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Legal positivism and the real definition of law

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ABSTRACT

We explore an underappreciated tension at the heart of the debate over legal positivism. On the one hand, many legal philosophers aspire for the debate to tell us what law is, and the nature of law. But on the other hand, the positions in the debate are generally formulated such that they're about something else: what law is necessarily connected to or dependent on. This is a genuine tension, because theses about what law is necessarily connected to or dependent on do not by themselves state or automatically settle what law is or the nature of law. This tension prompts us to propose a new approach to formulating positivism and antipositivism as theses about the *real definition* of law. Our proposal is simple, but fruitful. We argue that it better *insulates* and *unifies* the debate: that is, it prevents orthogonal theses from trivially vindicating or falsifying positivism and antipositivism, and it explains how different threads of the existing debate contribute to a single topic. We close by briefly considering two recent arguments about exclusive positivism (one against, by Scott Hershovitz, and one for, by Scott Shapiro), to illustrate how our discussion bears on contemporary jurisprudential debates.

Introduction

A central and longstanding debate in legal philosophy concerns the idea of legal positivism. Put roughly, what positivists deny, and what antipositivists affirm, is that the law has a (particular kind of) fundamental connection to morality. To illustrate, compare the most influential twentieth-century examples of each view. In *The Concept of Law*, H.L.A. Hart puts forward a theory on which law is a union of primary rules and secondary rules (i.e., rules about rules).[1] Among the secondary rules is the "rule of recognition", which states what properties a rule must have to be a part of the law in a given legal system.[2] Hart argues for a positivist position concerning the rule of recognition, on which the existence and content of a rule of recognition in a given context is ultimately

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[1]H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 1961/2012). The only twentieth-century defense of legal positivism which could rival Hart's for impact and significance is Hans Kelsen, *Pure Theory of Law* (University of California Press 1934/1967).

[2]In this paper, single quotation marks (e.g. 'cat') are used strictly to mention linguistic items. Double quotation marks (e.g. "cat") are used for a variety of tasks including quoting others' words, scare quotes, introducing terminology, and mixes of use and mention. Terms in small caps (e.g. CAT) pick out concepts. Italics are used for rhetorical stress.

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determined by contingent social practices of legal officials, and not by any moral criteria.[3] Ronald Dworkin offers a sharp contrast to this view in *Law's Empire*, where he advances an antipositivist view of law.[4] Dworkin argues that the law of a given jurisdiction is ultimately determined by what best morally justifies the totality of the relevant legal practices in that jurisdiction, where adequately "fitting" those practices is one aspect of that justification.[5] According to Dworkin, the moral facts that partly determine what counts as the best overall "justification" of these practices are relevant not because of the obtaining of contingent social facts, but because of what law *is* as such.

Running through the history of the debate over positivism is an ongoing issue: how should we understand the core commitments of positivism and antipositivism? In recent years, there has been increased explicit attention to this issue, in part motivated by the thought that this reflection might aid those involved in the debate.[6] In this spirit, we aim to make a contribution to such reflection by discussing an underappreciated tension between (a) the *aspirations* that many legal philosophers have for the debate over positivism and (b) the leading recent *formulations* of positivism and antipositivism. This tension can be summed up as follows. On the one hand, legal philosophers routinely state that the debate over positivism aspires to tell us *what law is* or *the nature of law*. (As we will discuss later, *what law is* and *the nature of law* are arguably related but distinct issues.) On the other hand, legal philosophers commonly formulate positivism and antipositivism in terms of *modality* or *dependence*. On these formulations, the core issue is whether law has a certain kind of *necessary connection* to morality or whether law is partly *dependent* on morality. The tension here is simple. Plausibly, what X *is* and what X is *necessarily connected to* or *dependent on* can come apart. Put otherwise, whether morality is in some sense part of the nature of law may not be settled by claims about necessity or dependence alone.

In this paper, we aim to explain this problem, and then propose a solution.[7] Our solution relies on the idea of a *real definition*: that is, a definition of something in the world (e.g., an object), as opposed to a word or concept that denotes that thing. The idea of "real definition" dates back to Aristotle, but fell out of favour in much of twentieth-century philosophy. It has been resuscitated in recent work in metaphysics.[8] We argue that by

[3]Our gloss of Hart's view here closely parallels the basic Leslie Green, 'Introduction' in H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012), Scott Shapiro, 'The Hart- Dworkin Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007), and Stephen Finlay and David Plunkett, 'Quasi-Expressivism about Statements of Law: A Hartian Theory' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law Vol 3* (2018).

[4]Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

[5]Our gloss of Dworkin's position in *Law's Empire* here closely parallels the ones given in Mark Greenberg, 'How Facts Make Law' in Scott Hershovitz (ed), *Exploring Law's Empire : The Jurisprudence of Ronald Dworkin* (Oxford University Press 2006) and Scott Shapiro, *Legality* (Harvard University Press 2011). We present "fit" as an aspect of justification, in line with Greenberg's reading of Dworkin's views in Greenberg, 'How Facts Make Law'. Some, like Sam Shpall, 'Dworkin's Literary Analogy' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019), treat "fit" as explanatorily independent of justification.

[6]For example, see John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 American Journal of Jurisprudence 199, Greenberg, 'How Facts Make Law', David Plunkett and Scott Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (2017) 128 Ethics 37, and David Plunkett, 'Robust Normativity, Morality, and Legal Positivism' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and General Jurisprudence* (Oxford University Press 2019).

[7]A version of this problem is briefly mentioned, then put aside, in Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry', 38 and Plunkett, 'Robust Normativity, Morality, and Legal Positivism', 108.

[8]For recent discussions, see Kit Fine, 'Essence and Modality' (1994) 8 Philosophical Perspectives, Gideon Rosen, 'Real Definition' (2015) 56 Analytic Philosophy 189, and Fabrice Correia, 'Real Definitions' (2017) 27 Philosophical Issues

formulating the views of positivism and antipositivism as rival claims about the real definition of law, the debate over positivism can be understood as squarely about *what law is* and *the nature of law*. Moreover, we argue that our way of thinking about what "positivism" and "antipositivism" consist in is compatible with a range of other, independently attractive ideas about how to best formulate these theses. In short, this is because our proposal is a schematic one that can incorporate a wide range of further views about the nature of "positivism" and "antipositivism".

The proposal we put forward centres on an important matter about how to best understand "positivism" and "antipositivism": namely, what "connection" between law and morality is at issue in the debate. Our answer is that the central connection concerns real definition. By appealing to real definition, we depart from existing answers that appeal *solely* to other relations, such as ones concerning necessity, identity, reduction, and grounding. On our view, some (or perhaps all) of these relations play a role in the debate over positivism. But the main issue, we argue, concerns the real definition of law.

In defending this view, our goal is to put forward philosophically fruitful ways of understanding "positivism" and "antipositivism". We think that legal philosophers should adopt our formulations of "positivism" and "antipositivism" given the philosophical payoff of doing so.[9]

We've already advertised one major payoff of adopting our proposal: namely, it resolves the tension we identify between common *aspirations* for the debate over positivism and leading recent *formulations* of positivism and antipositivism. Our proposal has three further major advantages. First, we argue that it promises to appropriately *insulate* the debate in an attractive way. That is, it explains why positivism cannot be easily vindicated or falsified by commitments about something other than law (e.g., about morality) that in some suspiciously indirect way concern what law is necessarily connected to or dependent on. Second, our account promises to *unify* a range of existing discussions about "positivism" that, at least on face value, seem to concern different philosophical issues. We grant that there are indeed different issues here, but explain how some of the central ones, which also concern the metaphysics of law, fit together as contributions to a single debate. Finally, our proposal makes new theoretical options and resources available in ways that make a difference to the contemporary debate about the metaphysics of law. To illustrate, we show how our proposal puts us in a better position to evaluate recent arguments from Scott Hershovitz and Scott Shapiro about "exclusive legal positivism" (a kind of legal positivism that we will explain in more detail below).

Our project is limited in three important respects.

First, our proposal does not aim to fully capture all the ways in which philosophers have discussed "positivism" and "antipositivism". This point connects to the fact that our proposal is not a descriptive one about the current meanings of words, but rather

52. For a helpful overview of different ways of thinking about "real definition", and the relation of these kinds of definitions to other kinds offered in philosophy (e.g., those focusing on words or concepts), see Anil Gupta, 'Definitions' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy (Summer 2021 Edition)* (2021).

[9]Insofar as our proposal involves a claim about how philosophers should use the terminology of 'legal positivism' and 'legal antipositivism', it can be seen partly as one in "conceptual ethics". This is in the sense of "conceptual ethics" that (roughly) refers to normative and evaluative issues about thought and talk, such as issues about which concepts we should use, and why, or what it would be good to mean by our words, and why. See Alexis Burgess and David Plunkett, 'Conceptual Ethics I' (2013) 8 Philosophy Compass 1091 and Alexis Burgess and David Plunkett, 'Conceptual Ethics II' (2013) 8 Philosophy Compass 1102.

a normative one about how we should best formulate theses for the purposes of philosophical inquiry.

Second, we aim to show that philosophers should adopt our view of what "positivism" and "antipositivism" amount to only in certain contexts, given certain goals many philosophers have (or at least should have) in those contexts. (This limitation is familiar from arguments about how philosophers should use other pieces of terminology, such as 'physicalism' in philosophy of mind, 'meaning' in philosophy of language, or 'morality' in ethics.[10]) As such, we don't mean to put forward a view about how *all* contemporary legal philosophers (let alone intellectual historians, sociologists, etc.) in *all* contexts should formulate the theses of "positivism" and "antipositivism". Rather, we aim to target those parts of the contemporary discussion where a certain level of precision really matters, given the aim of inquiry about the metaphysics of law. The idea that such precision might often matter in the debate over legal positivism resonates with a recurring theme in the history of the philosophy of law. This theme is that important arguments in the positivism debate suffer from a lack of clarity about what exactly these arguments are *about*.[11] We are sympathetic to this idea, and our aim here is partly to vindicate it. We argue that by thinking about legal positivism and legal antipositivism as rival views about the real definition of law, we can better evaluate important arguments in the debate over positivism.

Third, our proposal only responds to *one* important issue about how to understand the debate over positivism: namely, the issue of what connection or relation is centrally at stake. For the purposes of this paper, we remain neutral on a range of other important issues about how to best formulate "positivism" and "antipositivism". To get a sense of what some of those issues are, consider the issue of which *relata* legal positivism and antipositivism concern. For example, some take legal positivism to be a thesis about both legal institutions *and* legal content (e.g., the actual laws of a legal system), whereas others argue that it only concerns legal content.[12] Some think positivism is best formulated (as we have done so far) in terms of a relation between law and *morality*, which is how the position is often stated.[13] Others appeal to a relation between law and *normativity* or *value* or *merit*.[14] Still others appeal to a relation between law and a kind of normativity that is "authoritative" or "robust".[15]

[10]For more on this, see Burgess and Plunkett, 'Conceptual Ethics I' and Burgess and Plunkett, 'Conceptual Ethics II'.

[11]For some statements of this idea, see Hart, *The Concept of Law,* Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979/2002), Gardner, 'Legal Positivism: 5 1/2 Myths', Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 Ethics 278, Shapiro, *Legality*, and David Plunkett, 'Legal Positivism and the Moral Aim Thesis' (2013) 33 Oxford Journal of Legal Studies 563.

[12]For example, Shapiro, *Legality* goes with the former option and Greenberg, 'How Facts Make Law' with the latter one. Note that there are then, unsurprisingly, further debates about how to understand what exactly "legal content" itself is. For further discussion, see David Plunkett and Daniel Wodak, 'The Disunity of Legal Reality' (Forthcoming) Legal Theory.

[13]See, for example, Shapiro, *Legality*.

[14]For example, see Gardner, 'Legal Positivism: 5 1/2 Myths' and Greenberg, 'How Facts Make Law'.

[15]See Plunkett, 'Robust Normativity, Morality, and Legal Positivism' for this proposal, along with earlier brief discussion in Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry', 58. Put roughly, "authoritative" or "robust" normativity can be understood as the kind of normativity that concerns what we *really and truly* should do, think, or feel. (See Tristram McPherson, 'Authoritatively Normative Concepts' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics Vol 13* (Oxford University Press 2018), Tristram McPherson and David Plunkett, 'The Nature and Explanatory Ambitions of Metaethics' in Tristram McPherson and David Plunkett (eds), *The Routledge Handbook of Metaethics* (Routledge 2017), and Daniel Wodak, 'Fictional Normativity and Normative Authority' (2018) 49 Canadian Journal of Philosophy 828 for some general recent discussions about this kind of normativity.) Note that a focus on this kind of normativity (or a connected kind of value, which concerns, put roughly *what is really and truly* valuable, good, etc.) is plausibly the best way to interpret some accounts of positivism and

That said, we can't remain neutral on everything. One issue that we don't remain neutral on is this: like many others, we take positivism and antipositivism to be descriptive claims about what law *is* rather than prescriptive claims about what it *ought to be*.[16] We leave open whether (and, if so, how) the core tension that animates this paper – between aspirations for and formulations of positivism and antipositivism – arises for those who treat the views as prescriptive rather than descriptive.[17]

The roadmap for the paper is as follows. In Section 1, we discuss widely held aspirations for the debate over positivism and antipositivism. In Section 2, we outline the most common recent formulations of positivism and antipositivism. In the next two Sections (3 and 4), we argue that there is a genuine tension between these aspirations and formulations. In short, we argue that, absent defending certain controversial auxiliary theses, there are general philosophical reasons to expect a gap between the nature of X and what X is necessarily connected to or dependent on (Section 3), as well as a gap between the nature of *law* and claims about modality or dependence that feature in common formulations of positivism and antipositivism (Section 4). In Section 5, we introduce and explain our positive proposal, which involves formulating positivism and antipositivism as rival claims about the real definition of law. In Section 6, we consider an important objection from those who are skeptical of the idea of "real definition" in general. In Section 7, we discuss two important advantages of our proposal: that it *insulates* the positivism debate from being trivially resolved by orthogonal theses (i.e., by theses that aren't about law itself); and that it *unifies* the myriad issues explored within the positivism debate. Finally, in Section 8, we discuss two recent arguments about exclusive legal positivism – one against it, from Scott Hershovitz, and one for it, from Scott Shapiro – in order to illustrate how our proposal can make a difference in contemporary debates in legal philosophy.

1. The aspirations of the debate over legal positivism

In the introduction, we stated that many legal philosophers aspire for the debate over positivism to tell us (a) *what law is* or (b) *the nature of law*. In this section, we make the case that this is a *very* common aspiration, frequently expressed by positivists and antipositivists alike.

antipositivism (including perhaps those in Gardner, 'Legal Positivism: 5 1/2 Myths' and Greenberg, 'How Facts Make Law'), even if they are not explicitly stated using this terminology.

[16]In taking positivism and antipositivism to be descriptive, we follow a range of recent work in legal philosophy, including, for example, Hart, *The Concept of Law,* Gardner, 'Legal Positivism: 5 1/2 Myths', Greenberg, 'How Facts Make Law', Shapiro, *Legality*, Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007), Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 Oxford Journal of Legal Studies 683, Plunkett, 'Legal Positivism and the Moral Aim Thesis', Mitchell Berman, 'Of Law and Other Artificial Normative Systems' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019), and Leslie Green and Thomas Adams, 'Legal Positivsm' (2019) URL = <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>. The Stanford Encyclopedia of Philosophy (Winter 2019 Edition), Edward N Zalta (ed). It should be noted that, as one of us (Plunkett) underscores in David Plunkett, 'Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute Over Legal Positivism' (2016) 22 Legal Theory 205, taking the thesis of legal positivism to be a purely descriptive one doesn't preclude the idea that the *debate* about it might involve many normative issues, including (perhaps) normative ones about what the term 'law' should refer to.

[17]See Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Cavendish Publishing 2004) on "prescriptive" legal positivism, according on which "legal positivism" is a normative view about what law *ought* to be. We set this aside, along with descriptive formulations of positivism that are (at least partly) epistemological instead of purely metaphysical. For discussion and references for such formulations, see Samuele Chilovi and Daniel Wodak, 'On the (in)significance of Hume's Law' (2021) Philosophical Studies.

To illustrate how often this aspiration is expressed, we can start by considering the two *Stanford Encyclopedia of Philosophy* entries that discuss positivism at length. One, called "The Nature of Law", by Andrei Marmor and Alex Sarch, discusses "legal positivism" as one of the most important positions in the debate on that titular topic.[18] The other, called "Legal Positivism", by Leslie Green and Thomas Adams, describes positivism as a "thesis about the nature of law".[19]

By proceeding in this way, these authors follow a standard way in which positivists have presented their views. Consider, for example, that Thomas Hobbes – who endorses a form of positivism – refers to "the nature of written Law", "the nature of a Law", and "the nature of the Law" in defending his view.[20] Similar language runs through more recent work by those defending forms of positivism. Here are six examples. First, Hans Kelsen describes his "pure theory of law" as "a general theory of law", which as such "seeks to discover the nature of law itself".[21] Second, in the opening pages of *The Concept of Law*, Hart states that the perplexing question at issue in the book is "what is law?".[22] Third, Green writes that the value of jurisprudential inquiry such as Hart's stems from the fact that we "want to understand the nature of law".[23] Fourth, Raz says that "legal philosophy is an inquiry into the nature of law".[24] He also states that legal theory, at least of the kind that is a key focus in work on "general jurisprudence", is "an exploration of the nature of law".[25] In a similar vein, he also writes that "a theory of law is successful if it meets two criteria: first, it consists of propositions about the law which are *necessarily* true, and second, they *explain* what the law is".[26] Fifth, Scott Shapiro writes in *Legality* that general jurisprudence is about the core question "what is law?", and to address this question "is to inquire into the fundamental nature of law".[27] Shapiro takes positivism and "natural law theory" (which is Shapiro's way of talking about "antipositivism" in *Legality*) to be the two main competing theories in that inquiry.[28] And finally, Brian Leiter describes "positivism as a theory of the nature of law".[29] These examples make clear that many positivists at least *express* the aspirations for the debate over positivism that we introduced.

[18]Andrei Marmor and Alex Sarch, 'The Nature of Law' (2019) URL = <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/>. The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N Zalta (ed).
[19]Green and Adams, 'Legal Positivsm'.
[20]Thomas Hobbes, *Leviathan* (Cambridge University Press 1651/1996) 268, 359, 190.
[21]Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941), 55 Harvard Law Review 44 44. For connected discussion by Kelsen, see Kelsen, *Pure Theory of Law*.
[22]Hart, *The Concept of Law*, 1.
[23]Leslie Green, 'Introduction' in H.L.A. Hart, *The Concept of Law* (3rd edn)', 1iii.
[24]Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison: Joseph Raz' (1998), 251 4 Legal Theory 249 251.
[25]Joseph Raz, 'Can there be a Theory of Law?' in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Pub. 2005) 1.
[26]Ibid, 324. This second point about "what the law is" can plausibly be read as intimately bound up with giving an account of the "nature" of law. To reinforce this idea, consider Julie Dickson's statement (drawing on Raz) that "A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the *nature* of law." Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) 17, "emphasis ours".
[27]Shapiro, *Legality*, 8.
[28]Note that Shapiro's more recent views about the nature of positivism and its relation to general jurisprudence in Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' paint a more complicated picture than the one we are sketching here.
[29]Brian Leiter, 'Why Legal Positivism (Again)?' (2013) URL = https://ssrn.com/abstract=2323013 U of Chicago, Public Law Working Paper No 442 15. See also ibid, 2.

Antipositivists, and others who are critical of positivism, express similar aspirations for the debate. Here are four examples. First, Nicos Stavropoulos introduces Dworkinian "interpretivism" about law (a kind of antipositivist view that Stavropoulos also supports) as being "about the nature of law".[30] Second, natural law theory (also a kind of antipositivist view) is often framed as a view about the nature of law. This is true in the work of Michael Moore.[31] It is also reflected in the title of Jonathan Crowe's recent book, *Natural Law and the Nature of Law*.[32] Third, Lon Fuller makes multiple references to the 'nature of law' in evaluating legal positivism.[33] And, finally, Robert Alexy treats his rejection of positivism as a thesis about the "nature" and "definition" of law.[34]

We hope this overview shows that it is fairly orthodox to treat positivism and antipositivism as aspiring to tell us what law is or what its nature is.[35]

Interestingly, even those with unorthodox views concerning key issues in general jurisprudence often embrace these same aspirations for the debate over positivism. Consider Frederick Schauer's discussion of the view that general jurisprudence should be an inquiry into what is *typically* true of law, rather than what *must* be true of all instances of it.[36] Given this, one might think Schauer would deny that positivism is a thesis about the nature of law. Yet Schauer takes great pains to insist that his inquiry into what is typically true of law (which concerns theses like positivism as part of that inquiry) still concerns the "nature of law", properly understood.[37] We think this speaks to the fact that the aspirations we've been discussing are deeply ingrained in the positivism debate.

A final note before we move on. One might be inclined to deny that positivism aspires to tell us what the nature of law is, given that positivism is sometimes presented in connection with questions about the concept LAW, rather than about law itself. Hart's title, after all, was *The Concept of Law*. That title, however, is misleading in terms of what we actually find in the book. In *The Concept of Law*, Hart makes many *object-level* claims about law itself, not just about the concept LAW.[38] Like many others, we think that many legal philosophers have (rightly or wrongly) used conceptual analysis to help them discover the nature of law. Raz argues that this is true of Hart.[39] It's also the

[30]Nicos Stavropoulos, 'Interpretivist Theories of Law' in Enrique Villanueva (ed), *Law: Metaphysics, Meaning, and Objectivity: Social, Political, & Legal Philosophy, Volume 2* (Editions Rodopi 2007) 3. It should be noted that, interestingly, Dworkin himself doesn't often describe his view as one about the "nature" of law. This likely has something to do with the complicated ways in which his views relate to the project of general jurisprudence, and to metaphysics. It's beyond the scope of this paper to explore the issues here in depth. However, we should note that the issues here will depend in part on how metaphysically "loaded" or "heavyweight" one takes talk of "real definition" to be, and how that connects to Dworkin's philosophical commitments.

[31]See Michael S. Moore, 'Law as a Functional Kind' in Robert P. George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992) and Michael S. Moore, 'Law as Justice' (2001) 18 Social Philosophy and Policy 115.

[32]Jonathan Crowe, *Natural Law and the Nature of Law* (Oxford University Press 2019).

[33]See, for example, Lon Fuller, *The Morality of Law* (Yale University Press 1969) 53, 95, 115.

[34]Robert Alexy, 'The Dual Nature of Law' (2010), 167 23 Ratio Juris 167 167.

[35]"Fairly orthodox" does not mean universal. For example, as we noted above, there are also prescriptive legal positivists, who won't share these aspirations.

[36]Frederick Schauer, *The Force of Law* (Havard University Press 2015).

[37]Ibid. See also Frederick Schauer, 'On the Nature of the Nature of Law' (2012) 98 Archiv für Rechts- Und Sozialphilosophie 457.

[38]See Leslie Green, 'Introduction' in H.L.A. Hart, *The Concept of Law* (3rd edn) for connected discussion.

[39]See Joseph Raz, 'Can there be a Theory of Law?' in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005) 324-325.

approach Shapiro explicitly takes in *Legality*.[40] And Jules Coleman defends the use of this tool in jurisprudence more generally as follows: "The aim of conceptual analysis is to retrieve, determine, or capture the content of a concept in the hopes that by doing so, we will learn something interesting, important, or essential about the nature of the thing the concept denotes".[41]

Of course, some may question whether conceptual analysis is a particularly good method for helping us discover the nature of law. This questioning connects to the following general point: the aspirations of the positivism debate can constrain the methods used within the debate. That point comes up throughout the debate over positivism. For example, Dworkin argues that it is hard to see how the *methods* Hart and Raz use for doing legal philosophy really could be used to help discover the nature of law. He writes: "How could induction from a thousand very different cases of legal institutions, and from the varying motives and assumptions of thousands of actors in different times and places, reveal the "essence" or "very nature" of law's structure?"[42] To take another example, Leiter argues that the sort of investigation that would illuminate the nature of law is essentially a social scientific one, which he takes to be importantly different from the sort of armchair metaphysics that he thinks legal philosophers often (mistakenly) engage in when debating legal positivism.[43]

We take no stand in this paper on whether Dworkin and Leiter are right about these methodological points, or on the issue of how helpful conceptual analysis is for discovering the nature of law. Our concern lies elsewhere. Given how often legal philosophers describe the debate over positivism as being about "the nature of law", one might expect this aspiration to be reflected in the explicit ways in which positivism and antipositivism are commonly formulated. But as we'll now see, the most common formulations aren't explicitly about the nature of law. They are about related but distinct issues.

2. Formulations of positivism and antipositivism

One of the earliest influential formulations of positivism in modern philosophy comes from John Austin. On Austin's view, positivism is the claim that "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry".[44] Here, Austin is illustrative of a general tendency to leave ambiguous exactly what relation between law and morality (or merit, etc.) is being asserted or denied. On this front, consider here also Raz's influential "social thesis", according to which "what is law and what is not is a matter of social fact".[45] Raz describes this thesis as "the most fundamental" thesis for legal positivism, which provides "the foundation of positivist thinking about

[40]In *Legality*, Shapiro claims that the way to answer the question "what is law?" (which he takes to be a metaphysical question) fundamentally involves doing "conceptual analysis". Shapiro, *Legality* (chapter 1).

[41]Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Clarendon law lectures, Oxford University Press 2001) 179. See also Andrei Marmor, 'Farewell to Conceptual Analysis (in Jurisprudence)' in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (Oxford University Press 2013) 216 for connected discussion.

[42]Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 215.

[43]Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 Oxford Journal of Legal Studies 663.

[44]John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press 1832/1995) 157.

[45]Raz, *The Authority of Law: Essays on Law and Morality*, 37.

the law".[46] There are different potential ways of unpacking this thesis. As Raz notes, "the variety of social theses supported by positivists are various refinements and elaborations of this crude formulation".[47]

There is a clear sense in which we should expect any highly general account of what ideas lie at the foundations of "positivist" thinking about the law to allow for a high degree of flexibility in terms of how they are further fleshed out. After all, given that many different philosophers, with different philosophical commitments, have contributed to this line of thinking, it would be surprising if the general thesis that they all endorsed wasn't fairly schematic, like Raz's initial statement of the "social thesis".

In some contexts, a schematic account of a key philosophical thesis is fine. But precision matters for many philosophical purposes. Without a sufficient grasp of what a given thesis *is*, it can be hard to know what would count as a good argument for or against it, as opposed to for or against some nearby and superficially similar thesis. This becomes especially important when (as is the case in many parts of philosophy of law) more nuanced versions of views emerge, and where the differences between views can become subtle yet significant.

Philosophers of law have offered more precise formulations of positivism than Austin's famous statement and Raz's initial schematic statement of his "social thesis". The two dominant ways of formulating positivism and antipositivism with greater precision appeal to relations of (a) modality or (b) dependence.

The most famous modal formulation is Hart's influential idea that legal positivism is a thesis about the separation between law and morality. Hart puts this thesis as follows: "there is no necessary connection between law and morals or law as it is and ought to be".[48] Hart also states the main idea, which has become known as his "separability thesis", as the claim "that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so".[49] What *necessary* connections there are between law and morality is a modal issue.

Modal formulations of positivism and antipositivism face significant problems (some of which we discuss in Section 4). The main alternative to such formulations appeals to relations of "dependence" (or related notions of "determination"). Consider, for example, John Gardner's influential claim that positivism is the thesis that "[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)".[50] To take another example, consider Shapiro's formulation of positivism as the thesis that "all legal facts are ultimately determined by social facts alone".[51] He contrasts this view with "natural law theory", which, according

[46]Ibid, 37–38.
[47]Ibid, 37.
[48]H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71, 185–186 Harvard Law Review 61.
[49]Hart, *The Concept of Law* . The practice of calling this Hart's "separability thesis" stems from Jules L. Coleman, 'Negative and Positive Positivism' (1982) 11, 140–141 Journal of Legal Studies 139 140. See Leslie Green, 'Positivism and the Inseperability of Law and Morals' (2009) 83 New York University Law Review for further discussion of the history of Hart's idea, and for critical discussion. As has been noted by others, the "separability thesis" is sometimes understood to be a modal claim, and sometimes "taken to be the claim that the definition of the concept of law should be morality-free" Klaus Füsser, 'Farewell to 'Legal Positivism': The Separation Thesis Unraveling' in Robert P. George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press 1996) 121.
[50]Gardner, 'Legal Positivism: 5 1/2 Myths', 199.
[51]Shapiro, *Legality*, 27.

to Shapiro, holds that legal facts "are ultimately determined by moral *and* social facts".[52]

In some cases in philosophy, "dependence" or "determination" talk is used to pick out modal relations, such as ones of supervenience.[53] In other cases, it's used as a sort of placeholder phrase that could be fleshed out in different ways. However, in much of contemporary philosophy, this kind of talk is used to pick out *explanatory* metaphysical issues. Drawing on this usage, a number of philosophers who invoke ideas of "dependence" or "determination" (or related ideas of "fundamentality", etc.) make explicit that these kinds of explanatory metaphysical issues are the ones they want to target when characterising the debate over positivism. One such example is Shapiro, whose formulations of positivism and natural law theory we just glossed above. Or consider here Gideon Rosen, who takes the debate over positivism to concern an issue about what "grounds" the legal facts, where "grounding" is an explanatory metaphysical relation.[54] Or, to take one more example, consider Mark Greenberg's account of what's at issue in the debate over positivism. He writes that "the determination relation with which we are concerned is primarily a metaphysical, or constitutive, one […]: the law-determining practices make the content of the law what it is. To put it another way, facts about the content of the law ("legal-content facts") obtain in virtue of the law-determining practices".[55] Greenberg's use of "in virtue of" and "making" are explicitly meant to pick out explanatory metaphysical relations. In what follows, we stick with this practice and take "determination" and "dependence" to concern explanatory issues in metaphysics, such as issues about what grounds what.[56]

One final point about recent formulations of legal positivism will prove important later. It is widely accepted in the contemporary literature that such formulations must encompass both *inclusive* and *exclusive* positivism. Put roughly (using a determination-based formulation), inclusive positivism is the idea that moral facts can help determine the relevant legal facts (e.g., the facts about legal content), but only contingently, in virtue of the obtaining of certain social facts in a given context. Exclusive positivism denies that moral facts can help determine the relevant legal facts in this way. The (perceived) need to formulate positivism to encompass both views has led a number of recent legal philosophers who invoke "determination"-based formulations

[52]Ibid, 27.

[53]See Greenberg, 'How Facts Make Law' and Selim Berker, 'The Unity of Grounding' (2018) 127, n. 8 Mind 729 for discussion of such uses.

[54]Gideon Rosen, 'Metaphysical Dependence: Grounding and Reduction' in Bob Hale and Aviv Hoffmann (eds), *Modality: Metaphysics, Logic, and Epistemology* (Oxford University Press 2010). For other recent formulations of legal positivism and antipositivism in terms of grounding, see David Plunkett, 'A Positivist Route for Explaining How Facts Make Law' (2012) Volume 18 Legal Theory 139, Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry', Samuele Chilovi and George Pavlakos, 'Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25 Legal Theory 53, and Samuele Chilovi, 'Grounding-based Formulations of Legal Positivism' (2020) 177 Philosophical Studies 3283.

[55]Greenberg, 'How Facts Make Law', 226.

[56]Some legal philosophers might here be put off by the idea that these relations are "metaphysical", given what they take "metaphysics" to involve. For us, the crucial idea is that the relations concern *object-level* issues (about the law itself) rather than *representational-level* issues (about legal thought and talk). Note that there are then further questions about exactly how to best interpret such object-level claims, including whether or not they involve any "heavyweight" metaphysical commitments.

of positivism to the idea that positivism is a thesis about what *ultimately* explains legal facts.[57] Put roughly, the idea is that all positivists claim that social facts alone "ultimately" determine the legal facts, whereas antipositivists claim both social facts and moral facts do so. Philosophers who use "ultimately" in such formulations explicitly do *not* mean it in a common, straightforward sense (since positivists almost all agree that the relevant social facts depend on further, more basic facts, such as facts about mental states or physics).[58] This leads to difficult questions about how exactly to unpack this place holder idea of "ultimacy", or, if that can't be done in a satisfactory way, how else to incorporate the idea of inclusive positivism.[59]

We've only scratched the surface of the complexities raised by modal or dependence-based formulations. But our main aims in this section have been modest. They have been to show that (a) these are the relations that legal philosophers have invoked when giving formulations of positivism and antipositivism and (b) neither is stated *directly* in terms of "what law is" or "the nature of law".

3. Is the tension merely apparent?

So far, we've seen that legal philosophers use some bits of metaphysical ideology (e.g., when making claims about "what law *is*" or about "the *nature of* law") to state their aspirations for the debate over positivism, then use *other* bits of metaphysical ideology (e.g., "necessity" or "dependence") to explicitly formulate the positions in that debate. These different bits of metaphysical ideology are not equivalent. So there's at least a *prima facie* tension between these aspirations and formulations. The important question, to which we turn in this section and the next, is whether that tension is real or merely apparent. We argue that it is real, and that it matters for doing careful work on the metaphysics of law.

To build our argument, we'll start by considering the best case for our opponent. If one wanted to show that this tension is merely apparent, one's best option would be to show that the relevant distinct bits of metaphysical ideology we've been discussing are in fact equivalent, or else that the facts about one topic fully settle the facts about the other. This would involve showing that facts about the nature of X consist in, or are fully settled by, facts about modality or dependence involving X. If that were true, the positivism debate can aspire to tell us what the nature of law is, and can successfully do so via theses that concern modality or dependence.

We think that there are general philosophical reasons, to which we now turn, for why such commitments are hard to defend. These reasons may not be conclusive. But we think they suffice to show that such commitments should not structure the debate over positivism. Put differently, we think recent discussions in general metaphysics provide good arguments for thinking that the relevant claims about modality or dependence alone neither state nor fully settle claims about the nature of things. These points

[57]See Greenberg, 'How Facts Make Law', Shapiro, *Legality*, Plunkett, 'A Positivist Route for Explaining How Facts Make Law', and Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry'.

[58]This point is stressed in both Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' and Plunkett, 'Robust Normativity, Morality, and Legal Positivism'.

[59]For some recent discussions, see Plunkett, 'Robust Normativity, Morality, and Legal Positivism' and Chilovi, 'Grounding-based Formulations of Legal Positivism'.

support the thought that the tension we identified is more than merely apparent. But they also reveal something else: for one to take the nature of X to consist in, or be fully settled by, facts about modality or dependence involving X, one must take on controversial auxiliary theses in general metaphysics. And we think such theses should not be baked into formulations of positivism and antipositivism.

To begin, consider the first paragraph of Rosen's "Real Definition":

> The old Socratic questions—What is Justice? What is courage?—call for definitions, not of words or concepts, but of things. To answer the question "What is courage?" in the intended sense is not to say what the English word "courage" means, or what passes before the mind when we think of courage. It is to say what it is for a person to be courageous—to identify that in which the courage of the courageous person consists—by specifying non-trivial necessary and sufficient conditions for courage *somehow grounded in the nature of courage itself*.[60]

A real definition of X is not equivalent to a modal claim about X. One reason concerns explanation. Real definitions are explanatory in ways that modal claims are not. Another reason concerns symmetry. The relevant modal relations at issue are symmetric. For example: if there is a necessary connection between X and Y, there is also a necessary connection between Y and X. By contrast, if it lies in the nature of X to be Y, it does not lie in the nature of Y to be X. In other words, this relation is asymmetric. (This "lies in the nature of" talk is, for Rosen, a way of talking about what's part of real definitions.) To illustrate, Rosen states that "it may lie in the nature of table salt to contain chlorine without its lying in the nature of chlorine that salt should contain it".[61] Or, to draw on Kit Fine's famous example, Socrates and Socrates' singleton set (the set containing only Socrates) are necessarily coextensive, but it does not follow that it lies in the nature of Socrates to be a member of a singleton set.[62] Similar points have been made about *denials* of necessary connections. For example, Socrates and the Eiffel Tower are necessarily distinct, but this distinctness is not part of *what it is* to be Socrates.[63]

Reflection on other areas of philosophy helps us see why it matters that the nature of X can come apart from X's necessary connections. Take "non-naturalistic realism" about morality. One guiding thought of the kind of non-naturalism we have in mind here is that moral facts are *sui generis* in some sense.[64] Such a non-naturalist might grant that we can specify which actions are morally permissible in natural terms. For example, perhaps actions are morally permissible if and only if they are utility maximising. But, even if this is so, it does not automatically follow that it *lies in the nature of* moral permissibility to be utility maximising (or that it lies in the nature of utility maximisation to

[60]Rosen, 'Real Definition', 189.
[61]Ibid, 193.
[62]Fine, 'Essence and Modality', 4. Fine's point here is framed in terms of essence, but carries over to our discussion of real definition. We'll discuss this distinction between essence and real definition more below. It should be noted that some philosophers have (in contrast to Fine) argued that we can understand essence in terms of a restricted class of necessary properties. For example, see Sam Cowling, 'The Modal View of Essence' (2013) 43 Canadian Journal of Philosophy 248 and Nathan Wildman, 'Modality, Sparsity, and Essence' (2013) 63 Philosophical Quarterly 760. It is beyond the scope of this paper to engage with the details of such views here, or the challenges they present to the take on essence and real definition that we work with in this paper.
[63]Fine, 'Essence and Modality', 2. Note that one reason this last point matters, in the context of our current discussion, is that Hart's "separability thesis" involves the denial of a necessary connection between law and morality.
[64]For discussion of this way of thinking about the core commitment of non-naturalistic realism in metaethics, see Tristram McPherson, 'What is at Stake in Debates among Normative Realists?' (2015) 49 Noûs 123.

be morally permissible). It's conceptually open for the non-naturalist to argue that actions are morally permissible partly because they are utility maximising, and partly because of some moral law that links utility maximisation to moral permissibility.[65]

How much does the landscape change when we turn from modal to dependence relations? Many "dependence" relations, such as grounding, are widely thought to be both explanatory and asymmetric.[66] So can we plausibly take a claim about the nature of law to be equivalent to or fully settled by claims about what law depends on? This is a more promising possibility for our opponent. There is a significant literature on the relationship between claims about the "nature of" X and claims about dependence. Moreover, some philosophers are sympathetic to the view that claims about "the nature of X" are tightly connected to claims about "dependence" (at least when the former are understood as concerning essence and the latter are understood as concerning grounding).[67]

However, legal philosophers who use this literature to undercut the perceived force of the tension we've identified face three general obstacles. The first is that it is highly controversial whether claims about real definition are equivalent to, or settled by, claims about dependence. Consider Rosen's influential account of *real definition*. On this account, for Φ to be the real definition of F requires that Φ fully grounds F, and "the intimate connection between Φ and F should be grounded in the nature of F itself".[68] Rosen's account of real definition makes use of ground-theoretic resources, in addition to Fine's influential understanding of a *constitutive essence*. On this understanding, the constitutive essence of an object is tied to its nature and identity. The notion of a constitutive essence may be indefinable, but we have already introduced some key examples that help illustrate it: Socrates' singleton set is not part of Socrates' essence; chlorine may be part of the essence of salt. For Rosen, real definition and essence are tightly linked. This is part of why we think real definition is a promising place to start thinking about formulating the key positions within the debate over positivism. If Rosen is on the right track, then an account of *what X is* is intimately bound up with an account of *X's nature*. The two notions are not equivalent, but they are tightly connected.

We think Rosen's account of real definition is a good illustration of a way to understand the nature of X such that it is neither equivalent to nor fully settled by facts about grounding or necessity. Our opponents could push back on it. But we don't need Rosen's

[65]See Rosen, 'Real Definition', 206. See also Stephanie Leary, 'Non-naturalism and Normative Necessities' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics Vol 12* (Oxford University Press 2017), Selim Berker, 'The Explanatory Ambitions of Moral Principles' (2019) 53 Noûs 904, David Enoch, 'How Principles Gound' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics, Vol 14* (Oxford University Press 2019), Gideon Rosen, 'Metaphysical Relations in Metaethics' in Tristram McPherson and David Plunkett (eds), *The Routledge Handbook of Metaethics* (2017), and Gideon Rosen, 'Normative Necessity' in Mircea Dumitru (ed), *Metaphysics, Meaning and Modality: Themes from Kit Fine* (Oxford University Press 2020) for further discussion.

[66]For example, see Rosen, 'Metaphysical Dependence: Grounding and Reduction' and Kit Fine, 'Guide To Ground' in F. Correia and B. Schnieder (eds), *Metaphysical Grounding: Understanding the Structure of Reality* (Cambridge University Press 2012). For a dissenting view, see Elizabeth Barnes, 'Symmetric Dependence' in Ricki Leigh Bliss and Graham Priest (eds), *Reality and Its Structure* (2018). As a rule of thumb, for almost any purported feature of grounding, there is some philosopher who denies it. See Ricki Bliss and Kelly Trogdon, 'Metaphysical Grounding' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy (Winter 2016 Edition)* (2016) for a helpful overview.

[67]For some of the recent discussion here, see Fine, 'Guide To Ground', Shamik Dasgupta, 'The Possibility of Physicalism' (2014) 111 The Journal of Philosophy 557, Boris Kment, *Modality and Explanatory Reasoning* (Oxford University Press 2014), Rosen, 'Real Definition', 199, and Michael Gorman, 'Essentiality as Foundationality' in Daniel D. Novotný and Lukáš Novák (eds), *Neo-Aristotelian Perspectives in Metaphysics* (Routledge 2014).

[68]Rosen, 'Real Definition'.

account to be true. Our point is simply that our opponents need *all accounts like it* to be false. This includes, for example, Fine's view of constitutive essences. For Fine, "there is [an] error … in attempting to assimilate or unify the concepts of essence and ground".[69] The key point for Fine is that essence is about identity, and captures *what* something is, whereas grounding or dependence captures *how* something is.

Second, we think it's plausible that claims about the nature of X are not equivalent to or fully settled by claims about X's grounds, given how grounding claims can be "chained" together.[70] For example, suppose that being morally permissible is grounded in being utility maximising, and being utility maximising is grounded in being in some hyper-specific physical state (D_1 or D_2 or …). It follows that being morally permissible is grounded in being D_1 or D_2 (or …). But it is at least possible, if not plausible, that it's not part of the nature of moral permissibility to be grounded in D_1 or D_2 (or …).[71] The nature of moral properties might concern utility maximisation, but is unlikely to concern the hyper-specific physical states of affairs that realise utility maximisation. Others have expressed similar views. Here's Rosen:

> [I]t does not lie in the nature of *uncle* that one way to be an uncle is to satisfy some maximally determinate physical description $D_1(x)$, much less that one is an uncle iff one is either *D1* or *D2* or … Rather it lies in the nature of uncle that one is an uncle iff one is a male sibling or sibling-in-law of a parent.[72]

This is so even though facts about who is a male sibling or sibling-in-law of a parent presumably are grounded in, and necessarily coextensive with, some disjunction of some maximally determinate physical descriptions.

If there is a solution to the challenge we just raised in the last paragraph for those who want to hold that claims about the nature of X are equivalent to or automatically fully settled by claims about X's grounds, it will involve appealing to some very specific claim about X's grounds which either is equivalent to or fully settles the nature of X. This raises our third and final point. Will that specific claim be a good match for the claims about dependence that have been used to formulate positivism? We doubt it. Indeed, we saw above that the claims about dependence that have been used to formulate positivism are framed to accommodate inclusive and exclusive positivism. This leads some to formulate the view in terms of what "ultimately" grounds legal facts (where, recall, "ultimately" is read as something of a placeholder notion). What our opponent would need to defend, then, is that a claim about the essence of X is in general equivalent to a claim about X's grounds, and moreover is equivalent to the same type of claim about X's "ultimate" grounds that would encompass both inclusive and exclusive varieties of positivism. We see no reason for being optimistic that such claims will just happen to coincide.

[69]Fine, 'Guide To Ground', 80.
[70]For discussion, see Berker, 'The Unity of Grounding'.
[71]This comes up, for example, in Russ Shafer-Landau's response to Frank Jackson's work. See Russ Shafer-Landau, *Moral Realism: A Defense* (Oxford University Press 2003), responding to Frank Jackson, *From Metaphysics to Ethics: a Defence of Conceptual Analysis* (Clarendon 1998). For connected discussion, see also Pekka Väyrynen, 'Grounding and Normative Explanation' (2013) 87 Aristotelian Society Supplementary Volume 155 and Pekka Väyrynen, 'Normative Explanation Unchained' (2021) 103 Philosophy and Phenomenological Research 278.
[72]Rosen, 'Real Definition', 194.

This gives us three good general reasons to think that the tension we've identified – between the aspirations for the positivism debate and the formulations of positivism and antipositivism – is not merely apparent, but rather real and significant. We grant that our case is not conclusive. But the onus is to some degree on our opponent to offer reasons for being optimistic that we can capture the nature of law by focusing on what it is necessarily connected to or dependent on.

Moreover, recall that our main aim in this paper concerns how we should *formulate* the theses of positivism and antipositivism for the purposes of contemporary philosophical debate. Given that aim, we don't need our case to be fully conclusive. Rather, we just need our case to be strong enough to show that the *opposite* view should not be taken as common ground from the start in setting the terms of the debate over positivism. We think our case in this section clears at least that bar.

4. What doesn't settle the nature of law

In the last section, we put forward some general reasons why we should expect there to be a real tension between the aspirations of the positivism debate and the currently dominant formulations of views within it. Now we turn to another reason to think this mismatch is real and significant. Our overarching point is simple. There are different ways for law to be necessarily connected to or dependent on morality; but some of them say more about the nature of *morality* than the nature of *law*. Likewise, there are different ways for legal facts to be necessarily connected to (or dependent on) social facts alone, but not all of them should be taken to affirm a positivist view about the nature of *law*.

Let's start with modal formulations, such as Hart's "separability thesis". As Green and Adams write, "There are many necessary "connections", trivial and non-trivial, between law and morality".[73] For example, consider the following three theses:

(1) Necessarily, law deals with moral matters.
(2) Necessarily, law is justice-apt.
(3) Necessarily, law is morally risky.

These theses may not threaten Hart's more precise version of the separability thesis, which is "that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality".[74] But as Green and Adams also note, "it is possible that moral value *derives* from the existence of law".[75] To illustrate, they argue that Hobbes' positivism does not seem to be threatened by his famous argument that "any order is better than chaos and in some circumstances order may be achievable only through positive law".[76] After discussing these and similar examples, Green and Adams conclude:

> These three theses establish connections between law and morality that are both necessary and highly significant. Each of them is consistent with the positivist thesis that the existence

[73]Green and Adams, 'Legal Positivsm', drawing on Green, 'Positivism and the Inseperability of Law and Morals'.
[74]Hart, *The Concept of Law, 185–186.*
[75]Green and Adams, 'Legal Positivsm'.
[76]Ibid, drawing on Green, 'Positivism and the Inseperability of Law and Morals'.

> and content of law depends on social facts, not on the law's merits. Each of them contributes to an understanding of the nature of law. The once-popular idea that legal positivism insists on the separability of law and morality is therefore significantly mistaken.[77]

The narrower point that Green and Adams explicitly make is that these three modal theses (numbered (1), (2), and (3) above) should be consistent with positivism.[78] Partly for this reason, they hold that the positivist's thesis should be formulated in terms of an explanatory "dependence" relation, rather than in modal terms.[79]

But there is a broader lesson to be drawn, which draws on the penultimate sentence from the quote above. There are ways in which these theses could *contribute* to an understanding of the nature of law. But they do not thereby *state* or *settle* the nature of law. Such modal theses are at best downstream from the nature of law *and* the nature of justice and morality.

To see why, let's discuss (3) – the claim that "necessarily, law is morally risky". Green and Adams defend (3) by noting that the existence of a legal system makes available "newly efficient forms of oppression", along with "the possible alienation of community and value, the loss of transparency, the rise of a new hierarchy", and other moral risks.[80] Their understanding of this connection between law and moral risks primarily relies upon an understanding of morality according to which oppression, alienation, the loss of transparency, and the rise of certain hierarchies are of significant moral concern. At most, we need only couple this understanding of morality with fairly minimal assumptions about the nature of law to understand (3). In that sense, if (3) is true, its truth neither states nor settles the nature of law. We think this is *why* theses like (3) should not be able to vindicate or falsify positivism. But to take this stance, one must recognise that theses about what law is necessarily connected to neither state nor settle the nature of law – and hence that the tension we identified is real.

Similar objections are made to other modal formulations. Here's Rosen on "the debate over legal positivism":

> One side says that the legal facts are wholly grounded in the social facts; the other says that moral facts play a role in making the law to be as it is. Now try to frame this debate as a debate about a supervenience thesis. The antipositivist says that the legal facts supervene on the moral and the social facts taken together; but of course the positivist will agree. The positivist says that the legal facts supervene on the social facts alone – that possible worlds cannot differ in legal respects without differing in social respects. But the antipositivist need not deny this. For he may think that whenever two worlds are alike in social respects – whenever they involve the same actions, habits and response of human beings – they must also agree in moral respects, *since the moral facts themselves supervene on the social facts broadly conceived*. But in that case the parties will accept the same supervenience claims. And yet they differ on an important issue, viz., whether the moral facts play a role in making the law to be as it is.[81]

Rosen argues that since positivists and antipositivists could agree about such a supervenience thesis, it cannot be what's at issue in the debate. That's important. But we think

[77]Green and Adams, 'Legal Positivsm'.
[78]See Green, 'Positivism and the Inseperability of Law and Morals' for more on this point.
[79]Green and Adams, 'Legal Positivsm'.
[80]Ibid.
[81]Rosen, 'Metaphysical Dependence: Grounding and Reduction', 113–114, emphasis his. See also Greenberg, 'How Facts Make Law' for connected discussion.

there's another important lesson here. The key move in the paragraph is: *antipositivists can accept that the moral facts supervene on the social facts*. The antipositivist can accept this without adopting any interesting view about the nature of *law*, by instead adopting a view about *morality*. So settling whether legal facts supervene on social facts alone does not automatically settle the nature of law.

We've now offered further reasons to think there is a mismatch between the aspirations for the debate over positivism and *modal* formulations of positivism and antipositivism, and shown why this matters for how we think about the debate over positivism. What about dependence-based formulations? We'll now argue that the same basic point holds.

In the passage above, Rosen defends a dependence-based formulation. But the same problem Rosen identifies can recur on such a formulation. Consider the following claim:

> The antipositivist says that moral facts play a role in making the law be as it is. But the positivist need not deny this. For she may think that the moral facts wholly depend on the social facts, and so the legal facts wholly depend on the social facts.

The positivist and antipositivist can agree about the same dependence thesis. So again, this thesis cannot be the core of the debate over positivism. But note that the key move here concerns how we think about a commitment about what wholly determines the moral facts:

(4) The moral facts wholly depend on the social facts.

Crucially, (4) is not a thesis about *the nature of law*. That is why one should not be able to vindicate or falsify positivism by adopting (4); such a view should in principle be open to positivists and antipositivists alike. Indeed, one might adopt (4) based on a view about the nature of morality: roughly, that morality is in some sense fully 'social. This example illustrates that learning what X depends on does not always tell us the nature of X.

This point applies to all dependence-based formulations, provided they appeal to a view on which "dependence" is a transitive relation: i.e., if A depends on B and B depends on C, then A depends on C. For example, if the legal facts are grounded in the moral facts and the moral facts are grounded in the social facts, the legal facts are grounded in the social facts. The orthodox view is that grounding is transitive.[82] We see no reason why legal philosophers involved in the debate over positivism should deny this general claim.[83]

The crucial point here can be summed up as follows: *if* we formulate positivism in terms of dependence, orthogonal commitments (e.g., about moral facts, social facts, etc.) can trivially vindicate or falsify the view. These commitments are orthogonal *because they do not bear on the nature of law*. We think this point is equally intuitive with commitments about dependence as it was with commitments about modality. Hence our point that there is a significant mismatch between common formulations of positivism and the aspirations for the debate over positivism.

[82]See Kelly Trogdon, 'An Introduction to Grounding' in M. Hoeltje, B. Schnieder and A. Steinberg (eds), *Varieties of Dependence* (Philosophia Verlag 2013) for discussion and references, as well as Fine, 'Guide To Ground' and Fabrice Correia, 'Grounding and Truth-Functions' (2010) 53 Logique Et Analyse 251 on related principles.

[83]That said, it may be consistent with this orthodoxy to hold that what "ultimately" grounds what (in the specific sense of "ultimate" grounds that some appeal to in formulating "positivism" and "antipositivism") is an intransitive relation (depending on how the placeholder idea of "ultimate" grounds is filled in).

Notably, we're not arguing here that formulations of positivism and antipositivism in terms of modality or dependence are on a par. We think there are good reasons – some of which we discussed above – to favour "determination" or "dependence"-based formulations over modal-based formulations. One is simply that, taken at face value, significant parts of the debate over positivism seem to be about what *explains* the content of law.[84] Another is that there are more specific objections to modal formulations which we think are on the right track.[85] Even with respect to the tension that we've identified above, modal and dependence-based formulations of positivism and antipositivism aren't on all fours. For one thing, there are technical differences in *how* orthogonal commitments trivially vindicate or falsify what is taken to be the relevant thesis about modality or dependence.[86] Furthermore, the problems for modal and dependence-based formulations aren't identically severe. The case that facts about the nature of X aren't equivalent to (or fully determined by) modal facts about X is stronger than the case that they aren't equivalent to (or fully determined by) facts about what X depends upon. But we are still doubtful that dependence-based formulations can *fully* resolve the tension we identified. And to return to our earlier point, our main aim was not to show that these approaches can't possibly resolve the tension. Perhaps they can, by appealing to contentious claims in metaphysics. However, our main aim was to show that it is a mistake to take those claims in general metaphysics and bake them into how we understand the core theses in the debate over positivism.

5. The real definition of law

We've argued that there is a real tension between widespread aspirations for the debate over positivism and the dominant formulations of positivism and antipositivism. We have also argued that it is highly unlikely that we can resolve this tension by taking the nature of law to be settled by what law is necessarily connected to or dependent on. At this point, some may wish to stick with one of the dominant formulations and give up on the widespread aspirations that the debate should tell us the nature of law–at least when that aspiration is taken too literally. We think that approach might be fine in certain contexts.[87] Before one uses this approach across the board, however, it is worth exploring an alternative one: formulating positivism using metaphysical ideology that simply *is* a way of stating a thesis about "what law is". That is the route we shall explore by introducing the prospect of formulating positivism and antipositivism in terms of a *real definition* of law. We outline the proposal in this section.

We noted in the introduction that there are many choice points for any formulation of positivism and antipositivism on which we endeavour to remain neutral. Thankfully, we can offer a recipe for generating specific formulations of positivism and antipositivism that

[84]For further discussion, see Greenberg, 'How Facts Make Law' and Plunkett, 'A Positivist Route for Explaining How Facts Make Law'.

[85]For further discussion of some such reasons, see Greenberg, 'How Facts Make Law', Shapiro, *Legality*, Plunkett, 'A Positivist Route for Explaining How Facts Make Law', Rosen, 'Metaphysical Dependence: Grounding and Reduction', and Chilovi and Pavlakos, 'Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence'.

[86]We've skirted around some of these differences by framing the problem in terms of transitivity. For technical discussion and references, see Chilovi and Pavlakos, 'Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence', especially fn. 18–19.

[87]One of us (Plunkett) has used this approach in other work. See Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry', 38 and Plunkett, 'Robust Normativity, Morality, and Legal Positivism', 108.

allows us to remain neutral on the relevant choice points. The recipe is both general and simple: take another formulation of positivism or antipositivism and *embed it* within the claim "It lies in the nature of law that […]". For example: "It lies in the nature of law that legal facts are ultimately grounded in social facts alone, rather than social and moral facts". In other words, existing modal or dependence-based formulations of positivism and antipositivism should be embedded *as part of* proposed rival real definitions of law. The resulting real definitions are then the new proposed accounts of positivism and antipositivism.

Given its simplicity, this recipe might strike many readers as underwhelming. There are many formulations of positivism that are compatible with our proposal which face significant problems, most of which our proposal does not solve. But our proposal is not intended to be a panacea. It is designed to solve one specific problem: to eliminate the tension between the aspirations many philosophers have had for the debate over positivism and the dominant explicit formulations of the main positions in that debate. That's it. And it solves this problem not by *replacing* the ideology used in the dominant formulations of positivism and antipositivism, but by *adding* to the ideology used in those formulations. By embedding claims about necessity or dependence under a claim about law's real definition, one transforms those claims into ones that directly concern *the nature of law* and *what law is*. While the proposal is simple, that doesn't undermine its significance. Part of that significance lies in how it resolves the tension we've identified. But as we'll now argue, the proposal has several other attractive features that militate in its favour.[88]

6. Skepticism about real definition

Before we turn to these attractive features of our proposal, we want to address an important objection to it. Our proposal assumes that the idea of "real definition" is a good tool to use in philosophical theorising. And if real definitions involve claims about grounding and essence (as they do on Rosen's account of real definition that we have been working with), our proposal assumes that *three* metaphysical relations are in good order. Some may object that this assumption is unwarranted.

We have not, and cannot, offer a compelling case for that assumption here at any length. Doing that would take us well beyond the scope of this paper. But we take this objection to our use of the ideology of "real definition" seriously. So what can we say to those who offer this objection?

We have a three-fold response.

First, much recent work has been done to explain and defend the legitimacy and significance of these metaphysical relations (real definition, essence, and grounding). We are sympathetic to some of these discussions. At the very least, this work has done much to make a serious case for the usefulness and legitimacy of these notions.[89]

[88]In putting forward our proposal, we have been working with Rosen's account of real definition at many junctures. As we've discussed, for our main arguments to go through, we don't need Rosen's account in particular to be correct, but rather an account that shares certain important features with his. We think it is worth exploring what our proposal would look like based on the details of a range of contemporary accounts of real definition, including not only the details of Rosen's account but also those (such as Correia, 'Real Definitions') that don't use a Finean essentialist ideology. However, it is beyond the scope of this paper to engage in that work here. So too is it beyond the scope of this paper to engage with the closely related proposal of formulating "positivism" and "antipositivism" in terms of essence but not real definition.

[89]See Rosen, 'Metaphysical Dependence: Grounding and Reduction', Rosen, 'Real Definition', Fine, 'Essence and Modality', Fine, 'Guide To Ground', and Jonathan Schaffer, 'On What Grounds What' in David J. Chalmers, David Manley and Ryan

Second, there is a specific idea invoked in many general defenses of using these pieces of metaphysical ideology under consideration that we think is on the right track, and to which our paper contributes (even if only in a small way). This idea is that a good test for the ideology we use in philosophical theorising is whether they *earn their keep*. If some piece of ideology can be shown to be theoretically useful and fruitful, in discussions that we take to be important and legitimate for independent reasons, that gives us some reason to be optimistic that it is in good working order.[90] With this idea in mind, we think that the benefits of using real definition in thinking about legal positivism (which we discuss below) might themselves be part of a larger overall case for the legitimacy of theorising using the idea of "real definition".

Third, one can take our argument to be a defense of a *conditional* view: *if* real definition is a real relation that is apt for use in philosophical theorising, *then* we can and should use it to help tightly align formulations of positivism and antipositivism with the aspirations for the debate about these positions. We think that this conditional claim is still interesting and worth exploring, even if one has doubts (as we ourselves sometimes do) about whether the antecedent is true.

7. Theoretical virtues of our proposal

Our proposal is simple: formulate positivism and antipositivism as competing theses about what's involved in the real definition of law. The simplicity of this proposal as a way of dealing with the tension we've discussed in this paper arguably counts in its favour. But it might also lead some to be skeptical of its importance. For example: perhaps this proposal makes a merely scholastic point about philosophical bookkeeping, when compared to the existing formulations of positivism and antipositivism. In response to this kind of concern, we turn in this section to two general ways in which our proposal is useful and fruitful (beyond how it coheres with the aspirations for the debate over positivism). First, using real definition to formulate the theses of positivism and antipositivism helps *insulate* the debate over positivism from intuitively orthogonal issues. Second, using real definition to formulate the theses of positivism and antipositivism helps *unify* different strands of the debate over positivism. Following this, in the next section (Section 8), we then illustrate how our proposal can make a difference to our evaluation of specific arguments in the contemporary jurisprudential literature, focusing on arguments from Hershovitz and Shapiro.

7.1. Insulation

In Section 4, we argued that modal- and dependence-based formulations result in the following problem: one can vindicate one side of the positivism debate by appealing to

Wasserman (eds), *Metametaphysics: New Essays on the Foundations of Ontology* (Oxford University Press 2009). For opposing views, see Kristie Miller and James Norton, 'Grounding: It's (Probably) All in the Head' (2017) 174 Philosophical Studies 3059 and Jessica M. Wilson, 'No Work for a Theory of Grounding' (2014) 57 Inquiry 535.

[90]We here echo Rosen on "grounding" Rosen, 'Metaphysical Dependence: Grounding and Reduction' and Ted Sider on "structure" Theodore Sider, *Writing the Book of the World* (Oxford University Press 2011). Obviously our discussion here touches on major meta-philosophical issues that we cannot address in detail.

theses about things *other* than law, such as morality. Our proposal helps guard against this issue.

We can illustrate why this is so. Let's start with what we take to be a promising dependence-based formulation, according to which legal positivism is the view that the legal facts are, necessarily, ultimately grounded in social facts alone, and not in robustly normative facts.[91] Following our proposal, this formulation of legal positivism should be embedded into a proposed real definition, such that "legal positivism" is the thesis that it lies in the nature of legal facts that this is so. In turn, we can take legal antipositivism to be the denial of this claim, and the affirmation of the claim that "it lies in the nature of" legal facts that, necessarily, they are ultimately grounded in both social facts and robustly normative facts. For our purposes here, we will take "legal facts" to refer to those facts about what the law is in a given jurisdiction. For the sake of clarity, we'll assume here that those facts are the totality of facts about what the law legally prohibits, empowers, obligates, etc. agents to do in that jurisdiction.[92]

With these formulations of positivism and antipositivism in hand, we can now turn to the question of how our proposal helps insulate the debate over positivism. Recall the problem cases we discussed in Section 4 (the first 3 of which are from Green and Adams):

(1) Necessarily, law deals with moral matters.
(2) Necessarily, law is justice-apt.
(3) Necessarily, law is morally risky.
(4) The moral facts wholly depend on the social facts.

(1)-(3) are putative necessary connections between morality and law. They do not show that the moral grounds, or otherwise explains, the legal. Hence, such theses partly motivate many to prefer dependence-based accounts of positivism and antipositivism, which we take our ground-theoretic account to be an instance of. Since real definition involves grounding, if (1)-(3) do not show that the moral grounds the legal, they do not show that the moral is part of the real definition of the legal either.

What about (4), which we used to create similar trouble for determination-based accounts of positivism and antipositivism? Does trouble still arise on our view? We think not. The simple reason is that real definition requires more than grounding. If Rosen's account of real definition is on the right track, for example, real definition requires grounding *because of the nature of what is grounded*. According to Rosen, what it takes for Φ to be the real definition of F involves the following: necessarily, Φ fully grounds F, and "the intimate connection between Φ and F should be grounded in the nature of F itself".[93] In turn, for Rosen, "the nature of" talk here is cashed out

[91]For further discussion and qualifications, see Plunkett, 'Robust Normativity, Morality, and Legal Positivism'. One qualification worth flagging here is that ibid argues that the relevant normative facts here are either robustly normative facts *or* other normative facts (such as moral ones, on certain standard conceptions of them) that are tightly connected to robustly normative facts in the right way (e.g., which necessarily entail robustly normative facts).

[92]There are other ways of thinking about "the content of the law" that are closely related, but distinct. For example, one might think of "legal content" in terms of the totality of the relevant legal norms (those that are *laws*) that obtain in a given jurisdiction (at a given time). In turn, these things we are talking about here – legal duties, powers, rights, etc. – would be further upshots of those norms. For connected discussion, see Plunkett, 'A Positivist Route for Explaining How Facts Make Law', David Plunkett, 'The Planning Theory of Law II: The Nature of Legal Norms' (2013) 8 Philosophy Compass 159, and Plunkett and Wodak, 'The Disunity of Legal Reality'.

[93]Rosen, 'Real Definition', 199.

in terms of Fine's notion of "constitutive essence". Now suppose that robustly normative facts are fully grounded in social facts. Even if that's right, nothing forces one to accept that *the nature of law* guarantees this. Put contra-positively, on our proposal, for (4) to vindicate or falsify positivism, (4) must be guaranteed by the nature of law – and that is exactly as it should be. That is why shifting from explanation to real definition helps insulate the debate in an attractive way.

But could a different commitment than (4) generate the same kind of trouble for our view? This depends on whether real definitions are transitive. Suppose Φ is the real definition of F, and ψ is the real definition of Φ. Does it follow that ψ is the real definition of F? Plausibly, it should. If so, one may think we can use the same strategy from before to generate counterexamples to our proposal, such as the following:

(5) There is a real definition of the robustly normative in terms of the social.

This claim may seem to trivially vindicate positivism, on our proposal. Why? Suppose that there is a real definition of the legal in terms of the social and the robustly normative. It would seem, from this, that antipositivists were right. But now suppose that (5) is true. If so, we can substitute the robustly normative for *its* real definition and get the result that there is a real definition of the legal solely in terms of the social – which now seems to vindicate positivism.

We could generate a similar problem with an alternative to (5), such as:

(6) There is a real definition of the social in terms of the robustly normative.

Suppose that there is a real definition of the legal in terms of the social. It would seem, from this, that positivists were right. But now suppose that (6) is true. If so, we can substitute the social for the robustly normative – which now seems to vindicate antipositivism. The basic point that both (5) and (6) illustrate is that trouble seems to loom if we can substitute the *definiens* for the *definiendum* in the real definition of law.

We have three responses to this basic point. First, while one surely can substitute the *definiens* for the *definiendum* in some contexts (e.g., perhaps in many or all grounding claims), we are not sure one can do so in all claims about real definitions. That is, the nature of law might include the *definiens* but not its *definiendum*. An example that should be neutral between positivists and antipositivists might help to motivate this point:

(7) There is a real definition of the social in terms of the physical.

Some might defend (7) directly. Others might defend it via intermediary claims: perhaps there is a real definition of the social in terms of the mental, and the mental in terms of the physical. Either way, insofar as the social is part of the real definition of the legal (which should be common ground in much of the contemporary debate over positivism, insofar as theorists are working in a 'real definition' framework), it follows that if we can keep substituting *definiens* for *definiendum*, we can get to a real definition of the legal partly in terms of the physical. We think that positivists and antipositivists alike should agree with the following even if they see a decent case for a thesis like (7):

whatever else is involved in the real definition of law, it should say nothing about the nature of social facts.[94]

But say one can always substitute the *definiens* for the *definiendum*, including in a real definition. This position is much stronger than the view that grounding is transitive. Which leads to our second response: denying that (5) and (6) are really problem cases. After all, they are just specific instances of a fully general implication of the substitutability of the *definiens* for the *definiendum*: in any debate over whether F can be defined in terms of Φ or ψ, *if* Φ defines ψ or vice versa, the exact same issue will arise. We don't think this result should be troubling, when properly understood. If we grant the substitutability of the *definiens* for the *definiendum*, being committed both to (6) and to a real definition of the legal in terms of the social *just is* being committed to a real definition of the legal in terms of the robustly normative. This conjunctive commitment just is a view *about the nature of law*. This is different from a commitment to A being grounded in B and B being grounded in C, and therefore by *transitivity* – rather than *substitution* – A being grounded in C. If B grounds A, that C grounds B remains orthogonal to the nature of A. But if A is defined in terms of B, the further claim that C can be substituted for B in a real definition of A ceases to be orthogonal to the nature of A.

The third response is simpler. Since real definition entails grounding but not vice versa, it is much easier to secure the result that the social is grounded in the robustly normative (e.g., because the social is grounded in the mental and the mental is grounded in the robustly normative) than it is to secure the result that the social is defined in terms of the robustly normative (because of an equivalent chain of real definitions). So even if one rejects our previous two responses, one should grant that on our view the positivism debate is *better* insulated from intuitively orthogonal theses, even if not fully insulated. Perhaps this is the most one can ask for. After all, what would do better than real definition on this front? That is, what relation is both plausibly at the core of this debate and could absolutely hermetically seal the debate off from commitments about intuitively orthogonal issues in philosophy?

Tied to this final response, we'll close this section with a general contention. Our guiding thought in this section has been that the debate over positivism should be settled by facts about the nature of *law*, rather than those about the nature of *morality,* the nature of *the mental,* etc. However, like elsewhere in philosophy, our sense of which philosophical issues really hang free from each other might well be mistaken. Seemingly disparate philosophical issues may turn out to be surprisingly entwined. This point is especially important given that we think that too many parts of legal philosophy have proceeded in relative isolation from other areas of philosophy, and that this has hindered progress in the field.[95] Thus, we should be open to surprising connections here that would mitigate against insulating the positivism debate too strongly from theses about other things (e.g., morality or the mind). That's why we think that what our account helps secure is an *appropriate* amount of insulation of the positivism debate.

[94]It matters here that we think of the social as a distinctive category of facts, and not just as a placeholder encompassing all non-moral or non-normative facts in general.

[95]For more on this point, see the final part of Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry'.

7.2. Unification

A second key virtue of using real definition in formulating positivism and antipositivism is that it can *unify* the positivism debate. Many distinct strands of the debate (e.g., strands concerning the supervenience and grounding of legal facts) plausibly concern *implications* of the real definition of law. Since a claim about the real definition of law can be true only if its implications are also true, our proposal allows discussions of genuinely distinct topics to still be substantive contributions to a single issue. Thus, if the debate over legal positivism is centred on rival claims about real definition, we have a compelling explanation for why discussions about a range of issues *other* than the real definition of law are important parts of the debate.

Let's start with the easiest case: contributions to the debate that concern *what grounds the legal facts*. Consider the formulation of legal positivism that we introduced earlier for expository purposes: namely, that legal positivism is the claim that it lies in the nature of legal facts that, necessarily, they are ultimately grounded in social facts, and not in robustly normative facts. This claim is true only if the embedded claim is true (i.e., the embedded claim that legal facts, necessarily, are ultimately grounded in social facts, and not in robustly normative facts). So arguments about whether that embedded claim is true are clearly worthy contributions to a debate about the real definition of law. More generally, it's plausible that there's a tight link between real definition and grounding.[96] Rosen supports one that he calls the "Grounding-Definition link": "if to be F just is to be φ (i.e., if φ is the real definition of F), then, necessarily, if a thing is F, its being F is grounded in its being φ".[97] If this is true, then contributions to the debate about what grounds legal facts concern an implication of a thesis about the real definition of law.

Now let's turn to contributions that concern claims about necessary connections between law and morality. Again, such claims could be part of the real definition of law if they are embedded in the way we propose. And more generally, such claims about necessity could be implications of a claim about real definition. This implication could be defended directly – that is, one could argue that it is plausible that if to be F just is to be φ, then if an *x* is F, *x* is necessarily φ. One could also defend this implication indirectly by defending one link between real definition and grounding (as above) and then between grounding and necessity. One might do this by defending the following thesis: if the facts about φ ground the facts about F, the proposition <φ> metaphysically necessitates the proposition <F>.[98] A suitably fine-tuned claim about the presence or absence of a necessary connection between law and morality could then be an implication of a claim about the real definition of law. For example, if there is no necessary connection of the right kind between law and morality, then the real definition of law is plausibly non-moral. In sum, the point again

[96]For discussion, see Rosen, 'Metaphysical Dependence: Grounding and Reduction', 122–126.
[97]Rosen, 'Real Definition', 198.
[98]For defenses of a strong link (such as the one floated here) between grounding and metaphysical necessity, see Paul Audi, 'Grounding: Toward a Theory of the In-virtue-of Relation' (2012) 109 Journal of Philosophy 685, Fabrice Correia, *Existential Dependence and Cognate Notions* (Philosophia Verlag 2005), and Rosen, 'Metaphysical Dependence: Grounding and Reduction'. For dissent, see Stephan Leuenberger, 'Grounding and Necessity' (2014) 57 Inquiry: An Interdisciplinary Journal of Philosophy 151 and Alexander Skiles, 'Against Grounding Necessitarianism' (2015) 80 Erkenntnis 717. For overview of this and other debates about purported features of grounding, see Bliss and Trogdon, 'Metaphysical Grounding'.

is this: based on plausible assumptions in general metaphysics (which some, but not all, legal philosophers would endorse), contributions to the debate about what necessary connections there are between law and morality can be seen as concerning an implication of a thesis about the real definition of law.[99]

There are many complications here that we're skirting over. But this argument is just intended to illustrate how distinct metaphysical topics discussed in the debate over positivism can be unified as contributions to a debate about the real definition of law, given certain further, independently-motivated theses in general metaphysics. We think that this kind of strategy could also plausibly be used to bring together further topics still. (One example may be claims about epistemology that are often discussed in general jurisprudence, as possible epistemic "corollaries" of underlying metaphysical claims.[100]) But we leave that to future work.

Since the contributions we just illustrated are negative, it might seem that our approach only allows philosophers of law to negate putative real definitions of law by showing that their implications are false. But we don't think that's the case. Showing that the implications of a putative real definition of law are *true* can support an abductive argument for the real definition itself. For instance, suppose one showed that legal facts are ultimately grounded in social facts alone *and* accepted a tight connection between real definitions and grounds (along the lines of Rosen's Grounding–Definition link). From this, one might abductively infer that a positivist real definition of law is true. Such arguments are promising to explore, and we have significant sympathy for them.

At the same time, however, when we make the structure of such arguments explicit, there are also unexplored ways to push back. For example, as Rosen discusses, some philosophers deny (or seem committed to denying) claims like the Grounding–Definition link.[101] Some antipositivists might want to draw on such views, and then explore views on which the real definition of law comes apart from law's full grounds.

This last point illustrates that once we appreciate that claims about the ultimate grounds of law are distinct from claims about the real definition of law, there is a wider set of philosophical options to explore in the metaphysics of law than most philosophers working in the area appreciate. But it also serves to show, at least schematically, that understanding positivism and antipositivism in terms of the real definition of law matters for how we evaluate arguments in general jurisprudence. We'll now explore that theme in more detail by looking at recent arguments from Hershovitz and Shapiro.

[99]Our discussion here resonates with Shapiro's distinction in *Legality* between what he calls the "Identity Question" about something (e.g. law) and the "Implication Question" about the same thing Shapiro, *Legality*, 9. Shapiro does not frame Identity Questions as being about real definitions, and, moreover, goes on to frame positivism and antipositivism, which he takes as responses to the Identity Question about law, in terms of grounding. However, we think a good way of developing his views is to take Identity Questions (including those about law) to concern real definitions. Among other things, this way of developing Shapiro's views aligns with his emphasis on the idea that Identity Questions involve questions about what a thing *is*, his explicit invocation of Aristotle (who introduces the idea of real definition) in initially presenting the idea of Identity Questions, and his emphasis on essential properties rather than necessary and sufficient properties (for reasons emphasized by Kit Fine). See (ibid, 9 and ibid, 10, fn. 7 citing Fine, 'Essence and Modality'.

[100]For connected discussion, see Chilovi and Wodak, 'On the (in)significance of Hume's Law'.

[101]For example, this is one way of reading some forms of non-naturalistic realism in metaethics. (See Rosen, 'Real Definition' and Rosen, 'Normative Necessity' for discussion).

8. Hershovitz and Shapiro on exclusive legal positivism

The foregoing discussion puts us in a good position to show how our proposal makes a difference to recent arguments about the metaphysics of law. We will focus on two arguments about exclusive legal positivism, one *against* it, from Hershovitz, and one *for* it, from Shapiro. Both arguments are tied to an overall evaluation of Shapiro's Planning Theory of Law, which we will also briefly discuss here. Put roughly, the Planning Theory of Law holds that legal institutions are organisations involved in shared planning, and that the content of the law consists in the relevant plans of those organisations (regardless of the merit or morality of those plans). As Shapiro develops it, The Planning Theory is meant to vindicate positivism, and exclusive positivism in particular. In what follows, we first argue that our proposal for understanding positivism and antipositivism as rival theses about real definition can be used to show that Hershovitz's argument *against* legal positivism is not compelling as currently developed. We then turn to how our discussion brings out an important gap in Shapiro's main current argument in favour of exclusive positivism.

8.1. Hershovitz's hypothetical

Hershovitz's argument starts with a hypothetical case. Imagine a group of people read Dworkin's *Law's Empire*, and then decide that they want "what Dworkin describes—a legal system legal system whose content flows in a principled fashion from the political decisions that they make".[102] Based on this, they decide to try to create a legal system where the law is grounded in the kinds of facts that Dworkin claims the law is grounded in – including, crucially, normative facts about what best morally justifies the overall legal practices in that community.

Is it metaphysically possible for this group of people to create such a legal system? According to the Dworkinian antipositivist, the answer is obviously "yes". Indeed, from that point of view, we might say that what they are doing is just deciding to have *law*. An inclusive positivist can also say "yes". Recall that, put roughly, according to inclusive legal positivism, robustly normative facts are not amongst the *ultimate* grounds of legal facts, but can be amongst the grounds of the legal facts if certain contingent social facts obtain. Plausibly, the decision of this community to try to create such a legal system would suffice for the relevant kind of social facts to obtain. The exclusive positivist, by contrast, must answer "no". On that view, put roughly, such normative facts cannot be amongst the grounds of legal facts at all. As Hershovitz puts it, "exclusive legal positivists, like Raz and Shapiro, are committed to the view that this project [i.e., the project of these people creating a Dworkin-inspired legal system] must fail. Try as they might, these people cannot create the law they intend to create".[103]

Hershovitz finds this answer puzzling. What is it about such normative systems that makes them ineligible to be law? In other words, according to exclusive legal positivists, why *can't* we create legal systems where the content of the law is grounded partly in the

[102]Scott Hershovitz, 'The Model of Plans and the Prospects for Positivism' (2014) 125 Ethics 152 169.
[103]Ibid, 169.

kinds of normative facts that Dworkin has in mind in *Law's Empire*? Hershovitz writes the following:

> Raz and Shapiro give what strikes me as the only answer one could give to this question. These normative systems are ineligible because they cannot play the role in these people's lives that a legal system is supposed to play. For Raz, the law must be capable of making the difference that authority makes. For Shapiro, it must be capable of making the difference that plans make. The details are different, but the arguments take the same form because only an argument of that form seems apt to explain why these normative systems are ineligible to be law.[104]

Hershovitz argues that this form of argument is problematic. One reason is because it seems to move from a normative premise about how something *should* function to a descriptive claim about what it *is*, in a way that is unwarranted. Furthermore, Hershovitz argues (following Hart) that there is *no* "task, so central to what it is to be law, that nothing could be law if it could not do it".[105]

We don't want to discuss all of Hershovitz's criticisms of this form of argument, or to wade into exegetical debates about his reading of Raz and Shapiro. Rather, we want to consider Hershovitz's idea that Raz and Shapiro give the only possible answer (or, perhaps more charitably, the only somewhat plausible answer) that the exclusive legal positivist can give for why the hypothetical community of people must fail in setting up their Dworkin-inspired legal system. Hershovitz doesn't give an argument for *why* this is the only answer that the exclusive legal positivist can give. He simply says that it "strikes" him that it is the only one.

However, once we have the idea of *real definition* in hand, there's an obvious alternative answer that the exclusive positivist could offer. That answer is this: *of course the group can't create such a legal system, for it is part of the real definition of law, or else entailed by it, that such a legal system is metaphysically impossible.* Note that this response does not deny that the group has successfully created some kind of institutionalised normative system, and indeed one with certain law-like features. It just denies that what they create is thereby a legal system. By analogy, the group can get together and invent a game with plenty of chess-like features. But that game isn't chess if it is inconsistent with some of the metaphysically necessary features of chess (e.g., if it is inconsistent with constitutive rules of chess, whatever those are). More generally, for any real definition of X which is restrictive (that is, for which is some Φ that cannot be an instance of X), we can ask some version of Hershovitz's question: Why can't a group of people get together to create a Φ that's an X? Whether X is an artifact like law or chess, or anything else, we think a perfectly good general answer will be: *because that's impossible given the real definition of X.*[106]

[104]Ibid, 170.
[105]Ibid, 170.
[106]Note that this response doesn't by itself say anything about which things we *should* be picking out with our existing terminology, or what the real definitions *of those things* are. If the community in Hershovitz's thought experiment proposes a reform in how we should use the term 'law', on which 'law' *would* pick out something with a real definition compatible with a Dworkin-style system, we can then ask whether we should accept that reform. Perhaps we should (though we ourselves doubt it, at least in most contexts). However, even if X is the real definition of something picked out by a *reformed* meaning of a concept or term (e.g., 'law') that we should adopt, that doesn't by itself settle that X is also the real definition of the thing picked out by our current concept or term. And the latter is the kind of issue that we've been focusing on here, rather than the issue of what the real definitions is of the thing picked out by the best way of using 'law' (or any other existing piece of legal terminology). (It should be noted that one could of course argue for certain views that collapse, or at least significantly entwine these two different issues, but it's beyond the scope of this

This response does not require any commitment to the view that there is some task, so central to what it is to be law, that nothing could be law if it could not do it. In general, there are many possible ways of arguing for a putative real definition of X, whether X is law or anything else. Thus, in making the argument that the real definition of law guarantees the truth of exclusive legal positivism, we doubt that the exclusive legal positivist is forced into an argument about proper function. To illustrate another possible route, consider the following proposal. First, start with the following view about metalegal theory: it aims to explain how actual legal thought and talk – and what (if anything) it is distinctively about (e.g., legal facts, properties, etc.) – fits into reality overall.[107] In order to carry out this explanatory task, one might well develop an overall "package deal" that (among other things) includes claims in metaphysics, philosophy of language, philosophy of mind, and epistemology. That view might well be supported by something like an "inference to best explanation" argument. With this in mind, suppose we argue for a jurisprudential view – say Shapiro's Planning Theory of law (understood as involving a commitment to exclusive legal positivism) – as a "package deal" view in metalegal theory.[108] Moreover, suppose we argue for it using an "inference to best explanation" argument, where the rough idea is that this "package deal" does a sufficiently good job, and a better job than all the relevant alternatives, in explaining how legal thought, talk, and reality fit into reality. If we do so, we might endorse the claim that the real definition of law supports exclusive legal positivism *given* the role that this real definition plays in the overall "package deal" view in metalegal theory at hand. We think that this kind of argument for exclusive positivism is worth exploring further. We're not offering such an argument for exclusive positivism here, let alone endorsing the thought that it will turn out to work. Our point is simply that nothing forces such an argument to proceed via any commitments about the proper function of law.

Putting this all together, we think there is a simple response to Hershovitz's argument against exclusive legal positivism. That response relies on the idea of the real definition of law, but need not endorse any arguably problematic commitment to some claim about the proper function of law. Thus, as currently stated, we don't think that Hershovitz's argument against exclusive legal positivism is compelling.

8.2. Shapiro's argument for exclusive legal positivism

Our discussion of Hershovitz's argument illustrates how our proposal can make a difference to recent objections to exclusive positivism. What about arguments *for* that view? We think that our proposal can make a difference here too. To illustrate this, we now turn to one of Shapiro's main arguments in favour of exclusive positivism.

paper to engage with such views. See Herman Cappelen and David Plunkett, 'A Guided Tour of Conceptual Engineering and Conceptual Ethics' in Alexis Burgess, Herman Cappelen and David Plunkett (eds), (Oxford University Press 2020) for further discussion.)

[107]We are here working with the account of metalegal inquiry developed in Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry'.

[108]See ibid for this way of thinking about the Planning Theory of Law, which is put forward as a charitable interpretation of the ambitions of the theory developed in Shapiro, *Legality*.

The argument from Shapiro that we will consider is the one that Hershovitz, in the "Model of Plans", takes to be Shapiro's main argument for positivism (and eventually for exclusive positivism in particular). Hershovitz reconstructs it as follows:

> Premise 1: (P1) Laws are plans.
>
> Premise 2: (P2) The content of a plan is determined by social facts.
>
> Conclusion: (C) The content of the law is determined by social facts.[109]

As stated, (C) is a claim about the grounds of legal facts in general, and not just in an "ultimate" sense. Thus, for our purposes here, we can read it as a statement of exclusive legal positivism.

There are a number of questions we could raise about this argument.[110] However, our aim is just to focus on how our proposal bears on how we should evaluate the argument. Importantly, the points we raise carry over to a number of other ways one might want to argue from the premise that laws are plans to the conclusion that (exclusive) legal positivism is true.[111]

With our proposal in mind, we can ask: should we understand the claims in the reconstrued argument as putative *real definitions*? And if so, should we understand them as putative parts of the real definition of *law*?

Start with (C). Does it lie in the nature of law that the content of law is determined by social facts alone? If so, does the argument support this? It could if (P1) and (P2) are both part of the real definition of law. But this is implausible: (P2) is a claim about plans, not a claim about law. With a nod to issues we brought up in our earlier discussion surrounding the idea of "insulation", we can say the following: plausibly, the real definition of law is silent about the real definition of plans.

That may seem like a minor point. Perhaps the argument can establish that (C) is part of the real definition of law if (P1) is part of the real definition of law and (P2) is part of the real definition of plans. This could work, *modulo* some issues we raised above regarding the substitutability of *definiens* and *definiendum* in real definitions. But even here, we think a difficult question remains. Is it plausibly true that (P2) is part of the *real definition* of plans? Shapiro's defense of (P2) draws heavily on Michael Bratman's work on planning agency.[112] However, Bratman frames much of this work in terms of giving *sufficiency conditions* for a certain kind of planning agency – roughly, the kind of "strong" planning agency (which he thinks humans have) that involves certain forms of autonomy and self-governance, and capacities for cross-temporal and interpersonal organisation.[113] This is

[109]Hershovitz, 'The Model of Plans and the Prospects for Positivism', 158.

[110]For instance, Hershovitz claims that the argument is invalid because it equivocates between two different notions of "content". See ibid, 158–161. We think this objection raises important issues, but we don't think it ultimately succeeds.

[111]This point is tied to our choice of using Hershovitz's condensed, skeletal reconstruction of Shapiro's argument above as our starting point, rather than more detailed ones. Some other reconstructions might well avoid some of Hershovitz's charges (e.g., the charge of invalidity), or bring in further important details about the relations between Shapiro's argument for positivism in general vs. exclusive legal positivism in particular. Those exegetical details aren't crucial to the philosophical points we raise below, which is why we leave them aside here, even though they might well be crucial for further evaluation of Shapiro's arguments.

[112]See especially Michael Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press 1987) and Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge studies in philosophy, Cambridge University Press 1999).

[113]This focus on giving "sufficiency" conditions is emphasized in his methodological remarks in the introduction to Michael E. Bratman, *Structures of Agency: Essays* (Oxford University Press 2007), among other places. (See especially

far from offering anything akin to a real definition of that kind of planning agency, or the plans involved in that agency. So to adequately defend (P2) as part of the real definition of plans would involve taking on commitments that go significantly beyond what Bratman argues for. For example, a core part of Shapiro's argument for exclusive legal positivism is the following thesis: "the existence and content of a plan cannot be determined by facts whose existence the plan aims to settle".[114] It might well be that this thesis can be supported by Bratman's account of the particular kind of "strong" planning agency he thinks that humans have. But to show that this thesis is part of the *real definition* of this kind of planning agency would require going well beyond Bratman's "strategy of sufficiency" in developing his account of this kind of planning agency.

There's a general lesson here. Our proposal reveals how arguments for well-known views in general jurisprudence (such as exclusive positivism) might need to be far more ambitious than is often realised, insofar as those views are understood to be a part of, or necessarily follow from, the real definition of law. For example, we can ask questions about Raz's core argument for exclusive positivism that are similar to those we just raised about Shapiro's argument. Raz's argument rests on the idea that law claims practical authority, in combination with commitments about what *practical authority* involves, including his so-called "service conception" of authority.[115] It might be plausible to read (or develop) Raz's idea that law claims practical authority as part of a proposed real definition of law. But we don't think that it is plausible to read (or develop) the relevant commitments about practical authority as part of a proposed real definition of law. Indeed, it's also far from clear that they should even be read as commitments about the *real definition* of practical authority.[116] In any case, if these claims about practical authority were to be developed as part of the real definition of law, or of practical authority, this project would be significantly more ambitious than simply showing that these commitments about practical authority are true *when understood in some way* – e.g., as claims about sufficient conditions for having practical authority, or even necessary and sufficient conditions. This illustrates a general lesson: we need to demand more from arguments for exclusive positivism – just as we should for positivism or antipositivism more generally – than many currently do if these arguments are understood as concerning theses about real definitions, and about the real definition of *law* in particular.

There is another possibility about how to read Shapiro's commitment to exclusive legal positivism that is subtly, but perhaps importantly, different from what we've just been discussing. Consider again the two premise argument we reconstructed above, concluding in (C). It could be that (C) is true, but that it does not lie in *the nature of law* that (C) is true. In other words, on this view, exclusive positivism is true, but it is not part of the real definition of law. Of course, if (P1) is part of the real definition of law, then, given

ibid, 11) Bratman also adopts this "strategy of sufficiency" for explaining the nature of *shared* planning in Michael Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford University Press 2014). See, for example, ibid, 35–37.

[114]Shapiro, *Legality*, 275.

[115]See Raz, *The Authority of Law: Essays on Law and Morality* and Joseph Raz, 'Authority and Justification' (1985) 14 Philosophy and Public Affairs 3.

[116]For further discussion about some different ways of reading what kind of views Raz's views on authority are, and what this means for how they interact with the debate over legal positivism, see Plunkett, 'Robust Normativity, Morality, and Legal Positivism'.

(P2), it could be that (C) is an *implication* of the real definition of law.[117] That's an importantly different way of thinking about exclusive positivism. It may suffice for many of the exclusive positivist's theoretical ambitions, including for supporting a version of the response we sketched above to Hershovitz's objection (about the group attempting to create a Dworkinian legal system). Indeed, we already suggested it might suffice when giving our earlier response to Hershovitz, insofar as we put that response in terms of either what the real definition involves *or entails*. But notice that on this way of thinking about the argument, the only premise that states part of the real definition of law, (P1), involves only claims about its connection to plans.

Furthermore, suppose that we go with the idea that exclusive legal positivism is an implication of the real definition of law, rather than a part of it. If so, there are then a range of questions we can ask about the kind of "implication" this is, and what guarantees it. For example, does the implication involve an entailment that holds with metaphysical necessity? Or is it contingent? Whether this implication holds with metaphysical necessity or not, we can also ask about how the truth of it is tied to other theses connected to the debate. Is it guaranteed by the truth of a real definition (or some weaker thesis) about plans, or about authority, or something else entirely?

Once one clearly sees this option for how to read Shapiro's argument – where exclusive legal positivism is an implication of the real definition of law, rather than part of it – an interesting, underexplored possibility becomes visible. This is that perhaps the real definition of law is *neutral* between exclusive and inclusive positivism, or even between positivism and antipositivism. If this turned out to be the case, the guiding aspirations for the positivism debate we started with would turn out to be sadly misguided: for even if that debate concerns the real definition of law (as we have argued it does), discovering what that real definition is might not settle whether positivism or antipositivism is correct (let alone whether exclusive legal positivism is correct, *if* some form of positivism is correct). We don't have space to consider this possibility at length in this paper – or, more generally, the idea that the real definition of law just isn't that determinate with respect to any number of issues in the positivism debate that one might initially think it would settle. We have skepticism about at least some ways of developing this option, including those that aim to show that the real definition of law is neutral with respect to positivism and antipositivism. But we also think there is reason to at least explore it at more length.[118] In any case, the core point we want to make is as follows. Once we start thinking that the debate over positivism concerns the real definition of law, this opens up both more gaps in existing arguments in the debate than one might have realised, as well as more theoretical options worth exploring going forward.

[117]Notably, even on this reconstruction, the argument may involve taking on commitments that go significantly beyond what Bratman argues for, given his general "strategy of sufficiency" in developing his views on planning agency.

[118]Here is one way to motivate this option. Recall our earlier discussion of the idea of denying Rosen's "Grounding-Definition link". If one denied that link, that opens up the idea that the real definition of X might not settle facts about the grounds about X. To illustrate, some forms of metaethical non-naturalism (which seem committed to denying Rosen's proposed link) hold that the real definition of ethical facts is neutral with respect to a wide range of questions about those facts, including facts about their grounds. See Rosen, 'Normative Necessity' and Rosen, 'Metaphysical Relations in Metaethics' for discussion.

9. Conclusion

We started this paper with a tension in the literature on legal positivism. On the one hand, legal philosophers routinely aspire for the debate over legal positivism to tell us *what law is*, where that involves (at least in part) telling us the nature of law. On the other hand, the main recent ways of explicitly formulating positivism and antipositivism (as theses about modality or dependence) aren't directly about that topic. One way to resolve this tension, which we have explored in this paper, is to formulate positivism and antipositivism using the ideology of *real definition*. More specifically, we argued that existing modal or dependence-based formulations of positivism and antipositivism should be embedded *as part of* proposed rival real definitions of law. The resulting real definitions are then the new proposed accounts of positivism and antipositivism. We argued that this proposal, while simple, has several attractive features and makes a real difference in how we evaluate arguments in contemporary jurisprudential debate.

As a piece of metaphysical ideology, real definition is very old. It fell out of favour for much of twentieth century philosophy, but has received increased attention in recent years, and is gaining traction within many parts of philosophical theorising. While we think it is potentially fruitful in philosophy of law, we have not offered a full-throated defense of its use. Instead, as we emphasised earlier, our view in this paper may best be understood as being conditional: *if* real definition is a good piece of metaphysical ideology to use, then it can do some important work in the debate over positivism, and in the metaphysics of law more generally. We think there's value in exploring the implications of such a view, and it is worth taking seriously, despite uncertainty about the antecedent.

For much of recent history, legal philosophy has often been pursued in relative isolation from other areas of philosophy, such as general metaphysics. Sometimes that's perfectly fine, but sometimes it's a barrier to progress. The metaphysics of law *just is* a branch of metaphysics, after all. In this paper, we've argued if we take seriously the idea that the debate over positivism concerns the real definition of law, that may help us better grasp the shape of the debate as a whole, and the plausibility of positions and arguments within it. If our work in this paper has been successful, it is a case study that helps make the point that legal philosophy can benefit in important ways with serious engagement with other parts of philosophy, such as work in general metaphysics.

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