativity. For that reason, the real question becomes whether legal positivism provides any real challenge to natural law.

²³ The respective positivists may nonetheless quarrel with the particular something more Finnis offers. For example, after characterizing Finnis's theory as complementary to his own, Hart contends that, "[Finnis's] identification of the central meaning of law with what is morally legitimate, because oriented towards the common good, seems to me in view of the hideous record of the evil use of law for oppression to be an unbalanced perspective" H.L.A. Hart, "Introduction," 12.

1.2: Preliminary Notes of Caution

Before progressing further, I would like to make some general comments about my usage of the terms “legal positivism” and “natural law.” Throughout this dissertation, I try, as much as possible, to heed Joseph Raz’s cautionary admonition not to succumb to “one of the unattractive tendencies of contemporary legal and political philosophy . . . [to] not discuss anyone’s view, but a family of views,” because doing so “allows one to construct one’s target by selecting features from a variety of authors so that the combined picture is in fact no one’s view, and all those cited as adhering to it would disagree with it.”²⁴ Noting the danger of broad classifications, however, does not eliminate the fact that many authors self-identify their theories as versions of either “natural law” or “legal positivism.” Because most of the thinkers I discuss appropriate these labels to their theories, I will follow their self-designations when I can do so without sacrificing clarity, but I will make every effort to clarify where I am discussing the work of a particular theorist rather than making a comment about the general theoretical category or tradition.

²⁴ Joseph Raz, “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment,” *Legal Theory* 4 (1998) 1. Finnis provides a similar caution with the “belief that reflections on law and legal theory are best carried forward without reference to unstable and parasitic academic categories, or labels, such as ‘positivism’ (or ‘liberalism’ or ‘conservatism,’ etc.).” John Finnis, “On the Incoherence of Legal Positivism,” 1597.

During a similar cautionary note particularly apposite to this dissertation, Brian Bix adds that the dangers identified in this quote from Raz “must double when one is comparing two different schools of thought, here natural law theory and legal positivism.” Brian Bix, “On the Dividing Line Between Natural Law Theory and Legal Positivism,” 1614.

With that qualification in mind, I begin by noting that any successful general theory of law, whether “natural law” or “legal positivist,” will provide an account of the key features of law while leaving room to explain how and why purported legal systems (such as the rules of social order in so-called primitive societies and international law) can be identified as legal systems. Since Hart, most legal theorists agree that a successful theory of law will provide an account of at least the following two characteristics: legal validity and law’s unique normativity.²⁵ A theory of legal validity is a theory about the conditions under which a given norm becomes a law of a given legal system. A theory of law’s normativity explains how a law qua law can provide, or at least claim to provide, a reason for those subject to it to comply with it.²⁶ Thus, both natural law and legal positivism, as general theories about the nature of law aim to provide the proper theory of legal validity and law’s normativity.²⁷

²⁵ Hart’s own theory of legal validity required primary and secondary rules to be validated by a rule of recognition, while he aimed to explain law’s normativity by appealing to the acceptance of a rule from the internal point of view. See H.L.A. Hart, *The Concept of Law*, Second Edition (Oxford: Clarendon Press, 1994) 79-99. I will discuss these two aspects of Hart’s theory of law in Chapter 2 and Chapter 3 respectively.

²⁶ Other writers often refer to this feature of law as “law’s authority” or “law’s claim to authority.” I agree with those authors that law typically serves, or at least purports to serve, as a practical authority; that is, law’s dictates should be followed without an independent evaluation of their merits.

²⁷ I admit that the introduction, without further support, of these two desiderata for a general theory of law appears ad hoc. As with any theory, a general theory of law must be developed within a framework of certain background assumptions, and requiring a general theory of law to account for legal validity and the normativity of law appears to be a safe background assumption. That said, the importance of adequately explaining both of those two putative aspects of law remains an assumption that I will test throughout this dissertation, and, by the end, I will show it to be warranted.

1.3: Natural Law as a Theory of Law

Presenting the version of a “natural law” theory of the nature of law that I defend throughout this dissertation requires two separate steps. First, I must explain how, and to what extent, natural law as a theory about the nature of law (that is, a theory that adequately accounts for both law’s positivity and law’s normativity) can be separated from natural law as a normative moral or political theory and become a worthwhile topic for independent study. This discussion is needed to show how one can understand natural law as a legal theory that asserts a connection between law and morality without committing to a particular, first-order moral theory. Second, I must clarify the central commitments of a natural law legal theory and demonstrate how those commitments are best developed. I take the first of these steps in this section and the second in the next section.

“Natural law,” as theory in practical philosophy, can refer to a moral theory, a political theory, a legal theory, or often all three.²⁸ As I explain more fully below, the difficulty with dissociating natural law as a legal theory from natural law as a moral or political theory arises because all three are practical theories – theories concerning the

²⁸ “Natural law” is also commonly used to refer to a “law of nature,” or law of empirical possibility, in the natural sciences. However, the fact that the same term is commonly used to refer to theories about entirely distinct topics is not, by itself, a hindrance to a clear exposition of the author’s desired topic. For example, even though there are numerous theories known as “realism,” one can discuss realism with regard to the conditions under which a state should wage war without worry that the reader will confuse his subject with any of the realisms that affirm the existence of entities referred to by the predicates of a specified area of discourse. Similarly, that this dissertation concerns law and legal theory provides sufficient context for the reader to conclude that law-of-nature usage of “natural law” is inapposite.

sources and content of reasons for actions – that trace the practicality of their subjects to a common source.²⁹ That fact often leads to presentations of a natural law as a theory of law as necessarily associated with a particular first-order moral theory. In such presentations the merits of natural law as a general theory of law become tied to the merits of, and in particular the conclusions of, the first-order moral theory. I believe, however, that the core insights of a natural law theory about the nature of law can be developed and defended without also developing and defending a particular first-order moral theory. Rather, at the level of abstraction employed in this dissertation, natural law as a general theory of law is consistent with any number of first-order moral theories. In this section, I use the relationship between natural law as a theory of law and natural law as moral or political theory in Finnis’s writings as an example to demonstrate the extent to which a natural law theory of law can be separated from moral theory and the extent to which it cannot.

The tendency to develop a natural law legal theory in conjunction with moral and political theories is especially true in the work of Finnis.³⁰ Finnis investigates all three

²⁹ Philip Soper discusses some of the historical, etymological, and conceptual reasons for the common tendency to conflate natural law as a moral theory with natural law as a legal theory in “Some Natural Confusions about Natural Law,” *Michigan Law Review* 90 (1992) 2394-97. Even recognizing that historically well-entrenched double usage of natural law, the current association of natural law with a particular legal theory may, in some small part, be attributed to H.L.A. Hart. When Hart, as editor of the Clarendon Law Series, commissioned Finnis to write a monograph on legal theory, he required that the work be called “Natural Law and Natural Rights.” Nicola Lacy, *A Life of H.L.A. Hart: the Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) 273.

³⁰ For example, Finnis begins the “Preface” to *Natural Law and Natural Rights* by noting that the core of the book sketches “what the textbook taxonomists would label an

areas together because each involves the investigation and application of “practical reasonableness,” the term Finnis uses for the requirements of “right reason” or all types of well-formed practical reason.³¹ In the end, Finnis’s legal theory shares the same aim as his moral and political theories: to understand how each of those areas of practical deliberation conforms to the requirements of practical reasonableness, and in so doing can provide reasons for action.³² For that reason, to the extent the metaphysical and epistemological claims underlying a theory of practical reason are considered a moral theory, one cannot separate natural law legal theory from a corresponding meta-ethics.

Demonstrating the particular manner in which legal theory is inextricable from moral theory, as both are parts of practical reasonableness, requires a brief overview of Finnis’s understanding of “natural law.” Very compactly, Finnis states that his usage of “natural law” can be captured by the following:

- (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not relative-to-a-particular

‘ethics,’ a ‘political philosophy,’ and a ‘philosophy or law’ or ‘jurisprudence,’” but cautions that he accepts the labels, “as a scholarly convenience, but not the implication that the ‘disciplines’ they identify are really distinct and can safely be pursued apart.” John Finnis, *Natural Law and Natural Rights*, v.

³¹ See John Finnis, *Fundamentals of Ethics* (Washington, D.C.: Georgetown University Press, 1983) 70-79, and *Natural Law and Natural Rights*, 100-33.

³² See John Finnis, *Natural Law and Natural Rights*, 15 and 23.

purpose) and acts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards.³³

In summary, (i) provides a theory of value and (ii) provides a theory of right action. I can ignore (iii), the set of universal moral principles Finnis derives from his accounts of (i) and (ii), for the present purposes because a brief explication of (i) and (ii) provides enough detail of Finnis’s theory of practical reasonableness to establish which aspects are necessary for a natural-law-based legal theory and which are not.³⁴

Finnis’s full theory of value postulates an exhaustive list of irreducible, incommensurable, non-moral “basic goods” or “basic values”: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.³⁵ For Finnis, these seven categories represent the only intrinsically valuable activities that humans seek to instantiate through their rational, or even irrational, practical judgments. Even granting Finnis’s claims of irreducibility and incommensurability, one could easily object to this list’s exhaustiveness. For example, one could argue that pleasure, work, parenthood, marriage, romantic love, sexual intimacy, or any of a number of human

³³ John Finnis, *Natural Law and Natural Rights*, 23.

³⁴ For a further development of Finnis’s account of general moral standards, see his *Moral Absolutes: Tradition, Revision, and Truth* (Washington D.C.: Catholic University of America Press, 1991).

³⁵ John Finnis, *Natural Law and Natural Rights*, 86-90. In later writings, Finnis changed this list, but the changes serve more to elaborate and clarify the categories than express any disagreement with the original list. See, Germain Grisez, Joseph Boyle, and John Finnis, “Practical Principles, Moral Truth, and Ultimate Ends,” *The American Journal of Jurisprudence*, 32 (1987) 99-151, and John Finnis, *Aquinas: Moral, Political, and Legal Theory*, 79-86.

activities is valuable in and of itself and is intelligibly pursued by rational agents for its own sake.³⁶ This objection, however, does not affect my understanding of practical reason for the sake of this dissertation. I only need to agree with Finnis that there are intrinsically valuable activities that rational agents can select to participate in for their own sake: “what it would be good, worthwhile to do, to get, to have and to be.”³⁷

Similar to Finnis’s theory of value, understanding what I very roughly called Finnis’ theory of right action, and Finnis calls “the requirements of practical reasonableness,”³⁸ for the purposes of natural law as a general theory of law does not require agreeing with the details of the theory but rather only understanding its general structure. For the present purposes, it suffices to note that Finnis maintains that there are nine substantive requirements for a given act of practical deliberation to be practically reasonable.³⁹ The presence of these substantive requirements demonstrates that for

³⁶ Along these lines, Steven Smith objects that Finnis’s failure to include pleasure as a basic good demonstrates the “non-empirical” nature of his value theory, which undermines the theory’s ability to respond to actual moral dilemmas. Steven D. Smith, “Natural Law and Contemporary Moral Thought: A Guide from the Perplexed,” *The American Journal of Jurisprudence* 42 (1997) 299-330.

³⁷ John Finnis, *Fundamentals of Ethics*, 12.

³⁸ John Finnis, *Natural Law and Natural Rights*, 100-133 (“Chapter V: The Basic Requirements of Practical Reasonableness”).

³⁹ Those requirements include maintaining “a coherent plan of life,” having “no arbitrary preferences amongst values,” having “no arbitrary preferences amongst persons,” having sufficient “detachment” from and “commitment” to one’s projects, bringing “about good in the world . . . by actions that are efficient to their reasonable purposes,” maintaining “respect for every basic value in every act,” “favouring and fostering the common good of one’s communities,” and acting “in accordance with one’s conscience.” Ibid. Please note that the requirements of practical reasonableness are also

Finnis, and consistent with the greater natural law tradition, practical reasoning should be understood as a predominately rationalist, rather than empiricist, intellectual activity.

These labels, however, are not significant. For this dissertation, it is only significant that “practical reason” and “practical reasonableness” encompass substantive content beyond instrumental rationality or any other form of maximization of utilities, preferences or other purportedly observable and measurable unit of value.

In Finnis’s work, and throughout the natural law tradition, law is like both interpersonal morality and political morality in that one cannot provide an adequate theory of it without understanding the theory of practical reason that underlies each. That said, the above qualifications to Finnis’s theories of value and right action are intended to demonstrate that one can strip most of the substantive content from a theory of practical reasoning but leave the connection between practical reason and a general theory of law intact. By doing so, I accept throughout this dissertation that a theory of practical reason is needed to understand a natural law legal theory, without committing myself to Finnis’s or any other theorist’s particular first-order moral conclusions.⁴⁰

Separating law as an independent subject of inquiry apart from moral or political theory is a break from the dominant trends in the natural law tradition. Nonetheless, in

listed as one of Finnis’s basic values; thus, obeying (or, more accurately, instantiating) these requirements is itself an activity worth pursuing according to Finnis.

⁴⁰ For example, I assume that one could consistently agree with Finnis’s version of natural law as a legal theory and disagree with his views on sexual morality, though Finnis would likely reject such a move as both his moral theory and his legal theory result from the application of his theory of practical reason. See, e.g., John Finnis, “Law, Morality, and ‘Sexual Orientation,’” *Notre Dame Law Review* 69 (1994) 1049-76.

this dissertation I remain uncommitted, or one could say agnostic,⁴¹ as to the merits of any particular normative ethics and political philosophy. Rather, I choose to focus only on natural law as a general theory about the nature of law.

1.4: Three Versions of Natural Law as a Theory of Law

With my discussion of natural law limited to only to a theory of law, I can now clarify further the type of relationship between law and practical reason that places a legal theory within the natural law tradition. As I stated above, natural law as a legal theory is primarily concerned with reconciling the nature of law with practical reason. For the moment, I will follow Mark Murphy, who expands on that claim by stating that natural law, as a legal theory, maintains, at a minimum, that “necessarily, law is a rational standard for conduct. It is of the nature of law to provide a set of standards that rational agents should take as a guide to their conduct.”⁴² There are three distinct ways to elaborate this general claim, each of which creates a distinct version of natural law as a theory of law. In this section, I introduce and evaluate those three versions of natural law

⁴¹ “Agnostic” is an appropriate, if not ironic, term in this context given the widespread understanding of the natural law tradition as dependant upon not only a substantive moral theory but also religious beliefs, especially the religious beliefs of the Roman Catholic Church. As I understand the natural law tradition to provide the basis for a defensible theory of law without any dependence on the existence of God, I remain “agnostic” on that topic throughout this dissertation as well. I follow Finnis in this assumption, however, as he effectively leaves questions about the existence of God out of the theory he presents in *Natural Law and Natural Rights*, considering the topic only in that book’s final chapter. See John Finnis, *Natural Law and Natural Rights*, 371-413 (“Chapter XIII: Nature, Reason, and God”).

⁴² Mark C. Murphy, “Natural Law Jurisprudence,” 244.

as a theory of law and argue that one of the versions, which I call “weak natural law,” is preferable to the other two.

Before introducing the three version of natural law as a theory of law, one qualification about Murphy’s use of term “rational” is warranted. By saying that law provides a rational standard for conduct, Murphy does not mean that it can be instrumentally rational to comply with a law. Rather, Murphy means that for a given norm, if that norm is a law, then by its very nature as a law that norm provides a reason for action. By reason for action, in turn, the natural law tradition means, at a minimum, that a legal norm provides a justifying reason for action; a law need not provide a motivating reason for action. More precisely, a properly enacted law that satisfies the moral criteria to provide a reason for action because it is a law need not motivate obedience from any actor who rationally apprehends that fact. While one could provide a theory in which it would be irrational not to be motivated by a given law, that theory would involve an action theory that is not entailed by the central commitments of natural law as a general theory of law.⁴³ Natural law as a theory of law understands law to be a

⁴³ For example, during a discussion of Hume and Clarke on the ability to derive an ‘ought’ from an ‘is,’ Finnis states that:

this objection to Clarke is not Hume’s, for it treats the problem of obligation as the problem of finding justifying reasons, i.e. adequate point, for acting in certain ways, whereas Hume lacks any clear conception of, or systematic interest in the concept of, justifying reasons. For him, the problem of obligation seems to come down to the problem of finding a motive that *will* move someone to act in certain ways.”

John Finnis, *Natural Law and Natural Rights*, 41.

rational standard of conduct to the extent that merely being a law allows a norm to rationally justify an action.

With that qualification in mind, I can introduce the three ways in which Murphy's general, but incomplete, characterization of natural law can be developed: there is a "strong reading," a "moral reading," and a "weak reading" of the natural law thesis.⁴⁴ Providing my own definitions, I demonstrate the contrasts between these three versions of natural law by situating each version with regard to how it would address the truth of the putative slogan of natural law: *lex iniusta no est lex* ("unjust law is not law").⁴⁵ That slogan can be addressed in three different ways, which are as follows:

Strong natural law: the *no est lex* slogan is true – an unjust "law" cannot accurately be described as a law.

Moral natural law: the *no est lex* slogan is false – an unjust "law" can be properly identified as a law in a purely descriptive sense but nonetheless fail to provide moral reasons for compliance with it.

Weak natural law: the *no est lex* slogan is true but only because of diverging ways in which a norm can be a law – an unjust "law" can accurately be described as a law but by being unjust it is defective as a law.

⁴⁴ Ibid., 244 and 252.

⁴⁵ I state that the "*no est lex*," slogan is only a putative slogan for natural law as a legal theory because it appears that none of the primary contributors to the tradition (including Augustine and Aquinas) ever expressed it – at least not in that form. According to Kretzman, the quote from Augustine that is the supposed source of the "*no est lex*" slogan actually states that "*lex mihi esse non videtur, quae iusta non fuerit*" ("that which is not just does not seem to me to be a law"). Kretzman, "*Lex Inisusta Non Est Lex: Laws on Trial in Aquinas's Court of Conscience*," 101 (quoting Augustine, *De libro arbitrio* I v 11). Aquinas attributes this phrase to Augustine but leaves out the qualification "*mihi*" ("to me"), misquoting Augustine as stating that "*lex esse non videtur quae just non fuerit*" ("that which is not just does not seem to be a law"). Ibid.

There are two points to elaborate before considering these theses individually. First, both strong and weak natural law agree that regardless of its content-independent sources, a putative law can fail *in some way* to be a law based solely on its content, while moral natural law denies that. Strong natural law states that an unjust law fails to satisfy the proper standard for legal validity and weak natural law states that an unjust law fails in that it is a law only in a defective, or impoverished, sense of the term (which I explain more fully below), whereas moral natural law states that an unjust law is a law but not one that provides a reason for action. In short, strong and weak natural law agree that at some point practical reason, rather than theoretical reason alone, is required to determine whether a given norm is a law, while moral natural law contends that theoretical reason is enough.

Second, while of each these formulations of the natural law thesis involve the phrase “unjust law,” that phrase should not be understood literally. The term “unjust” provides a convenient short-hand for whatever practical, or moral, standard actually determines whether a norm is a law, but merely being unjust is neither a necessary nor sufficient condition for a law failing qua law to provide a reason for action. First, justice is not a necessary condition for a law’s normativity because a law could be unjust but still provide a justifying reason for compliance because it is a law. For example, a law that creates only a slight injustice, such as a slightly inequitable redistribution of wealth, could nonetheless provide a reason for action as a law because it provides a decisive

solution to some coordination problem.⁴⁶ Second, justice is not a sufficient condition for a law's normativity because an apparently just law, presumably a just law of a pervasively unjust legal system, could nonetheless fail to provide independent justifying reason for action. Thus, merely for a law to be unjust does accurately capture the central claim of natural law as a legal theory: there are standards of practical reason that upon the violation of which a putative law no longer provides an independent reason for action.

In light of those general comments, I turn to a closer examination of each version of the natural law thesis. In the remainder of this section I demonstrate the incoherence of strong natural law, the trivialness of moral natural law, and merits of weak natural law as a general theory of law.

1.4.1: Strong Natural Law

With regard to strong natural law, Finnis best expresses a belief shared by many contemporary natural law theorists when he describes the strong natural law thesis as “pure nonsense, flatly self-contradictory.”⁴⁷ In fact, Murphy may be unique among contemporary advocates of natural law for defending the coherence of the strong reading. Murphy claims that the apparent contradiction created by stating that a given norm, when unjust, can both be a law and not a law disappears if “law” is understood to function as an

⁴⁶ Murphy states that this fact demonstrates that natural law theory does not confuse “law as it is with law as it ought to be.” Mark C. Murphy, “Natural Law Jurisprudence,” 251 n.37. Similarly, Jeremy Waldron argues that the possibility of disagreement over the practical rationality of a given law could allow for an unjust law that a rational actor should still comply with because it is the law. Jeremy Waldron, “*Lex Satis Iusta*,” *Notre Dame Law Review* 75 (2000) 1829-58.

⁴⁷ John Finnis, *Natural Law and Natural Rights*, 364. For similar quotations, see Mark C. Murphy, “Natural Law Jurisprudence,” 245.

alienans in that context.⁴⁸ An *alienans* is an attributive adjective, such as “fake,” that removes the contradiction in a statement that “a ____ X is not an X” when inserted into the blank.⁴⁹ “Fake” and other successful *alienans*, however, perform that function because they operate as an implicit negation. That a “fake X” is not a real “X” is part of the semantic content of “fake”; that is, while “fake” may tell us something more, it tells us at least that a “fake X” is also a “not an X.” Thus, the statement that “a fake X is not an X,” entails that “something that is not an X is not an X,” which is free of contradiction. Given this, for Murphy to be correct that “unjust” operates as an *alienans* when attributed to law, “unjust” must operate as an implicit negation in that context.

That claim, however, runs contrary to well-established linguistic practice. As I stated above, any successful theory of law must provide an account of legal validity. It is widely accepted, however, that a law can be both legally valid and unjust. That is, a law can qualify as a law of a particular system under the proper standard for legal validity, but still be judged as unjust according to an independent moral standard. The ability to separate the legal validity of a norm from its moral merit derives from the widely acknowledged conventionality of law. A law is a law of a given system because it conforms to conventional standards of legal validity within that system. Murphy’s *alienans*-based explication of strong natural law, however, does not allow for legal

⁴⁸ Ibid., 250.

⁴⁹ Murphy observes that “fake” always functions as an *alienans*, but that other terms can function as an *alienans* when applied to certain nouns. Ibid. Murphy’s examples are that “fake diamonds are not diamonds” and that “a glass diamond is not a diamond.” Ibid., 246. According to Murphy, “fake” always functions as an *alienans* while “glass” only does so in particular contexts, such as “glass diamond.”

validity to be conventional in this way. Under the strong version of natural law, an unjust law is not a law even if that law was enacted according to the society's convention for determining legal validity. Murphy recognizes that for that reason the strong natural law theorist's "burden of showing that it is central to law that it be backed by decisive reasons . . . is made weighty by the fact that this view commits him or her to the thesis that a number of socially sanctioned rules called by consensus 'laws' are not really laws at all."⁵⁰ Murphy solves the problem by stating that according to strong natural law, the social consensus is simply incorrect, but when dealing with an irreducibly social phenomenon such as law, one cannot reject social consensus or practice easily. Rather, to support the plausibility of strong natural law, Murphy must offer the theory as a reforming definition of the term "law."⁵¹ However, that is not the project either of this dissertation or of general jurisprudence.

1.4.2: Moral Natural Law

Unlike strong natural law, moral natural law is not incoherent, but like strong natural law, it also fails to provide a theoretically interesting account of law. Moral natural law maintains that a norm that is determined to be a law of a particular legal system may "constitute such a departure from reasonableness that there could not be adequate reason to obey; the only law that merits our obedience is law that meets a

⁵⁰ Ibid., 250.

⁵¹ To be fair, Murphy only proposes to show that strong natural law is a possible position; that is, that it is not incoherent. I am unsure that he succeeds in that regard without offering a reforming definition that, in effect, changes the subject, but my objection matters little as Murphy also rejects strong natural law because that thesis "fails simply for lack of evidence in its favor." Ibid., 262.

certain minimum standard of reasonableness.”⁵² Understood this way, moral natural law states that social conditions alone may determine whether a given norm is a law, but additional moral considerations are required to determine whether the law provides a reason for action. Thus, according to the moral version, an unjust “law” is simply a law that is so morally defective there is no reason to obey it, but no one – whether natural lawyer or legal positivist – denies that some laws should not be obeyed.⁵³ Thus, if moral natural law captures the significant insight of the natural law tradition, then that tradition provides no unique contribution to legal theory.

Comparing strong natural law and moral natural law together, one must choose between (a) a theory that maintains that practical reason must be used to determine whether a given norm is a law but conflicts with established linguistic practice; and (b) a theory that denies that practical reason must be used to determine whether a given norm is a law. To the extent that moral natural law denies that practical reason plays a role in determining which norms are laws, thus abandoning the spirit of the *no est lex* slogan, it departs from the distinctive claim of the natural law tradition. An interesting natural law theory of law will accept that the *no est lex* slogan is true, as strong natural law does, but will not conflict with established linguistic usage of “law.” Weak natural law provides such a theory.

⁵² Ibid., 252.

⁵³ Ibid., 252; Brian Bix, “On the Dividing Line Between Natural Law and Legal Positivism,” 1620 n. 34.

1.4.3: Weak Natural Law

Having rejected both strong natural law and moral natural law, we are left with only weak natural law as a useful elaboration of the central commitments of natural law as a theory of law. Murphy's weak natural law provides a starting point for how natural law as theory about the nature of law will be understood throughout this dissertation, but that version of natural law requires some elaboration.⁵⁴

First, Murphy's claim that the central commitment of natural law legal theory – “necessarily, law is a rational standard for conduct” – provides one, but not the only, necessary or essential feature of law. For example, Finnis, a proponent of what I call weak natural law, offers the following as “A Definition of Law”:

Throughout this chapter, the term ‘law’ has been used with a focal meaning so as to refer primarily to rules made, in accordance with regulative legal rules, by a determinate and affective authority (itself identified and, standardly, constituted as an institution by legal rules) for a ‘complete’ community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the communities co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimizations of arbitrariness, and maintenance of

⁵⁴ The claim that the theory I call “weak natural law” departs from traditional versions of natural law theory (both legal and moral theory) is a common accusation in commentary on natural law. A prominent example of the position that Finnis's version of natural law is a “new” theory altogether is Russell Hittenger's *A Critique of the New Natural Law Theory* (South Bend, IN: Notre Dame Press, 1987). I have heard Finnis remark that the only “new” title appropriate for his theory might be “the new classical natural law theory,” to emphasize his belief that the theory is an accurate interpretation of the Aquinas on natural law. That particular internecine debate, the exact relationship between weak natural law and the Thomistic tradition, lies outside the scope of this dissertation but is, nonetheless, worth noting.

a quality of reciprocity between the subjects of that law both amongst themselves and in their relations with the lawful authorities.⁵⁵

This single sentence functions as a summary of the extended argument running throughout Finnis's *Natural Law and Natural Rights*. Successfully unpacking this sentence would require addressing and evaluating many arguments and claims present in the natural law tradition that stretch beyond the scope of this dissertation. Worthy of note, however, is Finnis's claim that a law, in the fullest sense of law, represents a practically reasonable solution to some problem of social co-ordination that is directed at the common good of those in the community.⁵⁶ For Finnis, direction toward the common good in a manner that

⁵⁵ John Finnis, *Natural Law and Natural Rights*, 276-277.

⁵⁶ For Finnis, the term "co-ordination problem" is a term of art that should not be confused with that term's usage in game or decision theory. In *Natural Law and Natural Rights*, Finnis states that by "co-ordination problem" he does not mean the "pure co-ordination problem" of game theory in which the interests of the parties coincide, and instead his use of the term "ranges from the pure to the very non-pure instances, approaching asymptotically the 'pure conflict case'" in which the parties interests diverge and one's gain is another's loss. *Ibid.*, 255. In a later paper, Finnis further distinguishes his usage of "co-ordination" problem from game theoretic usage:

the term 'co-ordination problem' extends, in political and legal theory, to any situation where, if there were co-ordination of action, significantly beneficial payoffs, otherwise unattainable, could be attained by significant numbers of persons in a way which other persons, even if harmed or at least not benefited by that option in that situation, could count as 'a good thing.' Thus understood, co-ordination problems are neither more nor less than the 'problems of united action' (i.e., 'common action' for the 'common good')

John Finnis, "Law as Co-ordination," *Ratio Juris* 2 (1989) 100 (emphasis and citations removed). See also John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," *Notre Dame Journal of Law, Ethics and Public Policy* 1 (1984) 115-137.

also serves the common good provides the moral standard according to which a putative law can be accurately described as a law in the fullest sense of the term.⁵⁷ My interest is not with the details of that standard, or whether that standard, as opposed to another moral standard, best explains law. Rather, my interest is only with the role the existence of such a standard plays in a general theory of law. It is according to such a moral standard that a putative law either becomes or fails to become a law in the fullest or “focal” sense of the term.

Second, moving from strong to weak natural law allows for the addition of law’s social origin as an integral aspect of law. Murphy’s defense of the strong natural law

⁵⁷ Finnis cites Aristotle for the term “common good,” but the sense of “common good” Finnis employs throughout the book (and which he attributes to early twentieth century French commentaries on Aquinas) – “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community” – can be traced to the social thought of the Roman Catholic Church. Finnis, *Natural Law and Natural Rights*, 155, 160. In particular, Finnis’s explication of the common good bears similarity to the account of that term provided by Pope John XXIII, who characterized the common good as “the sum total of those conditions of social living, whereby men are enabled more fully and more readily to achieve their own perfection.” Pope John XXIII, *Mater et Magistra: Christianity and Social Progress* (1961) #65. in David J. O’Brien and Thomas A. Shannon ed., *Catholic Social Thought: The Documentary Heritage* (Maryknoll, NY: Orbis Books, 1992) 82-128. Whatever particular debt Finnis’s account of the common good pays to the Catholic social tradition is irrelevant, as Finnis offers his account to stand, or fall, on its own merits regardless of its origins. Nonetheless, it is worth noting that this is not the only instance in *Natural Law and Natural Rights* where Finnis attributes inspiration to Aristotle that may be more accurately attributed to Catholic social thought. Whether those attributions are meant to hide the origins of the ideas or merely appeal to a wider audience, fully appreciating the positive argument Finnis provides in that work requires some familiarity with the relevant church documents. As I stated above, however, the details of Finnis’s first order moral theory, as well as his account of the common good, remain outside the scope of this work.

thesis prompts him to ignore the “posited” nature of law and the fact that even an unjust law can still be a valid law of a given legal system as a matter of social fact. Weak natural law’s acceptance that an unjust law may be described accurately as a law possesses the virtue of retaining the emphasis on positive law found in Aquinas’s legal theory as sketched above, by allowing for a norm with the proper social origin to be considered a law of a given legal system without also jettisoning the importance of moral evaluation to the general theory of law.

Third, weak natural law states that any norm with the correct sources to be counted among the laws of a given legal system can be accurately described as a law of that system, but only in an impoverished or derivative sense. The distinctive claim of a natural law theory of law is that it is a necessary part of the nature of law that law is normative and provides standards for conduct that are practically rational to obey. The difference between strong natural law and weak natural law is that strong natural law maintains that a putative law that is so morally deficient as not to provide a reason for action is not accurately described as a law, while weak natural law allows that it can be accurately described as a law, just not in the fullest sense of the term. The best analogy would be that just as a knife that is too dull to cut is still a knife – albeit a defective knife – a law that is too morally repugnant to provide a reason to obey is still a law – just a defective law.⁵⁸ Providing a practical reason for action is part of the “central case” or “focal sense” of law informs all other usages of the term.

⁵⁸ To demonstrate this point, Murphy states that weak natural law “does not hold that *necessarily, law is a rational standard for conduct* is a proposition of the same sort as *necessarily, triangles have three sides*: rather, it is of the same sort as *necessarily, the*

Fourth, weak natural law natural not only claims that it is part of the nature of law to provide reasons for action but also that the reason provided is of a particular type. Consider the example of a mandate requiring the execution of first-born children that has been enacted by a legislative body or promulgated by an executive or judicial officer in a manner that makes the mandate a law of that society. That law, however, is so morally repugnant that it would not provide a reason for a rational actor to obey it. Nonetheless, the particular social circumstances in which such a law may occur could create any number of prudential or instrumental reasons for obedience. Thus, even an abhorrent norm socially recognized as a law of a given legal system may still carry rational weight. Finnis captures this point by distinguishing four ways in which a given law could be normative:

(i) empirical liability to be subjected to sanction in the event of noncompliance; or (ii) legal obligation in the intra-systemic sense ('legal obligation in the legal sense') in which the practical premiss that conformity to law is socially necessary is a framework principle insulated from the rest of practical reasoning; or (iii) legal obligation in the moral sense (i.e. the moral obligation that presumptively is entailed by legal obligation in the intra-systemic or legal sense); or (iv) moral obligation deriving not from the legality of the stipulation-of-obligation but from some 'collateral source'⁵⁹

The great deviation from justice created by this law, however, undermines the ability of law to fulfill its role as a positive coordinating institution directed toward the common

duck is a skillful swimmer." Mark C. Murphy, "Natural Law Jurisprudence," 253. As Murphy explains, "[f]rom *necessarily, the duck is a skillful swimmer* we cannot deduce that *if X is not a skillful swimmer, then X is not a duck*; we can deduce that *if X is not a skillful swimmer, then X is not a duck or a defective duck*." Ibid.

⁵⁹ John Finnis, *Natural Law and Natural Rights*, 354.

good of those participating in the governed society – no matter how that moral standard is ultimately understood. In other words, a given law could provide a reason for action in senses (i), (ii), or (iv) above, but it is only in sense (iii) that the reason would be as a law in the fullest sense. Thus, weak natural law claims that a norm is a law in the fullest sense of that term only if it provides a reason for action simply because the norm is a valid law.

Fifth, while the weak version of natural law maintains that law has a “focal,” “central” or “fullest” sense and that an unjust law can be described as a law, without equivocating, only in a “corrupted,” “perverted,” or incomplete sense, that does not entail that the “central case” of law is intended as a mere ideal. Brian Bix, for example, has argued that different analyses of law undertaken for different purposes can result in different general theories of law, and concluded that Finnis’s interest in addressing law’s normativity produces an account of an evaluative ideal of law.⁶⁰ Timothy Endicott echoes Bix’s assessment when he states that, “[l]aw is a systematic form of social control that necessarily conforms to the ideal of the rule of law to some extent, and *it is more truly law* if it conforms more fully to that ideal.”⁶¹ For his part, Finnis, responding to Endicott in particular, finds it odd to describe the rule of law as an ideal: “just as it would be odd to use the phrase ‘moral ideal’ to describe the thought that we shouldn’t side with

⁶⁰ Brian Bix, “Conceptual Questions and Jurisprudence,” *Legal Theory* 1 (1995) 475-477.

⁶¹ Timothy Endicott, “The Reason of Law,” *The American Journal of Jurisprudence* 48 (2003) 105 (emphasis added).

the bully [on the schoolyard].”⁶² Rather, for Finnis, “the principles of the rule of law are . . . moral requirements, strong even though not unconditional, unqualifiable or infeasible.”⁶³ Following, Finnis, weak natural law – as a theory of law in its fullest sense – does not offer an account of the ideal of law (that is, what law aspires to be), but rather an account of what is required of law to conform to the demands of practical reason.

Lastly, weak natural law shows how an explanation of the normativity of law can be incorporated into a single, comprehensive general theory of law. Most, if not all, legal theorists agree that law can provide reasons for action. Many of those theorists, however, view the explanation of law’s normativity as a separate question from questions about law’s nature. That is, according to those theorists, general legal theory investigates only the descriptive nature of law, even if their theory states, as a matter of descriptive fact, that it is part of the nature of law to be normative.⁶⁴ Weak natural law, in contrast, not only states that law’s normativity as an essential aspect of any complete theory of law but also provides the theoretical framework to link the fact of law’s normativity to its sources in practical reason. By claiming that a given norm can be a law in the fullest sense only

⁶² John Finnis, “Law and What I Truly Should Decide,” *The American Journal of Jurisprudence* 48 (2003) 112.

⁶³ Ibid.

⁶⁴ Joseph Raz provides a notable example of this type of theory with his assertion that it is a part of the nature of law to claim authority over those subject to it, but it is a separate moral or political question whether a given law or legal system actually bears that authority. See Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994).

if it provides a practically reasonable standard of conduct, weak natural rejects the common presumption that describing the nature of law is the only real question for general theory of law and explanations of law's normativity are questions of moral or practical reason. According to weak natural law, a general theory of law is a practical, or moral, theory, at least in part. Part of being a law is being a norm that is morally right to follow.

1.5: Legal Positivism

With the theory of weak natural law in hand, I now turn the objections or “challenges” to that theory provided by legal positivism that will be my topic for the remainder of this dissertation. It is important to note at the outset of this discussion that there is no single challenge of legal positivism to weak natural law, rather there are three different objections derived from three popular usages of the term “legal positivism.” In this section, I distinguish the three distinct usages of “legal positivism” and briefly address or introduce the challenge to weak natural law presented by each.

The three distinct usages of “legal positivism” that purport to provide three distinct criticisms or “challenges” to weak natural law are (1) legal positivism as a theory about the nature of law, which I call “descriptive legal positivism”; (2) legal positivism as a theory about the proper method for legal theory, which I call “methodological legal positivism”; and (3) legal positivism as a theory about the proper adjudicative method for determining the content of the law in a particular legal system, which I call “adjudicative legal positivism.” The distinction between descriptive legal positivism and adjudicative legal positivism mirrors Jeremy Waldron's distinction between “descriptive positivism”

and “normative positivism,”⁶⁵ while the phrase “methodological legal positivism” comes from Stephen Perry.⁶⁶

Differing somewhat from Waldron’s and Perry’s formulations, those categories roughly maintain the following:

Descriptive legal positivism: the nature of law can be adequately characterized on the basis of social facts alone and does not contain any moral or evaluative content.

Methodological legal positivism: to properly theorize about the nature of law, the theorist need not make any moral or evaluative judgments.

Adjudicative legal positivism: whatever official is charged with authoritatively determining whether a particular norm is a law of a particular legal system should do so without making any moral or evaluative judgments.

These three positivist positions fit together at most only loosely. For example, one could be a descriptive legal positivist but deny adjudicative legal positivism by arguing that a particular, socially identified legal system should require that judges make evaluative judgments to identify the content of that system. Similarly, one’s method could conform to methodological legal positivism but reach a result that denies both descriptive legal

⁶⁵ Jeremy Waldron, “The Irrelevance of Moral Objectivity,” in Robert P. George ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992) 159-60. Waldron notes that this distinction cuts across the distinction between “positivism as a thesis in general jurisprudence – a thesis about law as such – and positivism as a thesis in particular jurisprudence – a thesis about some particular legal system (or a particular part of some legal system).” *Ibid.*, 160. As this dissertation is concerned with general jurisprudence, or legal theory, I employ these theses primarily for that purpose.

⁶⁶ Stephen R. Perry, “Hart’s Methodological Positivism,” in Jules Coleman ed., *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001) 311. Perry distinguishes “methodological positivism” from “substantive positivism,” or descriptive legal positivism in my terminology.

positivism and adjudicative legal positivism.⁶⁷ Lastly, and as I show below, one could be an adjudicative legal positivist without being either a descriptive or methodological legal positivist.⁶⁸

These three usages of legal positivism provide the basis for three different legal positivist “challenges” to natural law legal theory. In the remainder of this section I briefly explain why any putative “challenge of normative positivism” is irrelevant to debates about the nature of law and, as such, will be otherwise ignored in this dissertation. However, the other two “challenges” of legal positivism – the “challenge of descriptive positivism” and the “challenge of methodological positivism” – do present facially plausible objections to weak natural law that require substantial attention in what follows. For that reason, the following brief overview of those challenges also serves as an introduction to this dissertation’s two remaining chapters.

1.5.1: Adjudicative legal positivism

Popular press, and even sophisticated commentary, will often describe a jurist, or similar legal decision maker, as a “legal positivist” or as an adherent of “legal positivism.” Such labels, however, are not applied to indicate that the jurist believes that

⁶⁷ Doing so, however, would require a theory in which “moral facts” are a type of “natural facts.” Michael Moore endorses this position. Michael S. Moore, “Law as a Functional Kind,” in Robert P. George ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992) 188-242.

⁶⁸ This position would require the theorist to affirm that an accurate description of law must contain moral content and that the proper method for describing law requires some evaluative judgment but deny, for example, that judges should utilize moral judgment when determining the content of law. Despite the apparent oddity of such a position, I believe it is maintained by some contemporary defenders of natural law as a legal theory that nonetheless defend originalist or textualist theories of adjudication.

the nature of law can be adequately captured in purely descriptive terms or explained through purely descriptive methods. Rather, in those circumstances, “positivist” is used in contrast to terms such as “pragmatist,” “originalist,” “formalist,” “strict constructionist,” or “living constitutionalist” to loosely describe the jurist’s adjudicative method. This usage of “legal positivism” is applied to jurists who maintain that one should decide legal questions by adhering strictly to the plain language or directives of the validly enacted legal norms of the system without making any independent moral judgments regarding what the law of that system should be. In other words, determinations of the content of the law of a particular system should be a purely factual inquiry void of any moral, or evaluative, judgments.⁶⁹

This use of legal positivism, what I call “adjudicative legal positivism” above, is strictly a theory about how one charged with deciding questions involving the interpretation and application of law should make those decisions. It is not a theory about the nature of law or the relationship between law and morality in the abstract. Rather, it is a purely first-order normative theory about how judges should behave when executing (at least a large subset) of their judicial duties. However, by stating that judges should not interpret the law using any moral beliefs about what the law should be, could adjudicative legal positivism be derived from the truth of a particular theory about the nature of law? That is, must there not be a particular relationship between law and

⁶⁹ By evaluative, I mean a judgment regarding the moral value of a particular decision rather than a judgment about the purely legal merits of a case. A jurist must make evaluations in every case put before them. Adjudicative legal positivism is a theory the limits what factors a legal decision maker should take into account.

morality as a descriptive matter for adjudicative legal positivism to be the normatively correct theory of adjudication? The short answer to this question is absolutely not.

It is entirely possible for facts about the nature of law to influence the normative status of actions within the law. For example, one could imagine an argument that proceeds from a premise such as “law and morality are necessarily distinct,” or some other strong statement of descriptive legal positivism. Reaching the conclusion that, “therefore, one should not employ moral judgments to decide legal questions,” however, requires an additional premise, such as, “one should not decide legal questions according to something necessarily distinct from law.” But it is that additional, normative premise that drives the argument because any number of possible theories of adjudication are consistent with the descriptive fact, if it were so, that law and morality are necessarily distinct. There is no clear inference from descriptive legal positivism, or methodological legal positivism for that matter, to adjudicative legal positivism.

Moreover, just as there is no direct argument from those usages of legal positivism that claim to describe or explain the nature of law to adjudicative legal positivism, there is no argument from any of the forms of natural law discussed above to the rejection of adjudicative legal positivism. It is perfectly consistent with the claim that it is part of the nature of law to provide moral reasons for action that those who make legal decisions should not do so on the basis of moral judgments. For example, it could be the case that law’s moral purpose is only fulfilled if jurists abstain from moral judgments when adjudicating legal disputes. Under such circumstances, one should abide by the prescriptions of adjudicative legal positivism because doing so would further the purpose of law. This is likely not the case, but I posit it to demonstrate that there is

no single “natural law theory of adjudication” that follows from natural law as a general theory of law in the abstract. Rather, many theories of adjudication, including but certainly not limited to adjudicative legal positivism, are consistent with the theory of weak natural law as I have described it in this chapter.⁷⁰

This section is merely programmatic and suggestive of much deeper and more complicated debates about the relationship between the nature of law and normative theories of adjudication.⁷¹ It is meant only (1) to briefly elaborate on the claim that there are no entailment relationships between adjudicative legal positivism and either descriptive or methodological legal positivism, and (2) to demonstrate that, as described in this chapter, weak natural law is consistent with any number of normative theories of adjudication. The point of both these claims is that adjudicative legal positivism, as a normative theory of adjudication, is not concerned with and does not bear on debates about the nature of law. At the level of abstraction employed throughout this dissertation, there cannot be a “challenge of normative positivism.”

⁷⁰ As Murphy observes, “[t]here is nothing informative that I or anyone else can say about the prospects of a distinctively natural law theory of adjudication except that its prospects are those of a distinctively natural law theory of practical rationality.” Mark C. Murphy, “Natural Law Jurisprudence,” 252. Just as I leave open debates about the theory of practical rationality, I leave open what, if anything, could be considered a natural law theory of adjudication.

⁷¹ The most prominent example of drawing normative conclusions about judicial behavior from a general theory of law is found in the writings of Ronald Dworkin, and in particular his book *Law’s Empire* (Cambridge, MA: The Belknap Press of the Harvard University Press, 1986). Whether that synthesis finds any more than mixed success, however, does not detract from the individual merits of the two component theories: Dworkin’s general theory of law and his theory of adjudication. That is, without contradiction one could agree with Dworkin on adjudication but reject his general theory of law, or vice versa.

1.5.2: Descriptive Legal Positivism

In Chapter 2, I will examine the “challenge” that it is legal positivism, not weak natural law, that provides a descriptively adequate theory of law. To do so I focus on how to formulate two theses that that descriptive legal positivism asserts that natural law supposedly denies: “the separability thesis” and “the social thesis.” The separability thesis, often considered to be the hallmark of descriptive legal positivism’s challenge to any natural law legal theory, states that “there is no necessary connection between law and morality.” Were the separability thesis to be literally true, then it would conflict with weak natural law, which affirms a very central necessary connection between law and morality. I show throughout the chapter, however, that one cannot interpret the separability thesis in a manner that is both interesting and true. Rather, I show that the only way to interpret the separability thesis in a way that insulates it from obvious objections is to construe it as a claim about the conditions under which a given norm is identified as a law of a given legal system. But that claim is the same as the “social thesis,” rendering the separability thesis redundant and unnecessary.

From that discussion, I conclude that the social thesis, which states that whether a norm counts as a law of a particular legal system is fundamentally a matter of social fact, provides the only true and interesting claim of descriptive legal positivism. In other words, descriptive legal positivism does accurately describe one aspect of the nature of law with its theory of intra-systemic legal validity. The existence of socially recognized requirements for legal validity, however, is accepted by weak natural law. For that reason, descriptive legal positivism does not challenge weak natural law. Rather, I

demonstrate that descriptive legal positivism, as I present it in Chapter 2, is a necessary supplement to weak natural law.

1.5.3: Methodological Legal Positivism

In Chapter 3, I turn my focus to the “challenge” to weak natural law presented by methodological legal positivism. The debate over whether an acceptable and sufficiently comprehensive general theory of law can be developed through entirely descriptive methods, and without making any moral judgments, uncovers the key disagreement between natural law theory and legal positivism. This debate hinges on whether the ability of law qua law to provide reasons for action can be fully accounted for using only descriptive methods, as methodological legal positivism claims, or whether the normativity of law can only be explained through methods that require, at least in part, the application of practical reason. Stated that way, the challenge of methodological positivism, appears to be a rejection of a particular philosophical method. But, as I show, the challenge is actually substantive because the correct answer to the question about the proper method to use when creating a general theory of law will determine how, or even whether, a given theory of law can properly explain law’s normativity.

Chapter 3 addresses the “challenge of methodological positivism” by presenting two arguments for the conclusion, distinctive of weak natural law, that any attempt to articulate the nature of law, and in particular law’s unique role in practical reason, requires the theorist to utilize practical reason. Methodological legal positivism, as defined above, directly denies that conclusion, and the balance of the chapter presents and rejects several objections to the two arguments offered by defenders of methodological positivism. As I demonstrate, defenders of methodological legal

positivism are wrong in their claim that descriptive methods alone can explain law's inherent capacity to provide justifying reasons for action. Rather, only weak natural law can accurately describe and explain law's normativity, and for that reason the challenge of methodological positivism fails as well.

Chapter 2: The Challenge of Descriptive Positivism

In the first chapter I provided an extended elaboration of natural law as theory of the nature of law, but only introduced objections to it from the legal positivist tradition. In this chapter I shift my focus to an elaboration of the “challenges” to weak natural law derived from “descriptive legal positivism,” which I defined in Chapter 1 as the following claim about the nature of law:

Descriptive legal positivism: the nature of law can be adequately characterized on the basis of social facts alone and does not contain any moral or evaluative content.

Consistent with that definition, Coleman and Leiter state that, “[a]ll positivists share two central beliefs: first that what counts as law in any particular society is fundamentally a matter of social fact or convention (“*the social thesis*”); second, that there is no necessary connection between law and morality (“*the separability thesis*”),”⁷² both of which natural lawyers supposedly reject.⁷³ The thought is that by asserting a necessary connection between law and morality, natural law theories of law outright reject the separability

⁷² Jules L. Coleman & Brian Leiter, “Legal Positivism,” in Dennis Patterson ed. *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996) 241 (emphasis added). Although Coleman’s and Leiter’s characterization of legal positivism comes from an introductory treatment of the subject, and the authors admit that these theses are “broader than the ones offered by those who coined the terms,” these two theses provide a useful elaboration of the basic claim of descriptive positivism presented in Chapter 1. *Ibid.*

⁷³ At least according to Coleman and Leiter, who assert, “roughly, natural lawyers reject both the social thesis and the separability thesis.” *Ibid.*, 242.

thesis and are unable to acknowledge the fully social origins of legal validity captured by the social thesis.

In this chapter, I show that the weak natural law theory of the nature of law articulated in Chapter 1 runs afoul of neither the social thesis nor the separability thesis, as those theses are most plausibly stated. I begin by showing that Coleman and Leiter's "no necessary connection" formulation of the separability thesis is patently false, and demonstrate throughout the chapter that none of the major figures in positivists tradition, including Coleman, have ever actually defended it, at least not as literally construed.⁷⁴ Despite the rhetoric of denying any necessary connection, most discussions of the separation of law and morals among legal positivists concern the ability of substantive moral standards to be included among the factors that determine whether a given law is a valid law of a particular legal system.⁷⁵ These debates, however, concern the proper

⁷⁴ I discuss Coleman's more nuanced understanding of the separability thesis extensively below. At this point, it is fair to note Coleman's acknowledgement of the following:

The separability thesis can be characterized in other equally defensible ways. For example, it can be understood as the claim that even in those communities in which law and morality are coextensive, they are not cointensional. Alternatively, it might be understood as claiming that what makes a norm a matter of the community's law is distinguishable from what makes it a part of that community's morality.

Jules Coleman, "Rules and Social Facts," *Harvard Journal of Law and Public Policy* 14 (1991) 716.

⁷⁵ Following Hart, most legal positivists refer to the standard for legal validity of a particular legal system as the "rule of recognition" for that system. Understood as such, this statement actually invokes two intra-positivist debates: first, whether a substantive moral condition could be part of any legal system's rule of recognition; and, second, whether the rule of recognition is merely the standard for legal validity in a community or

interpretation of not the separability thesis, but rather the social thesis; that is, these debates concern what it means for legal validity to be a matter of social fact. As I show in sections 2.3 and 2.4 below, any defensible formulation of a general separability thesis states nothing beyond what is already captured by the social thesis, and that while the proper interpretation of the social thesis may be a topic of significant intra-positivist debate, neither side of that debate presents a theory that conflicts with the weak natural law theory I defended in Chapter 1. In short, there is no challenge of descriptive positivism.

2.1: The Absurdity of “No Necessary Connection”

As stated by Coleman and Leiter, the separability thesis – “there is no necessary connection between law and morality” – requires significant unpacking. To evaluate exhaustively the merits of a particular version of the “no necessary connection” formulation of the separability thesis, one could require clarification for almost every term.⁷⁶ Rather than examining all of the possible interpretations of each term of the

whether it also plays the further epistemic role of being the standard according to which the members of a particular community identify norms as valid laws of that community. Very roughly, “inclusive legal positivists” maintain that it is not necessary, but still possible, for a rule of recognition to contain moral standards and that the rule of recognition need only provide the criterion for legal validity. In contrast, and also very roughly, “exclusive legal positivists” maintain that it is impossible for a rule of recognition to contain a substantive moral standard because the rule of recognition must be the standard according to which at least some persons in the community identify valid laws. I return to the first (and more prominent) of these two debates in Section 2.4 below.

⁷⁶ Examples of the interpretative questions created by the statement that “there is no necessary connection between law and morality” are as follows. First, what is the appropriate sense of “necessary”: logical, conceptual, metaphysical, nomological? Second, what is meant by “connection”: a logical connection such as equivalence or entailment, the similarity of subject matter, the similarity of use, dependence of one on

thesis, I will focus instead on possible meanings of the term “connection,” and the precise nature of the relationship between law and morality that the separability thesis claims not to exist. Throughout my criticism of the separability thesis, I will show that any colloquial usage of “connection” renders the thesis at best false, and at worst absurd; whereas any plausible usage of the term transforms the thesis into a narrow and duplicative claim. In this section I first elaborate on the scope of what the claim that there is no necessary connection between law and morality denies and then argue that the term “connection” must mean some particular, positive connection between law and morality.

2.1.1: The Proper Scope of “No Necessary Connection”

Before examining possible meanings of the term “connection,” there are two ambiguities inherent in the phrase “no necessary connection” that need to be addressed. First, assuming that “necessary” means conceptual necessity, sometimes called broad logical necessity, the statement that “there is no necessary connection between law and morality,” could mean either of two claims. On the one hand, it could mean that even if some connections between law and morality are possible, there is no connection that obtains necessarily; that is, there exists at least one possible world in which law and

the other, determination of one by the other? Third, even limiting “law” to positive law, what falls under the caption of positive law: entire legal systems, narrow and particular legal rules, more general rules or principles, judge-made law, legislature-created law, executive-created law, treaties, the enactments of foreign governments? Fourth, and even more problematically, what is meant by “morality,” not only as a matter of first-order normative theory but also in terms of the associated metaphysical and epistemic theories as well? And these are only partial lists; additional and more detailed questions could be asked for each term.

morality are not connected. On the other hand, it could mean that the absence of connections between law and morality is a necessary truth, that is, in no possible world are there any connections between law and morality. Leslie Green captures these two interpretations with the following propositions:

- (EP) It is necessarily the case that there is no connection between law and morality.
- (IP) It is not necessarily the case that there is a connection between law and morality.⁷⁷

Even granting the imprecision of “connection,” (EP) cannot be defended. To claim that law and morality are not connected in any way in any possible world is simply false. Because law and morality bear several connections in the actual world, such as frequently overlapping contents, no possible worlds need investigation. The absurdity of (EP) suggests the separability thesis should be understood along the lines of (IP): there is at least one possible world in which law and morality are not connected.⁷⁸ That is, law and morality are not conceptually connected.

⁷⁷ Leslie Green, “Legal Positivism,” Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/legal-positivism/> (posted January 3, 2003). Green uses the labels (EP) and (IP) to refer to exclusive legal positivism and inclusive legal positivism respectively. Although I will return to the difference between exclusive and inclusive legal positivism below, that distinction is not relevant at this point as Green admits that neither of these claims accurately represent its eponymous theories. For example, he states, “in reality, however, legal positivism is not to be identified with either thesis and each of them is false.” Ibid.

⁷⁸ The difference between (EP) and (IP) reflects the difference between what Coleman calls “positive positivism” and “negative positivism.” Jules L. Coleman, “Negative and Positive Positivism,” *Journal of Legal Studies* XI (1982) 139-164. I will discuss that paper in greater detail below, but in it Coleman formulates the separability thesis as a modal claim denying the necessity of moral standards for legal validity. To the extent that the separability thesis captures a distinguishing feature of legal positivism,

A second ambiguity, however, brings into question the suitability of (IP) for stating the separability thesis. In particular, it is unclear whether “no necessary connection” means that there exists a possible world in which there is no connection at all between law and morality or whether it means that there is no single connection that obtains in every possible world. To clarify, (IP) could be restated as the follows:

(IP*) There is no single necessary connection between law and morality.

The only difference between (IP) and (IP*) is that (IP*) makes explicit the denial of a particular, albeit unspecified, “connection” existing in every possible world. One would think that there are “connections” between law and morality that exist in every possible world, such as law and morality both relate to the direction of conduct. (IP*) allows for this, by emphasizing that descriptive legal positivism is interested in denying some

it only entails “negative positivism,” the claim that law and morality are not necessarily connected but could be in some possible world. According to Coleman, the separability thesis does not entail the stronger theory of “positive positivism,” which denies the possibility of including moral standards within the law of a particular community. *Ibid.*, 143-148.

In a later paper, Coleman states a clear preference for (IP) over (EP) by claiming that “[t]he separability thesis is not the claim that law and morality are necessarily separated; rather, it is the claim that they are not necessarily connected.” Jules Coleman, “Authority and Reason,” in Robert P. George ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996) 291. Coleman admits that understood this way, “the separability thesis makes a very weak claim,” and “that if positivism is to be an interesting thesis, it must accept, but go beyond the separability thesis.” *Ibid.*, 316 n. 5. Coleman allows, however, that his “negative positivism” understanding of the separability thesis “is not the only available interpretation of it,” and that “[s]ome might take the separability thesis to mean that law and morality are distinct in that no moral principles can count as part of a community’s law.” *Ibid.*, 315 n.5. That formulation of the separability thesis is not as strong as (EP), but is much stronger than both “negative positivism” and (IP). Thus, my objections to (IP) in this chapter apply equally to more exclusive versions of legal positivism.

particular connection between law and morality. Assuming that the purpose of a general theory about the nature of law is to identify those properties central to a better understanding the social phenomenon of law, (IP*) appears to more accurately capture what Coleman and Leiter mean by “a necessary connection” between law and morality because it focuses on the identification of particular property or properties that do not provide a conceptual link between law and morality. Thus, the best interpretation of the separability thesis understands “no necessary connection” to mean that there is no unique connection or connections between law and morality that obtain in every possible world. What remains is to determine what those particular connections are if the separability thesis is to be true.

2.1.2: The Proper Meaning of “Connection”

If (IP*) accurately represents the most defensible version of the separability thesis, however, then the logic of the thesis (understood broadly to include both its form and the meaning of the two operative terms) renders it trivially false. That is, there will always be one logically derivable necessary connection between law and morality. Even if no further connection were available, the two concepts would always share, or be connected by, the fact that neither is necessarily “connected” to the other. This point suggests that the term “connection,” as used in the separability thesis, cannot have unlimited scope.

For example, the claim that there are no necessary connections between law and morality is false because the concepts of law and morality themselves allow for the derivation of other broadly logically necessary truths, which go beyond a bare minimum necessary connection. To demonstrate this point, Raz offers two examples of necessary

truths that are derived wholly from the concepts law and morality: first, “[g]iven that only living animals can have sex, necessarily rape cannot be committed by the law nor by legal institutions (though they and the law can sanction it, and legal institutions can be accomplices to it),”⁷⁹ and, second, “[g]iven value pluralism, necessarily no state or legal system can manifest to their highest degree all the virtues or all the vices there are.”⁸⁰ Both of these statements are necessary truths particular to law and morality, and either of these statements, if true, suffices to show that there are necessary connections between law and morality. Nevertheless, an advocate of the separability thesis need not reject it out of hand because the type of connections Raz identifies (and there are undoubtedly countless more) turn on interpretations of “necessary” and “connection” that fail to represent the claim they seek to support. Raz’s two necessary truths are both negative implications of the type of concepts law and morality happen to be. The statements are necessarily true because they are both denials of category mistakes; that is, they are attempted predications of properties to a concept that cannot be the bearer of those properties. Rather, the separability thesis purports to show the absence of a positive connection between law and morality: negative implications aside, there are no positive necessary connections between law and morality.

⁷⁹ Joseph Raz, “About Morality and the Nature of Law,” *The American Journal of Jurisprudence* 48 (2003) 3.

⁸⁰ Ibid. Raz defines value pluralism in a footnote as “the existence of a plurality of values which cannot be instantiated in the life of any single human being, and relying on the fact that the realization of various incompatible values and virtues requires supportive societal conditions.” Ibid., 3 n.8.

Limiting the separability thesis to the denial of only positive necessary connections, however, does not eliminate the problem that there are necessary connections between law and morality simply because of the types of concepts law and morality happen to be. In an attempt to defend the “no necessary connection” thesis, Matthew Kramer states that arguments such as these arguments by Raz lead:

to the conclusion that there are many necessary connections between law and morality and the number 31, on the ground that every proposition of morality is like the number 31 in being an abstract object and thus in being possessed of all the properties of any abstract object. Much the same can be said about the necessary connections between law and morality and the number 32. And so on.⁸¹

In this passage, Kramer demonstrates that it is not sufficient to merely reject Raz’s argument on the ground that the relevant sense of connection is a positive connection rather than a negative connection. Instead, to escape absurdity, the relevant sense of connection must be an even more narrowly specified, particular type of positive connection.⁸² What that positive connection is will in turn determine whether a

⁸¹ Matthew H. Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004) 224. In this passage, Kramer is responding specifically to an argument offered by John Gardner that is relevantly similar to Raz’s arguments discussed above. I present Gardner’s argument below in footnote 83.

⁸² Kramer’s affirmative defense of the separability thesis is not that the thesis is true. Rather, Kramer believes the separability thesis provides a useful slogan for the legal positivist tradition. Kramer states the following:

Though the language of “no necessary connections” is unquestionably rough as a means of summarizing the upshot of an insistence on the separability of law and morality, its vividness largely offsets its brashness. Hence, the “no necessary connections” formulation is acceptable as a slogan that can catchily synopsise some major lines of reasoning developed by legal positivists. Like any slogan, it has to be construed

defensible articulation of the separability thesis states something that weak natural law denies.

2.2: The Necessary Normativity of Law

Before enquiring further into what is the most plausible positive connection for the separability thesis to deny, it is helpful to look at one more example of what that positive connection cannot be in order to best appreciate how narrowly the facially unlimited separability thesis must be construed to be true. For example, it appears that at

with a modicum of generosity – rather than in an unresponsively caviling fashion – if its purpose is to be realized.

Ibid., 230. Leiter echoes Kramer’s “slogan defense” by stating that “one would have supposed it obvious that the slogan was a shorthand for at least two different theses that are distinctive of legal positivism” Brian Leiter, “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” 28 n.40. Those theses are that “morality is not necessarily a criterion of legal validity,” and that there is “a separation of what law as it is and law as it ought to be.” Ibid. (quoting Hart, “Positivism and the Separation of Law and Morals”). Interestingly, Leiter had rejected the phrase “no necessary connection” in an earlier paper as “too narrow to do justice to the full panoply of positivist doctrines.” Brian Leiter, “Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis” in Jules Coleman ed., *Hart’s Postscript: Essays on the Postscript to the Concept of Law*, 356 n. 6. In that paper, Leiter replaces the separability thesis with “the Separation Thesis (what the law *is* and what the law *ought* to be are separate questions).” Ibid., 356.

Without examining Kramer’s or Leiter’s reasons for defending the use of the “no necessary connection” formulation in detail, it is worth noting that by granting that the “no necessary connection” formulation is on its face absurd but still defending it as a convenient slogan, Kramer and Leiter change the debate about the separability thesis from factual to normative. That is, where truth is the primary epistemic goal and precision and clarity are the hallmarks of good philosophy, what justifies the continued assertion of a false, imprecise, and unclear slogan, especially where the particular theses it supposedly represents can be stated just as plainly and with greater precision and accuracy. As I show in this chapter, there may be true and interesting claims from the legal positivist tradition, but the separability thesis, to the extent it denies any necessary connection between law and morality, is not one of them.

a minimum, law and morality, as a matter of their respective natures, both aim to be action-directive, or normative. Therefore, normativity is a property shared by both law and morality and comprises a positive connection between the two. Put another way, law and morality both seek to guide human action, and this normativity is a necessary or essential property shared by both that in turn provides a positive, necessary connection between law and morality and further demonstrates that the most broadly construed reading of the separability thesis is false.⁸³ Despite the ease with which that argument can be stated, there are at least two objections to the claim that the fact that law and morality are both normative establishes a necessary, positive connection between the two. I will address each of those objections in the remainder of this section and, in doing so, will introduce the claim that there is a particular necessary connection between legal normativity and moral normativity, which I explore more fully in Chapter 3.

2.2.1: Legal Externalism

The first objection to the argument that law and morality are necessarily connected because they are both normative is inspired by those who deny a necessary or conceptual connection between, for example, moral beliefs or judgments and either motives or reasons for actions. The objection, in short, would be that, contrary to established linguistic usage, there is no conceptual connection between legal facts and

⁸³ John Gardner also makes this argument when he states that: “there is a necessary connection between law and morality if law and morality are necessarily alike in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms.” John Gardner, “Legal Positivism: 5 ½ Myths,” *The American Journal of Jurisprudence* 46 (2003) 203.

motives or reasons for action. To fully appreciate how that objection would work, however, requires a brief look at the view about moral judgments that inspires it.

Theorists who deny a conceptual connection between morality and action, sometimes referred to as “moral externalists,” come in two general varieties: they can be either “motive externalists” or “reason externalists.” “Motive externalists” deny that subject *S*’s belief of the proposition “action *A* is morally better than action *B*,” alone provides *S* with a motive to *A* rather than *B*. In addition to believing that proposition, the motive externalist asserts that to have a motive to *A* rather than *B*, one must have a corresponding desire to perform the morally preferable act. In contrast, “reason externalists” deny that subject *S*’s belief of the proposition “action *A* is morally better than action *B*,” alone provides *S* with a justifying reason to *A* rather than *B*. For the reason externalist the moral fact that *A* is preferable to *B*, does not, by itself, provide *S* a reason to *A* rather than *B* without the appropriate corresponding desire. Whichever form an externalist theory takes, the central intuition driving moral externalism is the denial of a necessary connection between moral facts and the guidance of human action. Thus, moral externalism appears to present an objection to the claim that law and morality are both necessarily action-directive by denying that morality bears that property.

Moreover, it appears that that objection could be pressed even further because a moral externalist presumably offers the same account for the legal proposition, “action *A* is legal while action *B* is not,” as he or she offers for the moral proposition, “action *A* is morally better than action *B*.” Roughly stated, neither of those statements, by themselves, would necessarily affect an agent’s motives or reasons for conduct. That is, for the externalist neither morality nor law is necessarily action-directive because legal

facts and moral facts are, by themselves, as normatively inert as facts of the natural or physical sciences. That either law or morality successfully directs conduct by providing either motives or reasons for action is at best only a contingent truth (contingent on whether an individual possesses an additional desire to conform her conduct to either moral or legal facts), and as such the putative necessary connection between law and morality based on the claim that both are necessarily normative does not exist.

Despite this apparent implication, externalism by itself does not provide an objection to the claim that law and morality possess a necessary, positive connection resulting from their shared relationship to human action. Externalists regarding putatively normative facts typically find a special place for moral, and presumably legal, beliefs. According to many externalists, a person that possesses a particular moral belief without the corresponding motive- or reason-giving desires is deficient in some way, such as failing to satisfy actual human needs or failing to maximize “objectified” subjective preferences.⁸⁴ For that reason, even though externalists generally believe that moral statements are descriptive in the same way as empirical statements, moral statements still have a unique logical content: they are facts that evaluate the status of human actions and character.⁸⁵ Similarly, whether an act is legal or illegal would also be

⁸⁴ See, e.g., Richard N. Boyd, “How to be a Moral Realist,” in Geoffrey Sayer-McCord ed., *Essays on Moral Realism* (Ithica, NY: Cornell University Press, 1988) 203-206, and Peter Railton, “Moral Realism,” in Stephen Darwall, Allan Gibbard, & Peter Railton ed., *Moral Discourse and Practice: Some Philosophical Approaches* (Oxford: Oxford University Press, 1997) 141-147.

⁸⁵ In the examples of externalist theories provided above, the evaluations in question are evaluations of the relative success of given actions in reference to the proffered standard for success. For example, it could be a matter of pure fact that a given act does

a fact that evaluates the status of that act. On this view, a conceptual connection would exist between law and morality in that both legal statements and moral statements designate facts that both report the status of human actions with regard to certain evaluative standards and, for that reason, are relevant to decisions about human conduct. Law and morality are both positively connected as normative guides for conduct, even if they are not connected through necessarily motivating or providing reason for action.

Simply put, one cannot deny the existence of a necessary connection between the action-directive nature of law and the action-directive nature of morality by advocating both “legal externalism” and “moral externalism” because whatever action-directive nature law and morality have under such theories, each would presumably have it in the same way. Rather, to deny a positive connection between law and morality based on their shared normative roles, and to provide a real defense of the separability thesis, one must distinguish between the action-directive aspects of law and morality in such a manner that the action-directiveness law and morality individually possess is not shared by both. Assuming that any position that recognizes moral externalism but not legal externalism is a non-starter, the distinction required to sustain this objection will allow for moral beliefs to be necessarily action-directive while explaining that legal beliefs, despite appearances to the contrary, are not. That is, one would have to provide a way to deny moral externalism but defend legal externalism.

or does not maximize objectified preferences, but is in accordance with this standard that actions are judged to be morally better or worse.

Aspects of Joseph Raz's general theory of law provide inspiration for the required distinction.⁸⁶ According to Raz, one essential characteristic of law, and the legal systems that instantiate it, is a claim to practical authority; that is, it is part of the nature of law to claim to provide an independent reason for action regardless of any other moral or prudential reasons in favor of the action.⁸⁷ Importantly, Raz emphasizes that this is only a claim to authority, and not that any law, merely to the extent that it is a valid law of a legal system, actually is a practical authority. Rather, the assertion that it is only essential that law claims an action-directive role is consistent with law remaining a purely factual social phenomenon. In other words, a given norm being a law is just a pure fact that by itself bears no weight on the practical deliberation of those subject to that law. When combined with another assertion inspired by Raz, that law qua law does not (as a matter of fact) provide reasons for action,⁸⁸ one arrives at a theory of law that appears to account

⁸⁶ As shown above, Raz is among those within the legal positivist tradition that reject the "no necessary connection" thesis, and I do not attribute this particular argument to Raz.

⁸⁷ See Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), Chapter 9.

⁸⁸ Raz defends the similar, but seemingly weaker, claim that there does not exist a general obligation to obey the law. Joseph Raz, *The Authority of the Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979) 233-249. For further defense of the claim that there is no general moral duty to obey the law, see M.E.B Smith, "Is There a Prima Facie Duty to Obey the Law?" *Yale Law Journal*, 82 (1973) 950-976 and Joel Feinberg, "Civil Disobedience in the Modern World," in Joel Feinberg and Hyman Gross, ed., *Philosophy of Law*, Fifth Edition (Belmont, CA: Wadsworth Publishing Co., 1995) 121-133.

I believe, however, that is a distinction without a difference as any putative obligation to obey the law would give rise only to a prima facie, as opposed to categorical, duty to obey the law. Most analyses of prima facie duties are derived from

for intuitions about the action-directive nature of law but still explains how any “oughtness” law may possess does not result qua law, but rather from independent, and truly practical, sources, such as moral or prudential judgments. This Raz-inspired theory would provide the basis for denying that law and morality are conceptually connected by both being normative, and would provide some basis for a broader understanding of the term “connection” in the separability thesis.

According to this objection, law remains on the fact side of any fact/value distinction, while morality is on the value side. For example, Coleman makes a version of this objection when he states that “[p]ut bluntly, law has no normative force. Law is instrumentally valuable only, and its authority depends on its being a conventionally accepted way of bringing about desirable social consequences.”⁸⁹ Coleman’s motivation for this objection comes from the claim that it is “impossible to derive ‘ought’ from ‘is.’”⁹⁰ In other words, the mere fact that a given norm is a valid law of a community’s legal system could not, by itself, provide a reason for action. Rather, there must be some

W.D. Ross’s seminal account of the same, and I agree with Robert Audi that with regard to Ross’s theory of prima facie duties, “[o]ne could indeed talk of such reasons rather than [prima facie] duties, and – since it is obvious that there are inconclusive reasons – the terminology has the advantage of creating no presumption, or a weaker presumption, that one ought on balance to do the thing in question.” Robert Audi, *The Good in the Right: A Theory of Intuition and Intrinsic Value* (Princeton, NJ: Princeton University Press, 2004) 24. Under this interpretation, there is no difference between denying that law qua law “obligates” action and claiming that law qua law provides a reason for action, but only because an obligation under this usage is an admittedly weak one.

⁸⁹ Jules Coleman, “On the Relationship Between Law and Morality,” *Ratio Juris*, 2 (1989) 72.

⁹⁰ *Ibid.*, 67. As I show in Chapter 3, the natural law tradition, at least under Finnis’s interpretation, agrees with this statement.

overtly practical source, such as a desired goal that conformance to the law would help achieve, to create a reason to obey the law.

This objection, which effectively asserts legal externalism while leaving room for the denial of moral externalism, appears to provide what a defender of the separability thesis desires: an explanation of how law appears to be normative that sustains the denial of a necessary connection between the normativity of law and morality. As such, this objection, if true, would revitalize a broader understanding of the type of connection denied by the separability thesis, but at the cost of significantly departing from prevailing intuitions about the nature of law. At its core, this objection presents a conflict of intuitions about the nature of law that may not be capable of rational resolution absent a convincing explanation of how law becomes normative, which I attempt to do in Chapter 3, or a convincing explanation of why the widely held belief that law directs conduct is mistaken.

Pending that discussion, however, I note that no influential writer currently advocates a complete denial of law's normativity, and this includes Coleman, who abandons this position in later writings. Moreover, even if this account of law's normativity is correct, and this particular necessary positive connection between law and morality does not exist, that does not insulate the separability thesis from the other objections in this chapter.

2.2.2: The Source of Law's Normativity

The second objection accepts that law and morality are both action-directive but returns to the question of the proper interpretation of the term "connection." More precisely, this objection questions whether merely sharing a property, even an essential

property, accurately captures the proper idea of connection. Along these lines, defenders of the separability thesis may assert that “connection” connotes something more, such as the presence of one property entails, requires, determines, depends, grounds, constitutes, or supervenes upon the presence of the other; that is, the existence of a connection requires something more than the brute, albeit necessary, fact that law and morality both instantiate a given property. This objection requires that for the necessary connection between law and morality to be troublesome to an advocate of the separability thesis, there must be a story explaining the why or the how of law’s normativity by appeal to the normativity of morality.

After abandoning “legal externalism” and accepting that law can be normative, Coleman now advances this objection. Consider, for example, how Coleman describes the relationship between the separability thesis and, what I called above, the social thesis:

My claim has always been that the additional tenet of positivism is the rule of recognition: that wherever there is law, there exists a social practice among officials that sets our criteria of legality. The interesting question is whether, and in what ways, the separability thesis might impose a constraint on the rule of recognition. Again my view is that it does impose a constraint on the rule of recognition but, unlike Dworkin and other positivists, I do not believe it is a constraint on the content of the rule of recognition. *Rather it is a constraint on the kind of normative practice the rule of recognition must be: a constraint on the source of its normativity.* Its authority must derive from its being a normative social practice of a certain kind, not from its truth or its reflecting some conception of the right standards of legality.⁹¹

I evaluate Coleman’s arguments for the source of law’s unique normativity in Chapter 3, but it suffices at this point to note that rather than provide an objection to my argument,

⁹¹ Jules Coleman, “Authority and Reason,” 316 n.5 (emphasis added).

this quote actually demonstrates one of this chapter's central claims: the separability thesis does not state a general, true claim about the nature of law.

Coleman describes the relationship between the separability thesis, which earlier in the same paper he gives the “no necessary connection” formulation, and the rule of recognition, which earlier in the paper he defines relevantly similar to the social thesis,⁹² as one of constraint: the separability thesis places a substantive constraint on the rule of recognition, and, consequently, the content of the social thesis. One would assume, however, that if the social thesis, considered in this instance as a theory about the nature of law's normativity, makes a paradigmatic claim of legal positivism, then it would do so without further qualification, which is precisely what Coleman's theory of normativity purports to do.⁹³ For this reason, the particular separation between the law and morality in question, the sources of their respective normativity, can be found in how Coleman articulates the social thesis. As such, the general separability thesis, the denial of any necessary connection between law and morality, is an unmotivated add-on. Thus, to the extent that the operative “connection” is reduced to the denial of a particular relationship between law and morality that is already accounted for by the social thesis, the separability thesis adds nothing substantive to descriptive legal positivism.

Even assuming for the sake of argument that law and morals have different sources of normativity, that alone would not support the claim that there is no necessary connection between law and morality. As shown above, there are still a myriad of

⁹² Ibid., 287.

⁹³ Ibid., 308-314.

necessary connections between the two, and those connections present an advocate of the separability thesis with the following dilemma: either defend the “no necessary connection” formulation as literally true, in which case the thesis is demonstrably false, or foreshorten the relevant necessary connections, in which case the thesis runs the risk of redundantly restating something already accounted for by the social thesis. As I show below, various legal positivists impale themselves on both horns of this dilemma in their attempts to defend the general separability thesis.

2.3: The Separability Thesis and Legal Validity

Up to this point I have ignored one obvious necessary connection between law and morality: the fact that both individual laws and entire legal systems, because they purport to direct human action, are necessarily capable of moral evaluation.⁹⁴ In other words, one can meaningfully ask not only what a community’s law is but also what it ought to be. In this section, I show how the need to distinguish between these two questions forms the historical impetus for the separability thesis, which was to demarcate the difference between the moral evaluation of a community’s laws from the intra-

⁹⁴ One may be tempted to argue that this relationship is reflexive in that morals, as directive of human conduct, are necessarily subject to legal evaluation. This would be misguided.

Norms of morality are necessarily capable of legal instantiation. For example, as a purely factual matter, the moral norm against intentional killing is almost always, if not always, included, in some form, among those norms that are also valid laws for the community. It would be nonsense, however, to evaluate the abstract moral prohibition itself as legal or not. Rather, it is the actions by individuals that either do or do not conform to that moral norm that are also either legal or illegal. Similarly, the reason that laws and legal systems can be moral or immoral is that they too are the products of human action, the particular action being the acceptance of those norms as valid laws of the community by the officials entrusted with the authority to do so.

systemic standards for legal validity in that community. In doing so, I show that any true formulation of the separability thesis is a redundant add-on to the social thesis, which states that legal validity is a socially determined fact.

This section makes a very close examination of the origins of both the separability and social theses as articulations of the central commitments of legal positivism in the work of Hart and Coleman. Beginning with Hart, this section demonstrates the very narrow manner in which the phrase “no necessary connections” is introduced, and then demonstrates that Hart’s concern in denying a connection between law and morality was merely to deny that there must be a moral standard for determining legal validity. During this discussion, I show that Hart was very cognizant of the ways in which law and morality are connected both factually and conceptually. This section, then turns to Coleman, and demonstrates that while Coleman appears to advocate a very broad interpretation of the separability thesis, his actual statements on the matter also reflect a narrowing of the scope of the separability thesis to legal validity. In doing, Coleman joins Hart in collapsing the separability thesis into the social thesis, which in turn states the core claim of the positivist tradition. The purpose of this section, thus, is to demonstrate that the separability thesis, properly construed, does not state a claim that weak natural law denies and does not provide an objection to weak natural law.

2.3.1: H.L.A. Hart

The association of the separability thesis with legal positivism likely begins with Hart. In “Positivism and the Separation of Law and Morals,” Hart addresses the claim

that “what *is* and what *ought* to be are somehow indissolubly fused or inseparable.”⁹⁵ Against this claim, Hart defends what he understood to be the position of Bentham and Austin, both of whom “insisted on the distinction between law as it is and as it ought to be,” as applied to “*particular* laws, the meanings of which were clear and so not in dispute, and they [also] were concerned to argue that such laws, even if morally outrageous, were still laws.”⁹⁶ In an attempt to explicate these commitments, Hart recasts them as, “the contention that *there is no necessary connection between law and morals* or law as it is and ought to be.”⁹⁷

The two sides of this disjunction, however, are logically independent. More specifically, there are no logical connections, either entailment or equivalence, between the true claim that there is a difference between what a given law is and what a given law ought to be and the existence of a necessary connection between law and morality. To recognize the difference between what law is and what law ought to be is only to accept the traditional difference between descriptive jurisprudence and normative jurisprudence. Descriptive jurisprudence ranges from a factual inquiry into the general nature of law to factual questions about the law of a particular legal system.⁹⁸ In contrast, normative jurisprudence asks purely prescriptive or normative questions about what the law – most

⁹⁵ H.L.A. Hart, “Positivism and the Separation of Law and Morals,” in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49-50.

⁹⁶ *Ibid.*, 56.

⁹⁷ *Ibid.*, 57 n. 25 (emphasis added).

⁹⁸ This range cuts across the difference between general and particular or special jurisprudence discussed in Chapter 1 above.

typically a particular law of a particular legal system – should be (for example, which laws should be enacted by the legislature, how the law should be interpreted by the judiciary, or how the law should be enforced by the executive). The “no necessary connection” thesis, as an example of what I called descriptive legal positivism in Chapter 1, is a claim in general, descriptive jurisprudence. The thesis, so construed, makes no normative claims whatsoever, but merely attempts to describe, in non-normative terms, the nature of law.

Recognizing the difference between descriptive and normative jurisprudence is not unique to legal positivism. Even weak natural law, which states that adequately describing the nature of law requires the use of practical reason, distinguishes between normative and descriptive jurisprudence by recognizing that a given law can be a law of a given system whether or not that law meets the moral requirements necessary for being a law in the fullest sense.⁹⁹ Thus, there can be a radical difference between what the law is

⁹⁹ One could object, however, that because weak natural law identifies the proper descriptive theory of law through the application of a substantive moral standard, weak natural law collapses the distinction between what law is and what it ought to be. This objection is misguided. Weak natural law still distinguishes, for example, between the descriptive fact that an intrinsically unjust law is a valid law of a particular legal system and the normative fact that the law ought not to be a law of any legal system.

Even Finnis, against whom many have made this objection, acknowledges the difference between theorizing about what the law is and what the law ought to be. For example, Finnis characterizes the debate between Dworkin on the one side and Hart and Raz on the other with the following:

So Dworkin’s is, fundamentally (though with many illuminative moments of description), a normative theory of law, offering guidance to the judge as to his judicial duty; [Hart’s and Raz’s] is a descriptive theory, offered to historians to enable a discriminating history of legal systems to be written. The fact that, as I have argued in this chapter, the descriptive theorist

and what the law ought to be and there still be necessary connections between law and morality.

Hart unquestionably understood this, as in the same paper he posits two necessary connections between law and morality. One of these connections falls under the type of conceptual necessity that has been discussed up to this point, as Hart claims “there is, in the very notion of laws consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.”¹⁰⁰ The moral value of the law to which Hart alludes is the impartiality implicit in legal rules, or “treating like cases alike,” which is “*one* essential element of the concept of justice.”¹⁰¹ Hart describes the other necessary connection as an instance of

needs the assistance of general normative theory in developing sufficiently differentiated concepts and reasonable standards of relevance *does not eliminate* the different uses to which the more or less common stock of theoretical concepts will be put by the normative and descriptive (historical) theorists, respectively.

John Finnis, *Natural Law and Natural Rights*, 21 (emphasis added).

¹⁰⁰ H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 81.

¹⁰¹ Ibid. Interestingly, Hart points out that, “This is justice in the administration of the law, not justice of the law.” Ibid. This assertion appears to point out the ability of necessary connections between law and morality to coincide with a strict bifurcation of law as it is and law as it ought to be.

In later writings Hart expresses misgivings about this necessary connection between law and morality. He states, for example, the following:

[A]n argument similar to mine against Fuller might be used to show that my claim made in [“Positivism and the Separation of Law and Morals”] and repeated in my *Concept of Law* that a minimal form of justice is inherent in the very notion of a general legal rule applied according to its

“‘natural’ necessity.”¹⁰² Natural because the actual facts of human life, such as physical needs, make, “rules forbidding the free use of violence and rules constituting the minimum form of property . . . so fundamental that if a legal system did not have them there would be no point in having any other rules at all.”¹⁰³ Although there would be no need for a moral or legal prohibition against homicide among immortals, natural human frailty dictates both prohibitions, connecting the content of law and morality as a matter of natural necessity.¹⁰⁴

In *The Concept of Law*, Hart revisits the connection between the contents of law and morality as a matter of natural necessity with his discussion of the “minimum content of natural law.”¹⁰⁵ Hart aims to demonstrate that there are “universally recognized

tenor to all its instances is similarly mistaken. I am not sure that it is so, but I am clear that my claim requires considerable modification.

H.L.A. Hart, “Introduction,” 18. For Hart’s treatment of this topic in *The Concept of Law*, see footnote 105 and accompanying text below.

¹⁰² H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 80.

¹⁰³ Ibid.

¹⁰⁴ H.L.A. Hart’s example is more imaginative: “suppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace, and could extract the food they needed from the air by some internal chemical process.” Ibid.

¹⁰⁵ Hart, *The Concept of Law*, 193-200. In *The Concept of Law*, Hart also reiterates the connection between the nature of law as rules and justice he mentions in his earlier work. Referring to an unattributed criticism by Lon Fuller of his earlier paper, Hart states that, “[i]f social control [through general rules or standards of conduct] is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be.” To this Hart adds that “if this is what the necessary connection between law

principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, [that] may be considered the minimum content of Natural Law.”¹⁰⁶ Hart clarifies, however, that he is concerned only with the overlap between law and morality explainable through an appeal to reasons for actions, not any overlap for which there is a causal (most likely a historical or social scientific) explanation.¹⁰⁷ Hart states that the “general form of the argument is simply that without such a content law and morals could not forward the minimum purpose of survival which men have in associating with one another”; that is “the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content.”¹⁰⁸ As Hart makes clear, however, the minimum content of natural law does not apply in all

and morality means, we may accept it. It is unfortunately compatible with very great iniquity.” *Ibid.*, 207.

For the criticism to which Hart is responding, see Lon L. Fuller, “Positivism and Fidelity to Law – a Response to Professor Hart,” *Harvard Law Review*, 71 (1958) 630-672. For a less generous response by Hart to Fuller’s criticism, see his later paper, “Lon L. Fuller: *The Morality of the Law*,” in *Essays in Jurisprudence and Philosophy*, 343-364.

¹⁰⁶ *Ibid.*, 193. Hart discusses the following “simple truisms” that explain the minimum content of natural law: “Human vulnerability” (pp. 194-95), “Approximate equality” (p. 195), “Limited altruism” (p. 196), “Limited resources” (pp. 196-97), and “Limited understanding and strength of will” (pp. 197-98).

¹⁰⁷ As an example of the type of causal explanation that he is not concerned with, Hart postulates that “the still young sciences of psychology and sociology may discover . . . that, unless certain physical, psychological, or economic conditions are satisfied . . . no system of laws or code of morals can be established, or that only those laws can function successfully conform to a certain type.” *Ibid.*, 193-94.

¹⁰⁸ *Ibid.*, 193.

communities to all persons equally.¹⁰⁹ Although practical reason may dictate that every legal system necessarily contain some set of shared prohibitions, Hart notes that the exact content of those prohibitions remains a matter of social convention. Thus, even accepting the minimum content of natural law, Hart maintains that what particular laws are valid in a legal system is a matter of social convention.

After his discussion of the minimum content of natural law, Hart outlines several other putative necessary connections between law and morality that “few legal theorists classed as positivist would have been concerned to deny.”¹¹⁰ What Hart does not include is a necessary connection between morality and the standards according to which a particular law becomes a law of a particular legal system.

Rather, for Hart the true concern of his predecessors in the legal positivist tradition, as well as the true separation of law and morality, is that criteria for intra-systemic legal validity need not contain substantive moral standards.¹¹¹ He states that even if a society’s laws were shaped by moral ideals, “it does not follow . . . that the

¹⁰⁹ Hart points out that his minimum content of natural law is not only few in proscriptions but also consistent with the presence of substantial inequalities within a given legal system. For example, Hart observes that “[t]he protections and benefits provided by the system of mutual forebearances which underlies both law and morals may, in different societies, be extended to very different ranges of persons.” *Ibid.*, 200.

¹¹⁰ *Ibid.*, 207. These include the shared normativity of law and morality, the ability to evaluate morally a society’s laws, and the connection between the generality of legal rules and justice discussed above, as well as morality’s influence on the law of a community and the role of moral judgments in judicial interpretation. *Ibid.*, 202-207. For an example of Hart’s changing thought on these matters in his later writings, see footnote 101 above.

¹¹¹ *Ibid.*, 207.

criteria of legal validity of particular laws used in a legal system must include, tacitly, if not explicitly, a reference to morality or justice.”¹¹² Hart asserts that “we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they often do so.”¹¹³ Thus for Hart, the separation of law and morals is the separation between intra-systemic legal validity and the moral value of a particular norm because “[a] concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.”¹¹⁴

Hart’s “Postscript,” written years after the initial publication of *The Concept of Law*, clarifies how Hart understood legal positivism’s supposed denial of a necessary connection between law and morality. In the “Postscript,” Hart states that “I argue in this book that though there are many different contingent connections between law and morality *there are no necessary conceptual connections between the content of law and morality*; and hence morally iniquitous provisions may be valid as legal rules or principles.”¹¹⁵ Hart continues: “According to my theory, the existence and content of law can be identified by reference to the social sources of law (e.g. legislation, judicial

¹¹² Ibid., 185.

¹¹³ Ibid., 185-86.

¹¹⁴ Ibid., 211

¹¹⁵ Ibid., 268 (emphasis added).

decisions, social custom) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of that law.”¹¹⁶

In these passages from the “Postscript,” Hart identifies the denial of a necessary connection between law and morality with the claim that a community need not include moral standards among the social facts that make a given norm one of the community’s laws. This claim is both much narrower than the general wording of the separability thesis and derivable in whole from the social thesis as stated above. For that reason, the social thesis alone adequately captures Hart’s understanding of the separation of law and morality with regard to legal validity. As this section demonstrates, Hart never actually advocates the general “no necessary connection” formulation of the separability thesis, and does not view it as central to the legal positivist tradition.

2.3.2: Jules Coleman

Based on the foregoing, Hart should not be blamed for the prominence of the claim that “there is no necessary connection between law and morality.” The blame instead may fall on Coleman, who coined the term “separability thesis,” in his seminal paper “Positive and Negative Positivism,” and has used the “no necessary connection” language ever since.¹¹⁷ In what follows, I recount, the various ways Coleman has articulated the separability thesis in many of his major works to demonstrate that a broad interpretation of the separability thesis is not part of the legal positivist tradition. In

¹¹⁶ Ibid., 269. This passage, as well as many similar passages, establishes that Hart’s view of the nature of law is a version of inclusive legal positivism. I discuss this further in Section 2.4 below.

¹¹⁷ Jules L. Coleman, “Negative and Positive Positivism,” 140.

doing so, I show both that Coleman frequently uses the “no necessary connection” formulation and that he never means it, at least not literally. In other words, a close and careful reading of Coleman’s treatment of the separability thesis demonstrates that, like Hart, Coleman is primarily concerned with accurately articulating and successfully defending the conventionality of law as captured by the social thesis. While Coleman repeatedly claims that there are no necessary connections between law and morality, it is always a narrower claim that he actually defends.

In first coining the term “separability thesis,” Coleman states that “[p]ositivism denies what natural law theory asserts: namely, a necessary connection between law and morality.”¹¹⁸ But in the next sentence Coleman retrenches the broad “no necessary connection” language by stating that “I refer to the denial of a necessary *or constitutive* relationship between law and morality as the separability thesis.”¹¹⁹ Coleman saves the reader from the task of determining whether “or constitutive” is a separate, disjunctive condition or whether the new clause is meant to be an appositive elaboration of the type of necessary connection in question by providing the following, more careful, formulation: “the separability thesis is the claim that there exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law.”¹²⁰

¹¹⁸ Ibid.

¹¹⁹ Ibid., 140-141 (emphasis added).

¹²⁰ Ibid., 141.

The latter formulation, however, is much narrower than the former two formulations. The first two formulations are general in that they apply to all connections between law and morality, while the third is specific to the possible content of a rule of recognition. Assuming that the more specific statement best evidences the author's intent, then even in his earliest presentation, Coleman intended the separability thesis to make the claim that it is not necessary for moral standards to be included among the conditions that determine whether a given norm is a valid law.¹²¹ While Coleman phrases his argument in terms of the total separation of law and morality, his actual thesis concerns only a narrow and, by Coleman's own admission, uninteresting claim that moral standards need not be used to determine the content of a community's law.¹²²

¹²¹ Rather than focus on intra-systemic legal validity, Coleman instead refers to the ability of a rule of recognition to provide "truth condition[s] for some or all propositions of law." *Ibid.* Coleman does not state his reason for this formulation, but I assume he focuses on truth as a proposition of law because it is arguably more inclusive than intra-systemic legal validity. There is some debate whether limiting the scope of a community's law to only laws that are valid under the rules of that community's legal system erroneously ignores, for example, that under principles of international law the valid laws of Country A may govern the resolution of certain disputes in Country B. Strictly speaking, the laws of Country A are not intra-systemically valid laws of Country B but nonetheless are true and applicable propositions of law in Country B. See, for example, Andrei Marmor, "Exclusive Legal Positivism," in Jules Coleman and Scott Shapiro ed., *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2002) 105-106. While worth noting, I have ignored this objection throughout this chapter because I believe it likely disappears under a proper elaboration of intra-systemic legal validity, and because the manner in which I have addressed these issues better conforms with the predominate usages in the literature I address.

¹²² According to Coleman, "[t]he form of positivism generated by commitment to the rule of recognition as constrained by the separability thesis I call negative positivism draws attention both to the character and the weakness of the claim it makes." Jules L. Coleman, "Negative and Positive Positivism," 143.

Coleman continues both to affirm the broad “no necessary connection” language and provide more limited formulations of his separability thesis throughout his writings. For example, in “On the Relationship Between Law and Morality,” Coleman begins his discussion “by referring to the denial of a necessary connection between law and morality as the separability thesis. Let’s also recognize that is the core of legal positivism in the following sense. Whatever the other tenets of positivism may be, they must be consistent with the separability thesis.”¹²³ Only two years later, in “Rules and Social Facts,” Coleman states the following:

Though no proponent of or critic of legal positivism denies that positivism is committed to the separability thesis, there is far less agreement about what it means and its implications for positivism. Hart characterizes the separability thesis as the claim that there is no necessary connection between law as it is and as it ought to be. *I understand this to mean that positivism is committed to the view that the morality of a norm is not necessarily a condition of its legality.*¹²⁴

While Coleman continually switches the scope of the separability thesis both within and among his published works, his general trend, until recently, has been

¹²³ Jules Coleman, “On the Relationship Between Law and Morality,” 67-68.

¹²⁴ Jules Coleman, “Rules and Social Facts,” 715 (emphasis added).

From the perspective of weak natural law, I find nothing to quibble with about this formulation. Nor do I take issue with Coleman’s additional comment that, “[g]iven a proper interpretation of the separability thesis, I think that negative positivism is conceptually unassailable and descriptively accurate. There is no logical or conceptual contradiction in asserting that there exists a possible world in which there is law and in which what makes something law is not a matter of its morality.” *Ibid.* But to clarify, I do not take issue with the latter statement only so long as “what makes something law” refers to a particular community’s conditions for legal validity, which is what I understand Coleman to mean.

to advance the “no necessary connection” formulation in name, but to argue for more limited separations between law and morality in substance.¹²⁵

Coleman’s more recent writings indicate a possible change in this trend. In “Incorporationism, Conventionality, and the Practical Difference Thesis,” Coleman mentions two different formulations of the separability thesis: “morality is not necessarily a condition of legality,” which he defends, and “morality could never be a condition of legality,” which he does not.¹²⁶ Both of these formulations, which correlate to inclusive and exclusive legal positivism respectively, concern the separation of law and morality with regard to legal validity. Equally important for present purposes, in the same paper

¹²⁵ For example, and as noted above, in “Authority and Reason,” Coleman states that “[t]he separability thesis is not the claim that law and morality are necessarily separated; rather it is the claim that they are not necessarily connected” but in that paper he merely argues that morality plays no role in explaining law’s unique normativity. See footnote 78 and footnote 91 and accompanying text above.

Similarly, in the same year, 1996, Coleman also published “Legal Positivism,” which contains the statement of the separability thesis cited at the beginning of this chapter. See footnote 72 and accompanying text.

¹²⁶ Jules Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis,” in Jules Coleman ed., *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001) 123 n. 39.

In all fairness to Coleman, his emphasis on the conventionality, or social origins, of law exists in even the earliest papers mentioned above. For example, in “Negative and Positive Positivism,” Coleman defends “‘positive, social rule positivism,’ which insists only on the conventional status of the rule of recognition,” but accepts that the rule of recognition may contain moral standards for legality. Jules L. Coleman, “Negative and Positive Positivism,” 163. What changes is not as much Coleman’s substantive position, but rather the relative emphasis he places on the two theses of legal positivism discussed at the beginning of the chapter. In Coleman’s early writings the separability thesis presents the core commitment of legal positivism, but in his later writings the importance (and scope) of the separability thesis is reduced while the social thesis gains prominence.

Coleman also claims that “[a]ll positivists embrace the Social Fact Thesis, the claim that while law is a normative social practice it is made possible by some set of social facts.”¹²⁷ In this paper Coleman begins to change what he claims to be the core of legal positivism from the separability thesis to the social thesis. As Coleman’s characterization of the separability thesis narrows, it becomes more evident that the social thesis represents legal positivism’s only distinctive claim.

Coleman’s latest, major treatment of this topic occurs in his book *The Practice of Principle*. In a footnote that precedes his full treatment of the separability thesis, Coleman states that “[a]s I have used the term, the separability thesis is the claim that there is no connection between law and morality.”¹²⁸ While Coleman still clings to the “no necessary connection” formulation, the detailed and intellectually honest treatment the separability thesis he provides later in the book demonstrates that the general denial of a necessary connection between law and morality is loose rhetoric. Coleman begins this discussion as follows:

It is common to characterize legal positivism in terms of two basic tenets: the social fact thesis and the separability thesis. Of the two, the separability thesis is the more familiar, more closely associated with positivism, and more contested – all of which strikes me as something mystifying. The separability thesis is the claim that there is no necessary connection between law and morality. Interpreted as a claim about the relationship between substantive morality and the content of the criteria of legality, the separability thesis asserts that it is not necessary that the legality of standard of conduct depend on its moral merit. Thus, the claim

¹²⁷ Jules Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis,” 116.

¹²⁸ Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) 104 n.4.

it makes is true just in case a legal system in which the substantive morality or value of a norm in no way bears on its legality is conceptually possible. The truth of this claim seems so undeniable as to render it almost entirely without interest; the claim it makes is so weak, no one really contests it.¹²⁹

In this paragraph, Coleman provides an interpretation of the separability thesis that clearly constrains it to a claim about the conditions for legal validity within a particular legal system. In so constraining the separability thesis, Coleman admits that he weakens it to the point that no one, neither legal positivism's advocates nor its critics, deny it.

Coleman most clearly devalues the separability thesis, appropriately construed, as a central claim of the positivist tradition when he notes both that “[w]e cannot usefully characterize legal positivism in terms of the separability thesis, once its is understood properly, because virtually no one – positivist or not – rejects it,” and that “if we are looking to characterize legal positivism as a distinctive and interesting jurisprudence we should focus instead on what I call the ‘social fact thesis.’”¹³⁰ Coleman further claims that “[w]hereas the separability thesis makes a claim about the *content* of the membership criteria for law, the social fact thesis makes a claim about their *grounds*, or *existence conditions*. It claims that the grounds of the criteria of legality in every community that has law are a matter of social fact.”¹³¹ Thus, Coleman admits that

¹²⁹ Ibid., 151 (footnotes omitted).

¹³⁰ Ibid.

¹³¹ Ibid.

some version of what he called the social thesis in the paper cited at the beginning of the chapter presents the distinctive insight of the legal positivist tradition.

As these passages demonstrate, despite some continuing loose rhetoric, Coleman agrees with two of the key theses of this chapter: first, the separability thesis is best formulated as a claim denying a particular separation between law and morality; and, second, the social thesis, or what in later papers Coleman calls the social fact thesis, states the core of descriptive legal positivism. Coleman goes beyond Hart in that he routinely proclaims the “no necessary connection” formulation of the separability thesis, but, like Hart, when Coleman addresses the details of his position, only the denials of particular necessary connections between law and morality, such as the necessity of a moral standard for legal validity, remain.

2.4: The Social Thesis and Legal Validity

As the prior section demonstrates, a broad interpretation of the “no necessary connection” formulation of the separability thesis is not a defensible articulation of the central commitments of descriptive legal positivism and does not provide a successful objection to weak natural law. The only defensible interpretation of the separability thesis, and the only interpretation defended as literally true by prominent writers in that tradition, is a limitation of the thesis to a claim about legal validity. However, that interpretation means that the separability thesis does nothing more than restate precisely the same claim as the social thesis. Thus, the social thesis is all that remains of Coleman and Leiter’s characterization of legal positivism that I presented at the beginning of this

chapter. Consequently, for descriptive legal positivism to challenge weak natural law, the social thesis must make a claim that weak natural law rejects.

In this section, I demonstrate that weak natural law, as described in Chapter 1, readily accepts the social thesis. In particular, I show that neither of the two competing legal positivist interpretations of the social thesis, so-called “inclusive legal positivism” and “exclusive legal positivism,” makes claims regarding intra-systemic legal validity that weak natural law denies. For that reason, descriptive legal positivism does not state any claim that weak natural law denies, and because the two theories are wholly compatible, there is no challenge of descriptive legal positivism.

2.4.1: Inclusive and Exclusive Legal Positivism

As formulated above, the social thesis states that what counts as a law in any particular society is fundamentally a matter of social fact or convention. Legal positivists, however, passionately dispute what this statement means. To fully demonstrate that the social thesis does not provide an objection to weak natural law, I must show that neither of the two predominate interpretations of that thesis conflict with weak natural law.

On one side of the debate over the proper interpretation of the social thesis are advocates of “inclusive legal positivism” – most notably Hart and including Coleman, Kramer, Himma, and Waluchow – who claim that the socially accepted conditions for legal validity in a particular legal system are law and can, but need not, include

substantive moral standards.¹³² In other words, if, as a matter of social fact, a particular community includes among its criteria for legal validity content- or merit-based standards, then those standards form part of the law of that community. For example, consider a community where a socially adopted and ratified constitution provides the basic standards for legal validity.¹³³ If that constitution provides that “a norm *N* is a law of community *C* if *N* provides a just rule of decision for disputes in *C*,” then a given norm can become a law of the community based only on *N*’s merits, or, more precisely, on whether *N* actually provides a just rule of decision. An inclusive legal positivist maintains that a judge charged with determining whether *N* is a valid law of *C* could erroneously adjudicate the legal validity of *N* in *C* if the judge erroneously evaluates the justice of *N*. As a result of the social fact that *C* enacted this constitutional provision,

¹³² Conforming to my notes of caution in Chapter 1, each of these writers except for Hart self-identifies their theories as versions of inclusive legal positivism. I include Hart with only moderate caution as he repeatedly states that a society could enact a legal system with a moral standard as a condition of legality, which is the hallmark of inclusive legal positivism. See footnote 116 above and accompanying text.

While Coleman prefers the name “incorporationism,” he readily admits his theory is a version of inclusive positivism. See, e.g., Jules Coleman, *The Practice of Principle*, 67 n.3. Examples of works from the others defending inclusive legal positivism include the following: Matthew H. Kramer, “On Morality as a Necessary or Sufficient Condition for Legality,” *American Journal of Jurisprudence* 48 (2003) 53-81 and *Where Law and Morality Meet*; Kenneth Einar Himma, “Inclusive Legal Positivism,” in Jules Coleman and Scott Shapiro ed., *The Oxford Handbook of Jurisprudence & Philosophy of Law*, 125-165 and “Law’s Claim to Legitimate Authority,” in Jules Coleman ed., *Hart’s Postscript: Essays on the Postscript to the Concept of Law*, at 271-309; and Wilfrid Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

¹³³ In terms consonant with current writings on legal positivism, the constitution provides the rule of recognition for the community, or at least part of that rule.

justice, for the inclusive legal positivist, becomes a substantive, merit-based meta-rule that constitutes part of the law of *C*.

On the other side are advocates of “exclusive legal positivism” – most notably Raz and including Gardner, Marmor, Shapiro, and Leiter – who claim that the socially accepted conditions for legal validity are limited to the social sources of a given legal rule.¹³⁴ In other words, the criteria upon which the relevant officials determine the content of a particular community’s law are not part of that community’s law. Rather, it is the act of the relevant official, the social source of the rule, that makes the given rule a law. For example, an exclusive legal positivist would deny that justice is a substantive legal requirement and part of the law in *C*, even if *C* enacted the constitutional provision that “a norm *N* is a law of community *C* if *N* provides a just rule of decision for disputes in *C*.” Despite the plain language of that constitutional provision, an exclusive legal positivist maintains that the provision does not create a content-based condition for legal validity, but rather confers on a judge the power to decide whether the putative law is just. If a judge declares that an otherwise valid law *N* is just (thus satisfying a sufficient

¹³⁴ I again break from my notes of caution as Raz does not use the name “exclusive legal positivism” for his theory, and I again do so with little hesitation as his views, such as those found in his *The Authority of Law* and *Ethics in the Public Domain*, are regarded without dissent as the leading articulations of exclusive legal positivism.

Works by the others defending exclusive positivism include the following: John Gardner, “Legal Positivism: 5 ½ Myths”; Andrei Marmor, “Exclusive Legal Positivism” and *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001); Scott J. Shapiro, “On Hart’s Way Out,” in Jules Coleman ed., *Hart’s Postscript: Essays on the Postscript to the Concept of Law* 149-191; and Brian Leiter, “Legal Realism, Hard Positivism, and Limits of Conceptual Analysis.” For Leiter, advocating exclusive positivism reflects a change from the position he defended in “Legal Positivism,” cited at footnote 72 above.

condition for legal validity in *C*), it is not the justice of *N* that explains its inclusion in the laws of *C*, but rather the judge's authoritative determination that *N* meets that condition for legality in *C*.

These characterizations provide only the roughest sketches of inclusive and exclusive legal positivism and ignore both the rich details of these theories as well as the arguments in favor of or in opposition to each.¹³⁵ Nonetheless, for the present purposes the distinction between inclusive and exclusive legal positivism can be captured by the difference between the following two versions of the social thesis:

Weak social thesis: whether a given norm is a valid law of particular legal system is a matter of social fact, and the relevant social facts can include the substantive standards according to which the community identifies its laws, including any merit-based, or moral, standards that the community may adopt.

Strong social thesis: whether a given norm is a valid law of a particular legal system is a matter of social fact, and the relevant social facts are only facts about sources of that norm, in particular the actual human behavior underlying the norm's status as a law.¹³⁶

Both of these versions of the social thesis assert that intra-systemic legal validity is ultimately a matter of social fact. Representative of exclusive legal positivism, the strong

¹³⁵ In particular, the debate between inclusive and exclusive legal positivism centers on the proper explanation of law's authority. The intra-positivist debate over the authority of law is discussed throughout the works cited at footnote 132 and footnote 134 above but does not affect the arguments presented in this dissertation.

¹³⁶ I borrow the names "strong social thesis" and "weak social thesis" from Raz, though I phrase my versions of these theses differently from his. For example, Raz states the following: "*The (Strong) Social Thesis*. A Jurisprudential theory is acceptable only if its tests for identifying the content of law and determining its existence depend exclusively on facts of human behavior capable of being described in value-neutral terms, and applied without resort to moral argument." Joseph Raz, *The Authority of the Law* (Oxford: Oxford University Press, 1979) 39-40.

social thesis provides that legal validity consists of all and only social facts about the social sources of a community's law. In contrast, the weak social thesis, as emblematic of inclusive legal positivism, allows for the possibility of content-based, as opposed to source-based, conditions for legal validity, but insists that even the content-based conditions are derived from or rooted in social sources or facts. Thus, to the extent that weak natural law accommodates the core claim shared by both versions of the social thesis, then weak natural law accommodates the core claim of either form of legal positivism.

2.4.2: The Social Thesis and Weak Natural Law

Properly understood, both the weak social thesis and the strong social thesis are not only perfectly consistent with the weak natural law theory I articulated in Chapter 1 but also one or the other is required by it. As outlined in Chapter 1, weak natural law states that even an unjust law can be a valid law of a given legal system based on the social fact that the law satisfies that legal system's criteria for legality. This is precisely what the general social thesis states. Moreover, this aspect of weak natural can only be understood in light of a theory of intra-systemic legal validity that outlines the criteria according to which a putative positive law can be identified as a law of particular legal system regardless of its moral merits. In other words, the question of whether a particular law of a community is also a law in fullest sense of the term comes subsequent to, or is dependant upon, the prior factual determination that the particular law is a valid law of that community. For this reason, weak natural law requires the truth of some version of the social thesis.

But does weak natural law require the truth of one version of the social thesis in exclusion of the other? For his part, Finnis has little interest in this intra-positivist dispute. He states, for example, the following:

No truth about law seems to be systematically at stake in contemporary disputes between exclusive and inclusive legal positivists. The central dispute seems not worth pursuing. Provided one makes oneself clear and unambiguous to one's readers, it matters not at all whether one defines positive law as (a) all and only the pedigreed standards or as (b) all and only standards applicable by judges acting as such.¹³⁷

As this passage asserts, from the perspective of weak natural law the debate between exclusive legal positivists and inclusive legal positivists is merely a semantic debate that only affects which prescriptions are accurately described as part of a community's law at the margins. One could identify the content of the law in a particular community using all and only source-based, or "pedigree"-based, criteria; alternatively, one could allow that the law of a particular community incorporates those principles, including moral principles, that judges apply when determining the content of the law in that community.¹³⁸ Under either account of legal validity, there remains the separate question of whether those laws that are included among the community's laws as a matter of social fact are laws in the fullest sense of providing practically reasonable directives for action.

¹³⁷ John Finnis, "Natural Law: The Classical Tradition," in Jules Coleman and Scott Shapiro ed., *The Oxford Handbook of Jurisprudence & Philosophy of Law*, 13.

¹³⁸ Ronald Dworkin, one of legal positivism's harshest critics, popularized both, referring to source-based criteria of legal validity as "pedigree" tests for legal validity and the recognition that abstract moral principles may play as important a role in adjudication as concrete legal rules. See Ronald Dworkin, "The Model of Rules I," in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) 14-45.

Despite Finnis's stated ambivalence, he appears to prefer inclusive legal positivism as more descriptively adequate than exclusive legal positivism. With regard to the judicial application of novel legal rules, Finnis states that "adjudication involves the duty not to declare and apply a rule unless it can fairly be said to have been all along a legally appropriate standard, more appropriate than alternatives, for assessing the validity and propriety of the parties' transactions."¹³⁹ Thus, Finnis maintains that a theory of legal validity must include as part of a community's law the unarticulated rules that justify a "legally appropriate" legal rule given the principles and precedents applicable to the case.¹⁴⁰ As such, the rule becomes part of the community's laws based on its merits, as allowed by an inclusive legal positivist. In contrast, an exclusive legal positivist would find the root of the rule's legal validity in the court's action of declaring that rule to be law, making a judge a quasi-legislator that promulgates a new, albeit retroactive, law. By including merit-based legal standards and principles as part of a community's law, Finnis indicates that the weak social thesis, as advocated by inclusive legal positivists, more accurately describes intra-systemic legal validity.

¹³⁹ John Finnis, "The Fairy Tale's Moral," *The Law Quarterly Review*, 115 (1999) 175.

¹⁴⁰ I follow Finnis's usage of "legally appropriate" to emphasize that Finnis does not insist that there necessarily exists a single, best, legal solution to every legal dispute. For example, Finnis states that one should reject Dworkin's thesis "that even in hard cases there is to be presumed to be a single legally right answer" because "[t]hat thesis exaggerates both the specificity of morality's own standards and the linguistic and purposive determinacy of most posited rules." John Finnis, "Natural Law: The Classical Tradition," 36. See also, John Finnis, "Natural Law and Legal Reasoning," in Robert P. George ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 143-145.

Accepting that the moral principles to which courts appeal when deciding novel disputes can be, but need not be, properly described as part of the law of a given community coheres well with weak natural law's claim that a particular valid law is only a law in the fullest sense when it satisfies a substantive moral standard. Nonetheless, there is no logical incoherence in denying the possibility that merit-based tests for legal validity can be included among the laws of a given community and still defending a version of weak natural law. The debate between inclusive legal positivists and exclusive legal positivists remains one that must be decided on the relative merits of those theories. Weak natural law requires the truth of one of the versions of the social thesis, but one cannot, working from the assumption that weak natural law is true, settle the debate as to which one.

Regardless which version of the social thesis, strong or weak, is true, this section demonstrates that the social thesis, legal positivism's only true and distinctive claim, constitutes a very limited descriptive claim. The social thesis only makes a claim about intra-systemic legal validity and does not purport to exhaust the nature of law. There is no inconsistency in recognizing both (1) that whether a particular law is a valid law of a particular legal system is a matter of social fact and (2) that a particular valid law may fail to further law's essential moral purpose, whatever that purpose may be. While the above discussion provides no reason to believe that, as claimed by weak natural law, law has such purpose; it does show that such a purpose is consistent with the social thesis. For that reason, there is no conflict between weak natural law and the social thesis sufficient to sustain a "challenge" from descriptive legal positivism.

2.5: Conclusion

This chapter introduced the “challenge” of descriptive positivism by stating that legal positivism asserts two descriptive claims that natural law as a legal theory denies: the separability thesis and the social thesis. Were both of these theses true, and were natural law actually to deny them, then descriptive legal positivism would more than challenge natural law’s description of the nature of law, it would show that natural law’s description was false. Throughout the course of the chapter, however, I have shown both that the separability thesis, if understood as a general denial of necessary connections between law and morality, is false and that weak natural law, the version of natural law defended in Chapter 1, does not deny the social thesis. That is, if these two theses truly are the only two distinctive claims of descriptive legal positivism, then legal positivism does not challenge weak natural law because weak natural law accepts, even depends upon, the true social thesis while rightly disregarding the false separability thesis.

Throughout this chapter, however, I mentioned circumstances in which legal positivists assert particular, as opposed to general, separations between law and morality. The most notable particular separation discussed above is the claimed separation between the normativity of law and the normativity of morality. In the next chapter, I discuss the final “challenge” of legal positivism, the challenge of “methodological legal positivism,” and in doing so demonstrate that attempts to separate the normativity of law and morality fail as well.

Chapter 3: The Challenge of Methodological Positivism

In Chapter 1, I postulated that theory A challenges theory B only if theory A offers something of epistemic value that theory B does not, such as greater descriptive accuracy or explanatory scope. This imprecise formulation is not meant to provide any insight into the resolution of theoretical conflict. Rather, it is meant only to capture the common-sense notion that when two theories address the same subject matter, the theories are only in conflict when they address that subject-matter in non-complimentary ways. I dissolve one such conflict in Chapter 2, where I demonstrate that theories in the legal positivist tradition are not more descriptively accurate than weak natural law. In particular, I showed that not only does weak natural law accommodate a legal positivist theory of legal validity, it requires it.

In that chapter, however, I focused on the need for a general theory of law to accurately describe legal validity and largely tabled discussions about the other central aspect of the nature of law: law's unique normativity. I passed over a deeper discussion of law's normativity because Chapter 2 focused on the putative descriptive dispute between versions of legal positivism and weak natural law, and merely describing the fact that by its nature law is, or at least purports to be, normative does not exhaust the conflict between those theories. This is because one could offer a purely descriptive theory that states that laws provide content-independent reasons for action. That descriptive statement, however, lacks any explanation for why laws bear that property. Although I mentioned two ways in which legal positivist theories have attempted to explain law's normativity while maintaining a non-trivial separation between law and morals in Section

2.2 above, I did not investigate the merits of those explanations. I now return to those debates by looking at the larger question of how one could present a general theory of law that explains the normativity of law qua law.

The debate over the best way to theorize about law has been dubbed the “methodology problem” in jurisprudence.¹⁴¹ As I show below, to capture its claim that law provides standards that rational agents should take as guides to their conduct, weak natural law asserts that a full explanation of the nature of law requires an application of practical reason, including moral reasoning. In contrast, an advocate of “methodological legal positivism,” as defined in Chapter 1, asserts the following:

Methodological legal positivism: to properly theorize about the nature of law, the theorist need not make any moral or evaluative judgments.

According to “methodological legal positivism” one can fully explain the nature of law using only descriptive methods; that is, moral judgments and other non-epistemic evaluations are not required. Unlike the putative challenge of descriptive legal positivism, the debate over what methodology is required to adequately explain the nature of law does not disappear under critical reflection.

¹⁴¹ The phrase “methodology problem” was coined by Brian Leiter in “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” 17-51. Two recent review essays about current methodological debates concerning how to theorize about the nature of law are Jules Coleman, “Methodology,” in Jules Coleman and Scott Shapiro ed., *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford, Oxford University Press, 2002) 311-351; and Julie Dickson, “Methodology in Jurisprudence: A Critical Survey,” *Legal Theory* 10 (2004) 117-156. Dickson’s *Evaluation and Legal Theory* (Oxford: Oxford University Press, 2001) also provides an overview of these debates.

In this chapter, I argue that weak natural law correctly states that moral reasoning is required to fully explain the nature of law and that “methodological legal positivism,” which I also call “descriptivism,” fails to provide a theory of law that offers the explanatory power of weak natural law. I begin by briefly recounting the origins of descriptivism in the work of Hart. From there, I reconstruct Finnis’s seminal criticism of Hart’s descriptivism and present two positive arguments for the claim that a fruitfully explanatory theory of law requires the application of practical reason. I then turn to a common but misguided criticism of those arguments as well as several more pointed criticisms provided separately by Coleman and Leiter. I conclude with a thought experiment that helps show both how misguided a denial of law’s normativity would be and how weak natural law best explains law’s capacity to provide content-independent reasons for action.

3.1: Hart’s “Descriptive Sociology”

Hart begins the original text of *The Concept of Law* by claiming that “[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology.”¹⁴² Few commentators have taken that claim seriously, with the dominant view being that Hart engages in some form of conceptual analysis of law. While this is a natural accusation given the title of the work, Hart certainly was not engaged in traditional conceptual analysis; that is, he did not attempt to identify necessary and sufficient conditions for the application of “law.” Rather, Hart acknowledges that there are “both clear standard cases and challengeable borderline cases” of law, but

¹⁴² H.L.A. Hart, *The Concept of Law*, vi.

maintains that fact does not account for why it remains interesting to ask “What is law?”¹⁴³ To understand the point of, and to ultimately answer, questions about the nature of law, Hart claims that the theorist must investigate the puzzling aspects of the nature of the social phenomenon that make inquiring into its nature a worthwhile pursuit.¹⁴⁴ Thus, Hart’s “descriptive sociology” seeks to identify those aspects of the nature of law that distinguish it as a unique social phenomenon.

While the original text of *The Concept of Law* follows the methodology described in its early pages, Hart explicitly returns to the question of methodology in the “Postscript,” where he describes his theory of the nature of law as one that is both general and descriptive. In the “Postscript,” Hart states that his theory is general in that “it is not tied to any particular legal system . . . but seeks to give an explanatory and clarifying account of law as a complex social and political institution,” and descriptive “in that it is morally neutral and has no justificatory aims.”¹⁴⁵ Thus, Hart’s methodological aims are to explain and to describe the complex social phenomenon that is law without attempting to morally evaluate or justify it. Hart seeks to provide a theoretical account of law that

¹⁴³ Ibid., 4-5. Hart notes that “besides the clear standard cases constituted by the legal systems of modern states . . . there exist also doubtful cases,” of which “[p]rimitive law and international law” are the foremost examples. Ibid., 3.

¹⁴⁴ Hart concludes the first chapter of *The Concept of Law* by noting that the purpose of the book “is not to provide a definition of law,” rather “it is to advance legal theory by providing an improved analysis of the distributive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality as types of social phenomenon.” Ibid., 17.

¹⁴⁵ Ibid., 239 and 240.

explains the difference between clear and borderline instances of law without also asserting that those clear instances are morally better.

In addition to these general comments, Hart makes a further methodological commitment in the original text, which he later revisits and clarifies in the “Postscript.” In Chapter 5 of the original text, Hart introduces the distinction between the “‘external’ and ‘internal points of view’” to illustrate that it is possible to view a society’s laws either “as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct.”¹⁴⁶ According to Hart, it is only through the “internal point of view,” the point of view of those who accept a society’s laws as a guide to conduct, that one can explain the law in terms of “rule dependant notions of obligation and duty” as opposed to mere “observable regularities of behavior.”¹⁴⁷ In other words, when the conduct of those acting within a legal system is viewed “externally” from the point of view of the detached observer one only sees predictable patterns of conduct. Thus, one must adopt the “internal point of view,” a point of view that encompasses the practical decision making of those acting within the legal system, to understand the law as a system of rules that individuals accept as providing justifying reasons for action.¹⁴⁸

¹⁴⁶ Ibid., 89.

¹⁴⁷ Ibid., 89 and 90.

¹⁴⁸ A significant feature of Hart’s account of law’s normativity is the notion of “acceptance,” which occurs when an individual “accepts” that a given legal system is a practical authority such that the laws of that legal system create content-independent reasons for action. Precisely what Hart meant by acceptance is a matter of significant debate, but the details of Hart’s theory of acceptance do not affect the arguments in this chapter and, for that reason, will be ignored. It is worth noting, however, that recent work on Hart’s theory of acceptance characterizes the notion in non-cognitivist, or norm-

Hart's appeal to the "internal point of view," however, invites the criticism that his method is no longer morally neutral. In particular, one could argue that by requiring the theorist to view law from the point of view of those who conform to the law because it creates reasons for action, the theorist must make the moral determination that the law really does provide reasons for action. If that is the case, then any resulting theory about the nature of law may still be "general" in Hart's sense of the term but would no longer be without any moral content.

To address this criticism, Hart clarifies his usage of the "internal point of view" in the "Postscript" by emphasizing that "there is in fact nothing in the project of descriptive jurisprudence as exemplified in my book to preclude a non-participant external observer from describing the ways in which participants view the law from such an internal point of view."¹⁴⁹ For Hart, adopting the "internal point of view" does not require the theorist to adopt the actual practical viewpoint of those who act within a given legal system; that is, to accept for themselves the same reasons for action accepted by those who act within that legal system. Rather the theorist must only account for how those who do act within the system incorporate the law into their practical reasoning. Hart elucidates this point as follows:

It is true that for this purpose the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is

expressivist, terms. See, for example, Kevin Toh's paper, "Hart's Expressivism and His Benthamite Project," *Legal Theory* 11 (2005) 75-123.

¹⁴⁹ H.L.A. Hart, *The Concept of Law*, 242.

not to accept the law or share or endorse the insider's internal point of view or in an other way to surrender his descriptive stance.¹⁵⁰

Thus, even when viewing law through the "internal point of view," Hart believes that the legal theorist can, and presumably should, retain the detached, third-person perspective characteristic of the natural sciences. I will refer to this part of Hart's theory as the "third-person perspective internal point of view."

Through the use of the "third-person perspective internal point of view," Hart believes he achieves his theoretical goals while maintaining both of his methodological commitments. That is, Hart claims to provide a general theory of law that identifies the characteristics that distinguish law as a unique and interesting social phenomenon without utilizing moral judgment to account for any of those characteristics.

3.2: Finnis's Two Arguments

Finnis rejects Hart's claim that that an interesting general theory of law can be morally inert. Instead, Finnis provides two separate arguments for his position that an explanatorily powerful "general theory of law" is impossible without discerning the "central case" of law through those who "from a practical viewpoint, treat law as an aspect of practical reasonableness," and "not only appeal to practical reasonableness, but also are practically reasonable," in their assessments.¹⁵¹ Given Finnis's understanding of practical reasoning as the intellectual activity directed towards answering, "what it would

¹⁵⁰ Ibid.

¹⁵¹ John Finnis, *Natural Law and Natural Rights*, 15.

be good, worthwhile to do, to get, to have and to be,”¹⁵² this conclusion can be simplified to the claim that to succeed at general, explanatory legal theory, one must do ethics. That is, one must reflect on how one ought to act.¹⁵³ This conclusion in turn provides the unique thesis of the weak natural law theory of the nature of law: to provide a general theory of law that adequately explains law’s ability to provide content-independent reasons for action, some moral reasoning is required.¹⁵⁴ In this section, I present two arguments – one made by Finnis, the other inspired by Finnis – for that thesis.

3.2.1: The Argument from Social Explanation

In the first chapter of *Natural Law and Natural Rights*, Finnis provides the argument that most associate with the claim that a worthwhile explanation of law requires moral evaluations.¹⁵⁵ Finnis starts his argument where Hart leaves off: the internal point of view. In short, Finnis argues that just as invoking the internal point of view helps to

¹⁵² John Finnis, *Fundamentals of Ethics*, 12.

¹⁵³ See also John Finnis, *Natural Law and Natural Rights*, 18-19. Underlying this point is Finnis’s unwillingness to distinguish neatly various manners of practical reasoning, such as prudential, moral, social, or political that I discussed in Section 1.3 above. All of these require practical reasoning, which I simplify as “doing ethics.” See John Finnis, *Fundamentals of Ethics*, Chapter I.

¹⁵⁴ Finnis states this conclusion as follows: “a theorist cannot give a theoretical description and analysis of social facts unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.” John Finnis, *Natural Law and Natural Rights*, 3.

¹⁵⁵ For example, Stephen Perry also defends this claim, and cites that chapter from *Natural Law and Natural Rights* as “illuminating.” Stephen R. Perry, “Hart’s Methodological Positivism,” 313 n.5. Critics of the claim such as Leiter and Dickson also identify that chapter as “seminal” and “instructive.” Brian Leiter, “Beyond the Hart/Dworkin Debate,” 18; Julie Dickson “Methodology in Jurisprudence,” 123.

explain how the social phenomenon of law differs from other social phenomena, focusing study on a particular instance, or “central case,” of the internal point of view will better isolate the particular phenomenon we identify as law. In short, Finnis claims that Hart’s “third-person perspective internal point of view” is descriptively and explanatorily inferior to a narrowly defined “first-person perspective internal point of view” in picking out the truly distinguishing features of law.

According to Hart, the “internal point of view” is required to explain how law’s normativity differs from both sanctions backed by threats and habitual social action, but does not require the theorist to make the practical determination that the law actually does so differ. Finnis simply wonders what justifies Hart in stopping his explanation there. Merely adopting the perspective of the agent who accepts the laws of a legal system as providing reasons for action, still allows for different possible explanations for the agent’s acceptance. For example, an agent can accept the laws of a particular system as normative for instrumental reasons, such as “accepting the laws of system *S* as providing reasons for action will achieve a desirable goal,” or other narrowly self-interested reasons, such as “accepting the law of system *S* as providing reasons for action will maximize my wealth and well-being.”¹⁵⁶ Both of these statements are examples of

¹⁵⁶ Hart elaborates this point as follows:

[I]t is not . . . true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not

internal reasons invoked by agents for accepting the laws of a particular legal system as providing content-independent reasons for action that are consistent with understanding individual laws as “obligating” rather than “obliging” conduct. Thus, the acceptance of a society’s laws as providing content-independent reasons for action still requires an explanation for that acceptance; that is, an explanation of how law’s normativity arises.

Finnis maintains that a single explanation for law’s normativity is part of the “central case” of law. In other words, of all the possible reasons for acceptance of a legal system as providing content-independent reasons for action, there is a unique explanation that is one of the identifying characteristics of law. Providing that explanation, Finnis argues, requires the theorist to make practical judgments about what one ought to do. Consequently, if we accept Finnis’s view that practical judgments are the same as moral judgments, then a general, descriptive theory of law requires moral evaluation.

I will call the argument of *Natural Law and Natural Rights*, Chapter 1, the “Argument from Social Explanation” (“ASE”).¹⁵⁷ That argument can be reconstructed as follows:

examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.

H.L.A. Hart, *The Concept of Law*, 203.

¹⁵⁷ In what follows, I focus my reconstructions and the textual support for it on the presentation of this argument in Chapter 1 of *Natural Law and Natural Rights*. Finnis has revisited this argument in two recent papers: “Problems in the Philosophy of Law,” in *The Oxford Companion to Philosophy*, Ted Honderich, ed., Second Edition (Oxford: Oxford University Press, 2005) 497-500; and “Law and What I Truly Should Decide.”

- (P1): The best descriptive-explanatory theory of a particular social phenomenon, such as law, will select and explain the central features of that phenomenon.
- (P2): One central feature of law is its ability to provide content-independent reasons for action; that is, for a given norm to provide a decisive reason for action only because that norm is a valid law.
- (P3): Providing the best explanation for law's ability to provide content-independent reasons requires the theorist to adopt the viewpoint of an agent that (a) makes the practical judgment that the laws of particular legal system provide such reasons for action, and (b) is practically rational in that judgment.
- (P4): Accepting the viewpoint of an agent that is practically rational in the judgment that the laws of a particular legal system provide content-independent reasons for action requires the application of practical reason; that is, the theorist must make a moral determination regarding the reasonableness of obedience to the laws in question.
- Conclusion: Therefore, the best descriptive-explanatory theory for the social phenomenon of law requires the theorist to make a moral determination regarding the reasonableness of obedience to the laws in question.

Finnis defends (P1) in part because he believes that it is the proper method for social theory and in part because he observes that Hart and Raz adopt the same method. Finnis claims that different descriptions of law “derive from differences of opinion, amongst the descriptive theorists, about what is *important* and *significant* in the field of data and experience with which they are all equally and thoroughly familiar.”¹⁵⁸ To determine “[f]rom what viewpoint, and relative to what concerns . . . *importance* and *significance* [are] to be assessed,” the social theorist must identify the “*focal meaning*” or

¹⁵⁸ John Finnis, *Natural Law and Natural Rights*, 9.

“*central case(s)*” of law, which in turn “enables an increasingly *differentiated* description of law to be offered still as a *general* theory of law.”¹⁵⁹

Finnis also defends (P2) by appealing to its acceptance by Hart and Raz. Finnis claims that “Hart and Raz are clear that a descriptive theorist, in ‘deciding to attribute a central role’ to some particular feature or features in his description of a field of human affairs, must ‘be concerned with’, ‘refer to’, or ‘reproduce’, one particular practical point of view (or set of similar viewpoints).”¹⁶⁰ More precisely, “Hart gives descriptive explanatory priority to the concerns and evaluations . . . of people with an ‘internal point of view,’” while Raz adopts “‘the legal point of view’, which is the point of view of people ‘who believe in the validity of the norms and follow them’ (paradigmatically, the viewpoint of the judge qua judge).”¹⁶¹ As these passages demonstrate, Hart and Raz, as well as Finnis, agree that to adequately describe and explain the social phenomenon of law, the theorist should focus on those instances in which the law qua law is understood to give content-independent reasons for action.

It is with (P3) that Finnis goes beyond the theories of law provided by Hart and Raz. Finnis states that the “position of Hart and Raz is unstable and unsatisfactory” because it fails to capture the explanatory advantages of further differentiating “the

¹⁵⁹ Ibid., 9-10.

¹⁶⁰ Ibid., 12. The first two internal quotations in this passage are to the first edition of Raz’s *The Concept of a Legal System* (Oxford: Clarendon Press, 1970), while the last two are to the first edition of Hart’s *The Concept of Law* (Oxford: Clarendon Press, 1961).

¹⁶¹ Ibid., 12-13.

central from the peripheral cases of the *internal or legal point of view itself*.”¹⁶² In particular, Finnis claims that there are two ways in which a theorist should narrow the central cases of the internal point of view.

First, Finnis claims that just as the theorist should distinguish between those circumstances in which a particular law is normative for merely instrumental reasons and those situations in which a particular law is normative qua law, the theorist should also distinguish between circumstances in which one accepts the law’s content-independent normativity for instrumental reasons and those situations in which one accepts it as providing moral reasons for action. According to Finnis, Hart’s person who accepts the law as a source of content-independent reasons out of tradition or Raz’s anarchist who does so only to be in a position to undermine it later are internal points of view that are “parasitic” on the “point of view in which legal obligation is treated as at least presumptively a moral obligation,” or a requirement of practical reason.¹⁶³ Finnis’s point is that one only truly accepts law as providing reasons when one makes the practical judgment that the law of a particular system sufficiently meets the requirements or practical reason, used here as a proxy for any possible moral standard, such as to provide decisive reasons for action.

Second, Finnis notes that “[a]mong those who, from a practical viewpoint, treat law as an aspect of practical reasonableness, there will be some whose views about what practical reasonableness actually requires in this domain are, in detail, more reasonable

¹⁶² Ibid.

¹⁶³ Ibid., 14.

than others.”¹⁶⁴ This second qualification amounts to the requirement that the theorist should further limit the central case of law to the viewpoint in which the judgment that the law provides a reason for action is practically reasonable in that its moral merits are such that it should create a reason for action. According to Finnis, the explanatory theories of law offered by Hart and Raz fail to explain the full potential for law to actually provide content-independent reasons for action because they fail to construct a theory of law that takes its full moral potential into account.¹⁶⁵

Lastly, and most importantly, (P4) claims that identifying the central case of the internal point of view, as described in (P3), requires the theorist to make a substantive, moral judgment as to when and why acceptance of the law as a source of content-independent reasons for action is in fact practically rational. This is the key, and most commonly misunderstood, premise of Finnis’s argument.

Both (P3) and (P4) will be tested extensively below, so for the present purposes, it is useful to look closer at Finnis’s conclusion, which he states as follows:

¹⁶⁴ Ibid., 15.

¹⁶⁵ In a recent paper, Finnis characterizes (P3) in the following manner:

[S]uch a thesis depends on the further, widely disputed premiss that what counts as the central case or fine specimen of a subject-matter of social (e.g. legal) philosophy is settled by reference to the evaluative concerns not of ‘bad citizens’ concerned only to avoid sanctions (as American legal realists proposed), nor of morally unconcerned judge or other officials as such (as Hart proposed), but rather of people who understand, accept, and promote law as a morally motivated and justified response to the evils and injustices of legally unregulated human relationships.

John Finnis, “Problems in the Philosophy of Law,” 502.

[T]he evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order. For the theorist cannot identify the central case of that practical viewpoint which he uses to identify the central case of his subject-matter, unless he decides what the requirements of practical reasonableness really are, in relation to this whole aspect of human affairs and concerns.¹⁶⁶

While most commentators correctly identify Finnis's conclusion that practical or moral reason comprises part of the proper method for legal theory, few if any focus on the following implications of that conclusion:

In relation to law, the most important things for the theorist to know and describe are the things which, in the judgment of the theorist, make it important from a practical viewpoint to have law – the things which, it is, therefore, important in practice to 'see to' when ordering human affairs. And when these 'important things' are (in some or even in many societies) in fact missing, or debased, or exploited or otherwise deficient, then the most important things for the theorist to describe are those aspects of the situation that manifest this absence, debasement, exploitation, or deficiency.¹⁶⁷

As this passage emphasizes, law in the fullest sense of the term, the sense appealed to by the theory of weak natural law, provides practical guidance because it attends to needs of those subject to it and their purposes for coordinating their affairs under law. In that regard, a general theory of law is as useful for explaining law in the fullest sense as for explaining the deficiencies of debased or corrupted instances of law.

3.2.2: The Argument from the Normativity of Law

ASE, however, is not the only argument for the conclusion that a general theory of the nature of law requires practical reasoning suggested in *Natural Law and Natural*

¹⁶⁶ Ibid., 16.

¹⁶⁷ Ibid.

Rights. Chapter 2, the second of two largely prefatory chapters that make up Part One of that work, suggests a slightly different argument. In that chapter, Finnis emphasizes the logical separation between factual discourse and normative discourse that not only runs throughout the natural law tradition but also was articulated most famously by Hume's claim that one cannot derive an "ought" from an "is."¹⁶⁸ Plainly put, practical reasoning about what one ought to do is radically distinct from theoretical reasoning about what is or is not the case.¹⁶⁹

A close extension of this observation is that one cannot conclude that one ought to follow the law without making a practical judgment that following the law is valuable for one to do.¹⁷⁰ The resulting need to use practical reason to reach a practical conclusion

¹⁶⁸ John Finnis, *Natural Law and Natural Rights*, 33-42. Finnis steadfastly argues that practical conclusions cannot be drawn from solely factual premises and, in doing so, corrects a common misconception both from within and without the natural law tradition. Finnis states, for example that the argument "that natural functions are never to be frustrated or that human faculties are never to be diverted ("perverted") from their natural ends. . . . in any form strong enough to yield the moral conclusions it has been used to defend . . . is ridiculous." *Ibid.*, 48.

¹⁶⁹ Nonetheless, Finnis asserts that the irreducible practicality of ethics does not entail that reasoning about what one ought to do it not also "theoretical," or concerned with discerning the true or correct answers to one's questions. See John Finnis, *Fundamentals of Ethics*, Chapter 1.

¹⁷⁰ Another way to view the problem is through the seemingly conflicting statements that (a) whether a particular norm *is* a valid law of a legal system is a purely factual, historical question, and (b) a valid law can provide a reason for action; that is, it can provide guidance to what one *ought* to do. In the following passage from a recent work, Finnis directly addresses the tension between the factual and normative senses of law:

Law has a double life. It is in force as a matter of fact; historians and contemporary observers can describe – and make predictions about – its content and effect by attending to the opinions and practices prevalent among certain persons and groups, especially courts and their officers.

about law's normativity suggests the following "Argument from the Normativity of Law"
("ANL"):

(P1*): The best descriptive-explanatory theory of law provides an explanation of all of the central aspects of law, including law's normativity.

(P2*): One can only explain law's normativity by applying practical reason to determine those circumstances in which it would or would not be reasonable for law to provide a reason for action.

Conclusion: Therefore, the best explanatory theory of law requires the theorist to make a practical judgment regarding those circumstances in which it would or would not be reasonable for law to provide a reason for action.

ANL is a straightforward application of Hume's claim that one cannot derive a practical conclusion from only factual premises. It proceeds from the shared assumption that an adequate theory of law must explain law's normative potential (captured in (P1) and (P2) of ASE above) through the observation that the normative potential of law cannot be

But it has its force by directing the practical reasoning of those persons and groups. And since one engages in practical reasoning to reach normative conclusions (such and such ought to be done, ought not, or is desirable, or permissible, etc.), facts count in practical reasoning only by virtue of some further, normative premise(s), the source of the reasoning's directiveness for decision and action. Law stated *in* such reasoning, not least in judicial reasoning, is stated as a norm, and exists *as* directing one towards or away from decisions and actions, validating or invalidating one's transactions, and so forth, precisely by being itself justified as part of a set of such standards. Law's existence, force and effect – its life – can always thus be understood as sheer fact (historical or predictable) or alternatively as directive standard.

John M. Finnis, "The Fairy Tale's Moral," 170. This passage identifies one of central conundrums posed to any theory of law: how can the purely descriptive fact that a norm is a legally valid law of a given legal system alone provide a reason for action?

explained absent the use of practical reason (echoing (P3) and (P4) of ASE above), to the conclusion that a general theory of law requires the use of practical reason. Comparing the two arguments, it may be possible to understand ANL as a simplified restatement of ASE, but it is likely best understood as a distinct argument to be evaluated on its own merits.

While Finnis does not explicitly present ANL, Stephen Perry, fully acknowledging his intellectual debt to Finnis, does.¹⁷¹ According to Perry, “[i]t is plausible to think that the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task.”¹⁷² Perry then states that “the problem of the normativity of law is philosophical: does law in fact obligate us in the way that it purports to do? This is an issue that arises within the philosophy of practical reason, and it would seem inevitable that its resolution will require normative and probably moral argument.”¹⁷³ From these two premises, Perry derives the conclusion that a theory of law, if it is to address law’s normativity, requires moral argument.¹⁷⁴

¹⁷¹ Stephen R. Perry, “Hart’s Methodological Positivism,” 347-353.

¹⁷² Ibid., 330. At this point of his argument, Perry avoids accusations of question-begging by emphasizing that by “an ‘account’ of the normativity of law I am being deliberately vague, so as to subsume such disparate views as . . . the natural law thesis that every law properly so called is moral binding, and . . . the Holmesian thesis that legal obligation is an empty concept.” Ibid., 330-331.

¹⁷³ Ibid., 335-336.

¹⁷⁴ It is worth noting though, that unlike Finnis, Perry frames his argument at a level of abstraction that leaves open whether a theory of law derived through this method clarifies the conditions under which law’s claims to obligations are justified or concludes that such claims cannot be justified. Ibid., 348. For that reason, Perry’s states his conclusion as follows:

Perry, however, couches his version of ANL in somewhat different terms than those offered above by claiming that Hart, or any legal theorist who provides a “conceptual analysis” of law, is not utilizing the “descriptive-explanatory method” whatsoever.¹⁷⁵ But because Perry makes clear that he understands the “descriptive-explanatory method” to refer only to casual/predictive theories of the natural or social sciences and because he acknowledges that there is a sense of “explanatory” that refers to the elucidation or clarification of how we understand certain social phenomenon, any disagreement between Perry’s version of the argument and the one presented above appears to be more one of emphasis rather than substance.¹⁷⁶ Thus, it is fair to conclude that, terminological differences aside, Perry provides a straightforward defense of ANL.

“[a] philosophical theory that has the goal of clarifying the way we conceptualize our social practices must attempt, from our own point of view, to make those practices transparent to us. In the case of law, this means showing that law’s claim to authority over us is always justified, showing that it is justified only under certain conditions (which might not always hold), or showing that it is never justified.”

Ibid., 347. Based on this conclusion, Perry correctly observes that “Hart . . . fails to come to grips with the problem of the normativity of law, because he insists on simply describing the phenomenon of acceptance rather than inquiring into the conditions under which acceptance might be justified.” Ibid., 343.

¹⁷⁵ Ibid., 319-325. According to Perry, Hart provides an “external conceptual analysis” of law because he does not investigate the potential normativity of law from a first-person perspective, whereas his own preferred methodology does and, consequently, provides an “internal conceptual analysis” of law. Ibid., passim.

¹⁷⁶ Ibid., 320-321.

3.2.3: The Shared Premise

Whether ASE and ANL are two different arguments to be evaluated and critiqued independently or are different versions of the same argument, both share the same central premise: to determine whether it is practically reasonable to recognize the law as providing content-independent reasons for action requires the application of practical, as opposed to purely theoretical reason. That is, both ASE and ANL depend upon the claim that reasoning about how one should behave cannot be accomplished through purely descriptive methods.

As shown above, that law, by its nature, possesses the potential to provide content-independent reasons for action is a claim that is not unique to natural law theories about the nature of law. The unique contribution of theories of the nature of law in the natural law tradition, including the theory of weak natural law, is to recognize that whenever a law does provide a reason for action, then it is within the realm of practical reason to explain how that came to be.

3.3: Moral Evaluation versus Epistemic Evaluation

Before addressing a number of unique and particular objections to ASE and ANL, I would like to first address an objection that both is made by almost every critic of those arguments and is completely misguided. The objection is that while an adequate descriptive theory of law does require evaluation, the evaluations in question are theoretical rather than practical. According to this objection, the claim that the theorist of law must make evaluations is uninteresting because every descriptive theorist must construct their theory with attention to such epistemic values as simplicity, descriptive scope, and explanatory power. But by itself, the requirement that a theorist make

epistemic evaluations presents no objection to the claim that one must use moral reasoning to determine law's unique characteristics because the requisite moral evaluations could be made in addition to the necessary epistemic evaluations. Rather, to provide an objection to premises (P4) of ASE or (P2*) of ANL, the claim must be that moral judgments either (a) cannot be used to formulate a descriptive theory of law or (b) are not necessary to do so.

The stronger version of this objection, version (a), is a non-starter. Inverting Hume, one could state that an "is" cannot be derived from an "ought." That is correct as far as it goes, but both ASE and ANL anticipate that factual considerations will factor into any general theory of law. There is no other reason to suppose the moral judgment could not be used to support a descriptive theory of law, assuming that other descriptive considerations are duly weighed.

Thus, the only sustainable version of this objection would be the weaker one, version (b). This objection states that moral evaluations are not needed to formulate a defensible general theory of law because the correct general theory of law can be provided using only epistemic evaluations. The weakness of this objection, however is that it works backwards from the assumption that a given theory of law is descriptively adequate and explanatorily fruitful to the conclusion about the methods used to create it. At its core, this weakened version of the epistemic evaluations objection is a substantive claim about the merits of particular theories of law.¹⁷⁷ Thus, this objection is best

¹⁷⁷ Coleman and Leiter independently discuss versions of (b). Coleman acknowledges that the objection alone is rather empty absent an examination of the underlying substance of the debate. Jules Coleman, *The Practice of Principle*, 177-179,

addressed implicitly below, by refuting the substantive arguments against ASE and ANL. I address those arguments in the next two sections, which consider the defenses of “methodological legal positivism” provided by Coleman and Leiter respectively.

3.4: Coleman

Coleman provides both an objection to central premises of ASE and ANL and an alternative account of law’s normativity in strictly “methodological legal positivist” terms. As I show in this section, both of these projects are informative but ultimately unsuccessful.

3.4.1: Coleman’s Objection: The “Hammer Argument”

Coleman, like Hart, believes that a legal positivist theory of law can fully clarify and explain our concept of law.¹⁷⁸ Coleman maintains that a legal positivist can admit that law has an “inherent potential to realize or to manifest an ideal of governance,” while still defending a conceptual separation between law and morality.¹⁷⁹ As discussed in Chapter 2, this separation cannot be complete, and Coleman accepts that.¹⁸⁰ Nonetheless, Coleman believes that there remains room in conceptual space for a morally neutral legal

199-200. Leiter, on the other hand, offers this objection as an independent reason in defense of “methodological positivism,” but as I show below, that argument depends upon substantive assumptions about the nature of law as well. Brian Leiter, “Beyond the Hart/Dworkin Debate,” 34-37.

¹⁷⁸ According to Coleman, “conceptual analysis would consist in uncovering the most salient features of a concept: those that figure most prominently in an explanation of the kind of thing it is the concept of – that are central to our understanding and appreciation of it.” Jules Coleman, *The Practice of Principle*, 179.

¹⁷⁹ Ibid., 192.

¹⁸⁰ This is so despite his continuous use of language to the contrary. Ibid., 151.

theory that goes beyond intra-systemic legal validity and successfully describes our complete concept of law.

Coleman includes Finnis, along with Fuller and Dworkin, as theorists who endorse the “argument from commendation.” Coleman offers the following summary of the argument:

Law is a predicate of weak commendation. This is because it is a part of our concept of law that it is morally attractive as such, from which it follows that every instance of law has some morally attractive property *M*. That property is the inherent potential of law to realize an ideal of governance. The relevant ideal can be specified in different, perhaps competing, ways, and at different levels of generality; but any analysis of the concept of law must invoke substantive moral premises in order to explain the nature of *M*, and to orient the analysis toward only those practices that have *M*. Thus, all jurisprudence must be normative.¹⁸¹

Because this passage presents premises relevantly similar to both (P3) and (P4) of ASE, this argument provides a fair approximation of ASE and appears to prove precisely what Coleman denies; namely, that a comprehensive account of the nature of law requires moral evaluation on the part of the theorist. To attack this argument, Coleman claims that it relies upon a flawed understanding of the “inherent potential of law.”

More specifically, Coleman claims that there is a fundamental difference between recognizing the potential of some thing *O* to realize some property *P*, and *P* being included in theoretically useful or insightful explication of the concept of *O*. To illustrate, Coleman points out the multitude of potentials uses for a hammer. He states that “a hammer is the kind of thing that can be a murder weapon, a paperweight, or a

¹⁸¹ Ibid., 194.

commodity.”¹⁸² The fact that a hammer has the potential to be a paperweight does not entail that the ability to be used as a paperweight is part of our concept of “hammer.” Along those same lines, Coleman states that “the fact that a thing, by its nature, has certain capacities or can be used for various ends or as a part of various projects does not entail that all or any of those capacities, ends, or projects are a part of our concept of that thing.”¹⁸³

Turning his focus to the concept of law, Coleman continues, “[t]he only point we must grant about the ‘inherent potential’ of law to realize an attractive moral ideal of governance is the fact that law is the kind of thing with the capacity to do so.”¹⁸⁴ According to Coleman, an analysis of law would be lacking if it could not accommodate law’s capacity to be morally attractive, but “the commendation argument errs when it assumes that a particularly interesting capacity of law is in fact a part of our concept of it.”¹⁸⁵ What Coleman cannot be suggesting here is that “particularly interesting” capacities are never included in concepts, for surely, the “interesting” capacity of a knife to cut is included in our concept of “knife.” Rather, Coleman must be asserting that the ability to fulfill human needs in beneficial ways is a capacity that law possesses, but is not central enough to be part of our concept of law.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid. For these reasons, Coleman states that “autonomy, dignity, and welfare . . . are external to the concept of law; law happens to be the kind of thing that can serve them well.” Ibid., 195.

Coleman faults those who would include values such as autonomy, dignity, and welfare in a general descriptive theory of law for their inability to offer an argument for doing so.¹⁸⁶ As shown above, that criticism is misplaced as Finnis does offer an argument along those lines with ASE.¹⁸⁷ Nonetheless, Coleman's indictment smacks of hypocrisy in that he does not offer an argument that these things are not part of our concept or law. He simply states that given their moral content, they are mere capacities that law's nature can be fully understood without. Coleman does nothing more than assert that the concept of law stops short of moral content, but Coleman's assertion that "the content stops here" appears tendentious on its own, and requires a life-supporting argument to maintain viability. Given the various discussions throughout this dissertation, I believe the burden is on Coleman to provide that argument but he has not done so.

¹⁸⁶ Ibid., 194.

¹⁸⁷ In direct response to this aspect of Coleman's "hammer argument," Finnis states the following:

One can reasonably spend a lifetime of using hammers without ever noticing that they would be good as paper weights or the backbones of garden gnomes. But one cannot begin to understand what law is about without noticing, not merely that it shares much of the same action-guiding vocabulary as morality but –overwhelmingly more important – that it does so because it purports to occupy *the same place in the world* as morality: the decisive framing of the options for choice at the point where deliberation is ending in decision about what I should do and what kind of person I should be.

John Finnis, "Law and What I Truly Should Decide," 126.

3.4.2: Coleman's Explanation of Law's Normativity

Arguing for the proposition that moral evaluation is unnecessary for a descriptive and explanatory theory of law presents Coleman with the further predicament of explaining law's normativity without appeal to normative argument. That is, Coleman must take on the central claim of ANL directly by deriving the "ought" of law from only the "is" of law. Coleman's attempt to do so fills in the blank left in the discussion of the normativity of law in Section 2.2.2 above, and further demonstrates the failure of "methodological legal positivism" to explain how the descriptive fact that a given norm is a valid law also provides a reason for action.

Coleman states that, "[i]n its broadest sense, legal positivism is the view that the possibility of legal authority is to be explained in terms of social facts."¹⁸⁸ For Coleman, as for Hart, explaining law's authority in terms of social facts means that law's normativity "is not to be explained as being an instance of moral authority"; that is, the reasons for action provided by law qua law are not moral reasons for actions.¹⁸⁹ As a descriptive claim, it is a rather uninteresting truth. As described in Chapter 2 above, legal reasons have unique, distinguishing, social origins that divide them on purely descriptive grounds from moral reasons. But Coleman states that law's action-directive nature need not be *explained* with reference to morality's action-directive nature, and one can assume from the context that Coleman would further reject a common explanation for both. I show below that this explanatory claim is false (and that Coleman does not actually

¹⁸⁸ Jules Coleman, *The Practice of Principle*, 120.

¹⁸⁹ *Ibid.*, 74-75.

endorse it), but to demonstrate why requires a brief look at what Coleman believes an explanation of law's authority that refers to only social facts could be.

Coleman's attempted explanation of the "possibility" of the normativity of law employs two distinct steps. First, Coleman limits his subject matter to the agreement by the relevant officials on the standards for legal validity in a given society, which Coleman follows Hart in calling that society's rule of recognition.¹⁹⁰ The reasoning behind the move is simple, a rule of recognition is a necessary condition for any legal system, and to exist it must be accepted by those officials charged with interpreting and implementing it. Consequently, the acceptance of the rule of recognition by the relevant officials is itself a necessary condition for a legal system. Moreover, those officials' acceptance of the rule of recognition cannot be based on the fact that it is a legally valid rule in that system, lest the account of law's normativity either proceed into infinite regress or collapse into a vicious circle.¹⁹¹ Thus, to avoid explaining the normativity of one law in terms of the normativity of another, Coleman follows Hart in claiming that the normativity of the rule of recognition – that is, the relevant officials' reason for adopting it – arises from a conventional practice coupled with those officials acceptance of that practice.¹⁹²

Second, Coleman states that the notion of a "shared cooperative activity" ("SCA") best describes the conventional practice of officials who accept a given rule of

¹⁹⁰ Ibid., 76-77.

¹⁹¹ Ibid., 70.

¹⁹² Ibid., 75 and 83. Please note that the officials could have any number of reasons for accepting the practice. This is the same as Hart's theory of acceptance, as discussed at Section 3.2.1 above.

recognition.¹⁹³ An SCA is a narrowly defined social interaction that involves the coordination of two or more persons in ways that respond to one another to achieve certain ends, examples of which include “taking a walk together, building a house together and singing a duet together.”¹⁹⁴ The identifying characteristics of an SCA are “[m]utual responsiveness,” “[c]ommitment to the joint activity,” and “[c]ommitment to mutual support.”¹⁹⁵ Stating that the acceptance of a rule of recognition by those charged with enforcing it is an SCA, however, merely describes the activity of those officials by identifying the type of conventional activity they are engaged in. It is part of the definition of an SCA that the officials share certain commitments but that does not *explain* how those commitments came to direct the officials’ action.¹⁹⁶ To explain the

¹⁹³ Ibid., 96-100, 157-160. Coleman borrows the notion of an SCA from Michael Bratman, and in particular Bratman’s papers, “Shared Cooperative Activity: Three Features,” *Philosophical Review* 101 (1992) 327-341, and “Shared Intention,” *Ethics* 104 (1993) 97-113. Ibid., 96 n. 30. Scott Shapiro and Kenneth Himma also develop accounts of law’s normativity that rely upon the SCA, with Shapiro’s being the most sophisticated available in the literature. See Kenneth Himma, “Inclusive Legal Positivism” in Jules Coleman and Scott Shapiro ed., *The Oxford Handbook of Jurisprudence & Philosophy of Law*, 125-165; Scott Shapiro, “Law, Plans, and Practical Reason,” *Legal Theory* 8 (2002) 387-441. Because Shapiro’s and Himma’s use of the notion of the SCA is the same in all relevant respects as Coleman’s, I will not consider their versions but my comments apply equally to all three.

¹⁹⁴ Jules Coleman, *The Practice of Principle*, 96.

¹⁹⁵ Ibid. (quoting Bratman, “Shared Cooperative Activity,” 328).

¹⁹⁶ Michael Steven Green criticizes Coleman’s appeal to SCAs as an attempt to distinguish legal from moral obligations by noting that “[i]f one uses justified expectations and reliance to explain why all officials – even the hardened offenders – are obligated to conform to legal practices, it looks like legal obligation is a species of moral obligation. Michael Steven Green, “Legal Realism as a Theory of Law,” *William and Mary Law Review* 46 (2005) 1948. Bratman also expresses reservations about whether SCAs can explain conformity of officials who do not wish to accept law as normative

normativity of law, therefore, one needs an explanation of the commitments underlying the relevant SCA.

With that observation, the further details of Coleman's account law's normativity can be ignored because Coleman accepts that the notion of an SCA, or any other attempt to explain law's normativity using only social facts, cannot actually explain how law could provide reasons for action. According to Coleman, "[i]t is not the primary burden of jurisprudential theory to explain how duties can be created by law," rather, "[w]hat needs explanation is something else altogether, the *possibility of claiming* to impose such duties as law."¹⁹⁷ Please note that this is a significantly different use of the "law claims to provide reasons" move mentioned in Section 2.2.1 above. In that prior section, the assertion was that law only claims to provide us reason for action and that it is not part of the nature of law to actually do so. Coleman, however, appears to accept that law has the inherent capacity to provide reasons for action. He uses the "law claims to provide reasons" to define what he believes to be the proper subject of general legal theory, which apparently does not include an actual explanation of law's normativity.

without appealing to moral obligations. Michael E. Bratman, "Shapiro on Legal Positivism and Jointly Intentional Activity," *Legal Theory* 8 (2002) 517. These objections are noteworthy but function somewhat differently than my objection in this section. Whereas Green and Bratman both object to the adequacy of SCAs to accurately describe the conduct by officials necessary to make law normative, I argue that any mere description of the official's conduct is insufficient to explain the normativity of law. To the extent, however, that Green's and Bratman's objections imply that moral considerations are required to explain why a given social phenomenon possesses the attributes of sufficiently just legal system, then their objections are similar to mine.

¹⁹⁷ Ibid., 160.

Instead of accepting the inability of SCAs, or the mere description of any other type of conventional practice, to explain law's unique normativity, Coleman claims that it is simply outside the purview of legal theory to provide such an explanation. In fact, Coleman anticipates the very objection leveled in this section by stating that "natural lawyers" claim that "legal positivism engages in the naturalistic fallacy by attempting to derive law's 'ought' from some set of social facts."¹⁹⁸ Coleman responds as follows:

[P]ositivism is in no way committed to *deriving* law's ought from social facts, and so the charge that positivists engage in the naturalistic fallacy is misplaced. The naturalistic account that positivism provides by explaining law in terms of social facts does not entail any particular moral ontology of the duty that law can create; rather the naturalistic account is just supposed to show how, by appealing to social facts alone, we can see that law is in the same boat with a lot of other practices that we normally suppose are capable of creating reasons and duties. Positivism seeks to show that the way in which law can give rise to duties is not more – *and no less* – mysterious than the way in which promises, pacts, reciprocal expectations, and so on can create duties. The ontology of duties that inhabit his class of practices is not a *special* problem for legal theory, but is rather in the provenance of meta-ethics. In so far as positivism is not wedded to any particular meta-ethical view or moral ontology, it cannot be accused of the naturalistic fallacy.¹⁹⁹

This is a long passage, but it is worth quoting in full because I believe unpacking it shows just how tendentious the claim that an explanation of law's normativity is not a proper question for legal theory happens to be.

Beginning with one of Coleman's own examples, consider what an instructive theory of promises would require. It would, of course, require some description of the unique social interaction that comprises the act of promising and may also require an

¹⁹⁸ Ibid., 159.

¹⁹⁹ Ibid.

account of the social expectations that a promise creates. These are the social facts that give rise to the unique reasons for action that promising creates. Those social facts, however, are silent as to why a promise creates a reason for action. Such an explanation may be based on an account of the social benefits provided by shared expectations, the value of trustworthiness as a character trait, or intrinsic moral worth of one's ability to create duties for one's self. While it is arguable what the proper explanation would be, it is not arguable that the explanation will be moral in character. An explanation of why a promise provides a reason for action will appeal to the moral values that make the social act of promising practically rational, and it certainly appears to me that this is precisely what an adequate theory of promises requires. Moreover, the resulting theory would not be a generalized theory in meta-ethics. Rather, it would be a descriptive-explanatory theory of promising that explains the normativity of promising in first-order moral terms, which is precisely the type of theory weak natural law offers for law.

To be fair, however, I recognize that attacking one of Coleman's examples does not attack his argument, but it does lay a useful foundation for demonstrating why his argument is unavailing. Coleman apparently believes that an explanation for law's ability to create reasons for action falls outside of legal theory because any such explanation would be based on a more general theory of how practical reasons guide action and that theory would be a theory in meta-ethics. That claim, which is the key premise in the argument quoted above, is mistaken for the following two reasons.

First, while a general theory about the nature of practical reasons may be a meta-ethical theory, that does not mean that a separate local theory about how a valid law can provide a unique reason for action does not also exist. The local theory will be ultimately

parasitic on some meta-ethical theory or another, but there is no reason to believe that the local theory is parasitic on a single meta-ethical theory, such that one must find the correct meta-ethical theory before providing an explanation of how the fact that *X* is a law means that one ought to *X*. Rather it would seem to be the case that one could provide a local theory about legal reasons based on certain plausible assumptions about the nature of practical reasons that would be consistent with any number of positions in meta-ethics.

Second, as the example of a theory of promises demonstrates, a proposed local explanation of legal normativity simply would not be a meta-ethical theory. The theory instead would be a “plain old” ethical theory, so to speak. Coleman uses his claim that legal positivism does not commit the “naturalistic fallacy” to change the subject from normative ethics to meta-ethics, which allows him to ignore that the real insight underlying ANL is that one cannot reason about what one ought to do without employing first-order practical reasoning. Even though the so-called “naturalistic fallacy” may invite meta-ethical questions about the nature of morality, the intuition behind it is that descriptive facts alone cannot direct action. But by claiming that natural law objections ask legal positivism to provide a particular meta-ethics, Coleman dodges the actual assertions of defenders of natural law theories concerning the necessity of first-order moral reasoning for explaining how valid laws create reasons for action.

The question posed in Section 2.2.2 above, and again in this section, is how a purely descriptive theory of law could explain why, under the appropriate conditions, the social fact that a given norm is a valid law by itself provides a reason for action. Coleman’s final position on the question is that a legal positivist theory does not have to

answer it but his reasons for that claim are unconvincing. Because he cannot justify his claim that the enquires sought by weak natural law are outside the purview of legal theory, Coleman's defense of legal positivism generally, and methodological legal positivism in particular, fails to provide any reason for rejecting either ASE or ANL. In short, this section demonstrates that just as a theory of promises would be woefully inadequate if it did not address why promises should be kept, a theory of law is inadequate if it does not address why law can provide content-independent reasons for action.

3.5: Leiter

As an introductory matter, Leiter begins his discussion of "methodological positivism" with the unwarranted claim that "[n]ow it is curious that this kind of methodology debate is found nowhere else in philosophy, not even in the domains of practical philosophy" ²⁰⁰ That statement, however, is patently false. There are, for example, deeply contested debates across all disciplines of practical philosophy over not only the existence of but also the contents of so-called "thick terms." ²⁰¹ These are terms that possess both descriptive and evaluative components, and one cannot correctly use a

²⁰⁰ Brian Leiter, "Beyond the Hart/Dworkin Debate," 30.

²⁰¹ Bernard Williams first popularized the notion of "thick concepts" or "thick terms" to describe descriptive terms that can possess additional, context-dependant, evaluative content. Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985), Chapter 8. "Thick terms" are distinguished from "thin moral terms," such a "right and "wrong," that have only evaluative content, and commonly play a prominent role in the work of contemporary virtue theorists and other value pluralists. Debates about "thick terms" include questions over the extent to which the evaluative content is socially conditioned and whether the evaluative aspect of the term can be removed without changing the nature of the term's referent.

“thick term” without understanding both. Examples of thick terms range from classical virtues such as courage, to general terms of disapprobation such as vulgar or rude, to slang and slurs such as racial epithets. The philosophical debates concerning “thick terms” are well outside the scope of this dissertation. Nonetheless, the generally agreed-upon existence of such terms demonstrates that Leiter is simply wrong that the methodological commitments of Finnis, among others, are unique to the philosophy of law.²⁰²

Beyond his attempt to parochialize debates over how to construct a general theory of law, Leiter offers two distinct objections to arguments such as ASE and ANL. The first of these objections, which I call the “Natural City Theory Argument” attempts to show that a theory of law derived by a purely descriptive method is not only possible but required for any moral evaluation of law. As I show below, that objection fails. The second argument attacks all methods in legal theory that do not appropriately heed Quine’s call to naturalism. As I show below, if Leiter is correct on this front, then he would provide an objection not only to both ASE and ANL but also to the methods of every other prominent legal theorist, including Hart’s “methodological positivism.”

3.5.1: The “Natural City Theory Argument”

Leiter’s principle argument against the premises of ASE and ANL analogizes from what is required to provide a descriptive theory of the social phenomenon of cities

²⁰² In fact, law itself may be considered a thick term. For example, Perry states that “[Hart’s] methodological claim is not, presumably, that the concept of law is necessarily non-thick – that we could not have a concept of law that included normative or moral considerations among its identifying criteria -- because there is no good reason to think that such a claim is true.” Stephen R. Perry, “Hart’s Methodological Positivism,” 324.

to what is required to provide a descriptive theory of the social phenomenon of law.

Leiter begins as follows:

If I want to provide an analysis of the concept of a “city,” whatever analysis I proffer had better explain the familiar, shared features of New York and London and Tokyo and Paris. Any analysis of the concept of “city” that doesn’t fit these paradigm instances (what Finnis would call “central cases”) is not an analysis for *our* concept of “city.”²⁰³

Within the context of this assumption, Leiter provides a dialogue between “the Descriptivist,” who argues that a descriptive theory of the city need not involve moral evaluation and the “the Natural City Theorist’ (NCT),” who argues that moral evaluation is required.²⁰⁴

The substance of Leiter’s objection to ASE can be captured by the following claim of the Descriptivist: “[t]o even ask your practical question – ought one to be a city dweller, or a suburbanite, or a farm inhabitant? – we already need to understand the difference between city and suburb and farm. Your practical questions are, themselves, parasitic on a demarcation made based on purely epistemic criteria”²⁰⁵ Leiter’s point appears to be that arguments such as ASN or ANL fail because, as a matter of fact, one must begin with a completely descriptive account of a social phenomenon before

²⁰³ Brian Leiter, “Beyond the Hart/Dworkin Debate,” 35.

²⁰⁴ Ibid.

²⁰⁵ Ibid., 36. Leiter’s Descriptivist also claims that “no project is purely descriptive” because “none of us can deny the Banal Truth that our subject-matter has to be demarcated for empirical inquiry to be possible. . . . We cut the joints of the world with an eye to epistemic values like simplicity, consilience, coherence with out theories, and so forth.” Ibid. This claim merely repeats the objection that Finnis’s methodological arguments conflate the difference between moral and epistemic values, which I discussed above.

ever applying moral argument. This point could be interpreted as a rejection of almost any of the premises of either ASN or ANL.

Whichever premise of whichever argument Leiter's "Natural City" dialogue aims to refute, the dialogue itself demonstrates a substantial misunderstanding of the theoretical project it purports to attack. Leiter begins by assuming that Finnis would consider New York, London, Tokyo and Paris to be "central cases" of a city. As Leiter states in the dialogue, these cities "are paradigm instances of our concept: someone who didn't think New York or Paris were paradigm instances of cities wouldn't be using the concept of 'city' the way we do."²⁰⁶ According to Leiter, those examples are paradigm instances of a city because they best conform to "statistically normal usage."²⁰⁷ As a descriptive matter, which may be as far as theorizing about cities goes, appeals to normal usage are perfectly acceptable exercises in lexicography. However, Finnis's aim for theory of law – an aim explicitly shared by Hart – is also explanatory; that is, he aims for a theory that identifies the unique features of law that one can use to explain whether and to what extent a given social phenomenon can be accurately described as law.

Were a purely descriptive and explanatory theory of a city possible, the participant in Leiter's dialogue may better be described as a "Natural [Kind] City Theorist." For example, were "city" to rigidly designate some property *P* such that for *C* to be a city, *C* must necessarily instantiate *P*, then that fact would provide a basis for describing and explaining attributions of city-ness to particular forms of social

²⁰⁶ Ibid., 35.

²⁰⁷ Ibid.

organization. Moreover, the discovery of *P* could be a purely theoretical endeavor. This possibility, however, would be irrelevant to ASE or ANL because the congregation of people into a city is a relevantly different social phenomenon than the occurrence in a society of law in that it is not part of the nature of a city to provide, or even purport to provide, reasons for human action. The fact that New York is a city while Mayberry is not may be relevant to one's decision of where to live if one must decide between those two locations and one values city life over small town life. That is, the fact that New York is a city does not by itself factor into deliberations about where to live, while the fact that a given norm is a law does factor into decisions about whether to conform one's actions to that norm.

That "city" is not typically a normative term explains why Leiter's objection that one must know what a city is to ask the "Natural City Theorist's" question about whether one ought to live in a city is a misplaced analogy with regard to law. One typically does not reason through the two-step process of first identifying that a given norm is a law and then considering whether there is a reason to obey it. Rather, part of what identifies a given norm as a law is that it has the potential to provide a content-independent reason for action. That a norm is a law of a particular legal system is a descriptive fact that, by itself, has normative implications.

To underscore where Leiter's argument goes wrong, suppose that the typical use of the term "city" did have a normative component, such as "if *X* is a city, then *X* is a place where one should live." In that case, upon determining that *X* is a city, it would be redundant to ask whether one has a reason to live in *X* because it is entailed by *X*'s being a city that one has a reason to live there. That reason need not be infeasible as there

may be a myriad of additional considerations about where one should live that would override it. Nonetheless, one could not identify a given locale as a city without also maintaining that one has a reason to live in that locale. In this case, the “Natural [Law] City Theorist” would maintain that one does not have an adequate theory of what it is to be a “city” until one has an explanation of why cities are places where people should live, and that explanation would require practical reasoning about the various values that determine where one should live. Thus, it is only such a “Natural [Law] City Theorist” that would provide a meaningful analogy to a defender of ASE or ANL.

In the end, Leiter’s “Natural City Theory Argument” fails to appreciate the radical consequences of the claim that it is part of the nature of law that legal prescriptions can provide content-independent reasons for action. Leiter takes for granted that a general theory of law must account for law’s normativity but ignores the consequences of that fact. In particular, Leiter falls into the same trap that ensnares Coleman by suggesting that a theory of law is descriptively adequate if it merely describes the fact that law is normative.²⁰⁸ Leiter does not consider the possibility that a theory of law should be

²⁰⁸ Leiter makes plain his belief that legal theory need only describe law’s normativity by accusing both Finnis and Perry of faulting methodological legal positivists for failing to answer questions that they never purport to ask. According to Leiter, Finnis “lambasts positivism for failing to answer a question it was never asking” and Perry seeks an answer to a question this is “plainly a question the answer to which is not required to give an analysis of the concept of law according to Hart.” *Ibid.*, 29 and 39. The questions he has in mind are “about ‘the authoritativeness, for an official’s or private citizen’s conscience (ultimate rational judgment), of these alleged and imposed [legally valid] requirements,’” and “‘does law in fact obligate us in the way that it purports to do?’”; that is, questions about whether, or how, the law provides reasons for conformity. *Ibid.*, 29 and 39 (citing John Finnis, “On the Incoherence of Legal Positivism,” 1611 and Stephen R. Perry, “Hart’s Methodological Positivism,” 335). According to Leiter, “an ‘analysis’ of legal obligation or the ‘claim’ of authority” are “clearly descriptive” projects

concerned with explaining why law may be normative, and that omission explains why his “Natural City” argument fails as a defense of “methodological legal positivism.”

3.5.2: Leiter’s Naturalism and Conceptual Analysis

This leads to Leiter’s true objection to ASE and ANL, which is to not object to those arguments at all. Rather, Leiter acknowledges the failure of arguments such as the “Natural City Theory Argument,” but for different reasons than those discussed above.

Following Quine, Leiter avers that the traditional defense of Hart’s version of descriptive jurisprudence is fruitless, if not incoherent, because “it relies on two central argumentative devices – analyses of concepts and appeals to intuition – that are epistemologically bankrupt.”²⁰⁹ Without retracing Leiter’s argument, which he only presents in a programmatic manner, one can focus on the consequences of his adopting a Quineian-naturalism: any robust version of conceptual analysis is “epistemologically bankrupt” because there is no distinction between analytic and synthetic truths, while a modest and epistemically defensible version of conceptual analysis, such as that defended

and acceptable for a general theory of law. These comments make it clear that Leiter believes that attempts to explain law’s normativity are not part of legal theory.

²⁰⁹ Ibid., 43-44. As Leiter states in a later paper, for the Quineian-naturalist the worry is not about losing the ability to resolve disputes in general jurisprudence:

The worry, rather, is that intuitions about concepts enjoy no privileged epistemic status, while claims in empirical science do. Even if empirical science does not resolve these disputes, it at least delineates criteria with epistemic weight for adjudicating them. The crucial question, then, becomes whether our best empirical science requires drawing the conceptual lines one way rather than another.

Brian Leiter, “Naturalism in Legal Philosophy,” available at <http://plato.stanford.edu/entries/lawphil-naturalism/> (updated February 20, 2007).

by Frank Jackson, can only provide results that are “strictly ethnographic and local” and cannot deliver “timeless or necessary truths about how things are.”²¹⁰ As Leiter is among those who interpret Hart to be providing a conceptual analysis of law, Leiter’s methodological position rejects not only Finnis’s use of moral reasoning to theorize about the nature of law but also the descriptive jurisprudence of Hart as well.²¹¹

But Finnis, even more than Leiter recognizes, also maintains that Hart’s methodology could only support “ethnographically relative results.”²¹² That failure

²¹⁰ Ibid., 46. In this passage, Leiter references Frank Jackson’s defense of a version of conceptual analysis that supposedly accounts for Quine’s critique of analyticity in practice, if not in principle. Frank Jackson, *From Metaphysics to Ethics: A Defense of Conceptual Analysis* (Oxford: Oxford University Press, 2000), 44-46, and 52-55. The details of Jackson’s version of conceptual analysis are too complicated for a brief presentation. It suffices for present purposes to note that Jackson bases a large part of his defense of conceptual analysis on folk intuitions about how words should be used and the nature of that to which those words refer. Ibid., 31-42 and 46-52. It is primarily the defeasibility of folk theories about how the world really is in light of scientific discoveries to the contrary that invites Leiter’s claim that Jackson’s method derives only ethnographically relative results.

²¹¹ In “Naturalism in Legal Philosophy,” Leiter explicitly states that these criticisms apply equally to the conceptual arguments of Raz, as they do to the positions for the “Soft Positivist” or “natural lawyer.” Brian Leiter, “Naturalism in Legal Philosophy,” available at <http://plato.stanford.edu/entries/lawphil-naturalism/>.

²¹² Although Leiter does not acknowledge it, Finnis begins *Natural Law and Natural Rights* with the following observation:

The subject matter of the theorist’s description does not come neatly demarcated from other features of social life and practice. Moreover, this social life and practice bears labels in many languages. The languages can be learned by speakers of other languages, but the principles on which labels are adopted and applied – i.e. the practical concerns and self-interpretations of the people whose conduct and dispositions go to make up the theorist’s subject-matter – are not uniform. Can the theorist do more, then, than list these varying conceptions and practices and their corresponding labels? Even a list requires some principal of selection of

explains, in part, the need for moral theorizing to provide an explanatory theory of law. To his credit, Leiter recognizes this with his actual, argued-for conclusion that “the methodological positivist like Hart, has two opponents: the Finnis-style critic who thinks epistemic values are not enough to demarcate his subject-matter; and the naturalist critic who thinks epistemic values conjoined with Hart’s dominant methods – conceptual analysis and appeals to intuition – can deliver no more than ethnographically relative results.”²¹³ Leiter then frames what remains of the methodological debate in jurisprudence by noting that “[i]f, with Raz, we take legal theory to be concerned with law’s essential properties, then the methodological question is now vivid: in figuring out *what there (essentially) is*, should we turn to morality or science? I think the answer is clear. But that, alas, is an argument for a different occasion.”²¹⁴

items for inclusion in the list. *And jurisprudence, like other social sciences, aspires to be more than a juxtaposition of all lexicographies conjoined with local histories.*

John Finnis, *Natural Law and Natural Rights*, 4 (emphasis added). In more recent paper, Finnis alludes back to this and the surrounding passage in *Natural Law and Natural Rights*, when admitting that “[m]y concern had much in common with Leiter’s: the concern that conceptual analysis and appeals to intuition can deliver no more than ‘ethnographically relative results,’ a lexicography or ‘glorified lexicography’ or ‘pop lexicography’ whose results are ‘strictly ethnographic and local,’ a ‘banal descriptive sociology of Gallup-poll variety.’” Finnis, “Law and What I Truly Should Decide,” 118-199 (quotations to Leiter’s paper omitted). In fact, Finnis acknowledges his agreement “with much of Leiter’s critique of ‘conceptual analysis.’” *Ibid.*, 125 n.45.

²¹³ *Ibid.*, 51.

²¹⁴ *Ibid.*, 51. Leiter acknowledges that he uses “essential” in the deflationary sense popularized by Quine in “Natural Kinds”, in *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969). I have also omitted a footnote from this quotation to another paper by Leiter, “Moral Fact and Best Explanations,” *Social*

While this dissertation will not consider the merits of Finnis’s methodology in jurisprudence versus the adoption of the methodological naturalism that Leiter endorses, it suffices to note that Leiter’s preferred methodology is not the methodology of Hart, or Raz, or Coleman, or any other prominent member of the legal positivist tradition. Even though he attempts to defend “methodological legal positivism” throughout his paper, Leiter’s position amounts to the rejection of Hart’s method for formulating a general theory of law altogether. Thus, even if Leiter’s claims about naturalized epistemology are correct, that does not provide a defense for “methodological positivism.” Rather, it provides a different reason to reject it.²¹⁵

3.6: Legal Externalism Revisited

Before dismissing the “challenges” of legal positivism altogether, one open question remains: how does weak natural law address the “legal externalist,” discussed in Section 2.2.1 above, who denies that law, qua law, ever provides a reason for action? As addressed above, any debate with the legal externalist comes down to a clash of intuitions that is precisely the type of dispute that drives Leiter to naturalism and others away from philosophy altogether. The best one can do to test the strength of the competing

Philosophy & Policy 18 (2001) 79-101, that argues for the explanatory inertness of moral properties.

²¹⁵ It would be a mistake, however, to assume that Leiter does not defend a particular general theory of law. Rather, Leiter defends “hard positivism” because the “leading social scientific accounts of judicial decision-making . . . demarcate ‘law’ from non-law factors in typical ‘Hard Positivist’ terms, i.e., they generally treat as ‘law’ only pedigreed norms, like legislative enactments and prior holdings of courts” Brian Leiter, “Naturalism in Legal Philosophy,” available at <http://plato.stanford.edu/entries/lawphil-naturalism/>.

intuitions is to offer thought experiments that not only clarify the actual commitments of the competing view but also shift the burden onto those with the competing intuition to explain why it should still be embraced.

What follows is a thought experiment that shifts the burden onto the defender of legal externalism by positing a legal system in which the fact of legal validity alone appears to spawn practical reasons. This thought experiment also bears the additional benefit of demonstrating some of the central commitments of weak natural law.

Consider a society with an ideal legal system; a system of laws that is perfectly just and fully satisfies both the actual needs and the rational wants of its subjects. The laws in this society are perfectly attuned to all of the natural, psychological, and sociological facts of those subject to it as well as every pertinent moral belief and practical consideration. Those who enact laws do so in a timely manner that is responsive to changing circumstances in the society, while those who decide legal disputes do so accurately and justly. From the point of view of one deciding whether to conform to the laws of this society, its laws would always conform to the directions of practical reason.

An example of a possible law in this society demonstrates just how nuanced and attuned to rational decision making the laws of this society would be. Supposing that the perfectly just society would recognize personal property rights in chattel, the laws of that society would have to delimit the extent of those rights and proscribe interferences with the property rights of others. Those rights and proscriptions, however, would only extend so far as practical reason dictates. That could, for example, mean a suspension of one's right to exclude the use of one's property by another, acknowledged by both the private

(tort) and public (criminal) law, when another person is faced with a situation of dire need. Through recognizing such exceptions, illegal looting, and the police enforcement that accompanies it, would not be necessary for people left without supplies essential to survival during a disaster because it would not be illegal to take what you need to survive – and practical reason would advise you are entitled to have.

In light of such a legal system, the question becomes, would it ever be rational not to conform to the laws of that society? To remain consistent with its claim that it is not part of the nature of law to provide content-independent reasons for action, the legal externalist would have to answer that question in the negative. The fact that a norm is a valid law of a given society, by itself, would have no bearing on whether one's decision to break that law, or conform to it for that matter, is rational. There may be strong prudential or instrumental reasons to always obey the law of this hypothetical society, such that disobedience would not, in the end, be rational. Nonetheless, the legal externalist would still claim that the laws of a perfectly just legal system, a legal system that conforms to the mandates of practical reason in every respect, do not provide reasons for action simply because they are valid laws of that system.

That does not seem correct. A legal system that conforms in every way with practical reason would seem to provide reasons for action because those laws would already account for the assorted values and other practical considerations that go into one's decision-making to fullest possible extent the law could. From the point of view of practical reason, there is nothing left for the law to do because it is already providing all of the practical guidance that is in its nature to provide. The defender of legal externalism would have to assert that even in light of a system of law where one subject

to it has no reason to disobey and every reason to obey, it still would be rational to disobey. Any attempt to explain that commitment would require significant practical argument, and I do not see how such an argument would proceed.

Beyond casting doubt on legal externalism, a perfectly just legal system provides a convenient platform for better appreciating the central contribution of weak natural law: it is the ability of law to fulfill some practical goal or purpose that explains how law, as part of its nature, can provide conduct-guiding norms. For Finnis the practical goal would be the resolution of a community's coordination problems in furtherance of the common good, but the appropriate goal could be something else. One need only accept that law can fulfill such a practical role to understand the theoretical value of weak natural law. That theory, when cashed out in the necessary details, both offers an accurate, general description of law and explains why or why not, whether or whether not, law provides reasons for action.

Please note as well that from the point of view of weak natural law not too much should be placed on the "perfectly just" stipulation of this thought experiment. Even assuming that a "perfectly just legal system" is possible, it certainly is not possible in the actual world. More importantly, the ability of law to further the pursuit of valuable human activities is not restricted to the situation in which law does so perfectly. Rather, it is even under the everyday conditions of the "reasonably just" legal system that law can direct conduct in ways that are rational to obey. Understanding precisely why, or under what conditions, the law, qua law, dictates rational obedience requires moral reasoning about what one should do. The recognition that addressing such questions is required to

provide the most complete account of the nature of law is weak natural law's unique contribution to jurisprudence.

3.7: Conclusion

In this chapter I argued that there is no "challenge of methodological positivism" because, given that it is part of the nature of law to create norms of conduct that provide reasons for action simply by being laws, the nature of law cannot be explained without appeal to first-order moral reasoning. As I showed above, the two arguments I presented for that conclusion, ASE and ANL, also provide direct support for weak natural law. The arguments support weak natural law because the perspective of the person who views law qua law as providing practically rational reasons for action, and is practically rational in that judgment, ultimately creates the "central case" of law that distinguishes weak natural law from other theories in the natural law tradition.

In conclusion, because weak natural law accepts that moral argument is necessary to explain law's normativity and, as I demonstrated in Chapter 2, also provides a descriptively accurate account of legal validity, weak natural law is a general theory of law that is more explanatorily fruitful and at least as descriptively accurate as the legal positivist theories considered in this dissertation. As I demonstrated throughout this dissertation, the objections from the legal positivist tradition to natural law theories simply do not provide objections to weak natural law, and, for all of reasons discussed above, there is no "challenge of legal positivism."

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