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3. Legal antipositivism and the reliability challenge in metaethics

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INTRODUCTION

At the heart of the debate over "legal positivism" is the question of whether the law does or doesn't have certain kinds of important connections to morality. The kind of conception of "morality" generally at issue here – especially in the contemporary debate – is one where "moral" facts are closely connected to what we can call "authoritative normative facts", which, put roughly, we can take to be facts about how people "really and truly" should live, or about what is "really and truly" valuable.[2] There are different ways of cashing out exactly which connections between law and such authoritative normative facts are at issue in the debate over positivism. For my purposes in this chapter, I am going to distinguish "positivism" and "antipositivism" in the following way.[3] Take

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[2] For an argument that these are the kinds of facts that are often at the core of recent discussions about "legal positivism" and "legal antipositivism", see 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). For more on the idea of "authoritative" (or, equivalently, "robust") normativity, see 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 David Plunkett and Scott Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (2017) 128 Ethics 37, drawing on Tristram McPherson, 'Against Quietist Normative Realism' (2011) 154 Philosophical Studies 223.

[3] In this chapter, I use single quotation marks (e.g. 'shoe') to mention linguistic items. I use double quotation marks (e.g. "shoe") for a variety of tasks including quoting others' words, scare quotes, and mixes of use and mention.

'facts about legal content' or 'legal facts' to refer to facts about what general legal obligations, legal rights, legal powers, and legal permissions obtain in a given jurisdiction (at a given time).[4] And take 'social facts' to refer broadly to whatever descriptive facts are relevant to determining legal content, such as facts about the behaviour of legal officials, social conventions, or the meaning of texts. According to positivism, it lies in the nature of law that, necessarily, only social facts "ultimately" explain legal facts, and not authoritative normative facts (nor facts that bear certain kinds of intimate explanatory connection to such normative facts, such as necessarily playing a major role in determining them).[5] In contrast, according to legal antipositivism, it lies in the nature of law that, necessarily, in addition to social facts, authoritative normative facts (or facts that bear certain kinds of intimate explanatory connection to such normative facts) "ultimately" explain the content of the law.[6]

Many legal positivists have argued that legal antipositivists, due to the central explanatory role they grant authoritative normative facts, end up saddled with deep problems in their proposed epistemology about how we learn about the law, problems which positivists (and especially "exclusive" legal positivists) can avoid.[7] In this chapter, I put forward a version of this kind of argument. I argue that there is an explanatory challenge tied to the epistemology of law that positivist theories are, in general, better equipped

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[4] This way of thinking about "legal content" and "legal facts" draws from Mark Greenberg, 'How Facts Make Law' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press 2006).

[5] The use of 'ultimately' here should be read as a sort of placeholder phrase, used to allow this formulation of positivism to make room for both "inclusive" and "exclusive" variants of positivism, which I discuss later in this chapter. To get a sense of the kind of "intimate explanatory connection" at issue here, consider forms of "moral rationalism" on which moral facts are conceptually distinct from authoritative normative facts, but necessarily entail the existence of such facts. See Plunkett, 'Robust Normativity, Morality, and Legal Positivism' (n 2) for further discussion.

[6] My formulations of legal positivism and antipositivism in terms of rival theses about the "ultimate" grounds of legal facts draw from the basic characterizations given in Greenberg, 'How Facts Make Law' (n 4); Scott Shapiro, *Legality* (Harvard University Press 2011); and David Plunkett, 'A Positivist Route for Explaining How Facts Make Law' (2012) 18 Legal Theory 139. I put it my formulations in terms of "authoritative normative facts" rather than "moral facts", for the reasons given in Plunkett, 'Robust Normativity, Morality, and Legal Positivism' (n 2). I include the starting phrase about "it lies in the nature of law" for the reasons given in David Plunkett and Daniel Wodak, 'Legal Positivism and The Real Definition of Law' (2022) Jurisprudence.

[7] For example, epistemological concerns about both antipositivism (especially of the kind associated with Ronald Dworkin) and inclusive legal positivism play important roles in the arguments for exclusive legal positivism given in both Joseph Raz, *The Authority of Law: Essays on Law and Morality* (first published 1979, Oxford University Press 2002) and Shapiro, *Legality* (n 6).

to deal with than antipositivist theories. This issue concerns explaining how people (including not only legal officials, such as judges, but also legal anthropologists, legal historians, and ordinary citizens, etc.) are reliable in forming the correct judgments about legal content that they do in fact form. Forming correct judgments about the content of the law is a core part of "legal interpretation" – indeed, perhaps *the* core part of it – on many ways of thinking about what "legal interpretation" is.[8] With that in mind, this issue about reliability can be seen as tied to explaining a key component of our reliability in legal interpretation. As I discuss, reflection on this issue about reliability in our legal judgments lends support to positivism. It also, I argue, suggests reasons to favour exclusive legal positivism over inclusive legal positivism. Drawing on a phrase from David Enoch, we can put the upshot as follows: legal positivism gains some "plausibility points" relative to antipositivism (and the same with respect to exclusive legal positivism, relative to inclusive legal positivism).[9]

Before I begin, I want to briefly flag how this chapter fits into a broader methodological idea. This idea – which I have advocated for in recent co-authored work with Scott Shapiro – is that one way to make progress in debates in general jurisprudence is to consider important connections between these debates and ones in contemporary metaethics.[10] With that in mind, my argument in this chapter can be seen as a sort of case study that puts this broader methodological idea into action.

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[8] See Mitchell Berman and Kevin Toh, 'On What Distinguishes New Originalism from Old: A Jurisprudential Take' (2013) 82 Fordham L Rev 545 and Mark Greenberg, 'Legal Interpretation and Natural Law' (2020) 89 Fordham L Rev 109 for discussion.

[9] See David Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (Oxford University Press 2011) 14. This "plausibility points" formulation of the upshots of my discussion might be importantly different than (and perhaps better than) the one I often use in this paper, where I put things in term of "evidence" for and against certain views. The reason for this is that my main aim in this paper is to focus on issues about the relative explanatory burdens of different metalegal views, and how those burdens make certain views more or less plausible overall, rather than to make a point about *evidence*, strictly speaking. Thus, if one has certain strongly held views about what constitutes "evidence" in general, I invite readers to use this "plausibility points" formulation of my argument rather than one in terms of "evidence".

[10] Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (n 2). See also Plunkett, 'Robust Normativity, Morality, and Legal Positivism' (n 2). The idea that there are important and underexplored connections between general jurisprudence and metaethics is also an important theme in Kevin Toh's work, such as Kevin Toh, 'Jurisprudential Theories and First-Order Legal Judgments' (2013) 8 Philosophy Compass 457.

1. THE RELIABILITY CHALLENGE IN METAETHICS

The type of reliability challenge I want to discuss is more regularly discussed in metaethics than in general jurisprudence. So, to get a grip on what the relevant reliability challenge is for legal judgments, let's start with the case of ethical judgments.

The basic reliability challenge in ethics that I want to focus on – which, arguably, is a core part of Sharon Street's influential "Darwinian Dilemma" argument – can be put as follows.[11] Most of us want to believe – and, indeed, think we are justified in so believing – that we are reliable in (at least core parts of) our ethical judgments. Of course, we might be wrong about *all sorts of* ethical issues. And it might be that certain experts are better at forming beliefs (at least about certain ethical issues) than other people are, and that everyone still has a lot they can learn about ethical matters. But take core ethical judgments such as "other things being equal, it is better to experience pleasure rather than pain" or "it is ethically wrong to harm innocent people just for fun". We seem to be relatively on track in making these judgments. Or at least we don't think we are hopelessly off track here, and certainly we think that we are better than just forming ethical judgments at random. We think the same is true for at least some ethical judgments about more complicated or specific ethical matters as well. Suppose we grant the non-sceptical premise that we are in fact reliable in the relevant ethical judgments at issue here. We then have a purported connection between (a) the content of our ethical beliefs (or at least some core ethical beliefs) and (b) the ethical facts that those beliefs are about. This is a striking correlation. It's one that many think "calls out for explanation". It's at least the kind of correlation that, other things being equal,

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[11] My formulation of this challenge draws from David Enoch, 'The Epistemological Challenge to Metanormative Realism: How Best to Understand it, and How to Cope With it' (2010) 148 Philosophical Studies 413 and Joshua Schechter, 'Explanatory Challenges in Metaethics' in Tristram McPherson and David Plunkett (eds), *The Routledge Handbook of Metaethics* (Routledge 2017), works which in turn draw on, and give interpretations of, Sharon Street, 'A Darwinian Dilemma for Realist Theories of Value' (2006) 127 Philosophical Studies 109. The kind of reliability challenge in metaethics that I discuss here draws from the discussion about a parallel challenge in the philosophy of math, developed by Hartry Field, *Realism, Mathematics, and Modality* (Blackwell 1991), drawing on Paul Benacerraf, 'What Numbers Could Not Be' (1965) 74 Philosophical Rev 47. For my own further discussion of this challenge, see David Plunkett, 'Conceptual Truths, Evolution, and Reliability About Authoritative Normativity' (2020) 11 Jurisprudence 169.

it would be good to have an explanation of. The reliability challenge in ethics is to explain that correlation.[12]

The basic idea is that it counts in favour of a metaethical theory if it has a good explanation of this correlation. And it counts against such a theory if it does not. By a "metaethical theory" I mean one that aims to explain how actual ethical thought and talk – and what (if anything) such thought and talk is distinctively about – fits into reality.[13] Importantly, different metaethical theories have different resources at their disposal for explaining this correlation, leading to more or less compelling explanations.

To illustrate some of the basic differences here, start with two common kinds of explanation that we might be able to give for this kind of correlation between X beliefs (that is: beliefs about the X facts) and the X facts themselves. One kind of relationship we might invoke is a causal one: e.g., the X facts could help cause the X beliefs, or else cause other facts that do so. To see how this might go, think here, for example, of a certain straightforward model of vision on which our beliefs about the location of objects around us can be partly caused by seeing those objects. Another kind of relationship we might invoke is a constitutive one: the X facts could be partly constituted by X beliefs. Think here, for example, of judgment-dependent views of humour on which facts about what is humorous depend on facts about what we judge to be humorous.

Certain metaethical views allow for the smooth use of these two kinds of connections, while others do not. This variation leads to different overall responses that proponents of different metaethical theories can give (or not give) to the reliability challenge.

For example, take certain kinds of "naturalistic realist" views on which, put roughly, ethical facts are part of the same "metaphysical similarity" class as the kind of "naturalistic" facts we study in the natural and social sciences.[14] If the

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[12] I have put the core issue here in terms of explaining our reliability about ethical "facts". However, it should be noted that if one wanted to deny that there were ethical "facts" (even in "quasi-realist" or "minimalist" sense), we could rephrase the reliability challenge in a different way. In short, we could say that the correlation that needs to be explained is between the content of our judgments (e.g., the judgment "P") and the relevant object-level reality (e.g., P). See Joshua Schechter, 'Does Expressivism Enjoy an Epistemological Advantage Over Realism?' (Manuscript) for connected discussion.

[13] For more on this way of thinking about metaethics, see McPherson and Plunkett, 'The Nature and Explanatory Ambitions of Metaethics' (n 2) and Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (n 2).

[14] My gloss of what naturalistic realism involves (and the account I give below of what non-naturalistic realism involves) draws from Tristram McPherson, 'What is at Stake in Debates among Normative Realists?' (2015) 49 Noûs 123.

ethical facts are like this – perhaps, for instance, by being identical to certain naturalistic facts, or by being fully definable in terms of them – they might then be apt to be the sort of things that could play a role in causal explanation. Some forms of naturalistic realism also make ethical facts attitude-dependent in some way. If this is so, advocates for this kind of view could potentially make use of the kind of constitutive connections I glossed above. Because of such considerations, it's plausible to think that, in general, naturalistic realist views in metaethics are (as a general class of views) fairly well-suited to explain the kind of reliability at issue.

Consider other kinds of metaethical theories in contrast. Start with non-naturalistic realists in metaethics – who, put roughly, take ethical facts to be "sui generis" (or "of their own kind") and thus *not* of the same metaphysical similarity class as naturalistic facts. Yet they also affirm that they are genuine facts, which are just as "real" as other kinds of facts we study in the natural and social sciences. Non-naturalist realists standardly deny that ethical facts (or at least the explanatorily fundamental ones) themselves play any sort of causal role, and also deny that they are in any way attitude-dependent. It's thus not clear what explanation (if any) they can give of our reliability in our ethical judgments.[15] Consider also "quasi-realist" expressivists who aim to endorse many of the same theses as non-naturalistic realists, but with a (purportedly) different underlying explanation of how to vindicate those theses.[16] They arguably inherit the same difficulties here as non-naturalist realists, at least to the extent that the theses they endorse include denying that ethical facts play a causal role and affirming that they are attitude-independent.[17] Finally, to take one last example, consider the sort of "relaxed" or "quietist" version of non-naturalistic realism on which there are non-naturalistic realist facts, but only in some kind of weak or less metaphysically "loaded" sense than "robust" non-naturalists such as Enoch think there are.[18] Such views arguably either face a similar set of issues to "quasi-realist" expressivist views with respect to the reliability challenge, or else they simply embrace a kind of quietism that

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[15] I discuss this further in Plunkett, 'Conceptual Truths, Evolution, and Reliability About Authoritative Normativity' (n 1).

[16] See Simon Blackburn, *Essays in Quasi-Realism* (Oxford University Press 1993) and Allan Gibbard, *Thinking How to Live* (Harvard University Press 2003).

[17] See Sharon Street, 'Mind-Independence Without the Mystery: Why Quasi-Realists Can't Have It Both Ways' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 6 (Oxford University Press 2011) and Schechter, 'Does Expressivism Enjoy an Epistemological Advantage Over Realism?' (n 12) for connected discussion.

[18] For example, see the view put forward in Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011), in contrast to the metaethical view that Enoch calls "Robust Realism" in Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (n 9).

claims that no explanation is needed in response to this challenge. That latter option for the quietist comes at a significant cost, insofar as one thinks there is a legitimate explanatory demand here that other rival metaethical theories (e.g., certain naturalistic realist theories) take head-on.[19]

Because of the different explanatory resources that different metaethical views bring to the table, many think that the reliability challenge can be used as an argument – perhaps a quite powerful one – against certain kinds of metaethical views (especially non-naturalistic realism). In short, the fact that some views have a better response to the challenge than others is a mark in their favour, while the fact that others have a worse response is a mark against them.[20]

There is a large literature in recent metaethics about this reliability challenge, along with work dealing with closely connected epistemological challenges in metaethics.[21] Unsurprisingly, this literature contains many different attempts to bolster the metaethical views that seem to have a comparatively harder time than their rivals at explaining our reliability in ethical judgment. For example, one of the leading kinds of explanation offered in support of non-naturalist views is a kind of "third factor" explanation. The idea, put roughly, is that the non-naturalist can appeal to some "third factor" that is appropriately connected (through either causal or constitutive connections) to both our ethical beliefs and the ethical facts.[22] Or, to take the case of quasi-realist expressivism, some have argued that, given the kind of underlying story the expressivist gives for

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[19] For connected (more general) criticisms of such "quietist" versions of non-naturalism, see McPherson, 'Against Quietist Normative Realism' (n 2); Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (n 9), and David Enoch and Tristram McPherson, 'What Do You Mean "This isn't the Question"?' (2017) 47 Canadian Journal of Philosophy 820. See also Sharon Street, 'Objectivity and Truth: You'd Better Rethink It' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 11 (Oxford University Press 2016).

[20] The reliability challenge in metaethics can be seen as an instance of a more general explanatory goal for metaethical theories: to explain *whatever* salient patterns of ethical judgment we in fact see, or at least those that in some sense "call out for explanation". (The parallel point also holds in the metalegal case.) For example, if we see a large degree of agreement in ethical judgments of a certain kind (whether those judgments are in fact correct or not), this would be a good thing, other things being equal, for a metaethical theory to explain.

[21] For a helpful overview and further references, see Schechter, 'Explanatory Challenges in Metaethics' (n 11).

[22] See Enoch, 'The Epistemological Challenge to Metanormative Realism: How Best to Understand it, and How to Cope With it' (n 11); Erik J Wielenberg, 'On the Evolutionary Debunking of Morality' (2010) 120 Ethics 441, and Knut O Skarsaune, 'Darwin and Moral Realism: Survival of the Iffiest' (2011) 152 Philosophical Studies 229.

how to capture the core theses of non-naturalistic realism, we have reason to think that they can avoid this challenge.[23] It is beyond the scope of this chapter to go into the details of these or other responses on behalf of views that at least initially seem to struggle more with explaining our reliability in ethical judgment. I flag them just to make clear that my sketch of the dialectic above is only that – a sketch. At the same time, the sketch is enough to bring out an important point: certain kinds of views that are major "live options" in the metaethical literature, at least prima facie, seem to have much more difficulty than other views in explaining our reliability in making ethical judgments.

Turning away from ethics, consider the following: for *any* set of facts for which we think we (or some group of people) have generally reliable judgments about, we can ask what explains that reliability. In each case, if a theory about the relevant part of thought, talk, and reality can explain that reliability, that is a mark in favour of it. And it is a mark against it if it cannot. I've focused on the case of ethics here for a reason, however. Given the context at hand, certain ethical facts – namely, those that are authoritatively normative – are crucial for the debate over legal positivism. But the reliability we (or certain of us) have in beliefs about a range of other kinds of facts arguably raises similar issues: some examples include our reliability about judgments about moral facts (conceived of as distinct from, or a subset of, the "ethical" ones), epistemological facts, mathematical facts, modal facts, or logical facts. One common feature in many areas where reliability challenges have loomed large is that they are places where views akin to "non-naturalism" in metaethics are seen as "live options". For example, take the philosophy of math, where the kind of reliability challenge I have been discussing has received significant attention (and has served as a basis for key parts of the recent metaethical discussion). There, "Platonism" about mathematical facts (on which, put roughly, such facts are about abstracta that are not part of the causal-explanatory order) has been an important view. And much like the closely related view of non-naturalism in metaethics, that is the primary view that has been targeted by reliability challenges in that area. For other kinds of facts where a version of the reliability challenge seems potent – for example, modal facts – the issue appears to be, put roughly, that the relevant facts (at least prima facie) seem to be hard to fit into our best overall naturalistic account, such that we aren't sure whether there is a good naturalistically acceptable epistemological story of how we learn about them. For other kinds of more prosaic facts (for example,

[23] See Allan Gibbard, 'How Much Realism? Evolved Thinkers and Moral Concepts' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 6 (Oxford University Press 2011) and Jamie Dreier, 'Quasi-Realism and the Problem of Unexplained Coincidence' (2012) 53 Analytic Philosophy 269 for different proposed responses on behalf of quasi-realist expressivism.

facts about the location of mid-sized objects in my immediate environment) or scientific facts (for example, biological facts), we can ask questions about what explains the (relevant kind and level of) reliability in judgments in those areas that people have. And there are many epistemological issues to be investigated there, many of which raise thorny philosophical questions (for example, issues in philosophy of perception or the philosophy of science). But there is a sense in which a "reliability challenge" in many areas (including the examples I just gave) wouldn't have the same bite as it does in the ethical case. This is because, in short, we have a clearer grip on how we might get a naturalistically respectable story about the epistemology in these areas off the ground than we do in ethics, at least on certain metaethical theories that are "live options".

2. THE RELIABILITY CHALLENGE IN METALEGAL INQUIRY

Now consider the legal facts. Many people – including ordinary people, judges, legal historians, and others – take themselves to be reliable in at least core legal judgments about what the law is (in a given jurisdiction, at a given time). Consider judgments about whether murder is currently legal in Spain, or whether the speed limit in Arkansas is currently below 150mph. As with other kinds of facts, some people (e.g., judges or lawyers) might be better at learning about some legal facts than other people. And many people might be wrong in many of their legal judgments and have much to learn. But, as with our ethical judgments, we at least think that we are far from hopeless here, and that we are certainly better than random. Suppose that is right. Then, other things being equal, it would be good for a metalegal theory to have a good explanation of this reliability. By a "metalegal" theory I mean one that explains how actual legal thought and talk – and what (if anything) such thought and talk is distinctively about – fits into reality.[24]

This challenge for metalegal theories might not seem that deep – at least not as deep as in the parallel case in metaethics. But, like in metaethics, different metalegal theories have different resources to explain the reliability at issue here. What I want to suggest in what follows is that legal antipositivists are, in general, in a relatively worse position than legal positivists to accomplish this task.

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[24] For more on what this idea of "metalegal inquiry" amounts to, and how "general jurisprudence" can be seen as a subset of "metalegal inquiry", see Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (n 2).

To begin to make this case, let's start with two different positivist theories, and what the relevant reliability challenge about legal judgments looks like relative to those theories.

First, consider H.L.A. Hart's metalegal account that he advances in *The Concept of Law*.[25] On Hart's account, the law is a particular kind of union of primary and secondary rules (which are "rules about rules"). Among the secondary rules is the "rule of recognition", which states what it takes for other rules to be part of the legal system at hand (which Hart discusses as the conditions of "legal validity").[26] On Hart's view, the existence and content of the rule of recognition is grounded in social facts about the convergent behaviour of legal officials. Hart thinks that insofar as a given rule of recognition makes reference to certain moral criteria, or other normative criteria of any kind, then the relevant moral facts (or other normative facts, tied to the other criteria at hand) help explain the legal facts in that jurisdiction (at that time). This makes Hart's view a form of "inclusive" legal positivism: put roughly, it's a view on which authoritative normative facts can be part of the grounds of law, but only in virtue of the obtaining of certain contingent social facts.[27] On the reconstruction of Hart that I favour, one's thoughts about the content of the law consist in attitudes that (at the most explanatorily basic level) are beliefs about how things stand in relation to the rules that (one thinks) are validated by the rule of recognition. That's a form of "cognitivism" about (at least this part of) legal thought. In turn, statements of law express those beliefs, such that a form of "descriptivism" is true of them.[28] On this view, the kinds of facts we need to explain our reliability in making judgments about "what the law is" are relational facts of a certain kind, about how things stand in relation to rules validated by the relevant rule of recognition.

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[25] H.L.A. Hart, *The Concept of Law* (first published 1961, 3rd edn, Oxford University Press 2012).

[26] Some philosophers read Hart as holding that there is only one rule of recognition per legal system, while others think that this need not be so. For an example of the first kind of reading, see Andrei Marmor, *Philosophy of Law* (Princeton University Press 2011). For an example of the second kind of reading, see John Gardner, 'Law in General' in *Law as a Leap of Faith* (Oxford University Press 2012). For ease of exposition, I stick with the first reading, but this should not be read as taking a firm commitment on this interpretative issue.

[27] See Plunkett, 'Robust Normativity, Morality, and Legal Positivism' (n 2) for further discussion about some of the complexities of formulating "inclusive" legal positivism, and for references to further discussions about this kind of view.

[28] See 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 (Oxford University Press 2018) for more on this way of reading Hart, and for discussion of alternative, rival reconstructions.

Now consider Shapiro's "Planning Theory of Law" as he develops it in *Legality*.[29] In rough terms, Shapiro's Planning Theory is based on two central claims about the nature of law. First, it claims that *legal institutions* create, apply, and enforce shared plans for a group of agents in a given community. Second, it claims that *the law* (in a given jurisdiction, at a given time) consists of those plans that are applied by those institutions, regardless of anything to do with the normative merit of those institutions or plans.[30] A key plan involved here is what Shapiro calls a "master plan", which, roughly, is the overall plan for shared planning in that legal institution. Similarly to Hart's "rule of recognition", Shapiro thinks that what the content of the "master plan" *is* in a given legal system is something explained in terms of social facts, and not authoritative normative facts. In contrast to Hart, Shapiro adopts a form of "exclusive" legal positivism, according to which the law doesn't incorporate moral norms (or other norms that either are "authoritatively" normative, or which bear some intimate connection to such norms). Such norms might be ones that the plans that constitute the law instruct agents to look at, but, according to exclusive positivism, they play no role in explaining what the law in fact is. Put roughly, on this picture, when the law instructs legal officials (or other agents) to look at authoritative normative facts, the beliefs that legal officials have about those norms might impact their plans, which (if they are the relevant plans) might in turn impact what the law is in that jurisdiction. But, in such a case, the normative facts themselves still don't play a role in the determination of the law. Coupled with this metaphysical account of laws as plans, Shapiro, like Hart (on my preferred reading of him), also endorses a form of cognitivism about legal thought, and a form of descriptivism about legal talk. Put roughly, for Shapiro, judgments about what the law is (in a given jurisdiction, at a given time) concern questions about which plans are part of the totality of the plans that legal institutions create, adopt, and enforce. In turn, judgments about whether a given action is legal or not consist in judgments about how things stand in relation to those plans. Legal statements about what the law is then express those beliefs. On this view, the kinds of facts we need to explain our reliability in making judgments about "what the law is" are (as on Hart's theory) relational facts of a certain kind, about how things stand in relation to a certain set of plans.

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[29] Shapiro, *Legality* (n 6).

[30] Shapiro also thinks that certain other "planlike norms"– e.g., norms of custom – can be part of the law, if they are taken up by those plans in the right sort of way. ibid 140. This detail won't be important in what follows. So I will drop it for ease of exposition.

Now consider Mark Greenberg's "Moral Impact Theory of Law".[31] According to the Moral Impact Theory, the content of the law is a subset of what Greenberg calls "the moral profile": the general *moral* obligations, rights, powers, and permissions that obtain in a given social context (at a given time). In particular, he argues that the content of the law is that subset of the moral profile which is brought about by the operation of legal institutions, in the right sort of way. In other words, on this view, legal obligations are identical to certain moral obligations (with the same parallel point being true of legal rights, powers, and permissions). Importantly, Greenberg states that when he claims that legal obligations are moral obligations, he doesn't mean to invoke an idea of "morality" according to which morality is a normative system that might or might not settle how we really and truly should live. Instead, as he puts it, according to the Moral Impact Theory, legal obligations are "genuine" obligations, where I take this to mean that they are directly about what we "really and truly" should do.[32] To put it in the terminology I've been working with here, when Greenberg talks about facts about "moral obligations" etc., he is talking about authoritative normative facts. According to the Moral Impact Theory, in making legal judgments about legal content, we are making judgments about a subset of the moral profile. Thus, on Greenberg's theory, in order to explain the reliability of our legal judgments, one needs to explain our reliability about the relevant kind of authoritative normative facts that are part of this moral profile. In other words, if the Moral Impact theory is correct, then the reliability challenge about legal judgments is just an instance of a version of the reliability challenge about authoritatively normative judgments.

Let's now contrast these three different views.

As the sketch of Shapiro's views illustrates, in order to explain our reliability in legal judgments about what the law is (in a given jurisdiction, at a given time), some positivists need not take on the task of explaining our reliability in ethical judgment. That's because, according to exclusive positivists such as Shapiro, authoritative normative ethical facts are not amongst the grounds of law. For inclusive legal positivists (such as Hart), whether authoritative normative ethical facts are amongst the grounds of the legal facts is a contingent matter, which depends on the social facts in a given context. So, according to the inclusive legal positivist, it's at least possible that there are some contexts where our reliability in legal judgments about what the law is (in a given jurisdiction, at a given time) won't involve reliability in ethical judgment: namely,

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[31] Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 The Yale LJ 1288.

[32] As he puts it: "When I say 'genuine' obligations, I am talking about whatever we are really required to do." Greenberg, 'Legal Interpretation and Natural Law' (n 8) 134.

ones where the legal facts don't depend on ethical facts. (I discuss some of the complications here with inclusive legal positivism and the reliability challenge about our legal judgments more below). Whether they are of the "inclusive" or "exclusive" variety, positivist theories can (and I think *should*) grant that legal judgments involve judgments about how things stand in relation to certain kinds of norms. But those norms need only be "normative" in a very thin, minimal sense – roughly, the sense in which *any* standard or norm is something for which we can judge whether things (e.g., actions) conform to it or not. The minimal kind of "normativity" involved here – which we can think of as "generic" or "formal" normativity – comes relatively cheap compared to "authoritative" normativity: it's the kind of normativity involved in board games, in addition to such (at least seemingly) "normatively weightier" or "more normatively authoritative" things as morality, justice, and rationality.[33]

The fact that positivist theories need only posit "formal" normative facts in explaining the metaphysics of law, rather than "authoritative" normative ones, arguably makes the task of explaining our reliability in legal judgment *easier* for them than for antipositivists. (And especially so for *exclusive* legal positivists.) This is because it seems easier to explain our reliability in judgment about the kinds of thin "formal" normative facts described above than it does to explain our reliability in judgment about authoritative normative facts in ethics (or elsewhere). That's not to say that there aren't significant epistemological (and connected metaphysical) issues about merely "formal" normativity. The literature on rules and rule-following stemming from the later work of Ludwig Wittgenstein helps make clear that there are quite significant philosophical issues here.[34] But consider the kind of "just too different" intuition that (for many) underwrites the appeal of non-naturalism in metaethics: the idea that the ethical facts are "just too different" from naturalistic facts for metaethical naturalistic realism to be true.[35] The pull of that intuition isn't as strong for the rules of chess as it is for authoritative normative facts about how one "really and truly" should live. That's part of why non-naturalistic realist views in

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[33] For more on the contrast between this kind of "formal" (or "generic") normativity, as opposed to "robust" (or "authoritative") normativity, see McPherson and Plunkett, 'The Nature and Explanatory Ambitions of Metaethics' (n 2); Plunkett and Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (n 2), drawing on McPherson, 'Against Quietist Normative Realism' (n 2).

[34] See, for example, Saul Kripke, *Wittgenstein on Rules and Private Language* (Harvard University Press 1982), discussing themes from Ludwig Wittgenstein, *Philosophical Investigations* (first published 1953, Wiley-Blackwell 1991).

[35] See Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (n 9).

metaethics are much more prominent than they are for thought and talk about, for example, the rules of board games or social conventions.[36]

Furthermore, we can note the following. On Hart's and Shapiro's theories, legal judgments concern how things stand in relation to formal norms, whose connection to authoritative normative ones is contingent. In turn, which formal norms are relevant is dependent on social facts: for example, in Hart's case, facts about the convergent behaviour of officials that determine the "rule of recognition". We might face any number of epistemological challenges in learning about the relevant social facts here, whether on Hart's theory or any other positivist one. However, at least prima facie, explaining our reliability in making judgments about social facts (even ones as complicated as those that Hart thinks determine the rule of recognition) doesn't seem nearly as difficult as the parallel reliability challenge in metaethics. To drive this comparative point home, consider that part of what makes the parallel reliability challenge in metaethics seem (at least prima facie) especially acute in the first place is precisely that it is less clear that the kind of constitutive connection between the relevant facts and facts about us, our behaviours, attitudes, and responses that positivists often take to be at the foundations of law (such as in Hart's account of the grounds of the "rule of recognition", or Shapiro's account of the grounds of the "master plan") play a similarly deep explanatory role in determining the ethical facts. Indeed, as I have discussed, it is precisely because certain prominent views that are "live options" in the field (such as non-naturalistic realism) rule out such constitutive connections that they appear to face a particularly acute version of the reliability challenge.

Of course, antipositivists such as Greenberg might have a compelling answer to the reliability challenge in metaethics, connected to a compelling overall metaethical view. One reason to think this might be so is that the reliability challenge is generally regarded as most acute for non-naturalistic realists, and antipositivists need not endorse non-naturalistic realism as a metaethical view. Or perhaps an antipositivist *is* a convinced non-naturalistic realist in metaethics who finds one of the existing responses to the reliability challenge on behalf of this view, such as the prominent "third factor" kind of response, fully convincing. But the point here is *not* that there is no compelling response to the reliability challenge in metaethics, either for those who defend

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[36] It's also part of why, I take it, many philosophers take authoritative normativity to (at least prima facie) be more metaphysically perplexing than merely formal normativity. (For an alternative, heterodox view here, which suggests that the opposite is true, see Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 The Yale LJ 1160. For a response, see 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)).

non-naturalistic realism or some other view (e.g., the kind of "relaxed" or "quietist" form of non-naturalism that Ronald Dworkin favours). The point, rather, is twofold. First, in order to explain reliability in legal judgment, antipositivists must take on the task of providing a compelling response to the reliability challenge in metaethics, given their metalegal views. Second, this challenge seems like a bigger one than the challenge that positivists face with explaining our reliability in legal judgment, given that only formally normative facts, grounded in social facts, need be part of the story, and not authoritative normative facts about ethics. This is because, as I explained above, the challenge of explaining our reliability in judgments about authoritative normative facts seems, at least prima facie, more acute than the challenge of explaining our reliability in judgments about formally normative facts, grounded in social facts. Or at least this is so if we give some decent degree of credence to a number of "live options" in metaethics (such as non-naturalistic realism, quasi-realism, and quietist realism), and don't give as much credence to the relevant parallel views about formal normativity (such as those that endorse non-naturalistic realism about merely formally normative facts). This doesn't show that antipositivism is wrong. But it does show that the view faces an extra (arguably quite significant) explanatory burden. If there isn't a good way of responding to that burden, and if positivists have a comparatively better explanation of our reliability in legal judgment, then that provides some evidence against antipositivism, and some evidence in favour of positivism.

3. COMPLICATIONS

I now want to turn to four important complications for my argument.

Let's start with a complication that concerns two different forms of antipositivism. Consider again Greenberg's Moral Impact Theory. As I have been presenting it here, the view asserts an identity relation between legal facts and certain authoritative normative facts.[37] Contrast that with forms of antipositivism that claim that, necessarily, legal facts are ultimately partially grounded in authoritative normative facts, but that don't posit an identity relation between legal facts and some authoritative normative facts.[38] What then of

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[37] This arguably means that Greenberg's view amounts to what is sometimes called a kind of "one system" form of antipositivism. The idea is that there is a sense in which, at the explanatory ground floor, there is only one normative system here, a "moral" normative system that is authoritatively normative, which the law is a part of. See Hershovitz, 'The End of Jurisprudence' (n 36) for discussion.

[38] This arguably yields what is sometimes called a "two system" form of antipositivism, on which there is (allegedly) an important sense in which the law is a separate system from morality. See ibid.

antipositivist views that stake out only necessary grounding connections that hold between the legal facts and the authoritative normative facts, but not an identity relation?[39]

It can be a delicate matter to pull apart exactly which antipositivist views are best formulated in terms of an assertion of an identity relation between legal facts and authoritative normative facts versus ones that don't assert an identity relation between those facts but only assert certain grounding connections (or other kinds of metaphysical "dependence" relations) between them. That question also obviously intersects with more general issues in metaphysics about the relations between identity and grounding. But let's assume, for now, that we are working with at least some "antipositivist" views that deny an identity relation between the legal facts and the authoritative normative facts but accept a grounding connection between them (and one that holds as a matter of necessity).

Now consider that, in general, if the X facts are grounded in the Y facts (rather than identical to them) that doesn't mean we need to learn about the Y facts to learn about the X facts. For example: if the biological facts are grounded in the facts about physics, that doesn't automatically entail that we need to study the facts of physics to study the biological facts. One might think that this point could help the antipositivist avoid taking on reliability challenges about the relevant authoritative normative facts, namely, the ones that (according to the form of antipositivism we are considering) are part of the ultimate grounds of the legal facts, but not identical to them. But how much does this point actually help antipositivists? I think not much. Consider that, in practice, when antipositivists make claims about what the law actually is, it's not as if they take the authoritative normative facts to be epistemologically irrelevant. Rather, they often give such facts pride of place in their own practices of making legal judgments about what the law is (in a given jurisdiction, at a given time).[40] This arguably reflects a more general truth about the way in

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[39] In asking this question, it's worth noting that Greenberg himself standardly presents "antipositivism" as such as a view about the ultimate grounds of legal facts. (As in Greenberg, 'How Facts Make Law' (n 4)). Moreover, many of his presentations of his Moral Impact Theory in Greenberg, 'The Moral Impact Theory of Law' (n 31) highlight a grounding formulation of the relation between legal facts and moral facts, in addition to often using language that suggests the kind of identity relation that I've been working with. Furthermore, Dworkin's view of law in Ronald Dworkin, *Law's Empire* (Belknap Press 1986) is arguably best understood as a view that fundamentally involves this kind of grounding relation between the legal facts and authoritative normative facts, rather than the kind of identity relation between those facts that is more salient in Dworkin, *Justice for Hedgehogs* (n 18).

[40] See, for example, Greenberg's discussions in Greenberg, 'The Moral Impact Theory of Law' (n 31) and Dworkin's discussions in Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996).

which (at least explanatorily core parts of) legal epistemology closely tracks the underlying metaphysics of law. Greenberg is a leading proponent of this general idea.[41] In short, the idea is that the core way we learn about the content of the law is through working out other facts (social facts, moral facts, etc.) that ground facts about legal content. In turn, whatever other more "indirect" ways we have of learning about the law – say, through testimony, or through the use of certain heuristics – are explanatorily parasitic on this core method. If this idea (which is neutral between positivism and antipositivism) is on the right track, which I think it is, then antipositivists won't be able to avoid taking on the reliability challenge in metaethics by appealing to a grounding-formulation of their views, rather than one in terms of an identity relation.

I now turn to two complications about different forms of positivism.

First, there are obviously differences in *which* social facts, relational facts, or "formal" normative facts different positivist views posit. It might of course be more difficult to explain reliability in judgments about certain such facts than others. To illustrate, compare the social fact about the number of people currently in the room I am writing this paper in versus the social fact about how many people are currently in India. It is arguably much easier for me to form a correct judgment about the former fact than the latter. This discrepancy reflects that, for all I have said, there might be significant differences in how well-positioned different positivist theories are to respond to the reliability challenge in metalegal inquiry. This is parallel to (for example) how some kinds of naturalistic realist theories in metaethics are in a better position than rival theories to respond to the reliability challenge in metaethics.

Second, consider the contrast between inclusive and exclusive legal positivism again. For inclusive positivists such as Hart, some of our legal judgments (in certain jurisdictions) might involve questions about how things stand in relation to authoritative normative ethical facts, e.g., if the relevant rule of recognition makes reference to them in the relevant ways. If we assume (in line with what I noted above) that the relevant parts of legal epistemology track the legal metaphysics here, then in order to explain our reliability in at least *some* judgments about what the law is, inclusive legal positivists need to explain our reliability in ethical judgments. In contrast, exclusive legal positivists such as Shapiro face no such challenge. Insofar as our reliability about ethical facts is something that is harder to explain than our reliability about the kinds of facts the exclusive legal positivist claim explain the law (such as the facts involved in Shapiro's Planning Theory), that seems to give exclusive legal

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[41] For some of the places where Greenberg advances this view, see Greenberg, 'How Facts Make Law' (n 4) and Greenberg, 'Legal Interpretation and Natural Law' (n 8).

positivists a leg up in explaining reliability in our legal judgments. It therefore seems that reflection on the reliability challenge in metalegal inquiry provides at least *some* evidence in favour of exclusive positivism over inclusive positivism, in addition to providing some evidence in favour of positivism over antipositivism.

This issue about inclusive versus exclusive legal positivism will be especially important if inclusive legal positivists think that (1) many (or at least many salient) actual legal systems are ones whose legal content is determined by authoritative normative facts and (2) in those legal systems, authoritative normative facts don't just determine *some* parts of the legal content, but rather play a foundational role in explaining most or all of it (e.g., the rules of recognition in those systems involve tests for legal validity that partly concern authoritative normative facts). Put roughly, the bigger the explanatory role inclusive legal positivists grant authoritative normative facts in explaining the relevant legal facts, the less they have an explanatory advantage over antipositivists in responding to the reliability challenge about legal judgment that I have been discussing.

Finally, I want to turn to an important issue that I have been skating over, which concerns how one frames the whole debate over positivism in the first place. Recall that when I introduced Greenberg's Moral Impact Theory, the relevant notion of "legal content" for him was the idea of the full set of general legal obligations, rights, powers, and privileges that obtain in a given jurisdiction (at a given time). However, when I switched to talking about legal positivists such as Hart and Shapiro, I focused on something else: what the full set of *laws* is in a given jurisdiction (at a given time). That's a different issue. It's one we might still think of as concerning one sense of "legal content" or the "content of the law", but it is not the same as what Greenberg is talking about.[42] This might be more than just a small point. To see why, consider that someone who endorsed either Hart's or Shapiro's theories as I have sketched them above might then go on to endorse any number of further claims about what "legal obligations" are (or about what "legal rights", "legal powers", or "legal privileges" are), and how to understand our thought and talk about them. Most strikingly, they might endorse a version of Greenberg's Moral Impact theory about legal obligations, while still holding that laws themselves are ultimately fully grounded in social facts, and not in authoritative normative ones. Neither Hart nor Shapiro do that. But the hypothetical brings out the point that,

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[42] For further discussion of this point, see David Plunkett, 'The Planning Theory of Law II: The Nature of Legal Norms' (2013) 8 Philosophy Compass 159 and David Plunkett and Daniel Wodak, 'The Disunity of Legal Reality' (forthcoming) Legal Theory.

if they did – or if they endorsed some other view on which legal obligations were identified as a subset of authoritative normative obligations, or partly grounded in them – then the positivist would face a more complicated task in explaining our reliability in legal judgments about a certain group of things (legal obligations, rights, powers, and privileges) than in explaining legal judgments about which laws obtain. And it might well be that positivists then have less advantage relative to antipositivists with respect to explaining our reliability about *these* judgments (about legal obligations, etc.) than one might initially think, given their relative dialectical advantage over antipositivists who endorse antipositivism about laws or other legal norms.

I don't have space here to further explore this point about the potential complexities for legal positivists in discussing "legal obligations". But I want to underscore that this is a potentially serious issue for certain positivists, depending on what they say about legal obligations. This is because many of them endorse complex views about thought and talk about "legal obligations" – including those that might well make at least certain instances of such judgments tightly bound up with judgments about authoritative normative facts in ethics.

To illustrate, consider Joseph Raz's influential view on which normative terms have the same sense in legal and moral contexts. Raz is one of the most influential defenders of legal positivism in recent history, and one of the most influential defenders of *exclusive* legal positivism in particular. He claims that "[n]ormative terms like 'a right,' 'a duty,' 'ought' are used in the same sense in legal, moral and other normative statements".[43] He goes on to argue that the relevant sense here isn't a sort of "generic" one (of the kind that you get, for example, on Angelika Kratzer's semantics for deontic modals).[44] Rather, put roughly, it's a sense that is tightly tied to what I have been referring to as "authoritatively" normative thought and talk. Or, put more tentatively, this is at least one plausible way of reconstructing his position. Part of *why* Raz develops this position is in order to defend legal positivism while making room for (purported) insights into the semantics of legal judgments that might initially seem to favour antipositivism. I'm not going to delve into all of that

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[43] Raz, *The Authority of Law: Essays on Law and Morality* (n 7) 158–9.

[44] See Joseph Raz, 'Incorporation by Law' (2004) 10 Legal Theory 1, 1–7. See Angelika Kratzer, *Modals and Conditionals: New and Revised Perspectives* (Oxford University Press 2012) for the kind of alternative view I mention here. For further discussion of the importance of Kratzer-inspired views about the semantics of 'legal obligation', see Daniel Wodak, 'What Does "Legal Obligation" Mean?' (2018) 99 Pacific Philosophical Quarterly 790 and Alex Silk, 'Normativity in Language and Law' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Legal Norms, Ethical Norms: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

here, or into Raz's complicated views about how to further develop this position. Rather, I just want to flag that at least the first few moves that Raz makes as I have reconstructed his position here – ones that closely tie together the semantics of 'legal obligation' and 'moral obligation', and where an "authoritatively" normative sense of "obligation" is involved in both – illustrate how legal positivists sometimes make claims about judgments about legal obligations that (at least prima facie) suggest a closer tie between legal judgments and authoritatively normative judgments than one might think. Depending on how one cashes out those links in more detail, this could well matter for what resources positivists have for explaining our reliability in (at least certain instances of) legal judgments about legal obligations (or legal rights, powers, and privileges), even if not about laws themselves.

CONCLUSION

In this chapter, I've argued that reflection on the reliability challenge in metaethics, and how it connects to a parallel challenge in general jurisprudence, can be used to put pressure on legal antipositivism (and, to at least some extent, on inclusive legal positivism as well). In making this argument, I haven't claimed that reflection on this reliability challenge is anything like a conclusive argument against either antipositivism (or inclusive positivism). Far from it. Rather, what I've suggested is that antipositivists (and to some degree inclusive positivists as well) take on a kind of explanatory burden that, at least prima facie, is going to make it harder for them to vindicate their view than for exclusive positivists to do so – and especially if they endorse certain metaethical views. That, I have suggested, provides at least some evidence against antipositivism and inclusive positivism, and in favour of exclusive positivism. Or, to put the basic point here another (perhaps more perspicuous) way, antipositivism loses some "plausibility points" here, and positivism (especially the "exclusive" variant of it) gains some. But, for all that I have said, it might well be that the explanatory benefits of antipositivism far outweigh whatever costs it has. The same holds for inclusive positivism. Whether that is so is something that obviously can only be sorted out by more general investigation into metalegal inquiry, and into connected issues in metaethics as well.