

RESEARCH ARTICLE

# The Promise and Limits of Grounding in Law

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## Abstract

Discussions of metaphysical grounding have recently found their way into general jurisprudence. It is becoming increasingly common to frame the debate between positivism and antipositivism as a disagreement about what facts metaphysically ground legal facts. In this article we critically evaluate this grounding turn. First, we argue that articulating the debate about the nature of law in terms of grounding holds the promise of recasting it in a common vocabulary. Second, we argue that this comes at a cost: framing the debate in this way obscures a range of further disagreements that cannot be usefully analyzed in terms of metaphysical grounding. We conclude that grounding may give us a clearer picture of what we already knew, while obfuscating a number of important questions to which it cannot, and is not intended to, provide answers.

## I. Introduction

Law, it is said, is not fundamental. Rather, it is “derivative” because it “owes its existence to more basic entities; it depends on them.”<sup>1</sup> Because of its derivative nature, law is usefully analyzed in terms of a relation of dependence. Identifying and clarifying the relation of dependence between the more and the less fundamental is the work of the metaphysics of grounding.<sup>2</sup>

Grounding has received wide attention: philosophical accounts abound. The work on grounding, many now believe, marks a paradigmatic shift in the way we think about the structure of reality.<sup>3</sup> Some go even further and argue that philosophy, in fact, has always been about explicating the notion of grounds. As Fine puts it, “[g]

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<sup>1</sup>Samuele Chilovi & George Pavlakos, *Law Determination as Grounding: A Common Grounding Framework for Jurisprudence*, 25 *LEGAL THEORY* 53, 54 (2019).

<sup>2</sup>For a recent introduction to grounding, see KERRY MCKENZIE, *FUNDAMENTALITY AND GROUNDING* (2022).

<sup>3</sup>Jonathan Schaffer, *On What Grounds What*, in *METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY* 347 (David Chalmers, David Manley & Ryan Wasserman eds., 2009).

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round . . . stands to philosophy as cause stands to science.”<sup>4</sup> But it is not only philosophy that is supposed to benefit from this renewed interest in grounding. The claims about the utility of grounding have been made across the spectrum of disciplines, from the natural to the social sciences.<sup>5</sup> In particular, grounding has been said to enable a more perspicuous analysis of a variety of questions in the realm of the social, such as the nature of social entities, group intentionality, and more.<sup>6</sup>

Jurisprudence has followed suit: an increasing number of legal philosophers use the language of grounding to articulate positions in the debate between positivism and antipositivism.<sup>7</sup> For example, Plunkett and Shapiro suggest that this debate “concerns whether the ultimate grounds of legal facts are social facts alone or moral facts as well.”<sup>8</sup> On this understanding, positivists hold the former view and antipositivists the latter.<sup>9</sup> Of course, the thought that the dividing line between positivism and antipositivism lies in their different understanding of the grounds of law is not new.<sup>10</sup> What is new, however, is the idea that these familiar claims about the grounds of law are best understood as claims about the relation of metaphysical grounding, and that this is what the debate has been about all along. As Plunkett puts it elsewhere, the relevance of grounding “stems from the simple fact that when positivists and antipositivists enter into the debate about legal content, they take it for granted that the question they are addressing is an explanatory question about *in virtue of* what legal facts obtain.”<sup>11</sup> This is precisely what metaphysical grounding aims to

<sup>4</sup>Kit Fine, *Guide to Ground*, in METAPHYSICAL GROUNDEDNESS: UNDERSTANDING THE STRUCTURE OF REALITY 37, 40 (Fabrice Correia & Benjamin Schnieder eds., 2012).

<sup>5</sup>See, e.g., REALITY AND ITS STRUCTURE: ESSAYS IN FUNDAMENTALITY (Ricky Bliss & Graham Priest eds., 2018). For an attempt to formulate naturalism in terms of grounding, see, e.g., Gideon Rosen, *Metaphysical Relations in Metaethics*, in THE ROUTLEDGE HANDBOOK OF METAETHICS 151 (Tristan McPherson & David Plunkett eds., 2017).

<sup>6</sup>See BRIAN EPSTEIN, THE ANT TRAP (2015); Aaron M. Griffith, *Social Construction and Grounding*, 97 PHIL. & PHENOMENOLOGICAL RSCH. 393 (2017); Jonathan Schaffer, *Social Construction as Grounding: Or: Fundamentality for Feminists, a Reply to Barnes and Mikkola*, 174 PHIL. STUD. 2449 (2017).

<sup>7</sup>See, e.g., Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109 (Bob Hale & Aviv Hoffmann eds., 2010); David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139 (2012); Nicos Stavropoulos, *Legal Interpretivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2021); EPSTEIN, *supra* note 6, at ch. 6; David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 ETHICS 37 (2017); Chilovi & Pavlakos, *supra* note 1; Samuele Chilovi, *Grounding-Based Formulations of Legal Positivism*, 177 PHIL. STUD. 3283 (2020); Mitchell N. Berman, *Dworkin Versus Hart Revisited: The Challenge of Non-Lexical Determination*, 42 OXFORD J. LEGAL STUD. 548 (2022); Mitchell N. Berman, *How Practices Make Principles, and How Principles Make Rules*, University of Pennsylvania Law School, Public Law Research Paper No. 22-03, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4003631#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4003631#). Grounding has also been used as a framework to illuminate other important issues in legal philosophy. See, e.g., Michael S. Pardo, *Grounding Legal Proof*, 31 PHIL. ISSUES 280 (2021).

<sup>8</sup>Plunkett & Shapiro, *supra* note 7, at 56.

<sup>9</sup>*Id.*

<sup>10</sup>Ronald Dworkin famously sought to “construct and defend a particular theory about the proper grounds of law.” RONALD DWORKIN, *LAW’S EMPIRE* (1986), at 11.

<sup>11</sup>Plunkett, *supra* note 7, at 152. Plunkett raises this point in the context of his discussion of Greenberg, but it seems reasonable to assume that he also accepts this framing given that he accepts Greenberg’s view that “the core of the debate between positivists and antipositivists concerns which sorts of facts are necessarily among the determinants of legal content” as “roughly correct.” *Id.* at 146. It is worth mentioning that

address. As we shall explain, grounding is a relation between less fundamental and more fundamental facts that underwrites a form of constitutive explanation—often expressed by the connective “in virtue of” or “because”—that positivists and antipositivists seem to be after on this picture.<sup>12</sup> It then seems obvious that general jurisprudence should avail itself of the tools developed in recent philosophical work on metaphysical grounding.

In this article, we evaluate the usefulness of grounding for framing the debate about the nature of law. In Section II, we begin with a brief consideration of the basics of grounding. Much of what we say there will be familiar to those who work on these issues, but it may clarify the basic concepts for those new to the discussion. In Section III, drawing on recent work on metaphysical grounding, we provide a ground-theoretic account of the debate between positivism and antipositivism. While this has been attempted before in relation to positivism, we articulate such an account with a view toward accommodating both positivist and antipositivist views, adding details to already existing accounts, in order to provide a clearer basis for assessment.<sup>13</sup> In Section IV, we subject this account to critique. We argue that while it is possible to formulate important philosophical theses about the nature of law in terms of grounding, this has the effect of obscuring some of the key elements of disagreement.

## II. The Fundamentals of Grounding

The idea behind grounding is that the world is ordered in a particular way, from more to less fundamental entities. The task of metaphysics is to uncover this ordered structure.<sup>14</sup> The priority between entities within this ordered structure is not a matter of causality. Causality obtains horizontally and diachronically: it is a relation by virtue of which a set of causes brings about a set of effects over time.<sup>15</sup> By contrast, grounding obtains vertically and synchronically: it is a relation by virtue of which certain entities constitutively generate or determine other, derivative entities, at the same point in time.<sup>16</sup> Grounding, in other words, is the metaphysical reason for why certain entities exist or facts obtain.<sup>17</sup>

It is useful to distinguish between the *grounds*, as the more fundamental entities; the *grounded*, as the less fundamental entities; and the *grounding* itself, which is the relation of dependence between the grounds and the grounded. The first two elements—the grounds and the grounded—are *relata*: they are the things to which

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in later work Plunkett argues that there is an important “metalinguistic dimension” to this debate. See David Plunkett, *Negotiating the Meaning of “Law”: The Metalinguistic Dimension of the Dispute over Legal Positivism*, 22 *LEGAL THEORY* 205 (2016).

<sup>12</sup>Plunkett, *supra* note 7, at 153.

<sup>13</sup>See in particular renditions of positivism in grounding terms in Chilovi & Pavlakos, *supra* note 1, at 70–74, and Chilovi, *supra* note 7.

<sup>14</sup>Schaffer, *supra* note 3.

<sup>15</sup>See, e.g., DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (2d ed. 2001), at chs. 1 and 7.

<sup>16</sup>Jonathan Schaffer, *Grounding in the Image of Causation*, 173 *PHIL. STUD.* 49 (2016); Schaffer, *supra* note 6; Fine, *supra* note 4.

<sup>17</sup>EPSTEIN, *supra* note 6, at 69.

relations pertain.<sup>18</sup> While there is some disagreement about the kinds of relations between which grounding obtains, they at least include facts, and for the sake of expositional clarity we will continue to talk about facts only.<sup>19</sup> We will further assume that facts are states of affairs that obtain, such as the fact a chair is broken or that Joseph Biden is the forty-sixth president of the United States, and that true propositions state facts.<sup>20</sup> The third element—grounding—is a type of *relation* between facts, whereby one of the facts is more fundamental and makes it the case that the other fact obtains. For example, the fact that one of the chair's legs is broken grounds the fact that the chair is broken, and the fact that Joseph Biden won 306 electoral college votes grounds the fact that Joseph Biden is the forty-sixth president of the United States.

This grounding relation exhibits several properties. First, grounded facts cannot be the most fundamental facts. Because they are grounded, they are less fundamental than other, more basic facts that ground them.<sup>21</sup> Second, grounding is asymmetric and irreflexive: the grounds generate the grounded and not the other way around.<sup>22</sup> For example, it is not the case that because Joseph Biden is the forty-sixth president of the United States he won 306 electoral college votes, but winning these votes made him the president.

Third, grounding is a relation of dependence, and not of mere covariation.<sup>23</sup> Two facts can covary while not being metaphysically dependent on one another. For example, covariance may occur as a consequence of causal relations or coincidence.<sup>24</sup> Even the relation of supervenience, understood as a relation of necessary covariance, is too coarse-grained to capture the idea of dependence involved in grounding.<sup>25</sup> A set of properties A supervenes on a set B just in case there cannot

<sup>18</sup>*Id.* at 65–66.

<sup>19</sup>See, e.g., Rosen, *supra* note 7. For the view that grounding obtains between things, see Jonathan Schaffer, *Grounding, Transitivity, and Contrastivity*, in *METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY* 122, 124 (Fabrice Correia & Benjamin Schnieder eds., 2012).

<sup>20</sup>In our view, the talk of facts, as used by the proponents of grounding, is best understood as a way of expressing what is the case to account for the truth value of propositions. It is equally possible to understand facts as true propositions or truth bearers. See, e.g., Gottlob Frege, *Thoughts*, in *PROPOSITIONS AND ATTITUDES* 35 (Nathan U. Salmon & Scott Soames eds., 1988); MICHAEL DUMMETT, *FREGE: PHILOSOPHY OF LANGUAGE* (1973), at 442. Nothing in our argument depends on a particular view of “facts,” and, for simplicity, we follow Epstein in holding that propositions can be expressed in sentences and that true propositions correspond to facts. See EPSTEIN, *supra* note 6, at 63, 66–67. For some skepticism about facts see ARIANNA BETTI, *AGAINST FACTS* (2015).

<sup>21</sup>This does not entail that their grounds are the most fundamental, for they can be grounded themselves. For example, the fact that Waffle is a dog is grounded in biological facts, which may further be grounded in certain chemical facts, which in turn may be grounded in facts about particles. Schaffer, *supra* note 6, at 2453.

<sup>22</sup>Selim Berker, *The Unity of Grounding*, 127 *MIND* 729, 756–760 (2018); Paul Audi, *A Clarification and Defense of the Notion of Grounding*, in *METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY* 101, 102–103 (Fabrice Correia & Benjamin Schnieder eds., 2012). For an argument against understanding of grounding as nonreflexive, see C.S. Jenkins, *Is Metaphysical Dependence Irreflexive?*, 94 *MONIST* 267 (2011).

<sup>23</sup>JAEGWON KIM, *SUPERVENIENCE AND MIND: SELECTED PHILOSOPHICAL ESSAYS* (1993), at ch. 9; Kit Fine, *Essence and Modality*, 8 *PHIL. PERSPS.* 1 (1994).

<sup>24</sup>Schaffer, *supra* note 3, at 364; EPSTEIN, *supra* note 6, at 72.

<sup>25</sup>Fine, *supra* note 23.

be a change in A without a change in B.<sup>26</sup> In this sense, supervenience resembles grounding.<sup>27</sup> But supervenience is reflexive and (at least sometimes) symmetric, while grounding is not: every fact supervenes on itself but is not grounded in itself, and no fact can ground another fact and at the same time be grounded in that other fact.<sup>28</sup> Although it is possible for two sets of facts or properties to necessarily covary without grounding one another, supervenience can be a useful tool to diagnose the relations of grounding between facts: if two sets of facts covary, it may be the case that they stand in a relation of metaphysical dependence, such as grounding.<sup>29</sup> Finally, grounding can be either partial or full. Grounding is full if the grounding fact is sufficient for the grounded fact to obtain. Conversely, grounding is partial if the grounding fact is not sufficient to make it the case that the grounded fact obtains.<sup>30</sup>

What is the work of grounding and how shall it be put to use? The key notion is that, because of its link with dependence, grounding is closely connected to certain important forms of explanation. Fine argues that, in fact, grounding is a form of explanatory relation “in which explanans and explanandum are connected, not through some sort of causal mechanism, but through some form of constitutive determination.”<sup>31</sup> Others—perhaps less controversially—suggest that grounding is a worldly relation that backs noncausal forms of explanation,<sup>32</sup> and that positing grounding is necessary precisely to make sense of such explanations.<sup>33</sup> The idea is that the correctness of an explanation is “at least in part a matter of its matching up with the structure of the world,”<sup>34</sup> and that noncausal explanations are

<sup>26</sup>See generally KIM, *supra* note 23, at ch. 8; Stephan Leuenberger, *Supervenience in Metaphysics*, 3 PHIL. COMPASS 749 (2008).

<sup>27</sup>On whether grounding entails supervenience, see, e.g., Samuele Chilovi, *Grounding Entails Supervenience*, 198 SYNTHESIS 1317 (2021), and Stephan Leuenberger, *From Grounding to Supervenience?*, 79 ERKENNTNIS 227 (2014).

<sup>28</sup>More precisely, supervenience is nonsymmetric: it sometimes holds symmetrically and sometimes asymmetrically. Brian McLaughlin & Karen Bennett, *Supervenience*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2021). An additional issue is hyperintensionality; see Ralf M. Bader, *Towards a Hyperintensional Theory of Intrinsicity*, 110 J. PHIL. 525 (2013) and Michael Duncan, Kristie Miller & James Norton, *Is Grounding a Hyperintensional Phenomenon?*, 58 ANALYTIC PHIL. 297 (2017).

<sup>29</sup>EPSTEIN, *supra* note 6, at 72.

<sup>30</sup>For instance, the fact that the Earth ends up in the same place after one year only partially grounds the fact that the Earth revolves around the Sun: there are further facts that need to obtain, such as that the Sun, and not for example the Moon, is at the center of the Earth’s orbit. We follow Epstein in formulating this distinction, see EPSTEIN, *supra* note 6, at 70–71. A further question is whether full grounding involves the notion of necessity, so that the set of grounding facts, if full, necessitates the grounded facts. See more on this in Paul Audi, *Grounding: Toward a Theory of the In-Virtue-Of Relation*, 109 J. PHIL. 685 (2012); Shamik Dasgupta, *On the Plurality of Grounds*, 14 PHILOSOPHERS’ IMPRINT 1 (2014); Louis deRosset, *Getting Priority Straight*, 149 PHIL. STUD. 73 (2010); Rosen, *supra* note 7; Kelly Trogon, *Grounding: Necessary or Contingent?*, 94 PAC. PHIL. Q. 465 (2013); Alexander Skiles, *Against Grounding Necessitarianism*, 80 ERKENNTNIS 717 (2015). We will explain how Epstein’s account can be adjusted to account for the necessity of full grounding.

<sup>31</sup>Fine, *supra* note 4. See also Kit Fine, *The Question of Realism*, 1 PHILOSOPHER’S IMPRINT 1, 15 (2001).

<sup>32</sup>Schaffer, *supra* note 19, at 124.

<sup>33</sup>Audi, *supra* note 30, at 687–688.

<sup>34</sup>Audi, *supra* note 22, at 105.

underwritten by and answerable to grounding relations in the world. The grounds are thus supposed to account for the grounded: they explain why or in virtue of what certain other facts obtain. The success of grounding analysis, we submit, turns on its ability to sustain this claim to being explanatorily useful.<sup>35</sup>

### III. Grounding and Law

What are the benefits of framing the debate between positivism and antipositivism in terms of metaphysical grounding? As mentioned, the key claim is that the debate is best understood as a disagreement about the grounds of legal facts.<sup>36</sup> This insight is supposed to “clarify different theories of the ‘sources’ of the law,”<sup>37</sup> or delineate “the space of available theories and the issues they investigate,” which should enable us to evaluate their “strengths and weaknesses.”<sup>38</sup> We agree that theories of law are often in need of clarification, which may happen as a consequence of articulating them in a common and precise vocabulary.<sup>39</sup> In this section, we formulate the debate in grounding terms, and in the next section, we inquire whether framing the debate in this way can accomplish this.

There is no canonical ground-theoretic formulation of the debate between positivism and antipositivism currently on offer. The accounts that explicitly use the sophisticated machinery of grounding focus almost exclusively on rendering the claims of legal positivism in the language of grounding.<sup>40</sup> But if grounding is to perform its purported clarificatory role or provide a common framework of analysis for the debate between positivism and antipositivism, a ground-theoretic framing of the debate needs to include both accounts. Brian Epstein has formulated one of the most incisive, clear, and developed ground-theoretic accounts of legal positivism while at the same time indicating that it is possible to develop an antipositivist

<sup>35</sup>Framing a relation in terms of grounding should allow us to draw a number of conclusions about grounded facts, without having to do the groundwork (no pun intended) from scratch. For example, given that facts are grounded, we can conclude that they are nonfundamental and are generated by or dependent on, and explicable with reference to, more fundamental facts. Moreover, on some views at least, if we can explicate the grounds of such facts fully, this brings us close to demonstrating their necessity. See *supra* note 30. And by understanding how the grounded facts are ordered between themselves, we can draw conclusions about their “chaining,” because grounding relations are supposed to be transitive (for a different view on transitivity, see Schaffer, *supra* note 19). Finally, we should also be able to apply the complex logic of grounding, the development of which is already well under way. Fine, *supra* note 4.

<sup>36</sup>See Plunkett, *supra* note 7; Plunkett & Shapiro, *supra* note 7; Rosen, *supra* note 7; and Nicos Stavropoulos, *The Debate that Never Was*, 130 HARV. L. REV. 2082 (2017), among others.

<sup>37</sup>EPSTEIN, *supra* note 6, at 88.

<sup>38</sup>Chilovi, *supra* note 7, at 3287.

<sup>39</sup>Notice that this goal is limited: it is possible to argue that the fault lines in jurisprudence have been well known and well understood even before the recent advent of grounding. For useful summaries, see Scott Shapiro, *The “Hart–Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN (Arthur Ripstein ed., 2007) and Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003).

<sup>40</sup>See Chilovi & Pavlakos, *supra* note 1, Chilovi, *supra* note 7, and EPSTEIN, *supra* note 6. Greenberg, in contrast, uses the language of “rational determination” to explicate the debate and his account thus does not match seamlessly with the recent work on ground-theoretic interpretation of positivism. See Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004).

account within the same framework. We thus see his account as a natural starting point of analysis, with two important caveats. First, we will add important details about legal theories that are currently missing from Epstein's account to bring it more in line with the competing positions in jurisprudence while explaining how his account could apply to antipositivism. Second, we will amend his account to accommodate some very plausible criticisms of his framework made by Jonathan Schaffer, criticisms that have already gained traction among the friends of grounding in legal philosophy.<sup>41</sup>

One advantage of Epstein's work is that it allows us to recognize that the roles various facts play in the grounding base can be different.<sup>42</sup> The first element of his account are *frame principles*. Frame principles express the link between grounding conditions and grounded facts.<sup>43</sup> The *frame* is a set of possibilities (e.g., situations, contexts, worlds) in which a frame principle fixes the grounding conditions for certain facts (or, more generally, kinds) in the same way.<sup>44</sup> The key question for Epstein is what connects or "glues together" the set of facts and their grounding conditions: in other words, what puts a frame in place.<sup>45</sup> The answer is what Epstein calls *anchoring*, which is "a relation between a set of facts and a frame principle" whereby such set of facts is "the metaphysical reason" why "the frame principle is the case."<sup>46</sup> To put it simply, *anchors* put in place *frame principles* that stipulate the *grounding* conditions for facts.<sup>47</sup>

Epstein believes that anchoring and grounding are distinct metaphysical relations.<sup>48</sup> But—as Schaffer argues—there are reasons to think that anchors and grounds are simply different kinds of grounds, and that facts can be grounded by a conjunction of two facts, i.e., facts about grounding conditions for certain kinds of facts and facts about the obtaining of such grounding conditions. This is so not least because the properties of grounding, elaborated above (such as their connection with fundamentality, generation, dependence, and explanation) seem to apply to both grounding and anchoring, and because the alleged advantage of grounding lies precisely in removing the need to postulate a range of obscure metaphysical relations as

<sup>41</sup>Chilovi and Pavlakos use Schaffer's framework in their explanation of the positivist grounding tree (Chilovi & Pavlakos, *supra* note 1, at 71–74). One disadvantage of this framework is that it explicitly relies on the idea of "rule-setting" facts and the notion of "existence of social rules" instead of Epstein's notions of "anchoring" facts and "frame principles." See Jonathan Schaffer, *Anchoring as Grounding: On Epstein's the Ant Trap*, 99 PHIL. & PHENOMENOLOGICAL RSCH. 749 (2019). Given the controversy surrounding the idea of "rules" in jurisprudence, we believe that Epstein's framework is more suitable to be extended to antipositivist views.

<sup>42</sup>See also Schaffer, *supra* note 41; Chilovi & Pavlakos, *supra* note 1; and Chilovi, *supra* note 7.

<sup>43</sup>EPSTEIN, *supra* note 6, at 78.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 81.

<sup>46</sup>*Id.* at 82 (footnotes omitted).

<sup>47</sup>There are alternative vocabularies to articulate the same thought. Chilovi for example uses the term "enablers" to denote what Epstein would call "anchors." In his view, an "enabler responsible for the grounding of legal facts is something that sets conditions the satisfaction of which allows an entity to count as a legal determinant. What a legally relevant enabler does, in other words, is to put a determinate range of entities in a position to be grounds of law." Chilovi, *supra* note 7, at 3294. Similarly, Schaffer uses the term "structuring grounds" and contrasts this with "triggering grounds." Schaffer, *supra* note 41.

<sup>48</sup>See EPSTEIN, *supra* note 6, at 120–124.

primitives.<sup>49</sup> Moreover, full grounding on most views implies metaphysical necessity, while Epstein's model suggests that grounding is contingent on the frame principle in place; to restore the modal implications of grounding it would need to be the case that anchors, frame principles, and grounds (in Epstein's vocabulary) are all elements of the grounding base.<sup>50</sup> To focus our attention on explaining what work grounding might do in illuminating the nature of law we accept the view that grounding and anchoring are in fact both grounding relations in this wider sense. We will, however, use Epstein's vocabulary of anchoring and grounding, which captures the distinct work these two relations are doing in generating facts, and we will rely on the idea of frame principles, which allows us to focus attention on the potential points of agreement and disagreement in jurisprudence.<sup>51</sup>

How can grounding and anchoring account for legal facts? Let us suppose that legal facts at least incorporate facts about the content of law at a given point in time,<sup>52</sup> and let us further suppose that there is some overlapping agreement about the set of facts that qualify as facts about the content of law on any given philosophical view about law (an assumption that, as we will show, leaves scope for important disagreement about which facts are actually legal facts properly so called). Consider the much-discussed case of *Riggs v. Palmer*, wherein the majority found that Palmer was not entitled to inherit under the will of his grandfather whom he had murdered.<sup>53</sup> The majority employed a "canon of construction" that excludes interpretations that would go against the hypothetical will of the legislator,<sup>54</sup> and a "general" principle of the common law that "no one shall . . . take advantage of his own wrong."<sup>55</sup> Judge Gray, dissenting, argued for a literal interpretation of the statute that would allow Palmer to inherit.<sup>56</sup> While we will return to this disagreement to illustrate the differences between positivism and antipositivism, let us assume here that the majority simply declared the facts about the content of law. Such facts can be specific (such as the fact that Palmer is not entitled to inherit the estate) or more general facts about what the law requires or prohibits in similar situations (such as the fact that murdering the testator disqualifies one from being a beneficiary). In this section, we focus on specific facts to illuminate all the elements

<sup>49</sup>Schaffer, *supra* note 41. See Epstein's response to Schaffer in Brian Epstein, *Anchoring Versus Grounding: Reply to Schaffer*, 99 PHIL. & PHENOMENOLOGICAL RSCH. 768 (2019).

<sup>50</sup>As mentioned, Epstein formulates full grounding in terms of sufficiency only. But it seems that for the sufficiency criterion to be satisfied, frame principles—expressing the link between the grounds and the grounded—would also need to be a part of the grounding base (the obtaining of the grounding fact would not be sufficient for obtaining the grounded fact without there being a frame principle that connects them). See Schaffer, *supra* note 41, at 757. For an argument against metaphysical necessity of grounding, see Stephan Leuenberger, *Grounding and Necessity*, 57 INQUIRY 151 (2014).

<sup>51</sup>On the similar role of "general laws" in grounding legal facts (taken to be social facts) see Gideon Rosen, *Ground by Law*, 27 PHIL. ISSUES 279 (2017).

<sup>52</sup>See, e.g., Chilovi, *supra* note 7, at 3284.

<sup>53</sup>*Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215 (2009); Dennis Patterson, *Theoretical Disagreement, Legal Positivism, and Interpretation*, 3 RATIO JURIS 260 (2018).

<sup>54</sup>*Riggs*, 115 N.Y. 506.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* (dissent).

of the grounding tree, but the same model also includes and explains more general legal facts.

Let us see how we might account for such facts in the language of grounding. We will focus on a Hartian-positivist understanding first before we complicate the picture further. The question is: How can the fact that Palmer murdered his grandfather ground the fact that he is not entitled to inherit the estate? The answer is that there is a frame principle that establishes a metaphysical connection between these two facts. This frame principle could be understood as a general fact about the content of law: a legal rule that states that wills are to be executed in line with the expressed wish of the testator unless this would go against the hypothetical intentions of the legislator or established principles of the common law. The frame principle in question would in Hart's language be a primary rule of obligation that specifies the conditions under which legal duties and entitlements obtain.<sup>57</sup>

But what anchors or puts this frame principle in place? This rule is not simply a function of understanding the meaning of the words in a statute. As lawyers know, statutes must be construed in the light of precedents. Additionally, as Epstein puts it, "unencoded legislation" (e.g., legislative intent) often bears on our understanding of the law, and it plays a key role in *Riggs v. Palmer*; the statute as written is but a part of "the overall package that anchors the law" or "the network of legal practice."<sup>58</sup> The positivist anchors of the rule are to be found in the practice of legal officials including legislation, common law principles, and methods of interpretation.

So far, the picture includes a frame principle that connects the two facts (the fact of the murder and the fact of legal entitlement) and that is anchored in a set of further facts about how law is applied and interpreted in a particular legal system. But how is this frame principle connected with the facts about the application and interpretation of law? For Hart, the answer lies in the idea of secondary rules. As is well known, secondary rules are rules *about* rules and govern how legal officials can change rules, resolve disputes about rules, and identify valid rules in a legal system.<sup>59</sup> The key secondary rule is the rule of recognition, which specifies the criteria that all other rules must satisfy to be considered as rules of a particular legal system in which that rule of recognition obtains.<sup>60</sup> It is the secondary rules, and in particular the rule(s) of recognition, understood as frame principles, that make it the case that valid legal rules are to be found in statutes and precedents and are to be interpreted by customary methods of interpretation.<sup>61</sup>

The key question for Hart, as Epstein sees it, "is not so much what the rule of recognition is, but what puts it in place. How, in other words, is this rule anchored?"<sup>62</sup> Hart's account of social practices explains the anchors of the rule of

<sup>57</sup>H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994), at 80–81.

<sup>58</sup>EPSTEIN, *supra* note 6, at 93.

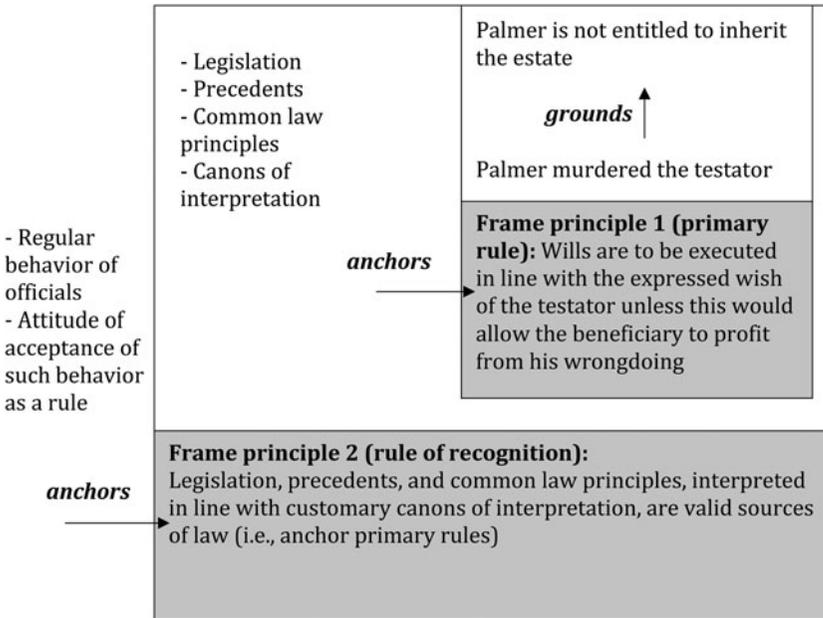
<sup>59</sup>HART, *supra* note 57, at ch. 5.

<sup>60</sup>*Id.* at ch. 6.

<sup>61</sup>Rules about interpretation could also be understood as rules of adjudication.

<sup>62</sup>EPSTEIN, *supra* note 6, at 95.

recognition. There are two conditions to the rule of recognition being in place: the convergence in behavior of the officials in a legal system, and a “critical reflective attitude” of the officials toward such behavior, accepting it as a “common standard.”<sup>63</sup> When these conditions are satisfied, the rule of recognition is anchored, and it further frames the anchoring of primary rules. Following and adjusting Epstein’s model, the grounding-anchoring relations are explained with the following schema:



This schema is a useful first attempt at understanding the positivist account of grounding legal facts but does not amount to a complete picture because there are different versions of legal positivism. Nevertheless, these different versions of positivism can be made more visible by using this general schema. The central dispute concerns the way in which anchoring of primary rules is understood. According to inclusive legal positivism, the anchors of primary rules (i.e., frame principle 1) can also be moral facts provided the anchors of secondary rules (i.e., frame principle 2) remain nonmoral.<sup>64</sup> The key to this view is that the anchors of the frame principle

<sup>63</sup>HART, *supra* note 57, at 57; EPSTEIN, *supra* note 6, at 95.

<sup>64</sup>See, e.g., WILFRID J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001). While the nature of the anchors for secondary rules is often referred to as “social,” this is unhelpful as it unnecessarily takes a position on the nature of moral facts that are then understood as “nonsocial”; the real target of the positivist explanation is the role of moral facts in grounding and anchoring legal facts and that taking a position on their nature is not strictly speaking necessary.

I can, but need not, be moral facts. This reading aims to explain the instances of apparent reliance on moral principles by courts (e.g., in *Riggs* where the majority argued that the decisive principle “evolved from the general principles of natural law and justice”);<sup>65</sup> moreover, it allows inclusive legal positivists to accept the claim that courts are only declaring already existing facts about the content of law, rather than making new legal facts, while retaining the positivist view about the nonmoral nature of the anchors for secondary rules. For exclusive legal positivism, by contrast, anchors of both primary and secondary rules must be nonmoral if the court’s claim to be declaring already existing legal facts rather than creating new facts is accepted (a question to which we return below). This view is motivated differently. In Raz’s version, for example, it aims to account for the nonredundant, authoritative role that law plays in the framework of practical reasons that would be lost if law simply were a matter of moral reasons that apply to us anyway.<sup>66</sup> The common denominator of both versions of positivism is that legal facts are ultimately, at the most fundamental level, anchored in nonmoral facts (in some yet-to-be-specified sense of “ultimacy”).<sup>67</sup>

But the usefulness of the grounding schema for clarifying jurisprudential debates should primarily be considered in light of its ability to contrast positivism with its main competitor: antipositivism. Put in the language of grounding, antipositivism is a position that denies the positivist understanding of anchoring: it argues that legal facts are necessarily anchored in moral facts. Dworkin’s interpretivist theory of law is the prime example of such a view,<sup>68</sup> and one that explicitly aims to elucidate “the grounds of law.”<sup>69</sup>

<sup>65</sup>*Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). Notice that this need not mean that the principle is used as a principle of natural law or morality but that it has been practiced in different legal systems of the world and used as a socially grounded principle. For a different, moralized reading of the role of principles in *Riggs* and similar cases see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), at chs. 2 and 3.

<sup>66</sup>See, e.g., JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* (2009), at 182–202. For a different argument for exclusive legal positivism based on an understanding of law in terms of plans see SCOTT SHAPIRO, *LEGALITY* (2011).

<sup>67</sup>Such “ultimacy” cannot be understood in terms of fundamentality because legal facts are also grounded in, say, biological facts about humans, facts about logic, and so on. See, e.g., Plunkett & Shapiro, *supra* note 7, and Chilovi, *supra* note 7. For an explanation in the context of antipositivism, see Mark Greenberg, *The Moral Impact Theory, the Dependence View and Natural Law*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* (George Duke & Robert P. George eds., 2017).

<sup>68</sup>We will present what we believe is the best understanding of Dworkin’s view as a competitor to positivism, necessarily simplifying it along the way (as we did with positivism). We will also primarily focus on his mature views. This is both because Dworkin’s views have evolved over time (see, e.g., DWORKIN, *supra* note 65; DWORKIN, *supra* note 10; RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011)), and because our goal is to gauge the usefulness of grounding for jurisprudence and not to assess different theories of law as such.

<sup>69</sup>See, e.g., DWORKIN, *supra* note 10, at 4. Dworkin’s work appeared before the recent advancements in the field of metaphysical grounding, and for him the grounds of law are “propositions” in virtue of which the “propositions of law” are “true or false” (*id.* at 4) and not facts that make it the case that legal facts obtain. One of the main proponents of interpretivism, Nicos Stavropoulos, has recently defined interpretivism as a “thesis about the fundamental or constitutive explanation of legal rights and obligations . . . or, for short, about *the grounds of law*” where the relevant notion of grounds is explained in terms of metaphysical grounding. As he puts it, “[i]n the relevant sense, some fact grounds another when the latter obtains in virtue of the former; and the relation between the two facts is explanatory in a non-causal, metaphysical sense of constitutive determination.” On this view, interpretivism claims that “in addition to institutional

How might Dworkin's theory be cashed out in terms of metaphysical grounding? Let us again start with *Riggs*. As explained, in *Riggs*, there was disagreement about the best way to interpret the law. Dworkin's claim is that, given its commitment to the social nature of law's anchors, which must be practiced and accepted by the officials, positivism cannot explain this kind of fundamental or "theoretical" disagreement about what constitutes the grounds of law or criteria of legal validity.<sup>70</sup> In other words, Dworkin argues that positivism requires a level of agreement about the socially embedded anchors of law that is apparently lacking in cases such as *Riggs*. For Dworkin, what occurs in cases such as *Riggs*, and in law generally, is a process of "interpretation" whereby both nonmoral and moral facts together ground legal facts: judges interpret existing social facts arising in institutional practice to identify their morally salient features, and then determine legal facts in light of moral facts that put the institutional practice in its best moral light.<sup>71</sup>

We need not be concerned with the details of the distinct moral significance of the institutional practice of law or its best justification. Dworkin builds a comprehensive account of moral facts that ground law that centers around the idea of justification of state coercion and moral relevance of past institutional practice for such justification.<sup>72</sup> For our purposes, it is important to note that, for Dworkin, moral facts are always implicated in grounding legal facts, be those concrete facts about the content of law or more general facts about the kind "law."<sup>73</sup> It is not the case, as it were, that one can identify legal facts simply by looking at the past institutional-social practice and then consider how moral facts determine their normative force; instead, past institutional practice plays a role in the grounding framework for legal facts *because of* moral facts (such as the fact that taking past institutional practice into account ensures principled consistency or integrity). Furthermore, each concrete legal fact, such as the fact that Palmer is or is not entitled to inherit the estate, depends on moral facts that determine the interpretation of relevant institutional facts about past political decisions.<sup>74</sup> For example, judges may look at statutes for democratic reasons, and at past precedents because of reasons of consistency, and then interpret such sources in a way that enables them to reach a decision based on a moral principle that fits both facts about past political practice and moral facts about the justified use of coercion. In other words, there simply aren't any facts about law that are not constitutively determined by moral facts. The metaphysical schema explaining Palmer's entitlements can be represented thus:

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practice . . . certain moral facts necessarily play some role in the explanation" of legal facts. Stavropoulos, *supra* note 7.

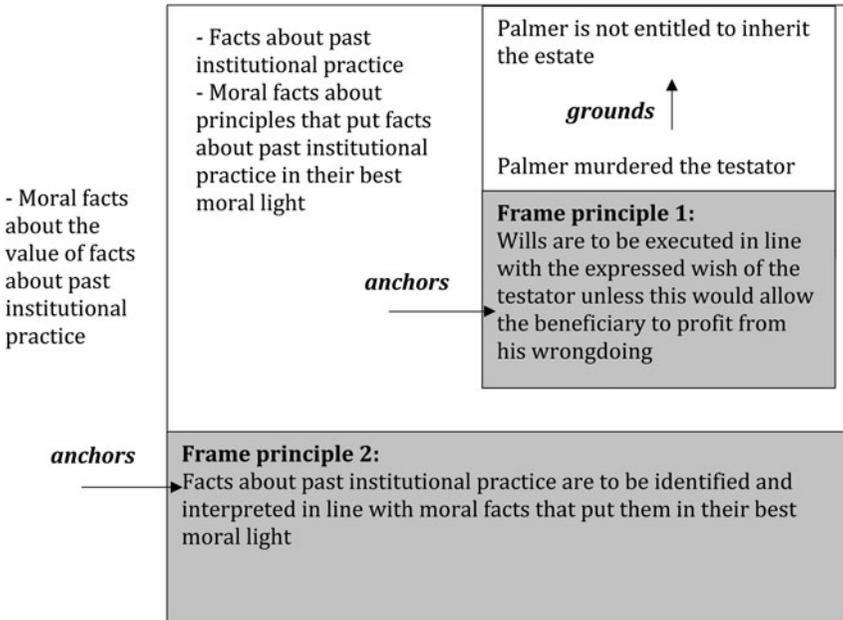
<sup>70</sup>DWORKIN, *supra* note 10, at chs. 1 and 2. For the possibilities of a positivist response, see Patterson, *supra* note 53; Leiter, *supra* note 53.

<sup>71</sup>DWORKIN, *supra* note 10, at ch. 7.

<sup>72</sup>See, e.g., *id.* at ch. 6. In this picture, legal facts are grounded in moral facts that pertain to "individual rights and responsibilities" and at the same time flow "from past political decisions about when collective force is justified." *Id.* at 93.

<sup>73</sup>*Id.* at ch. 3.

<sup>74</sup>DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 68, at ch. 19.



Notice that in this schema, frame principle 1 is the same as in the positivist understanding. While we partly speculate here about the outcome of Dworkin’s interpretive process, it is reasonable to assume—based on his treatment of *Riggs*—that some such principle could be reached by applying his method of constructive interpretation.<sup>75</sup> This allows us to draw attention to the point of disagreement between positivists and antipositivists: while they may agree on grounding and on concrete legal facts that obtain as a consequence, their understanding of anchoring is radically different. For Dworkin, moral facts play a role in anchoring both frame principle 1 *and* frame principle 2. Legal facts are not determined by regular behavior and acceptance of norms but by establishing which moral facts bear on the institutional practice of officials and by the best moral interpretation of this practice in light of such facts.<sup>76</sup>

<sup>75</sup>DWORKIN, *supra* note 10, at 15–20.

<sup>76</sup>There may be some disagreement about what would play the role of anchors of frame principle 2 in Dworkinian interpretivism, which may as a consequence lead some Dworkinians to question the schema as presented here. As explained, we rely on Dworkin’s restatement of the theory in *Justice for Hedgehogs*, *supra* note 68, which suggests that the anchors of frame principle 2 are determined by moral considerations that make the facts about past institutional practice relevant. Stavropoulos calls this “pure interpretivism” and argues that “[m]oral facts fix the relevance of other factors. . . . They determine which precise aspect of institutional practice is relevant to the practice’s contribution to the law.” Stavropoulos, *supra* note 7. On this picture, moral facts play a role both in determining the moral relevance of facts about institutional practice *and* in determining how such facts about past institutional practice ground the content of law. Notice that this view is not held by some other antipositivists. For example, Greenberg seems to be primarily interested in the question of how moral facts determine the content of law and not whether they play a role in identifying relevant legal practices. Greenberg accepts that a range of possible views on what constitutes a legal institution (even positivist ones, such as those espoused by Raz and Shapiro) are potentially consistent with his theory. See Mark Greenberg, *The Moral Impact Theory of Law*, 123

What is the nub of the disagreement between positivists and Dworkinians? As Epstein observes, “(w)hichever position turns out to be the most attractive, in large part the debate can be seen as one about anchoring.”<sup>77</sup> Epstein thus identifies anchoring as the precise pivot in the debate.<sup>78</sup> Inclusive legal positivists permit moral facts to figure in the anchors of legal facts, but they insist that they are neither necessary nor ultimate anchors. Exclusive legal positivists maintain that moral facts never anchor legal facts.<sup>79</sup> Dworkinians, by contrast, argue that moral facts always figure in anchoring legal facts. Different positions can be represented with this table, setting out their position on grounding:<sup>80</sup>

	Anchors of frame principle 1	Anchors of frame principle 2
<b>Exclusive legal positivism</b>	Nonmoral facts	Nonmoral facts
<b>Inclusive legal positivism</b>	Mixed (nonmoral facts and, albeit not necessarily, moral facts)	Nonmoral facts
<b>Interpretivism</b>	Both moral <i>and</i> nonmoral facts	Both moral <i>and</i> nonmoral facts

But is this insight useful? As its proponents argue, the key contribution of grounding analysis is its clarification of the metaphysical dimension of the debate between positivism and antipositivism. First, such analysis shows that the debate concerns anchoring (understood here as a species of grounding) and not some other metaphysical relation. Compare, for example, grounding analysis with an attempt to cash out this disagreement in terms of supervenience. As previously explained, supervenience is a relation between two sets of facts that necessarily co-obtain: there is no change in one set of facts without a change in the other. However—if the debate is framed in terms of supervenience—it becomes difficult to capture the differences between positivism and antipositivism. As Rosen puts it:

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,

YALE L.J. 1288, 1324–1325 (2014). Although Greenberg does accept a moral test for facts about past institutional practice such that they ought not generate obligations to oppose or remedy them in order to qualify as relevant facts, *see id.* at 1321–1323, this still does not fully explain the anchors of frame principle 2 (that would make social facts about institutional practice relevant in the first place). *See* Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains That the Moral Impact Theory Cannot*, 28 LEGAL THEORY 59, 68–69, n.25 (2022).

<sup>77</sup>EPSTEIN, *supra* note 6, at 99.

<sup>78</sup>Epstein’s analysis concludes in this way: “Theories of the criteria of legal validity are theories of the sorts of facts that anchor primary rules. And theories of the sources of legality are theories of the sorts of facts that anchor secondary rules.” *Id.* at 99. We think that the talk about “primary” and “secondary” rules is misleading, especially in relation to antipositivism.

<sup>79</sup>*Id.* at 99.

<sup>80</sup>The table is adjusted from EPSTEIN, *supra* note 6, at 98.

habits and responses 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.<sup>81</sup>

If understood in terms of supervenience, the disagreement is not explained but eliminated. This does not seem right, for the positions do differ in terms of the role they ascribe to morality in determining the content of law (i.e., legal facts). While, to our knowledge, no one claims that the relevant relation is supervenience,<sup>82</sup> grounding and anchoring analysis is capable of ruling this possibility out by identifying and explaining the relevant metaphysical relation that makes better sense of the disagreement and is not peculiar to law but obtains in other domains as well.

Second, if the precise point of disagreement is identified in this way, this could potentially reduce the debate to a common vocabulary. Legal philosophers have long debated the grounds of law but have asked a range of different questions, such as “in virtue of what are legal propositions true?”<sup>83</sup> and, in so doing, they have used distinct vocabularies.<sup>84</sup> If Dworkin’s claim that the content of law is determined by interpretation or the positivist claim that law is a matter of social facts could be understood as claims about how law is grounded, one would be able to analyze them in neutral terms without committing to either of the positions that could ensue from accepting one or the other vocabulary.<sup>85</sup> This could pave the way for progress by reducing the possibility of merely verbal disagreements, and avoiding inflation of intractable and idiosyncratic conceptual apparatuses.<sup>86</sup>

However, while grounding analysis does point to an important part of the disagreement in jurisprudence, it does not illuminate the ultimate reasons for this disagreement. If grounding is made the central vehicle of analysis, further disagreements—empirical, conceptual, methodological—simply crop up in other places. Any purported clarificatory role of grounding is overshadowed by its potential to obfuscate these disagreements. We now turn to the reasons why this is so.

<sup>81</sup>Rosen, *supra* note 7, at 113–114.

<sup>82</sup>See Tomasz Gizbert-Studnicki, *The Social Sources Thesis, Metaphysics and Metaphilosophy*, in *METAPHILOSOPHY OF LAW* (Paweł Banaś, Adam Dyrda & Tomasz Gizbert-Studnicki eds., 2016).

<sup>83</sup>See, e.g., DWORKIN, *supra* note 10. See generally DENNIS PATTERSON, *LAW AND TRUTH* (1996).

<sup>84</sup>Consider for example Greenberg’s claim that legal facts are determined by an “unusual metaphysical relation” that he dubs “rational determination.” Greenberg, *supra* note 40, at 160; Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 265, 270 (Scott Hershovitz ed., 2006). But, as argued by Chilovi and Pavlakos, rational determination is in fact best understood as grounding because “[b]oth [rational determination and grounding] are relations of constitutive dependence whereby the determinant facts give reasons why the facts they determine obtain.” Chilovi & Pavlakos, *supra* note 1, at 68. Part of their argument is that, in fact, grounding is also “rational” in that it is explanatory: it makes the links between different levels of reality intelligible in the same way “rational determination” seeks to do, without infusing the relation with moral reasonableness or any such notion that would be question-begging against positivism. See more generally Jonathan Schaffer, *The Ground Between the Gaps*, 17 *PHILOSOPHER’S IMPRINT* 1 (2017).

<sup>85</sup>See, e.g., Schaffer, *supra* note 6.

<sup>86</sup>This would come without cost, together with the elimination of poorly understood *sui generis* metaphysical relations from the debate. See, e.g., discussion on “rational determination” in Greenberg in *supra* note 84.

#### IV. What Grounding Won't Solve and Why

Recall the claims made on behalf of grounding analysis. First, it is suggested that grounding analysis enables an evaluation of the “strengths and weaknesses” of positivism and antipositivism.<sup>87</sup> Second, it is argued that the disagreement between positivism and antipositivism concerns the “ultimate grounds” or “anchors” of legal facts. We take up these claims in turn.

##### A. The Possibility of Grounding-Based Assessment

While no one suggests that grounding analysis alone will resolve the debate between positivism and antipositivism, the question arises as to its ability to provide a useful framework for evaluating their competing claims. The limitations of grounding analysis in this sense primarily lie in the nature of grounding itself. Grounding is supposed to underwrite an important form of explanation, whereby the grounded is explained as obtaining in virtue of its grounds. The question then is: What makes one such explanation preferable to another?

If grounding is understood as a worldly relation then the plausibility of any grounding explanation depends on the way the world is.<sup>88</sup> But—in legal philosophy—this is precisely what is subject to dispute. Positivism would have us believe that the fact that Palmer was not entitled to inherit depends on a complex set of nonmoral (social) facts because this is how the world of law works. Positivists aim at the best explanation of a social institution that, in their view, does not involve moral facts, at least not at the most fundamental level. To support this claim, positivists may, for instance, cite empirical evidence that shows that there is wide and pervasive agreement about the anchors of law in practice.<sup>89</sup> They can also explain away the appearance of disagreement by arguing that in the minority of cases where lawyers and judges do seem to disagree about the anchors of legal facts they are either disingenuous and disagree over what legal facts should be like,<sup>90</sup> or they are the victim of an actual empirical error about the existing agreement in the grounding base of legal facts.<sup>91</sup>

By contrast, Dworkin's claim that moral facts always figure among the grounds of law is at least partly based on the way the world is: he argues that we must take “at face value” the phenomenology of judging, which suggests that judges do in fact disagree about the anchors of law while they are at the same time merely articulating already existing legal facts.<sup>92</sup> In other words, judges do seem to disagree about the best way to interpret the law while the judgments they reach seem to proclaim what the law actually is and not what it should be. To save this “face value” account of the practice of judging, Dworkin builds a general theory of the grounds of law that explains how legal facts are grounded throughout the system and not only in hard cases where such disagreements surface.

<sup>87</sup>Chilovi, *supra* note 7, at 3287.

<sup>88</sup>See, e.g., THEODORE SIDER, *WRITING THE BOOK OF THE WORLD* (2011), at 5 (“The heart of metaphysics is the question: what is the world ultimately, or fundamentally, like?”).

<sup>89</sup>Leiter, *supra* note 53, at 1226–1228.

<sup>90</sup>DWORKIN, *supra* note 10, at 37–44.

<sup>91</sup>Leiter, *supra* note 53, at 1225–1226.

<sup>92</sup>DWORKIN, *supra* note 10, at 20.

If we look at the formal properties of a grounding relation, we find nothing that can provide a basis for assessing these competing claims. Both positivists and antipositivists can argue that the relation they are explicating is a relation of dependence that is irreflexive and asymmetric. In positivist terms, that would mean that the social anchors of the rule of recognition are more fundamental and ground the rule of recognition and not the other way around. In antipositivist terms, this would mean that moral facts about the value of the institutional practice of law are more fundamental and ground facts about legal entitlements. Inclusive legal positivists could say that the ultimate anchors of law are nonmoral (social) facts while nonultimate anchors can be partly moral facts; exclusive positivists could say that legal facts are fully anchored in nonmoral (social) facts; Dworkinians could say that the legal facts are only partly anchored in institutional facts and that the full anchors of legal facts must incorporate moral facts as well. While the disagreement could be understood in the language of grounding, both sides can avail themselves of that language without the possibility of evaluating them on the basis of it.<sup>93</sup>

### *B. Disagreement About the Nature of Legal Facts*

What about the claim that the disagreement is about the grounds of legal facts? Recall that grounding analysis explicates a *relation*, but that it may not tell us enough about the nature of the *relata*, except that they stand in a particular relation whereby one is more fundamental vis-à-vis the other. This raises a prior question that we put aside earlier, and that concerns both the conceptual boundaries that determine which facts count as “legal” and the nature of such legal facts. Positivism and antipositivism disagree about this issue and the suggestion that they primarily disagree about the grounds of legal facts is misleading.

Let us turn to the example of the fact that Palmer is not entitled to inherit, and a further, more general fact, that no one is entitled to inherit if it would allow them to profit from their own wrongdoing.<sup>94</sup> There is disagreement between positivism and antipositivism about the nature of such facts. For positivism, these kinds of facts are not genuine normative facts about moral entitlements. The question of whether such facts ground further facts about moral entitlements is a separate one; for positivists, determination of legal facts is a question prior to any such further moral inquiry.<sup>95</sup> But this is the key point of disagreement with antipositivists. Dworkin denies that it is possible to properly conceptualize legal facts without understanding them in light of their alleged moral implications.<sup>96</sup> Any specific legal fact, such as that

<sup>93</sup>Note that positivism and antipositivism have been previously discussed in meaningful ways in relation to this issue without need of grounding. See, e.g., Leiter, *supra* note 53; John Oberdiek & Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology*, in *LEGAL PHILOSOPHY* 60 (Ross Harrison ed., 2007).

<sup>94</sup>Such general facts are expressed by frame principle 1.

<sup>95</sup>An exception to this might be Shapiro, who considers the claims of legal rights to be “normative.” See SHAPIRO, *supra* note 66, at 47.

<sup>96</sup>For Dworkin, legal rights are “legal” precisely “because they are enforceable on demand in an adjudicative political institution such as a court,” and it then follows that “We construct a conception of law— an account of the grounds needed to support a claim of right enforceable on demand in that way— by finding

Palmer is entitled to inherit, or a general fact about what the law requires or prohibits, is a fact that has normative effects and as such must be explained in virtue of moral facts that determine such effects.<sup>97</sup>

In other words, disagreement between positivists and antipositivists can be understood as partly being about the nature of relata—the nature of legal facts—from which the question about their grounding unfolds almost automatically in a particular direction. Do legal facts create genuine normative obligations, or, more generally, require a normative explanation, merely in virtue of the fact that they are “legal”? If they do, they are grounded in moral facts; if they don’t, they are not. It would then be misleading to understand the disagreement as being about the grounds only, as this obscures an important part of the controversy and does not provide the key to its solution.<sup>98</sup>

It could be objected that this argument relies on overly robust views about the nature of concrete relata (legal facts) in order to undermine the usefulness of grounding analysis. Instead—the objection goes—to analyze different grounding frameworks, one should proceed from legal facts that are undisputed and then see how such frameworks can distinguish between legal facts that are typically seen as legal and those that are normally considered as deviant (assuming some minimal agreement about clear cases of legal and nonlegal/deviant facts). Recall, for example, that positivist and antipositivist grounding frameworks can generate the same legal fact, such as the fact that Palmer was not legally entitled to inherit the estate. But if a grounding framework incorporates substantive positivist or antipositivist views about the nature of relata, it is bound to be question-begging. For instance, if one were to develop a grounding framework for law based on the assumption that legal facts are or are not robustly normative, this would skew the analysis one way rather than another. Importantly, this objection is epistemic: because grounding is supposed to be explanatory, the plausibility of any grounding framework can be assessed on the

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a justification of those practices in a larger integrated network of political value.” DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 68, at 404–405. The same goes for the concept of law more generally: Dworkin believes that “law” is an “interpretive” concept because designating something as “legal” carries normative implications. DWORKIN, *supra* note 10, at ch. 2.

<sup>97</sup>For natural law theorists, a *complete* explanation of the grounds of law must account for some of its normative features, such as its authority or success conditions, and thus needs refer to moral facts. See, e.g., John Finnis, who argues that “[t]hrough human law is artefact and artifice, and not a conclusion from moral premises, both its positing and the recognition of its positivity . . . cannot be understood without reference to the moral principles that ground and confirm its authority or challenge its pretention.” John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 195, 204 (Robert P. George ed., 1999). See also Mark Murphy, who argues that “one cannot have a complete descriptive theory of law without an exhaustive account of the ways that law can be defective; and one cannot have an exhaustive account of the ways that law can be defective without having a complete understanding of the requirements of practical reasonableness.” Mark C. Murphy, *Natural Law Jurisprudence*, 9 *LEGAL THEORY* 241, 263 (2003).

<sup>98</sup>For some alternative understandings of this disagreement, see Plunkett, *Negotiating the Meaning of “Law”*, *supra* note 11, suggesting that “metalinguistic” negotiation is an important dimension of disagreement; Raff Donelson, *Describing Law*, 33 *CAN. J. L. & JURIS.* 85 (2020), arguing that the claims about the nature of law are best understood as claims about practical reasons; and Kenneth Einar Himma, *Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology*, 26 *REVUS* 65 (2015), arguing for conceptual analysis in jurisprudence, and—following Jackson—suggesting that such analysis is prior to metaphysical explanations.

basis of its ability to generate knowledge about grounded facts.<sup>99</sup> The underlying principle is that if one were to know all the grounds, one should be able to infer the grounded facts.<sup>100</sup> If a grounding framework does not allow us to reliably map grounded facts, it should be rejected.

Greenberg advances an argument of this kind to undermine the plausibility of positivism, and it can be analogously used to undermine the positivist account of grounding.<sup>101</sup> The gist of the objection is this: even if one were to know all social facts that supposedly ground legal facts, this would still not generate knowledge about legal facts for it would still be possible to derive a number of mutually incompatible legal facts from such grounds. Conversely, if one were to know all morally relevant social facts *and* all the relevant moral facts that together constitute the antipositivist grounding base, then one would be in a position to know the legal facts. According to Greenberg, this conclusion follows “without assuming that legal facts are themselves normative facts,” that is, without explaining the disagreement in virtue of the nature of the relation.<sup>102</sup> Greenberg’s solution is to understand legal facts as being partly grounded in moral facts and explain them as facts about the moral impact of facts about legal institutions on our obligations, powers, and privileges.<sup>103</sup> If this were correct, it would show positivism to be mistaken, but, more importantly for our purposes, it would show that the disagreement is about the grounds of legal facts and that grounding is a useful frame for assessing the plausibility of positivism and antipositivism regardless of how the nature of legal facts is understood.<sup>104</sup> For this strategy to succeed, however, it needs to be the case that there is no positivist route capable of ruling out deviant mappings from social facts to legal facts, and that the antipositivist grounding framework does not include moral facts in the grounding base before they are introduced to solve the problem of such deviant mappings.

While it is not our intention to defend the positivist grounding framework, let alone offer a comprehensive defense, it should suffice to show that there is a plausible route for positivism to address this challenge, putting it on a par with its antipositivist counterpart. Recall that the argument from deviant mappings suggests that, if social facts were the only grounds of legal facts, they would yield putative legal facts that are not commonly thought of as legal facts (e.g., because they are mutually incompatible). A typical positivist response is that legal practitioners routinely generate nondeviant legal facts from social facts alone, and that they reach pervasive agreement on obtaining legal facts without recourse to facts about moral impact.

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<sup>99</sup>For a sophisticated discussion of this issue see Samuele Chilovi & George Pavlakos, *The Explanatory Demands of Grounding in Law*, 103 PAC. PHIL. Q. (2021), early view: <https://doi.org/10.1111/papq.12393>.

<sup>100</sup>*Id.* at 5.

<sup>101</sup>Greenberg, *How Facts Make Law II*, *supra* note 84.

<sup>102</sup>*Id.* at 265.

<sup>103</sup>According to Greenberg, “the content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way.” Greenberg, *supra* note 76, at 1323.

<sup>104</sup>It is worth repeating that Greenberg is not framing his argument in terms of grounding, and that we here follow Chilovi and Pavlakos in understanding Greenberg’s “rational determination” as metaphysical grounding. See Chilovi & Pavlakos, *supra* note 1.

Among others,<sup>105</sup> Bill Watson provides such an argument.<sup>106</sup> The basic idea is that legal facts are determined by the communicative content of legal texts (such as legislation and precedents), which includes both the semantic or literal meaning encoded in these texts and their pragmatic or intended meaning in a particular context.<sup>107</sup> The first piece of evidence that legal facts are grounded in such communicative content without resort to moral facts is an empirical observation about legal practice, mentioned above as one of the key dimensions of the debate. As Watson puts it, “practitioners do reason and argue about what directive a legal text communicates,” while “we do not observe practitioners treating legal texts’ moral impact as grounds for deciding either easy or hard cases.”<sup>108</sup> This is then combined with a familiar observation about the pervasive agreement in legal practice as to which legal facts actually obtain.<sup>109</sup> Importantly, such pervasive agreement is reached by employing methods that do not refer to facts about the moral impact of social facts. In other words, on this picture, the grounds of law (i.e., communicative content of legal texts) make legal facts intelligible to legal practitioners and exclude potential deviant mappings (as evidenced by agreement on obtaining legal facts). For Watson—and positivists generally—the purported work of the “moral impact” of social facts is an unnecessary complication: nothing needs to be added to social facts to make the connection intelligible or rule out deviant mappings. As we will discuss later, any residual disagreement about which facts obtain in a legal system is then explained by the phenomenon of law creation and not law determination.

It is of course open to Greenberg to argue that, as the explanandum of his metaphysical explanation, legal facts are not coextensive with the beliefs of practitioners about legal facts, but can be independent of such beliefs.<sup>110</sup> But this—at a minimum—shifts the burden of proof to antipositivists to explain how practitioners can be in widespread error about the way in which they map legal facts from their grounds. More importantly for our purposes, this would be an indication that the understanding of the nature of legal facts, as a starting point of analysis for positivism and antipositivism, is different: positivists generally see this kind of evidence as crucial given their commitment to legal facts as social facts that competent practitioners cannot be persistently mistaken about, while antipositivists need not accept this precisely because of the role moral facts are supposed to play in the grounding base that can—on this view—make it the case that practitioners can potentially be in a state of pervasive error about which legal facts obtain.<sup>111</sup>

<sup>105</sup>See Plunkett, *supra* note 7.

<sup>106</sup>Watson, *supra* note 76. See also Bill Watson, *Explaining Legal Agreement*, JURISPRUDENCE (forthcoming 2023), <https://doi.org/10.1080/20403313.2023.2165789>.

<sup>107</sup>Watson, *supra* note 76, at 77–78.

<sup>108</sup>*Id.* at 87, 73 (italics omitted). On the use and nature of moral arguments in law, see BOSKO TRIPKOVIC, *THE METAETHICS OF CONSTITUTIONAL ADJUDICATION* (2017).

<sup>109</sup>*Id.* at 74; PATTERSON, *supra* note 83.

<sup>110</sup>See Greenberg, *supra* note 40. For a discussion in the context of positivism, see Plunkett, *Negotiating the Meaning of “Law”*, *supra* note 11, at 209–210.

<sup>111</sup>See, e.g., Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004); Michael Moore, *Metaphysics, Epistemology and Legality*, 60 SOUTHERN CAL. L. REV. 453 (1987). For discussion, see Dennis Patterson, *Dworkin’s Critique of Hart’s Positivism*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 675 (Torben Spaak & Patricia Mindus eds., 2021).

This is true even of Greenberg's theory, which is supposed to hold without assuming in advance that legal facts are moral facts. Greenberg explicitly adopts a prior moral test for facts that can potentially have appropriate moral impact and thus generate legal facts. According to him, not all facts about institutional action count, but only those that "come about in the appropriate way" and do not make "the moral situation worse."<sup>112</sup> This is because "a legal system, by its nature, is supposed to change the moral situation for the better."<sup>113</sup> While this is a negative test, one that excludes certain institutional facts from potential grounds of law, it is a moral test nonetheless, and by being included in the grounding base it is bound to affect the nature of downstream legal facts that can obtain on this model. It would thus be a mistake to see Greenberg's model as neutral in relation to which facts count as deviant. For example, moral facts in the grounding base prevent the possibility of there being morally abhorrent legal facts.<sup>114</sup> Given that it neither understands legal facts as genuinely normative nor includes such a prior moral test in the grounding base, positivism can accept that morally abhorrent or problematic legal facts obtain. It is thus no reply to positivism to assume, as Greenberg does, that moral facts ground legal facts. Conversely, it is no response to antipositivism to assume that moral facts do not ground legal facts, as this too would beg the question. The crux of the debate lies elsewhere: it concerns the nature of legal facts.

### C. Disagreement About the Modality of the Grounding Relation

If positivism and antipositivism disagree about the nature of legal facts as the target relata of their explanations, they may also be engaged in explicating distinct relations, thus bringing the claim that they primarily disagree about the grounds of legal facts into further doubt. According to Kit Fine, there are distinct grounding relations or "modalities": metaphysical, normative, and natural. As he puts it:

to each modality—be it metaphysical, natural, or normative—there corresponds a distinct relation of one thing holding in virtue of another. It is plausible to suppose that the natural in-virtue-of relation will be of special interest to science, the normative relation of special interest to ethics, and the metaphysical relation of special interest to metaphysics. Each of these disciplines will be involved in its own explanatory task, that will be distinguished, not merely by the kinds of things that explain or are explained, but also by the explanatory relationship that is taken to hold between them.<sup>115</sup>

Fine suggests that there is no unitary or generic "grounding" relation behind these modalities, but that each modality is connected to a different "explanatory relationship."<sup>116</sup> The motivating idea is that metaphysical grounding is mediated through

<sup>112</sup>Greenberg, *supra* note 76, at 1321–1322.

<sup>113</sup>*Id.* at 1322.

<sup>114</sup>As Greenberg puts it, there cannot be "truly evil legal norms." *Id.* at 1337.

<sup>115</sup>Fine, *supra* note 4, at 39.

<sup>116</sup>*Id.* at 40.

the essence or nature of the grounded.<sup>117</sup> In other words, “statements of ground will hold in virtue of the nature of the grounded fact”<sup>118</sup> and “[i]t is the fact to be grounded that ‘points’ to its grounds and not the grounds that point to what they may ground.”<sup>119</sup> But in cases of normative and natural grounding, at least on certain views about these domains, there does not seem to be an explanation of the grounding relation holding in terms of the essence or nature of grounded facts.<sup>120</sup> Take the example of normative grounding: the fact that something is right can be grounded in naturalistic facts, such as the fact that it maximizes pleasure, but on a nonreductive conception of normativity it is not part of the essential nature of “right” that it is grounded in any particular naturalistic feature such as maximizing pleasure (for it could otherwise be reduced to that naturalistic feature).<sup>121</sup> Given that metaphysical necessity for Fine is “a special case of essence,”<sup>122</sup> that is, that metaphysical necessity follows from essential truths, normative (and natural) grounding cannot hold with metaphysical necessity, and thus cannot be relations of metaphysical grounding. Put differently, the nature of grounded facts determines the kind of necessity that holds between the grounds and the grounded:<sup>123</sup> in the case of metaphysical grounding, grounded facts are entailed by their grounds as a matter of metaphysical necessity, while in the case of normative grounding, only as a matter of weaker, normative necessity.<sup>124</sup>

If the domains in which distinct grounding relations hold are determined by the nature of the grounded relata,<sup>125</sup> then positivists and antipositivists are engaged in elucidating distinct explanatory relationships, each connected with a different “modality.” On the positivist view, there is space for both descriptive and normative forms of explanation for facts about law.<sup>126</sup> But positivists would distinguish the facts about what the law is from normative facts about law, pertaining to, for example, how the law should be or whether it generates genuine normative reasons for action.<sup>127</sup> The point Dworkin is making is different. For him, legal facts are normative, and they can only be explained by further normative facts.<sup>128</sup> Finnis similarly argues

<sup>117</sup>Fine, *supra* note 4, at 39–40 and 74–80. See also Jon Erling Litland, *In Defense of the (Moderate) Disunity of Grounding*, 7 THOUGHT 97 (2018).

<sup>118</sup>Fine, *supra* note 4, at 75.

<sup>119</sup>*Id.* at 76.

<sup>120</sup>Rosen, *supra* note 7, at 132–133.

<sup>121</sup>Fine, *supra* note 4, at 77.

<sup>122</sup>Kit Fine, *Essence and Modality*, 8 PHIL. PERSPS. 1, 9 (1994).

<sup>123</sup>As Fine puts it, “each class of objects . . . will give rise to its own domain of necessary truths, the truths which flow from the nature of the objects in question.” *Id.* at 9.

<sup>124</sup>See Kit Fine, *The Varieties of Necessity*, in CONCEIVABILITY AND POSSIBILITY 253 (Tamar Gendler & John Hawthorne eds., 2002).

<sup>125</sup>For a more general skepticism about the unity of grounding, see Jessica Wilson, *No Work for a Theory of Grounding*, 57 INQUIRY 535 (2014).

<sup>126</sup>I.e., “metaphysical” and “normative” modality. See more on this in Gideon Rosen, *What Is Normative Necessity?*, in METAPHYSICS, MEANING, AND MODALITY: THEMES FROM KIT FINE 205 (Mircea Dumitru ed., 2020). See also Dennis Patterson, *Dworkin on the Semantics of Legal and Political Concepts*, 26 OXFORD J. LEGAL STUD. 545 (2006).

<sup>127</sup>HART, *supra* note 57, at 238–276 (“Postscript”).

<sup>128</sup>See, e.g., DWORKIN, *supra* note 10, at 190, and Ronald Dworkin, *supra* note 111. See generally, on irrelevance of metaphysics and metaethics in explanation of normative facts, Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFFS. 87 (1996). For the necessity of appeal to normative

that the nature of law must be understood from a normative point of view “in which legal obligation is treated as at least presumptively a moral obligation.”<sup>129</sup> If the appropriate modality of grounding for legal facts depends on their nature, and such modalities are irreducibly distinct, then positivism and antipositivism do not disagree only about the grounds of legal facts, but also about the relevant relation that holds between them. It is then an open question whether the appropriate modality for grounding legal facts is metaphysical or normative. While this point does assume that the debate between positivism and antipositivism is in part about the grounds of legal facts, it also suggests that the debate depends in significant ways on the prior question of the nature of legal facts and the corresponding modality of grounding.

Suppose, however, that grounding relations are not irreducibly distinct. We cannot settle that question here, but notice that the upshot of Fine’s view is that normative facts are not metaphysically grounded and can thus only be metaphysically fundamental.<sup>130</sup> This might be difficult to accept, and it might also be possible to develop a conception of grounding for normative facts that would hold with metaphysical necessity. But it is not clear how any such conception would bypass the question of the nature of facts that are explained: even if there were no distinct grounding modalities this would not undermine the idea that the question of natures or essences—about which positivism and antipositivism disagree—is separate and prior to the question of grounding.

Take, for example, Rosen’s idea of “bridge-laws” and their role in grounding normative facts. According to Rosen, normative facts, understood as “facts about the normative properties things possess and the normative relations in which they stand”<sup>131</sup> are metaphysically grounded as follows: “when a particular thing A has normative property F, this fact is metaphysically grounded in non-normative features  $\phi$  of A, together with a moral law to the effect that whatever  $\phi$ s is F.”<sup>132</sup> The key to restoring metaphysical necessity for grounding explanations of normative facts is to characterize these moral laws in a way that makes them explanatory. Rosen entertains several possibilities, such as that the nature of grounded normative facts singles out moral laws of the right sort, or that moral laws themselves incorporate the relation of normative grounding, which is not merely “analogous to the metaphysical grounding relation . . . but parasitic on it” in the sense of “being a relation which, by its very nature, plays a certain metaphysical grounding role.”<sup>133</sup>

On any given solution, however, there will be a mediating item, the nature of which makes it the case that such a grounding relation holds. Rosen makes this point when he says that:

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nature of law to defend the antipositivist conception of grounding, see George Pavlakos, *The Metaphysics of Law: From Supervenience to Rational Justification*, in *SUPERVENIENCE AND NORMATIVITY* 139 (Bartosz Brożek, Antonino Rotolo & Jerzy Stelmach eds., 2017) and Patterson, *supra* note 53.

<sup>129</sup>JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011), at 14.

<sup>130</sup>Gideon Rosen, *What Is a Moral Law?*, in *OXFORD STUDIES IN METAETHICS* 12, 137–138 (Russ Shafer-Landau ed., 2017).

<sup>131</sup>*Id.* at 135.

<sup>132</sup>*Id.* at 138 (italics omitted).

<sup>133</sup>*Id.* at 157.

whenever A grounds B, there always exists an item (or items) whose nature ensures that every A-like fact grounds a corresponding B-like fact. . . . When [Warburton won] is grounded in the fact that Warburton crossed the finish line first together with the rules of the race, this is so in part because it lies in the nature of *that sort of race* that anyone who crosses the finish line first while running a race of that sort thereby wins.<sup>134</sup>

If this is correct, then the question of the nature of law is prior to the question of its grounds, for it is the former and not the latter that will play this mediating role and hold together the edifice of grounding.

Notice that answering the question about the nature of law will need to include an account of the nature of legal facts, for even if normative grounding relations (and not normative facts) by their nature play a mediating role in metaphysical grounding, they do that only for facts about normative properties. One consequence of this, for example, is that only in the case of genuinely normative (moral) facts will bridge-laws be basic in the grounding tree. As Rosen puts it, “[i]n the soft normativity cases,” which include legal facts on the positivist picture, “[f]or all we know the [bridge-law] itself is metaphysically grounded without remainder in prior particular facts about the actions and dispositions of individuals. And if that’s right we can convert a grounding explanation that includes the [bridge-law] into a more fundamental explanation that does without it.”<sup>135</sup> The idea is that general laws of this kind ground out in prelegal particular facts that do not include moral facts. In the case of moral facts, on a non-reductive understanding of morality, bridge-laws are indispensable because they do not ground out in further particular facts: they are, in other words, basic.<sup>136</sup> So, how these different facts are grounded depends on their nature, as only the facts about genuinely normative properties will require bridge-laws to be basic in this sense.

The more general point is that—even on a metaphysical interpretation of the debate—there seem to be two levels of disagreement between positivism and antipositivism. The first concerns the nature or essence of legal facts, and the second relates to their grounds. As Fine puts it, “It seems to me that there is [an] error. . . . in attempting to assimilate or unify the concepts of essence [i.e., nature] and ground. The two concepts work together in holding up the edifice of metaphysics; and it is only by keeping them separate that we can properly appreciate what each is on its own and what they are capable of doing together.”<sup>137</sup> Even if one is not convinced that the kinds of grounding relations are plural, there are two kinds of explanations involved, “one of identity, or of what something is, and the other of truth, or of why something is so,” and “[o]ne might talk in connection with the first of essence. . . . and in connection with the second one might talk of ground.”<sup>138</sup> We have argued that the

<sup>134</sup>*Id.* at 147.

<sup>135</sup>Rosen, *supra* note 51, at 298.

<sup>136</sup>*Id.*

<sup>137</sup>Fine, *supra* note 4, at 80.

<sup>138</sup>Kit Fine, *Unified Foundations for Essence and Ground*, 1 J. AM. PHIL. ASS’N 296, 296 (2015). While Fine came to the view that “the two tasks do not represent distinct explanatory aims but are merely two different poles along a single explanatory endeavor,” this does not mean that they cannot be distinguished;

former is prior to the latter, and that formulating the debate between positivism and antipositivism in terms of grounds only is bound to mislead.

#### D. Disagreement About Lawmaking

Not only do positivists and antipositivists disagree about the normativity of legal facts, they also disagree about which facts need to be explained by a grounding framework. Consider the fact that Palmer was not entitled to inherit. One could understand it as a fact about what the law required prior to the decision of the court, or it may be a fact that obtained only when the court reached its judgment in *Riggs v. Palmer*. The same holds for general legal facts about the rule that was eventually applied in *Riggs*. Is it a fact that this had been a rule prior to *Riggs*, or was a new legal rule created? A lot depends on the framing of this issue, and such a framing determines the choice of grounding framework.

A key tenet of Dworkin's theory of law is the idea that legal facts are not made but found.<sup>139</sup> In his language, propositions of law are true in virtue of the grounds of law that include political morality. Translated into the language of facts, which are expressed by such propositions of law, this means that legal facts obtain independently of a court's decision: any legal fact—such as the fact that Palmer is not entitled to inherit or that anyone who seeks to profit from their own wrong will be denied the entitlement—obtains prior to the actual event in which it is simply declared. For it to obtain, it only needs to follow from the best moral interpretation of past institutional practice. This understanding fits well with the synchronic and static nature of grounding, which is a relation between facts that already obtain.

But for positivism, there are two ways to explain the decision in *Riggs*. Positivism can explain the judgment as being grounded in previous precedents and common law principles. In this case, the court is merely declaring legal facts. But positivism can equally argue that the court created “new” legal facts. If the court's judgment, or the legal rule it relied on, can be traced back to the sources of law identified by the rule of recognition, then such a judgment is declaring a legal fact. If the judgment or the rule cannot be traced back to such sources, the court is creating a new fact. Such a new fact becomes “legal” if the court has exercised its legal competence to make new law in line with established legal rules, or it can be validated by further practice of legal officials who accept it and perhaps even adjust the rule of recognition to accommodate its legality.

The talk of facts can elide the distinction between these two explanations. A grounding analysis may lead to the view that all legal facts that are established in judgments are existing legal facts, while they may become so only *ex post facto*. Law is an inherently dynamic social phenomenon and—at least from the standpoint of positivism—many “facts” acquire their status by retrospective recognition. As Hart puts it:

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it only means that these tasks are continuous as “major explanatory tasks in metaphysics” and parts of a “more general task of providing generic explanations.” *Id.* at 311. See more in Mark Jago, *From Nature to Grounding*, in *REALITY AND ITS STRUCTURE: ESSAYS IN FUNDAMENTALITY* 199 (Ricky Bliss & Graham Priest eds., 2018); Gideon Rosen, *Real Definition*, 56 *ANALYTIC PHIL.* 189 (2015).

<sup>139</sup>Ronald Dworkin, *No Right Answer?*, 53 *N.Y.U. L. REV.* 1 (1978). This is explored in Patterson, *supra* note 126.

One form of “formalist” error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisioned questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. . . . But where less vital social issues are concerned, a very surprising piece of judicial law-making concerning the very sources of law may be calmly “swallowed”. Where this is so, it will often in retrospect be said, and may genuinely appear, that there always was an “inherent” power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done.<sup>140</sup>

Perhaps it is a failure of (positivist) legal theory that it hasn’t provided a more detailed account of how such changes occur.<sup>141</sup> One way of doing this would be to analyze the changes in the attitudes of acceptance that ultimately ground legal rules. But that does not undermine the more general point that grounding analysis may fall into this “formalist” trap and push us further away from a satisfactory understanding of the problem. This is because it crucially relies on the idea of “facts” that by definition already “obtain.” While we believe that the idea that courts create new law is deeply embedded in legal practice, nothing in our argument turns on that question: we simply submit that this is something that grounding framing obfuscates. The reason for this is that grounding is neutral about the prior question of which facts are existing legal facts that stand in need of a grounding explanation.<sup>142</sup>

Let us close with a more general observation about the limits of grounding for understanding general jurisprudence. It is clearly not the intention of grounding theorists to argue that the debate about grounding of legal facts is the only debate to be had. But it is inevitable that it leads to a reductive understanding of different positions that are much richer than grounding analysis seems to allow. For example, there seems to be agreement between positivism and natural law theory about the grounds of positive law; however, it would be mistaken to think that there are no important differences between positivism and natural law.<sup>143</sup> Furthermore, there are very

<sup>140</sup>HART, *supra* note 57, at 153.

<sup>141</sup>*Id.* at 112, 117–123. See generally Bosko Tripkovic, *Judicial Comparativism and Legal Positivism*, 5 *TRANSNAT’L LEGAL THEORY* 285 (2014).

<sup>142</sup>Hart’s insight may be more challenging than it first appears. For Epstein, “all social facts” follow the pattern of anchoring and grounding. EPSTEIN, *supra* note 6, at 74. But it could be that, if we want to keep the talk of facts when explaining social phenomena, we also need to accept that not all facts follow the pattern of anchoring and grounding. For some examples, see Schaffer, *supra* note 41, at 753–754. Hart’s theory points to other examples that escape this model too: on one reading at least, the ultimate character of the rule of recognition is explained by the fact that it grounds out in individual psychological facts and thus doesn’t follow the grounding-anchoring pattern.

<sup>143</sup>See the quote and explanation in *supra* note 97. For Finnis, positive (“human”) law is not grounded in moral principles, but a complete explanation of law must refer to moral principles that ground its authority. One way to understand the disagreement would be to say that it concerns the facts that stand in need of explanation: for Finnis, a theory of law needs to account for normative facts about the authority of positive

distinct motivations for positivist views on grounding, which also are not easily captured by the grounding analysis. For instance, Scott Shapiro—one of the pioneers of the use of grounding analysis in jurisprudence<sup>144</sup>—makes the case for exclusive legal positivism on the basis of the idea that solving coordination problems is the moral purpose of law, which it can only discharge if the content of law is determined on the basis of social facts alone.<sup>145</sup> This view does not allow moral facts to play a role in the grounding base of law, while it crucially depends on moral facts about law's purposes.<sup>146</sup> In other words, it qualifies as positivist in terms of grounding, but departs quite significantly from the key tenets of the mainstream Hartian view.<sup>147</sup> It is thus difficult to resist the conclusion that important elements of distinct philosophical views are simply lost if grounding is the only mode of analysis.

## V. Conclusion

The central problem of analytic jurisprudence is the debate about the nature of law. That debate has in recent years been understood to revolve around the question of metaphysical grounds of legal facts. We have argued that jurisprudence should be cautious to accept this framing. While it holds the promise of clarifying and recasting some old debates in a common vocabulary, this comes at a cost of obscuring a range of dimensions of the disagreement about the nature of law. In this sense, grounding is akin to Wittgenstein's ladder: when we climb it, we see the world more clearly, but we also recognize its limits; to go beyond it, we must throw it away.

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law and about moral obligations that it may create. See, e.g., John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597 (2020).

<sup>144</sup>In Shapiro's view, the main goal of analytical jurisprudence is examining the "metaphysical foundations" of law. SHAPIRO, *supra* note 66, at 2.

<sup>145</sup>Roughly, the idea is that because law is a form of planning, and plans are "supposed to pre-empt deliberations about [their] merits, as well as purporting to provide a reason to pre-empt deliberations about [their] merits," reopening the question of moral merits of defeats the purpose of law and consequently undermines its nature as a plan. *Id.* at 129.

<sup>146</sup>As Shapiro puts it, "legal systems are enterprises for solving moral problems." *Id.* at 358.

<sup>147</sup>It should be noted that moral reasons have played a role in some positivist views ever since Bentham. See more on this in Frederick Schauer, *Normative Legal Positivism*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 61 (Torben Spaak & Patricia Mindus eds., 2021).

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