On the Value of Jurisprudence

LEGALITY. By Scott J. Shapiro. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011. 472 pages. $39.95.

Reviewed by Ian P. Farrell*

Introduction

It is a truth universally acknowledged that a legal philosopher in possession of a theory of law must be in want of a point. At least, such is the conventional wisdom on the opinion of mainstream legal academics—the core audience, as it happens, of law reviews like this one. According to this conventional wisdom, analytical jurisprudence is an abstract and abstruse enterprise of little interest to the typical law professor or student. The fundamental question that analytical jurisprudence seeks to answer—What is law?—has no *practical* significance, and in any event, legal philosophers' attempts to answer it are incomprehensible. In short, there are better ways for a legal scholar to spend her time than to read a book on analytical jurisprudence.

This Austenian framing of the conventional view is, of course, hyperbole. But like most caricatures, it contains a kernel of truth. As Scott Shapiro wryly observes in his excellent recent book, *Legality*, "one doesn't need especially acute powers of social observation to be aware that analytical jurisprudence is not everyone's cup of tea."[1] Shapiro's book challenges this common sentiment. Shapiro develops an original and ambitious theory of law,[2] and does so with a clarity of expression that makes it engaging and accessible to readers not fluent in jurisprudential jargon. Along the way, Shapiro directly addresses the skeptical view of the value of analytical jurisprudence by arguing that the nature of law in general is of crucial importance to determining the content of law in particular cases.[3]

The central claim of *Legality* is that law is best understood as an intricate system of plans that allows us to resolve the serious moral problems

---

* Assistant Professor, The University of Denver Sturm College of Law. I am extremely grateful to Rebecca Aviel, Brian Leiter, Nancy Leong, Justin Marceau, Justin Pidot, and Garrick Pursley for their very helpful suggestions and feedback, to the *Texas Law Review* staff for their exceptional editorial work above and beyond the call of law review duty, and especially to Nicholas Stepp for inviting me to write this Review. All errors and omissions are my own.

1. SCOTT J. SHAPIRO, LEGALITY 22 (2011). Shapiro uses the term *analytical jurisprudence* to describe the area of legal philosophy concerned with determining the fundamental nature of law, in contrast to normative jurisprudence, which is concerned with interpreting and critiquing the content of law from a moral perspective. *Id.* at 2–3.

2. *Id.* at 169–73.

3. *Id.* at 25.

that arise from communal life in large, complex societies. In the course of presenting and defending this claim, Shapiro positions his theory within the tradition of legal positivism and responds to several prominent critiques from natural law. The result is therefore a guided tour of much of the terrain of Anglophone jurisprudence, with lucid descriptions of theorists including H.L.A. Hart, John Austin, Lon Fuller, and Ronald Dworkin. As such, Shapiro's book provides the jurisprudential rookie with an introduction to both the historical debates and the contemporary disputes in analytical jurisprudence, disputes that have already begun to include the "Planning Theory of Law."

Legality has much to offer jurisprudential veterans as well. For it is not merely an introductory treatise, in either intent or execution. It involves, first and foremost, the development of a sophisticated and comprehensive theory of the nature of law—one that, Shapiro argues, resolves questions that, up until now, legal positivism has found impossible to answer. While, as I argue below, Shapiro's arguments are not always successful, he nonetheless presents a stimulating, evocative, and ambitious theory of law that adds a fresh dimension to the modern jurisprudential discourse.

This Review has several goals. The first goal is to provide readers of the Review with a strong sense of Shapiro's book. This requires not just an exposition of Shapiro's Planning Theory of Law, but also sketching the way Shapiro characterizes the enterprise of analytical jurisprudence, and placing his thesis in the context of other jurisprudential theories and current controversies. One of the strengths of *Legality* is that it presents an accessible overview of analytical jurisprudence structured around a statement of the central questions of jurisprudence, with the interplay between various theories presented by their differing approaches to answering these questions. My aim is to reflect that attribute of the book in this Review, albeit in significantly truncated form. This Review, in other words, is intended to provide juris-curious scholars with a useful point of entry into legal philosophy.

The Review also engages Shapiro's analysis from a critical perspective, posing several questions raised by the Planning Theory, including whether it remedies the weaknesses Shapiro identifies in earlier positivist theories and whether it provides convincing responses to critiques of legal positivism. I also address whether Shapiro succeeds in achieving one of his self-described goals, namely, demonstrating that "analytical jurisprudence has profound practical implications for the practice of law."[4]

The structure of the Review mirrors these goals. Part I sets out Shapiro's formulation of the core endeavor of analytical jurisprudence by reference to its central questions and puzzles. Part II involves a brief description of previous influential positivist theories, how they attempted to resolve the questions described in Part I, and why Shapiro considers them to

4. *Id.* at 25.

have been unsuccessful. Part III of the Review recounts Shapiro's Planning Theory of Law, addressing both what plans are in general and how they provide insight into the nature of law. In order to do justice to Shapiro's theory, and to achieve my goal of giving the reader a useful orientation to the world of jurisprudence, the first three parts include more exposition than is often the case in book reviews. In Part IV, I raise some questions for the Planning Theory: I suggest, *inter alia*, that Shapiro's theory may not remedy the flaws of earlier positivistic theories—especially in relation to law's normativity—and I put pressure on the meaning of Shapiro's claim that it is part of the essential nature of law to have a moral aim. Part V describes Shapiro's detailed rebuttal of Ronald Dworkin's argument that legal positivism cannot explain theoretical disagreements in law. Put briefly, Shapiro argues that his Planning Theory generates an approach to the question of interpretive methodology in law that explains not only the possibility of disagreement about which methodology to employ in, for instance, constitutional interpretation, but also the obduracy of such disputes.

Shapiro's response to Dworkin provides a segue into his claim regarding the value of analytical jurisprudence. I argue in Part VI that Shapiro partly succeeds on this front, as his analysis shows the value of legal theory, but not by demonstrating that it determines the answers to particular legal disputes. Analytical jurisprudence has significant value regarding the practice of law by telling us the *kinds* of arguments we ought to make, how those arguments ought to be oriented, and by adding to our understanding of *why* the arguments we already make are sensible and coherent. Moreover, to assess the value of jurisprudence in purely practical terms is to cast too narrow a net. The value of analytical jurisprudence extends beyond pragmatic concerns. As with other branches of philosophy (and theoretical endeavors in general), analytical jurisprudence also has the intrinsic value of sharpening and systematizing what is an otherwise inchoate or nebulous understanding of a concept or practice such as law.

I. The Central Questions of Analytical Jurisprudence

A. What Is the Fundamental Nature of Law?

Shapiro presents the central project of jurisprudence as addressing "the overarching question of 'What is law?'"[5] To ask this question, according to Shapiro, is to "inquire into the fundamental nature of law."[6] And asking about the fundamental nature of a thing, including law, can take the form of two separate yet related questions, which Shapiro dubs the "Identity Question"[7] and the "Implication Question."[8] The Identity Question requires

5. *Id.* at 3.
6. *Id.* at 8.
7. *Id.*
8. *Id.* at 9.

one to discover the identity, the essence, of the thing being studied. That is, it requires one to ascertain the set of essential properties of the thing that distinguish it from other, different things.[9] With respect to law, then, the Identity Question is concerned with determining "what makes all and only instances of law instances of *law* and not something else."[10] It asks what makes law *law* and not, for example, morality, or etiquette, or large-scale brute force.

In contrast to the Identity Question, the Implication Question addresses not "what *makes* the object the thing that it is but rather . . . what *necessarily follows from* the fact that it is what it is and not something else."[11] The Implication Question directs us to discover those properties that follow by necessary implication from the nature of the entity in question. In jurisprudence, the Implication Question involves identifying the necessary properties of law, namely "those properties that law could not fail to have."[12] It also involves distinguishing the necessary properties of law from its contingent properties.[13] The contingent properties of law are those that are shared by some (or many, or most) legal systems, but not *all* legal systems. Since it is possible for an entity to be law without such properties, they cannot be said to be part of the law's identity.

Moreover, in addressing the Implication Question, according to Shapiro, the discerning legal philosopher will not care about *all* the necessary properties of law. She will only seek to discover the *interesting* necessary properties.[14] To Shapiro, a property is interesting only if it is "*distinctive*."[15] The interesting properties of law are therefore those properties that law has but other social practices do not have. Legal philosophers want to know, for example, "which properties law necessarily possesses in virtue of being an instance of law and not a game, social etiquette, religion, or some other thing."[16] In sum, then, on this view, legal philosophers are engaged in the search for the set of properties shared by all law, but only law.

---

9. As Shapiro puts it, "to ask about the identity of X is to ask what it is about X that makes it X and not Y or Z or any other such thing." *Id.* at 8. If this all seems a little abstruse, Shapiro illustrates what he means by giving the example of water. The identity of water is H_2O. Why? "[B]ecause water is just H_2O. Being H_2O is what makes water *water*." *Id.* at 9.

10. *Id.*

11. *Id.* (first emphasis added). Shapiro gives the example of the number *three* and the property of its being prime to demonstrate the difference between the Identity Question and the Implication Question: "While being a prime number is not part of the number 3's identity (being the successor of 2 is), we might still say that it is part of the nature of 3 because being 3 necessarily entails being prime." *Id.*

12. *Id.*

13. *Id.* at 10.

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 9–10.

Whereas some legal philosophers have focused on the Identity Question and others on the Implication Question,[17] Shapiro explicitly states that he is attempting to address both questions.[18] Despite the distinction that Shapiro is careful to draw between these two endeavors,[19] they have in common the fact that they are both ways of searching for the fundamental or essential nature of law.[20] I wish to emphasize this point for several reasons. First, a clear understanding of Shapiro's target, and his methodology for approaching that target, enables us to make better sense of the point and context of Shapiro's analysis. Second, understanding what Shapiro is trying to achieve provides us with a framework from which to evaluate the success of Shapiro's theoretical arguments. Specifically, given that Shapiro is trying to discover a set of properties common to all law, but only law, he fails on his own terms if his theory designates as part of the essence of law properties that are not necessary to law or are common to nonlaw practices. I argue below, for instance, that we can imagine legal systems that do not have the aim of addressing the moral problems arising from what Shapiro calls the "circumstances of legality"[21] and therefore that this aim cannot be part of the fundamental nature of law.

Finally, the fact that Shapiro frames analytical jurisprudence as an exercise in determining the essential nature of law is one of the main points on which *Legality* has drawn criticism.[22] Because this methodological

17. *Id.* at 12.

18. *See id.* ("I want here to try to address both problems. That is to say, I will be concerned in what follows not only with the question of what makes law *law* but also with the related question of what necessarily follows from the fact that something is law.").

19. Shapiro asserts the importance of not muddling questions of identity and implication, pointing out that conflating the two has resulted in, for example, disagreement as to whether the "separability thesis"—that there is no necessary connection between law and morality—need be a point of contention between natural lawyers and positivists. *Id.* at 404–05 n.8; *see also, e.g.*, JOSEPH RAZ, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN 194, 210–11 (1994) (asserting that the idea of a "necessary connection" between law and morality is compatible with positivism where the connection relates to a legal system's service of moral ends); Jules L. Coleman, *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*, 27 OXFORD J. LEGAL STUD. 581, 583 (2007) (arguing that positivists and natural lawyers can agree upon many of the most important claims about the relationship between law and morality and suggesting that disagreement between the two schools of thought is primarily methodological); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1037–41 (2008) (highlighting competing views about the meaning of the severability theory and its relationship to different schools of positivist thought).

20. SHAPIRO, *supra* note 1, at 8.

21. *Id.* at 170.

22. *See* Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 32 OXFORD J. LEGAL STUD. (forthcoming 2012) (manuscript at 4–6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599620 (arguing that essentialist accounts such as Shapiro's are doomed to fail because the concept of law is an artifact and as such does not have essential properties); Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 590 (2010) (reviewing SHAPIRO, *supra* note 1) (arguing that Shapiro's *Legality* exemplifies the misguided modern tradition in jurisprudence of "seeking to explain the nature of law in terms of essential properties, and accordingly without reference to force"). To be sure, Shapiro is not alone in taking

dispute[23] is likely to be a significant aspect of contemporary jurisprudence, with Shapiro as one of the main players, a review of *Legality* would be incomplete without notifying the reader of the book's role in this likely ongoing dispute.

B. How Is Law Possible?

Having identified the target of inquiry, Shapiro frames his discussion of the jurisprudential tradition around a fundamental puzzle, namely: How is it possible for law to arise? Shapiro introduces the divide between natural lawyers and legal positivists by reference to their divergent answers to this puzzle, each of which generates a distinct challenge for its proponents. He describes each of these new challenges and sets out the positivistic attempts to meet them, and then he argues that his Planning Theory of Law succeeds where the earlier theories fail.

Shapiro describes the puzzle of how the law could have been invented[24] as a "classic 'chicken-egg' problem."[25] Acquiring legal authority "seems to involve a catch-22: in order to *get* legal power, one must already *have* legal power."[26] Two statements both seem to be true about legal authority (or legal power): First, in order for somebody to have *legal* power—as opposed to naked force, for instance—there must already be an existing legal norm that confers this power. Second, in order for there to be a legal norm that bestows this legal power, it must have been created by some already-existing body with the legal power to do so.[27]

Shapiro neatly introduces the natural-law–legal-positivism schism by reference to their divergent approaches to explaining this paradox,—which Shapiro labels the "Possibility Puzzle"[28]—"without resorting to vicious circles or infinite regresses."[29] The modern natural lawyer points to the rules of morality, which exist without anyone having created them, as the ultimate

---

this essentialist approach and consequently, criticism for this approach does not fall on him alone. Indeed, Brian Leiter identifies the search for the essential properties of law as having been central to jurisprudence for the last century. Leiter states that the "Demarcation Problem"—how to distinguish law and morality—has been "*the* dominant problem in jurisprudence" in "the last hundred years." Leiter, *supra* (manuscript at 1). To be precise, the Demarcation Problem, as Leiter frames it, refers specifically to the demarcation between law and morality, but his challenge applies generally to attempts to demarcate the border between law and other normative systems by isolating law's essential attributes. Leiter focuses on the boundary between law and morality because morality is the normative system from which legal positivists have been most at pains to demarcate the law.

23. *See* Schauer, *supra* note 22, at 590 (describing the search for the essential features of law as a "prevailing methodological commitment[] of contemporary jurisprudential inquiry").

24. SHAPIRO, *supra* note 1, at 37.

25. *Id.* at 39.

26. *Id.* at 37.

27. *Id.* at 40.

28. *Id.* at 20.

29. *Id.* at 40.

source of legal authority. The legal positivist, by contrast, claims that *social facts* can ground legal authority (and thereby short-circuit the vicious circle).[30]

C. Hume's Challenge and the Problem of Evil

Both the natural-law and positivistic routes to resolving the Possibility Puzzle present their proponents with a separate challenge. Because natural law grounds legal authority in moral authority, it appears to "rule[] out the possibility of evil legal systems."[31] But the existence of evil, or even morally illegitimate legal systems, is an obvious truth.[32] The "Problem of Evil"[33] faced by the natural lawyer is therefore how to reconcile the claim that legal authority is grounded in morality with the existence of morally illegitimate legal systems.

The existence of evil legal systems presents no problem, of course, for the positivist, as social facts rather than moral norms ground legal authority. But this raises a different problem, namely, how to explain the notion of legal obligation. To claim that someone has a legal obligation—that they legally *ought* to do something—is to make a normative claim. But according to the positivist, "the content of the law is ultimately determined by social facts alone,"[34] and the existence of social facts is a descriptive matter. It is a matter of what is, rather than what ought to be. According to David Hume's widely accepted law, one can never derive an *ought* from an *is*;[35] one cannot derive normative conclusions from descriptive premises. Thus, "Hume's Challenge"[36] to the legal positivists is how to reconcile the claim that legal authority is grounded in social facts with the fact that one can sensibly make claims about the existence of legal obligations.

At first blush, both Hume's Challenge and the Problem of Evil seem insurmountable; choosing the natural-law or positivistic route to explaining

30. *Id.* at 42–44.

31. *Id.* at 49.

32. *Id.* at 16, 49. On Shapiro's intuitions at least, morally illegitimate legal systems, such as that of the Soviet Union, are indeed legal systems. *See id.* at 16–22 (discussing the role of intuitions in conceptual analysis and the role of conceptual analysis in analytical jurisprudence); *see also* Ian P. Farrell, *H.L.A. Hart and the Methodology of Jurisprudence*, 84 TEXAS L. REV. 983, 996–1003 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)) (clarifying what is meant by *conceptual analysis* and distinguishing between different forms of conceptual analysis).

33. SHAPIRO, *supra* note 1, at 49.

34. *Id.* at 47. This is referred to in the jurisprudential literature as the "social fact thesis." *See, e.g.*, Jare Oladosu, *Choosing a Legal Theory on Cultural Grounds: An African Case for Legal Positivism*, *in* LAW, MORALITY, AND LEGAL POSITIVISM 47, 53 (Kenneth Einar Himma ed., 2004) ("The import of the social fact thesis is the claim that the existence of the law is purely a matter of social fact.").

35. SHAPIRO, *supra* note 1, at 47 (citing DAVID HUME, A TREATISE OF HUMAN NATURE 302 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2005) (1739)).

36. *Id.* at 45–47.

the nature of law is therefore "very much an exercise in picking our poison."[37] The strength of each of these challenges, according to Shapiro, explains the intractability of the jurisprudence's continental divide:

> Indeed, the debate between legal positivists and natural lawyers is so interesting, and has lasted for so long, precisely because it seems as though neither side can be right. On the one hand, if we follow the natural lawyer and try to solve the Possibility Puzzle by ultimately grounding the law in moral facts, then we preclude the possibility of morally illegitimate legal systems. Yet if we eschew the appeal to moral facts completely and follow the positivist in founding the law on social facts alone, we solve the Possibility Puzzle only on pain of violating Hume's Law. Legal philosophers, therefore, face a terrible dilemma: they are damned if they do ground the law in moral facts and damned if they don't.[38]

II. A Brief History of Legal Positivism

While Shapiro displays a sympathetic understanding for natural law in *Legality*, an appreciation for which he credits Mark Greenberg,[39] he is a card-carrying member of legal positivism. As such, he positions his Planning Theory primarily in response to earlier positivistic theories. He argues that the Planning Theory is superior to these earlier theories in terms of accurately capturing the essential nature of law and addressing the Possibility Puzzle and Hume's Challenge. Shapiro therefore devotes much of the first third of his book to outlining and critiquing the theories postulated by his positivistic predecessors, primarily John Austin and H.L.A. Hart, before setting out his Planning Theory and arguing that it provides better answers to these questions. The structure of my argument will mirror that of Shapiro's. In this part, I will briefly outline the theories of Austin and Hart and describe the challenges Shapiro thinks most compelling. In Part III, I will describe Shapiro's Planning Theory and argue that it also does not adequately address the key questions of jurisprudence.

A. Austin's Sovereign-Command Theory of Law

Shapiro's guided tour of legal positivism begins with John Austin's *The Province of Jurisprudence Determined*.[40] According to Austin, a law is

37. *Id.* at 49.

38. *Id.*

39. *Id.* at 451.

40. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) [hereinafter AUSTIN, PROVINCE OF JURISPRUDENCE]. Austin's account of law was heavily influenced by Jeremy Bentham's positivistic understanding of law. SHAPIRO, *supra* note 1, at 52 (explaining that in the lectures comprising Austin's book, "Austin tried to simplify and develop the ideas of his friend and mentor Jeremy Bentham"). But Austin's account had the twin virtues of being exponentially simpler and published during his lifetime. Bentham's theory of jurisprudence was not published at all until 1945, and even then,

simply "(1) a rule (2) issued by the sovereign,"[41] where a rule is a command backed by threat of harm for noncompliance, and the sovereign is a person or entity who is habitually obeyed by most members of a community and who does not, in turn, habitually obey any other person or entity.[42]

Austin therefore gives us a simple answer to the Identity Question: "what makes the law *the law* is its being the general commands issued by someone who is habitually obeyed by the bulk of the population and habitually obeys no one else."[43] The theory also proposes "a clean resolution to the Possibility Puzzle"[44] (legal rules derive from legal authorities, not the other way around) and a direct response to Hume's Challenge. Hume's prohibition on deriving normative conclusions from descriptive premises is not violated because while on the Austinian account the grounds of legal authority are merely descriptive, so too are statements of legal obligation. To say that a person has a legal obligation is simply to say that there is a threat that they will be sanctioned for failure to comply; it says nothing of what a person *ought* to do.[45]

As Shapiro explains, however, Austin's responses to both the Possibility Puzzle and Hume's Challenge are unsatisfactory. The sovereign-command theory fails to explain the puzzle of law's creation because the notion of the habitual obedience "cannot account for basic properties of legal authority, namely, its continuity, persistence, and limitability."[46] Nor does it have the resources to explain other features of legal systems, such as the way many people think of, and talk about, the sovereign as having a "*legal right* to rule."[47]

Austin's theory avoids violating Hume's Law by decoupling the concept of what one is legally obliged to do from the concept of what one should or ought to do.[48] As Shapiro points out, this has "disastrous

---

inaccurately. H.L.A. Hart, *Bentham's* Of Laws in General, 2 CAMBRIAN L. REV. 24, 25–26 (1971) (discussing the 1945 publication date and the publication's inaccuracy). The definitive version had to wait until 1970. JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., 1970). By that time, Austin had become deeply entrenched as the father of English jurisprudence. *See generally* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (Robert Campbell ed., 3d ed. 1869); AUSTIN, PROVINCE OF JURISPRUDENCE, *supra*. Whether Bentham's more complex theory of law better withstands Hartian criticism than does Austin's is an interesting question that has yet to be fully explored.

41. SHAPIRO, *supra* note 1, at 53.

42. *Id.*

43. *Id.* at 54.

44. *Id.* at 57.

45. *Id.* at 58.

46. *Id.* at 77. Lawmaking power continues uninterrupted when a new sovereign begins to rule, before a habit of obedience has been established. *Id.* at 74. Legal prohibitions persist even after the sovereign who created them no longer exists. *Id.* And many sovereigns, such as constitutional regimes, are *legally limited*, which is impossible if the sovereign is the source of all legal rules. *Id.* at 75.

47. *Id.* at 76 (emphasis added).

48. *Id.* at 58, 77.

consequences"[49] for Austin's theory of law. It reduces the authority of the law to the brute force of a gunman demanding your money and fails to make sense of the justificatory and evaluative functions of concepts such as *obligation*.[50] To treat the concepts of *obligation*, *duty*, and *right* as descriptive rather than as normative is to repudiate them; such concepts are inherently normative. As Shapiro explains,

> When we tell people that they are obligated to perform some action, we are trying to state a *reason* for them to do it. Similarly, when we criticize people for violating their obligations, we are presupposing that they *ought* to have acted differently. We say that they have acted "wrongly" and are "guilty" of an "offense." If any concepts are normative, these are; to borrow a phrase from Wilfrid Sellars, they are "fraught with ought."[51]

For these reasons, Shapiro concludes that Austin's theory fails to provide solutions to the central questions of jurisprudence.[52]

B. Hart's Theory of Law as Social Rules

Shapiro is by no means the first to point out these flaws in Austin's understanding of law. These weaknesses were part of the definitive critique of Austin performed by H.L.A. Hart in his seminal work, *The Concept of Law*.[53] Hart proposed an alternative (but also positivist) theory with greater resources to explain the features of law. Whereas Austin built his account around the notion of the command of a habitually obeyed sovereign, Hart proceeds from the concept of a *social rule*.[54]

Hart pointed out that a rule involves more than "[m]ere convergence in behaviour between members of a social group."[55] For a rule to exist, this convergence must be accompanied by a critical attitude among its participants: their reasons for behaving in accordance with the rule must include the fact that they *accept* it as a rule. The rule must not be incidental to their reasons for acting. They must treat the existence of a rule as giving them a reason to act in compliance with it and to criticize failure to comply. For a rule to exist, most members of the community to which it applies must

---

49. *Id.* at 77.

50. *Id.* at 77–78.

51. *Id.* (quoting Wilfrid Sellars, *Truth and "Correspondence,"* 59 J. PHIL. 29, 44 (1962)).

52. *Id.* at 78.

53. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

54. SHAPIRO, *supra* note 1, at 80. I shall use the terms *rule* and *social rule* interchangeably. Hart considered all legal rules to be social rules, in that their existence and content is determined by social facts. *See id.* at 84 (explaining that the rule of recognition, which lies at the heart of a legal system and determines the validity and content of all other rules in that system, is a social rule that exists only because of certain social facts).

55. HART, *supra* note 53, at 9.

take this attitude toward it.[56] Hart names this attitude the "internal point of view."[57]

Many of the rules that compose a legal system impose duties and as such resemble Austinian commands. Criminal prohibitions, for example, fit this model: they involve orders to refrain from certain behavior accompanied by threats of punishment for noncompliance.[58] But Hart's notion of social rules is not exhausted by orders and threats.[59] Unlike Austin's sovereign-command theory, Hart's theory of social rules is expansive enough to include rules that confer power, such as the power to alter legal rights by creating a will or getting married.[60]

Hart's theory also provides for rules about rules, such as rules of adjudication (how to settle disputes about rules) and rules of change (how to change the rules). Hart calls these *secondary rules*, as they "are in a sense parasitic upon or secondary to" the basic or *primary rules* that obligate individuals "to do or abstain from certain actions."[61]

The most important of the secondary rules is the *rule of recognition*, which is a rule about which rules are valid in the legal system.[62] Shapiro states Hart's doctrine of the rule of recognition in the following manner:

> According to Hart, every legal system necessarily contains one, and only one, rule that sets out the test of validity for that system. The systemic test of validity specifies those properties the possession of which by a rule renders it binding in that system. Any norm that bears one of the marks of authority set out in the rule of recognition *is a law of that system*, and officials are required to recognize it when carrying out their official duties.[63]

Hart claimed that the "[t]he union of primary and secondary rules"[64] "may be justly regarded as the 'essence' of law."[65] Shapiro renders this

---

56. SHAPIRO, *supra* note 1, at 81–82.

57. HART, *supra* note 53, at 90.

58. SHAPIRO, *supra* note 1, at 59–60.

59. HART, *supra* note 53, at 79–91 (recognizing the failures of a model of law based on the sovereign's coercive orders and suggesting that rules originate from social pressure rather than sovereign orders); SHAPIRO, *supra* note 1, at 89–90.

60. HART, *supra* note 53, at 96 (explaining how rules that confer power allow individuals to vary their initial positions under the primary rules). For a discussion of why power-conferring rules cannot be accommodated within Austin's command model, see SHAPIRO, *supra* note 1, at 59–69.

61. HART, *supra* note 53, at 81.

62. *Id.* at 94.

63. SHAPIRO, *supra* note 1, at 84. By way of example, Hart described the British legal system's rule of recognition as: "What the Queen in Parliament enacts is law." *Id.* at 85. It is a little more difficult to state the U.S. rule of recognition. *See id.* at 85–86 (noting that no single provision of the U.S. Constitution explicitly sets out a complete U.S. rule of recognition as it would pertain to federal judges, legislators, and executive branch officials).

64. HART, *supra* note 53, at 99. It is worth noting, in light of criticisms about the essentialist character of modern jurisprudence, that Hart does not claim that the union of primary and secondary rules is a set of necessary and sufficient conditions for law, or at least for the word *law*. *Id.* at 155. He claimed that "[t]he union of primary and secondary rules is at the centre of a legal system; but it

union in terms of criteria for the existence of a legal system: "According to Hart, then, we can say that a legal system exists for a group *G* just in case (1) the bulk of *G* obeys the primary rules *and* (2) officials of *G* accept the secondary rules from the internal point of view and follow them in most cases."[66]

Hart's theory of law has many advantages over Austin's simpler theory. Shapiro states that "Hart's theory is able to account for many of the commonplace features of modern legal systems that were mysterious or inconceivable in Austin's account. It also renders legal thought and discourse intelligible by showing how legal concepts and terminology are ultimately rule based in nature."[67]

Chief among the advantages of Hart's theory is the role of the rule of recognition, which Shapiro describes as "a great advance in legal theory."[68] The rule of recognition "at the foundation of every legal system" is a *social rule*, the existence and content of which are determined by social facts: the practices, behaviors, and attitudes of legal officials.[69] Social rules are simply social practices, according to Hart, and therefore "the rule of recognition is generated through the convergent and critical behavior of official identification of certain rules because the rule of recognition is *nothing but* this practice among officials."[70]

Hart has therefore provided an answer to the Possibility Puzzle: the rule of recognition, and through it the legal system, can be created without prior legal authority simply by engaging in the relevant social practice. The rule of recognition exists purely because of its acceptance and practice among officials, and primary rules exist by virtue of being validated by the rule of recognition.[71]

Crucially, therefore, legal systems are not grounded in moral facts; Hart's theory is "a scrupulously positivistic one."[72] But because it grounds law in social facts, Hart's account faces Hume's Challenge: "How can normative judgments about legal rights and obligations be derived from purely

---

is not the whole." *Id.* at 99. This union occupies the central place in legal theory because of its great explanatory power. *Id.* If we understand the law as a system of primary and secondary rules, then "*most* of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear." *Id.* at 81 (emphasis added). Schauer's criticism of jurisprudence in general, and Shapiro specifically, can be thus understood as a claim that modern legal theory ignores a central feature of most legal systems with great explanatory power, namely, that law employs coercion. Schauer, *supra* note 22, at 593–94.

65. HART, *supra* note 53, at 155.

66. SHAPIRO, *supra* note 1, at 93.

67. *Id.* at 80.

68. *Id.*

69. *Id.*

70. *Id.* (emphasis added).

71. *Id.* at 80, 84–85.

72. *Id.* at 97.

descriptive judgments about social practices?"[73] This is a question that Hart never explicitly addresses, and so Shapiro takes on the task of constructing a Hartian response, drawing on Hart's various writings and more recent developments in the field of metaethics.[74]

Shapiro ascribes to Hart the view that law's normative terminology expresses the speaker's state of mind—specifically, her attitude toward the relevant rule—but does not assert the existence of a moral obligation or authority. In other words,

> [C]laims of obligation and right express the internal point of view, that is, the normative attitude of commitment to a social rule. When one claims, say, that one is obligated to keep one's promises, one is expressing one's commitment to the social promise-keeping rule, not asserting the existence of a normative fact requiring one to keep one's promises.[75]

On this "expressivist"[76] account, claims of legal obligation and legal authority do not violate Hume's Law, for two reasons. First, they do not involve deriving normative conclusions from purely descriptive premises because the premises (of statements of legal obligations, for instance) are themselves normative. Declarations of legal obligation are grounded in the speaker's normative commitment to the relevant social rule. Since the legal *ought* is derived from this normative premise, Hume's prohibition on deriving *ought* from *is*, is not violated. Second, claims of legal obligation—for instance, when a judge declares that a defendant has an obligation to pay damages—should be understood not as a statement about the defendant's moral obligations but instead as a statement of what the *judge* is entitled to do. The judge is not declaring what the defendant ought morally to do; rather, the judge "is claiming that *she* may demand compliance from the defendant and extract performance if necessary."[77] Because the relevant legal rules provide the judge with reasons to act in a certain way (the judge accepts the rules from the internal point of view), the claim of legal obligation is normative with respect to the judge. However, the claimed obligation does not necessarily provide the defendant with reasons for acting, and therefore those reasons are not *moral* with respect to the defendant.[78]

If the expressivist understanding of normativity is convincing, then, Hart's theory wins the trifecta. First, it survives Hume's Challenge by "regard[ing] legal concepts such as *authority* and *obligation* as normative, but not moral."[79] Second, it explains law's normative discourse and so

73. *Id.*
74. *Id.* at 98–99.
75. *Id.* at 99 (internal citation omitted).
76. *Id.*
77. *Id.* at 102.
78. *Id.* at 101–02.
79. *Id.* at 113.

captures an undeniable feature of a legal system that Austin's theory could not account for, and it distinguishes being *obligated* to obey the law from merely being *obliged* to obey a gunman. Third, the expressivist account explains these features while still having the resources to deny that legal authority necessarily entails moral authority—thereby avoiding the Problem of Evil.

However, Shapiro ultimately rejects the expressivist account of law's normativity as an unsustainable compromise.[80] Once we admit that legal concepts are normative, he argues, "it becomes hard to resist the conclusion that these concepts must be moral as well."[81] These legal concepts are used to "ground coercive and punitive responses"[82] and to "make demands that materially constrain freedom."[83] According to Shapiro, "[o]nly moral concepts have the heft to make such serious claims."[84] Normative claims therefore collapse into moral claims. The expressivist view also "misconstrues the intended audience of the law"[85] by treating duty-imposing legal rules as primarily directed at legal officials rather than subjects.

Crucially, Hart's theory of law cannot account for the fact that "legal judgments can be coherently formed and expressed even when the judger does not take the internal point of view toward the system's rule of recognition."[86] A person who rejects the law's moral authority, who follows the law only for self-interested reasons like avoiding punishment—the infamous "bad man" of Oliver Wendell Holmes[87]—is able to describe the law "using the language of obligation."[88] The bad man can say, for instance, "not only that the law obliges him to pay his taxes, but also that he is *legally obligated* to do so."[89] This is a problem for Hart. Since the bad man does not take the internal point of view, he has no normative commitment to the legal rules, and so his statement that he has a legal obligation is not an expression of such a commitment. In addition, the bad man is deriving a normative conclusion—the judgment that he is under a legal obligation—

80. *Id.*

81. *Id.* at 114.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 115.

86. *Id.* at 112.

87. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."); *see also* HART, *supra* note 53, at 90 ("The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation.").

88. SHAPIRO, *supra* note 1, at 112.

89. *Id.*

from purely descriptive premises (observing legal rules from the external point of view) in violation of Hume's Law.[90]

For these reasons, among others,[91] Shapiro concludes that Hart's theory of law is unsatisfactory, despite Hart's "core insights"[92] regarding the relationship between legality and the commitments and evaluations of legal officials. According to Shapiro, the fundamental nature of law is not to be found by describing the commitments and evaluations of officials as creating social *rules*. Rather, the essence of law is that the attitudes of legal officials take the form of creating, adopting, and applying social plans.[93]

III. The Planning Theory of Law

A. Understanding Plans

As we have seen, both Austin and Hart analyze the concept of law by reference to other, simpler concepts. Austin's theory centers law around the concept of *sovereign commands*, while Hart understands the law to consist of *social rules*. Shapiro's theory of law follows a similar pattern, but for him the building blocks of a legal system are *plans*.[94]

Like rules, plans are norms: they guide conduct.[95] Plans are also like Hartian rules in that they are man-made entities, "created via adoption and sustained through acceptance."[96] They are created specifically for the purpose of guiding conduct. To borrow Shapiro's example, "I adopted a plan to cook dinner tonight precisely so that it would guide my conduct in the direction of cooking dinner."[97] Accepting a plan disposes one to follow it and settles some of the questions about what is to be done. Again, if I plan to cook dinner tonight, I am disposed to do so, and it is settled that I will not make a restaurant reservation.[98] But plans do not typically settle every question about what to do. Plans are usually incomplete at first, and are fleshed out incrementally over time by other subplans. At first, I simply plan to cook

90. *Id.*

91. Shapiro critiques Hart's theory of law on other grounds as well. *See, e.g.*, *id.* at 102–04 (arguing that the identification of legal rules in the practices of legal officials involves a "category mistake" because rules are "*abstract objects*" and practices are "*concrete events*"); *id.* at 104–10 (pointing out that not all social practices create rules and that "Hart cannot, therefore, simply assume that social rules will be generated just because officials regularly engage in a practice of rule recognition in every legal system").

92. *Id.* at 116.

93. *Id.* at 116–17.

94. Shapiro's theory of law as a system of plans builds on the insights of Michael Bratman, to whom Shapiro is quick to give credit, on the nature and psychology of planning. *Id.* at 120–21.

95. *Id.* at 128.

96. *Id.* They are thus distinguished from moral norms and logical norms, which are not man-made creations: they "exist simply by virtue of their ultimate validity." *Id.*

97. *Id.*

98. Plans are, however, contingent. They are not set in stone, but rather can be revised if good reasons to do so arise. *Id.* at 126.

dinner; then I plan what I am going to cook, the ingredients I will use, and where I will buy them. In this way, a nested system of plans is created.

Even for individuals acting alone, planning for the future is a valuable means of achieving our goals. By settling a course of conduct in advance, plans allow us to avoid spending our entire time deciding what is to be done and second-guessing those decisions.[99] The nested structure of planning also prevents us from having to decide everything at once: we can leave our initial plans sketchy at first and later create subplans to fill in the details.[100]

Planning has additional benefits in the context of group activity. Shared plans are a way of coordinating behavior so that we each can know our own roles, predict what other members of a group will do, and allocate tasks to those most suited to implementing them.[101] The need for a plan will be especially important in relation to activities that are complex, contentious, or involve arbitrary decisions.[102] By providing a framework for coordination and specialization, planning allows us to achieve goals that would be beyond the reach of individuals or groups that act by improvisation.

Plans can divide labor not only horizontally, but also vertically.[103] Some group members may allocate the activity of planning (or parts of it) to other members, creating a hierarchical structure. The subordinates surrender their exclusive power to plan and in exchange receive the benefit of outsourcing the cost and effort of planning. In Shapiro's lingo, the plan is shared by the group when the superiors adopt a plan for the entire group, provided that most group members accept the hierarchical relationship and their role in the adopted plan.[104] This vertical division of labor is itself a plan: subordinates "accept a plan to defer to someone else's planning."[105] The efficiency of these plans for planning makes hierarchy "a major technological advance in behavioral organization."[106]

Crucially, hierarchical plans allow groups to achieve goals to which not all members of a group are committed, or even intending, to achieve.[107] I may agree to go shopping for you, not because I am committed to your goal of cooking dinner, but because you offer to pay me for the service. Provided I perform my role in the plan (such as following the shopping list you give me) and allow others to do their part (I do not cook the ingredients if that role has been allocated to someone else), I have *accepted* the plan, even if I do not desire that your dinner-cooking goal be achieved. Hierarchies, therefore,

99. *Id.* at 122–23.
100. *Id.* at 123.
101. *Id.* at 131–33.
102. *Id.* at 133–34.
103. *Id.* at 141–42.
104. *Id.* at 141, 150.
105. *Id.* at 141.
106. *Id.* at 142.
107. *Id.* at 136.

allow members of a group to achieve their goals by recruiting the effort and expertise of other members via incentivizing useful conduct, even if they "care [not] a whit" about the success of the enterprise.[108]

According to Shapiro, "That individuals can be made to work together in pursuit of ends that they do not value is critically important in understanding how the modern world is possible."[109] The value of planning increases with the size of the group.[110] In a larger group, there is likely to be more diversity of skills, knowledge, and values; the goals that the group aims to accomplish are likely to be more complex; and it is less likely that everyone will be committed to the same goals. But as the value of planning increases, so too does the cost.[111] As Shapiro points out, "If shared plans are needed to regulate behavior in complex and contentious environments, it is likely that they will be expensive to create ahead of time through deliberation, negotiation, or bargaining."[112] As group size increases, there comes a point where planning mechanisms such as hierarchy "become[] not only desirable but absolutely indispensable."[113] Shapiro describes the role of plans in these circumstances in terms of regulating trust and distrust:

> Developing a dense network of plans and empowering trustworthy individuals to be decentralized plan adopters, affecters, and appliers are essential to supplying distrusted participants with correct instructions for how to proceed as well as standards for holding them accountable. In the end, massively shared activity is possible only because shared plans are capable of capitalizing on trust as well as compensating for distrust.[114]

B. The Law as a System of Plans

1. How to Build a Legal System.—Shapiro provides a concrete illustration of planning and the manner in which a legal system can be understood as a solution to the problems of social life in a complex society by ingeniously extrapolating his example of planning to cook dinner. Shapiro's development of this narrative to communicate sophisticated ideas is one of the chief delights of his book.

The concept of a plan is introduced via the example of a single person planning to cook dinner, then expanded to include two friends planning to cook dinner together, which requires them to coordinate their activities and

---

108. *Id.* at 149.

109. *Id.*

110. *Id.* at 151.

111. *See id.* at 138 (noting that the group dynamics that make shared plans necessary "also make them costly to produce").

112. *Id.* at 138.

113. *Id.* at 151.

114. *Id.*

play separate roles.[115] The example is further extended to a group of friends who form an ongoing cooking club, which adopts general policies and delegates both plan adoption and plan application to various members.[116] When the cooking club decides to form a catering company, hierarchical plans are invaluable in order to direct the activities of employees who do not share the original club members' commitment to the enterprise.[117]

Shapiro then has us imagine that the catering company is so sensationally successful that the cooking-club members take the catering company public. They soon sell their shares for a fortune, "move to an uninhabited island in the South Pacific, and start a new community."[118] This provides Shapiro with the opportunity to discuss the role of planning in the organization of an entire community.

The island, now called "Cooks Island,"[119] initially has sufficient resources to support a comfortable hunter–gatherer existence. This simple existence involves shared activity among small groups; therefore "small-scale group planning is crucial to our ability to live peacefully and productively together."[120] However, community-wide "*social* planning"[121] is not necessary—at least not until the arrival of winter. The resultant food shortage demonstrates that community-wide action is required for long-term sustainability.[122] The community pools its resources, begins ranching and farming, and creates a system of private property to prevent free riding and the consequent waste of island resources. For this plan to succeed, "it is imperative that the policies govern the activities of the whole community."[123]

The new property regime works well. With a dramatic increase in the production of goods, trading markets emerge. However, these changes render transactions more numerous and complex and increase the level of conflict—even if "[e]ach of us is willing to do what we morally ought to do . . . none of us knows or can agree about what that is."[124] Regularized planning is needed, but prosperity has led to population growth. Planning by community consensus on an ongoing basis is no longer possible, so a "master plan"[125] is created. The master plan delegates to some people the power to adopt plans in the future, and other people are authorized to apply those

115. *Id.* at 129.

116. *Id.* at 139.

117. *Id.* at 144–45.

118. *Id.* at 157.

119. This is perhaps a clever allusion to the Cook Islands, a group of fifteen islands located in the South Pacific Ocean between French Polynesia and Fiji. *The Cook Islands*, COOK ISLANDS GOV'T ONLINE, http://www.cook-islands.gov.ck/cook-islands.php.

120. SHAPIRO, *supra* note 1, at 157.

121. *Id.* at 158.

122. *Id.*

123. *Id.* at 160.

124. *Id.* at 163.

125. *Id.* at 166.

plans. To ensure stability, these roles are institutionalized. Some officials create written proclamations of general application, other officials put plans into effect, and still others resolve disputes that arise under them.[126]

Shapiro concludes, "At this point, it seems safe to say that Cooks Island has developed a legal system,"[127] with the master plan as its constitution.[128] The Cooks Island system exhibits all the main characteristics we associate with legal systems.

2. The Planning Theory of Law.—Shapiro argues that this depiction of the birth of a legal system gives us several insights into the nature of law and provides us with—among other things—convincing solutions to the conundrums of the Identity Question, the Possibility Puzzle, and Hume's Challenge. First, it provides an example of a completely plausible legal system that contains no penalties for disobedience[129] and thereby demonstrates that sanctions are not a *necessary* or *essential* feature of law.[130] In other words, sanctions are not a property of the fundamental nature of law.

Second, Shapiro has shown us that it is possible to build a legal system using nonlegal parts. The Cooks Island scenario began in a nonlegal state, and a legal system was constructed without introducing any purely legal concepts.[131] Another way of putting this is that legal norms were created without preexisting legal authority, hence solving the Possibility Puzzle. Law is possible because plans are possible (and plans are possible because human beings are rational creatures with the ability to commit to, and carry out, plans).[132]

Shapiro's solution to the Possibility Puzzle is positivist in nature. The Cooks Island example shows that the existence of a legal system is determined exclusively by social facts.[133] It does not depend on whether any moral facts obtain. As Shapiro points out,

> The shared plan can be morally obnoxious. It may cede total control of social planning to a malevolent dictator or privilege the rights of certain subgroups of the community over others. The shared plan may

126. *Id.* at 169.

127. *Id.*

128. *Id.*

129. *Id.* On Cooks Island, "[t]he islanders all accept the legitimacy of the group plans and, as a result, abide by them. . . . Sanctions would simply be otiose in such a setting." *Id.*

130. *Id.*

131. Shapiro self-consciously parallels Hart's "Constructivist Strategy" in Part IV of *The Concept of Law*. *Id.* at 20–21; HART, *supra* note 53, at 52–78. As Shapiro explains, "The Constructivist Strategy enables the development of noncircular analyses of law. By building legal systems from exclusively nonlegal building blocks, legal philosophers can ensure that they do not appeal to the law in order to explain the law." SHAPIRO, *supra* note 1, at 21.

132. *Id.* at 179–81.

133. *Id.* at 177.

> have no support from the population at large; those governed by it may absolutely hate it.[134]

A legal system may nonetheless exist provided the following social facts obtain: (1) the master plan sets out a public, impersonal, hierarchical activity of social planning; (2) most of the officials designated by the master plan accept it; and (3) the community normally abides by the plans created pursuant to the master plan.[135]

Shapiro claims that the existence and content of a legal system "*must* be determined exclusively by social facts *if* [*shared plans*] *are to fulfill their function*."[136] The function of all shared plans, including legal systems, is "to guide and coordinate behavior by resolving doubts and disagreements about how to act."[137] If people have to resolve moral questions to determine what plan to apply, this would "resurrect the very questions that plans are designed to settle."[138]

Third, the Cooks Island story demonstrates not only that law *has* a moral goal, but what that moral goal is. The Cooks Island community reached a point at which it was faced with "numerous and serious moral problems whose solutions [were] complex, contentious, or arbitrary."[139] In

---

134. *Id.*

135. *Id.* at 177, 179–80. It is worth noting the parallel between Shapiro's requirements for the existence for law and the requirements under Hart's theory. According to Hart, a legal system exists if officials accept the rule of recognition from the internal point of view, and the community normally obeys the primary rules validated by the rule of recognition. HART, *supra* note 53, at 116–17.

136. SHAPIRO, *supra* note 1, at 177 (first emphasis added).

137. *Id.*

138. *Id.* Because he believes it would be self-defeating for the law to require adjudicators to resolve moral questions, Shapiro is an "exclusive" legal positivist—as opposed to an "inclusive" legal positivist. While legal positivists all agree that law is *ultimately* a matter of social fact, they disagree as to whether law is *exclusively* a matter of social fact. *Id.* at 268–69. Inclusive legal positivists (also called "soft" positivists) allow for moral tests of legality, provided those tests are in fact accepted by officials from the internal point of view. For example, the moral standard of "cruel and unusual punishment" is a legal norm in the United States because the Eighth Amendment has the requisite social pedigree. *Id.* at 270. Exclusive legal positivists, by contrast, claim that "a norm counts as law only when it has a social pedigree and is ascertainable *without resort to moral reasoning*." *Id.* at 271 (emphasis added). On this view, the Cruel and Unusual Punishment Clause does not create a legal norm; instead, it imposes a *legal* obligation to look "*outside* the law to morality in order to resolve the case at hand." *Id.* at 273 (emphasis added). Shapiro sides with the exclusivists because it would violate the logic of planning to have the existence and content of law "determined by facts whose existence the law aims to settle." *Id.* at 275. Jeremy Waldron makes a counter argument that inclusive legal positivism does not violate the logic of planning. *See* Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 895–96 (2011) (reviewing SHAPIRO, *supra* note 1) ("[E]ven when moral predicates are used, their use does not always beg the question that the law is supposed to settle."). Waldron makes a similar argument with respect to Shapiro's claim that the law's planning function requires the *ultimate* ground of law must be determined by social facts alone. *Id.* at 891–96. For a more detailed discussion of inclusive and exclusive positivism, see, for example, RAZ, *supra* note 19, at 194 and Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125, 125–65 (Jules Coleman & Scott Shapiro eds., 2002).

139. SHAPIRO, *supra* note 1, at 170.

these conditions, which Shapiro calls the "circumstances of legality," resolution of the serious problems of community life demanded "the sophisticated technologies of social planning that only legal institutions provide."[140] That this function is an essential feature of the nature of law is the "central claim" of Shapiro's Planning Theory of Law: "[*T*]*he law is first and foremost a social planning mechanism whose aim is to rectify the moral deficiencies of the circumstances of legality*."[141]

C. The Planning Theory and Hume's Challenge

Shapiro proposes an adamant version of legal positivism to explain the fundamental nature of law. Like earlier positivistic theories, the Planning Theory faces the challenge posed by Hume's Law. That is, the theory appears to derive normative conclusions from descriptive premises by grounding legal obligations in social facts.

Shapiro responds to this challenge by denying that claims of legal obligation are normative claims. According to Shapiro, claims of legal obligation are descriptive; grounding legal obligations in social facts therefore does not violate Hume's Law.[142]

The difficulty with this approach, as we saw with Austin's theory, is that the concepts of authority, right, and obligation are moral concepts. A theory of law that treats such statements as descriptive, it seems, fails to explain this feature of law. Shapiro's response is to distinguish between adjectival and perspectival interpretations of a statement that someone has a legal obligation.[143] The adjectival interpretation treats the *legal* in *legal obligation* as an adjective. That is, legal obligation is a *kind* of obligation, just as a yellow car is a kind of car. Because obligation is inherently moral, any kind of obligation is also a *moral* obligation.[144] The adjectival interpretation of *legal obligation* therefore leads to a violation of Hume's Law.

Shapiro argues that the perspectival interpretation of *legal obligation* does not violate Hume's Law. On this interpretation, the term *legal* plays a qualifying,[145] or distancing,[146] rather than modifying role. To say that

---

140. *Id.*

141. *Id.* at 172 (emphasis added).

142. *Id.* at 188. In this passage, Shapiro states,

> [S]tatements of legal authority, legal rights, and legal obligations are *descriptive*, not normative. . . .
>
> Because legal statements purport to describe the legal point of view, the conclusion of legal reasoning will be a descriptive judgment. . . . From descriptive judgments about the existence of shared plans or the content of the legal point of view, other descriptive judgments about the legal point of view can be derived. The Planning Theory, in other words, conforms to Hume's Law because legal reasoning does not involve the derivation of an ought from an is, but rather an is from an is.

Id.

143. *Id.* at 185.

144. If a car is inherently a form of transport, a yellow car is also a form of transport.

145. SHAPIRO, *supra* note 1, at 185.

someone has a legal obligation is simply to say that, "from the legal point of view,"[147] the person has an obligation. One can think of this in the following way: to say that a person has a legal obligation is merely to say that the law *claims* the person has a (moral) obligation; it does not involve a claim that the person in fact has a (moral) obligation.

According to the perspectival interpretation, therefore, statements of legal obligation—and legal authority, legal right, and so on—are descriptive, not normative.[148] They simply report what the law's normative judgments are without endorsing those judgments.[149] By employing the perspectival interpretation, in other words, the Planning Theory of law is able to meet Hume's Challenge. As Shapiro puts it, "The Planning Theory . . . conforms to Hume's Law because legal reasoning does not involve the derivation of an ought from an is, but rather an is from an is."[150]

As the Planning Theory provides persuasive answers to such puzzles as Hume's Challenge, Shapiro concludes, it represents a significant improvement on previous theories of legal positivism. In the part below, I shall examine whether Shapiro's understanding of law as a system of plans does in fact resolve the problems of previous positivistic legal theories. I shall also raise several questions of clarification and critique, most notably with respect to Shapiro's claim regarding the moral aim of law.

IV. Some Questions Raised by the Planning Theory

A. Obligation, Rules, and Plans

As I outlined in subpart II(B) above, one of the main criticisms Shapiro levels at Hart is that his theory of law as social rules cannot explain legal concepts such as obligation. Hart's expressivist theory cannot explain, for instance, how the bad man may make normative judgments like "I have a legal obligation to pay my taxes," despite not accepting law from the internal point of view. Shapiro asserts that, in contrast, the normative discourse of law is explicable under his theory.[151] Statements of legal obligation and legal authority should not be interpreted as expressing the speaker's commitments to the rule or as adjectival statements. Rather, a claim of legal obligation should be understood as perspectival—as a descriptive claim that, *from the law's perspective*, there is a (moral) obligation. Understood in this way, judgments of legal obligation make sense even when made by the bad man and also conform to Hume's demand that *ought* cannot be derived from *is*.

146. *Id.* at 186.
147. *Id.* at 185 (emphasis omitted).
148. *Id.* at 188.
149. *Id.* at 186.
150. *Id.* at 188.
151. *See supra* subpart III(C).

There are two points worth noting with respect to Shapiro's position. The first point is that the distinction between rules and plans plays no role in the perspectival understanding of statements of legal obligation. We can understand statements of legal obligation as perspectival regardless of whether we treat rules or plans as the fundamental building blocks of law. To put it another way, a Hartian legal philosopher could accept the perspectival understanding of statements of legal obligation without rejecting the view that law consists of social rules. The perspectival account of legal obligation does not entail the position that law is a system of plans. That the perspectival account better explains law's normative discourse than the expressivist account, therefore, cannot count as a reason why we should prefer the Planning Theory over a social-rules theory of law. It merely provides a reason for rejecting the expressivist account of normative discourse.

Second, it is unclear how to understand, on the perspectival account of claims of obligation, the distinction between "being obliged" and "having a legal obligation." Shapiro seems to accept (as did Hart)[152] that the law is not simply the gunman writ large, but rather involves obligations in a way that a gunman's demands do not. But what is to stop us from describing the gunman's demands as involving "gunman-obligations"? That is, could we not say that a victim is under a gunman-obligation to hand over her money, by which we would mean that from the perspective of the gunman, the victim is under a moral obligation to hand over her money?

Shapiro could respond to this question by reminding us that under his theory, having a moral aim is part of law's essential nature—unlike gunmen's essential nature. It therefore makes more sense to think of having a moral obligation to obey from the law's perspective rather than having a moral obligation to obey from the gunman's perspective. Whether this response is sufficient requires us to consider more closely what exactly Shapiro means when he declares that "it is part of the nature of law to have a moral aim."[153]

B. The Moral Aim of Law

1. Law Outside the Circumstances of Legality.—As we saw in section III(B)(2) above, the Planning Theory posits that the fundamental aim of law is to address the serious moral problems that arise out of the circumstances of legality. Given Shapiro's discussion of the fundamental nature or essence of law,[154] it seems reasonable to understand this fundamental aim as a prerequisite for the existence of a legal system. That is, a system is only a legal system if it has the aim of rectifying the moral problems that arise out of the

152. HART, *supra* note 53, at 82.

153. SHAPIRO, *supra* note 1, at 392.

154. *See supra* Part I.

circumstances of legality. This, in turn, seems to entail that the circumstances of legality themselves are necessary for the existence of a legal system.

This is a counterintuitive result. Imagine that there is another island—call it New Island—located near Cooks Island in the South Pacific. The resources of New Island are plenty and easily suffice to support its small population. New Island has a simple social structure based around kinship ties, which ensures homogenous values and community accord. In short, the circumstances of legality do not apply to New Island. The community does not need complex mechanisms for harnessing trust and corralling distrust. But suppose a charismatic traveler from Cooks Island visits New Island and dazzles them with tales of his community's complex legal system—its courts, legislatures, and executive officials. We can imagine the citizens of New Island, impressed by this newcomer, deciding to adopt a similar system of their own. They choose a leader and other officials to whom they delegate legislative and executive authority (in Shapiro's lingo, the authority to plan on their behalf); they adopt a system of individual property ownership and agree to have disputes settled by appointed arbitrators.

All of this newfangled planning technology is, of course, unnecessary. The New Islanders were content with their simple but well-functioning society before the arrival of the Cooks Island visitor. These sophisticated, hierarchical institutions are inefficient overkill. But just because they are not necessary for, or even valuable to, the well-being of the community does not make them impossible.

We therefore seem to have the possibility of a legal system that does not fit Shapiro's criteria for the existence of a legal system. Shapiro asserts that "the Planning Theory's answer to the Identity Question for law" includes the criterion that *the law* is a "planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering."[155] Shapiro reiterates this point: "If we want to explain what makes the law *the law*, we must see it as necessarily having a moral aim . . . ."[156] But not just any moral aim. According to the Moral Aim Thesis, "The fundamental aim of legal activity is to remedy the moral deficiencies *of the circumstances of legality*."[157] If we take Shapiro's claims of the necessity and essentialness of this aim seriously (and Shapiro appears to intend that we do), it would seem that on this view legal activity is

155. SHAPIRO, *supra* note 1, at 225.

156. *Id.* at 215; *see also id.* at 216 ("It is simply an essential truth about the law that it is supposed to solve moral problems.").

157. *Id.* at 213 (emphasis added). It is not the existence of any old moral aim that distinguishes a legal system from other normative systems, but specifically "the rectification of the moral defects associated with the circumstances of legality." *Id.* at 214. Moral aims of some kind will be common to many, if not all, normative systems, "[b]ut only a legal system is supposed to address those problems that less sophisticated methods of coordinating social activity and guiding action are unable to resolve." *Id.*

impossible absent the circumstances of legality. For when these circumstances do not apply, it cannot be the *aim* of the law to remedy their deficiencies.[158]

Through his Cooks Island narrative, Shapiro makes a compelling case that a society in the circumstances of legality will inevitably develop a legal system. But this argument does not establish that a society not faced with the moral predicament of the circumstances of legality *cannot* adopt a legal system. The Planning Thesis, Shapiro claims, "explains why we think that law is invaluable in the modern world but not, say, among simple hunter-gatherers."[159] But explaining why law is not invaluable to hunter–gatherers is insufficient to justify a claim that it is not possible for hunter–gatherers to have a legal system. That legal systems are only invaluable to large, complex societies might justify an empirical claim regarding the relative prevalence of law among complex and simple societies. But it is inadequate to justify Shapiro's *metaphysical* claim that "[a] legal system cannot help but have a moral aim if it is to be a legal system."[160]

More generally, what Shapiro has demonstrated is that a complex, pluralistic society cannot resolve the moral problems arising from the circumstances of legality without a legal system. This does not support his Moral Aim Thesis that a law is not possible without the aim of resolving these moral problems. Shapiro's argument is that when a society *does in fact have the aim* of remedying the moral deficiencies of the circumstances of legality, then they will create a legal system. It does not tell us whether legal systems exist when a normative system does *not* have this aim (either because the circumstances of legality are not present, or because they are present but the normative system does not aim to remedy the deficiencies of those circumstances). It leaves open the possibility that a legal system can exist without this moral aim.[161]

---

158. To be precise, it could be the aim of legal activity—or at least the *purported* aim—to remedy the defects of the circumstances of legality in circumstances where officials *claimed* to be faced with, or *believed* they were faced with, these circumstances, even when they do not in truth apply. The purported aim need not be sincere, for on Shapiro's account the law has a moral aim if "high-ranking officials *represent* the practice as having a moral aim." *Id.* at 216–17 (emphasis added). I address this point in greater detail below. For present purposes, it suffices to point out that in the New Island example, the high-ranking officials do not even represent that the legal system has the aim of resolving the deficiencies that arise out of the circumstances of legality.

159. *Id.* at 214.

160. *Id.* at 215. That we can provide counterexamples to Shapiro's description of the essential nature of law is also, of course, relevant to whether law actually *has* an essential nature. As I discussed in subpart I(A), *supra*, commentators have recently criticized the claim that law has an essential nature.

161. A possible avenue of response for Shapiro is to deny that the social organization of New Island qualifies as a *legal* system. That is, while the New Islanders have a sophisticated system for guiding behavior, it is not law. I am not persuaded by this rejoinder. On my understanding of linguistic usage, it is appropriate to say that New Island has a legal system. Indeed, it seems that we do in fact ascribe legality to systems that arise in societies where it is at least arguable that they are not faced with the circumstances of legality. For example, modern Australian law recognizes that

Shapiro might argue that I am misinterpreting his statements that the law's aim is to solve those moral problems that arise out of the circumstances of legality. After all, he also asserts that "the fundamental problem to which law is a solution is not any *particular* moral quandary" but is rather "the problem of how to solve moral quandaries *in general*."[162] However, this move dilutes the connection between law and social plans. What made the Cooks Island example so compelling was that the problems that the law resolved for the Cooks Islanders were the types of problems to which *plans* are uniquely suitable—problems of coordination, choosing between contentious or equally appropriate options, and so on. Once we understand the moral aim of the law as being the resolution of *some* moral problem, the conceptual connection between law and plans is less apparent.

2. Representing a Moral Aim.—The Moral Aim Thesis was also recently criticized by Fred Schauer as leading to counterintuitive results with respect to the legal status of unjust regimes whose leaders are not morally motivated. He argues that

> although Shapiro's use of moral motivation to distinguish legal from nonlegal institutions allows the law of erroneously morally motivated states—Nazi Germany, apartheid South Africa, and Stalinist Russia, for example—to count as law, it also leads to the counterintuitive conclusion that kleptocratic states whose dictators are interested only in their own gain—the Philippines under Marcos, for example, or Zaire under Mobutu—do not have law at all.[163]

To be precise, Shapiro is not committed to denying that Marcos's Philippines or Mobutu's Zaire did not have law at all, because these dictators were interested only in their own gain. If a dictator *represents* that his regime has a moral purpose, then the Moral Aim Thesis is satisfied even if the purported moral purpose is not genuine. Whether the Moral Aim Thesis leads to counterintuitive conclusions in the cases Schauer mentions depends on whether Marcos and Mobutu *represented* their regimes "as having a moral mission."[164]

---

customary *law* existed among indigenous societies prior to the arrival of European colonists. *See Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 57 (Austl.) (recognizing that customary law existed in indigenous societies prior to the acquisition of sovereignty by the British Crown, and holding that the British acquisition of sovereignty did not automatically extinguish customary property rights). While not all indigenous societies were hunter–gatherers, it is doubtful that they satisfied Shapiro's definition of the circumstances of legality, which envisions populations of a massive size, without close ties of kinship, and so on. In any event, my intuitions suggest that the notion of law does apply to New Island and other similar normative systems. The intuitions of my colleagues with whom I have discussed this accord with my own. Just as "it is easy for [Shapiro] to imagine legal systems that are evil," it is easy for me to imagine legal systems that do not have the aim of remedying the moral deficiencies of the circumstances of legality. SHAPIRO, *supra* note 1, at 16.

162. SHAPIRO, *supra* note 1, at 173.

163. Schauer, *supra* note 22, at 599 n.49.

164. SHAPIRO, *supra* note 1, at 217.

Shapiro might respond that the officials of these regimes *did* represent the practice as having a moral aim, at least implicitly. As long as the regime presents the appropriate moral posture, the requirement that it have a moral aim is satisfied. As Shapiro describes it,

> These representations may take many forms, either explicitly in speeches, ceremonial steles, preambles to constitutions, prologues to legal codes, and judicial dicta, or implicitly through the atmospherics of ritual dress and speech, the construction of monumental buildings housing legal activity, and the use of religious or moral iconography in legal settings. *Perhaps most importantly, the moral aims of the law are represented through legal discourse.* By describing legal demands as "obligating," not merely "obliging," and power as based on "right," not merely "might," elites present their practice as something other than a criminal enterprise or self-interested pursuit of pleasure, profit, or glory. They depict it, in other words, as an activity that is supposed to solve moral problems and should be obeyed for that reason.[165]

This broad understanding of what is required in order for a regime to be depicted as having a moral aim is an effective response to Schauer's claim that the Moral Aim Thesis denies the possibility of kleptocratic legal systems. For even self-interested dictators invoke the apparatuses and discourse of law. In fact, it is difficult to imagine a regime, even when completely uninterested in the welfare of its citizens, that did not use the language of "obligation" and the "right" to rule. As is so often the case, however, the answer to one question raises several others. First, according to Shapiro's expression of the Moral Aim Thesis, not any moral mission will do. Only a regime that purports to be committed to resolving the particular moral questions of cooperation and coordination that arise from the circumstances of legality have the status of law. But nothing in the language of moral discourse specifically depicts this particular goal. The same concepts and terminology could be invoked for any putatively moral purpose.

Second, Shapiro's explanation of when a regime represents to have a moral aim locates this representation—which is an essential feature of law—in the discourse of rights and obligations. This claim seems to be in tension with Shapiro's later claim that laws "do not claim moral force."[166] Shapiro expands upon this notion that law does not claim moral force in relation to how we should understand legal directives:

> Strictly speaking, the directive to pay income tax is best rendered as: "Everyone, pay x percent of your income in taxes!" (rather than:

165. *Id.* (emphasis added).

166. *Id.* at 231. It is also difficult to reconcile the assertion that law does not claim moral force with Shapiro's statement that, "[t]he law claims the right to demand compliance from everyone, even those who reject its demands." *Id.* at 112. For further discussion of Shapiro's analysis of how law's normative discourse forms punitive and coercive regimes, see *supra* subpart II(B).

> "Everyone is obligated to pay x percent of their income in taxes") and the authorization to Congress to regulate interstate commerce is similarly rendered as: "Everyone, *Congress* regulates interstate commerce!" (as opposed to: "Congress has the right to regulate interstate commerce").[167]

The best rendering of a legal directive, then, excludes any reference to moral concepts. However, it is just this "morally inflected"[168] language that characterizes legal discourse and that Shapiro identifies as representing law as having a moral aim—a representation essential to law being *law*. How might we reconcile the claims that (1) law necessarily claims to have a moral aim, and (2) law does not claim moral force? A possible move is to suggest that claiming to have a moral aim is different from claiming to have moral force. This move is not a fruitful one, however. Shapiro argues that officials depict law as having a moral aim precisely by describing legal demands as creating "obligations," and power as based on a "right" to rule.[169] Surely such assertions involve a claim of moral *force*—that seems at least as clear as Shapiro's assertion that they involve a claim that law has a moral *point*. And if legal demands are rendered without this moral terminology, then they no longer represent that they have a moral point. It does not seem possible for legal demands to assert claims of moral purpose—by using the language of "right" and "obligation"—and not simultaneously assert claims of moral force. If anything, Shapiro seems to derive law's representation of a moral aim primarily from law's representation of (or demand regarding) moral force.

Shapiro's generous analysis of what is required for the law to have a moral aim, and his comments regarding the best analysis of legal directives, also make it more difficult to maintain the normative distinction between law and the "gunman writ large." For not only could a gunman conceivably couch his demands in moral terms—stating a right to issue his demand, however insincerely, and his victim's obligation to obey—but Shapiro's "best rendering" of legal directive puts them on the same footing as mere demands for compliance.[170] "Everyone, pay your taxes!" is a general version of, "Hand over your money!"

---

167. SHAPIRO, *supra* note 1, at 231.

168. *Id.* at 232.

169. *Id.* at 231–32.

170. Shapiro expressly addresses criminal syndicates such as the Sicilian Mafia and Japanese Yakuza, which are essentially versions of the gunman on a larger scale. *Id.* at 215–17. He concludes that criminal syndicates are not legal systems because they "do not portray their threats as creating legal obligations and right[s] for their victims. They drop the conceit that they are trying to solve the problems associated with the circumstances of legality . . . ." *Id.* at 217. While it may be true that, empirically, most criminal syndicates do not represent themselves in this way, it is by no means inconceivable that they could. Members of the Mafia could insist that shopkeepers have an obligation to pay protection money, and that individuals have a right to petition the Don on the day of his daughter's wedding. The top officials could even insist (disingenuously) that the Mafia has a moral aim: providing stability, say, in a multiracial, religiously diverse urban setting. Shapiro

3. Finnis and Focal Examples of Law.—That Shapiro treats law as having a moral aim whenever elite officials purport that it has such an aim has ramifications for his response to John Finnis's prominent theory of natural law. Finnis claims, in Shapiro's words, that "one truly understands the nature of law only when one understands its moral point or purpose."[171] Because law has a moral purpose, Finnis argues, just legal regimes are "central" or "focal" examples of law—whereas unjust or evil regimes are "peripheral," "watered-down," or "borderline" instances of law.[172] In other words, legal positivists fail to recognize that unjust legal systems are "not *really* law."[173]

Shapiro agrees with Finnis that most positivists are mistaken in asserting that law does not have a moral aim.[174] As we have already discussed, Shapiro believes law has a moral aim, that "it is part of the nature of law that law must conform to morality."[175] He disagrees with Finnis, however, as to the status of regimes that fail to satisfy this fundamental aim. Such regimes are not borderline examples of law but are simply unsuccessful legal systems. They are real (albeit defective) legal systems. Shapiro illustrates his disagreement with Finnis with the "well-worn analogy"[176] of a broken clock. An unjust legal system is a real legal system just like a broken clock is a real clock. A decorative clock, on the other hand, is a borderline example of a clock. Unlike a broken clock, a decorative clock is not a real clock. Finnis's error, according to Shapiro, is to treat broken legal systems as decorative legal systems.

However, as applied to legal systems, the distinction between broken and decorative is more difficult to maintain on Shapiro's understanding of when law "has" a moral aim. As we have discussed, a legal system has a moral aim when its top officials *represent* that it has a moral aim. In other words, it is the fundamental nature of law to *purport* to have a moral aim, not to actually have such an aim. But this makes self-consciously unjust legal systems analogous to decorative clocks: they are not actually even trying to solve moral problems—they are just pretending to solve moral problems. The clock–law analogy does not hold because, unlike Shapiro's conception of law, our concept of a clock applies to devices that depict the time, not objects that merely purport to depict the time. For the broken–decorative

---

concedes "that if a criminal organization presents itself as dedicated to solving serious moral problems (think of Robin Hood and his Merry Men), it too might be eligible to be a legal system." *Id.* at 424 n.20. Presumably the same applies to criminal organizations such as the Mafia or Yakuza if they present themselves in a similar fashion, even if their representation is less plausible than that of Robin Hood.

171. *Id.* at 390 (citing JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 16–17 (1980)).

172. *Id.*

173. *Id.*

174. *Id.* at 390–91.

175. *Id.* at 391.

176. *Id.*

distinction to apply to law, on Shapiro's understanding of the aim of law, he would have to draw a distinction between "real" legal systems that genuinely attempt to resolve moral problems but fail and "borderline" legal systems that insincerely represent to resolve moral problems—an unlikely concession for a legal positivist to make.

V. Dworkin, Interpretation, and Theoretical Disagreements

As I have discussed above, in *Legality*, Shapiro addresses how the Planning Theory of Law improves upon earlier theories of legal positivism. I have also discussed, relatively briefly, Shapiro's response to one natural-law critique, that of John Finnis. Shapiro further argues that the Planning Theory provides a compelling response to Lon Fuller's influential criticism of positivism.[177] Shapiro devotes the most energy, however, to perhaps the most high profile and persistent critic of legal positivism of the last few decades—Ronald Dworkin. Dworkin rejects legal positivism for a number of reasons, several of which Shapiro outlines and responds to in *Legality*.[178] In this Review, I will address the one Dworkinian critique that Shapiro considers "extremely powerful and not so easily dismissed,"[179] namely the problem of "'theoretical' disagreement[s]."[180]

According to Dworkin's theory, the fact that theoretical disagreements such as debates about the proper method for interpreting law are not only possible, but also endemic, poses a serious difficulty for legal positivism:

> As Ronald Dworkin has argued, the mere fact that such disputes take place indicates that law cannot rest on the kind of facts that positivists believe form the foundation of legal systems. For positivists have maintained that the criteria of legal validity are determined by convention and consensus. But debates over interpretive methodology demonstrate that no such convention or consensus exists. In other words, disagreements about interpretive method are impossible on the

177. According to Shapiro, Fuller claims that "positivists fail to see that a regime would not be law if it consistently flouted the moral principles that constitute the Rule of Law." *Id.* at 392 (citing LON L. FULLER, THE MORALITY OF LAW 33–38 (1964)). These eight principles or values include requirements such as that legal rules are publicly available, clearly drafted, capable of being satisfied, do not contradict each other, and are not applied retroactively. *Id.* at 393. Shapiro accepts that a regime lacking these characteristics would not be a legal system but claims that the Planning Theory neatly explains this, while maintaining that law's existence is not grounded in morality. According to Shapiro, "[R]egimes that flout these principles are simply not engaged in the basic activity of law: they are not engaged in social planning." *Id.* at 394. The Planning Theory, Shapiro concludes, allows positivists to "agree with Fuller that observance of his eight principles is necessary for the existence of a legal system and yet deny that the existence of law depends on moral facts." *Id.* at 395.

178. *See id.* at 259–388 (considering three of Dworkin's critiques and possible responses by legal positivists).

179. *Id.* at 284. That Shapiro considers this critique to be of immense importance is reflected by the fact that he devotes almost one-third of *Legality* to engaging it.

180. RONALD DWORKIN, LAW'S EMPIRE 4–5 (1986).

> legal positivist position. Nevertheless, they seem not only possible, but pervasive.[181]

It can hardly be denied that disputes about proper interpretive methodology are pervasive features of law. In fact, whether or not the U.S. Constitution should be interpreted according to its original meaning is surely a leading candidate for the most often and hotly debated question in American law. This debate, though, is about "what the grounds of law *are*,"[182] which is precisely the question that the rule of recognition is supposed to settle.[183] But a legal system only exists when there is a consensus among officials (including judges) about the rule of recognition. If there is a consensus about the grounds of law, perennial disagreements such as the debate about constitutional interpretation are impossible.

Dworkin concludes that legal positivism is at odds with truisms about the practice of law and ought to be rejected. He presents an alternative theory of law known as constructive interpretation[184] that, he claims, accounts for the existence of theoretical disagreements. Constructive interpretation of the law requires legal interpreters to engage in moral reasoning, and because moral disagreements are endemic and intractable, so too are legal theoretical disagreements.[185]

A. Law as Constructive Interpretation

A complete exposition of Dworkin's theory is well beyond the scope of this Review. I will therefore restrict myself to a very brief—but hopefully fair—description of Shapiro's presentation of Dworkin's relevant claims. I will focus on Shapiro's argument that the Planning Theory of Law explains the persistent disagreements about interpretive methodology in law. Put briefly, Dworkin argues that law involves the practice of constructive interpretation. In general, constructive interpretation is the process of "imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[186]

To take literary interpretation as an example, because a novel is a form of art, "the interpreter seeks to impose on the text an *aesthetic* purpose that

---

181. SHAPIRO, *supra* note 1, at 283.

182. *Id.* at 285.

183. *See id.* (arguing that Dworkin's distinctions between theoretical and empirical disagreements "have analogues in Hart's theory of law" (i.e., the rule of recognition) and equating theoretical disagreements—or disagreements over "what the grounds of law *are*"—to "disputes about the content of the rule of recognition").

184. *See* DWORKIN, *supra* note 180, at 90 (arguing that all general theories of law are really constructive interpretations).

185. *See* SHAPIRO, *supra* note 1, at 293 ("Dworkin argues that the process of legal interpretation should be viewed . . . as a form of constructive interpretation. . . . Disagreements about the grounds of law would be predicated upon disagreements about the moral purpose of law . . . [because] the content of the law is dependent on which principles portray legal practice in its morally best light, genuine *moral* disagreements will induce genuine *legal* disagreements.").

186. *See id.* at 292–93 (quoting DWORKIN, *supra* note 180, at 52).

will make it the best possible novel it can be."[187] Because people "disagree about the aesthetic merits of literature[,] . . . the pervasiveness of theoretical *literary* disagreements can be neatly explained."[188]

Similarly, because law is a form of social control, "the legal interpreter imposes a purpose on legal practice in order to make it the *morally best* social practice it can be."[189] But people disagree about the *moral merits* of law as a social practice, a fact that accounts for theoretical *legal* disagreement.[190]

B. Interpretation and Distrust

Shapiro's response to the Dworkinian critique has two parts. First, he claims that the Planning Theory illustrates why Dworkin's explanation of theoretical disagreements is fatally flawed. Second, he argues that the Planning Theory *can* account for theoretical disagreements, or, as Shapiro calls them, "meta-interpretive" disagreements.[191] If successful, this argument would constitute a major advance in analytical jurisprudence, for as Shapiro points out, "no positivist theory . . . has yet shown that theoretical disagreements are possible."[192]

Shapiro deals with the first part of this response in a manner the reader will find familiar. On Dworkin's account, "the only way to discover the content of the law is to engage in moral and political philosophy, which is the very sort of inquiry that the law aims to obviate."[193] By putting back on the table the contentious issues that the law is supposed to settle, "Dworkin's theory recommends a meta-interpretive practice that defeats the very purpose of law."[194]

Moreover, Dworkin's meta-interpretive theory demands an incredible degree of philosophical skill and moral judgment on the part of interpreters, and quintessentially, judges. Shapiro argues that as a result, Dworkin's

187. *Id.* at 293 (emphasis added).

188. *Id.* (emphasis added).

189. *Id.* (emphasis added).

190. I should note that this explanation of pervasive theoretical disagreement does not indicate that there is no right answer to legal questions—quite the contrary. According to Dworkin, there is a correct method of legal interpretation, but it is a Herculean task that requires, among other things, substantial moral reasoning. DWORKIN, *supra* note 180, at 96–101. It is the fact that people have genuine moral disagreements that explains theoretical disagreements in law. But this fact does not require more than one moral view to be *correct*.

191. SHAPIRO, *supra* note 1, at 304–05. Meta-interpretive disagreements are disagreements about which interpretive method one ought to apply. A meta-interpretive theory "does not set out a specific methodology for interpreting legal texts, but rather a methodology for determining which specific methodology is proper. It provides participants of particular systems, in other words, with the resources they need to figure out whether to endorse textualism, living constitutionalism, originalism, pragmatism, law as integrity, and so on." *Id.*

192. *Id.* at 308.

193. *Id.* at 307; *see also id.* at 310 ("Having to answer a series of moral questions is precisely the *disease* that the law aims to cure.").

194. *Id.* at 307.

account not only violates the logic of plans in general, but also violates the specific plan embodied in the U.S. Constitution. The design of the Constitution, Shapiro claims, evinces a "pervasive sense of mistrust"[195] of both individuals and organs of government.[196] The Constitution's institutional arrangements were designed to distribute authority so as to "economize on the small degree of virtue present in the system"[197] and "leverage . . . distrust in order to prevent power from growing beyond its proper sphere."[198]

Shapiro bases his own meta-interpretive theory on the notion that all planning systems can be understood as exercises in "trust management."[199] For example, an investment plan developed by a financial advisor (and accepted by her client) that takes all investment decisions out of the client's hands reflects an attitude, on both their parts, of trust in the advisor's financial decisions and distrust in the client's.[200] For plans—including legal plans—to achieve their goals, they must be interpreted in a manner consistent with their "economy of trust."[201] In other words, the function of law[202] demands that interpreters "*defer to its economy of trust*, namely, the attitudes of trust and distrust that motivated its creation."[203] This is Shapiro's meta-interpretive theory.

It is crucial to understand that this meta-interpretive theory does not mandate a particular method of interpretation for all legal systems. Rather, the best interpretive methodology for a specific legal system will be contingent on the particular attitudes of trust represented in that system's master plan. We can say, roughly, that "[a] distrustful system requires a constraining methodology, such as textualism, whereas a more trusting system demands one according greater interpretive discretion."[204]

Shapiro now has the resources to explain, contra Dworkin, how meta-interpretive (that is, theoretical) disagreements are possible under legal positivism. Legal officials can *agree* on the social facts by which the existence and content of the (legal) master plan is determined, but they can *disagree* about the attitudes of trust and distrust the plan embodies and about which interpretive methodology will best give effect to those attitudes. As

195. *Id.* at 325.

196. *See generally id.* at 312–27 (chronicling the development of the Framers' mistrust in both powerful political actors and the people through the events leading up to the Constitutional Convention of 1787 and how those attitudes affected the eventual structure of the federal government).

197. *Id.* at 324.

198. *Id.* at 325.

199. *Id.* at 335.

200. *Id.* at 332–33.

201. *Id.* at 335.

202. Shapiro argues that "the problems of the circumstances of legality are largely (although not exclusively) problems of trust." *Id.* at 337.

203. *Id.* at 336 (emphasis added).

204. *Id.*

the agreement is about one thing and the (theoretical) disagreement is about another, acknowledging that officials disagree about interpretive methodology is consistent with claiming that the law requires official consensus about the social foundations of law.[205]

Shapiro's theory also accounts for why theoretical disagreements are so prevalent: "[I]t is highly likely that meta-interpreters will disagree with one another about the content of the planners' shared understandings and which methodologies are best supported by them."[206] Without these shared understandings, theoretical disagreements will be "irresolvable."[207]

C. Interpreting the Eighth Amendment

The debate about the Eighth Amendment and its application to the death penalty is a case in point. The debate revolves around whether the prohibition on "cruel and unusual punishments"[208] should be interpreted in accordance with the Framers' intent. If this is the proper interpretive methodology, then the death penalty is constitutional (as "the framers plainly did not regard the death penalty as cruel and unusual").[209] On the other hand, if the prohibition is interpreted "literally" (to use Shapiro's term) then the death penalty is unconstitutional ("since 'cruel' means cruel, and the death penalty is cruel and unusual").[210]

Which of these two methodologies is appropriate will turn on social facts that are in dispute. The originalist could argue that the constitutional designers were distrustful of judges, for example.[211] This distrust is respected by an interpretive method of fidelity to original intent, which will "minimize the potential for judicial mischief."[212] The anti-originalist could argue, among other things, that constitutional features such as life tenure for federal judges, judicial review, and the broad language of the clause in question indicate a high degree of trust in judges, at least compared to

---

205. *Id.* at 383.

206. *Id.* Shapiro's meta-interpretive theory, like Dworkin's, is quite taxing on the abilities of meta-interpreters. But while Dworkin's theory requires meta-interpreters to address difficult questions of moral and political philosophy, Shapiro's theory requires meta-interpreters to determine questions of *social fact*, such as the planner's attitudes of trust. *Compare* DWORKIN, *supra* note 180, at 87–113 (explaining that differing conceptions of the law diverge according to how they account for the relationship between a community's laws and its popular morality), *with* SHAPIRO, *supra* note 1, at 382–83 (asserting that the ideology of a legal system is a fact about the behavior and attitudes of social groups, which may be established by empirical reasoning). While these questions may be difficult or even irresolvable, they do not raise the very questions that law is supposed to resolve and therefore do not violate the logic of planning. SHAPIRO, *supra* note 1, at 382.

207. SHAPIRO, *supra* note 1, at 383.

208. U.S. CONST. amend. VIII.

209. SHAPIRO, *supra* note 1, at 384.

210. *Id.*

211. *Id.*

212. *Id.*

legislators.[213] There is further room for reasonable disagreement along another dimension. According to Shapiro's theory, what matters is the planners' allocation of trust, and whether the "planners" are the Framers or current participants depends on *why* the current participants accept the system.[214] If we currently accept the Constitution because we believe it was "designed by those having superior authority or judgment,"[215] then we should adhere to the original allocation of distrust. If, however, we currently accept the Constitution because we believe that it provides appropriate solutions to moral problems (but we believe so for different reasons than the framers did), then we should follow our current attitudes of trust and distrust.[216] Which of these scenarios applies to the U.S. Constitution is, of course, a matter on which originalists and non-originalists may have differing opinions.[217]

The Planning Theory is therefore able to explain the intractable legal controversy surrounding interpretation of the Eighth Amendment, and American constitutional interpretation generally. The correct interpretation depends on social—often historical—facts that shed light on the attitudes of trust and distrust among the U.S. Constitution's planners, and as Shapiro points out, "In a legal system as complex and old as the U.S. regime, there really is something for everyone."[218]

VI. The (Practical?) Value of Jurisprudence

The Planning Theory's agnosticism about the correct constitutional interpretive methodology may leave nonphilosophers with a hollow feeling; those readers hoping for guidance (or supportive theoretical arguments) are likely disappointed. Not only does Shapiro's theory fail to identify the correct method of constitutional interpretation, it provides the possibility that there is no definite answer to the question.

From the theoretical perspective, this is an altogether-appropriate conclusion for a positivistic theory. Since law is dependent on social facts and is partially indeterminate, it makes sense that the legally proper interpretive methodology will be contingent on the social facts that apply and may not be determined. Nor does the theory's failure to answer the meta-interpretive question undermine Shapiro's response to Dworkin. Indeed, this *is* Shapiro's response. Shapiro summarizes these considerations as follows:

---

213. *Id.* at 384–85.

214. *Id.* at 350.

215. *Id.*

216. *Id.*; *see also id.* at 385 ("[T]he U.S. system is a constitutional democracy that grants life tenure and the power of judicial review to federal courts, an allocation of authority that bespeaks a fairly high degree of trust in judges as compared to the legislature.").

217. I do not address here whether we *should* treat the Framers of the U.S. Constitution as having superior authority or judgment, nor do I address the interesting question of in what circumstances (if any) a society should defer to the moral judgment of an earlier generation.

218. SHAPIRO, *supra* note 1, at 385.

> [A] theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution to them. An adequate theory, in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law. Whether a unique solution to these disputes actually exists is an entirely different, and contingent, matter, and a jurisprudential theory should not, indeed must not, demand one just because participants think that there is one.[219]

Shapiro makes a strong case that the Planning Theory of Law makes a valuable contribution to analytical jurisprudence. It improves upon the weaknesses of prior positivist theories and rebuts a powerful and heretofore unanswered critique. The question remains, however, whether Shapiro has made his case for the *practical* value of analytical jurisprudence. The strength of Shapiro's theoretical argument (that disagreement is both possible and intractable) may undercut his argument for practical value (that the general nature of law is crucial to determining the content of specific laws).

The reader will recall that Shapiro argues that "many of the most pressing practical matters that concern lawyers"[220] depend on the answers to abstract questions of legal philosophy. In the opening chapter of *Legality*, Shapiro declared,

> One of the main goals of this book will thus be to show that analytical jurisprudence has profound practical implications for the practice of law—or, in other words, that the answer to what the law is *in any particular case* depends crucially on the answer to what law is *in general*.[221]

And Shapiro referred specifically to the debate about the correct way to interpret the Constitution as an example of the profound practical difference that analytical jurisprudence can make.[222] The jurisprudential skeptic is likely to argue that Shapiro's discussion of constitutional interpretation demonstrates precisely the opposite: that legal theory does *not* have significance with respect to the outcome of concrete cases. To quote Judge Richard Posner, "Nothing does turn on it."[223]

There are two responses to this complaint. First, it is a mistake to equate "It does not determine the answer" with "It is of no significance." The Planning Theory does not tell us whether we should interpret the Constitution according to originalism or non-originalism, but it does tell us

---

219. *Id.* at 384.

220. *Id.* at 25.

221. *Id.* Perhaps ironically, this description of the relationship between general theories of law and practical legal questions echoes Dworkin's sentiments on the issue. Dworkin asserts that, "Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers . . . . Jurisprudence is the general part of adjudication, silent prologue to any decision at law." DWORKIN, *supra* note 180, at 90.

222. SHAPIRO, *supra* note 1, at 28–29.

223. RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 3 (1996).

the kinds of arguments that are legally appropriate. It rules out arguments for a particular interpretive theory—either originalism or non-originalism—that appeal to moral philosophy. It demands that such arguments require sociological inquiry into whether certain facts obtain. Surely guidance on the right forms of argument in constitutional disputes is of practical importance to even the most pragmatic legal scholars.

The determined skeptic might respond by pointing out that the Planning Theory provides little assistance to lawyers because they already make the kinds of arguments that the Planning Theory recommends. Indeed, Shapiro concedes that "many of the meta-interpretive arguments that lawyers have actually made conform, albeit in an inchoate and unreflective manner, to the process of meta-interpretation that the Planning Theory recommends."[224] This is not to concede, however, that *all* meta-interpretive arguments that lawyers make already conform to the Planning Theory. That they do not all conform is clear in the constitutional context: arguments for both originalism and non-originalism are rife with the kind of appeals to moral and political philosophy that the Planning Theory would preclude.

In addition, the Planning Theory is of practical value to the lawyers who already use arguments that conform to its recommendations, because it allows them to improve their arguments from "inchoate and unreflective" to, well, choate and reflective.

This last observation indicates the second response available to the defender of analytical jurisprudence as a valuable enterprise: the value of an enterprise, especially a scholarly one, should not be judged solely on its "practical" value—in the case of legal philosophy, on its capacity to conclusively resolve particular legal disputes. Legal philosophy increases our understanding of the social practice of law; it helps us make sense of the practices and institutions that legal scholars and practicing lawyers—indeed, all individuals to varying degrees—contribute to and engage with on a regular basis. That understanding of law is, I suggest, of value in addition to its instrumental value in resolving legal disputes or providing guidance on the applicable legal arguments. We could say that analytical jurisprudence has hermeneutical value: it improves our ability to "make ourselves and our practices intelligible."[225] It makes the practice of law more intelligible by providing a *theory*, that is, by providing an explanation that gives the practice internal consistency and coherency by unearthing the sometimes obscure relationships between different aspects of the practice and providing a framework within which to resolve questions about the practice, its rules, and its institutions.

224. SHAPIRO, *supra* note 1, at 355.

225. Farrell, *supra* note 32, at 1002.

Conclusion

Shapiro argues that law is best understood as a sophisticated system of plans, the function of which is to resolve the serious moral issues that arise in the circumstances of legality. This understanding of law, Shapiro argues, allows us to determine the existence and content of law purely by reference to social facts, while also providing us with the resources to capture features of law previously inexplicable to the legal positivist—most notably, the existence of persistent and pervasive theoretical agreements about the grounds of law. While the Planning Theory does not achieve all of these (ambitious) goals, it is nonetheless a substantial contribution to analytical jurisprudence and provides the field with a fresh focal point around which future debates will coalesce. Moreover, *Legality*'s combination of breadth and accessibility makes it a worthy introduction to analytical jurisprudence, while not sacrificing sophisticated philosophical analysis. As for the jurisprudential skeptic, Shapiro partially succeeds in his argument regarding the value or relevance of analytical jurisprudence. While Shapiro may not have convincingly demonstrated that knowledge of law's fundamental nature is invaluable in resolving particular cases, *Legality* does represent an example of the value of analytical jurisprudence in sharpening, systematizing, and clarifying our amorphous understanding of law.