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Accepting Freedom: Legal Normativity Without Political Obligation

Summary

This dissertation examines the nature of legality (i.e. the quality of being law) and provides a unique understanding of legal normativity. As I will use the term, 'legal normativity' refers broadly to the relationship between legality and reasons for action.

Explanations of legal normativity can be grouped into two categories, one consisting of legal positivist interpretations and the other consisting of anti-positivist interpretations. There are several core theses comprising legal positivism; among these, I am primarily concerned with the separability thesis, which affirms that identifying law does not necessarily involve moral judgments or evaluations. The anti-positivist thesis denies the separability thesis. Although explanations of legal normativity often assert either the separability thesis or the anti-positivist thesis, it is, I will argue, possible to plausibly explain the phenomena without asserting one or the other. I will attempt to provide such an explanation in the form of (what I will call) the 'acceptance model' of legal normativity. The acceptance model responds to the contention that, while existing legal positivist theories (e.g. those presented by HLA Hart, Joseph Raz, and Scott Shapiro) are *inadequate* to account for legal normativity (or at least face significant difficulties in doing so), anti-positivist theories (e.g. those of Immanuel Kant, Ronald Dworkin, and Nigel Simmonds) are *unnecessary* to account for legal normativity.

The acceptance model explains legal normativity as consisting of at least two layers. First, a legal system, where satisfying Hartian requirements and exhibiting (to some extent) each of Lon Fuller's precepts of legality, necessarily provides (1) officials with choices entailed by their official roles, and (2) certain subjects with several choices that may be protected by a right to

bodily integrity. The provision by a legal system of these choices represents a prima facie reason for conforming with legal directives to an extent necessary to establish efficacy. This is because, per Hart, a legal system exists only if efficacious, i.e. only if its directives are sufficiently conformed with. I will refer to such conformity as 'efficacious conformity.' The prima facie reason to efficaciously conform, then, is to facilitate the existence of the legal system so that it can provide the aforementioned choices to officials and subjects. This prima facie reason to efficaciously conform is a reason that applies to those legal directives-- regardless of their content-- that must be conformed with in order to facilitate efficacy.

Second, the reason for efficacious conformity, manifested by the provision of these choices, is 'had' by officials and certain subjects because this reason counts as such from the perspective of the practical reasoning of officials and certain subjects. This reason counts as such from the perspective of the practical reasoning of officials and certain subjects because of (what I will call) the implied point of view. An official or subject adopts the implied point of view when, in executing his role as official or by making a choice provided by law, he exercises for any reason his capacity to choose. By exercising for any reason his capacity to choose in execution of his role, or by making a choice provided by law, an official or subject treats as true the proposition that the legal system provides choices with which to satisfy reasons (i.e. whatever reasons an official has for executing his role, or that a subject has for making a choice provided by law). As a result, officials and certain subjects ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. The prima facie reason to efficaciously conform is to facilitate the legal system, which exists only if efficacious, so that it can provide officials and subjects with these choices.

Preface

This dissertation is dedicated to my wonderful mother, Lesley Graham-Tokawa.

I could not have written this dissertation without the insight, kindness, and generosity of Lesley Graham-Tokawa, Nigel Simmonds, Asif Hameed, Matthew Kramer, Lars Vinx, Scott Boucher, Peter Benson, Mohamed Abdel-Fattah, David Hobbs, and Caroline Youdan. Thank you all.

To the extent that they are correct, the arguments presented herein were facilitated by the intelligence and commitment of my PhD supervisors: Nigel Simmonds, Asif Hameed, and Matthew Kramer. I could not have asked for a better supervisory team than that provided to me at Cambridge, and I will always be grateful for the opportunity to learn from them.

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. This dissertation is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee. The dissertation (including footnotes) is 65,830 words.

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Introduction

This dissertation examines the nature of legality (i.e. the quality of being law) and thereby provides a unique (although perhaps not comprehensive)[1] understanding of legal normativity. Beginning with the assumption that a legal system exists only if sufficiently satisfying Hartian requirements and Fuller's precepts of legality, the analysis leads to the acceptance model, which represents a new understanding of the normativity of law. As I will use the term, the normativity of law (or legal normativity) refers broadly to the relationship between legality and reasons for action.

Explanations of legal normativity can be grouped into two categories, one consisting of legal positivist accounts and the other consisting of anti-positivist accounts. There are several core theses comprising legal positivism; among these, of primary concern in this work is the separability thesis, which affirms that identifying law does not necessarily involve moral judgments or evaluations. Anti-positivism (as I will use the term) denies the separability thesis, and so affirms that identifying law necessarily involves moral judgments or evaluations. Although explanations of legal normativity often assert either the separability thesis or the anti-positivist thesis, it is, I will argue, possible to plausibly explain the phenomena without asserting one or the other. I will attempt to provide such an explanation in the form of the acceptance model of legal normativity.

This dissertation suggests that, while certain legal positivist theories (e.g. those presented by Hart, Raz, and Shapiro) are *inadequate* to account for legal normativity (or at least face significant difficulties in doing so), anti-positivist theories (e.g. those of Kant, Dworkin, and Simmonds) are *unnecessary* to account for legal normativity. Of course, one might say that, if a given anti-positivist account of legal normativity is correct and sufficient as an explanation, then any account that I offer will also be unnecessary. This is true; however, I believe there is good reason to prioritize searching for an explanation of legal normativity premised on something

[1] The explanation to be presented represents (I hope to show) an important conception of legal normativity, but it does not preclude the possibility of other theories that may supplement it.

other than moral facts. This is because the conclusion-- that legal validity necessarily depends on moral facts-- is highly contentious and not accepted by legal positivists. In contrast, the assertion that legal validity necessarily depends on social facts is accepted by both legal positivists and anti-positivists. If we can discover a way to account for legal normativity without resorting to contentious moral facts, then we begin on more agreeable terrain.[2]

As specified by the acceptance model, there are at least two layers comprising legal normativity. First, a legal system, because satisfying Hartian requirements and exhibiting (to some extent) each of Fuller's precepts of legality, necessarily provides (1) officials with choices entailed by their official roles, and (2) certain subjects with several choices that may be protected by a right to bodily integrity. The provision by a legal system of these choices represents a prima facie reason for conforming with legal directives to an extent necessary to establish efficacy. This is because, per Hart, a legal system exists only if efficacious, i.e. only if its directives are sufficiently conformed with. I will refer to such conformity as 'efficacious conformity.' The prima facie reason to efficaciously conform, then, is to facilitate the existence of the legal system so that it can provide the aforementioned choices to officials and certain subjects. So, this prima facie reason to efficaciously conform is a reason that applies to those legal directives-- regardless of their content[3]-- that must be conformed with in order to facilitate efficacy of the system they

[2] Shapiro presents another argument for prioritizing examination of legal positivist theories: 'I want to begin with the positivists not because the objections to the natural law approach are more damning, but rather for the simple reasons that the objections to the positivistic position are more interesting and enjoy logical priority. For consider how natural lawyers must respond to the Problem of Evil: they must (1) deny that they are flouting a truism or (2) claim that their truism-flouting is not nearly as bad as the problems positivists face. The first part of this response may be correct (though I doubt it), but it is not a very interesting argument. After all, it amounts to no more than the defiant declaration that evil legal regimes are not possible. Once this tack is taken, it is not clear where the conversation can go from here. And while the second part of the natural law response is philosophically interesting, its cogency can be assessed only once we have determined the force of the objections against the positivists. Thus, we can know which poison to pick only once we have assessed the toxicity of the positivistic one first' (Scott Shapiro, *Legality* (Belknap Press 2011) 50).

[3] Thus, the prima facie reason to do [X] where doing [X] is needed to efficaciously conform does not establish a reason to do [X] that exists independent of (the necessity of [X] for) efficacious conformity. Keep in mind the words of Raz: 'It is obviously often the case that people have reason to perform actions which are in fact required by law. This in itself does not explain how *all* laws can be said to be reasons. But suppose it can be shown that one always has reason to perform every action which is in fact required by law. That would still fall short of solving our problem. We will also want to know whether it is the fact that those actions are required by law which is held to be the reason for performing them. Similarly we will not be content to learn that individuals ought to follow rules which are also legal rules. We would

belong to.

Second, the prima facie reason for conforming, manifested by the provision of these choices, is 'had' by officials and certain subjects because this reason counts as such from the perspective of the practical reasoning of officials and certain subjects. This reason counts as such from the perspective of the practical reasoning of officials and subjects when officials and subjects adopt the implied point of view. Officials adopt the implied point of view when, in executing their official duties, they exercise for any reason their capacity to choose, and thereby treat as true the proposition that their official roles provide choices with which to satisfy reasons (i.e. whatever reasons they have for executing their duties). Similarly, subjects adopt the implied point of view when, by conforming with legal directives (or by acting pursuant to any choices provided by law), they exercise for any reason their capacity to choose, and thereby treat as true the proposition that the legal system provides choices with which to satisfy reasons (i.e. whatever reasons they have for conforming with legal directives, or for acting pursuant to choices provided by law). Because they treat as true these propositions, officials and certain subjects ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. They ought to treat this proposition as true because, given the Hartian requirement of efficacy, such conformity is necessary to obtain the choices provided by a legal system's existence.

This account of legal normativity is called the 'acceptance' model because adopting the implied point of view involves officials and certain subjects accepting the proposition that the legal system provides them with choices that can be exercised in satisfaction of reasons. It is due to the technical meaning of 'acceptance' (discussed in Chapter 4) that an official or subject, in virtue of accepting this proposition, ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. In a nutshell, to 'accept' a proposition in the technical sense is to treat it as true for some reason or, stated differently, to

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like to know whether they ought to follow them because they are legal rules. It is not merely the validity of the norms which has to be established but their systemic validity. We want to know what difference the fact that a norm belongs to a legal system in force in a certain country makes to our practical reasoning. We cannot be satisfied with an answer which shows that laws coincide with systems of valid norms. (Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1975) 154-155).

reason on the basis of the truth of a proposition. If a proposition is accepted in the technical sense, then one *ought* to accept each proposition that is entailed by the proposition that is accepted. This contrasts, in several ways (elaborated in Chapter 4), to Hart's internal point of view, which one accepts in a non-technical sense by endorsing a rule of recognition (i.e. criteria of legal validity) as a guide to conduct and standard of criticism.

Before presenting the acceptance model, I will identify and examine some difficulties faced by several existing explanations of legal normativity. My focus is on the legal positivist theories of Hart, Raz, and Shapiro, given that, as discussed, we start on more settled terrain by examining accounts that do not rely on moral facts. The critique of Hart to be presented is unoriginal, and draws upon arguments made by Dworkin, Raz, Shapiro, and Simmonds. Because this critique of Hart is not my own, it is discussed only within the context of presenting the acceptance model (in Chapter 4), rather than being discussed as a stand-alone critique. By comparison, the critiques I will present of Raz (Chapter 2) and Shapiro (Chapters 2 and 3) are original, and each will be given a more focused treatment.

I will argue that Raz's theory of law is implicitly (and, in light of the sources thesis, incoherently) inclusive positivist, i.e. implicitly affirms that legal validity can depend on moral considerations. By Raz's 'theory of law,' I mean his line of reasoning leading from the authority thesis (law necessarily claims legitimate authority) to the sources thesis (legal validity necessarily depends on social facts, and cannot depend on moral considerations). Raz's theory is implicitly inclusive positivist because implying that, in certain contingent circumstances, legal validity depends on moral considerations. These circumstances obtain where it is obvious or known to officials whether a purported legal system is immoral, and officials are not insincere or confused about the moral conditions of authority. Here, the purported legal system is a true legal system only if it does not exhibit severe immorality because it is only if it does not exhibit severe immorality that its officials can sincerely claim legitimate authority, as they must for the system to qualify as a legal system.

According to Shapiro's planning theory of law, explained in Chapter 1, '*legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of*

alternative forms of planning in the circumstances of legality.'[4] Indeed, 'Legal institutions are supposed to enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone.'[5] In Chapter 3, I argue that there are at least two inconsistencies in the planning theory. First, Shapiro's theory explicitly claims that adopting a law plan necessarily provides instrumentally rational reasons for following the plan; however, Shapiro's reasoning implies that adopting a law plan does not necessarily provide instrumentally rational reasons. Implicitly, Shapiro's reasoning suggests that adopting a law plan provides instrumentally rational reasons only if such law plan is not so immoral that it does a worse job, than a prior non-law plan, of resolving the moral problems of the circumstances of legality. This dependence, upon moral considerations, leads to the second inconsistency in the planning theory. The second inconsistency is that, although Shapiro explicitly endorses (exclusive) legal positivism, his theory is implicitly anti-positivist.

This dissertation aims to contribute to the literature of legal philosophy in both a critical and a constructive sense. Critically, I hope to identify some of the difficulties faced by the legal theories of Raz and Shapiro. Constructively, I hope to present-- in the form of the acceptance model-- a plausible account of legal normativity. The dissertation is organized into five chapters. In Chapter 1, I identify the normativity of law as the relationship between legality and reasons for action, and introduce several prominent legal theories that have tried to explain legal normativity. In Chapter 2, I critique Raz's theory of law, and examine Shapiro's argument against the incorporation thesis (whereby a rule of recognition can include moral criteria of validity). In Chapter 3, I scrutinize Shapiro's planning theory of law, arguing that it contains at least two inconsistencies. Then, in Chapter 4, I present the acceptance model of legal normativity, and try to explain why it improves upon Hart's theory. Finally, in Chapter 5, I examine whether the acceptance model represents a return to Kantian legal philosophy (No). A key difference between the acceptance model and Kant's theory of law is that Kant, but not the acceptance model, purports to establish a political obligation.

[4] Shapiro (n 2) 171.

[5] ibid.

Chapter 1: The Normativity of Law

1.1 A Relationship Between Legality and Reasons for Action

Perhaps counterintuitively, the issue of legal normativity-- broadly defined as a relationship between legality and reasons for action-- is what results from, rather than what initiates, the inquiry undertaken in this dissertation. The question with which my research began simply asked, 'what is implied by the nature of legality (i.e. the quality of being law)?' More exactly, assuming that a legal system exists only where Hartian requirements, and Fuller's precepts of legality, are sufficiently fulfilled, is there anything of interest that is entailed by law? Through this inquiry, I ultimately reached the acceptance model and the conclusion that each legal system necessarily provides officials and certain subjects with a prima facie reason to conform with particular legal directives, and contingently provides a conclusive reason to do the same.

The relationship between legality and reasons for action (as embodied in the acceptance model) is thus the output (and not the input) of the analysis. Accordingly, my research did not begin with any particular question about the normativity of law, which I then sought to answer. Instead, I wanted simply to further illuminate the nature of law in any way that might be of interest to legal philosophy. There is, therefore, no assumption that any particular question regarding legal normativity needs answering. What needs answering is the question, 'what is implied by the nature of law?' If this answer involves legal normativity, then we can conclude that normativity-- as entailed by legality-- is an essential feature of law and thus something worthy of explanation[6] (to the extent that it has not been adequately explained already). That said, some discussion of legal normativity may provide helpful context for the acceptance model to be presented in Chapter 4.

[6] This point responds to those (e.g. Enoch--see David Enoch, 'Reason-Giving and the Law' (2011) Oxford Studies in the Philosophy of Law 1) who argue that legal normativity is a pseudo-problem and so not something that necessarily needs to be explained by a legal theory. If the elements described by the acceptance model (e.g. the several choices) are entailed by legality, then they are essential elements of law. If, therefore, any of these elements is absent from a purported legal system, then the system in question is not a legal system. Resultantly, to the extent that it is important to distinguish legal from non-legal systems, it is important to identify and understand these elements.

The issue of the normativity of law, and its significance to legal theory, is much-discussed among legal philosophers. According to Gerald Postema, 'We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting.'[7] Thus, 'any adequate general theory of law must give a satisfactory account of the normative (reason-giving) character of law'[8] Speaking of legal normativity, Andrei Marmor says, 'Laws do not purport to describe aspects of the world; they do not consist of propositions about the way things are. In one way or another, laws purport to affect or modify people's conduct, and mostly by providing them with reasons for action.'[9] Legal normativity, then, has to do with the relationship between legality and reasons for acting.

For Raz, perhaps the most important issue in jurisprudence is how to explain law's dual nature, which includes law's essential normative aspect: 'In many ways it is the most important set of problems that any philosophy of law has to face since it raises the problem of the double aspect of law, its being a social institution with a normative aspect. The supreme challenge for any theory of law is to do justice to both facets of the law.'[10] Accordingly, 'A theory of law must explain this dual nature of the law, as fact and as norm.'[11] For Raz, then, law has a dual nature because law is a social fact with a normative aspect, and a legal theory's success depends on adequately explaining this duality. There are, says Raz, two things we must know in order to understand law's normative aspect. First, one must understand law's capacity to provide reasons for subjects: 'the question of normativity is whether, and when, laws constitute or provide reasons (and of what kind) to those subject to them.'[12] Second, for Raz, understanding law's normative aspect entails understanding law's use of normative language: 'The problem of the

[7] Gerald Postema, 'Coordination and Convention at the Foundations of Law' (1982) Journal of Legal Studies 165, 165.

[8] ibid.

[9] Andrei Marmor, *Philosophy of Law* (Princeton University Press 2011) 2.

[10] Joseph Raz, *The Authority of Law*, 2nd ed (Oxford: Oxford University Press, 2011) at 296.

[11] Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) at 345.

[12] ibid. at 3.

normativity of law is the problem of explaining the use of normative language in describing the law or legal situations.'[13]

Here is another way of thinking about the normativity of law. As noted by Simmonds, law is not only a social practice, but is also an *idea* within such social practice. The idea of law is embedded within the social practice of law because the status of law is invoked by judges, in the course of adjudication, to justify to subjects the imposition of sanctions for violating legal directives. Subjects are not sanctioned by courts because they violated mere rules; rather, subjects are sanctioned because they violated *the law*. To understand the social practice of law, therefore, we must understand the idea of law that is invoked in the course of such practice. Pursuant to Simmonds,

> The judicial judgment is addressed to the litigants amongst others, and is intended to justify the judicial decision. An adequate account of law's nature must be able to make sense of this, and must therefore be able to explain how the arguments characteristically offered in judicial judgments (arguments that attach central importance to the status of certain rules as law) can intelligibly be offered as a justification for a decision that may involve the ordering of coercive force against the citizen.[14]

For Simmonds, then, to adequately explain law we must be able to render intelligible the judge's invocation of the status of law as a justification (i.e. a reason) for sanctions. If the status of law cannot be intelligibly invoked as a justification for sanctions, then the social practice of law is unintelligible to the extent that it makes such invocation. Given the centrality of the invocation to the practice of law, this threat of unintelligibility is a threat to coherently describing the social practice of law: 'Even if our object is simply to identify the distinctive characteristics of the practices composing a legal order, there is nevertheless a need to understand the ascription of normativity to law, for that ascription of normativity is central to the entire framework of thought

[13] Raz (n 3) 170.

[14] Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2007) 136.

that makes up the relevant practices.'[15] Further, 'The claim that the rule violated was law, moreover, is not a classificatory or conceptual afterthought forming no part of the justificatory reasoning: it is a central (indeed, *the* central) element in that reasoning.'[16]

As identified by David Enoch, there are multiple ways in which legal normativity might manifest. Enoch specifies the following five possibilities. First, legal normativity could refer to how law necessarily provides *legal* reasons for action.[17] Second, legal normativity could refer to how law necessarily gives real (genuine, non-qualified) reasons for action.[18] Third, it might be that legal normativity means that law *often* gives reasons: 'Of course, one may concede that the law doesn't-- as a matter of necessity-- give reasons for action, but nevertheless insist that often enough, at least in basically decent and effective legal systems, the law does give reasons for action.'[19] Fourth, legal normativity might refer to the fact that law is necessarily *capable* of providing reasons: 'perhaps what is true of the law as a matter of necessity is not that it does give reasons for action, but rather that it can do so?'[20] Fifth, legal normativity might mean that law necessarily *claims* or *purports* to give reasons for action.[21]

As demonstrated by the variety (discussed below) in the legal theories of Kant, Simmonds, Hart, Raz, and Shapiro, legal normativity manifests in different ways to different theorists. Yet each of these theorists agree (at least implicitly) that legal normativity involves some relationship between legality and reasons for action. But what is the precise nature of this relationship? Is it accurately described by one (or more) of Enoch interpretations? While Enoch talks of reasons for action generally, the acceptance model focuses more specifically on reasons for efficacious conformity (keeping in mind that such conformity may, of course, involve action) that are

[15] ibid. at 119.

[16] ibid. at 129.

[17] David Enoch, 'Reason-Giving and the Law' (2011) Oxford Studies in the Philosophy of Law 1, 16.

[18] ibid. at 19.

[19] ibid. at 26.

[20] ibid. at 33.

[21] ibid. at 33-34.

provided to officials and certain subjects (i.e. those who are granted several choices). The (Chapter 4) argument, in summary, is that each legal system necessarily provides-- by granting several choices-- a prima facie reason for officials and certain subjects (i.e. those granted several choices) to efficaciously conform with legal directives, and contingently provides (also in the form of such choices) a conclusive reason to efficaciously conform. The contingent circumstances, in which a conclusive reason is provided, arise where there are no considerations (e.g. no conflicting reasons) that defeat the prima facie reason favouring efficacious conformity.

The argument involving prima facie and conclusive reasons, supporting efficacious conformity, begins with Raz. Reasons for action are 'referred to in explaining, in evaluating, and in guiding people's behaviour'[22] -- these are the three primary purposes of the concept of a reason.[23] Reasons have a dimension of strength, which means that some reasons are stronger or more weighty than others.[24] Where there is a conflict between them, the stronger reason overrides the weaker.[25] The concern is with logical strength rather than phenomenological strength, which is the degree to which the thought of the reason preoccupies a person, dominating his consciousness.[26] Regarding strength, there are two important features: 'Firstly, of two conflicting reasons the one which overrides the other is the stronger. Secondly, if one reason overrides all the reasons which are overridden by another reason, and if it overrides other reasons as well, then it is stronger than that second reason.'[27] In this way, the 'relative strength of a reason has been explained in terms of its power to override other reasons.'[28]

[22] Raz (n 3) 15-16.

[23] ibid. at 16.

[24] ibid. at 25.

[25] ibid.

[26] ibid.

[27] ibid. at 27. For a more detailed formulation of these two features, see ibid. at 26.

[28] ibid. at 27.

The idea of overriding should not be confused with the situation in which a reason is cancelled by a cancelling condition.[29] Cancellation by a cancelling condition 'does not involve a conflict of reasons' and 'does not reflect on the strength of reasons.'[30] Thus, the 'fact that one reason would be cancelled by a certain condition whereas another reason would not does not tend to establish that the second is stronger than the first. It implies nothing of the relative strength of these reasons.'[31]

For Raz, there are both first order and second order reasons. A second order reason is 'any reason to act for a reason or to refrain from acting for a reason.'[32] Conflicts between first order reasons are resolved by reference to the relative strength or weight of the reasons. A conflict between a first order reason and a second order reason is resolved 'by a general principle of practical reasoning which determines that exclusionary reasons always prevail, when in conflict with first order reasons.'[33] It is also possible for an exclusionary reason to conflict with and be overridden by another second order reason; only undefeated exclusionary reasons succeed in excluding.[34]

First order reasons include conclusive reasons, absolute reasons, and prima facie reasons. Second order reasons include exclusionary reasons. An exclusionary reason is a 'second order reason to refrain from acting for some reason.'[35] Regarding conclusive reasons: P is a conclusive reason for one to X if, and only if, P is a reason for one to X (which has not been cancelled) and there is no Q that overrides P.[36] Regarding absolute reasons: P is an absolute reason for one to X

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[29] ibid.

[30] ibid.

[31] ibid.

[32] ibid. at 39.

[33] ibid. at 40.

[34] ibid.

[35] ibid. at 39.

[36] ibid. at 27.

if, and only if, there cannot be a fact which would override it; that is to say, for all Q it is never the case that when Q, Q overrides P.[37] A prima facie reason is a first order reason which is neither conclusive nor absolute.[38] So, my argument is that each legal system, by granting several choices, necessarily provides at least a prima facie reason for officials and certain subjects to efficaciously conform, and contingently provides a conclusive reason for efficacious conformity.

To further contextualize the acceptance model of legal normativity, it may be helpful to review some other examinations of the relationship between law and reasons for action. Suppose a legal theorist makes the claim that law is normative because legal directives are necessarily moral (i.e. have morally meritorious content). We could undermine this theorist's argument by identifying a legal system that lacks moral directives. A key point is that the normativity of law attaches to the *status* of law, and so necessarily obtains wherever a legal system obtains. Because legal normativity necessarily obtains wherever law obtains, the explanation for legal normativity, to be adequate, must also necessarily obtain wherever law obtains. We can infer that an explanation that is contingent in relation to (i.e. not entailed by) law's existence will be inadequate as an account of legal normativity.[39] Pursuantly, an explanation that identifies the moral content of law (i.e. morally meritorious directives) as the source of legal normativity is an explanation that is inadequate because contingent in relation to law's existence. Such an explanation is contingent given that a legal system can exist although lacking moral directives.

A more promising explanation of law's essential normative aspect might be: law is not necessarily normative in virtue of its content (i.e. what its directives actually require), but is, rather, necessarily normative in virtue of its *existence depending on moral considerations* (in addition to depending on social facts).[40] If law's existence depends on moral considerations,

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[37] ibid.

[38] ibid. at 28.

[39] In Chapter 3, I argue that Shapiro's planning theory identifies a source of legal normativity that is contingent in relation to law's existence.

[40] What is the difference between, on the one hand, law necessarily having a moral content and, on the other hand, law's existence depending on moral considerations? These ideas are distinct because there is no *mutual* entailment between them. If law necessarily has a moral content, then law's existence depends on moral considerations (i.e. the considerations determining whether the moral content obtains); however, just because law's existence depends on moral considerations, we cannot conclude that law necessarily

then the very status of law-- regardless of the content of its directives-- would seem to carry at least some normative weight. And, because attaching to the status of law, such normativity would be entailed by law's existence, and thus could[41] adequately explain law's essential normative aspect (which is also entailed by law's existence). This is the approach generally taken by anti-positivist theories, which assert that identifying law necessarily involves moral judgments. However, anti-positivism is not the only sort of explanation of legal normativity-- explanations can also be legal positivist.

There are several theses that comprise legal positivism's core commitments. The social fact thesis asserts that law is a social creation or artefact, and that legal norms are distinguished from non-legal norms because the former instantiate a property that refers to some social fact.[42] The obtainment of the relevant social fact is what ultimately explains the existence of a legal system.[43] According to the weak conventionality thesis, 'the authority of the validity criteria in any conceptually possible legal system' is accounted for because such criteria 'constitute the terms of a social convention among the persons who function as officials.'[44] A social convention consists of a convergence of behaviour and attitude-- in addition to conforming behaviour, there must be a 'shared belief that non-compliance is a legitimate ground for criticism.'[45] For Hart, this social convention consists of officials taking the internal point of view towards a rule of recognition (i.e. criteria of legal validity). Pursuant to the strong conventionality thesis, the rule of recognition imposes a legal duty on officials to conform to its criteria of validity, and so 'the

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has a moral content. There could be considerations, other than those relating to law necessarily having a moral content, that account for law's existence depending on moral considerations.

[41] I am not discounting the possibility that any normativity carried by the status of law could be so weak as to fail to account for law's normative aspect. I am suggesting only that the normativity carried by the status of law (if indeed it does carry normativity) *could* be strong enough to account for law's normative aspect.

[42] Kenneth Himma, 'Inclusive Legal Positivism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 126.

[43] ibid.

[44] ibid. at 129.

[45] ibid. at 130.

conventional rule of recognition is a duty-imposing rule.'[46] The strong conventionality thesis affirms that officials are obligated to apply the rule of recognition in discharging their official roles, and that such a rule of recognition is what autonomously gives rise to this obligation.[47]

Finally (and, for my purposes, most importantly), the separability thesis asserts that law and morality are conceptually distinct. Per the 'object-level interpretation' of the separability thesis, there exists a conceptually possible legal system in which the legal validity of a norm does not depend on its moral merits[48] or, in other words, that there exists at least one conceptually possible legal system in which the criteria of validity are exclusively source- or pedigree-based.[49]

The details of the separability thesis differ depending on what the morality referenced in the thesis is contrasted to. There are at least three contrasts: (1) morality contrasted with evil or immorality; (2) morality contrasted with factuality; and (3) morality contrasted with prudence.[50] In the context of the distinction between the moral and the evil/immoral, the separability thesis asserts that 'the norms implemented by a legal system can be evil in their content or in their effects,' such that 'Nothing guarantees that a legal system or a law will be benign merely because it is a legal system or a law.'[51] In the context of the distinction between morality and factuality, the separability thesis claims that 'the process of ascertaining the law does not perforce involve moral judgments,' and so such process can 'unfold as a starkly factual inquiry into the relevant sources of legal norms that have been constituted by previous legislative and adjudicative decisions.'[52] For Kramer, although a legal system can obligate and empower its officials to apply moral tests when identifying the law, this is merely a contingent feature.[53]

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[46] ibid. at 132.

[47] ibid.

[48] ibid. at 135-136.

[49] ibid. at 136.

[50] Matthew Kramer, *In Defense of Legal Positivism* (Oxford University Press 1999) 3.

[51] ibid. at 2.

[52] ibid. at 3.

[53] ibid.

Regarding the distinction between morality and prudence, the separability thesis asserts that 'legal decision-making and rule-of-law observances can be based on officials' purely prudential calculations,' such that 'officials who care only about their own interests in securing the efficacy of their grip on power will typically have solid reasons for adhering quite consistently to the rule of law.'[54] The implication here is that the ideal of the rule of law is not an intrinsically moral ideal.[55]

In contrasting legal positivism and anti-positivism, I am primarily concerned with the separability thesis as related to the distinction between morality and factuality. So, as I am using the term, anti-positivism is the denial of the separability thesis as it operates in the context of the distinction between morality and factuality. Thus construed, anti-positivism affirms that identifying law necessarily involves moral judgments. The distinction between legal positivism and anti-positivism can be better understood by looking at some examples. Examples of anti-positivism include the theories of Kant and Simmonds. Legal positivists include Hart, Raz, and Shapiro. I will discuss, in the order presented above, each of these legal theorists. The purpose of the discussion is not only to illustrate the distinction, introduced above, between legal positivists and anti-positivists; the discussion also serves to introduce the theories that I will subject to critique in later chapters.

1.2 Anti-Positivism

For the anti-positivist Kant, legal validity necessarily depends on moral considerations because law's existence necessarily depends on two conditions, each of which entails moral considerations. Kant's first condition is that the lawmaker has authority, established by natural law, to bind others by choice. Kant's second condition is that there are certain judgments about the moral content of legal directives.

Regarding the first condition, Kant says that positive law depends on the lawmaker having authority, established by natural law, to bind others by choice: 'One can therefore conceive of

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[54] ibid.

[55] ibid.

external lawgiving which would contain only positive laws; but then a natural law would still have to precede it, which would establish the authority of the lawgiver (i.e., his authorization to bind others by his mere choice).'[56] In Simmonds' description, 'Kant equated the normativity of law with moral bindingness,' such that, 'even in a system of wholly posited laws one would still require a basic natural law that established the moral authority of the law-giver. The possible scope of positive law was consequently determined by the extent of such moral authority.'[57]

Regarding the second condition (of law's existence), Kant says that 'any possible giving of positive laws' depends on 'judgments' about 'whether what [law] prescribed is also right.' The jurist, says Kant,

> can indeed state what is laid down as [positive law], that is, what the laws in a certain place and at a certain time say or have said. But *whether what these laws prescribed is also right*, and what the universal criterion is by which one could recognize right as well as wrong, this would remain hidden from him *unless* he leaves those empirical principles behind for a while and seeks the *sources of such judgments in reason alone*, so as to *establish the basis for any possible giving of positive laws.*[58]

Although the wording in the above passage is somewhat awkward, it seems clear enough that, according to Kant: the 'judgments' (sourced in 'reason alone'), of 'whether what these laws prescribed is also right,' is what '[establishes] the basis for any possible giving of positive laws.' For Kant, then, the existence of any legal system depends on those moral considerations entailed by judgments about 'whether what these laws prescribed is also right.' So, as specified by Kant's anti-positivism, legal validity necessarily depends on moral considerations-- and thus law has an essential normative aspect-- because the existence of any legal system depends on those moral considerations entailed by (1) the authority of the lawmaker, established by natural law, to

[56] Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1996) 17.

[57] Matthew Kramer, NE Simmonds, and Hillel Steiner, *A Debate Over Rights* (Oxford University Press 1998) 135.

[58] Kant (n 56) 23 [italics are mine].

bind others by choice, and (2) judgments about 'whether what these laws prescribed is also right.'

What, then, does a Kantian legal system look like? According to Arthur Ripstein, Kant's legal system is guided by the universal principle of right, which generates each person's innate right to freedom, which leads to private right and then finally public right:

> The Universal Principle of Right says that 'an action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can co-exist with everyone's freedom in accordance with universal law.' The universal principle generates each person's 'one innate right' to 'Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law,' which 'is the only original right belonging to every human being by virtue of his humanity.' This innate right leads to private right, which governs the interactions of free persons, and then to public right, which requires the creation of a constitutional state.[59]

Kant thus establishes, from a foundation of a single principle and a single (innate) right, a comprehensive legal order:

> The idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional separation of powers. Kant argues that these norms and institutions do more than enhance the prospects for independence: they provide the only possible way in which a plurality of persons can interact on terms of equal freedom.[60]

The primary difficulty with Kant's theory is that not all legal systems resemble the Kantian legal system. There can, and have been, legal systems that are unjust and immoral, and it is doubtful

[59] Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 13-14.

[60] ibid. at 14.

that such systems can be accurately described as representing a rightful condition[61] of equal freedom entailed by the innate right. If Kant's conception of law excludes unjust or immoral legal systems, then Kant cannot account for the existence-- and thus the normativity-- of such unjust or immoral legal systems. As will become apparent in Chapters 4 and 5, the acceptance model has certain affinities with Kant's legal system. Most notably, the acceptance model specifies a right to bodily integrity that overlaps with Kant's innate right to freedom. However, while Kant's legal system is moral in nature, the acceptance model applies to all legal systems, whether moral, amoral, or immoral. It is due to this universal application that the acceptance model, unlike Kant's legal theory, is capable of accounting for legal normativity.

Simmonds' archetypal theory of law offers a more recent anti-positivist account of law's nature and normativity. Simmonds' theory is, at least prima facie, somewhat similar to the acceptance model that I present later on-- both Simmonds' archetypal theory and the acceptance model are underpinned by, and expand upon, Fuller's precepts of legality. When I present the acceptance model (in Chapter 4), I will compare and contrast it to Simmonds' theory, and so it is helpful for readers to understand Simmonds' ideas. Further, in the course of contrasting the acceptance model to Simmonds' archetypal theory, I will present a critique of Simmonds which will be understandable only to those familiar with his theory.

For Simmonds, law is an archetypal concept, with the archetype of law being an ideal of liberty as independence. The 'essential hallmark of an archetypal concept is the fact that instantiations of the concept count as such by resemblance or approximation to the archetype, such resemblance or approximation being a property that can be exhibited to varying degrees.'[62] Law, says Simmonds, is not only an archetypal concept, but the archetype of law is moral in nature. The archetype of law is moral in nature because it represents an ideal of liberty as independence: 'When citizens live under the rule of law, it is conceivable that the duties imposed upon him or her will be very extensive and onerous, and the interstices between these duties might leave very few options available. Yet, if the rule of law is a reality, the duties will have limits and the limits

[61] 'It is possible to have something external as one's own only in a rightful condition, under an authority giving laws publicly, that is, in a civil condition' (Kant (n 56) 44).

[62] Simmonds (n 14) 54.

will not be dependent upon the will of any other person.'[63] Indeed, 'to the extent that law governs, citizens will enjoy certain zones of optional conduct where the state will not interfere; and they will benefit from certain general prohibitions on the most general forms of interference that might be attempted by their fellow citizens.'[64] This is because

> Simply in consisting of followable rules, the law must recognize certain areas of (non-obligatory) conduct, however narrowly circumscribed those areas may be: for the law's demands cannot be limitless while also being possible to comply with. Even if my daily round is entirely absorbed by the performance of legal duties, I must enjoy certain options about how I perform those duties (e.g. should I wear a hat whilst doing so?) if the duties are to be performable at all.[65]

The foundation of law's archetype consists of Fuller's precepts of legality.[66] Thus, it is sufficient proximity to Fuller's precepts (coupled with the other features, discussed below, of law's archetype) that ensures a legal system grants to its subjects zones of optional conduct that are not subject to the will of a sovereign lawmaker: 'One needs to remember here that laws must be prospective, and must not be subject to constant change. At any one time, therefore, the law may conflict with the present will of the sovereign lawmaker.'[67]

There are other parts of law's archetype. First, Simmonds suggests that, in the archetype of law,

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[63] ibid. at 101.

[64] ibid. at 104-105.

[65] ibid. at 104.

[66] ibid. at 65. According to Fuller's precepts, which are discussed in detail in Chapter 4: there must be (1) general rules that are (2) promulgated, (3) not retroactive, (4) sufficiently clear, (5) non-contradictory, (6) possible to conform with, (7) not subject to constant change, and (8) there must be congruence between official action and declared rule (e.g. no sanctions unless there has been a violation of a rule).

[67] ibid. at 101. In Simmonds' description: 'where the law satisfies the eight principles, it will consist of intelligible and followable rules; and, where the law consists of followable rules, citizens will enjoy certain areas of optional conduct. These areas of conduct will receive some protection from interference (probably in the form of general prohibitions on trespass and assault) and their existence will be independent of the will of any person, being dependent solely upon the content of the law.' (ibid. at 163).

rules should perhaps be enforced.[68] Second, Simmonds suggests that the archetype of law may be experiential in that the ideal law is gradually revealed to us only through the experience of its pursuit.[69] Indeed, 'We discover the limitations of an explicitly formulated principle, and deepen our understanding of the moral value that it imperfectly expresses, through the experience of trying to apply it in the multifarious circumstances of the real world.'[70] Third, the archetype 'might also include, for example, conditions that would integrate the totality of published enactments more closely into an intelligible and possible way of life which is compatible with the various projects that humans typically wish to pursue.'[71]

In review, for Simmonds, legal validity depends conclusively on sufficient proximity to the moral archetype of law.[72] The archetype of law is moral because it represents an ideal of liberty as independence.[73] Simmonds' suggestion, then, is that a legal system exists only if sufficiently proximate to the moral archetype of law. Because legal systems exist only if sufficiently proximate to the moral archetype of law, legal validity necessarily depends on moral considerations (i.e. depends on those considerations needed to determine sufficient proximity to the moral archetype).

Why should we think of law as an archetypal concept, with the archetype of law being an ideal of liberty as independence? Simmonds argues law is an archetypal, rather than class, concept because this conclusion is reflected in how we think of law as both (1) a mundane instrument (that is morally neutral), and (2) embodying a moral ideal. Indeed, 'we seem to think of law in two mutually incompatible ways. On the one hand, it seems to be a mundane institution that has no intrinsically moral properties but derives its moral status (as good or evil) from the

[68] ibid. at 162.

[69] ibid. at 145.

[70] ibid. at 146.

[71] ibid. at 158.

[72] ibid. at 52-54.

[73] ibid. at 142, 159.

contingencies of particular circumstances. On the other hand, it seems to embody a lofty moral ideal.'[74]

There are three ways in which the idea of an archetype is reflected by how we think of law as both (1) a mundane instrument and (2) a moral ideal. The first way involves the rule of law:

> A theoretical approach that views the concept of law as structured by an archetype has a number of virtues. In the first place, an understanding of the concept of law as structured by an archetype captures our intuitive sense (acknowledged by Raz) that the ideal of the rule of law 'is an ideal rooted in the very essence of law' such that '[i]n conforming to it the law does nothing more than be faithful to its own nature.'[75]

Simmonds argues that 'the rule of law is intrinsically linked to liberty, understood as one's not being under the power of others.'[76] The second way in which the idea of law, as an archetype of liberty as independence, is reflected by our understanding of law, is that this idea explains certain features we associate with legality, including how the status of law can be intelligibly invoked by officials as a justification for sanctions.[77] Third, conceiving of law as an archetype of liberty as independence reflects our understanding about doctrinal legal scholarship.[78]

We can see that each of Kant and Simmonds is an anti-positivist given that each affirms, albeit in different ways, that legal validity necessarily depends on moral considerations. It is these moral considerations that, for anti-positivists, explain legal normativity. There is, however, a

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[74] ibid. at 44.

[75] ibid. at 100.

[76] ibid. at 158.

[77] ibid. at 159.

[78] 'We see that the claims of doctrinal scholarship fit very well with the account of law as a moral idea. The forms of doctrinal reasoning and analysis that compose both the treatise and the judgment can be understood as an attempt to fit each discrete rule into a coherent system of social interaction, practice and understanding. The propositions offered in such contexts can legitimately be offered as propositions of law precisely in so far as they move our understanding of each isolated rule or doctrine closer to the archetype of law, when that archetype is more fully understood.' (ibid. at 167).

significant obstacle-- presented by Raz-- that any anti-positivist theory must face. Raz argues that anti-positivist theories cannot account for legal normativity because they are unable to account for the use of normative language in legal discourse: because the moral facts that (say anti-positivists) legal validity necessarily depends on are not generally known, such moral facts cannot explain the use of normative language in legal discourse. In Raz's words:

> Many people who do not accept the natural law view of the necessary morality of law, indeed many who reject it, are happy to apply normative language to the law. This must mean that the explanation of the use of normative terms to describe the law and legal situations cannot depend on the truth of the controversial natural law theories-- and it is the explanation of the use of normative language which lies at the heart of the problem of the normativity of law.[79]

Raz is not saying that 'an explanatory theory of the use of normative language in legal contexts must already be accepted by all and sundry'-- 'This is obviously false.'[80] Raz's argument is that

> if natural law theories are to explain the use of normative language in such contexts they must show not only that all law is morally valid but also that this is generally known and thus accounts for the application of normative value to the law. Since this assumption is false, natural law cannot explain the normativity of law.[81]

Raz's critique of natural law theories, and the difficulty they face in accounting for legal normativity, presents an important lesson to learn: to adequately account for legal normativity, an explanation must account for the use of normative language, and thus a source of normativity must be generally known at least by officials and arguably subjects as well. The acceptance

[79] Raz (n 3) 169.

[80] ibid. at 170.

[81] ibid.

model learns this lesson because the source of normativity specified by the model-- that a legal system is a means of satisfying reasons-- is generally known to officials and subjects.[82]

My contention is that, regardless of whether they are correct, anti-positivist theories are unnecessary to answer the question of the normativity of law. In affirming the acceptance model, therefore, I am not relying on the incorrectness of any particular anti-positivist theory (although I do critique Simmonds in Chapter 4 and Kant in Chapter 5); however, I am denying the necessity of any anti-positivist theory to account for legal normativity. In contrast, I will argue that the legal positivist theories of Hart, Raz, and Shapiro are inadequate to account for legal normativity (or at least face significant difficulties in doing so).

1.3 Inclusive Legal Positivism

Hart

The second category of answer, to the question of legal normativity, is legal positivism, which affirms (among other things) the separability thesis. There are two versions of legal positivism: inclusive legal positivism and exclusive legal positivism. Inclusive legal positivism asserts that legal validity can (but need not) depend on moral considerations, while exclusive positivism holds that legal validity cannot depend on moral considerations.

Inclusive legal positivism includes the incorporation thesis, which Kenneth Himma summarizes this way: 'there are conceptually possible legal systems in which the validity criteria include substantive moral norms. In such legal systems, whether a norm is legally valid depends, at least in part, on the logical relation of its content to the content of the relevant moral norms.'[83] Notice that, because inclusive legal positivists affirm that legal validity does not necessarily depend on moral considerations, inclusive positivists cannot rely on such moral considerations to explain law's essential normative aspect. Those who affirm the incorporation thesis, then, must come up with some other explanation for law's normativity. The incorporation thesis is associated with Hart's idea of a rule of recognition. A rule of recognition, says Hart, 'is accepted and used for

[82] For instance, officials and subjects generally know that the legal system can be used to sue people for money.

[83] Himma (n 42) 136.

the identification of primary rules of obligation'[84] such that, 'To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.'[85] In Leslie Green's words, 'a rule of recognition provides criteria of legal validity by determining which acts create law.'[86] For Hart, then, the rule of recognition represents the criteria conclusively determining legal validity.[87] Here is how the rule of recognition is associated with the incorporation thesis: pursuant to the incorporation thesis, legal validity can depend on moral considerations in that a rule of recognition can incorporate, into its criteria for determining legal validity, such moral considerations ('the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values.')[88]

In Hart's version of inclusive legal positivism, the social facts on which legal validity (i.e. law's existence) necessarily depends are the presence of generally-followed primary rules, and a rule of recognition accepted by officials from the internal point of view (i.e. endorsing it as a guide to conduct and a standard of criticism):[89]

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as

[84] HLA Hart, *The Concept of Law* (Oxford University Press 2012) 100.

[85] ibid. at 103.

[86] ibid. at xxi.

[87] ibid. at 94-95.

[88] ibid. at 250. Below, I distinguish between two manifestations of inclusive legal positivism. First, inclusive positivism could refer to the possibility of an incorporationist rule of recognition, which is a rule of recognition that includes-- as a sufficient condition-- moral criteria of validity. Second, inclusive positivism could refer to the possibility of an inclusive rule of recognition, which is a rule that includes-- as a necessary condition-- moral criteria of validity. When I discuss inclusive positivism, I am generally (i.e. unless specified otherwise) concerned with moral criteria as a necessary condition of validity.

[89] ibid. at 242.

> common public standards of official behaviour by its officials.[90]

Now, recall that inclusive (or exclusive) legal positivists must explain law's essential normative aspect while denying that legal validity necessarily depends on moral considerations. The incorporation thesis-- whereby a rule of recognition may incorporate moral criteria-- is explicitly affirmed by Hart[91] but does not represent Hart's explanation of law's essential normative aspect. This is because the incorporation thesis suggests only that legal validity *could* (but does not necessarily) depend on moral considerations. And, moral considerations that legal validity (merely) *could* depend on are moral considerations that are not entailed by law's existence. Because they are not entailed by law's existence, such moral considerations are inadequate to explain law's normative aspect, which is entailed by law's existence. Therefore, if Hart used the incorporation thesis (without more) to explain law's normative aspect, then Hart's explanation of law's normative aspect would be clearly inadequate. It is, rather, the internal point of view, and not the incorporation thesis, that represents Hart's explanation of law's normative aspect.[92]

The internal point of view is 'that of the participant in such practice who accepts the rules as guides to conduct and as standards of criticism.'[93] Here is how Shapiro describes the internal point of view:

> Normative judgments, on this view, are not apprehensions of normative facts, but rather commitments to giving descriptive facts certain weight in one's deliberations. Thus, one may take the internal point of view toward the social practice

[90] ibid. at 116.

[91] Hart states that 'the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values;' (ibid. at 250). For e.g., 'In some legal systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values;' (ibid. at 204).

[92] 'When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which *accepts and uses them as guides to conduct*. We may call these respectively the 'external' and the 'internal points of view.'' (ibid. at 89 [italics are mine]). Below in Chapter 4, I discuss Shapiro's argument that the purpose of Hart's internal point of view is not to explain legal normativity but is, rather, to render law intelligible.

[93] ibid. at 255.

> of rule recognition and, in so doing, treat it as a standard for guidance and evaluation. The normative judgments that are formed through this practical engagement with social practice can then be used to derive other normative judgments about legal rights, obligations, and validity.[94]

The internal point of view explains how law's normative aspect is entailed by law's existence in a way that does not render law's existence necessarily dependent on moral considerations. To this end, by asserting that a legal system exists only if officials adopt the internal point of view,[95] Hart explains how law's normativity, generated by the internal point of view, is entailed by law's existence. At the same time, Hart's explanation of how law's normativity is entailed by legal validity does not render legal validity necessarily dependent on moral considerations. This is because legal validity can be conditional on the internal point of view without being conditional on moral considerations. Legal validity can, without being conditional on moral considerations, be conditional on the internal point of view because the internal point of view can be adopted absent moral judgments.[96] If the internal point of view can obtain absent moral judgments, then legal validity can depend on the internal point of view without depending on moral considerations. In this way, Hart uses the internal point of view to explain legal normativity without rendering legal validity necessarily dependent on moral considerations. Again, because Hart is an inclusive legal positivist denying that legal validity necessarily depends on moral considerations, he cannot rely on such moral considerations to explain the normativity of law. Instead, Hart uses the internal point of view, which is normative but not necessarily moral, to explain the normativity of law.

1.4 Exclusive Legal Positivism

Exclusive legal positivism affirms the sources thesis, whereby legal validity necessarily depends on social facts, and cannot depend on moral considerations. I will discuss Raz and Shapiro as representatives of exclusive legal positivism.

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[94] Shapiro (n 2) 111-112.

[95] Hart (n 84) 116.

[96] ibid. at 203.

Raz's Theory of Law

By Raz's 'Theory of Law,' I mean his line of reasoning leading from the authority thesis (law necessarily claims legitimate authority) to the sources thesis (legal validity necessarily depends on social facts, and cannot depend on moral considerations). For Raz, 'it is an essential feature of law that it claims legitimate authority.'[97] Because claiming legitimate authority is an essential feature of law, law necessarily claims legitimate authority or, stated otherwise, law exists only if claiming legitimate authority. This is the authority thesis.[98] Raz argues the authority thesis is established because such thesis is how to properly interpret four facts of law: (1) the fact law requires conformity even if conformity is unsupported by the balance of reasons; (2) the fact law uses normative language (e.g. 'right' and 'duty'); (3) the fact legal institutions are designated as 'authorities'; and (4) the fact officials claim subjects owe allegiance to and ought to obey the law.[99]

Note that, although (per the authority thesis) law necessarily claims legitimate authority, law's claim of legitimate authority is not necessarily fulfilled: 'A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none.'[100] Law 'claims to have legitimate authority, in the sense that legal institutions both act as if they have such authority, and articulate the view that they have it.'[101] Further, the law claims authority in the sense that it 'presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority.'[102] Law's 'claim to legitimate authority is not merely a claim that legal rules are reasons. It includes the claim that they are

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[97] Raz (n 10) 30.

[98] There have been various critiques directed at the authority thesis. See, for instance: Kenneth Himma, 'Law's Claim of Legitimate Authority' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford University Press 2001); Philip Soper, 'Legal Theory and the Claim of Authority' (2989) 18 Philosophy & Public Affairs 209; Matthew Kramer, 'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties' (1999) 109 Ethics 375.

[99] Joseph Raz, *Ethics in the Public Domain* (Oxford University Press 1994) 199-200.

[100] ibid. at 199.

[101] Raz (n 10) 331.

[102] ibid. at 33.

exclusionary reasons for disregarding reasons for non-conformity.'[103] An exclusionary reason[104] is '[a reason] not to act for certain reasons,'[105] or 'a reason for not following (i.e. not acting for) reasons that conflict with the rule.'[106] Exclusionary reasons 'exclude reliance on conflicting reasons, not all conflicting reasons, but those that the law-maker was meant to consider before issuing the directive.'[107] In this way, when law claims legitimate authority, it is claiming to provide exclusionary reasons for subjects to conform with legal directives.

But, one might ask, when does law *actually* provide exclusionary reasons for subjects to conform with legal directives? (i.e. when is law's claim of legitimate authority fulfilled?). Raz's service conception of authority[108] provides the answer. According to Raz's service conception, there are two conditions determining whether law has legitimate authority: the normal justification condition[109] and the independence condition. The normal justification condition is 'based on a contrast between how I would act if unaffected by the authority compared with how I would act

[103] ibid. at 30.

[104] For critiques directed at Raz's idea of exclusionary reasons, see (for e.g.): Larry Alexander, 'Law and Exclusionary Reasons' (1990) 18 Philosophical Topics 5; Stephen Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (2013) Morality, Authority, and Law 151; Chaim Gans, 'Mandatory Rules and Exclusionary Reasons' (1986) 15 Philosophia 373; Philip Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge University Press 2002); Clarke DS, 'Exclusionary Reasons' (1977) LXXXVI Mind 252; Michael Moore, 'Authority, Law and Razian Reasons' (1989) 62 Southern California Law Review 827; Emran Mian, 'The Curious Case of Exclusionary Reasons' (2002) 15 The Canadian Journal of Law and Jurisprudence 99; Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 Southern California Law Review 913.

[105] Raz (n 3) 183.

[106] Raz (n 11) 144.

[107] ibid.

[108] For a critique of the service conception of authority, see: James Sherman, 'Unresolved Problems in the Service Conception of Authority' (2010) 30 Oxford Journal of Legal Studies 419.

[109] For critiques of the normal justification condition, see (for e.g.): Kenneth Himma, 'Just Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis' [2005] SSRN Electronic Journal; Emran Mian, 'The Curious Case of Exclusionary Reasons' (2002) 15 The Canadian Journal of Law and Jurisprudence 99; Stephen Darwall, 'Authority, Accountability, and Preemption' (2011) 2 Jurisprudence 103; Scott Hershovitz, 'The Role of Authority' Philosophers' Imprint volume 11, no. 7 march 2011; Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 S Cal L Rev 913; Jonathan Quong, *Liberalism without Perfection* (Oxford University Press 2011).

when trying to follow the authority.'[110] As specified by the normal justification condition, 'authorities are legitimate only if their directives enable their subjects to better conform to reason.'[111] The normal justification condition is fulfilled if 'the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not.'[112] Authoritative directives, then, 'are binding because, and where, they improve our powers by enabling us to conform to reason better than we could without them.'[113] In short, the normal justification condition is fulfilled if, but only if, directives guide subjects to better conformity with reason than would subjects' own judgments (of what best conforms with reason). According to the independence condition, 'authority is legitimate only where acting by oneself is less important than conforming to reason.'[114] The independence condition is fulfilled if 'the matters regarding which the [normal justification condition] is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority.'[115]

Pursuant to the next step in Raz's argument: to claim legitimate authority, something must be at least *capable* of having legitimate authority. How do we know that, for Raz, law claims legitimate authority only if capable of having it? We know because Raz is explicit on the matter:

> If the claim to authority is part of the nature of law, then whatever else the law is it must be capable of possessing authority. A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none. But it must possess all the other features of authority, or else it would be odd to say that it claims authority. *To claim authority it must be capable of having it*, it must be a system of a kind

[110] Raz (n 11) 143.

[111] ibid. at 140.

[112] ibid. at 136-137.

[113] ibid. at 142.

[114] ibid. at 137.

[115] ibid.

> which is capable in principle of possessing the requisite moral properties of authority.[116]

More precisely, if one claims legitimate authority, then one is capable of having legitimate authority, unless (1) the claim is insincere, and/or (2) the claimant misunderstands the nature of the claim or the nature of himself.[117] However, says Raz, the claim made by law does *not* generally involve insincerity or misunderstanding. The possibility that law's claim of legitimate authority is normally insincere or based on a conceptual mistake is ruled out because 'the claim is made by legal officials wherever a legal system is in force.'[118] Further, Raz says legal officials and institutions cannot be conceptually confused, at least not systematically, about the nature of the claim.[119] This is because, 'given the centrality of legal institutions in our structures of authority,' the claims and conceptions of legal officials and institutions are 'formed by and contribute to our concept of authority,' such that our concept of authority 'is what it is in part as a result of the claims and conceptions of legal institutions.'[120] The upshot of this reasoning is that, since law's claim of legitimate authority does not normally involve insincerity or misunderstanding, such claim can normally be made only by a legal system capable of having legitimate authority.[121]

Raz then specifies 'two features which must be possessed by anything capable of being authoritatively binding':[122] 'First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to behave. Second, it must be possible to identify the directive as being issued by the alleged authority without relying on

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[116] Raz (n 99) 199 [italics are mine].

[117] ibid. at 201 [italics are mine].

[118] ibid.

[119] ibid.

[120] ibid.

[121] For a critique of Raz's argument that law sincerely claims legitimate authority only if capable of having it, see Kenneth Himma, 'The Instantiation Thesis and Raz's Critique of Inclusive Positivism' (2001) 20 Law and Philosophy 61.

[122] Raz (n 99) 202.

reasons or considerations on which directive purports to adjudicate.'[123] This second feature is 'closely tied to the mediating role of authority':[124]

> A decision is serviceable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle [...] The same applies to the subjects of any authority. They can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle.[125]

In other words, the 'subjects of any authority' can 'benefit by its decisions only if they can establish their existence and content' without 'raising the very same issues which the authority is there to settle.' This argument is supported by Raz's idea of legitimate authority as exclusionary reasons. If a legal system is to have directives representing exclusionary reasons for conforming, then the identification of such directives cannot require subjects to depend on the very reasons that, being depended on in the process of identifying directives, are *not* excluded by such directives. Stated differently, if legal directives are to represent exclusionary reasons, then identifying the existence and content of such directives cannot require subjects to depend on the very reasons that are supposed to be excluded. If identifying legal directives cannot require subjects to depend on reasons meant to be excluded by such directives, then legal validity cannot depend on moral considerations. This follows because moral considerations are among those reasons meant to be excluded by legal directives: 'for the law to be able to fulfill its function, and therefore to be capable of enjoying moral authority, it must be capable of being identified *without reference to the moral questions which it pre-empts,* i.e. the moral questions on which it is meant to adjudicate.'[126]

Here is a less abstract description of Raz's argument. Because exclusionary reasons take the form of directives guiding subjects to better conformity with reason than would subjects' own

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[123] ibid.

[124] ibid. at 203.

[125] ibid.

[126] Raz (n 11) 115 [italics are mine].

judgments of what best conforms with reason, law can provide exclusionary reasons only if identifying legal directives does not depend on subjects judging what best conforms with reason. Why? Because, if identifying legal directives did depend on subjects judging what best conforms with reason, then it would be impossible for such directives to guide subjects to better conformity with reason *than would subjects' own judgments of what best conforms with reason.*[127] Given that subjects' judgments of what best conforms with reason include moral considerations, this point-- that identifying legal directives cannot depend on such judgments-- implies that identifying legal directives cannot depend on moral considerations. And, if identifying legal directives cannot depend on moral considerations, then (per the sources thesis) legal validity cannot depend on moral considerations.

Inclusive legal positivists have made several attempts to respond to Raz by arguing that the incorporation thesis, whereby a rule of recognition can include moral criteria of validity, is not falsified by the authoritative nature of law. As identified by Brian Leiter, there are at least three possible rejoinders to Raz. First, inclusive positivists 'might contest whether identifying laws by reference to moral considerations necessarily requires taking into account the dependent reasons on which those laws are based.'[128] To this end, WJ Waluchow notes that 'The set of all moral reasons is not identical with the set of dependent moral reasons underlying an authoritative directive.'[129] However, says Leiter, even if Waluchow is correct on this point, 'it wouldn't prove enough' because 'it suffices to defeat [inclusive legal positivism] as a theory compatible with the law's authority if there exists any case in which the dependent reasons are the same as the moral reasons that are required to identify what the law is'-- it is irrelevant that there 'remain some cases where these reasons "may" be different.'[130] Second, Jules Coleman has argued that inclusive positivism is 'compatible with the authoritative nature of law because the rule of

[127] For an argument critiquing Raz's reasoning here, see: Scott Hershovitz, 'The Authority of Law' (2011) The Routledge Companion to Philosophy of Law (U of Michigan Public Law Working Paper No. 232).

[128] Brian Leiter, 'Realism, Hard Positivism, and Conceptual Analysis' (1998) 4(4) Legal Theory 533, 541.

[129] WJ Waluchow, 'Authority and the Practical Difference Thesis' (2000) 6(1) Legal Theory 45, 49.

[130] Leiter (n 128) 541.

recognition is not the rule by which ordinary people (those subject to the law's authority) identify what the law is.'[131] Coleman's argument depends on at least two empirical claims: (1) that most ordinary people can identify valid law; and (2) that most ordinary people cannot formulate the applicable rule of recognition.[132] The problem, says Leiter, is that these claims get the matter backwards-- ordinary people typically do not know the legally valid law; however, they are likely to know the rule of recognition.[133] Further, there is no necessary reason why only those aspects of a rule of recognition that employ source-based criteria are likely to become known to ordinary people and thus only those will play an epistemic role for them (in identifying the law).[134] Third, inclusive positivists might deny that authority involves exclusionary reasons-- if authoritative directives are not exclusionary reasons, then the fact that one 'might need to consider dependent reasons in order to identify law-- a consequence of [inclusive legal positivism]-- would not be fatal to law's claimed authority.'[135] Waluchow argues[136] that the Canadian Charter is an inclusive rule of recognition that can exert authority without providing exclusionary reasons. For instance, the Supreme Court of Canada has held (in R. v. Oakes) that a Charter right can be limited so long as the objectives of such limitation are 'sufficiently important' and that there is no other way of achieving these objectives. For Waluchow, this indicates that, although Charter rights do enjoy a heavy presumption in their favour, such rights are not fully exclusionary. However, Himma argues that Waluchow's observation-- that the scope of a constitutional right can be limited by other kinds of value-- cannot by itself defeat the Razian critique. This is because, as Raz concedes, an exclusionary reason may exclude all or only a certain class of first-order reasons. Accordingly, 'Raz can respond that the reasons

[131] ibid.

[132] ibid. at 542.

[133] ibid. at 542-543.

[134] ibid. at 543.

[135] ibid. at 543-544.

[136] See Chapter 5 in WJ Waluchow, *Inclusive Legal Positivism* (Clarendon Press 1994).

provided by the Canadian Charter are exclusionary but nonetheless have a limited scope that excludes the more important values that can justify limiting a Charter right.'[137]

Recently, Himma has provided a purported counter-example to Raz's authority argument. This counter-example takes the form of an institutional normative system that 'validates all and only mandatory moral norms in a possible world that resembles ours' and 'shows that the system satisfies every condition plausibly thought conceptually necessary for the existence of a legal system.'[138] Himma's counter-example exists in a 'nomologically possible world' in which subjects have intellectual abilities 'limited in the same way as ours,' but they differ from us in several ways regarding their beliefs about morality.[139] First, the subjects always agree on what morality requires.[140] Second, subjects' beliefs regarding what morality requires always happen to be correct.[141] Third, subjects' beliefs regarding what morality requires always happen to be epistemically justified-- the subjects 'always stumble onto a sound argument that justifies their beliefs and are hence in cognitive possession of an epistemic justification for each of their beliefs.'[142] These subjects are thus accidentally-- but not necessarily-- infallible with respect to morality.[143] Like us, the subjects in Himma's counter-example often commit 'socially disruptive acts that they believe are morally wrong.'[144] In the world of the counter-example, material resources are scarce and there will frequently be violent conflicts breaching the peace.[145] These conflicts arise with sufficient frequency that 'something like law is needed to keep the peace.'[146]

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[137] Himma (n 42) 151.

[138] Kenneth Himma, *Morality and the Nature of Law* (Oxford University Press 2019) 197.

[139] ibid. at 206.

[140] ibid.

[141] ibid.

[142] ibid.

[143] ibid. at 207.

[144] ibid. at 208.

[145] ibid.

[146] ibid.

As to the rule of recognition of Himma's system, 'the officials in this institutional normative system converge on recognizing, applying, and enforcing as rules of the system all and only mandatory moral norms.'[147] The subjects of this normative system 'conform to the valid norms enough to permit them to live and work peacefully together in something properly characterized as a community,' and they generally believe that the norms governing them are 'morally justified as a necessary but regrettable means of ensuring that they can live together in comparative peace so as to secure the benefits of social cooperation.'[148] Himma thus proposes a 'nomologically possible world with an efficacious institutional normative system that validates all and only mandatory moral norms.'[149]

The viability of Himma's counter-example depends on the normal justification condition being unnecessary to establish legitimate authority. The problem is that Raz implies that the normal justification condition is necessary to establish legitimate authority. Himma explains that 'at first blush,' his counter-example seems to 'run afoul' of the normal justification condition, which asks: 'Is it metaphysically possible for subjects to better comply with what right reason requires by following the authority's view of what right reason requires than by following their own views of what right reason requires?'[150] According to the normal justification condition, authority is morally justified 'only insofar as subjects are likely to better comply with respect to right reason by following the authority's view of what it requires than by following their own views.'[151] However, if moral norms take into consideration prudential interests and determine what subjects should do all things considered according to reason, then it is 'not metaphysically possible for subjects to better comply with right reason by following the authority's view than by following their own views because they will always arrive at exactly the same result' regarding

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[147] ibid. at 209.

[148] ibid. at 210.

[149] ibid.

[150] ibid. at 214.

[151] ibid.

what reason requires since 'the moral standards reflect the balance of all applicable reasons, including the prudential reasons.'[152]

Himma acknowledges that his system 'does not satisfy [the normal justification condition],'[153] but argues that, in response to such non-satisfaction, we should not reject the counter-example but, rather, should conclude that the normal justification condition is unnecessary to establish legitimate authority. Himma's system 'appears to be morally legitimate,'[154] such that 'If any legal system authorizing sanctions for violations of law is legitimate in this nomologically possible world, this system is.'[155] In any event, for Himma, the normal justification condition is 'not properly construed as articulating a necessary condition for the existence of a legitimate authority.'[156] Himma notes that, in describing the normal justification condition, Raz 'scrupulously avoids' characterizing it as 'providing either necessary or sufficient conditions for legitimacy'; rather, it expresses only the 'primary' and 'normal' way to show that authority is legitimate.[157] Himma recommends construing the normal justification condition as 'compatible with the legitimacy of the system constructed in the model,' such that 'although the "normal" condition is not satisfied, the system is nonetheless legitimate in virtue of the distinctive properties of the system and its subjects.'[158]

However, there is another passage, unmentioned by Himma, that implies that Raz intends the normal justification condition to be necessary for establishing legitimate authority: 'Criticism [of

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[152] ibid. at 214-215.

[153] ibid. at 215.

[154] ibid. As described by Himma: the norms (of his system) '(1) are morally just and justly enforced; (2) succeed in keeping the peace; (3) distribute the resources of the society in the manner required by morality; (4) enjoy the consent of subjects; and (5) are such that subjects will better comply with right reason by following them than by following their inclinations, impulses, and corrupted judgments.' (ibid.).

[155] ibid.

[156] ibid.

[157] ibid.

[158] ibid. at 216.

the service conception] can be radical, rejecting the service conception altogether. Or it can be more moderate, accepting the service conception or some of its central traits, especially the normal justification thesis, as setting necessary conditions for the legitimacy of authority.'[159] The suggestion is not that Himma's system necessarily lacks legitimate authority (after all, Raz's service conception may be wrong), but rather that perhaps Himma's system does not falsify *Raz's* arguments from authority: if Himma's counter-example depends on the normal justification condition being unnecessary to establish legitimate authority, but Raz suggests that the condition is necessary, then perhaps Himma's system does not represent a counter-example to Raz's theory. As for why it is called the 'normal' justification condition, perhaps the name comes not because the condition applies merely in 'normal' circumstances (and thus is unnecessary to establish legitimate authority), but rather because it is-- relative to the independence condition-- the normal way in which a purported authority fails to have legitimate authority, and thus represents the primary or 'normal' difficulty that must be overcome before authority is established. This is, of course, speculative, but the larger point is that we cannot discern, simply from the fact that it is called the 'normal' justification condition, that the condition is unnecessary to establish legitimate authority.

Shapiro's Planning Theory of Law

Shapiro's 'central claim' is that 'legal activity is a form of social planning':[160]

> Legal institutions plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are entitled to affect what others may or may not do. Following this claim, legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply. In this way, the law organizes individual and collective behavior so that members of the community can bring about moral goods that could not have been achieved, or achieved as well,

[159] Raz (n 11) 126.

[160] Shapiro (n 2) 155.

otherwise.[161]

For Shapiro, plans are 'abstract propositional entities that require, permit, or authorize agents to act, or not act, in certain ways under certain conditions.'[162] According to Shapiro's planning theory, '*legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality*.'[163] The circumstances of legality exist 'whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary.'[164] In these circumstances, the 'benefits of planning will be great, but so will the costs and risks associated with nonlegal forms of ordering behavior, such as improvisation, spontaneous ordering, private agreements, communal consensus, or personalized hierarchies. Indeed, the costs and risks of nonlegal planning may be so large as to be prohibitive.'[165] Legal systems are 'supposed to enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone.'[166] Thus, '[t]he fundamental aim of the law is to rectify the moral deficiencies associated with the circumstances of legality.'[167] Shapiro presents this idea as the moral aim thesis.[168]

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[161] ibid.

[162] ibid. at 127.

[163] ibid. at 171.

[164] ibid. at 170.

[165] ibid.

[166] ibid. at 171.

[167] ibid. at 213.

[168] 'When a community faces moral problems that are numerous and serious, and whose solutions are complex, contentious, or arbitrary, certain modes of planning such as improvisation, spontaneous ordering, private bargaining, communal consensus, or personalized hierarchies will be costly to engage in, sometimes prohibitively so. Unless the community has a way of reducing the costs and risks of planning, resolving these moral problems will be, at best, expensive and, at worst, impossible. On the Planning Theory, the fundamental aim of the law is to meet this moral demand in an efficient manner. By providing a highly nimble and durable method of social planning, the law enables communities to solve the

Pursuant to the planning theory, 'what makes the law, understood here as a legal institution, *the law* is that it is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering.'[169] Shapiro '[calls] a planning organization "self-certifying" whenever it is free to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid.'[170] Therefore, a planning organization 'will be self-certifying whenever it is supreme or enjoys a general presumption of validity from all superior planning organizations.'[171] The planning theory implies that 'what makes laws *laws* is that they are either (1) parts of the master plan of a self-certifying, compulsory planning organization with a moral aim; (2) plans that have been created in accordance with, and whose application is required by, such a master plan, or (3) planlike norms whose application is required by such a master plan.'[172]

Shapiro argues the planning theory is supported by multiple reasons. First, law shares many features with plans. Second, the planning theory purportedly resolves (what Shapiro calls) the possibility puzzle. Third, Shapiro claims that the planning theory explains the normativity of law. With respect to the first reason-- regarding features shared by law and plans-- Shapiro points to four features (or groups of features). The first feature of both law and plans is that each is built incrementally. Legal regulation is 'typically assembled piece by piece, starting off either as broad standards that are refined over time, detailed regulations that are unified by the development of general standards, or a hodgepodge of rules that are supplemented bit by bit as new problems arise.'[173] In comparison, 'planning typically involves the creation of [...] larger plans.'[174] The second shared feature of law and plans is that each can be expressed in either a

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numerous and serious problems that would otherwise be too costly or risky to resolve. Call this the "Moral Aim" Thesis.' (ibid.)

[169] ibid. at 225.

[170] ibid. at 221.

[171] ibid.

[172] ibid. at 225.

[173] ibid. at 195.

[174] ibid. at 121.

top-down or bottom-up structure. In particular, legislation often matches the structure of top-down planning,[175] while the common law tends to match the structure of bottom-up planning.[176] The third feature is that 'legal activity also seeks to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize, and monitor the behavior of individuals and groups.'[177] The fourth feature is really a trio of features-- that law and plans are (1) settling, (2) dispositive, and (3) purposive. Regarding the law as 'settling,' Shapiro says that 'Legal institutions are not in the business of either offering advice or making requests. They do not present their rules as one more factor that subjects are supposed to consider when deciding what they should do.'[178] Instead, the task of legal institutions is to 'settle normative matters in their favor and claim the right to demand compliance.'[179] Legal systems are 'dispositive' in the sense that their existence depends on efficacy: 'The dispositive nature of legal activity can be seen by attending to the "general efficacy" condition on legal systems. All legal philosophers agree that legal systems exist only if they are generally efficacious, that is, they are normally obeyed.'[180] Finally, law is purposive in that it is intentionally created: 'The legislative process does not just happen to produce laws as a side effect of its pursuit of some other end. Its very point is to create norms that are supposed to settle questions about how to act. Similarly, the

[175] ibid. at 124-125. In top-down planning: 'the planner starts with the overall action to achieve (cook dinner) and breaks it up into a few major tasks (buy food, cook food, clean up). She then refines each major task into its component parts (buy food: drive to store, select food, buy food, load car, and drive home). The planner continues this process of refinement at each step until she reaches a point at which the relevant actions can be accomplished without further planning (get in car, start car, make right at State Street, and so on).'

[176] ibid. at 125. In bottom-up planning: 'the planner starts with a vague sense of the goals to be achieved [...] and proceeds to think through the lower-level tasks in great detail [...] Once other basic tasks are planned, she attempts to combine them to see whether they fit together [...] Once the subplans are adjusted, the new high-level tasks are then combined to see whether they fit together [...] The process of planning ends when all the tasks settled on are sufficient to achieve the ultimate goal.'

[177] ibid. at 200.

[178] ibid. at 202.

[179] ibid.

[180] ibid.

function of adjudication is to apply norms to others.'[181]

The second reason Shapiro offers as support for the planning theory is that it resolves the possibility puzzle. According to the possibility puzzle, 'Some body has power to create legal norms only if an existing norm confers that power'; however, 'A norm conferring power to create legal norms exists only if some body with power to do so created it.'[182] By 'norm,' Shapiro means 'any standard-- general, individualized, or particularized-- that is supposed to guide conduct and serve as a basis for evaluation or criticism.'[183] The possibility puzzle results because 'it appears that any body with power to create legal norms must derive its power from some norm, while any norm that could confer such a power must itself be created by someone with the power to do so.'[184] The possibility puzzle essentially asks the more abstract question: 'On what does legal authority ultimately rest, social facts alone or moral facts as well?'[185] How does the planning theory resolve the possibility puzzle? According to the planning theory,

> legal authority is possible because certain kinds of agents are capable of (1) creating and sharing a plan for planning and (2) motivating others to heed their plans. Legal systems are possible, in other words, because certain states of affairs are achievable, namely, those that underwrite the existence of a legal system's master plan and those that account for the disposition of the community to comply with the plans created under normal conditions.[186]

Explained differently, for Shapiro, legal authority can obtain even absent prior law. Instead of legal authority resulting only from some prior law, legal authority is facilitated by the capacity to make a social plan. This authority to plan is inherent within humans: 'shared plans are able to

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[181] ibid.

[182] ibid. at 40.

[183] ibid. at 41.

[184] ibid. at 42.

[185] ibid. at 45.

[186] ibid. at 181.

authorize legal officials to plan for others because human beings are planning agents capable of guiding and organizing their actions both over time and across persons [...] we are able to create law because we are able to create and share plans.'[187]

The third reason Shapiro offers in support of the planning theory is that the theory accounts for the normativity of law. The planning theory 'requires officials to accept the fundamental legal rules as a condition of their existence.'[188] Regarding the acceptance of plans, Shapiro explains that:

> since the Planning Theory regards the fundamental rules as elements of a shared plan, the acceptance in question is a more complex attitude than Hart's internal point of view. [...] acceptance of a plan involves more than just committing to do one's part; one must also commit to allow others to do their parts as well. Moreover, to accept one's plan is to adopt a plan. In other words, to accept one's part does not merely commit one to following the plan; one also commits to filling out the plan, to ensuring consistency with one's beliefs, subplans, and other plans, and to not reconsidering it absent a compelling reason for doing so.[189]

Law's normativity, for officials, is generated by the instrumental rationality involved in the acceptance of a plan: 'Since acceptance of the fundamental legal rules involves the adoption of plans, the distinctive norms of rationality that attend the activity of planning necessarily come into play.'[190] Pursuantly, 'an official who accepts her position within an authority structure will

[187] ibid. at 180-181. Here is how Schiavello describes Shapiro's answer to the possibility puzzle: 'legal authority derives from the master plan and the power of the officials to adopt the shared plan derives from the norms of instrumental rationality. In this connection, as we have seen, planning is a rational way to pursue complex desires and objectives. The norms of instrumental rationality that legitimate adoption of a master plan are not plans in turn, and this means that we do not have to go in search of an authority that has produced them.' -- Aldo Schiavello, 'Rule of Recognition, Convention and Obligation: What Shapiro Can Still Learn from Hart's Mistakes' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 83.

[188] Shapiro (n 2) 183.

[189] ibid.

[190] ibid.

be rationally criticizable if she disobeys her superiors, fails to flesh out their orders so that she may take the means necessary to satisfy their demands, adopts plans that are inconsistent with these orders, or reconsiders them without a compelling reason to do so.'[191] Shapiro describes these 'rationality requirements,' which 'apply whenever legal systems exist,' as the 'inner rationality of law.'[192] Keep in mind, however, that 'The inner rationality of law [...] is a limited set of constraints because the rational norms of planning only apply to those who accept plans.'[193] Consequently, the bad man 'cannot be rationally criticizable for failing to obey legal authorities insofar as he does not accept the law.'[194] At the same time, 'since most officials do accept the master legal plan, they are criticizable for disobeying the law absent a compelling reason to do so,'[195] even though 'there is no reason to think that the master plans of every possible legal system will be morally legitimate.'[196]

To understand how law is normative for its subjects, recall that plans are norms.[197] Shapiro is careful to note that 'The fact that someone adopts a plan for others to follow does not, of course, mean that, from a moral point of view, those others ought to comply. The plan might be foolish or evil and, thus, unless there are substantial costs associated with nonconformity, the subjects morally should not carry it out.'[198] Further, Shapiro concedes that 'the normativity of the master plan of a legal system is of a very limited sort. While legal officials are rationally required to conform to their shared plan, it is also true that those who do not accept the law are not similarly

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[191] ibid.

[192] ibid.

[193] ibid.

[194] ibid.

[195] ibid.

[196] ibid. at 184.

[197] '[Plans] are guides for conduct, insofar as their function is to pick out courses of action that are required, permitted, or authorized under certain circumstances. They are also standards for evaluation, insofar as they are supposed to be used as measures of correct conduct, if not by others then at least by the subjects of the plans themselves.' (ibid.).

[198] ibid. at 143.

bound.'[199] Further, 'the master plan of a legal system may be morally illegitimate and hence not capable of imposing a moral obligation on anyone to obey.'[200] Nonetheless,

> if the subject has accepted the shared plan that sets out the hierarchy, then, from the point of view of instrumental rationality, he is bound to heed the plan. For if someone submits to the planning of another, and yet ignores an order directed to him, he will be acting in a manner inconsistent with his own plan. His disobedience will be in direct conflict with his intention to defer.[201]

Indeed, 'Even in cases of economic or physical coercion, once individuals form an intention to treat the supervisor's directives as trumps to their own planning, they have transformed their normative situation and are rationally-- if not morally-- committed to follow through unless good reasons suddenly appear that force them to reconsider.'[202]

Regarding legal authority, Shapiro asserts that a body has legal authority in a particular legal system when two conditions are met. The first condition is that 'the system's master plan authorizes that body to plan for others,' and the second condition is that 'the members of the community normally heed all those who are so authorized.'[203] Resultantly, legal authority is possible 'just in case it is possible for both of these conditions to obtain.'[204] To understand what Shapiro means by 'legal authority,' we must distinguish between an 'adjectival' interpretation and a 'perspectival' interpretation. The adjectival interpretation imputes 'a type of moral authority' such that, 'On this reading, the word "authority" means the same as it does in moral contexts, roughly speaking, the power to impose moral obligations and confer moral rights, and

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[199] ibid. at 182.

[200] ibid.

[201] ibid. at 143.

[202] ibid.

[203] ibid. at 180.

[204] ibid.

the word "legal" functions as an adjective, identifying this kind of moral power.'[205] On the adjectival interpretation, then, 'the person in question has moral authority in virtue of being an official in a legal institution.'[206] In contrast, regarding the perspectival interpretation, Shapiro explains that, 'although the term "authority" in claims of legal authority refers to a moral power, the word "legal" often does not modify this noun-phrase; rather, its role is to qualify the statement in which it is embedded.'[207] On the perspectival interpretation, 'When we ascribe legal authority to someone [...] we are not necessarily imputing any kind of moral authority to her. To the contrary, we are qualifying our ascription of moral legitimacy. We are saying that, *from the legal point of view*, the person in question has morally legitimate power.'[208] In the same vein, 'to say that one is legally obligated to perform some action need not commit the asserter to affirming that one is really obligated to perform that action, that is, has a moral obligation to perform that action.'[209] This is because 'the statement may be understood to mean only that from the legal point of view one is (morally) obligated to perform that action.'[210] Unlike adjectival legal claims, perspectival legal claims carry no moral implications.[211]

But, what *is* the legal point of view? The legal point of view

> is not necessarily the perspective of any particular legal official. No officials may personally accept it, although they will normally act as though they do. The legal point of view, rather, is the perspective of a certain normative theory. According to that theory, those who are authorized by the norms of

[205] ibid. at 185.

[206] ibid.

[207] ibid.

[208] ibid.

[209] ibid.

[210] ibid.

[211] 'To ascribe legal authority to another on the perspectival reading is not to impute moral authority and hence does not imply, as it would on the adjectival reading, that others are morally obligated to comply and their disobedience would be moral criticizable. Rather, it merely commits one to believing that disobedience is criticizable from the legal point of view.' (ibid. at 186);

> legal institutions have moral legitimacy and, when they act in accordance with those norms, they generate a moral obligation to obey. The legal point of view of a certain system, in other words, is a theory that holds that the norms of that system are morally legitimate and obligating.[212]

Note that the aforementioned normative theory 'may be false from a moral perspective': 'Those authorized by legal institutions to act may be morally illegitimate and their actions may generate no moral obligations to obey [...] In short, the legal point of view always *purports* to represent the moral point of view, even when it fails to do so.'[213] Stated concisely, the legal point of view 'will ascribe moral legitimacy to a body just in case its norms confer power on that body.'[214] Because the legal norms that confer legal authority are subplans of the system's master plan, 'the legal point of view will ascribe moral legitimacy to a body when its master plan authorizes that body to so act.'[215] Thus, 'On the perspectival reading, a body has legal authority in a system just in case it has moral authority from the legal point of view and it has moral authority from the legal point of view just in case it is authorized by the system's norms.'[216]

Shapiro's planning theory is an instance of exclusive legal positivism because it affirms the sources thesis, whereby legal validity (i.e. law's existence) necessarily depends on social facts, and cannot depend on moral considerations. Regarding exclusive legal positivism, Shapiro notes that the existence of plans is established simply by pointing to 'the fact of their adoption and acceptance,'[217] and does not depend on the merits of such plans: 'Whether I have a plan to go to the store today, or we have a plan to cook dinner together tonight, depends not on the desirability of these plans but simply on whether we have in fact adopted (and not yet rejected) them.'[218]

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[212] ibid.

[213] ibid.

[214] ibid. at 187.

[215] ibid.

[216] ibid. at 187-188.

[217] ibid. at 119.

[218] ibid.

What this means is that 'positivism is trivially and uncontroversially true in the case of plans: the existence of a plan is one thing, its merits or demerits quite another.'[219] Next, 'The existence conditions for law are the same as those for plans because the fundamental rules of legal systems *are* plans'[220]; and, 'In other to determine the content of the plan, the planner must be careful not to engage in deliberation about its merits.'[221] This is because 'the value of a plan is that it does the thinking for us' and 'Plans cannot do the thinking for us if, in order to discover their counsel, we are required to repeat the same sort of reasoning.'[222] Consequently, 'Shared plans must be determined exclusively by social facts if they are to fulfill their function'[223]:

> As we have seen, shared plans are supposed to guide and coordinate behavior by resolving doubts and disagreements about how to act. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation or bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts, not moral ones, can serve this function.[224]

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[219] ibid.

[220] ibid.

[221] ibid. at 127.

[222] ibid.

[223] ibid. at 177.

[224] ibid. Here is how Shapiro summarizes his exclusive legal positivist approach: 'Why might one claim-- as legal positivists do-- that law and morality do not share the same basic ground rules? Why is the determination of legal validity a matter of sociological, rather than moral, inquiry? I hope that my answer to these questions is now apparent: namely, that the fundamental rules of a legal system constitute a shared plan and, as we have seen, the proper way to ascertain the existence or content of a shared plan is through an examination of the relevant social facts. A shared plan exists just in case the plan was designed with a group in mind so that they may engage in a joint activity, it is publicly accessible, and it is accepted by most members of the group in question. As a result, if we want to discover the existence or content of the fundamental rules of a legal system, we must look only to these social facts. We must look, in other words, only to what officials think, intend, claim and do around here.' (ibid.)

Shapiro is clear that 'the existence of the shared plan does not depend on any moral facts obtaining' and that it 'can be morally obnoxious.'[225] Indeed, the shared plan 'may cede total control of social planning to a malevolent dictator or privilege the rights of certain subgroups of the community over others' or 'may have no support from the population at large; those governed by it may absolutely hate it.'[226] Nonetheless, 'if the social facts obtain for plan sharing-- if most officials accept a publicly accessible plan designed for them-- then the shared plan will exist.'[227] This shared plan represents a system of legal authority if it 'sets out an activity of social planning that is hierarchical and highly impersonal and the community normally abides by the plans created pursuant to it.'[228]

Although Shapiro's planning theory is an exclusive legal positivist theory, it is not devoid of moral elements. As mentioned, Shapiro asserts what he calls the moral aim thesis. As specified by the moral aim thesis, a legal system, unlike a criminal syndicate, has a 'moral mission'[229] in that 'The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.'[230] Consistent with exclusive legal positivism, however, 'to say that the law's mission is to address the moral defects of alternative forms of social ordering is not to claim that legal systems always succeed in their mission. The law may end up pursuing immoral objectives or simply replace private moral mistakes with public ones.'[231] Thus, 'What makes the law *the law* is that it has a moral aim, not that it satisfies that aim.'[232]

The moral aim thesis, argues Shapiro, is supported by three considerations. First, the moral aim

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[225] ibid.

[226] ibid.

[227] ibid.

[228] ibid.

[229] ibid. at 215.

[230] ibid. at 213.

[231] ibid. at 214.

[232] ibid.

thesis 'explains why we think that law is invaluable in the modern world but not, say, among simple hunter-gatherers. The former is a paradigm of the circumstances of legality, whereas the latter is its antithesis.'[233] Second, 'the Moral Aim Thesis explains why legal systems that are unable to solve serious moral problems are criticizable': 'No one blames baseball for failing to alleviate poverty or protecting populations from natural disasters, but a legal system that ignores such problems, or addresses them incompetently, is subject to rebuke.'[234] Third, the moral aim thesis distinguishes legal systems from criminal syndicates: 'If we want to explain what makes the law *the law*, we must see it as necessarily having a moral aim, an end that criminal organizations do not necessarily possess.'[235]

Having reviewed several anti-positivist and legal positivist theories, I will now proceed to the critical stage of the discussion.

[233] ibid.

[234] ibid.

[235] ibid. at 214-215. In more detail: 'the difference between legal systems and these criminal syndicates is not that the former are *in fact* morally better than the latter; rather, the distinguishing factor is that it is in the nature of the former that they are *supposed to be so*. In other words, it is part of the identity of law to have a moral mission, whereas it is not in the nature of nonlegal criminal syndicates to have such a mandate.' (ibid. at 215)

Chapter 2: Some Concerns Regarding Exclusive Legal Positivism

Each of Raz and Shapiro has offered arguments purporting to impugn and undermine inclusive legal positivism, whereby it is possible for legal validity to depend on moral considerations. For Raz, inclusive positivism is inconsistent with the sources thesis, which follows from the authoritative nature of law. For Shapiro, directives that depend for their validity upon moral considerations (as specified by an inclusive rule of recognition) cannot guide conduct as (per Hart) they must be able to in order to count as law.

I will argue, however, that these arguments fail to achieve their intended outcome. Raz's theory of law, although intending to establish exclusive legal positivism, is implicitly (and, in light of the sources thesis, incoherently) inclusive legal positivist. Raz's theory implicitly affirms inclusive legal positivism because implying that, in certain contingent circumstances, legal validity depends on moral considerations. These circumstances exist, generally speaking, where the severe immorality of a purported legal system is obvious or known to officials, such that they are prevented from claiming legitimate authority.[236] Shapiro's argument against the incorporation thesis is undermined by the fact that the content of a rule of recognition is contingent and can evolve from being wholly or partly moral to being purely social. Because the content of a rule of recognition can evolve from being inclusive to being purely social, directives that depend for their validity on an inclusive rule of recognition are nonetheless capable of guiding conduct because they belong to a system that is capable of having a purely social rule of recognition. If these analyses are correct, then two of the primary arguments supporting exclusive legal positivism are significantly flawed.

2.1 Raz's Theory Implies Inclusive Legal Positivism

[236] I am aware of Horacio Spector, 'A Pragmatic Reconstruction of Law's Claim to Authority' (2019) 32(1) Ratio Juris 21, which includes a critique of Raz that is very similar to, and which reaches some of the same conclusions as, the critique presented in this Chapter 2. I came upon Spector's recent article after finishing my research and, indeed, after I had finished my dissertation. Although Spector argues for some of the same conclusions regarding Raz that I reach, there are enough differences in the analyses to warrant the retention in the dissertation of the critique of Raz presented. Had Spector's article been published earlier, I would of course have taken account of it in my own discussion. Given how recent Spector's article is, however, I will confine myself to pointing out the similarities between his work and mine. The fact that two discussions of Raz have independently reached the same conclusions regarding his theorizing is grounds for heightened confidence in the correctness of those conclusions.

If Raz's theory implies inclusive legal positivism, then it is inconsistent with the sources thesis and therefore, by Raz's own standards, inadequate as a theory of law: the 'social thesis' (i.e. the sources thesis), which is the 'backbone of the version of positivism' Raz defends, is 'best viewed not as a "first-order" thesis but as a constraint on what kind of theory of law is an acceptable theory-- more specifically it is a thesis about some general properties of any acceptable test for the existence and identity of legal systems.'[237]

Here, in overview, is the line of reasoning leading to the conclusion that Raz's theory implicitly affirms inclusive positivism. For Raz, a legal system exists only if its officials claim legitimate authority. Raz explicitly argues that officials, in claiming authority, are not systematically insincere or confused regarding the *conceptual* conditions of authority; however, his reasoning for this conclusion implies that officials are also not systematically insincere or confused regarding the *moral* conditions of authority. If this is correct, then (Raz implies) a legal system exists only if its officials, who are not insincere or confused regarding the moral conditions of authority, claim legitimate authority. But, there are certain contingent circumstances-- i.e. where the immoral nature of directives is obvious or known to officials-- in which a purported legal system can be so severely immoral that its officials can claim authority only if they are systematically insincere or confused regarding the moral conditions of authority. Therefore, a legal system's existence-- in affirmation of inclusive positivism-- depends in certain circumstances on it not being so severely immoral that its officials, who are not insincere or confused about the moral conditions of authority, are prevented from claiming authority. These circumstances arise where the immorality of the system is obvious or known to officials.

To begin, Raz's theory relies on the conclusion that a legal system exists only if the conceptual conditions of legitimate authority are satisfied. This conclusion follows from combining two statements that can be attributed to Raz:

(1) A legal system exists only if its officials claim legitimate authority;

(2) Officials claim legitimate authority only if the conceptual conditions of having authority are satisfied (but the moral conditions need not be satisfied for the claim to be made).

[237] Raz (n 10) 39.

Regarding statement (1), we know that Raz holds the authority thesis, whereby a legal system exists only if it claims legitimate authority.[238] In support of statement (2), Raz says that 'since the law necessarily claims authority, and therefore typically has the capacity to be authoritative, it follows that it typically has all the non-moral, or non-normative, attributes of authority.'[239] For its officials to claim legitimate authority, a purported legal system must satisfy the conceptual conditions of authority; however, a claim of legitimate authority can be made even if the moral conditions of authority are unsatisfied:

> A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none. But it must possess all the other features of authority, or else it would be odd to say that it claims authority. To claim authority it must be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority.[240]

Notice that statement (2)-- that officials claim legitimate authority only if the conceptual conditions of having authority are satisfied-- assumes that officials are not systematically insincere or confused regarding the conceptual conditions. Specifically, the assumption is that officials are not systematically insincere or confused regarding (1) the nature of the conceptual conditions of authority, or (2) the nature of the entity that is purported to have authority. Raz needs to make this assumption because, if officials are systematically insincere or confused regarding (at least one of) (1) the nature of the conceptual conditions, and/or (2) the nature of the entity purported to have authority (e.g. trees), then officials can claim an entity has authority even if these conceptual conditions are unsatisfied: 'If I say that trees have authority over people, you will know that either my grasp of the concepts of authority or of trees is deficient or that I am trying to deceive (or, of course, that I am not really stating that trees have authority but

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[238] 'I shall argue that, though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority.' (Raz (n 99) 199).

[239] ibid. at 202.

[240] ibid. at 199.

merely pretending to do so, or that I am play-acting, etc.).'[241] This passage indicates that it is possible to claim that an entity (e.g. a tree), which is incapable of having authority, has authority, but only if one is confused regarding (1) the nature of the conceptual conditions ('the concepts of authority') or (2) the nature of the entity purported to have authority ('trees') (or if one is trying to deceive, or is not really stating that trees have authority but merely pretending to do so, or is play-acting, etc.). Therefore, for Raz to conclude that officials claim a system has authority only if it satisfies the conceptual conditions of authority, he must assume that officials are not insincere (i.e. not 'trying to deceive') or confused regarding (1) the nature of the conceptual conditions, or (2) the nature of the entity purported to have authority.

Raz is, of course, aware of this assumption, which is why he specifies that officials, in claiming legitimate authority, are neither systematically insincere nor confused about their system satisfying the conceptual conditions of authority:

> That is enough to show that since the law claims to have authority it is capable of having it. Since the claim is made by legal officials wherever a legal system is in force, the possibility that it is normally insincere or based on a conceptual mistake is ruled out. It may, of course, be sometimes insincere or based on conceptual mistakes. But at the very least in the normal case the fact that the law claims authority for itself shows that it is capable of having authority.[242]

Although officials and institutions can be occasionally confused regarding the conceptual conditions of authority, they cannot be systematically confused because, 'given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority. It is what it is in part as a result of the claims and conceptions of legal institutions.'[243]

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[241] ibid. at 201.

[242] ibid.

[243] ibid.

The difficulty for Raz begins with the point that the reasoning he offers in support of the conclusion, that officials are not systematically insincere or confused regarding the *conceptual* conditions of authority, is equally supportive of the conclusion that officials are not systematically insincere or confused regarding the *moral* conditions of authority.[244] If the facts, that 'the claim is made by legal officials wherever a legal system is in force,' and that the 'claims and conceptions' of legal institutions are 'formed by and contribute to our concept of authority' (such that the concept is partly determined by such claims and conceptions), are sufficient to support the conclusion that officials cannot be systematically insincere or confused about the nature of the conceptual conditions of authority, then-- given that the authority claimed consists of moral conditions[245] in addition to conceptual conditions-- it is reasonable to infer that these facts equally support the conclusion that officials cannot be systematically insincere or confused about the nature of the moral conditions of authority (e.g. the content of directives conforming with moral reasons to an extent consistent with such directives guiding subjects to better conformity with the balance of first order reasons). In other words, if the explanation for why officials cannot be systematically insincere or confused about the nature of the conceptual conditions of authority is because their claims are necessarily made and partly determinative of the concept of authority, then the fact that these claims involve moral conditions as well as conceptual conditions indicates that officials also cannot be systematically insincere or confused about the nature of the moral conditions of authority. Raz's reasoning, meant to support the conclusion that there is among officials no systematic insincerity or confusion regarding the conceptual conditions of authority, does not distinguish between conceptual conditions and moral conditions. If, therefore, this reasoning is sufficient to support the conclusion that officials are not systematically insincere or confused regarding the conceptual conditions, then it must also be sufficient to support the parallel conclusion regarding the moral conditions.

[244] This point was suggested to me by Matthew Kramer.

[245] Keep in mind that, in the service conception, legitimate authority obtains only if directives guide subjects to better conformity with reasons-- including moral reasons-- than would be achieved by subjects following their own judgments of what they ought to do. A moral condition of authority, therefore, is conforming with moral reasons to an extent that is consistent with better conforming with the balance of all first order reasons.

Note that I am not arguing (or denying) that it is actually true that officials cannot be systematically insincere or confused about the moral conditions of authority; the argument is that Raz's reasoning supports this conclusion regarding moral conditions *just as much* as it does the parallel conclusion regarding conceptual conditions. To avoid this analysis, Raz must argue that officials' claims and conceptions are formed by and contribute to the conceptual-- but not the moral-- conditions of our concept of authority. But, if the reason why officials' claims and conceptions are formed by and contribute to the conceptual conditions of our concept of authority is because of the 'centrality of legal institutions in our structures of authority,' then the fact that legal institutions make a claim involving not only conceptual but also moral conditions (i.e. that directives conform with moral reasons to an extent consistent with guiding subjects to better conformity with first order reasons) suggests that officials' claims and conceptions are also formed by and contribute to the moral conditions of our concept of authority. Once again, Raz's reasoning, regarding officials' systematic insincerity or confusion, fails to distinguish between the conceptual and the moral conditions of authority.

This discussion suggests that Raz's reasoning, *if* adequate to support the conclusion that officials cannot be systematically insincere or confused about the nature of the conceptual conditions of authority, is also adequate to support the conclusion that officials cannot be systematically insincere or confused about the nature of the moral conditions of authority (e.g. the extent to which the content of directives must conform with moral reasons to be consistent with directives guiding subjects to better conformity with the balance of first order reasons). Combining this conclusion with the analysis above, we can infer that (per Raz) a legal system exists only if its officials claim legitimate authority, and officials, in making this claim, are not systematically insincere or confused regarding each of (1) the nature of the conceptual conditions of authority, (2) the nature of the entity/system purported to have authority, and (3) the nature of the moral conditions of authority. At this point, we can make an inference: if officials are not insincere or confused regarding (3) the nature of the moral conditions of authority, then it is possible that a severely and obviously immoral system (as described below) does not count as a legal system because its officials can claim that the system has authority only insincerely or pursuant to confusion about the moral conditions of authority. Given that (per the service conception) legitimate authority entails guiding subjects to better conformity with the balance of first order reasons-- including moral reasons-- an atrocious non-conformity with moral reasons (i.e. severe

immorality) could indicate a failure to guide subjects to better conform with the balance of first order reasons. For this to be impossible, it would have to be the case that the concept of immorality is (arbitrarily) restricted such that, at its strongest, conforming with it does not indicate a failure to better conform with the balance of reasons. But why should the concept of immorality be restricted in this way?

When I speak of a system characterized by severe and obvious immorality, I am not referring to a legal system that is only slightly or even moderately immoral, such that one could-- wrongly but without insincerity or confusion about the moral conditions of authority-- claim that it guides subjects to better conformity with the balance of first order reasons. I am referring to a legal system exhibiting an immorality (perhaps embedded in the rule of recognition) that is so severe and obvious that officials can claim the system has legitimate authority only pursuant to insincerity or confusion about the moral conditions of authority; given that (as implied by Raz's reasoning) officials are not insincere or confused about the moral conditions of authority, they cannot claim that such a system has legitimate authority-- indicating (pursuant to the authority thesis) that the system does not qualify as a legal system.

Consider, for instance, a purported legal system (i.e. an institutional normative system) underpinned by a rule of recognition specifying that validity obtains for only those directives exhibiting an immorality so severe that it precludes such directives from coming even remotely close to guiding subjects to better conformity with the balance of first order reasons. Given that they are (Raz's reasoning implies) not systematically insincere or confused regarding the moral conditions of authority, officials of this system are precluded from claiming that the system has legitimate authority. Here, there are only two scenarios in which officials might be able to claim authority. First, officials could claim authority pursuant to a sincere but confused understanding of the moral conditions of authority. Second, officials could claim authority while being insincere (and only possibly confused) regarding the moral conditions. Unfortunately for Raz, the first scenario is precluded because, as implied by Raz's reasoning, officials are not confused about the moral conditions of authority; and the second scenario is precluded because, implicitly per Raz, officials are not insincere regarding the moral conditions of authority. Because each scenario, in which officials could claim authority (in facilitation of law's existence), is precluded in these circumstances, it is possible that an institutional normative system fails to claim

legitimate authority-- and thus does not count as a legal system-- due to being severely and obviously immoral. In this way, it is possible for severe and obvious immorality to preclude the existence of a legal system. If it is possible for immorality to preclude the existence of a legal system, then-- in affirmation of inclusive positivism-- it is possible that a legal system's existence (i.e. legal validity) depends on moral considerations (pertaining to the non-obtainment of such immorality).

Notice that the meaning of 'severe immorality' varies, from system to system, depending on what level of conformity with reason subjects would likely achieve by following their own judgments of what they ought to do.[246] In a purported legal system having subjects whose actions (resulting from following their own judgments) are highly reasonable, the severity of the immorality that would preclude the system from being a legal system is less extreme than the severity that would apply to a purported legal system having subjects whose actions are less reasonable. This is because the severe immorality I am specifying represents a non-conformity with moral reasons that is so atrocious as to indicate a clear failure to guide subjects to better conformity with the balance of first order reasons; and, whether such non-conformity indicates a clear failure to guide subjects to *better* conformity with first order reasons depends on how well subjects would likely conform with reasons by following their own judgments of what they ought to do. It is conceivable, then, that a purported legal system, governing subjects whose actions (resulting from following their own judgments) would likely conform to a very high degree with the balance of reasons, would be disqualified from being a legal system if it exhibited an immorality that can be easily imagined and possibly instantiated by legal systems that have existed (e.g. the Nazi legal system).[247]

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[246] Which is not to suggest that morality is subjective. Rather, the suggestion is that the level of morality, that could disqualify a system from being a legal system, varies from system to system (or at least could do so depending on the nature of the respective subjects).

[247] This does not suggest that (implicitly per Raz) the Nazi legal system was not a true legal system; rather, it indicates that (implicitly per Raz) the Nazi legal system could have been disqualified from being a true legal system if its immorality was so severe that its directives did not come remotely close to guiding subjects to better conformity with first order reasons. The correctness of the conclusion-- that the Nazi system did not come remotely close to guiding subjects to *better* conformity with reason-- depends on the level of conformity with reason that subjects of the system would likely achieve by following their own judgments. Because Raz does not identify any particular level of conformity with reason that subjects of the Nazi system would likely achieve by following their own judgments, we cannot conclude

This critique does not imply that (per Raz) officials claim legitimate authority (and that law exists) only if a legal system is actually legitimately authoritative. To be clear, the argument is not that Raz's theory is implicitly inclusive positivist in the sense that it implies a legal system's existence can depend on satisfying its claim of authority; rather, Raz's theory is implicitly inclusive positivist in the sense that it implies a legal system's existence can depend on the system not being so severely and obviously immoral that its officials, who are not systematically insincere or confused about the moral conditions of authority, are prevented from claiming legitimate authority. We cannot conclude, merely because a legal system is not severely and obviously immoral, that such system is legitimately authoritative (i.e. guides subjects to better conformity with reason). Thus, it is possible for a legal system, which is not severely or obviously immoral, to exist while lacking legitimate authority.

Here is a summary of the critique of Raz. Where (as implied by Raz's reasoning) officials are not systematically insincere or confused about the moral conditions of authority, legal validity can depend on moral considerations. Legal validity depends on moral considerations if the immoral nature of a purported legal system is obvious or known to officials. In these circumstances, the purported legal system is an actual legal system only if it is not severely immoral. A purported legal system is severely immoral if its officials can claim authority only pursuant to insincerity or confusion about the moral conditions of authority. The assumption supporting this reasoning is that it is possible for directives to fail to conform to morality to such an extent that officials can claim such directives guide subjects to better conformity with first order reasons only if they are insincere or confused about the moral conditions of authority (i.e. confused about the extent to which directives must conform with morality to be consistent with guiding subjects to better conformity with first order reasons). Given that (as implied by Raz's reasoning) officials are not insincere or confused about the moral conditions, they are precluded in these circumstances from claiming authority. Because no claim of authority is made by its officials, the purported legal system is not a true legal system. Law's existence-- and thus legal validity-- can therefore depend on the non-obtainment of severe immorality.

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that he implies the Nazi legal system was disqualified by its immorality from being a true legal system. And, we know that the sources thesis means that Raz explicitly disavows the conclusion that the immorality of Nazi law disqualified it from being a legal system.

There are at least two counter-arguments that could be made in response to this critique of Raz. First, one could respond by arguing that, even if officials are not insincere or confused about the moral conditions of authority, they can nonetheless claim that a severely and obviously immoral system, lacking legitimate authority, has legitimate authority (i.e. guides subjects to better conformity with reason than subjects would likely achieve by following their own judgments of what they ought to do). They can make this claim because such officials could be insincere or confused about the level of conformity with reason that subjects would likely achieve by following their own judgments of what they ought to do. More specifically, even if officials are not insincere or confused about the moral conditions of authority, they could be insincere or confused that the level of conformity with reason, that subjects would likely achieve on their own, is so low that even immoral directives can guide subjects to better conformity with reason. If officials are insincere or confused that even immoral directives can guide subjects to better conformity with reason, then-- even if they are not insincere or confused about the moral conditions of authority-- they can claim that the immoral system has legitimate authority. However, there is a problem with this counter-argument: the possibility of insincerity or confusion, regarding this level of conformity, is precluded by the fact that officials are not insincere or confused about the moral conditions of authority.

So, in response to this counter-argument, I am claiming that, where officials are not insincere or confused about the moral conditions of authority (i.e. a legal system conforming with moral reasons to an extent that is consistent with guiding subjects to better conformity with first order reasons), they are also not insincere or confused that the level of conformity with reason, that subjects would likely achieve on their own, is so low that even immoral directives can guide subjects to better conformity with first order reasons. Suppose that there is an institutional normative system that is severely immoral. If officials of this system are insincere or confused that the level of conformity with reason, that subjects would likely achieve on their own, is so low that even the severely immoral directives of the system can guide subjects to better conformity with reason, then such officials are insincere or confused about the moral conditions of authority (i.e. that authority depends on directives conforming with morality to an extent that is consistent with guiding subjects to better conformity with first order reasons). Contrapositively, if officials are not insincere or confused about the moral conditions of authority, then they are also not insincere or confused that the level of conformity with reason,

that subjects would likely achieve on their own, is so low that even severely immoral directives can guide subjects to better conformity with reason.

Second, one might respond by arguing that the critique presented establishes only that a legal system's existence can depend on it not being severely and *obviously* immoral-- the critique does nothing to preclude a legal system that is severely, but not obviously, immoral. But, keep in mind that the purpose of the critique is not to establish that Raz's theory precludes every possible immoral legal system. That would be an outlandish conclusion. The purpose of the critique is to establish that Raz's theory implies inclusive positivism, which can be done by showing there could be a system that does not qualify as a legal system only because of its immorality. If there can be an instance of immorality that is sufficient to disqualify a system from being a legal system, then a legal system's existence can depend on the non-obtainment of that instance of immorality.

To illustrate the point, suppose we have two purported legal systems (i.e. institutional normative systems), LS0 and LS1, which are identical in every way except for their contrasting levels of immorality. LS0 is obviously severely immoral (as described), and its officials are not insincere or confused about the moral conditions of authority. LS1 is obviously not severely immoral, and its officials are not insincere or confused about the moral conditions of authority. If the analysis above is correct, then Raz's theory implies that LS1-- but not LS0-- qualifies as a legal system. LS1 is a legal system because, given that it is not severely immoral, its officials can claim-- perhaps wrongly but without insincerity or confusion about the moral conditions of authority-- that the system has authority. LS0 is not a legal system because, given that it is severely immoral, its officials cannot without insincerity or confusion claim legitimate authority. Because LS0 and LS1 are identical in every way other than their contrasting levels of immorality, we can infer that the only reason why LS0 is not a legal system is because of its (severe) level of immorality. The status of LS1 as a legal system thus depends on the non-obtainment of the severe immorality that characterizes LS0. This hypothetical shows that (implicitly per Raz) severe immorality can disqualify a system from being a legal system, the existence of which can therefore depend on the non-obtainment of severe immorality.

Looking at the big picture, the critique of Raz is basically supported by two points. The first point is that it is possible for there to be a purported legal system (i.e. an institutional normative

system) that is so severely and obviously immoral that its officials can claim legitimate authority only pursuant to insincerity or confusion about the moral conditions of authority. The second point is that, implicitly per Raz, officials are not systematically insincere or confused about the moral conditions of authority. If each of these points is correct, then this purported legal system is disqualified from being a true legal system (given that its officials cannot claim authority), which indicates that Raz's theory is implicitly inclusive positivist because implying that, in certain circumstances (i.e. where the moral or immoral nature of a system is obvious or known to officials), legal validity depends on the non-obtainment of severe immorality.

The critique suggests that Raz implicitly (and, in light of the sources thesis, incoherently) affirms the incorporation thesis, whereby a rule of recognition can include moral criteria of validity. If a particular legal system's existence depends on the non-obtainment of severe immorality, then identifying legally valid directives-- and thus the rule of recognition-- requires or includes reference to moral considerations (e.g. 'validity obtains only absent severe immorality.'). So, given that (implicitly per Raz) a legal system's existence can depend on the non-obtainment of severe immorality, a rule of recognition can include moral criteria specifying this fact. The assumption behind this reasoning is that there are legally valid directives only if there is a legal system-- there are no laws without a legal system. Because a directive is legally valid only if there is a legal system in place, identifying a directive as law requires identifying an existing legal system. As a result, if a legal system exists only if it is not severely immoral, then identifying a directive of the system as legally valid (via a rule of recognition) requires confirming the non-obtainment of such severe immorality. Raz therefore implies that a legal system can have a rule of recognition specifying that validity obtains only absent severe immorality.

2.2 Shapiro's Argument Against Inclusive Positivism

Shapiro argues that (1) Hart implies that a legal system is necessarily capable of guiding conduct, and that (2) this function is inconsistent with an inclusive rule of recognition. For Shapiro, 'If a judge is guided by a rule of recognition that validates certain norms based on moral criteria, those norms that pass such a test will not be able to guide conduct.'[248] Shapiro asserts that Hart

[248] Scott Shapiro, 'On Hart's Way Out' (1998) 4 Legal Theory 469, 489.

holds the practical difference thesis, whereby 'Legal rules must in principle be capable of securing conformity by making a difference to an agent's practical reasoning.'[249] Shapiro argues, however, that it is impossible to simultaneously believe that (1) every legal system has a social rule of recognition, (2) such rule of recognition can make morality a condition of legality, and (3) legal rules must be capable of making a practical difference.[250]

Hart actually operated with two different concepts of guidance-- epistemic and motivational.[251] The law's function is to 'epistemically guide the conduct of its ordinary citizens via its primary rules and to motivationally guide the conduct of judicial officials via its secondary rules.'[252] To be epistemically guided by a legal rule is to 'learn of one's legal obligations from the rule and to conform to the rule because of that knowledge. It does not imply that one is motivated because of the rule.'[253] Hart would later clarify what is meant by motivational guidance. An agent is motivationally guided by a rule when he treats it as 'both a content-independent and a peremptory reason for action.'[254] One treats a rule as a content-independent reason when he complies with it because he was so commanded; one treats a rule as a peremptory reason when his compliance is not conditional on the outcome of deliberation about the merits of following the rule.[255]

Shapiro's argument can be considered in relation to a rule of recognition that is either incorporationist or inclusive. An incorporationist rule of recognition includes (at least some) moral criteria as a sufficient condition of validity. An inclusive rule of recognition includes (at least some) moral criteria as a necessary condition of validity. I will begin by discussing

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[249] Scott Shapiro, 'Law, Morality, and the Guidance of Conduct' (2000) 6 Legal Theory 127, 129.

[250] ibid at 130.

[251] Shapiro (n 248) 492.

[252] ibid.

[253] ibid.

[254] Shapiro (n 249) 163.

[255] ibid.

Shapiro's argument in relation to an incorporationist rule, before turning attention to the relationship between this argument and an inclusive rule.

Can an incorporationist rule of recognition epistemically guide the conduct of subjects? Pursuant to this conception of guidance, the 'primary function of the law is to designate certain standards of conduct as legitimate.'[256] The difficulty arises because it is hard to see 'how the law can serve this function with respect to rules that are valid in virtue of their moral content.'[257] Shapiro makes the point concisely: 'Telling people that they should act on the rules that they should act on is not telling them anything.'[258] In more detail, 'Marks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms,' but 'a mark that can be identified only by resolving the very question that the mark is supposed to resolve is useless.'[259] A norm bearing such a trivial mark is therefore 'unable to discharge its epistemic duties.'[260] A purported legal system with an incorporationist rule of recognition is 'no advance over a regime of primary rules' because 'people are left to discover which rules they ought to apply rather than being able to rely on the mediating role of authorities.'[261] Furthermore, an incorporationist rule of recognition 'cannot epistemically guide judges in adjudication' because such a rule does not 'tell judges which moral rules they should apply,' rather, it simply '[tells] judges to apply moral rules.'[262] The judge of a system underpinned by an incorporationist rule of recognition cannot be epistemically guided because he is left to figure out for himself what the rules are.[263]

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[256] Shapiro (n 248) 494.

[257] ibid.

[258] ibid.

[259] ibid at 494-495.

[260] ibid at 495.

[261] ibid.

[262] ibid.

[263] ibid.

Yet, says Himma, there is a straightforward objection to this reasoning: 'if it is possible, as is presupposed by our ordinary practices, for mandatory moral norms to epistemically guide non-official behavior, it would also have to be possible for legal norms valid in virtue of moral merit to epistemically guide non-official behavior.'[264] Himma finds it difficult to see 'how an official act of recognizing, applying, or enforcing a mandatory moral norm that is antecedently capable of epistemically guiding non-official behavior would render that norm incapable of doing so simply because officials treat it as a mandatory legal norm.'[265] If we are morally accountable for our behavior, then 'it must be possible for us both to discern what a mandatory moral norm requires by consulting the norm and to conform our behavior to that norm.'[266] Inferentially, if it is possible for a subject to be epistemically guided by mandatory moral norms governing non-official behavior, then a subject can be epistemically guided by an institutional norm governing non-official behavior that is valid in virtue of reproducing the content of a mandatory moral norm.[267] What subjects can learn about a norm's requirements by consulting it is not changed simply by 'giving a norm a new name and treating it as a member of a different class of norms.'[268]

Regarding judges, Shapiro argues that a system underpinned by an incorporationist rule of recognition is incapable of motivational guidance. To be capable of guiding conduct, a rule must be capable of making a practical difference. Whether a rule makes a practical difference depends on what would happen if the agent did not appeal to the rule. A rule 'makes a difference to one's practical reasoning only if, in this counterfactual circumstance, the agent might not conform to the rule.'[269] For instance, if the agent were 'fated to conform to the rule even though he or she did not appeal to it,' then such rule 'does not make a practical difference.'[270] We can establish

[264] Himma (n 138) 178.

[265] ibid.

[266] ibid.

[267] ibid.

[268] ibid.

[269] Shapiro (n 248) 495.

[270] ibid. at 496.

that, 'if a judge guided his or her conduct by the [incorporationist] rule of recognition, then that judge would act in conformity to any valid rule even if he or she never appealed to such a rule.'[271] Shapiro considers an example consisting of an incorporationist rule of recognition that states, 'in hard cases, act according to the principles of morality':[272]

> In Riggs, judges guided by this [incorporationist] rule of recognition would conform with the principles of morality when deciding whether to invalidate the will. Let us further assume that the only relevant principle of morality is that people should not profit from their own wrongs and that the majority in that case believed this to be so. A judge guided by the rule of recognition, therefore, would invalidate the will.[273]

Here, the principle-- that no man should profit from his wrongs-- cannot make a practical difference as a legal norm, 'For if the judge were guided by the [incorporationist] rule of recognition, but did not appeal to the moral principle, he or she would still end up invalidating the will.'[274] This outcome creates a problem for Hart because 'the rule of recognition is supposed to create the possibility of legally authoritative guidance,' but 'guidance by an [incorporationist] rule of recognition [...] precludes the possibility that the primary rules can guide anyone's conduct.'[275] The primary rules cannot guide conduct because, 'once the judge is guided by an [incorporationist] rule of recognition, the rules supposedly validated by it can no longer make a practical difference.'[276]

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[271] ibid.

[272] ibid.

[273] ibid.

[274] ibid.

[275] ibid.

[276] ibid. Here is how Coleman describes Shapiro's argument: 'Shapiro's point is that someone cannot have his conduct guided both by the rule of recognition and by the rules validated under it. The reason is simple: if one is guided by the rule of recognition, one will be moved to act morally. That is what the rule of recognition asserts, and if one is guided by the rule, one is moved to act in accordance with it for the reason that the rule requires it. If that is the case, "legal" rules identified under the rule of recognition

Shapiro's argument seems to refute the idea that a legal system can have an incorporationist or inclusive rule of recognition. First, regarding incorporationism: where an institutional normative system with moral criteria of validity lacks any source-based criteria, each valid norm of the system would be valid in virtue of moral merit; however, this means that none of the norms valid under the rule of recognition are capable of motivationally guiding the official behavior of a judge who is motivationally guided by the rule of recognition to apply those norms.[277] Given that no valid norm of the system can make a practical difference in the deliberations of a judge motivationally guided by the rule of recognition, none are properly considered to be a legal norm.[278] Here, the system would have a rule of recognition but no valid legal norms and would therefore not be properly considered a legal system-- 'there can be no law without laws.'[279] So, if 'all the norms expressing, say, the minimum content of natural law have not been officially promulgated and are putatively valid only in virtue of moral merit, then they are not legal norms and the system fails, for that reason, to be a legal system.'[280]

Second, regarding an inclusive rule of recognition: where an 'institutional normative system with moral criteria of validity also incorporates source-based criteria of validity as a necessary condition for a norm to be valid in the system,' it is only those norms that are valid partly in virtue of source that can make a practical difference in the deliberations of a judge motivationally guided by the rule of recognition.[281] This indicates that 'every norm putatively

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cannot add anything of practical significance. One is, after all, already moved to act morally by the rule of recognition. The rules identified as law under the rule of recognition are not capable of adding anything of practical significance. If such rules cannot in principle add anything of practical significance, they cannot be legal rules. Legal rules must in principle be capable of making a practical difference. These cannot. Thus, they cannot be legal rules. If they cannot be legal rules, then the rule of recognition that sets out the conditions that validate them cannot be a rule of recognition. Thus, the classic incorporationist "rule of recognition" cannot, in the end, be a rule of recognition at all.' (Jules Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4 Legal Theory 381, 421-422).

[277] Himma (n 138) 187-188.

[278] ibid at 188.

[279] ibid.

[280] ibid.

[281] ibid.

valid wholly in virtue of moral merit would not be a legal norm' under the practical difference thesis.[282] As there are here no norms valid in virtue of moral merit that count as law, 'the system would have, despite appearances to the contrary, only source-based criteria of validity.'[283] Pursuantly, if 'all the norms expressing the minimum content of natural law have been officially promulgated and are hence valid in virtue of source, then the system is a legal system; those norms would be valid in virtue of having a proper source.'[284] However, since each norm of the institutional system that is putatively valid wholly in virtue of moral merit would not count as a legal norm, 'the legal system to which that institutional system gives rise would lack moral criteria of legal validity.'[285]

At this point, I will interject to identify a problem with the reasoning behind Himma's analysis of the second option. The problem arises because Himma assumes that the source-based criteria is sufficient to establish legal validity (e.g. if 'all the norms expressing the minimum content [...] have been officially promulgated and are hence valid in virtue of source'); but, if the source-based criteria is sufficient to establish validity, then satisfying moral criteria is unnecessary to establish validity. The problem is that this assumption is applied to a hypothetical premised on moral criteria being necessary to determine validity-- where 'an institutional normative system with moral criteria of validity also incorporates source-based criteria of validity as a necessary condition for a norm to be valid in the system.' In this passage, Himma must mean that the moral criteria is necessary for validity (i.e. he must be referring to an inclusive rule of recognition)-- he cannot mean that it is sufficient[286] given that there is also 'source-based criteria of validity as a necessary condition.' The reasoning here is that, if social facts are necessary for validity, then moral facts are insufficient for validity, given that moral facts do not entail social facts. More precisely, if moral facts do not entail social facts, then moral facts can obtain absent social facts, and thus without being accompanied by a necessary condition of validity. But, if

[282] ibid.

[283] ibid.

[284] ibid.

[285] ibid.

[286] And he would not mention it as a criteria of validity if it was neither necessary nor sufficient.

moral facts can obtain without a necessary condition of validity, then moral facts are insufficient to establish validity-- this follows because, if moral facts were sufficient to establish validity, then they would obtain only when all necessary conditions of validity are satisfied. Where the rule of recognition makes the obtainment of moral facts a necessary condition of validity (i.e. is inclusive), there are only two possibilities: either (1) moral facts are necessary and sufficient for validity, and so social facts are insufficient and unnecessary; or (2) moral facts are necessary and insufficient for validity, and so social facts are insufficient and necessary. In neither option is the obtainment of social facts sufficient to establish validity. Therefore, once we enter the hypothetical premised on moral facts being necessary to establish validity, we cannot reason on the basis of the assumption that social facts are sufficient to establish validity-- to make this assumption is to depart from the hypothetical.

Here is how Shapiro characterizes his argument asserting that a legal system cannot have an inclusive rule of recognition. Recall that an 'agent is epistemically guided by a legal rule when he learns of his legal obligations or rights from the rule without having to engage in deliberation about the merits of following such a rule,' and that legal rules are 'able to perform this function because they possess authoritative marks': 'By appealing to the mark, agents are able to identify those rules that are authoritative without having to appeal to shared judgments about which rules are legitimate and which are illegitimate.'[287] So, authoritative marks must be identifiable as such without deliberation 'given that their function is to enable agents to learn that a rule is a legal rule without deliberation';[288] however, if one can identify a mark only by deliberating on the merits of following the rule it affixes to, then one cannot learn of one's legal obligations or rights from the rule without engaging in deliberation.[289] An inclusive rule of recognition 'flouts this constraint precisely by allowing moral properties to be marks of authority.'[290] Judges cannot be motivationally guided by an inclusive rule of recognition, such as one that 'validates only those

[287] Shapiro (n 249) 161.

[288] ibid. at 162.

[289] ibid.

[290] ibid.

rules that are both passed by Congress and consistent with fundamental rights.'[291] Here, to decide whether a given rule is a legal rule, a judge must assess some of the moral properties of the rule in question-- she must determine whether the rule is consistent with fundamental rights.[292] Pursuantly, the judge will not be treating the rule as a peremptory reason for action because 'her compliance is conditional on her judgment about the moral appropriateness of following the rule.'[293] The judge therefore cannot be motivationally guided by the rule.

Matthew Kramer has responded to Shapiro, who presumes that, 'if ascertaining the existence of a legal norm will perforce involve some moral judgments, then the norm cannot amount to a peremptory reason for action.'[294] For Kramer, Shapiro's presumption disregards Raz's 'observations concerning possible restrictions on the scope of any particular reason's exclusionary or peremptory force.'[295] Indeed, 'In almost every instance, the peremptory sway of a norm is limited.'[296] More exactly, 'As long as an exclusionary reason removes some factors from a balance of considerations that can be legitimately acted upon, it need not remove all such factors,' such that 'Restrictions on the scope of a peremptory reason are fully compatible with its nature as such a reason.'[297] Stated differently, a legal norm 'can partake of peremptoriness even if it disqualifies only some countervailing concerns, rather than all countervailing concerns, as reasons for legitimately acting at variance with the norm's demands.'[298]

In Shapiro's words, Kramer 'claims that a judge can be guided in a peremptory fashion by a primary legal rule even when he must deliberate about some of the merits of the rule.'[299] Kramer

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[291] ibid. at 163.

[292] ibid.

[293] ibid.

[294] Matthew Kramer, 'How Moral Principles Can Enter Into the Law' (2000) 6 Legal Theory 83, 90.

[295] ibid.

[296] ibid.

[297] ibid.

[298] ibid 90-91.

[299] Shapiro (n 249) 163-164.

implies that 'Morality can serve as a necessary condition of legality in a way consistent with the peremptory nature of motivational guidance, provided that the moral reasons conditioning legality fall outside the exclusionary scope of the primary legal rules.'[300] Shapiro admits that 'Kramer's response is very clever and might be useful to any inclusive legal positivist who permitted rules to have flexible scopes of preemption'; however, Shapiro does not think that Hart-- the main target of Shapiro's arguments-- is one of these inclusive positivists.[301]

Waluchow responds to Shapiro's argument by questioning whether the 'functions noted by Shapiro' should be 'ascribed to individual laws or to legal systems in general.'[302] As Waluchow says, 'it fails to follow from the fact that a function is attributable to the legal system that it must be attributable to any and all laws within the system.'[303] Consequently, 'even if, as Hart and others have argued, it is an important function of legal systems that they provide something like the kind of guidance Shapiro describes, there is no reason to think the same must be said of all laws.'[304] Stated concisely, 'it fails to follow from the proposition that a legal system must make a practical difference that all its rules must do likewise.'[305] Shapiro, in reply to Waluchow, agrees that although 'one cannot, in general, conclude that a part has a function F just because the whole has the function F,' such an inference is sound in the case of legal rules and legal institutions.[306] This is because 'legal rules are the means by which legal systems guide conduct'-- 'We can say that the function of legal rules is to guide conduct because they have been produced by legal institutions in order to guide conduct.'[307] Furthermore, 'the idea that legal

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[300] ibid. at 164.

[301] ibid.

[302] Waluchow (n 129) 76.

[303] ibid.

[304] ibid.

[305] ibid.

[306] Shapiro (n 249) 169.

[307] ibid.

rules have, as their function, the guidance of conduct is one of the core features of Hart's theory of law.'[308]

Himma offers an overarching critique of Shapiro's arguments against the incorporation thesis. Himma argues that the guidance function of law 'does not imply that every legal norm must be capable of guiding or informing the behavior of every person'; rather, what is implied is that 'every legal norm must be capable of guiding or informing the behavior of every person whose behavior it governs.'[309] Given that the rule of recognition governs only official behavior, we cannot conclude that subjects must be able to determine, by consulting the rule of recognition, their non-official obligations under valid law.[310] Shapiro's guidance arguments are problematic only insofar as they assume that 'a rule that does not govern someone's behavior must nonetheless be capable of guiding or informing her behavior.'[311] No plausible conceptual theory of law entails that 'it must be possible for the rule of recognition to epistemically guide or inform non-official behavior because the rule of recognition does not govern that behavior.'[312] By the same token, no plausible conceptual theory of law entails that 'the valid legal norms that a judge applies to a case involving non-official behavior must be capable of motivationally guiding the judge's official behavior because those norms do not govern the judge's official behavior.'[313] Shapiro's arguments are unsuccessful in that neither strand shows that 'the norms of an institutional normative system with moral criteria of validity cannot properly guide someone whose behavior it must be capable of guiding.'[314]

If there is doubt regarding the deficiencies of Shapiro's arguments, there is another criticism that can be made. I mentioned above that the point-- that the content of a rule of recognition is

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[308] ibid.

[309] Himma (n 138) 168.

[310] ibid.

[311] ibid.

[312] ibid. at 193.

[313] ibid.

[314] ibid.

contingent and may evolve-- undermines Shapiro's argument that directives are incapable of guiding conduct if their validity depends on satisfying moral criteria. I will now attempt to justify this conclusion. Imagine that there is an institutional normative system that is underpinned by a partly moral (i.e. inclusive) rule of recognition, meaning that it includes criteria making the obtainment of certain moral facts a necessary condition of validity. Now, suppose that a precedent case comes before the adjudicative body of the system, and the judgment in this case establishes and applies system norm A. Then, some time after the precedent case, the normative system's rule of recognition-- having a contingent content-- evolves from being partly moral to being purely social. At some time following the evolution of the rule of recognition, a subsequent case comes before the adjudicative body of the system. The judge in the subsequent case applies system norm A as a precedent, having identified it (as a valid norm of the system) by reference to the (now) purely social rule of recognition. This hypothetical shows that, because a normative system's rule of recognition can evolve from partly (or wholly) moral to purely social, norms of the system depending for their validity on a partly (or wholly) moral rule of recognition are not thereby incapable of guiding conduct-- system norm A is capable of guiding conduct because it is valid during a time when the rule of recognition could evolve to be purely social.

To this analysis, one might respond by arguing that, once system norm A depends for its validity on social facts (i.e. depends on satisfying the evolved, purely social, rule of recognition), it no longer depends for its validity on satisfying the moral criteria of the partly moral rule of recognition. This argument may or may not be true, but it is besides the point, which is that, at one time (i.e. prior to the rule of recognition evolving), system norm A depends for its validity on satisfying moral criteria, and yet-- because the rule of recognition could evolve to be purely social-- system norm A is capable of guiding conduct. Even if we assume that there is a time (e.g. the moment the evolved rule of recognition comes into existence) during which system norm A is capable of guiding conduct but does not depend for its validity on satisfying moral criteria, we cannot without more infer that there is no time (e.g. after A is established but prior to the rule of recognition evolving) during which A is both capable of guiding conduct and dependent for its validity on satisfying moral criteria. To be precise, while an inclusive rule of recognition is in place, system norm A (1) *does not* make a practical difference (because it is identified by reference to moral criteria), but (2) is *capable* of making a practical difference

(because-- given that the rule of recognition could evolve-- norm A could be identified by reference to purely social criteria). If there is a time during which system norm A is both capable of guiding conduct and dependent for its validity on satisfying moral criteria, then it is untrue that being dependent for its validity on satisfying moral criteria is sufficient for A to be incapable of guiding conduct. Because the content of a rule of recognition is only contingently moral, and could be purely social, norms that depend for their validity on satisfying the moral criteria of a rule of recognition are *capable* of guiding conduct, even if they fail to do so. Shapiro is essentially relying on the truth of the (incorrect) statement, 'if a rule of recognition contingently includes moral criteria, then system norms *cannot* guide conduct.' The problem is that the correct statement reads, 'if a rule of recognition contingently includes moral criteria, then system norms *do not* guide conduct.'

The remaining question is whether system norm A is capable of guiding the conduct of subjects. The answer must be 'yes.' Assuming that, following the subsequent case, the system's rule of recognition remains purely social, then subjects will be able to guide their conduct according to system norm A, having identified it as valid by reference to the purely social rule of recognition.

In response to this critique of Shapiro, one might argue that the institutional normative system with an inclusive rule of recognition is not the same system as the one with a purely social rule of recognition. However, to reach this conclusion, we would have to assume or show that a legal system cannot survive the evolution, from partly moral to purely social, of its rule of recognition. But why would this be the case? For Raz, 'That one legal system comes to an end and another takes its place manifests itself in a change of rule of recognition, for each legal system has a different rule of recognition.'[315] And yet, the rule of recognition is a customary rule, and so it is 'constantly in a process of change.'[316] We can therefore ask: 'What changes are consistent with the continued existence of the same rule, and what changes compel the admission that a new rule has replaced the old one?'[317] Raz suggests that the answer depends on whether there is continuity in the relevant political system: 'the continuity of the legal system is fundamentally a

[315] Raz (n 10) 98.

[316] ibid.

[317] ibid.

function of the continuity of the political system.'[318] If this is correct, then a rule of recognition evolving from partly moral to purely social need not indicate that a new legal system is in place because such evolution could occur within the context of a continuous political system. We can, therefore, defend against this response to my critique of Shapiro simply by supplementing the hypothetical such that there is a continuous political system in place while the rule of recognition evolves from partly moral to purely social.

[318] ibid. at 100.

Chapter 3: Two Inconsistencies in the Planning Theory of Law

Shapiro's planning theory of law can be criticised on two grounds. First, I will argue that, implicitly per Shapiro, adopting a law plan provides instrumentally rational reasons for conforming only if the content of such plan is sufficiently moral. If this is correct, then Shapiro's theory (incoherently) asserts that adopting a law plan does-- and does not-- necessarily provide instrumentally rational reasons for following the plan. Second, I will argue that Shapiro's planning theory is internally inconsistent because its legal positivism is contradicted by its account of legal normativity.

The key to this critique of the planning theory is a slight shift in perspective. Shapiro focuses primarily on the instrumental rationality generated by adopting a *law* plan. I want to take a step back, and focus instead on the instrumental rationality generated by adopting a non-law plan that precedes (adopting) a law plan. To establish the critique, I will present four points, which will then inform a question that is problematic for Shapiro. The first point is that (it is reasonable to assume) a non-law plan precedes a law plan. The second point is that adopting/accepting a (law or non-law) plan necessarily establishes instrumental rationality (i.e. instrumentally rational reasons for following the plan). The third point is that, once a plan is accepted, it is instrumentally irrational to depart from such plan without a compelling reason to do so. The fourth point is that it is possible for a law plan to be highly immoral. These four points inform the question of whether there is necessarily a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. If there is no compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan, then such adoption-- from the perspective of the instrumental rationality of the prior non-law plan-- will be instrumentally irrational. And, if adopting a law plan is instrumentally irrational, then such adoption fails to provide instrumentally rational reasons for following the plan. Moreover, this reasoning supports the second critique of Shapiro, which argues that the planning theory is internally inconsistent because its account of legal normativity contradicts the legal positivism it espouses.

I will begin the initial critique by discussing the four points, summarized above, informing the question of whether there is necessarily a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. The first point is that we can reasonably assume that a non-law plan will precede a law plan. This is reasonable given that 'it is plausible to suppose

that law is a comparatively recent invention,'[319] while 'Planning is a core component of human agency because we have desires for many ends that demand substantial coordination'[320] and we are compelled to plan by our limited rationality.[321] If law is a 'comparatively recent invention' and yet planning is 'a core component of human agency' that we are compelled to do, then we can reasonably assume that planning in general (i.e. non-law planning) precedes law (i.e. law planning). A non-law plan is an abstract propositional entity that (1) is not a legal system, and that (2) requires, permits, or authorises agents to act, or not act, in certain ways under certain circumstances.[322] To reach this definition of a non-law plan, I have simply adopted Shapiro's definition of a 'plan,' and then added the requirement that the plan in question is not a legal system.[323] Non-legal forms of planning include 'improvisation, spontaneous ordering, private agreements, communal consensus, [and] personalized hierarchies.'[324] In contrast, a law plan is a plan that qualifies as a legal system.

The second point is that, for Shapiro, adopting a plan-- either a non-law plan or a law plan-- necessarily establishes instrumentally rational reasons for following the plan: 'Since acceptance of the fundamental legal rules involves the adoption of plans, the distinctive norms of rationality that attend the activity of planning necessarily come into play.'[325] In other words, accepting the fundamental legal rules brings into play the 'distinctive norms of rationality that attend the activity of planning' because to accept the fundamental legal rules is to adopt a plan. Given that there *are* 'distinctive norms of rationality that attend the activity of planning,' and given that planning does not necessarily involve law (because there can be non-law plans), we can conclude that the adoption of non-law plans, like the adoption of law plans, establishes instrumental rationality. So, the second point is that adopting a (law or non-law) plan necessarily establishes

[319] Shapiro (n 2) 36.

[320] ibid. at 122.

[321] ibid.

[322] ibid. at 127.

[323] A non-law plan is exemplified by what Shapiro calls a shared plan in ibid. at 134-153.

[324] ibid. at 170.

[325] ibid. at 183.

instrumental rationality (i.e. instrumentally rational reasons for following the plan) because 'the distinctive norms of rationality that attend the activity of planning necessarily come into play.' Adopting a plan involves accepting it: 'In order for a group to share a plan, then, each member of the group must accept the plan.'[326] Accepting a shared plan 'does not mean simply that each member accepts *her* particular part of the plan. To accept a plan entails a commitment to let the other members do their parts as well.'[327] However, accepting a plan 'does not require that the participants actually know the full content of the shared plan; the commitment may simply be to allow others to do their parts, *whatever they happen to be*.'[328]

The third point is that, once officials accept a plan, they are-- from the perspective of instrumental rationality-- criticizable for departing from it without a compelling reason. From the perspective of instrumental rationality, 'an official who accepts her position within an authority structure will be rationally criticizable if she disobeys her superiors, fails to flesh out their orders so that she may take the means necessary to satisfy their demands, adopts plans that are inconsistent with these orders, or reconsiders them without a compelling reason to do so.'[329] Pursuantly, given that 'most officials do accept the master legal plan, they are criticizable for disobeying the law absent a compelling reason to do so.'[330] According to the third point, then, it is instrumentally irrational to depart from an adopted plan unless there is a compelling reason for such departure.

Regarding the fourth point, notice that, just because (Shapiro says) a law plan is necessarily instrumentally *rational*, does not mean that such law plan is necessarily *moral*:

> 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

[326] ibid. at 135.

[327] ibid. at 136.

[328] ibid.

[329] ibid. at 183.

[330] ibid.

> have no support from the population at large; those governed by it may absolutely hate it.[331]

The fourth point, then, is that it is possible for a law plan to be highly immoral.

Here, in summary, are the four points established above. First, we can reasonably assume that a non-law plan will precede a law plan. Second, accepting a (law or non-law) plan necessarily establishes instrumental rationality, which, third, means that those who have accepted a non-law plan ought not depart from it unless there is a compelling reason to do so. Fourth, a law plan can be highly immoral. With these four points in mind, consider the following hypothetical. Suppose that a community of planners are finding that their accepted non-law plan cannot help them resolve the problems that have arisen in the circumstances of legality. They want to switch to a law plan; however, the only law plan under consideration is one already used by a neighbouring jurisdiction, where the law plan, far from resolving the moral problems of the circumstances of legality, actually makes such problems much worse. This is because the law plan is 'morally obnoxious' as it cedes 'total control of social planning to a malevolent dictator' who '[privileges] the rights of certain subgroups of the community over others' and has 'no support from the population at large.' Here is the question I want to ask: in this hypothetical, is there a *compelling reason* to adopt the morally obnoxious law plan in departure from the prior non-law plan? The question is important because, if there is no compelling reason to adopt the morally obnoxious law plan in departure from the non-law plan, then adopting such law plan will contradict the *instrumental rationality established by accepting the (prior) non-law plan*. And, if the adoption of the law plan is instrumentally irrational, then such adoption fails to provide instrumentally rational reasons for following the law plan.

In response to this critique, Shapiro might say that, in the circumstances of legality, there *is* a compelling reason to switch from a non-law plan to a law plan because *only* a law plan can resolve the problems associated with the circumstances of legality: 'Communities who face [the circumstances of legality], therefore, have compelling reasons to reduce these associated costs and risks. And in order to do so, they will need the sophisticated technologies of social planning

[331] ibid. at 177.

that *only legal institutions provide*.[332] Notice what Shapiro is saying here: there are compelling reasons to switch, in the circumstances of legality, from a non-law plan to a law plan because a law plan is *necessary* to resolve the problems associated with the circumstances of legality. But, just because a law plan is necessary to resolve the problems associated with the circumstances of legality, does not mean that a law plan is sufficient to resolve such problems. Indeed, the fact (assuming it is a fact), that a law plan is necessary to resolve the problems associated with the circumstances of legality, is entirely consistent with a law plan exacerbating such problems by virtue of being 'morally obnoxious' because ceding 'total control of social planning to a malevolent dictator' who privileges 'the rights of certain subgroups of the community over others' and which has 'no support from the population at large.' The question therefore remains: if a (highly immoral) law plan-- although necessary to resolve the moral problems of the circumstances of legality-- actually exacerbated such problems, would there be a compelling reason to adopt such (immoral) law plan in departure from a prior non-law plan? Looked at differently, is the mere *capacity* to resolve the problems of the circumstances of legality sufficient to generate a compelling reason to adopt a highly immoral law plan in departure from a non-law plan? I think the answer is 'no.' I think, instead, that the existence of a compelling reason to adopt a law plan in departure from a prior non-law plan depends on the content of such law plan being moral enough to not exacerbate the moral problems associated with the circumstances of legality-- or, more precisely, to not exacerbate these problems to such an extent that the law plan does a significantly worse job, than does the prior non-law plan, of resolving such problems. If a highly immoral law plan does a significantly worse job, than does a prior non-law plan, of resolving the problems of the circumstances of legality, then it is difficult to see how there can be a compelling reason to adopt the immoral law plan in departure from the prior non-law plan. And, if there is no compelling reason to switch from the non-law plan to the immoral law plan, then-- from the perspective of the instrumental rationality of the prior non-law plan-- it is instrumentally irrational to adopt (and then follow) the immoral law plan. The conclusion-- that it is irrational to adopt a highly immoral law plan that does a significantly worse job (than a prior non-law plan) of resolving the problems of the circumstances of legality-- is implicitly supported by Shapiro's own words, when he says:

[332] ibid. at 170 [italics are mine].

> To say that the fundamental aim of the law is to compensate for the infirmities of custom, tradition, persuasion, consensus, and promise is not to suggest that the law never relies on these other mechanisms. When simpler methods of organizing behavior work, it would be *irrational to abandon or overturn them in favor of accomplishing the very same ends* through more sophisticated methods.[333]

If, as Shapiro says, it would be irrational to abandon a non-law plan in favour of a law plan that accomplishes 'the very *same* ends through more sophisticated methods,' then it would presumably also be irrational to abandon a non-law plan in favour of a law plan that does a significantly worse job of resolving the problems associated with the circumstances of legality.

If the above discussion is correct, then adopting a law plan is not necessarily instrumentally rational because there is not necessarily a compelling reason to adopt a law plan in departure from a prior non-law plan. There is not necessarily a compelling reason because it is possible that the law plan is so immoral that it does a significantly worse job, than does the prior non-law plan, of resolving the moral problems associated with the circumstances of legality. Indeed, just because a law plan, unlike a non-law plan, is *capable* of resolving the problems of the circumstances of legality, we cannot conclude that a law plan necessarily resolves such problems better-- it is, on the contrary, possible that a law plan does a worse job than does a non-law plan of resolving such problems. This is possible because a highly immoral law plan could exacerbate the moral problems that arise in the circumstances of legality, while a non-law plan might simply *not resolve* such problems, without making them worse. If there is no compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan, then, from the perspective of the instrumental rationality generated by (accepting) the non-law plan, adopting the immoral law plan is instrumentally irrational. And, if the adoption of a law plan is instrumentally irrational, then such adoption does not provide instrumentally rational reasons for following the plan. Whether there is a compelling reason to adopt a law plan in departure from a prior non-law plan depends on the moral content of the law plan. Specifically, there can be a compelling reason only if the content of the law plan is moral enough to not exacerbate the moral problems (of the circumstances of legality) to such an extent that the law plan does a

[333] ibid. at 213 [italics are mine].

significantly worse job, than a prior non-law plan, of resolving these problems. In this way, a law plan's provision of instrumentally rational reasons for conforming is content-dependent-- it depends on the content of the law plan being moral enough to be consistent with a compelling reason to adopt such law plan in departure from a prior non-law plan.

Shapiro seems to anticipate this critique: 'While acceptance of a subordinate position within a hierarchy creates rational requirements of obedience, it may of course be the case that participants were *irrational for acquiescing to the shared plan* in the first place. Their superiors may be ignorant, unethical, or irresponsible. Nevertheless, there are often good reasons to defer.'[334] This response, however, is inadequate as an answer to the critique presented. This is so in several ways. First, Shapiro is not here talking about the situation of transition from a non-law plan to a law plan. He is, rather, talking about the adoption of a shared plan that is irrational (perhaps because supervisors are 'ignorant, unethical, or irresponsible'), but not irrational *from the perspective of a prior non-law plan*. Second, Shapiro is talking about *subordinate* officials of a shared plan-- I am talking about the officials (i.e. planners) of a shared (law) plan. Third, the fact (assuming it is a fact) that 'there are *often* good reasons to defer' is insufficient to establish a compelling reason to switch from a non-law plan to a highly immoral law plan that does a significantly worse job of resolving the problems associated with the circumstances of legality. This is most obviously true given that, even if there are 'often' good reasons to defer, there might be no good reason to defer in the case of a highly immoral law plan. Finally, even if these 'good reasons' obtain, each is insufficient to generate a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. Here are the examples of 'good reasons to defer' (to a shared plan) that Shapiro provides:

> For example, others might know more than the subordinates do about what the group should do and can be trusted to point them in the right direction. As we have also seen, the complexity and contentiousness of shared activities increases not only the benefits of planning, but also its costs. By vertically dividing labor between those who adopt plans and those who apply and carry them out, participants are able to resolve their doubts and

[334] ibid. at 142-143 [italics are mine].

> disagreements without having to engage in costly deliberations or negotiations. It should also not be overlooked that individuals might accept a subordinate role in a shared activity because they have no other viable option. They might desperately need the money or fear that they will be harmed if they do not.[335]

So, these 'good reasons to defer' (to a shared plan) include:

1) Others might know more than the subordinates do about what the group should do and can be trusted to point them in the right direction;
2) Gaining the ability to resolve 'doubts and disagreements without having to engage in costly deliberations or negotiations';
3) There is no other 'viable option.'

The first reason to defer to a shared plan does not apply in the case of a morally obnoxious law plan run by a malevolent dictator-- a *malevolent* dictator cannot be 'trusted to point [the group] in the right direction.' What about the second reason? This second reason is insufficient to generate a compelling reason to switch from a non-law plan to a law plan that is morally obnoxious because gaining the *ability* to resolve 'doubts and disagreements' without 'costly deliberations or negotiations' is consistent with a morally obnoxious law plan exacerbating moral problems such that a non-law plan, simply by not exacerbating them, does a better job of 'resolving' such problems (that is to say, the non-law plan does not resolve them at all, which is better than exacerbating them). The third reason to defer to a shared plan (such as a law plan) is because there may be no other viable option. This third reason to defer is inadequate, in two ways, to generate a compelling reason to adopt a morally obnoxious law plan in departure from a prior non-law plan. First, the third reason to defer does not apply to the hypothetical in which there is a prior non-law plan, because sticking with the prior non-law plan *is* a viable option (albeit one that cannot resolve the moral problems associated with the circumstances of legality). Second, even if we assume there is no other *viable* option, we cannot without more conclude that there is a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. To see the point, suppose that a community of planners is considering a switch from their non-law plan to a highly immoral law plan, and there is no other viable option (other than to

[335] ibid.

make the switch). This scenario still leaves open the possibility that there is, in competition with the highly immoral law plan, a non-viable option. If this is the case, then the existence of a compelling reason depends on whether (switching to) the highly immoral law plan is preferable to any non-viable option. Is it necessarily preferable to plan for immorality than to partake in (for e.g.) nonsense? I do not think so. There are certain crimes (e.g. the holocaust) that could obtain only where there is a shared plan, and which could have been avoided (or at least reduced in magnitude) by incoherence, such as that involved in a non-viable option. Because it is possible that we ought to avoid (or at least reduce in magnitude) such crimes, it is possible that the incoherence of a non-viable option is preferable to deferring to a highly immoral plan.

Shapiro also says that 'Even in cases of economic or physical coercion, once individuals form an intention to treat the superior's directives as trumps to their own planning, they have transformed their normative situation and are rationally-- if not morally-- committed to follow through unless good reasons suddenly appear that force them to reconsider.'[336] But this point does not facilitate a defence against the critique. The issue at hand is whether there is necessarily a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. From the above passage, we can see that economic or physical coercion does not *preclude* accepting a plan and thereby transforming one's normative situation. But, just because economic or physical coercion does not preclude instrumental rationality from being generated by accepting a shared plan, does not mean that economic or physical coercion is sufficient to generate a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. In actuality, economic or physical coercion is insufficient to establish a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan because the immorality of the law plan could outweigh the force generated by a given instance of economic or physical coercion.

This critique, which implies that adopting a law plan does not necessarily provide reasons for conforming, is bolstered by comments made by Kevin Toh and Michael Bratman. Toh notes that

> Judy could have a plan, not for something as anodyne as going to the zoo on Saturday, but for something horrible, like poisoning her children. It would be odd, to say the least, to think that it

[336] ibid.

> follows merely from the fact that Judy plans to poison her children that she thereby gains reasons to poison her children, or reasons to plan to poison her children.[337]

Consider also the comments of Bratman, whose work underlies Shapiro's planning theory of law. First, in a move that could apply to our highly immoral law plan, described above, Bratman is open to 'the possibility of a system of social structures characteristic of law that is horrendous in ways that block any normative support that may come from going some way to solving problems of the "circumstances of legality."'[338] Second, Bratman, like my critique above, suggests that perhaps merely adopting a law plan is insufficient to generate or induce reasons for following the plan.[339] It is perhaps more accurate to say that law *transmits*-- rather than generates/induces-- normative reasons: 'This suggests that one thing the planning theory of law does is provide a model of a kind of sociality that helps solve these characteristic problems and thereby *transmits*, in means-end fashion, the normative force of the general reasons we have to solve those problems to the specific legal actions mandated by the relevant planning structures.'[340] While 'The inner rationality of law is an essential aspect of what supports this transmission of reasons,'[341] such transmission 'also requires a background story of the reasons for law-- this is, so to speak, the major premise in the transmission.'[342] These comments are consistent with the conclusion, implied by the critique presented, that adopting a law plan does not necessarily establish reasons for following the plan.

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[337] Kevin Toh, 'Plan-Attitudes, Plan-Contents, and Bootstrapping: Some Thoughts on the Planning Theory of Law' in Gardner, Green, and Leiter (eds), *Oxford Studies in Philosophy of Law* 3, 37 (Oxford University Press 2018).

[338] Michael Bratman, 'Reflections on Law, Normativity and Plans' in Bertea and Pavlakos (eds), *New Essays on the Normativity of Law*, 82 (Hart Publishing 2011).

[339] ibid.: 'even in those (extremely common) cases in which there really are reasons of the cited sort for the legal system in question, it is misleading to say that, on the current picture, law by its nature *induces* reasons for specific legal actions. What it is more accurate to say, so far, is that law *transmits* such reasons; that is, there are, independently of law, reasons to solve the cited problems (or so we are supposing).'

[340] ibid. at 81 [italics are mine].

[341] ibid. at 81-82.

[342] ibid.

The second critique is that the planning theory is internally inconsistent because its explicit legal positivism is contradicted by its account of legal normativity. The planning theory is an exclusive legal positivist theory because it affirms the sources thesis whereby legal validity necessarily depends on social facts, and cannot depend on moral considerations. For Shapiro, 'the fundamental rules of a legal system constitute a shared plan,' and 'the proper way to ascertain the existence or content of a shared plan is through an examination of the relevant social facts [...] if we want to discover the existence or content of the fundamental rules of a legal system, we must look [...] only to what officials think, intend, claim and do around here.'[343] We can see, from examining two points, how Shapiro's explicit affirmation of legal positivism is contradicted by his account of legal normativity. The first point is that the existence of fundamental legal rules depends on the norms of instrumental rationality. The second point is that the norms of instrumental rationality, in the context of a law plan, depend on the content of such law plan being *moral enough* to be consistent with a compelling reason to adopt the law plan in departure from a prior non-law plan. Transitivity applies to these two points to establish the conclusion: the existence of fundamental legal rules depends on the content of a law plan being moral enough to be consistent with a compelling reason to adopt such law plan in departure from a prior non-law plan. If the existence of fundamental legal rules depends on the content of a law plan being sufficiently moral, then legal validity depends on moral considerations-- contrary to Shapiro's legal positivism.

We can begin with the first point, which is that (for Shapiro) the existence of fundamental legal rules depends on the norms of instrumental rationality. This point is established by looking at two passages from Shapiro (although the first passage is sufficient to establish the point). Here is the first passage: 'rational requirements of obedience necessarily attend the existence of any

[343] Shapiro (n 2) 177. See also: 'The crucial point here is that the determination by social facts is not some necessary, but otherwise unimportant, property of shared plans. Shared plans must be determined exclusively by social facts if they are to fulfill their function. As we have seen, shared plans are supposed to guide and coordinate behavior by resolving doubts and disagreements about how to act. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation or bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts, not moral ones, can serve this function.' (ibid.).

legal system.'[344] And the second passage: 'the Planning Theory is able to secure the existence of fundamental legal rules [...] Legal officials have the power to adopt the shared plan that sets out these fundamental rules by virtue of the norms of instrumental rationality.'[345] In light of the first passage, this second passage can be interpreted to mean: the existence of fundamental legal rules is secured by 'the power to adopt the shared plan that sets out these fundamental rules,' and this power depends on 'the norms of instrumental rationality.' Inferentially, the existence of fundamental legal rules depends on the norms of instrumental rationality.

The second point is that the norms of instrumental rationality, in the context of a law plan, depend on the content of a law plan being moral enough to be consistent with a compelling reason to adopt such law plan in departure from a prior non-law plan. This point was established in the discussion above, in which we saw that whether a law plan provides instrumentally rational reasons is content-dependent. More exactly, we saw that adopting a law plan is not necessarily instrumentally rational because there is not necessarily a compelling reason to adopt a highly immoral law plan in departure from a prior non-law plan. Whether there is a compelling reason depends on the moral content of the law plan-- if the content of the law plan means that the law plan is significantly worse (than a prior non-law plan) at resolving the moral problems associated with the circumstances of legality, then there is no compelling reason to make the switch. We can on these grounds infer that (in the context of law plans) the norms of instrumental rationality depend on the content of a law plan being sufficiently moral.

In review, the two points established above state: first, the existence of fundamental legal rules depends on the norms of instrumental rationality; and second, the norms of instrumental rationality (in the context of a law plan) depend on the content of a law plan being moral enough to be consistent with a compelling reason to adopt such law plan in departure from a prior non-law plan. Applying the transitive property to these points, we can conclude that (implicitly per the planning theory) the existence of fundamental legal rules depends on the content of a law plan being moral enough to be consistent with a compelling reason to adopt such law plan in departure from a prior non-law plan. The problem for Shapiro is that, if the existence of fundamental legal rules depends on a law plan having a particular moral content, then-- contrary

[344] ibid. at 184.

[345] ibid. at 181.

to Shapiro's legal positivism-- legal validity depends on moral facts. It is in this way that Shapiro's account of legal normativity (i.e. as being grounded in instrumental rationality) is inconsistent with his legal positivism.

One counter-argument to this critique of Shapiro might assert it is an error to assume that a 'compelling reason,' for adopting a law plan in departure from a prior non-law plan, is determined objectively. This issue is noticed by Emily Sherwin: 'Another preliminary issue is whether the existence of a compelling reason to defect from commitment is an objective question or a question to be answered from the perspective of the agent.'[346] Sherwin believes 'the best reading of Shapiro's comments about exceptions to commitment is that agents are permitted to defect when they believe or reasonably believe that the reasons to defect strongly outweigh the reasons to obey (including the value of binding commitment).'[347] However, Shapiro himself seems to determine compelling reasons objectively. To this end, when he discusses the existence of a compelling reason (for adopting a law plan) in the circumstances of legality, Shapiro says: 'Communities who face [the circumstances of legality] [...] have compelling reasons' to do that which 'only legal institutions provide'[348] or, in other words, communities in the circumstances of legality have compelling reasons to adopt a law plan.[349] Notice, here, that the circumstances of legality are objective: they 'obtain whenever a community *has* numerous and serious moral problems whose solutions *are* complex, contentious, or arbitrary';[350] and, in the circumstances of legality, 'the benefits of planning *will* be great, but so *will* the costs and risks associated with nonlegal forms of ordering behavior.'[351] If the determination of what counts as a 'compelling

[346] Emily Sherwin, 'Legality and Rationality: A Comment on Scott Shapiro's Legality' (2013) 19 Legal Theory 403, 415.

[347] ibid.

[348] Shapiro (n 2) 170 [italics are mine].

[349] This statement ('communities in the circumstances of legality have compelling reasons to adopt a law plan') is, of course, contradicted by my analysis above, which suggests that there are not necessarily compelling reasons (to adopt a law plan) in the circumstances of legality (given that it is possible that a law plan does a significantly worse job, than a non-law plan, of resolving the problems associated with the circumstances of legality). Nonetheless, the statement is useful to demonstrate that there is reason to believe Shapiro intends compelling reasons to be determined *objectively*.

[350] ibid. [italics are mine].

[351] ibid. [italics are mine].

reason' was not objective, then the objective circumstances of legality would be insufficient to establish compelling reasons to adopt a law plan. Given that, per Shapiro, the objective circumstances of legality are sufficient to establish compelling reasons to adopt a law plan, we can infer that the determination of compelling reasons involves an objective inquiry.

In any event, even if we assume that the inquiry, determining what counts as a compelling reason, is subjective, the critique of Shapiro is untroubled. In the hypothetical presented above, the highly immoral law plan under consideration is *already* in place in a neighbouring jurisdiction, and so the would-be adopters of this law plan subjectively believe (accurately, in this case) that it does a significantly worse job, than their non-law plan, of resolving the problems associated with the circumstances of legality. If the planners subjectively believe the highly immoral law plan under consideration does a significantly worse job, than does the non-law plan, of resolving the problems of the circumstances of legality, then-- even if compelling reasons are determined subjectively-- it is hard to see how there can be a compelling reason to adopt such immoral law plan in departure from the prior non-law plan. Stated otherwise, even if compelling reasons are determined subjectively, we can think of circumstances (e.g. where the law plan is believed to be highly immoral) in which there is no compelling reason to adopt a law plan in departure from a prior non-law plan.

The critique presented suggests that Shapiro's planning theory of law is implicitly anti-positivist because implying that a law plan exists only if *moral enough* to be consistent with a compelling reason for adopting the plan in departure from a prior non-law plan. If this is correct, then Shapiro's planning theory is what Shapiro calls a natural law theory. By 'natural law,' Shapiro means the position holding that 'legal facts are ultimately determined by moral *and* social facts.'[352] The problem with natural law theories, Shapiro tells us, is that they cannot answer the problem of evil: 'Just as theologians have struggled to explain how evil is possible given the necessary goodness of God, the natural lawyer must account for the possibility of evil legal systems given that the law is necessarily grounded in moral facts.'[353] Unfortunately for natural law theorists, 'By insisting on grounding legal authority in moral authority or moral norms,

[352] ibid. at 27.

[353] ibid. at 49.

natural law theory rules out the possibility of evil legal systems.'[354]

If the above analysis is correct and Shapiro's planning theory is implicitly anti-positivist (or, as Shapiro says, a natural law theory), then we can ask whether the planning theory is subject to Shapiro's own critique of natural law theories. A related question is whether Shapiro's critique of natural law theories, whether applicable to the planning theory or not, is sound. If Shapiro's critique is unsound, then it is inconsequential whether the planning theory is subject to it. Simmonds has argued that Shapiro's critique is unsound because it discounts the possibility that evil legal systems are *non-focal* instances of law. For Simmonds, 'Shapiro is quite mistaken in his claim that natural law theories must deny the possibility of evil legal systems. They may with consistency say, as Finnis says, that evil systems are "non-focal" instances of law. But a "non-focal" instance of law is still an instance of law.'[355]

Shapiro does consider a 'weak reading' of the natural law thesis, whereby immoral laws are 'defective as laws,'[356] but dismisses it for three reasons. First, 'the weak reading of the natural law thesis is consistent with the central tenet of legal positivism. A positivist can coherently maintain that the law is ultimately grounded in social facts alone but that immoral laws are defective as law.'[357] By characterizing natural law as he has, Shapiro intends to 'capture the traditional understanding that natural law theory is a *rival* to legal positivism.'[358] Second, 'the weak reading of the natural law thesis cannot explain why so many natural lawyers have claimed that unjust rules are not laws.'[359] According to Shapiro, 'natural lawyers accept this view because they hold that legal facts are ultimately determined by social and moral facts and, in the case of unjust rules, the right sort of moral facts are missing.'[360] Third, while the weak reading

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[354] ibid.

[355] NE Simmonds, 'The Logic of Planning and the Aim of Law' (2012) 62(2) University of Toronto Law Journal 255, 257.

[356] Shapiro (n 2) 408-409.

[357] ibid.

[358] ibid. at 409.

[359] ibid.

[360] ibid.

of natural law is not uninteresting, it is 'not so interesting that the dispute over it should constitute the major debate in analytical jurisprudence.'[361]

Simmonds argues that the first two of Shapiro's reasons are unconvincing. Shapiro's first reason

> fails properly to acknowledge the ambiguity of the phrase 'defective as laws.' For we may reasonably ask whether the fact that a body of rules is 'defective as law' weakens or qualifies the sense in which it is law. Is being 'defective as law' just the same as being law that is defective? Or is being 'defective as law' a matter of being defective in respect of those very features that contribute to the status of a rule or institution a law, so that, although constituting law, the rule or institution is law only in a weaker or qualified sense?[362]

In light of this ambiguity, 'we realise that the "weak reading" of the natural law thesis fails to capture the difference between natural law theories and legal positivist theories only because it is ambiguous as between a natural law reading and a legal positivist reading.'[363] Pursuant to Simmonds, 'Once one has perceived the ambiguity of the phrase "defective as laws," Shapiro's second reason also collapses.'[364] This collapse results because, 'if one thinks of unjust laws as "defective as laws" and take that defectiveness to weaken or qualify the legal nature of the relevant rules, then one will surely not find it difficult to "explain" why grossly unjust enactments might be regarded by some theorists as not being law at all,' i.e. because 'a defectiveness that weakens or qualifies legal status may not unreasonably be regarded as negating such status at the extreme.'[365]

The debate regarding the weak reading of the natural law thesis is, relative to my purposes, largely contextual because the planning theory inadequately accounts for evil legal systems

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[361] ibid.

[362] Simmonds (n 355) 258.

[363] ibid.

[364] ibid.

[365] ibid. at 258-259.

regardless of whether Shapiro's critique of natural law theories is tempered by the weak reading of the natural law thesis. More exactly, even if we adopt the weak reading of the natural law thesis, Shapiro's theory inadequately accounts for evil legal systems because such theory cannot account for even non-focal instances of (certain) evil legal systems. Keep in mind that a non-focal instance of law is still an instance of law. Thus, to account for a non-focal evil legal system, the planning theory must account for the existence of an evil legal system. The problem is that, as argued above, the planning theory can account for only those law plans that are moral enough to be consistent with a compelling reason for adopting such plan in departure from a prior non-law plan. Shapiro's planning theory implies that an evil law plan can exist only if, at the time of its adoption in departure from a prior non-law plan, it was not significantly worse than the prior non-law plan at resolving the moral problems of the circumstances of legality. This is inadequate to account for all evil legal systems, however, because evil legal systems can arise even if, when they are adopted in departure from a prior non-law plan, they do a significantly worse job at resolving the problems of the circumstances of legality. Resultantly, the planning theory cannot account for the existence of an evil legal system that-- whether a focal or non-focal instance of law-- is adopted in departure from a prior non-law plan that does a significantly better job at resolving (by not exacerbating) the problems of the circumstances of legality.

Chapter 4: The Acceptance Model of Legal Normativity

This chapter argues that legality entails a particular conception-- captured by the acceptance model-- of legal normativity. As I am using the term, legal normativity refers broadly to the relationship between legality and reasons for action.

According to the acceptance model, there are at least two layers of legal normativity, which is largely about officials and subjects accepting that law provides them with choices with which to satisfy reasons. First, a legal system, because satisfying Hartian requirements and exhibiting (to some extent) each of Fuller's precepts of legality, necessarily provides (1) officials with choices entailed by their official roles, and (2) certain subjects with several choices that may be protected by a right to bodily integrity. The provision by a legal system of these choices represents a prima facie reason to efficaciously conform with legal directives. This is because, per Hart, a legal system exists only if its directives are conformed with to such an extent as to be efficacious. The prima facie reason to efficaciously conform, then, is to facilitate the existence of the legal system so that it can provide officials and subjects with the aforementioned choices. Second, the prima facie reason for efficaciously conforming, manifested by the provision of these choices, is 'had' by officials and certain subjects because this reason counts as such from the perspective of the practical reasoning of officials and certain subjects. The key to this process is the adoption, by officials and subjects, of the implied point of view.

Officials adopt the implied point of view when, in executing their official duties, they exercise for any reason their capacity to choose, and thereby treat as true the proposition that their official roles provide them with choices with which to satisfy reasons (i.e. whatever reasons they have for executing their duties). Similarly, subjects adopt the implied point of view when, by conforming with legal directives (or by acting out any other choice provided by law),[366] they exercise for any reason their capacity to choose, and thereby treat as true the proposition that the legal system provides choices with which to satisfy reasons (i.e. whatever reasons they have for conforming with legal directives, or for acting out a choice provided by law). Because they treat as true the proposition that the legal system provides choices with which to satisfy reasons-- and

[366] Here is what I mean by 'acting out' a choice provided by law: if a legal system provides subjects with a choice of whether to [X], then to 'act out' this choice is to perform those actions (or inactions) that are treated by the legal system as manifesting [X].

so is a means of satisfying reasons-- officials and subjects ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. They ought to treat this proposition as true because, given the Hartian requirement of efficacy, such conformity is needed for a legal system to exist to provide officials and subjects with these choices and thus to be a means of satisfying reasons.

This account of legal normativity is called the 'acceptance' model because adopting the implied point of view involves officials and certain subjects accepting the proposition that a legal system provides them with choices with which to satisfy reasons. It is due to the technical meaning of 'acceptance' that an official or subject, in virtue of making this acceptance, ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. In a nutshell, to accept a proposition in the technical sense is to treat it as true for some reason or, more exactly, to reason on the basis of the truth of a proposition. If a proposition is accepted in the technical sense, then one *ought* to accept each proposition that is entailed by the proposition that is accepted. This contrasts to Hart's internal point of view, which one accepts in a non-technical sense by endorsing a rule of recognition (i.e. criteria of legal validity) as a guide to conduct and standard of criticism.

4.1 Preliminaries and Basic Elements of Law

Does legality entail any particular form of legal normativity and, if so, what is the nature of this normativity? These are among the questions addressed by the acceptance model. The model can be understood as a neo-Fullerian project, but one that tries, hopefully with success, to avoid some of the deficiencies of Fuller's ideas. Unlike Fuller, I will not argue (or deny) that Fuller's precepts of legality are inherently moral. The argument is that, regardless of whether they are inherently moral, Fuller's precepts-- properly fleshed-out and supplemented with Hartian requirements and the implied point of view-- are adequate to illuminate at least part of the relationship between legality and reasons for action. By 'properly fleshed-out,' I refer to a conception of Fuller's precepts involving a greater appreciation for the implications of adhering, to some extent, to each of these precepts in the context of a Hartian legal system.

In the acceptance model, legal normativity is at least partly explained because officials and subjects ought to treat as true the proposition that there is a prima facie reason to efficaciously

conform with legal directives. The prima facie reason to efficaciously conform is to facilitate the existence of the legal system so that it can, by providing choices, be a means of satisfying reasons. This explanation, if correct, (1) accounts for legal normativity without relying on moral considerations on which legal validity necessarily depends, and yet (2) does not deny that there *could* be moral considerations on which legal validity necessarily depends. Because the acceptance model does not deny that legal validity necessarily depends on moral considerations, the model is consistent with anti-positivism (affirming that legal validity necessarily depends on moral considerations). At the same time, the explanation presented is not itself anti-positivist; this is because it does not affirm that legal validity necessarily depends on moral considerations. So, while the acceptance model does not specify any moral considerations on which legal validity necessarily depends, the model does not deny that there *could* be moral considerations on which legal validity necessarily depends. There could be such moral considerations because there could be other necessary elements of law, not specified by the acceptance model,[367] that are inherently moral.

I am affirming, then, that while it is possible that legal validity necessarily depends on moral considerations, we do not have to rely on moral considerations in order to explain the normativity of law. Even if we assume that the provision, by a legal system, of choices to officials and subjects is not inherently moral, such provision is nonetheless a prima facie reason to efficaciously conform with legal directives because, due to the implied point of view, officials and subjects are committed by their own decisions-- premised on reasons which may or may not be moral-- to accepting a proposition that entails the proposition that there is such a prima facie reason.

We can begin by examining (at least some of) the essential elements of a legal system, and how they are connected to each other. According to the acceptance model, there are, in addition to Hart's requirements, at least[368] two essential elements of law. For Hart, a legal system exists

[367] One reason I am calling it the 'acceptance model of legal normativity' rather than the 'acceptance theory of law' is because the model does not purport to specify each essential element of law. Rather, the model focuses on those essential elements of law that are (I am arguing) adequate to significantly advance our understanding of legal normativity.

[368] I am, recall, open to the possibility that there are other, possibly moral, essential elements of law.

only if there are sufficiently followed (i.e. efficacious) primary rules, and a rule of recognition accepted by officials from the internal point of view.[369] I will argue that, in addition to these Hartian requirements, a legal system exists only if (1) it exhibits, to some extent, each of Fuller's precepts of legality, and (2) officials and certain subjects take the implied point of view. The first additional requirement is adopted directly from Fuller: 'A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.'[370] Here are Fuller's eight precepts of legality: there must be (1) general rules that are (2) promulgated, (3) not retroactive, (4) sufficiently clear, (5) non-contradictory, (6) possible to conform with, (7) not subject to constant change, and (8) there must be congruence between official action and declared rule (e.g. no sanctions unless there has been a violation of a rule).[371]

With these basic elements in mind, we can now examine the fleshed-out conception of Fuller's precepts, in the context of a Hartian legal system, that I have described. The central idea is that a legal system, by satisfying Hartian requirements and exhibiting each of Fuller's precepts to some extent, necessarily provides certain subjects with several choices that may be protected by a right to bodily integrity.

4.2 The Choices Necessarily Provided by Any Legal System

The proposal in this part is that a legal system satisfies Hartian requirements and fulfills, to some extent, each of Fuller's precepts-- and thus exists as law-- only if it provides to certain subjects at least seven choices:[372] (1) a choice of whether to conform with legal directives; (2) a choice of *how* to conform with legal directives; (3) a choice of whether to defend (i.e. plead not guilty) against sanctions; (4) a choice of whether to challenge the law in court; (5) a choice of whether

[369] Hart (n 84) 116, 242.

[370] Lon Fuller, *The Morality of Law* (revised edn, Yale University Press 1969) 39.

[371] ibid.

[372] Technically speaking, the provision of choice (6) depends on whether a right to bodily integrity is provided, which is a contingent matter.

to alter, via property or contract, one's rights; (6) a choice of whether to seek a legal remedy; and (7) a choice of whether to be governed by a legal system. At least (the initial) six of these choices may be protected by a right to bodily integrity. Because law's existence is conditional on providing several choices, the law itself functions (as discussed below) as a sort of security interest for those subjects who must be granted these choices. Given that there is no non-legal form of governance that is conditional on providing these choices, there is no non-legal form of governance that is normative in this way.

To be clear, when I argue that law necessarily provides certain subjects with several choices, I am not adopting Simmonds' argument that law necessarily exhibits, to some extent, liberty as independence (i.e. independence from the will of others). These ideas-- liberty as independence and providing subjects with choices-- are distinct in the sense that providing subjects with choices does not entail liberty as independence. The provision of choices to subjects is *granted by law* and thus depends on-- rather than being independent of-- the will of lawmakers. Therefore, the argument that law necessarily provides choices to subjects does not entail the argument that law necessarily exhibits liberty as independence. The acceptance model is somewhat similar to Simmonds' archetypal theory in that each attempts to explain the normativity of law by reference to a fleshed-out conception of negative liberty entailed by a commitment to Fuller's precepts of legality. There are at least two points of distinction between the acceptance model and the archetypal theory: (1) (as mentioned) the acceptance model does not imply that law necessarily exhibits liberty as independence; and (2) unlike the archetypal theory, the acceptance model does not adopt Simmonds' idea of the depth of the ideal of legality.[373] However, like the archetypal theory, the acceptance model does affirm that a legal system exists only if exhibiting, to some extent, each of Fuller's precepts (which can be exhibited to varying degrees).

First, I am not arguing that law necessarily exhibits liberty as independence because, as pointed out by Kramer, a legal system does not necessarily exhibit liberty as independence:

> under the rule of law or under any other mode of governance, the continuation of anyone's

[373] A third difference is that Simmonds presents his theory as an anti-positivist theory, while I am (as discussed above) neither affirming nor denying that the acceptance model is anti-positivist.

> opportunities is always dependent on the wills of other people. Most notably, the continued existence of the opportunities open to any person is dependent on the wills of legal-governmental officials, who if they are so inclined can act concertedly to remove any of those opportunities (if necessary, by slaying the person).[374]

Kramer's critique of Simmonds appears sound. If the existence of a legal system depends on the will of lawmakers as described by Kramer, then such existence can ensure liberty as independence only if what subjects are independent of is lawmakers' wills *apart* from their will regarding whether to continue to provide subjects with any opportunities at all. But, if officials can choose to remove-- by killing a subject-- any opportunities provided by law, then it is hard to see how a subject is independent of the will of lawmakers in any meaningful sense.

Second, I am not adopting Simmonds' idea of the depth of the ideal of legality (although the acceptance model is open to the possibility that law is an archetypal concept) given that, if legal validity is determined by proximity to an archetype, then such archetype cannot manifest the depth of the ideal. To understand this conclusion, it is helpful to review what Simmonds means by the 'depth of the ideal.' By this phrase, Simmonds means

> the possibility that our experience of the problems internal to the realization of the ideal will lead to an enriched grasp of what the ideal really amounts to, and how it should be understood. Perhaps the possibility of revision is inherent in any statement of a guiding ideal, for we may always deepen our grasp of the ideal by reflecting upon the experience of its pursuit.[375]

Notice that Simmonds' idea of the depth of the ideal implies that the archetype of law is infinite: if the 'possibility of revision is *inherent* in any statement' of the archetype, such that 'we may *always* deepen our grasp' of it, then the nature of the archetype cannot be something that can ever be completely understood. And, if the archetype can never be completely understood, then it must be infinite given that, if the archetype was finite, then it would be at least conceptually

[374] Matthew Kramer, 'Freedom and the Rule of Law' (2009-2010) 61 Ala. L. Rev. 827, 842.

[375] Simmonds (n 14) 145.

possible to completely understand. I will argue that law can be an archetypal concept only if the archetype of law is finite; but, if the archetype of law is finite, then Simmonds is wrong regarding the depth of the ideal of legality. If this analysis is correct, then the archetype of law (assuming it obtains) does not manifest the depth of the ideal.

To begin, consider that there are, regarding the archetype of law, only two possibilities:[376] the archetype is either finite or infinite. Where the archetype of law is infinite, we cannot use it to distinguish on the basis of proximity a legal system from a non-legal system, because any two purported legal systems will be *equal* proximity away from the archetype-- that is to say, each will be infinite proximity away from the infinite archetype. Because each system will be infinite proximity away from the infinite archetype of law, we cannot conclude that one is more law-like than the other. We know this is correct because infinity minus any finite value is still infinity; thus, the difference (or distance) between the infinite archetype of law and any finite system is infinite. This analysis is significant because, if the archetype of law cannot distinguish a legal system from a non-legal system, then the archetype of law cannot conclusively determine the existence of a legal system. Consequently, if the existence of a legal system is conclusively determined by an archetype, then such archetype is not infinite in nature. We can on these grounds infer that law is an archetypal concept (i.e. the existence of law is determined by proximity to an archetype) only if the archetype of law is finite.

Next, if the archetype of law is finite, then it does not manifest Simmonds' idea of the depth of the ideal of legality. We can reach this conclusion by looking at Simmonds' comments on the difference between an archetype and a (Finnisian) focal or central case. Simmonds suggests that an archetype differs from a central case in that central cases are 'fully instantiated in experience, whereas archetypes are not.'[377] This fact-- that 'archetypes are not perfectly instantiated'-- is connected to the depth of the ideal.[378] However, if the above discussion is correct and the

[376] A third possibility-- where the archetype is partially finite and partially infinite-- is considered (and rejected) below.

[377] NE Simmonds, 'Reply: The Nature and Virtue of Law' (2010) 1(2) Jurisprudence 277, 279.

[378] ibid. at 279. 'Here my suggestion is that it is always possible for us to deepen our understanding of an ideal through the experience of pursuing it. Moral knowledge always in principle contemplates an entire way of life and is concerned with the conditions of human flourishing as a whole: such knowledge, therefore, is always in part a product of experience. Moreover, the very practices that at any one time

archetype of law is finite, then it must be conceptually possible for the archetype to be fully instantiated in experience. And, if the archetype can be fully instantiated in experience, then (1) the archetype does not manifest the depth of the ideal, and (2) Simmonds' argument distinguishing archetypes from central cases collapses. Indeed, if the archetype can be fully instantiated in experience, then it is not '*always* possible for us to deepen our understanding of [the archetype] through the experience of pursuing it.'

But, one might ask, what if the archetype is *finite enough* to determine legal validity, but *infinite enough* that we can always deepen our understanding of it? This question does not help Simmonds. Suppose that the archetype of law is infinite enough that we can always deepen our understanding of it. If we can always deepen our understanding of the archetype, then we can always gain new insights regarding what counts as a legal system. This is because the archetype contains the essential elements of law. The archetype contains the essential elements of law because the existence of law is determined by proximity to the archetype. Sufficient proximity to the archetype being the determinant of legal validity makes sense only if the archetype contains (in their ideal form) the essential elements of law. Resultantly, if the archetype of law is infinite enough that we can always deepen our understanding of it, then we can always gain new insights regarding what counts as a legal system. However, if we can always gain new insights of what counts as a legal system, then any determination of legal validity is necessarily subject to revision (indeed, any revision of a determination of validity would also be subject to revision). This outcome creates a problem for this particular defence of Simmonds. Where any determination of legal validity is necessarily subject to revision, the invocation of the status of law, as a justification for sanctions, is unintelligible-- how can something that is necessarily subject to revision justify (to the subject) the imposition of sanctions that could include a lengthy prison term or even the death penalty?

As a result of these considerations, although the acceptance model asserts that law necessarily provides certain subjects with several choices, it does not argue that law necessarily exhibits

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partially embody the ideal (and which may in advance have seemed perfectly to realise the ideal) can open up forms of moral perception and understanding that enable us to grasp the extent to which the ideal outstrips its current embodiment. The idea of a central case seems to me rather different, and not to involve these complexities.' (ibid.).

liberty as independence, nor that the archetype of law-- assuming it obtains-- manifests the depth of the ideal of legality. Here are the choices that are necessarily provided by law, the initial six of which may be protected by a right to bodily integrity.

A choice of whether to conform with legal directives

We can begin the discussion of choices necessarily provided by law with Hart's idea of efficacy (i.e. that a legal system exists only if its directives are sufficiently conformed with) and Fuller's sixth precept of legality (i.e. that a legal system exists only if its directives are, to some extent, followable). If a legal system exists only if its directives are, to some extent, followable and sufficiently conformed with, then law necessarily provides subjects with a choice of whether to conform with its directives. If subjects cannot choose to conform with directives, then such conformity can only be involuntary and sporadic-- even if officials force subjects to conform involuntarily, it is hard to imagine such power not being confined to those instances in which officials are capable of exerting physical force upon subjects. And, involuntary and sporadic conformity is likely insufficient to establish (or maintain) a legal system, which (by Hart's requirements) exists only if its directives are sufficiently conformed with.

Note that, when I say 'to some extent' (as in 'a legal system exists only if its directives are, to some extent, followable'), I mean 'in at least one case.' A feature (e.g. directives being followable) occurring in (at least) one case may not seem significant; however, it is important to remember that I am talking about *theoretical minimums*-- the task is to identify elements that are essential for law's bare conceptual existence. Given the doctrine of precedent and the systematic nature of law, it is highly unlikely that a legal system will in practice exhibit only a single, isolated, case exhibiting the features identified. In practice, if there is a single case affirming a given principle or exhibiting a certain feature, then there will likely be a line of cases resulting therefrom, which must cohere with the larger legal system.

The fact that law necessarily provides subjects with a choice of whether to conform is sufficient to distinguish law from a gunman writ large. When we picture the gunman in our minds, we might imagine him as saying, 'your money or your life' (or something of that nature); but, in reality, there is no reason why the gunman has to give his victim any choice at all-- he can,

rather, simply shoot (and then rob) his victim.[379] We have, then, identified one way in which law necessarily respects, to some extent, subjects' capacity to choose the ends to which their means will be put: law-- unlike a state of lawlessness-- necessarily provides subjects with a choice of whether to conform with its directives.

The choice of whether to conform with legal directives is, more exactly, a choice of whether to perform those acts (or non-acts) which will be treated by the legal system as conforming with directives.

A choice of how to conform with legal directives

Simmonds has argued that law necessarily provides subjects with choices regarding how to conform with legal directives:

> Simply in consisting of followable rules, the law must recognize certain areas of (non-obligatory) conduct, however narrowly circumscribed those areas may be: for the law's demands cannot be limitless while also being possible to comply with. Even if my daily round is entirely absorbed by the performance of legal duties, I must enjoy certain options about how I perform those duties (e.g. should I wear a hat whilst doing so?) if the duties are to be performable at all.[380]

Simmonds' suggestion, that law necessarily provides subjects with choices of how to conform with legal directives, is supported by the Hartian fact that a legal system exists only if its directives are efficaciously conformed with: to deprive subjects of all choices regarding how to conform, legal directives would have to be specified with such extensive detail that it would not be possible for subjects to efficaciously conform with them. Where (for instance) subjects have a legal obligation to appear in court, the law cannot-- without becoming generally unfollowable-- specify when subjects will eat what for breakfast, how many steps they are to walk to their cars, which route to drive to the courthouse etc. Given that law exists only if its directives are efficaciously conformed with, subjects must have choices as to how to conform with legal

[379] Notice, however, that this is a limited distinction, because it is possible that a gunman requires the cooperation, with his directives, of his victims in order to achieve his criminal purposes.

[380] Simmonds (n 14) 104.

directives. These choices are choices regarding which acts (or non-acts)-- from among those constituting conformity with directives-- to perform.

A choice of whether to defend (i.e. plead not guilty) against sanctions

There is a third choice that law necessarily provides: legal subjects necessarily have, to some extent, a choice of whether to defend (i.e. plead not guilty) against sanctions. This is a choice of whether to perform those acts (or non-acts) which will be treated by a legal system as a plea of not guilty.

According to Fuller, a legal system exists only if its sanctions are, to some extent, imposed *only* following non-conformity with directives. This is due to the precept that there must be, to some extent, congruence between official action and declared rule. Now, consider that a subject can be charged and prosecuted even if innocent, i.e. even if he has not violated a legal directive. We know this is true because sometimes subjects who are prosecuted are (correctly) found not liable (in virtue of not violating a legal directive). However, if subjects have no opportunity to plead not guilty (i.e. if the court deems them to have pled guilty in any event), then being prosecuted is the same as being liable. In these circumstances, being prosecuted is the same as being liable because, if a (deemed) guilty plea is the only available option, then liability necessarily follows prosecution. And, if liability necessarily follows prosecution, then liability is imposed without having to show that the subject failed to conform with a legal directive (given that it is not necessary, for a guilty plea to be registered, for the prosecution to prove a directive has been violated).

In this way, if subjects have no opportunity to plead not guilty, then sanctions do not depend, to any extent, on non-conformity with directives, given that liability (and thus sanction) results from prosecution regardless of whether a subject has failed to conform. If the imposition of sanctions does not depend, to any extent, on subjects' non-conformity with directives, then sanctions are not necessarily imposed, to any extent, only on subjects who have failed to conform. In the end, if (as Fuller says) a legal system exists only if its sanctions are, to some extent, imposed only on subjects who have failed to conform, then subjects must have some opportunity to plead not guilty-- if subjects never have any opportunity to plead not guilty, then

the legal system's sanctions will be imposed regardless of whether there has been non-conformity with directives.

A choice of whether to challenge the law in court

A plea of not-guilty can be supported in at least three ways. First, a subject can argue that he did not violate the directive he is accused of violating. Second, a subject can argue that, although he violated the directive he is accused of violating, he has an applicable defence. Third, a subject can argue that, although he violated the directive he is accused of violating, the directive in question is not a *legal* directive (i.e. does not have the status of law). This third option represents a challenge to legal validity.

For a legal system to exist, it must be possible for subjects to challenge the validity of a law in court. A similar idea was presented by Fuller: 'the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.'[381] In Kristen Rundle's description, 'The central thesis of "Forms and Limits" is that adjudication can be distinguished from other forms of ordering by the particular mode of participation that it confers upon the parties to an adjudicated dispute and decision.'[382] In Fuller's view, adjudication is 'a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering.'[383] Accordingly, 'If, as in adjudication, the only mode of participation consists in the opportunity to present proofs and arguments, the purpose of this participation is frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretense whatever to rationality.'[384] In Fuller's 'Forms and Limits' the conversation is convened in 'the language of having a chance to put your case, of arguing for a decision in your favour, of

[381] Lon Fuller and Kenneth Winston, 'The Forms and Limits of Adjudication' (1978) Harvard Law Review 353, 364.

[382] Kristen Rundle, *Forms Liberate* (Hart Publishing 2012) 40.

[383] Fuller and Winston (n 381) 366.

[384] ibid. at 367.

participating in a process with a view to your own ends and, within this, being treated as an end in yourself, yet all the while necessarily respecting another's entitlement to do the same.'[385]

Why must subjects be granted, in at least one case, a choice of whether to challenge the validity of laws? To see why, keep in mind that the rule of recognition-- essential for a legal system to exist-- is a duty-imposing rule (it imposes a duty on officials to apply the law as determined by the rule of recognition). In Stephen Perry's words, 'The normative character of the rule of recognition, like all Hartian social rules, is duty- or obligation-imposing. More particularly, it imposes a duty on officials to apply other rules which can, in accordance with criteria set out by the rule of recognition, be identified as valid law.'[386] Importantly, however, the rule of recognition will not be a duty-imposing rule-- and thus will not exist-- if the 'duty' it imposes on officials ultimately depends on the discretion of officials themselves. The idea behind this conclusion is that a 'duty' that can be discarded at the discretion of the person it is imposed on is no duty at all.

Keeping these points in mind, imagine now that a legal system provides subjects with no opportunity whatsoever to challenge the validity of its laws. If subjects have no opportunity to challenge the law, then subjects cannot argue in court that a given law is legally invalid due to not satisfying the criteria of the rule of recognition. If subjects cannot argue that laws are legally invalid because failing to satisfy the rule of recognition, then challenges to legal validity, on the basis of non-fulfillment of the rule of recognition, can come only from officials at their discretion.

Why 'at their discretion'? Why can there not be a rule S specifying when officials must challenge a law for failing to satisfy the rule of recognition? Suppose there is such a rule S. Here, if subjects have no opportunity whatsoever to challenge the legal validity of rules, then officials have discretion to create and abide by rule T, which says that rule S is without force. Officials have discretion to create rule T because, given that subjects cannot challenge the validity of rule T, it is only officials who can choose whether to challenge the validity of rule T.

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[385] Rundle (n 382) 42.

[386] Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006-2007) 75 Fordham Law Review 1171, 1172.

Because officials can always choose to not challenge the validity of rule T, they can continue to abide by rule T at their discretion. Because officials have discretion to conform with rule T, they have discretion to not conform with rule S (as prescribed by rule T). But, one might ask, what if the rule of recognition itself, as part of the duty it imposes, obligates officials to challenge the validity of those rules which they reasonably suspect do not satisfy the rule of recognition? In other words, what if the rule of recognition affirms, 'apply *only* those rules which satisfy the rule of recognition'?[387] Here, the situation is the same. It does not matter *where* the duty to challenge the validity of rules comes from (e.g. whether from rule S or the rule of recognition): as long as subjects cannot challenge the validity of laws, subjects cannot argue that officials have failed in their duty to challenge the validity of rules they suspect do not satisfy the rule of recognition. These arguments, resultantly, can come only from officials at their discretion.

To this analysis, one might respond by pointing out that legal systems often exhibit separation of powers, which could limit official discretion regarding whether to challenge the validity of laws. However, the separation of powers is only a contingent feature of law. Further, even if a legal system exhibits separation of powers, such separation can only *constrain* officials' discretion-- it does not prevent officials from exercising it to avoid their duties. Even if there is separation of powers, it is still ultimately up to the discretion of officials-- albeit multiple factions of them-- to determine whether to challenge the validity of laws (assuming that subjects are unable to challenge them).

Most significantly, where subjects cannot challenge legal validity, rules establishing the separation of powers are themselves subject to the discretion of officials, who can choose to issue directives altering or circumventing these rules. Indeed, just because a legal system has rules establishing separation of powers, we cannot conclude that an official's ability to alter or circumvent these rules (i.e. by creating new laws) is itself subject to a separation of powers. The only way in which this counter-argument could be effective is if there is a rule (e.g. rule A or rule B) establishing that a separation of powers applies to any official who attempts to alter or circumvent rule A, which establishes a separation of powers. However, there is no reason why

[387] This is how Raz interprets the rule of recognition: 'The rule of recognition imposes an obligation on the law-applying officials to recognize and apply all and only those laws satisfying certain criteria of validity spelt out in the rule' (Raz (n 10) 93).

any rule A or B, stating that a separation of powers applies to any official attempting to alter or circumvent rule A, is not itself subject to alteration or circumvention by an official acting in his discretion. There must, as a result, be a rule (e.g. rule A or B or C) stating that a separation of powers prevents an official from using his discretion to alter or circumvent rule A or B. And so on. The separation of powers criticism could work, therefore, only if there is an infinite regress of separation of powers which is never subject to an official acting pursuant to his own discretion. But such an infinite regress does not obtain.

To see why, suppose there is an (apparent) infinite regress of separation of powers such that, for each separation of powers, there is a rule stating that the rules establishing the separation of powers are themselves subject to separation of powers, such that they cannot be altered or circumvented by an official acting in his discretion. This apparent infinite regress of separation of powers is not a true infinite regress because it is actually subject to whether an official chooses to exercise his discretion: (where subjects cannot challenge legal validity) if an official, acting in his discretion, creates a new rule that invalidates each rule establishing a separation of powers, and such invalidation is retroactively applied to before the creation of the new rule, then such official is legally unconstrained (by the separation of powers) and free to use his discretion to create the new rule and thereby alter or circumvent the rules establishing the separation of powers.

In the outcome, if challenges to legal validity, on the basis of non-fulfillment of the rule of recognition, cannot come from subjects, then officials have discretion as to whether their lawmaking is constrained by a rule of recognition. And, if officials have discretion as to whether their lawmaking is constrained by a rule of recognition, then such 'rule of recognition' is not duty-imposing: this 'rule of recognition' does not impose a duty on officials because the only 'duty' it can impose on officials (i.e. to apply the legally valid law) is one that, being conditional on the discretion of officials, is no duty at all. Given that any true rule of recognition is duty-imposing, we can on the above grounds infer that a purported legal system, providing subjects with no opportunity to challenge the validity of its directives, is not underpinned by a (duty-imposing) rule of recognition and thus does not exist as a true legal system. Ultimately, then, a legal system exists only if it provides, to some extent, subjects with a choice of whether to perform those acts that will be treated by the system as a source of information that is considered

(by courts) in determining whether a directive is legally valid in virtue of satisfying the rule of recognition (or the chain of validity issuing therefrom).

This discussion shows that, in any legal system, subjects must have some opportunity to challenge legal validity in court on the ground that a purported law does not actually fulfill the criteria of a rule of recognition (or the chain of validity emanating therefrom). This opportunity is more significant than may appear at first because it provides considerable leeway to the subject: because the subject must have some opportunity to argue that a purported law is invalid due to non-fulfillment of the rule of recognition, the nature and identity of the rule of recognition (and the chain of validity issuing therefrom) is a live issue. It is therefore open to the subject to make arguments about what the rule of recognition actually *is*. This, then, is another choice a legal system necessarily grants to certain subjects-- a choice of how to interpret the system's rule of recognition (and the chain of validity issuing therefrom to the particular directive that has allegedly been violated). Furthermore, because the subject can make arguments about what the rule of recognition actually is, he has an opportunity to influence the nature of the legal system that governs him by influencing how its rule of recognition is interpreted. This is one way in which the legal subject can participate, to some extent, in his own governance.

We have identified at least four choices that a legal system necessarily provides to some of its subjects. These choices may need to be protected by a right to bodily integrity. There are two relevant scenarios. First, the subjects of a legal system could be so peaceful that, if their system did not provide a right to bodily integrity, they would not interfere with each other exercising the choices that must be provided by law. In these circumstances, the legal system can exist-- in virtue of providing the choices[388] that must be provided-- without providing a right to bodily integrity protecting these choices. Here, the choices are exercisable-- and thus can be provided by law-- even absent a right to bodily integrity. Second, the subjects of a legal system could be not so peaceful that, if their system did not provide a right to bodily integrity, they would not interfere with each other exercising the choices provided by law. It is (only) in the second scenario that a legal system exists only if providing to subjects a right to bodily integrity protecting these choices. In sum, I am not arguing that the right to bodily integrity is a necessary

[388] The assumption here is that choices are provided by law only if they are exercisable.

element of law; the acceptance model does not make this claim because it is possible that subjects are so peaceful that-- even absent a right to bodily integrity-- law can provide them with the choices it must provide in order to be law. Given that the right to bodily integrity may be a non-essential feature of law,[389] the acceptance model does not rely on it to account for legal normativity. The right to bodily integrity is nonetheless a significant part of the acceptance model because, I will argue, the right to bodily integrity coupled with the implied point of view is sufficient (although unnecessary) to establish legal normativity.

The right to bodily integrity that may be provided by law protects subjects against interference precluding them from choosing certain acts (or non-acts) (e.g. challenging the law in court) that their bodies will be used to perform. For example, where subjects have a choice of whether to conform with legal directives, the right to bodily integrity can protect this choice by protecting subjects from interferences that would preclude them from freely performing those acts (or non-acts) which are treated by a legal system as conforming with its directives.

There is significant overlap between the right to bodily integrity, on the one hand, and Kant's innate right to freedom (as described by Arthur Ripstein), on the other hand. Describing Kantian freedom, Ripstein says: 'In the first instance, your capacity to set your own purposes just is your own person: your ability to conceive of ends, and whatever bodily abilities you have with which to pursue them. You are independent if you are the one who decides which purposes you will pursue.'[390] Kant's claim is that 'you are independent if your body is subject to your choice rather than anyone else's, so that you, alone or in voluntary cooperation with others, are entitled to

[389] Of course, it is possible that the right to bodily integrity is an essential feature of law (even if the acceptance model does not rely on this being the case). Hart seems to take this view: 'The common requirements of law and morality consist for the most part not of active services to be rendered but of forbearances, which are usually formulated in negative form as prohibitions. Of these the most important for social life are those that restrict the use of violence in killing or inflicting bodily harm. The basic character of such rules may be brought out in a question: If there were not these rules what point could there be for beings such as ourselves in having rules of *any* other kind? The force of this rhetorical question rests on the fact that men are both occasionally prone to, and normally vulnerable to, bodily attack.' (Hart (n 84) 194). Hart's rhetorical question suggests that, without a right to bodily integrity, law would be pointless. Inferentially, to the extent that law has a point (whether a modest Hartian point of guiding conduct, a more robust Finnisian point of practical reasonableness and flourishing, or a point of providing choices), it must provide a right to bodily integrity.

[390] Ripstein (n 59) 14.

decide what purposes you will pursue.'[391] These points apply not only to Kant's innate right to freedom, but also to the right to bodily integrity that is being proposed.

This rationale for the right to bodily integrity (i.e. as a way of ensuring law provides the choices it must provide to be law) means that it does not matter what form (e.g. claim right against the state vs a private right etc.) the right takes. What matters is that subjects' bodies are protected from interference in such a way that subjects can exercise the choices that must be provided by law. Whatever form of right fulfils this role can be considered a 'right to bodily integrity.'

A choice of whether to alter, via property or contract, one's rights

For Hart, any legal system necessarily contains a minimum content of natural law, which (among other things) allows subjects to vary their rights by way of property[392] and contract.[393] In response to Hart, Raz is quick to point out that, just because a legal system facilitates property and contract, does not mean that such system has moral value.[394] A similar sentiment is described by James Allan: 'Hart's minima were any rules that allowed people to live in groups.

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[391] ibid.

[392] 'It is a merely contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil. These facts alone make indispensable some minimal form of the institution of property (though not necessarily individual property), and the distinctive kind of rule which requires respect for it.' (Hart (n 84) 196).

[393] 'But the division of labour, which all but the smallest groups must develop to obtain adequate supplies, brings with it the need for rules which are *dynamic* in the sense that they enable individuals to create obligations and to vary their incidence. Among these are rules enabling men to transfer, exchange, or sell their products; for these transactions involve the capacity to alter the incidence of those initial rights and obligations which define the simplest form of property. The same inescapable division of labour, and perennial need for co-operation, are also factors which make other forms of dynamic or obligation-creating rule necessary in social life. These secure the recognition of promises as a source of obligation.' (ibid. at 196-197).

[394] Raz (n 3) 169: 'H.L.A. Hart, who did more than anyone to clarify the nature and status of the claim that there are common elements to the content of all legal systems, regards these arguments as explaining whatever truth there is in the natural law approach. This may be true. But if it is, more will have to be established than that there must be in every legal system some laws regulating the use of force, property, voluntary obligations or sex. One would have to show that these areas of conduct have to be regulated in a morally good way. Cannot the use of force or the institution of property be regulated in a morally obnoxious way? Can it not be regulated to support oppressive slavery, for example?'

Such living did not have to be of a kind ensuring individual justice. It could be awful living. It could be of a sort experienced by blacks in Apartheid South Africa, by slaves in ancient Rome, by untouchables in India, by women in large parts of the world today.'[395] However, I am not arguing that law is necessarily moral because it exhibits Hart's minimum content of natural law. Rather, the argument is that, because a legal system exhibits Hart's minimum content of natural law, subjects are provided with choices-- that may be protected by a right to bodily integrity-- regarding whether to alter (via property or contract) their rights. More specifically, the law must provide, to some extent, subjects with choices regarding whether to perform those acts that will be treated by the legal system as altering, via property or contract, subjects' rights.

Of course, this argument works only if Hart's minimum content of natural law is entailed by a legal system's existence. Richard Epstein holds this view: 'In the end, I think that the full picture leads to this conclusion, Hart adopted the phrase "minimum content of natural law" to show the bare minimums that any legal system has to have in order to survive.'[396] However, Allan emphasizes that Hart's minimum content of natural law depends on contingent facts:[397]

> Hart simply offers a very Humean set of assertions, all of them made as empirical generalisations (not as a priori truths), about limited altruism, vulnerability, approximate equality and limited resources. All of Hart's assertions are open to potential challenge. For instance, one need not accept that humans are such that their fellow feeling, their love of others, is limited [...] The same goes for the claim about limited resources, approximate equality and all the others. They are all open to empirical challenge.[398]

[395] James Allan, 'Is You is or is You Ain't Hart's Baby? Epstein's Minimum Content of Natural Law' (2007) 20(2) Ratio Juris 213, 223.

[396] Richard Epstein, 'The Not So Minimum Content of Natural Law' (2005) 25(2) Oxford Journal of Legal Studies 219, 221.

[397] Which Hart readily admits: 'It is a merely contingent fact that human beings need food, clothes, and shelter…' (Hart (n 84) 196).

[398] Allan (n 395) 221.

Indeed, 'If you accept that picture of the world as an accurate empirical generalisation, and only if you accept that picture, then given that we are focused only on those who wish to survive and that requires group living (a further contestable claim), it follows that we need rules against violence, theft and deception.'[399]

Allan's words could be interpreted as implying that, due to the contingency described, a legal system does not necessarily exhibit the minimum content of natural law. Yet, even if the minimum content of natural law depends on contingent facts, we cannot without more conclude that the minimum content is not entailed by law, given that it is possible that law depends on the same contingent facts that the minimum content depends on. And, it is plausible that the contingent facts, regarding our nature and limited resources, that are entailed by the minimum content of natural law are also entailed by a legal system. Would a society of beings whose needs are (somehow) entirely satisfied have a legal system? What use is coordination (such as that provided by law) to a group of beings who want for nothing that could be produced thereby? And, if such beings have no use for their (purported) legal system, then would they generally conform with its directives in facilitating its existence? Perhaps not-- why bother? This argument assumes that these hypothetical beings are rational; however, such rationality is implicit in the hypothetical-- if a group of beings (somehow) want for nothing that could be produced by law, then they do not want for legal reason or knowledge, and must therefore be highly rational.

A choice of whether to seek a legal remedy

I have argued that a legal system exists only if it provides several choices, each of which may be protected by a right to bodily integrity. Where at least one subject has a right to bodily integrity, such subject must have a choice of whether to seek a remedy for violations of his right. This is because a subject has a choice of whether to bring to the attention of the legal system (e.g. via a lawsuit) any violation of his right. The assumption is that, if a subject is precluded from bringing a violation of his right to the attention of the legal system, then he does not truly have a legal right.

[399] ibid.

Interestingly, then, the right to bodily integrity generates its own expansion: where at least one subject has a right to bodily integrity, at least one subject has a choice-- of whether to seek a legal remedy for violations of his right-- that may be protected by the right to bodily integrity.

A choice of whether to be governed by a given legal system

Because law exists only if efficacious, it is always theoretically possible for subjects to eliminate (although perhaps only at great cost) a legal system by choosing non-conformity en masse. A legal system's subjects, as a whole, therefore necessarily have a choice of whether to *be* subjects of their legal system. Here, the choice is: (1) efficaciously conform with legal directives and be governed by a (possibly awful) legal system, or (2) do not efficaciously conform with legal directives (and bear any resulting costs) and cease being governed by a particular legal system.

At least (the initial) six of these seven choices may be protected by a right to bodily integrity. The right to bodily integrity may seem quite thin, protecting as it does only against interference precluding a subject from exercising any of the six choices.[400] At the same time, the right to bodily integrity does represent a right to life-- to protect subjects' capacity to choose, the right to bodily integrity must protect subjects' lives, given that subjects are capable of choosing only if alive. This, of course, does not protect against interference not resulting in an incapacity to choose, but it does provide a measure of protection that is objectively valuable.

4.3 The Implied Point of View

The acceptance model includes the implied point of view as part of its layered understanding of legal normativity. The acceptance model implies both (1) that the implied point of view, coupled with the necessary provision of several choices to officials and certain subjects, is sufficient to establish that officials and certain subjects ought to treat as true the proposition that there is a prima facie reason to efficaciously conform, and (2) that the necessary provision, by a legal system, of several choices to officials and certain subjects is sufficient to establish a prima facie reason for officials and certain subjects to efficaciously conform with the directives of that legal system.

[400] This thinness is arguably necessary, given that legal normativity must be exhibited by even highly immoral legal systems.

The implied point of view specifies how officials and subjects 'have' the reasons, provided by law, for efficaciously conforming with legal directives. More exactly, the implied point of view explains how-- from the perspective of an official's or subject's own practical reasoning-- an official or subject ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. An official or subject adopts the implied point of view when, in executing his role as official or by acting out a choice provided by law, he exercises for any reason his capacity to choose. By exercising for any reason his capacity to choose in execution of his role or by making a choice provided by law, an official or subject treats as true the proposition that the legal system provides him with choices with which to satisfy reasons. As a result, officials and certain subjects ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. The prima facie reason to efficaciously conform is to facilitate the legal system, which exists only if efficacious, so that it can (1) provide officials with choices entailed by their official roles, and (2) provide subjects with several choices (identified above) that may be protected by a right to bodily integrity.

But, readers might ask, why is the implied point of view helpful in explaining legal normativity? Why is Hart's theory, and the internal point of view, insufficient? I will discuss several critiques of Hart and the internal point of view, some (e.g. Simmonds') more successful than others.[401] Hart's most famous critic is probably (still) Dworkin. Dworkin's strongest critique of Hart, as identified by Shapiro, comes in the form of the theoretical disagreement argument. Dworkin's objection 'attempts to show that legal positivists are unable to account for a certain type of disagreements that legal participants frequently have, namely, those that concern the proper method for interpreting the law.'[402] The 'only plausible explanation' for the possibility of such disagreements is that 'they are moral disputes,'[403] which indicates that 'law does not rest on

[401] The scholarship responding to Hart's theory represents an enormous literature. The discussion that follows is not intended to be a comprehensive treatment or summary of that literature. Rather, the purpose of the discussion is more modest-- to establish the point that there are legitimate concerns regarding the adequacy of Hart's account of legal normativity. Note that, even if Hart's theory is sound, the acceptance model can still be seen as a helpful supplement.

[402] Scott Shapiro, 'The Hart-Dworkin Debate: A Short Guide for the Perplexed' (2007) University of Michigan Law School Public Law and Legal Theory Working Paper Series 77, 26-27.

[403] ibid. at 27.

social facts alone but is ultimately grounded in considerations of political morality as well as institutional legitimacy.'[404]

To make his critique, Dworkin distinguishes between 'propositions of law' and 'grounds of law.'[405] A proposition of law may be true or false, and is a statement about the content of the law in a particular legal system. Whether a proposition of law is true or not depends on the grounds of law. The grounds of law are thus propositions in virtue of which propositions about law are true and false.[406] Regarding Hart's theory, the grounds of law would include the rule of recognition.[407] Dworkin argues that two types of legal disagreements are possible.[408] First, an empirical disagreement is about whether the grounds of law have obtained as a matter of fact. Second, a theoretical disagreement is not about whether the grounds of law obtain, but rather involves conflicting claims about what the grounds of law *are*. The problem, argues Dworkin, is that the 'plain-fact' view of law cannot account for theoretical disagreements.

Plain fact theories affirm that the existence and content of jurisdiction-specific law depend on empirical facts (e.g. about the history of a statute).[409] The plain-fact view, for Dworkin, consists of two claims: (1) that the grounds of law are determined by consensus among officials; and (2) the only types of facts that may be grounds of law are those of plain historical fact.[410] Inferentially, the plain-fact view 'cannot countenance the possibility of theoretical legal disagreements':[411]

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[404] ibid.

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

[406] ibid.

[407] Barbara Baum Levenbook, 'Dworkin's Theoretical Disagreement Argument' (2015) 10(1) Philosophy Compass 1, 3.

[408] Dworkin (n 405) 4-6.

[409] ibid. at 7.

[410] Shapiro (n 402) 30.

[411] ibid.

> For if, according to its first tenet, legal participants must always agree on the grounds of law, then it follows that they cannot disagree about the grounds of law. Any genuine disagreement about the law must involve conflicting claims about the existence or nonexistence of plain historical facts. They must, in other words, be purely empirical disagreements.[412]

Dworkin's critique attempts to 'capitalize on the alleged fact that judges often disagree with one another about what the grounds of law are.'[413] To the extent that Hart is committed to the plain-fact view of law,[414] he cannot explain theoretical disagreements because the plain-fact view holds that the grounds of law are fixed by agreement.[415] The relevant question asks: how can Hart account for 'disagreements about the legal bindingness of certain facts whose bindingness, by hypothesis, requires the existence of agreement on their bindingness?'[416]

In response to Dworkin's theoretical disagreement critique, Hart denies that his theory is a 'plain-fact' view of law,[417] and (following Coleman) treats disagreements about the grounds of law as disagreements concerning the application-- and not the content-- of the rule of recognition.[418] In such a dispute, there can be 'a fact of the matter over which the disputants are disagreeing. The dispute may be due to the incorporation of moral principles and values into a jurisdiction-specific rule of recognition, where it is their application that is disputed.'[419] Hart

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[412] ibid. at 30-31.

[413] ibid. at 37.

[414] Smith claims that plain fact theories are generally understood to refer to legal positivism. See Dale Smith, 'Theoretical Disagreement and the Semantic Sting' (2010) 30(4) Oxford Journal of Legal Studies 635.

[415] Shapiro (n 402) 37.

[416] ibid. at 38.

[417] 'as I have already stated, my theory is not a plain-fact theory of positivism since amongst the criteria of law it admits values, not only "plain" facts.' (Hart (n 84) 248).

[418] ibid. at 246.

[419] Levenbook (n 407) 4.

thus claims that legal positivism can 'account for disagreement about the application, rather than the content, of general jurisdiction-specific standards of existence and content of law.'[420] However, this response can account for only some, and not all, of what Dworkin is contemplating: 'Dworkin also claims that the disputes he is interested in are about "pivotal cases," which go to something at "the core" of or "fundamental" to the law,' and disputes about application 'don't touch the core of the rule of recognition, since they aren't about its content.'[421] In the outcome, Hart 'can't account for widespread disputes about pivotal cases for the rule of recognition; for pivotal case divergence is inconsistent with mutual recognition of the same rule of recognition.'[422]

Another of Hart's prominent critics is Raz, who argues that Hart fails to establish legal normativity:

> A valid norm can either be practised or not. It can be followed and endorsed by a person or a society or it can be disregarded by them. A norm which is not valid can, of course, also be practised. That a norm is practised entails that at least some believe that it is valid, but it does in no way entail that the norm is valid. The practice theory of norms is mistaken in thinking that by explaining what it is for a norm to be practised it explains what a norm is.[423]

If Raz is correct, then Hart's internal point of view is insufficient to explain the normativity of law; this is because the existence of a norm is independent of whether it is 'followed and endorsed by a person or a society.' The acceptance model gets around Raz's critique because, in the acceptance model, the implied point of view does not-- and is not meant to-- establish reasons for conformity provided by law. Rather, in the acceptance model, the implied point of

[420] ibid.

[421] ibid.

[422] ibid.

[423] Raz (n 3) 81.

view identifies how officials and subjects 'have' the defeasible reason that is independently provided by law (i.e. the provision of choices).

Raz makes another criticism of Hart's internal point of view, arguing that law cannot be normative for subjects simply in virtue of officials taking the internal point of view for purely prudential reasons.[424] Raz's critique implies that, absent being done in subjects' self-interest, officials' acceptance of the internal point of view can impose duties on subjects only if, in violation of Hart's legal positivism, officials adopt it for moral reasons (or at least pretend to do so).[425] As discussed below, the implied point of view avoids this critique of Hart because, unlike the internal point of view (which is necessarily adopted only by officials), the implied point of view is necessarily adopted by (certain) subjects as well as officials.

Shapiro presents at least four (somewhat overlapping) criticisms of Hart. First, Shapiro argues that Hart commits a category error by conflating social rules (e.g. the rule of recognition) with social practices. To this end, Shapiro says that 'for Hart, social rules are social practices.'[426] In Shapiro's description, Hart reduces social rules to social practices, such that 'social practices generate rules because these rules are nothing but social practices.'[427] Hart's problem, says Shapiro, is that social rules cannot be reduced to social practices because rules and practices belong to different metaphysical categories: rules are 'abstract objects' rather than 'entities that

[424] 'For it seems that rules telling other people what they *ought* to do can only be justified by *their* self-interest or by moral considerations. My self-interest cannot explain why they ought to do one thing or another except if one assumes that they have a *moral* duty to protect my interest, or that it is in *their* interest to do so. While a person's self-interest can justify saying that he ought to act in a certain way, it cannot justify a duty to act in any way except if one assumes that he has a *moral* reason to protect this interest of his.' (Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 Oxford Journal of Legal Studies 123, 130). For a rebuttal of this line of reasoning, see Chapter 4 from Kramer (n 49).

[425] 'it seems to follow that I cannot accept rules imposing duties on other people except, if I am sincere, for moral reasons. Judges who accept the rule of recognition accept a rule which requires them to accept other rules imposing obligations on other people. They, therefore, accept a rule that can only be accepted in good faith for moral reasons. They, therefore, either accept it for moral reasons or at least pretend to do so.' (ibid.).

[426] Shapiro (n 2) 80.

[427] ibid. at 95.

exist within space and time,' while practices are 'concrete events' that 'take place within the natural world and causally interact with other physical events.'[428]

Kramer has defended Hart by arguing that, while it is true that social rules cannot be reduced to social practices, it is untrue that Hart advocated for such reduction. Two points support Kramer's conclusion. First, the few statements made by Hart that could be (ungenerously) interpreted as affirming a reduction of social rules to social practices are properly interpreted as affirming no such thing. Second, Hart was aware of the distinction between 'the regularities of social practices and the norms toward which those practices are oriented.'[429]

Regarding the first point supporting Kramer's response to Shapiro, consider the following passages from Hart:

1) 'if a social rule is to exist[,] some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.'[430]
2) 'How many of the group must...treat the regular mode of behaviour as a standard of criticism, and how often and for how long they must do so to warrant the statement that the group has a rule, are not definite matters.'[431]
3) 'to refer to the internal aspect of rules seen from [the] internal point of view' is 'to bring into the account the way in which the group regards its own behaviour.'[432]

With respect to the first and second passages, Kramer argues that the term 'standard' is equivocal, and can refer either '(i) to an abstract normative entity toward which some practice is oriented or (ii) to the behavioral and attitudinal regularities that make up the practice.'[433] Although Hart at times uses the term 'standard' in the latter sense, 'there are no grounds whatsoever for the claim that he collapsed the former sense in to the latter.'[434] Similarly,

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[428] ibid. at 103.

[429] Matthew Kramer, 'In Defense of Hart' (2013) 19 Legal Theory 370, 382.

[430] Hart (n 84) 56.

[431] ibid.

[432] ibid. at 90.

[433] Kramer (n 429) 381.

[434] ibid.

regarding the third passage, although Hart 'wrote both about the adoption of an internal perspective on rules and about the adoption of an internal perspective on the behavioral/attitudinal regularities that are oriented toward those rules,' he does not suggest that the rules are 'nothing more than the regularities.'[435]

The second point, supporting the conclusion that Hart did not reduce social rules to social practices, is that Hart 'frequently evinced his awareness of the distinction between the regularities of social practices and the norms toward which those practices are oriented.'[436] Kramer notes that Hart adverted to 'the regularities of observable behaviour in which conformity with the rules partly consists.'[437] Kramer suggests that, if Hart had taken the position Shapiro says he takes, then Hart would 'not have referred here to conformity with the rules; he would instead have written about the regularities of behavior in which the rules themselves partly consist.'[438] From the fact that Hart does refer here to conformity with the rules, 'we can rightly infer that he did not take the rules to be reducible to the behavioral regularities and associated attitudes of which social practices are composed.'[439] Another example of Hart's awareness of the distinction is when Hart declares that 'our social group has… rules which, like that concerning baring the head in church, makes [sic] a specific kind of behavior standard.'[440] Kramer argues that, if Hart espoused the reductive position imputed to him by Shapiro, then Hart 'would not have written that the rules make certain patterns of behavior standard. Rather, he would have written that the rules are certain standard patterns of behavior.'[441]

Regarding his second critique of Hart, Shapiro argues that the internal point of view means that

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[435] ibid. at 381-382.

[436] ibid. at 382.

[437] Hart (n 84) 89.

[438] Kramer (n 429) 382.

[439] ibid.

[440] Hart (n 84) 57.

[441] Kramer (n 429) 383.

Hart's theory violates Hume's law (i.e. derives an 'ought' from an 'is').[442] In response to Hume's challenge, Hart argues that social facts can be approached not only theoretically, but practically (i.e. as reasons for action) as well. On this view, normative judgments are 'not apprehensions of normative facts, but rather commitments to giving descriptive facts certain weight in one's deliberations.'[443] Pursuantly, it is possible to 'take the internal point of view toward the social practice of rule recognition and, in so doing, treat it as a standard for guidance and evaluation.'[444] Next, 'The normative judgments that are formed through this practical engagement with social practice can then be used to derive other normative judgments about legal rights, obligations, and validity.'[445] In this way, 'Legal reasoning in a positivistic framework does not, therefore, violate Hume's Law, insofar as legal judgments are derived only from other, similarly normative judgments.'[446] However, Shapiro argues that, due to the way Hart's theory treats the bad man's behavior, such theory's response to Hume's challenge is seriously undermined:[447]

> Insofar as the bad man is bad, he does not engage practically with the regularity among officials. This practice of recognition is merely the object of a descriptive judgment, not a normative judgment to treat it as a standard of conduct and evaluation. Despite the lack of practical engagement, he is able to figure out the law of his jurisdiction and characterize it using standard legal terminology. He

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[442] 'The problem with Hart's expressivism is that it cannot account for certain features of legal thought and discourse. Even when people do not accept the law from the internal point of view, it is always possible for them to figure out the content of the law and to describe legal rules using the familiar normative terminology of 'obligation,' 'rights,' and 'validity.' The fact that even the bad man can engage in legal reasoning, despite his alienation from legal practice, strongly suggests that legal judgments can be made without taking the internal point of view. If so, then the bad man will have derived a normative judgment from purely descriptive ones, and will have violated Hume's law in the process.' (Shapiro (n 2) 111).

[443] ibid.

[444] ibid. at 111-112.

[445] ibid.

[446] ibid. at 112.

[447] ibid. at 113.

> is able, in other words, to derive a normative judgment from a purely descriptive one. Since the reasoning of the bad man follows the DINO pattern, it violates Hume's Law.[448]

Shapiro's third critique is that Hart's internal point of view cannot account for the redescribability of law. Shapiro explains what 'redescribability' means by explaining that, 'Even when the law is no better than the gunman, it is always possible to accurately redescribe its content using normative terminology. This is so even when the asserter does not take the internal point of view toward the secondary rule of the system.'[449] Thus, 'The bad man does not accept these norms but can nonetheless truthfully redescribe the law in terms of obligations, rights, and legal validity.'[450] So, on Hart's 'expressivist' theory, 'the law can be described as imposing obligations, conferring rights, and validating rules only when the asserter accepts the system's rule of recognition. However, the bad man can redescribe the law using normative terminology, even though he takes the external point of view.'[451] If Shapiro's third critique is correct, then Hart's internal point of view is unnecessary to account for the use of normative legal language.

Shapiro's fourth critique is that Hart's internal point of view cannot account for the 'openness' of legal reasoning: 'The bad man can not only talk the talk; he can think the thought.'[452] Even the bad man can 'think like a lawyer.'[453] Shapiro concludes that legal reasoning 'is a remarkably open process. Even those who judge the law morally illegitimate, or reject it for self-interested reasons, can figure out what the law demands of them.'[454] This is entirely appropriate, suggests Shapiro, given that 'it would be bizarre if the only people who could understand the law were

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[448] ibid.

[449] ibid. at 112.

[450] ibid.

[451] ibid. at 113.

[452] ibid. at 112.

[453] ibid.

[454] ibid.

those who accepted it.'[455] Unfortunately, says Shapiro, 'Hart cannot explain either the redescribability of the law or the openness of legal reasoning.'[456] For Hart, the law can be described as normative only when the asserter accepts the system's rule of recognition. However, 'the bad man can redescribe the law using normative terminology, even though he takes the external point of view.'[457] The case regarding legal reasoning is similar.[458] Like his third critique of Hart, Shapiro's fourth critique implies that the internal point of view is unnecessary to account for legal normativity (in the form of normative legal reasoning): if those who do not adopt the internal point of view can engage in normative legal reasoning, then the internal point of view is unnecessary to explain how individuals can engage in normative legal reasoning.

Kramer, once more, comes to Hart's defence. In Kramer's description, Shapiro insists that Hart violates Hume's law because 'people can reason about the law and reach legal conclusions even if they have not adopted the internal perspective toward the practices of law-ascertainment in their jurisdiction. They can derive normative inferences about the law while occupying an uncommitted perspective.'[459] In Shapiro's mind, then, Hart fails to explain how an uncommitted observer could manage to 'draw normative conclusions from the non-normative facts of officials' conduct and attitudes.'[460] Even though the uncommitted observer 'does not ascribe normative force to the conduct and attitudes,' he is able to reach conclusions about legal norms and obligations.[461] Shapiro contends that Hart cannot credibly deny the possibility of an

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[455] ibid.

[456] ibid. at 113.

[457] ibid.

[458] 'legal reasoning makes sense in a Hartian framework only when the reasoner accepts a particular rule of recognition. But the bad man does not engage with the law in a practical manner, yet he is still able to derive the content of the law. On Hart's account, legal reasoning turns out to be a highly discriminatory process: only good people can engage in it.' (ibid.)

[459] Kramer (n 429) 388.

[460] ibid. at 389.

[461] ibid.

uncommitted observer drawing such conclusions, and yet 'within the confines of his theory the drawing of such conclusions by such an observer is a contravention of Hume's Law.'[462] However, Kramer responds, there is a dichotomy-- the simulative/internal dichotomy-- that shields Hart from Shapiro's criticism.[463]

A person occupying the simulative perspective 'does not merely attribute normative beliefs to officials and some citizens; in addition, he articulates such beliefs as if they were his own,' such that he 'speaks or writes as if from an internal point of view without actually occupying that point of view.'[464] A simulative utterance can be compared to a thespian performance. They are similar in that each 'consists in giving voice to a point of view that is not one's own,' but a simulative perspective 'leaves much more latitude for innovation than does the recitation of lines.'[465] Kramer argues that, 'By adverting to the as-if role of the simulative perspective, Hart could account for the ability of an uncommitted observer to articulate normative conclusions about the law in this or that jurisdiction.'[466]

To prevent Hart from utilizing such a strategy, Shapiro tries to undermine Raz's distinction between committed and detached statements. To this end, Shapiro summarizes the distinction as follows: 'According to Raz, committed and detached statements express the same normative proposition but have different truth conditions. Committed statements have normative truth conditions, whereas detached statements have exclusively descriptive truth conditions.'[467] Regarding the difference in truth conditions, 'The usual semantic assumption is that propositions are individuated according to their truth conditions.'[468] In response to Shapiro, Kramer argues that the 'committed/detached dichotomy is naturally understood (by a philosopher) as a matter of

[462] ibid.

[463] ibid. at 391.

[464] ibid. at 389.

[465] ibid. at 390.

[466] ibid.

[467] Shapiro (n 2) 415.

[468] ibid.

pragmatics rather than as a matter of semantics.'[469] More precisely, it is naturally understood as a 'difference between the purposes for which people utter various statements rather than as a difference between the meanings which people's statements bear.'[470] Because Raz's dichotomy is a difference of the former sort and not the latter, 'it does not pertain to any distinction between truth-conditions.'[471] And, 'If the content of a simulative utterance is the same as that of an internal utterance, then the truth-conditions for the utterances are likewise the same.'[472] For instance, 'If a sentence S is uttered simulatively, the truth-conditions for that simulative statement are the same as the truth-conditions for an internal statement that consists of the utterance of S.'[473] If Kramer is right, then Shapiro fails to undermine the distinction which is thus available to defend Hart[474] against Shapiro's criticisms.

Simmonds makes two critiques of Hart, the latter of which is particularly effective. First, Simmonds (like Raz) argues that the internal point of view-- which is necessarily adopted only by officials-- cannot account for how law might be normative for its subjects. Second, Simmonds argues that the internal point of view is not necessarily connected to the status of law, indicating that the internal point of view cannot render intelligible the invocation by judges of the status of law as a justification for sanctions.

Regarding the first critique, Simmonds points out, 'It is impossible to understand how any official could think that the acceptance of a rule of recognition by himself and his colleagues (for what might be entirely non-moral reasons) could without more be offered as a justification for the ordering of force against a defendant.'[475] In response to Simmonds, Hart might argue that

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[469] Kramer (n 429) 391.

[470] ibid.

[471] ibid.

[472] ibid.

[473] ibid.

[474] Or the acceptance model.

[475] Simmonds (n 14) 130. Indeed, 'imagine a judge who informs the defendant that he is to be punished because he has violated a rule stemming from the basic rule of recognition that the judge and his colleagues accept. Why should the defendant care about that? Why should anyone regard this, without

law is not necessarily normative for subjects, and so there is no need to explain how law is necessarily normative for subjects. Simmonds' first critique, therefore, is effective only if, to render intelligible the invocation of the status of law as a justification for sanctions, it is necessary to explain how law is normative for its subjects. It seems clear that explaining how law is normative for its subjects would be sufficient to render intelligible the invocation of the status of law-- but is such an explanation necessary for intelligibility? Perhaps not-- perhaps there could be reasons for officials to invoke to subjects the status of law as a justification for sanctions that do not involve law's capacity to provide subjects with reasons for conforming. For instance, perhaps officials want to achieve some (moral, immoral or amoral) purpose, and believe that invoking the status of law as a justification for sanctions will further their purpose by furthering subjects' conformity with the law.[476] Simmonds' first critique, therefore, undermines Hart's internal point of view as an account of legal normativity only if there is a need to explain how law is normative for its subjects.

Simmonds' second critique of Hart is more daunting:

> On Hart's account [...] it seems that the justificatory force of the rules is entirely a matter of derivability from the rule of recognition. But derivability from a rule of recognition qualifies the relevant rules as law only if the system as a whole is a legal system. Claims about the status of the system as a whole, however, form (on Hart's account) no part of the justificatory reasoning. Consequently, the status of the rules as law plays no part in the justificatory reasoning, while our settled understandings tell us that such status is critical to the justification.[477]

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more, as a justification for the decision? How then can the judge regard it, without more, as a justification for the decision? The intelligibility of the purported justification is thrown still further into doubt if we remember that (according to Hart) the judge may accept the basic rule for purely non-moral reasons, including reasons of self-interest.' (ibid. at 129).

[476] Shapiro presents a different view: 'Hart's account [...] misconstrues the intended audience of the law. Subjects, not officials, are the primary objects of legal guidance and evaluation. Thus, when officials guide and evaluate conduct, they form judgments and make claims about the conduct that subjects should perform. Statements about X's legal obligation to do A are statements about X's reasons to do A, not the official's reasons for demanding that X do A.' (Shapiro (n 2) 115).

[477] Simmonds (n 14) 130.

This second critique is stronger than the first because, even if officials accept the rule of recognition for moral reasons, such acceptance 'might nevertheless be unrelated to the status of the rule of recognition, and the system to which it gives rise, as a system of law.'[478] This lack of relation (to the status of law) is possible because a rule of recognition can underpin *non-legal* systems: 'Not all systems of rules derived from a basic rule of recognition are systems of laws. There could be a basic rule of recognition in certain games, for example, where the game is complex and regulated by some official body.'[479] If a rule of recognition underpins a non-legal system, then (non-technical) acceptance by officials of such rule is an acceptance *unrelated* to the status of law. Explained differently, given that a rule of recognition can underpin a non-legal system, officials' acceptance of a rule of recognition is not necessarily related to the status of law-- the problem here is that 'in the adjudicative justification of sanctions, the status of the relevant rules as law plays a key part.'[480] Given that officials' acceptance of a rule of recognition is not necessarily related to the status of law, any normativity generated by such acceptance is not necessarily related to the status of law; and, if the normativity specified by Hart is not necessarily related to the status of law, then Hart's account fails to render intelligible officials' invocation of the status of law as a justification for sanctions.

Here is another way of understanding Simmonds' second critique of Hart's internal point of view. Suppose that there is a rule of recognition that underpins a non-legal system, and the officials of this non-legal system take the internal point of view towards its rule of recognition. Here, there are officials taking the internal point of view towards a rule of recognition, and yet-- because the rule of recognition underpins a non-legal system-- there is no *legal* normativity. This demonstrates that officials taking the internal point of view towards a rule of recognition is insufficient to establish legal normativity. Because officials taking the internal point of view towards a rule of recognition is insufficient to establish legal normativity, legal normativity depends on something *other* than officials taking the internal point of view towards a rule of recognition. This is significant because, if legal normativity depends on something other than

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[478] ibid. at 133.

[479] ibid. at 127.

[480] ibid. at 133.

officials taking the internal point of view towards a rule of recognition, then Hart cannot account for legal normativity merely by referring to the internal point of view. And, if Hart's internal point of view (without more) cannot account for legal normativity, then the internal point of view (without more) cannot render intelligible the invocation of the status of law as a justification for sanctions. This, says Simmonds, is a problem because (as discussed above) we can explain how law is a coherent social practice only if we render this invocation intelligible. Simmonds' second critique of Hart, then, does not merely threaten Hart's account of legal normativity; indeed, this critique indicates that Hart cannot describe how law is a coherent social practice. Even if Hart rejects the need to explain how law is normative for its subjects, he would admit that an adequate (legal positivist) theory must describe how law is a coherent social practice. If this is correct, then one lesson to learn from Simmonds' critique of Hart is that, to be adequate, an account of legal normativity must attach to the status of law.

The significance of Simmonds' second critique of Hart's internal point of view becomes clear in light of Shapiro's argument that Hart intended the internal point of view not to explain legal normativity but, rather, to render legal practice intelligible. Per Shapiro, 'It is sometimes thought that Hart introduced the internal point of view in order to explain how social rules, and in turn the law, can give group members reasons for action.'[481] This interpretation, however, renders Hart's claims 'thoroughly perplexing, for he never explains how the internal point of view imbues rules with normative force.'[482] Shapiro asks, 'how does the fact that most members of the group believe that others have a reason or an obligation to D give them a reason or obligation to D?'[483] For Shapiro, the internal point of view 'does not explain the morality or rationality of legal activity, but rather its very intelligibility.'[484] However, if Simmonds' second critique is correct, then Hart's internal point of view-- if intended to render legal practice intelligible-- is

[481] Scott Shapiro, 'What is the Internal Point of View?' (2006-2007) 75 Fordham Law Review 1157, 1166.

[482] ibid.

[483] ibid.

[484] ibid.

inadequate because it cannot render intelligible the invocation, made by judges, of the status of law as a justification for sanctions.

Raz's argument, that the internal point of view is inadequate to account for legal normativity, has been made by others.[485] For Adam Perry, this objection 'shows the need to supplement Hart's account of the attitude held by participants in the internal aspect of a social rule.'[486] Drawing upon the work of philosophers of action (such as ME Bratman, L. Jonathan Cohen, and Robert Stalnaker), Perry proposes supplementing Hart's account by adding the idea of (technical) acceptance, which involves treating, for some reason, a proposition as true: it is the 'notion of *treating as true* (taking as given, proceeding on the basis, etc) that is central to acceptance.'[487] While the usual reason for treating a proposition as true is because you believe it is true, you can also accept a proposition you do not believe.[488] More exactly, 'acceptance that p in a context leads you to treat p as true in that context,' and 'what you accept in a context is (i) shaped by practical reasons; (ii) context-dependent; and (iii) under your direct, voluntary control.'[489] Perry proposes that 'a participant in the internal aspect of a social rule is someone who has an attitude of acceptance towards the proposition that is the rule's content, where that acceptance is held independent of any corresponding belief. The internal aspect of that social rule is then a societal or "shared" belief-independent acceptance of that proposition.'[490]

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[485] (Adam) Perry summarizes another version of the critique: 'Hart understood the participants' attitude in terms of its manifestations. It leads participants in the internal aspect of a social rule to criticize deviations from the rule, to acknowledge the legitimacy of like criticisms by others, and to express these reactions using normative language. The problem, as Geoffrey Warnock and others pointed out, is that a belief that an action ought to be performed displays itself in the ways Hart described, yet a society does not have a rule requiring its members to act in some way merely because they generally act in that way and believe they ought to do so.' (Adam Perry, 'The Internal Aspect of Social Rules' (2015) 35(2) Oxford Journal of Legal Studies 283, 283-284).

[486] ibid. at 284.

[487] ibid. at 287.

[488] ibid.

[489] ibid. at 289.

[490] ibid. at 290.

Perry's proposal is helpful in that it addresses Raz's critique: because acceptance involves treating a proposition as true *for some reason*, there is always a reason that plays a role in the practical reasoning of those engaged in (technical) acceptance. Just because we believe or endorse a proposition does not mean the proposition is true, or that there is a reason for treating the proposition as true; however, if we treat the proposition as true for some reason, then there is a reason for treating the proposition as true. If the proposition says, 'you ought to conform with legal directives,' then acceptance indicates you are for some reason treating it as true that you ought to conform with legal directives. Given its advantages, the idea of technical acceptance is adopted by the implied point of view. However, even if Hart's internal point of view is supplemented as suggested by Perry, there is-- based on the critique of Simmonds-- nonetheless reason to doubt that the internal point of view can account for legal normativity. More specifically, even if Hart's internal point of view is supplemented by the idea of (technical) acceptance, what is accepted is still the rule of recognition, and thus this explanation of normativity does not necessarily attach to the status of law (given that, as discussed, a rule of recognition can underpin a non-legal system).

Although not denying Hart's idea of the internal point of view, the acceptance model does not rely on this idea to explain legal normativity. Instead, the acceptance model relies on the implied point of view. The implied point of view plays a similar role in the acceptance model to that played in Hart's theory by the internal point of view-- it is used to explain how law can be normative for officials. Unlike the internal point of view, however, the implied point of view can also explain how law is normative for its subjects. Finally, the implied point of view learns lessons from the criticisms of Hart presented above.

The acceptance model adopts the idea of (technical) acceptance, proposed by Perry, but in a modified way meant to get around the critiques levelled at Hart's internal point of view. To accomplish this task, the acceptance model must (among other things) be connected to the status of law. The acceptance model is connected to the status of law because it is only a legal system (and not any non-legal form of governance) that is conditional on providing certain subjects with the choices identified above. This is because only a legal system is conditional on exhibiting, to some extent, each of Fuller's precepts of legality (in addition to the Hartian requirements), such exhibition necessarily providing certain subjects with these choices. The provision of these

choices is thus secured by-- because such provision is necessary for-- the existence of a legal system. This does not suggest that a legal system cannot cease to exist-- of course it can. But a measure of constancy is in the nature of a legal system: per Fuller, legal directives are not subject to constant change and thus cannot belong to a legal system that comes in and out of existence erratically.

Given that a legal system is conditional on providing subjects with several choices, the fact that a legal system is reasonably constant through time indicates that the choices, provided by law, are reasonably constant through time. Because law's existence is conditional on providing certain subjects with several choices, the law itself functions as a sort of security interest-- if these subjects are not provided with the choices discussed, then they are no longer subject to law (given that the law will have ceased to exist). These subjects (though not subjects generally) are thus bound by legal obligations only if they are provided with the several choices. Because there is no non-legal form of governance that is conditional on providing these choices, there is no non-legal form of governance that acts in this way like a security interest for its subjects.

Remember that to technically accept a proposition, generally speaking, is to treat it as true for some reason. For Bratman, 'in accepting that p I do not simply behave as if I think that p: I also reason on the assumption that p.'[491] For Stalnaker, 'To accept a proposition is to treat it as a true proposition in one way or another-- to ignore, for the moment at least, the possibility that it is false. One may do this for different reasons, more or less tentatively, more or less self-consciously, with more or less justification, and with more or less feeling of commitment.'[492] In Cohen's words:

> to accept the proposition or rule of inference that *p* is to treat it as given that *p*. More precisely, to accept that *p* is to have or adopt a policy of deeming, positing, or postulating that *p*—i.e. of including that proposition or rule among one's premisses for deciding what to do or think in a

[491] ME Bratman, 'Practical Reasoning and Acceptance in a Context' (1992) 101(401) Mind 1, 9.

[492] Robert Stalnaker, *Inquiry* (MIT Press 1984) 79.

> particular context, whether or not one feels it to be true that *p*.[493]

Acceptance may be tacit-- it can, but need not, be reflected in how one speaks or behaves.[494] Acceptance 'implies commitment to a pattern, system, or policy-- whether long or short term-- of premissing that p as a basis for a decision.'[495] At bottom, acceptance 'executes a choice-- the accepter's choice of which propositions to take as his premisses.'[496] Pursuantly, 'Acceptance, in contrast with belief, occurs at will, whether by an immediate decision or through a gradually formed intention.'[497] Consequently, 'We may conclude [...] that people are held responsible and accountable for what they accept or fail to accept, not for what they believe or fail to believe.'[498] For Cohen, acceptance is 'subjectively closed under deducibility.'[499] To introduce the idea of being subjectively closed under deducibility, Cohen explains that:

> It is tempting to say that, while the explicit, direct act of acceptance involves a conscious adoption of a policy about premisses or rules of inference, a person also accepts indirectly or unconsciously all the deductive consequences of each of the propositions that he accepts explicitly, and of any of their conjunctions, whether or not he is himself aware of those consequences or able or disposed to work them out.[500]

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[493] L. Jonathan Cohen, *An Essay on Belief and Acceptance* (Clarendon Press 1999) 4.

[494] ibid. at 12.

[495] ibid.

[496] ibid. at 22.

[497] ibid.

[498] ibid. at 23.

[499] ibid. at 28.

[500] ibid. at 27.

However, 'although it is tempting to analyse acceptance in this way, there is a serious difficulty that the analysis encounters. If acceptance is thus closed under the relationship of deducibility, then a good deal of what a person may accept is either controversial or perhaps even unknown.'[501] Controversy obtains because of the competing theories that exist about deducibility,[502] and 'a good deal of what you accept may even be unknown, if there is still some progress to be made in the logic or mathematics of deducibility.'[503] Yet these problems can be resolved

> if acceptance is instead regarded as merely being subjectively closed under deducibility. Your acceptance then reaches no further than the rule of modus ponendo ponens will carry you. If you accept both p and the deducibility of q from p, then you at least unintentionally, if not in fact intentionally, accept q. *Of course, where q is deducible from p and you accept p, you ought always to accept q*. But whether you actually do so or not depends on whether you also accept that q is deducible from p.[504]

The point (relevant to the acceptance model) is that, if an official or subject accepts a proposition, then such official or subject *ought* to accept every subsequent proposition that is entailed thereby. Those who adopt the implied point of view ought to accept the proposition that there is a prima facie reason to efficaciously conform with legal directives. The proposition--that such prima facie reason exists-- ought to be accepted whenever an official or subject exercises for any reason his capacity to choose in executing his role as official or when making a choice provided by law. Accordingly, one reason the proposition ought to be treated as true is whatever (moral or pragmatic) reason an official or subject has for exercising his capacity to choose in executing his role or making a choice provided by law.

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[501] ibid.

[502] ibid. at 27-28.

[503] ibid. at 28.

[504] ibid. [italics are mine].

To establish the conclusion that, by exercising for any reason his capacity to choose (in execution of his role), an official ought to accept the proposition that there is a prima facie reason to efficaciously conform with legal directives, I will argue that (1) an official accepts a proposition (i.e. that his official role provides him with choices with which he can satisfy reasons) that (2) entails the proposition that such prima facie reason exists. Here is the relevant line of reasoning. If an official exercises for any reason his capacity to choose in executing his official duty, then he accepts the proposition that his official role provides him with choices that allow him to satisfy reasons. The proposition that an official's role provides him with choices with which to satisfy reasons entails the proposition that there is a prima facie reason for him to efficaciously conform with legal directives-- the reason to efficaciously conform is to facilitate the legal system (which exists only if efficacious) so that it can provide the official with such choices.

With respect to officials, the acceptance model gets around Simmonds' second critique of the internal point of view because the source of normativity specified obtains only in a legal system: it is only in virtue of being an official of a legal system that an official is granted certain choices (e.g. regarding how to administer or interpret the law). Similarly, it is only a legal system (and not a state of non-law) that necessarily provides to certain subjects several choices that may be protected by a right to bodily integrity. Further, because officials and subjects ought to accept the proposition that there is a prima facie reason to efficaciously conform with legal directives, it is at least intelligible for officials to invoke (to subjects) the status of law as a justification for sanctions following non-conformity.

Note that I am not arguing that, once officials or subjects have adopted the implied point of view, they ought to treat as true the proposition that a legal system provides them with *undefeated* reasons for conforming (such that, all things considered, they ought to conform). The argument, rather, is that once officials or subjects have adopted the implied point of view, they ought to treat as true the proposition that the legal system provides them with a prima facie reason for efficaciously conforming. Given that the reason in question is prima facie, there is no contradiction in saying that an official or subject has taken the implied point of view towards a legal system that, overall, he ought *not* generally conform with. Here, an official or subject takes the implied point of view by exercising, for any reason, his capacity to choose in executing his

role or by making a choice provided by law; however, this official or subject ought not generally conform with the legal system because the balance of reasons or an exclusionary reason favours non-conformity.

I explained above how officials adopt the implied point of view. I will now describe how a conforming subject does the same. When a subject chooses, for any reason, to conform with legal directives (or to exercise any of the choices provided by law), he treats as true the proposition that the legal system provides him with choices with which to satisfy reasons (i.e. whatever reasons he has for conforming with directives or exercising any of these choices). This is the proposition that is accepted, and-- because a legal system exists only if efficacious-- this proposition entails the proposition that there is a prima facie reason to efficaciously conform with legal directives. The prima facie reason to efficaciously conform is to facilitate the legal system, which exists only if efficacious, so that it can provide subjects with several choices with which to satisfy reasons.

There is also a broader version of the implied point of view. When an official or subject exercises for any reason his capacity to choose in executing his role or making a choice provided by law, he treats as true the proposition that choices provided by law can be used to satisfy reasons; if choices provided by law can be used to satisfy reasons, then a legal system-- because providing choices-- is a means of satisfying reasons. If a legal system is a means of satisfying reasons, then there is a prima facie reason to efficaciously conform-- the reason to efficaciously conform is to facilitate the legal system, which exists only if efficacious, so that it can provide choices and thus be a means of satisfying reasons. So, if an official or subject exercises for any reason his capacity to choose in executing his role or making a choice provided by law, he ought to accept the proposition that there is a prima facie reason to efficaciously conform with legal directives.

Where a legal system also provides a right to bodily integrity (protecting the choices that must be provided by law), there is an additional normativity, which results from the following line of reasoning. When a subject, in conforming with legal directives (or exercising any choices provided by law), chooses for any reason to use (or not) his body, he accepts that securing his bodily integrity has value (after all, he does not want to be interfered with so as to preclude him from acting, or not, in satisfaction of reasons), and thus ought to accept that there is a prima facie

reason to efficaciously conform with legal directives, given that a legal system-- which is conditional on efficacy-- provides him with a right to bodily integrity.

The implied point of view is, in some respects, quite similar to Noam Gur's dispositional model. Gur describes the dispositional model this way:

> [...] the fact of there being a legal system in place which meets certain competence and quality prerequisites-- namely, a system whose substantive laws, procedures, and design generally exhibit a reasonable level of conformity with morality as well as with principles of legality (also known as the rule of law), and are in general reasonably apt to secure valuable goods-- is a reason for its subjects to adopt an attitude which I will refer to as a law-abiding attitude.[505]

For Gur, 'the conative (or behavioural) component of this attitude is a disposition, a standing inclination, to comply with legal requirements,' such that 'those who adopt a law-abiding attitude [...] thereby adopt a disposition to comply with the law.'[506] The implied point of view is similar to the dispositional model because both involve reasons for treating law as something that ought to be complied with. There is, however, a significant difference between Gur's dispositional model and the acceptance model-- Gur's dispositional model does not (and is not intended to) account for legal normativity. This is because Gur's law-abiding attitude obtains only where a legal system satisfies certain moral prerequisites.[507] Indeed, Gur does not intend his dispositional model to answer the question of legal normativity: the focal purpose of Gur's book is to 'inquire into a modal aspect of the relationship between law and practical reasons, rather than to search or establish a theory about the justificatory underpinnings of legal

[505] Noam Gur, *Legal Directives and Practical Reasons* (Oxford University Press 2018) 135-136.

[506] ibid.

[507] 'the dispositional model does not endorse a law-abiding attitude under any legal system, but only under a legal system that meets certain prerequisites of competence and quality: the system's laws, procedures, and design must generally exhibit an at least reasonable (as distinct from perfect or ideal) level of conformity with relevant moral standards, as part of which they must be at least reasonably just and fair.' (ibid. at 138).

legitimacy.'[508] In contrast, the acceptance model can explain legal normativity because the prima facie reason specified by the model (albeit provided only to officials and certain subjects) is provided by any legal system-- including immoral ones not satisfying Gur's moral prerequisites.

The implied point of view learns lessons arising from the discussion of critiques of Hart's internal point of view. According to these lessons:

1) (Arguably) an adequate account of legal normativity explains how law is normative for its subjects;
2) An adequate account of legal normativity will not violate Hume's law (i.e. will not derive an 'ought' from an 'is');
3) An adequate account of legal normativity will explain how the bad man can redescribe the law using normative language and engage in legal reasoning;
4) An adequate account of legal normativity attaches to the status of law.

First, the implied point of view explains how law is normative for (some of) its subjects because the implied point of view, unlike Hart's internal point of view, is necessarily adopted by (certain) subjects[509] as well as by officials.

Second, the acceptance model and the implied point of view do not violate Hume's law. The acceptance model follows the permitted NINO pattern rather than the forbidden DINO pattern: the normative input manifests as (1) a legal system providing several choices to officials and subjects, which is a prima facie reason for efficaciously conforming with legal directives, and (2) whatever reason an official or subject has for exercising, in executing his role or making a choice provided by law, his capacity to choose (in adopting the implied point of view). The normativity specified by the acceptance model is not established merely by the fact that an official or subject has exercised his capacity to choose; rather, the normativity specified by the acceptance model is established by this normative input. The purpose of the implied point of view is not to generate legal normativity; rather, the purpose of the implied point of view is to explain how legal

[508] ibid.

[509] i.e. those subjects granted the choices identified.

normativity figures in the practical reasoning of officials and subjects. It is from the perspective of an official's or subject's own practical reasoning that he ought to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives. More precisely, it is due to the official's or subject's decision, to exercise his capacity to choose for any reason in executing his role as official or making a choice provided by law, that he ought to treat as true the proposition that such prima facie reason obtains. It is not, then, merely from the point of view of *the law* that the official or subject has reason to conform with legal directives; rather, it is additionally from the (implicit) point of view of the official's or subject's own practical reasoning that he has reason to efficaciously conform.

Third, the bad man can redescribe the law using normative language and engage in legal reasoning because (1) nothing in the acceptance model precludes the bad man from doing so,[510] and (2) even if the redescribability of law and engaging in legal reasoning were confined to those taking the implied point of view, the bad man could still engage in such redescribability or legal reasoning because even the bad man can take the implied point of view. Even the bad man (i.e. the subject who does not accept the legitimacy of law) can take the implied point of view because the bad man can be a conforming subject and can make choices provided by law.

Fourth, the normativity specified by the acceptance model attaches to the status of law because it obtains where a system *necessarily* provides the choices discussed-- and only a legal system necessarily provides these choices.

There is a final lesson to be learned. Bring to mind Raz's critique of natural law theories. Raz argued that natural law theories cannot account for legal normativity because they cannot account for the use of normative language, and they cannot account for the use of normative language because they fail to identify a source of normativity that is generally known to officials

[510] For instance, nothing in the acceptance model indicates that only those who adopt the implied point of view can use normative language or engage in legal reasoning-- this is why legal theorists outside the jurisdiction of a legal system can use normative language and engage in legal reasoning despite not adopting the implied point of view towards such legal system. Adopting the implied point of view is sufficient to account for legal normativity; I am not claiming that adopting the implied point of view is necessary to engage in normative language or normative legal reasoning.

and subjects.[511] The acceptance model avoids Raz's critique because officials and subjects generally know that law is a means of satisfying reasons (e.g. subjects know that the legal system can be used to sue people for money), and thus the normativity specified by the acceptance model is generally known to officials and subjects. Because the normativity specified by the acceptance model is generally known to officials and subjects, it can account for their use of normative language.[512]

Under the acceptance model, is law normative only for those subjects who are *necessarily* granted several choices (i.e. only those subjects who must have such choices in order for law to exist), or is it normative also for those subjects who are *contingently* granted such choices? The short answer is that, under the acceptance model, law is normative for those subjects who are necessarily *or* contingently granted these (indeed, any) choices; however, the normativity identified is *unique to law* only for those subjects who are necessarily granted the several choices discussed.

In response to Simmonds' second critique of Hart, I noted above that the normativity specified by the acceptance model attaches to the status of law, in the sense that it is exhibited only by a legal system (given that only a legal system necessarily provides several choices that may be protected by a right to bodily integrity). Expanding on this, the normativity specified by the acceptance model is unique to law only for those subjects who necessarily have the choices identified, but this does not mean that law is not normative (as specified) for those subjects who contingently have these choices. On the contrary, the implied point of view obtains even for those subjects who contingently have these choices, and so law is normative for these subjects as

[511] 'if natural law theories are to explain the use of normative language in such contexts they must show not only that all law is morally valid but also that this is generally known and thus accounts for the application of normative value to the law. Since this assumption is false, natural law cannot explain the normativity of law.' (Raz (n 3) 170).

[512] A possible criticism of the acceptance model is that the normativity it specifies is just too *obvious* to be insightful. To this criticism, I would respond that whatever is responsible for legal normativity would likely be something fairly obvious, because (as pointed out by Raz) it must be something that is generally known to officials and subjects. The obviousness of the right to bodily integrity, or choices provided by law, is consistent with a correct account of legal normativity.

well (it is, however, a normativity that is not unique to law, given that non-legal systems could also contingently provide any of these choices).

For subjects, then, legal normativity (as specified by the acceptance model) operates (or not) on three levels: first, for those[513] to whom the law necessarily grants several choices, legal normativity obtains and is also distinct (from non-legal normativity); second, for those to whom the law contingently grants such choices, legal normativity obtains but is not necessarily distinct; and third, for those without any choices provided by a legal system, law is not normative as specified.[514]

4.4 Possible Counter-Arguments

There are several possible counter-arguments that could be made in response to the claims presented above. Regarding the first possible counter-argument: in response to the acceptance model, it might be said that the proposition that is accepted by officials and subjects (i.e. that the legal system provides choices with which to satisfy reasons) does not entail the proposition that there is a prima facie reason to efficaciously conform with legal directives. This is because the proposition that is accepted specifies several choices that can be (contingently) provided to subjects even absent a legal system, and thus without subjects efficaciously conforming with legal directives. If the choices provided by a legal system can be equally provided by a non-legal system, then officials and subjects accepting the proposition that a legal system provides them with choices with which to satisfy reasons does not entail the proposition that there is a prima facie reason to efficaciously conform with legal directives. Indeed, if there is a non-legal system that provides the same choices (as provided by a legal system), then normativity is achieved (via the non-legal system) regardless of whether a legal system exists, and thus regardless of whether subjects efficaciously conform with legal directives.

However, this counter-argument works only if we assume that a non-legal system, providing the same choices as a legal system, can exist (1) as something other than the legal system itself, and

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[513] It is these subjects for whom the law functions, as described above, like a security interest. This functioning is unique to law.

[514] Which is not to suggest (or deny) that law is not normative in other ways for these subjects-- keep in mind that the acceptance model does not purport to include *every* essential element of law.

(2) even if subjects fail to efficaciously conform with legal directives. If this second assumption does not hold, and such a non-legal system's existence is conditional on subjects efficaciously conforming with legal directives, then any reason to facilitate the existence of the non-legal system would also be a reason to efficaciously conform with legal directives. Yet, (assuming a non-legal system exists only if efficacious) where the *exact* same choices (e.g. regarding conformity) are provided by a legal system and a competing non-legal system, subjects efficaciously conform with the non-legal system (in facilitating its existence) only if they also efficaciously conform with the legal system. Thus, such a competing non-legal system exists only if subjects efficaciously conform with legal directives, and so the second assumption, on which this counter-argument depends, cannot be relied on.

And, note that it is not possible for a competing non-legal system to provide the same, and also more, choices than a legal system. This is not possible because, if a choice is provided by a non-legal system but not provided by a legal system, then a subject of the legal system is prohibited from acting out that choice (given that a subject is obligated to follow a legal system before non-legal directives). If subjects are prohibited from acting out a choice, then such choice is not exercisable and therefore not provided by a non-legal system.

The second possible counter-argument claims that the (present) choices that are exercised in adopting the implied point of view are not the same as the (future) choices that are facilitated by efficaciously conforming with legal directives. This difference seems to break the flow of normativity from the exercise of the present choices provided by law to the justification for efficaciously conforming with legal directives. There are two reasons why this counter-argument does not trouble the acceptance model. The first reason is because the counter-argument is wrong in what it asserts. The second reason is because, even if we assume the counter-argument is correct, it is not effective against the broader version of the implied point of view.

First, the counter-argument is wrong in what it asserts because a choice of whether to [X] is the same choice regardless of whether it is provided in the present or the future (assuming that 'X' has the same meaning in the present and the future). For instance, a choice of whether to challenge legal validity in court is the same choice regardless of whether it is provided in 2010 or 2020-- it is at each time a choice of whether to perform those acts which will be treated by the

legal system as a source of information to be considered (by a court) in determining whether a directive is legally valid. Consequently, if a subject exercises, for any reason, a (present) choice of whether to [X], then he ought to accept the proposition that there is a prima facie reason to efficaciously conform with legal directives-- the reason is to facilitate the legal system, which exists only if efficacious, so that it can provide (in the future) a choice of whether to [X].

But, one might respond, even if the (future) choice is in substance the same, it is still a different instance of the same substantial choice and, just because one chooses a present instance of [X], does not mean that one does, or ought to, accept every future instance of [X]. For example, if A consents to have sex with B (at some point) in 2010, this does not mean that A consents (or ought to consent) to have sex with B in 2020. However, this is a false analogy: the relevant (analogous) question is not whether A's consent to have sex with B in 2010 indicates that A consents (or ought to consent) to sex with B in 2020; this is not the question because I am not arguing that exercising a (present) choice indicates willingness or commitment to exercise the same choice in the future. Rather, I am arguing that exercising, for any reason, a present choice indicates one ought to accept the proposition that there is a prima facie reason to do what is necessary to facilitate the provision of the same choice in the future.

In light of this, the apt question would be whether A's (reasonable) consent to sex with B in 2010 indicates that A ought to accept there is a prima facie reason to do what is necessary to facilitate the provision of a choice of whether to consent to sex with B in 2020. Given that A always has a choice of whether to consent to sex, A does not have to do anything to facilitate the provision of such choice. We are left with the following as the appropriate analysis, for this e.g., that is implied by the reasoning of the acceptance model: if A consents to sex (for any reason) with B in 2010, then A ought to accept that there is a prima facie reason to do nothing at all in order to facilitate the same choice in the future. There is nothing suspicious about this analysis, which does not undermine the acceptance model. Furthermore, even if A (somehow) did not always have a choice of whether to consent to sex, nothing in the acceptance model implies that A consenting to sex with B in 2010 indicates A's consent to sex with B in 2020. All that would be implied is that A consenting to sex (for any reason) with B in 2010 indicates that A ought to accept there is a prima facie reason to do what is necessary to ensure the provision, in 2020, of a choice of whether to consent.

Second, even if we assume this counter-argument is correct in what it asserts, it is nonetheless ineffective against the broader version of the implied point of view. Here, again, is the broader version of the implied point of view. When an official or subject exercises for any reason his capacity to choose in executing his role or making a choice provided by law, he treats as true the proposition that choices provided by law can be used to satisfy reasons; if choices provided by law can be used to satisfy reasons, then a legal system-- as a provider of choices-- is a means of satisfying reasons. If a legal system is a means of satisfying reasons, then there is a prima facie reason to efficaciously conform-- the reason to efficaciously conform is to facilitate the legal system, which exists only if efficacious, so that it can provide choices and thus be a means of satisfying reasons. In this way, if an official or subject exercises for any reason his capacity to choose in executing his role or making a choice provided by law, he ought to accept the proposition that there is a prima facie reason to efficaciously conform with legal directives.

Notice that in the broader version of the implied point of view, legal normativity does not depend on the provision of any *particular* choice but, rather, depends on the fact that the legal system provides choices and is therefore a means of satisfying reasons. The legal system is a means of satisfying reasons even if the (present) choices that are exercised by subjects are different than the (future) choices that are facilitated by efficaciously conforming with legal directives-- this is because both sets of choices are means of satisfying reasons. In other words, what is accepted here is not merely that a legal system provides a particular choice with which to satisfy reasons, but also that a legal system-- as a provider of choices-- is a means of satisfying reasons.

A third possible objection to the acceptance model is that the prima facie reason it identifies is too weak to count as a genuine reason.

The reasons for an action are 'considerations which count in favour of that action. Other things being equal, they are sufficient grounds for taking the action, and, barring reasonable ignorance or other excuses, grounds for finding fault with the actor's conduct, if he fails to take the action.'[515] We can think of these grounds as the 'fact statements of which form the premises of a sound inference to the conclusion that, other things being equal, the agent ought to perform the

[515] Raz (n 3) 186-187.

action.'[516] Considerations establishing that an action also has disadvantages 'do not in the least show that the reasons do not exist, nor do they show that they are subject to an 'exception''.[517] Indeed, the 'original reasons are still there. The inference from them to the conclusion that, other things being equal, the act ought to be done is still sound.'[518] These conflicting considerations 'merely show that there are conflicting reasons, i.e. that there is also a sound inference to the conclusion that, other things being equal, the act ought not to be done.'[519] The 'other things being equal' premise needed to sustain a conclusion regarding what ought to be done 'excludes defeating considerations of any kind,' including (but not limited to) conflicting reasons, which are 'essentially independent considerations which point to the desirability of the non-performance of that action.'[520]

The issue raised by this counter-argument, then, is whether the provision of several choices by a legal system is a consideration that, *other things being equal*, is sufficient grounds for officials and certain subjects to efficaciously conform. To the extent that the choices necessarily granted by law are valuable but obtained only through efficacious conformity, certain subjects-- other things being equal-- ought to efficaciously conform in order to obtain these choices. For example, suppose that a subject is granted the several choices identified only if he efficaciously conforms, which (in this hypothetical) means that he must respect the right of bodily integrity provided to each subject. Here, other things being equal, the subject ought to respect others' right of bodily integrity so that he can obtain the choices identified by the acceptance model. The assumption is that the choices are sufficiently valuable to justify the inaction involved in respecting others' right to bodily integrity. Notice that the hypothetical does not work if efficacious conformity requires *violating* others' bodily integrity-- because violating bodily integrity is immoral, we cannot say that there are no defeating considerations (and thus cannot say that 'other things are equal').

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[516] ibid. at 187.

[517] ibid.

[518] ibid.

[519] ibid.

[520] ibid. at 187-188.

I am assuming, then, only that the choices provided by law have sufficient value such that-- all other things being equal-- certain subjects ought to efficaciously conform in order to obtain them. If-- other things being equal-- the provision of choices is sufficient for subjects to ought to efficaciously conform, then this provision is a prima facie reason for efficacious conformity. Note that I make no comment on the *exact* strength of the prima facie reason, such that we could identify with precision which conflicting reasons would equal or outweigh the prima facie reason; my interest is limited to whether the provision of choices has sufficient strength to exist as a prima facie reason.

The discussion of 'other things being equal' also explains how a legal system, by necessarily providing choices to officials and certain subjects, contingently provides a conclusive reason for officials and certain subjects to efficaciously conform. The contingent circumstances arise where other things *are* equal (i.e. excluding defeating considerations of any kind). Where other things are equal, the prima facie reason, necessarily provided by law, becomes a conclusive reason for officials and certain subjects to efficaciously conform.

The fourth possible counter-argument might be called the anarchist's challenge. My argument is that each legal system necessarily provides officials and certain subjects (i.e. those granted several choices) with a prima facie reason to efficaciously conform with legal directives, and contingently (i.e. where other things are equal) provides them with a conclusive reason to efficaciously conform. In response to this argument, an anarchist might argue that although law necessarily provides several choices, it also necessarily deprives subjects of other choices that would be available in a state of non-law.

The anarchist challenge does not undermine the acceptance model because, even if we assume that law necessarily deprives subjects of other choices, such deprivation would not represent a condition that cancels the prima facie reason established by the provision of choices; rather, such deprivation would represent only a conflicting reason. Using different words, even if law necessarily deprives subjects of other choices, it is nonetheless true that there is-- due to the necessary provision of choices-- a prima facie reason for officials and certain subjects to efficaciously conform.

Raz is careful to distinguish between a reason which is overridden (by a conflicting reason) and a reason which is cancelled by a cancelling condition.[521] Conflicting reasons, unlike cancelling conditions, do not render reasons non-existent-- they merely conflict with them.[522] Regarding cancelling conditions, Raz says:

> Once a reason for an action is cancelled it stops being a ground for the action, or for faulting or regretting its non-performance. But the cancelling circumstance is not itself [...] a reason for any other action. The cancelling facts show how the act will no longer achieve its desired result [...] or that the result is no longer desirable.[523]

In contrast, conflicting reasons are 'essentially independent considerations which point to the desirability of the non-performance of that action,' and conflicts of reasons 'occur when the agent has reason both to perform and not to perform a certain act.'[524] Indeed, a reason can be 'overridden only by a fact which is itself a reason for contradictory action.'[525]

If the provision of several choices is a reason in favour of efficacious conformity, and the deprivation of other choices (as proposed by our hypothetical anarchist) is a reason against efficacious conformity, then the deprivation of these other choices represents a conflicting reason, and not a cancelling condition, in relation to the prima facie reason to efficaciously conform established by the provision of several choices. We can see that such a deprivation of choices is not a cancelling condition because this deprivation is itself a reason for non-conformity (which may entail action), while cancelling conditions are not reasons 'for any other action' but rather 'relate to the reasons that they cancel.'[526]

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[521] ibid. at 27.

[522] ibid. at 188.

[523] ibid. at 188-189.

[524] ibid. at 189.

[525] ibid. at 27.

[526] ibid. at 189.

A fifth possible counter-argument is similar to the anarchist's challenge, and involves evil legal systems. The analysis of the anarchist challenge is instructive to the analysis of evil legal systems. Regarding evil legal systems, we are tempted to conclude that-- due to the immorality of the system-- it is not the case that there is a prima facie reason for conformity which is overridden by a conflicting reason but, rather, that there is no prima facie reason for conforming at all.

The relevant issue is whether the immorality of an evil legal system is a cancelling condition or a conflicting reason. Recall that a cancelling condition is not itself a reason for any other action; rather, the cancelling condition shows how an act will no longer achieve its desired result, or that the result is no longer desirable. A conflicting reason, in contrast, points to the desirability of the non-performance of the action supported by the reason it conflicts with. It seems clear enough that the immorality of a legal system supports the conclusion that one ought not conform with its (immoral) directives-- a conclusion against efficacious conformity. This would make such immorality a conflicting reason. Furthermore, the immorality of a legal system does nothing to undermine the effectiveness or purpose of the provision of several choices as a prima facie reason for officials and certain subjects to efficaciously conform, suggesting that the immorality of an evil legal system is not a cancelling condition regarding the prima facie reason established by the provision of choices.

A sixth possible counter-argument asks: what if efficacious conformity is achieved by subjects who are not granted the choices identified? If efficacious conformity is achieved by subjects not granted choices, then why should subjects who are granted choices bother to efficaciously conform?

This sixth counter-argument is misleading, because subjects who efficaciously conform are necessarily subjects who are granted choices, given that (as discussed above) one of the choices granted by law is the choice of whether to conform with legal directives. In other words, by efficaciously conforming with legal directives, subjects are exercising one of the choices granted to them by law.

But, one might respond, what if the subjects who achieve efficacious conformity are granted the first choice (i.e. whether to conform), but none of the other choices? This scenario seems

implausible. If the several choices are necessarily granted by law, then a legal system-- to exist-- cannot effectively prohibit subjects from exercising these choices. And, if the legal system cannot effectively prohibit subjects from exercising these choices, then such choices must be either explicitly or implicitly tolerated by the system. If these several choices are tolerated by the system, then we ought to consider them included within the choice of whether to conform with legal directives.

Chapter 5: A Return to Kant?

In Chapter 1, we began our examination of anti-positivism by looking at Kant's theory of law, which, I argued, is inadequate as an account of legal normativity. Kant's theory is inadequate because it cannot account for the existence of an immoral legal system, and thus cannot account for how an immoral legal system is normative. There is an affinity between Kant's anti-positivism and the acceptance model-- the right to bodily integrity specified by the model significantly overlaps (as described in Chapter 4) with Kant's innate right to freedom, which is the right to 'Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law,' and 'is the only original right belonging to every human being by virtue of his humanity.'[527]

At the same time, there are several differences between the acceptance model and Kant's theory. One difference is that Kant's theory, but not the acceptance model, depends on a relational conception of freedom. There are passages in Ripstein that suggest Kant's theory is inconsistent with the idea, implied by the acceptance model, that a right to bodily integrity (akin to Kant's innate right) could belong to only one person.[528] The point-- that the innate right to freedom cannot belong to a single person alone-- follows for Ripstein because Kant's theory specifies a relational conception of freedom: 'The normative analysis of innate right that I propose is entirely relational,' such that 'The universal principle of right guarantees the coexistence of choice between a plurality of persons.'[529] Because the acceptance model is not premised on a relational conception of freedom, the right to bodily integrity that it describes is not precluded (in theory) from belonging to a single subject only.

A second difference between Kant's legal theory and the acceptance model is that Kant, but not

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[527] Ripstein (n 59) 13-14.

[528] 'I reject the claim that your innate right to independence is grounded in our capacity for purposiveness. Purposiveness is not an interest, specifiable apart from right, which rights serve to protect. You do not, and could not, have an innate right to set and pursue your own purposes, simply as such. Instead, your innate right is your right to set and pursue your purposes, consistent with the entitlement of others to do the same, that is, that your choice be restricted by the choice of others only under universal law.' (Arthur Ripstein 'Reply to Flikschuh and Pavlakos' (2010) 1(2) Jurisprudence 317, 318).

[529] ibid. at 317-318.

the acceptance model, claims that realizing freedom (in the form of the innate right) entails law. For Ripstein's Kant, the 'idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional separation of powers.'[530] These 'norms and institutions' provide 'the only possible way in which a plurality of persons can interact on terms of equal freedom.'[531] In contrast, the acceptance model does not claim that the right to bodily integrity entails a legal system. Rather, the claim made by the acceptance model is that a legal system entails the provision of several choices that may be protected by a right to bodily integrity.

The third and most significant difference, between the acceptance model and Kant's theory, is that only Kant argues that there is a political obligation. Green identifies three similar, but distinct, questions. The first question relates to the normativity of law-- how should we understand 'the pervasive use of normative terms, including "obligation" and "duty," in stating and describing the law'?[532] The second question relates to the legitimacy of law-- 'what might justify [law's] rule, including its ultimate use of coercive force?'[533] The third question relates to political obligation-- 'should the law's subjects take its requirements as morally binding?'[534] As argued by (Stephen) Perry, the second question is distinct from the third question because of the 'reverse entailment problem': 'although it is true that legitimate political authority (in the sense of a moral power) entails the existence of a general obligation to obey the law, the existence of a general obligation to obey the law does not, in and of itself, entail legitimate political authority.'[535] The discussion thus far has been concerned with the first of these questions. Now, I want to turn attention to the third question.

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[530] Ripstein (n 59) 14.

[531] ibid.

[532] Leslie Green, *The Authority of the State* (Oxford University Press 1990) 517.

[533] ibid.

[534] ibid.

[535] Stephen Perry, 'Political Authority and Political Obligation' in Green and Leiter (eds), Oxford Studies in Philosophy of Law 2 (Oxford University Press 2013) 4.

Per the Stanford Encyclopedia of Philosophy, 'To have a political obligation is to have a moral duty to obey the laws of one's country or state.'[536] What are the elements of a political obligation? Green specifies five conditions.[537] These conditions are 'derived simply by considering what it would take to establish the conclusion in question: that every citizen has a duty to obey all the laws of his or her own state.'[538] For Green, there is, within a given legal system, a general obligation to obey the law only if there is (1) a moral reason for action; (2) a content-independent reason for action; (3) a binding or mandatory reason for action; (4) a particular reason for action (meaning a reason that applies only to the subjects of a legal system, and not to those outside its jurisdiction); and (5) a universal reason for action that binds all the legal system's subjects to all of its directives.

Regarding (1) morality, Green says that a political obligation is a 'moral reason for action' and therefore 'has whatever formal and material features a requirement must have in order to be moral.'[539] Green adopts the commonplace view that the first requirement demands 'something more than direct prudential reasoning,' and so 'excludes arguments to the effect that certain threats, offers, or considerations of self-interest mandate compliance.'[540]

What about (2) content-independence? Here, the core idea is that 'the fact that some action is legally required must itself count in the practical reasoning of the citizens, independently of the nature and merits of that action.'[541] One who believes in political obligation does not merely accept that 'In political life as elsewhere we have at least those general duties which bind irrespective of social and political institutions'; rather, he or she also accepts that 'the fact that

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[536] Dagger, Richard and Lefkowitz, David, "Political Obligation", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2014/entries/political-obligation/>

[537] Green (n 532) 224-229.

[538] ibid. at 224-225.

[539] ibid. at 225.

[540] ibid.

[541] ibid.

the state requires something of us itself changes our moral position by giving us further duties or giving existing ones a new source of validity.'[542] This requirement is consistent with the law having only prima facie force, but 'it must at least in principle be capable of making some difference to our moral reasoning, a difference which does not depend on the nature of the action prescribed.'[543] The idea of content-independence is a 'coherent and necessary one in any argument purporting to establish the existence of a political obligation'-- it 'serves to rule out any arguments which cannot show how politics makes a difference to what people ought to do.'[544] Perry replaces Green's content-independent condition with a 'directive-as-ground' (DAG) condition, formulated as follows:

> In the case of any legal directive which attempts to impose a requirement on someone to do X, any argument demonstrating that there is a moral duty to obey the directive which arises by virtue of the directive's status as law must take the existence of the directive as the ground or part of the ground of the duty, but must not make essential reference to the independent merits of doing X.[545]

Why substitute the DAG condition? Perry notes that Green's content-independence condition actually expresses both a negative and positive constraint. The negative constraint is that the 'nature and merits' of a legally required action 'must not count in the practical reasoning of citizens as they decide whether or not they are obligated by the relevant legal directive.'[546] The positive constraint is that 'the fact that some action is legally required must itself count in the practical reasoning of the citizens.'[547] The problem is that both the negative and positive constraints are 'formulated in terms of the actual practical reasoning that is supposedly required of persons to ensure that what they are doing counts as obeying the law,' when it is preferable to

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[542] ibid.

[543] ibid.

[544] ibid. at 226.

[545] Perry (n 535) 15-16.

[546] ibid. at 13.

[547] ibid.

'simply look to what is required for the existence of the obligation.'[548] The DAG condition formulates the negative and positive constraints 'not as constraints on anyone's practical reasoning, but rather as constraints on what can count as an argument that is capable of establishing that there is a (moral) obligation to obey a legal directive, such that the obligation can be said to arise by virtue of the directive's status as law.'[549]

Together with the requirement of (2) content-independence, the requirement of (3) bindingness 'specifies more narrowly what sort of moral reason is expected.'[550] The bindingness condition:

> aims to capture the common view that some actions are obligatory which do not, however, seem to be of special weight and importance. According to [bindingness], they are special because they exclude from consideration certain otherwise valid reasons for non-performance of the action-- usually, and at a minimum, weak considerations of ordinary self-interest or convenience.[551]

The requirements of content-independence and bindingness 'pick out a subset of all the possible reasons for complying with the law as being of special interest'; these two requirements 'offer a partial analysis of what it is to have an obligation.'[552] Note, however, that while these two requirements are severally necessary, they are not jointly sufficient to establish a moral obligation because 'they specify this in purely formal terms: some things satisfying [the two requirements] are not moral reasons of any sort.'[553]

The (4) particularity requirement seeks to 'capture the directionality common to political obligation and other special obligations': 'Just as promising creates duties to particular persons

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[548] ibid. at 14.

[549] ibid. at 16.

[550] Green (n 532) 226.

[551] ibid.

[552] ibid.

[553] ibid.

only and not to the world at large, political obligations bind them to certain states only.'[554] Typically, this means the state of which one is a citizen.[555] The particularity requirement has significant implications, because 'most ordinary moral reasons do not respect the boundaries of states in the appropriate way.'[556] While such reasons 'might be able to explain duties to humanity in general, they can make little sense of narrower, more particular bonds.'[557] Note, however, that Green is not claiming that 'it is paradoxical or impossible for individuals to owe duties to more than one country.'[558] So, while the particularity requirement 'need not be understood as excluding plural obligations, it does exclude general ones.'[559] Political obligation is 'not just some general duty to humanity which requires compliance with governments, but rather a special moral relationship between a citizen and a state.'[560]

The (5) universality requirement is 'doubly universal' in that political obligation 'purports to bind all citizens to all laws.'[561] The question, then, is whether 'it is true of all citizens that they are bound to obey all their laws.'[562] The universality requirement is related to the content-independence requirement: 'if law has content-independent force, then it has it qua law, and that will underwrite the obligation to obey all the laws.'[563] While there are cases in which one is entitled not to obey certain valid laws, the state purports to regulate these exceptions as well.[564]

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[554] ibid. at 227.

[555] ibid.

[556] ibid. at 228.

[557] ibid.

[558] ibid.

[559] ibid.

[560] ibid.

[561] ibid.

[562] ibid. at 229.

[563] ibid.

[564] ibid.

Resultantly, like a universal law of nature, 'the thesis of political obligation cannot withstand a single counterexample': 'In a just state, there can be no valid laws which are morally inert. To support otherwise is just to concede that there is no obligation to obey the law as such.'[565] The universality condition rules out 'any arguments which are merely based on the systematic character of law, for example, on the fact that a legal system being in force provides certain goods of social co-operation.'[566] These benefits result from the general effects of the legal system as a whole; because the source of such benefits is systematic, 'they are threatened only by disobedience which threatens the existence of the legal system or which substantially weakens it.'[567] However, it is 'just false to think that there are no laws whose disobedience the system can survive, and false to think that there are no people whose compliance is unnecessary.'[568] The universality condition is the most difficult to satisfy: 'As an empirical matter, argue Green and many others, it is never true that, for any given legal system, each and every legal directive gives rise to a moral obligation to obey that directive which holds for each and every person who falls within the directive's scope.'[569]

The acceptance model does not purport to establish a political obligation. Just because officials and certain subjects ought, as described by the acceptance model, to treat as true the proposition that there is a prima facie reason to efficaciously conform with legal directives does not mean that there is a political obligation. To assert otherwise is to rely on a non-sequitur. There are at least two reasons why this is a non-sequitur. First, it is only subjects who are granted the several choices discussed that ought, as specified by the acceptance model, to treat as true the proposition that there is a prima facie reason to efficaciously conform. Because not every subject is necessarily granted these choices, not every subject necessarily ought to treat this proposition as true. Second, even for those subjects who are granted these choices, the prima facie reason to conform with directives applies only where such conformity is necessary to

[565] ibid.

[566] ibid.

[567] ibid.

[568] ibid.

[569] Perry (n 535) 12.

establish the efficacy of the legal system (and thereby facilitate its existence), and so does not necessarily apply to all legal directives. These reasons show that Green's universality condition is unsatisfied by the acceptance model.

In contrast to the acceptance model, Ripstein's Kant does purport to establish a political obligation. For Kant, the question of political obligation is closely connected to the concept of freedom. According to Robert Paul Wolff, 'The fundamental assumption of moral philosophy is that men are responsible for their actions. From this assumption it follows necessarily, as Kant pointed out, that men are metaphysically free, which is to say that in some sense they are capable of choosing how they shall act.'[570] Further, 'so long as we recognize our responsibility for our actions, and acknowledge the power of reason within us, we must acknowledge as well the continuing obligation to make ourselves the authors of such commands as we may obey.'[571] There is, says Wolff, a conflict between authority and autonomy:

> The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution to the conflict between the autonomy of the individual and the putative authority of the state. Insofar as a man fulfills his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him. That is to say, he will deny that he has a duty to obey the laws of the state simply because they are the laws.[572]

Raz to some extent agrees with Wolff, stating that '... it is true that accepting authority inevitably involves giving up one's right to act on one's judgment on the balance of reasons,'[573] and that '[Wolff] sees correctly that legitimate authority involves a denial of one's right to act on

[570] Robert Paul Wolff, *In Defense of Anarchism* (University of California Press 1998) 12.

[571] ibid. at 17.

[572] ibid. at 18.

[573] Raz (n 10) 26.

the merits of the case.'[574] As the title of Ripstein's book suggests, Kant is emphatically concerned with the interplay between coercion (force) and freedom: 'States claim authority - the entitlement to tell people what to do - and coercive power - the right to force them to do as they are told. How can these powers be consistent with each human being's entitlement to be his or her own master?'[575]

Kant's argument for a political obligation is ingenious (which is not to suggest it is necessarily correct). Because each person's innate right to freedom can be fully realized only in a rightful condition exhibiting an omnilateral will, we have an obligation to exit the state of nature by founding a state. Given that we have an obligation to establish a state, we have an obligation to obey the laws of existing states.[576] Described summarily, 'if each person has an innate right to freedom, then we have an obligation to found the state, obey its authority, and make it look as Kant describes.'[577] Establishing a state and obeying state authority is required because 'the set of enforceable rights that we have in the state of nature is radically inadequate,' and state authority is justified in virtue of the state's 'ability to place us in a "rightful condition," a condition in which we have the set of enforceable rights required to secure independence.'[578] More exactly, we have a right to equal freedom because each person is entitled to complete independence from others.[579] Independence means that 'each person gets to set her ends for herself, and may not

[574] ibid. at 27. In Raz's description: 'The paradoxes of authority can assume different forms, but all of them concern the alleged incompatibility of authority with reason or autonomy. To be subjected to authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational. Similarly the principle of autonomy entails action on one's own judgment on all moral questions. Since authority sometimes requires action against one's own judgment, it requires abandoning one's moral autonomy.' (ibid. at 3)

[575] Ripstein (n 59) x-xi.

[576] This is how Ebels-Duggan interprets Ripstein's Kant—see Kyla Ebels-Duggan, 'Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy' (2011) 41(4) Canadian Journal of Philosophy 549, 551.

[577] ibid.

[578] Victor Tadros, 'Independence without Interests' (2011) 31(1) Oxford Journal of Legal Studies 193, 194.

[579] ibid. at 195.

have the purposes of others imposed on her.'[580] While 'One person's independence may be less valuable than another's, in that the first person's independence may provide him with fewer opportunities for welfare than the second's,' it is nonetheless true that the two are 'equal in their freedom in that each is fully independent of the other.'[581]

So, Ripstein's Kant believes that 'a rational agent's external freedom-- her ability to set and pursue ends for herself without being subject to the choices of others-- can justifiably be restricted only for the sake of external freedom itself.'[582] Kant's argument for political obligation can be broken down into two premises: first, that human beings living side by side are free only if they enjoy certain rights against one another (including the innate right to freedom); and second, that these rights can be enjoyed only in a civil condition, given that they are either provisional or imperfectly realized in a state of nature.[583] To be clear, however, it should be mentioned that Kant does not affirm that there is a political obligation regarding just *any* authority. If 'an actual state fails to establish the proper republican public institutional framework, then it is not a civil society, and the people living subject to its power are under an enforceable duty to establish civil society.'[584] As a result, Kant's conception of political legitimacy is 'not a conception according to which any systematic and powerful use of might is seen as yielding political obligations (absolutism), since there are institutional requirements on the political authority.'[585] Not just any powerful coercive structure qualifies as civil society: the just state is a 'representative, republican system of public right composed of a tripartite public authority with a monopoly on uses of coercion, which is reconciled with each subject's innate right to freedom through securing private right for all, the provision of conditions of equal

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[580] ibid.

[581] ibid.

[582] Louis-Philippe-Hodgson, 'Kant on Property Rights and the State' (2010) 15(1) Kantian Review 57, 57.

[583] ibid.

[584] Helga Varden, 'Kant's Non-Absolutist Conception of Political Legitimacy—How Public Right 'Concludes' Private Right in the 'Doctrine of Right'' (2010) 101(3) Kant-Studien 331, 351.

[585] ibid.

systemic freedom regarding land, the economy and finances, and through the institutional guarantee of unconditional poverty relief.'[586] These are the institutional conditions that must be met before political obligations exist.[587]

But, one might ask: why, pursuant to Kant, can the innate right to freedom be realized only in a state of law? The answer can be most easily understood by looking at property rights, which-- as a form of acquired right-- represent an extension of the innate right to freedom. In a state of non-law, C acquires through his own choosing a property right (or what would be a property right in a state of law) over a previously unowned object only by placing D under a corresponding obligation of non-interference with the object. But, given that D has an innate right to freedom, on what authority can C unilaterally place D under such obligation? In Ripstein's words, 'Kant's point is that the theory of property raises a deeper problem of how one person's act can place another person under a new obligation. How can an act done entirely of your own initiative, to which others are not parties, have binding effects on them?'[588] For Kant, C has no authority to unilaterally place D under an obligation of non-interference. Rather, the only authority that can place D under such an obligation is not the result of a unilateral will, but is instead the result of an omnilateral will, because it is only an omnilateral will that is consistent with equal freedom. And, an omnilateral will is possible only in a state of law. Here is how Katrin Flikschuh describes the process:

> Property claims and their effects are systemic. In taking any (unowned) external object of my choice into my possession I unintentionally change not only your normative situation but also that of everyone else. You and everyone else do likewise. You, too, along with me and everyone else, claim particular objects of your choice, changing my and everyone else's normative situation relative to that object. So we all unintentionally and unavoidably change one another's normative situation. Yet none of us have a natural authority to put others under a coercible obligation. Only an 'omnilateral' or public

[586] ibid.

[587] ibid.

[588] Ripstein (n 59) 153-154.

> will can have this sort of authority.[589]

Resultantly, 'the claim to freedom of choice and action, hence to property, is vindicable only in the civil condition.'[590]

One implication of Kant's argument is that it limits the considerations that are relevant to legal normativity. As described by Ripstein,

> Although architectonic and methodological factors shape Kant's presentation of his arguments, his grounds for rejecting empirical and anthropological starting points in political philosophy rest on the simple but compelling *normative* idea that, as a matter of right, each person is entitled to be his or her own master, not in the sense of enjoying some form of special self-relation, but in the contrastive sense of not being subordinated to the choice of any *other* person.[591]

This normative starting point for political philosophy 'leads Kant to reject anthropological and empirical factors in general, and benefits and burdens in particular.'[592] This framing of the issues 'limits the ways in which benefits and burdens can be relevant to either the formulation or the application of any basic normative principle.'[593] Accordingly, 'Your right to be your own master entails that no other person is entitled to decide for you that the benefits you will receive from some arrangement are sufficient to force you to participate in it.'[594] Indeed, 'You alone are

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[589] Katrin Flikschuh, 'Innate Right and Acquired Right in Arthur Ripstein's Force and Freedom' (2010) 1(2) Jurisprudence 295, 297-298.

[590] ibid. at 298.

[591] Ripstein (n 59) 4.

[592] ibid. at 5. More specifically, 'Both the empirical peculiarities of human inclinations and vulnerabilities and the consideration of where benefits or burdens fall can only be brought in insofar as they can be shown to be consistent with a condition in which every person is his or her own master as against each of the others. The systematic implications of that right have to be worked out first, before any 'principle of politics' incorporating information based on experience can be introduced.' (ibid.).

[593] ibid.

[594] ibid.

entitled to decide whether a benefit to you is worth the burdens it brings.'[595] Similarly, others cannot 'justify authority over you, or use force against you, on the ground that the restrictions thereby placed on you will generate greater benefits for others.'[596] This same fundamental idea 'blocks the appeal to the sort of value pluralism according to which competing political values rather than interests must be "balanced" against one another.'[597] This is because 'The authority of any person or institution's mandate to balance competing values must itself be reconciled with each person's right to be his or her own master.'[598] Now, none of this means that, for Ripstein's Kant, 'political authority or justified coercion is impossible, or even that institutions are never competent to balance competing values';[599] rather, what is implied is that, for Ripstein's Kant, 'the authority to make or enforce decisions needs to be established by showing it to be consistent with each person's right to freedom before competing interests or value can be considered.'[600] Ripstein is concerned to exclude interests from his conception of rights because he 'views it as problematic that one person can be subordinated to others and their choices.'[601] The worry is that 'if the state, or non-state actors, were permitted to take interests into account in shaping the obligations of others, some people would be co-opted in the service of others.'[602] But, says Victor Tadros, 'Ripstein's reaction to the problem that it is wrong to force some people to act for the sake of others is extreme.'[603] It is extreme because 'it is not obvious that forcing some to act for the interests of others permits the latter to make the former subject to their choices.'[604]

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[595] ibid.

[596] ibid.

[597] ibid.

[598] ibid.

[599] ibid. at 5-6.

[600] ibid. at 6.

[601] Tadros (n 578) 198.

[602] ibid.

[603] ibid.

[604] ibid.

Indeed, 'My interests are not simply determined by my preferences or my choices,' such that 'The fact that I choose v as my end does not make it in my interests that I v.'[605] For Tadros, then, 'Ripstein's implied account of interests tends to exaggerate the extent to which an interest-based account of rights permits one person to impose his will on others.'[606]

Miriam Ronzoni argues that the concept of freedom as independence can provide a foundation for a full-blown account of political justice only if a richer interpretation of it, than that presented by Ripstein's Kant, is provided.[607] More exactly, 'we must be willing to make controversial and empirically informed claims about what counts as a threat to our freedom as independence under specific circumstances.'[608] What is required is a more embedded account of freedom as independence, one that 'engages with the contingencies of politics and of the human condition.'[609] The goal of providing a richer interpretation of freedom as independence cannot be achieved without engaging in 'those empirical and anthropological starting points which Kant intends to eschew.'[610] In particular, the general and highly abstract concept of freedom as independence must be embedded in 'an account of human nature and a conception of the person,' a 'general but suitably rich account of which powers and protections human agents need to enjoy in order to be their own masters,' and 'an anthropologically and empirically informed account of which kinds of human vulnerability, forms of interaction, and social dynamics and structures, can threaten our [...] capacity to be our own masters.'[611] These specifics can be crucial to providing plausible interpretations of what counts as freedom as independence, and of what constitutes important threats to it.[612] It is only in this way that we can 'derive a rich and

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[605] ibid.

[606] ibid.

[607] Miriam Ronzoni, 'Politics and the Contingent: a Plea for a More Embedded Account of Freedom as Independence' (2012) 20(3) European Journal of Philosophy 470, 470.

[608] ibid.

[609] ibid.

[610] ibid. at 472.

[611] ibid.

[612] ibid.

sufficiently concrete package of rights, duties, and institutional recommendations from the right to freedom.'[613] In short, freedom as independence must be embedded in concrete practices for us to be able to give meaning to it.[614] Without this embedding, the concept of freedom 'not only has little guidance, but can be used, rhetorically if not even ideologically, to justify opposing views, policies and institutions.'[615]

Ronzoni is not arguing that Ripstein's Kant is committed to the view that 'everything that matters politically can be logically deduced from the concept of freedom as independence, without relying on any empirical and anthropological insights'; indeed, Ripstein affirms that principles are necessarily abstract, and thus can be applied only with the help of careful exercises of judgment.[616] However, we cannot simply relegate important decisions and crucial areas of disagreements to the 'realm of mere application of principles through the exercise of judgment.'[617] There are two reasons for this. First, such a stark separation between principles and judgment 'might obscure how much disagreement actually happens at the level of judgment, and thus induce us to rest too quickly.'[618] Second, if the exercise of judgment is considered external to political philosophy-- as a mere problem of application-- then 'the very concept of freedom as independence becomes too malleable, and can be interpreted in this or that direction in order to fit in with pre-existing political agendas and sets of interests.'[619] In Ronzoni's view, then, there is an essential intermediate step-- consisting of interpretations of freedom-- that must be taken for us to move from the concept of freedom to a theory of justice.[620]

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[613] ibid.

[614] ibid.

[615] ibid.

[616] ibid. at 476.

[617] ibid.

[618] ibid.

[619] ibid. at 477.

[620] ibid.

Given the significant differences between the acceptance model and Kant's theory, there are certain criticisms that have been made of Kant that do not undermine the acceptance model. I will discuss the following criticisms of Kant: (1) the allegation that Kant's theory of law is circular; (2) the claim that an omnilateral will can obtain absent monopolistic state law, and thus that the requirement for an omnilateral will fails to justify a monopolistic state legal system; and (3) the charge that Ripstein's Kant struggles to justify a duty, to enter into a rightful condition, premised on the innate right (as opposed to acquired right).

Charge of Circularity

Andrea Sangiovanni has charged that Kant's legal philosophy, as described by Ripstein, is circular because it presupposes a conception of morality:

> what are the criteria for determining which uses of one's means (including one's body) count as subjecting others' choices, and which ones count as merely affecting them? [...] At the crucial point where Ripstein introduces the innate right to freedom under universal law, he analyses the notion of subjection in terms of actions that either usurp or destroy your powers to set ends. [...] The trouble is that 'usurp' is a moralized concept: to usurp means to illegitimately take over a power or jurisdiction, or, alternatively, to take over a power or jurisdiction that is rightfully someone else's.[621]

Laura Valentini has similarly argued that Kant's innate right to freedom, as characterized by Ripstein, is circular because it both grounds all other rights and presupposes a conception of rights.[622] Valentini thus argues that 'there is a vicious circularity in Ripstein's definition of the

[621] Andrea Sangiovanni, 'Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?' (2012) 20(3) European Journal of Philosophy 460, 462.

[622] In Valentini's description, 'This vicious circularity arises from Ripstein's endorsement of the following claims: a. The right to freedom grounds all other rights. b. The right to freedom is the right of each individual to be his/her own master, to be independent of the will of others. c. Independence of the will of others consists in the ability to use one's own means to pursue one's own purposes robustly unhindered by others. d. One's own means and purposes are the means and purposes one has a right to. e. The right to freedom is therefore the right to use the means and pursue the purposes one has a right to, robustly unhindered by others. (Laura Valentini, 'Kant, Ripstein and the Circle of Freedom: A Critical Note' (2012) 20(3) European Journal of Philosophy 450, 453).

right to freedom, which prevents it from grounding all other rights.'[623] On the one hand, 'individual rights are said to derive from the right to freedom,' while on the other hand, 'freedom itself is defined by reference to individual rights.'[624] More specifically, 'To be unfree/dependent on others is to have one's own means or resources used by others for their, rather than one's own, purposes. But in order to know what qualifies as one's own, we need a prior account of a person's rights (i.e., a theory of justice), which is precisely what freedom is meant to deliver.'[625]

Valentini uses an example to make her point (that we cannot determine what our means are without a prior conception of rights or justice): 'To be sure, when policemen stop a thief, they prevent him from using his (positive, as opposed to normative) powers for his (positive) purposes, yet we would hardly regard such an intervention as unjust, as a violation of the thief's right to freedom.'[626] When the police stop a thief, 'This is paradigmatically a legitimate intervention, aimed at "hindering a hindrance to freedom" (i.e., the freedom of the victim, whose means would serve someone else's, the thief's, purposes).'[627] And yet 'The freedom referred to in the expression "hindering a hindrance to freedom" cannot be any freedom, but must be the freedom one is entitled to on grounds of justice.'[628] Accordingly, 'Until we have an independent account of justice [...] we cannot know whether someone is free or unfree.'[629] This example shows that 'Unless we know what is ours, we cannot know whether constraints on our de facto agency are violations of our independence or consistent with it. Rather than grounding all rights and entitlements, Ripstein's Kantian notion of freedom is derivative of them (i.e., it presupposes them).'[630]

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[623] ibid. at 451.

[624] ibid.

[625] ibid.

[626] ibid. at 453.

[627] ibid.

[628] ibid. at 454.

[629] ibid.

[630] ibid.

Ripstein has responded to Valentini's charge of circularity, arguing that Valentini ignores the sequenced nature of the Kantian argument, and confuses indeterminacy for circularity.[631] Overlooking the sequenced development of Kant's argument misrepresents Kant in two ways. First, such overlooking misrepresents Kant as 'some sort of libertarian, with respect to politics, unwilling to permit redistributive taxation.'[632] Second, Kant is misrepresented as introducing 'an unargued premise about the moral value of markets.'[633] Valentini not only 'distorts' Kant's position as presented by Ripstein, but also 'misrepresents the Universal Principle of Right not as the starting point of Kant's argument, but instead, as a principle that is supposed to be sufficient to determine exhaustively what is and is not permissible.'[634] Ripstein, following Ronzoni, argues further that Valentini's critique does not show that Kant's argument is circular but, rather, only indeterminate (which is unproblematic for Kant).[635] Moreover, not only do Valentini and Sangiovanni misrepresent the place of the universal principle of right in the Kantian argument, but each also misrepresents the universal principle of right itself:[636]

> Valentini urges that there cannot be a right to freedom by drawing attention to the way in which freedoms might come into conflict with each other.

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[631] Valentini omits mention of 'the sequenced nature of Kant's argument, which introduces new concepts at different stages, developing from each person's innate right of humanity, through the possibility of private rights and then to public right and the right of nations. At each stage, concepts of right are applied to new classes of objects and relationships, including those between individual human beings, and those between citizens and the state.' (Arthur Ripstein, 'Form and Matter in Kantian Political Philosophy: A Reply' (2012) 20(3) European Journal of Philosophy 487, 488).

[632] ibid.

[633] ibid.

[634] ibid. at 489.

[635] 'Ronzoni's contribution shows one respect in which Valentini and Sangiovanni go awry: what they characterize as circularity is better understood as indeterminacy. Abstract conceptions of right need to be made determinate in specific ways and, indeed, it is one of the three pillars of Kant's argument about the need to exit the state of nature that positive law is required to give effect to the Universal Principle of Right. As Ronzoni points out, Kant's argument as a whole not only concedes indeterminacy, but, the indeterminacy of the application of basic concepts of right is a cornerstone of his argument for the need for a state.' (ibid.).

[636] ibid.

> Yet the universal principle of right does not say that each person has a right to freedom; so understood, freedoms would not form a consistent set, and so could not be subject to a right.[637]

This is a misrepresentation because 'Kant's claim is that each person has a right to freedom consistent with the same freedom for others.'[638] In light of Kant's claim,

> the question of whether something falls within a person's right to freedom cannot be answered except in terms of whether everyone else could enjoy the same freedom. The universal principle of right asks how one person's exercise of choice can be independent of each other person's exercise of choice.[639]

However, by overlooking this 'element of systematicity,' Valentini presents Kant's view 'as though he is claiming that two wrongs make a right: if an interference with freedom is bad, then interfering with freedom to prevent an interference with freedom must also be bad.'[640] This presentation is misleading-- 'While talk about wrongdoing in terms of goods and bads is at home in Bentham's philosophy, it has no place in Kant's.'[641]

The arguments of both Valentini and Sangiovanni 'share Bentham's conception of what it would be to give a philosophically adequate account, as both suppose that the concept of a right must either be grounded in something that can be expressed without any reference to the concept of a right, or else must fail because circular.'[642] In contrast, Kant's project 'works out the implications of a set of interrelated and irreducible moral ideas.'[643] Admittedly, 'By Benthamite

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[637] ibid.

[638] ibid.

[639] ibid.

[640] ibid. at 490.

[641] ibid.

[642] ibid. at 491.

[643] ibid.

standards, such an approach must seem circular, because the concept of right is never eliminated in favour of something empirical.'[644] But Benthamite standards are not Kantian standards-- 'the rights that we have are explained in terms of their place in a larger system of right, as developed through the sequenced stages of Kant's argument. So understood, no issue of circularity or emptiness arises.'[645]

Regardless of whether the charges of circularity apply to Ripstein's Kant, such charges do not apply to the acceptance model. Valentini argues that Kant's innate right to freedom is circular because it both underlies and presupposes a conception of rights and justice; however, this charge of circularity does not apply to the acceptance model because the right to bodily integrity-- if provided-- is grounded in legality, which does not presuppose a theory of rights or justice. So, the acceptance model's right to bodily integrity does not presuppose that one's means are those things that one has a right to. Rather, the right to bodily integrity arises where one's body must be protected so that law can provide the choices that it must provide in order to exist as law.[646] The means (i.e. one's body) covered by the right to bodily integrity are not protected because one has a prior right to them (although perhaps one does); rather, these means are protected because in certain circumstances, absent such protection, subjects could be interfered with in preclusion of them exercising any of the choices necessarily provided by law. To the extent that choices are provided by law only if they are exercisable, the argument (made by the acceptance model) that law exists only if providing certain choices indicates that, in certain circumstances, law exists only if subjects' bodies are protected, via the right to bodily integrity, from interference precluding them from exercising any of the choices provided.

Thus, the charge of circularity does not apply to the acceptance model's right to bodily integrity because the right to bodily integrity is not grounded in a prior conception of rights or justice; rather, the right to bodily integrity is grounded in legality and, more specifically, in the need for law to provide particular choices. A subject's body is protected, via the right to bodily integrity,

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[644] ibid.

[645] ibid.

[646] i.e. those circumstances in which subjects are not so peaceful that a legal system can provide the choices identified even without providing a right to bodily integrity to protect them.

simply in virtue of the fact that-- in certain circumstances (i.e. where subjects are not so peaceful that they will on their own allow each other to exercise the choices identified)-- such protection is necessary for law to provide to subjects the choices it must provide in order to exist as law.

Fisher

Talia Fisher argues that Kant's conception of freedom cannot justify the 'concrete, interventionist' state that Ripstein endorses, a state that 'wields the authority to aid the disadvantaged by taxing the excess means of the wealthy.'[647] Pursuantly, even if we accept that Kantian equal freedom can obtain only if public legal institutions are established, there is without more no justification for the Kantian welfare state.[648] More significantly, Fisher goes further and argues that Ripstein fails to offer a solid justification for a state legal system; specifically, that 'Kantian premises regarding the requirement of omnilateral authorization not only do not support the interventionist Kantian state, but cannot even justify the minimal night-watchman state, endorsed by libertarian thinkers.'[649] Fisher's argument is that the innate right to freedom does not, in virtue of entailing an omnilateral will, require or entail a monopolistic state legal system: 'There is room to claim that the assumptions regarding freedom, as articulated in Force and Freedom, do not offer solid justification for any type of state "force" per se, and cannot justify even the minimal night-watchman state, functioning as the embodiment of "Law".'[650] This is because the innate right to freedom, says Fisher, can obtain in circumstances where there are polycentric legal institutions.

Fisher's argument consists of a counterexample showing that the innate right to freedom can obtain even absent a monopolistic state legal system. The innate right can obtain absent a monopolistic state legal system because the innate right can obtain if there are polycentric legal institutions. In Fisher's words,

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[647] Talia Fisher, 'Force and Freedom: Can They Co-Exist' (2011) 24 Can J L & Jurisprudence 387, 389.

[648] ibid.

[649] ibid.

[650] ibid. at 397.

> Law is a network industry, characterized by such demand-side returns to scale. The more people join a legal network to which one belongs, i.e., abide by the rules one is subjected to-the larger the group of people with whom one's transaction costs are lower. The greater the scope of the legal network and its number of members, the more far-reaching the potential legal interactions between those members will be. Each consumer of legislation and adjudication services confers network benefits upon other members of her legal network, by virtue of her mere affiliation with the network.[651]

'Network industries' are 'good and services which generate demand-side returns to scale-namely, greater value to their consumers as the number of users who consume them proliferates.'[652] Roughly speaking, 'network industries can be categorized as those industries whose goal is to serve as a platform for interaction between consumers, and that feature characteristics that enable their consumers to share information and standards.'[653] Law is no different:

> the network features of law will push toward standardization and compatibility between private legal agencies and individual wills even without central planning. The network structure creates mutual dependence among individuals as well as among competing legal agencies: legal agencies must adapt to the network's prevailing norms and institute a framework for arranging inter-agency disputes, if they are to survive. They can only perform by coordinating with competing agencies and by providing network-conforming legal rules with shared basic features.[654]

This analysis is significant because 'Such polycentric legal networks can be viewed as a form of

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[651] ibid. at 399.

[652] ibid.

[653] ibid.

[654] ibid.

"rightful condition," and as an authorization of omnilateral will.'[655] Resultantly, 'The omnilateral authorization requirement can thus be met without resort to a monolithic state law, but rather also under a polycentric legal regime, in which a plurality of legal communities operate in a single geo-political unit.'[656] Fisher concludes that 'a centralistic state law model does not constitute the only possible venue in which a plurality of individuals can interact on terms of equal freedom, for the omnilateral authorization requirement can also be met within the framework of a polycentric legal regime.'[657]

Fisher's critique, however, is inapplicable to the acceptance model because, unlike Kant, the acceptance model does not affirm that a legal system is normative because it is entailed *by* the innate right to freedom or the right to bodily integrity protecting subjects' capacity to choose; rather, the acceptance model affirms that a legal system is normative because it *entails* the provision of several choices that may be protected by a right to bodily integrity. In other words, it does not matter to the (correctness of the) acceptance model whether the right to bodily integrity can obtain in a state of non-law (or in circumstances involving polycentric legal institutions rather than a monopolistic state legal system); what matters is that a legal system is sufficient to provide several choices, which may be protected by a right to bodily integrity, because a legal system's existence is conditional on providing these choices.

Flikschuh

I described above how, for Ripstein's Kant, the need for property establishes a need for an omnilateral will, and thus establishes an obligation to enter a civil condition characterized by such omnilateral will. For Flikschuh, however, there is one right that cannot establish an obligation to enter a civil condition-- the innate right to freedom. This is because, for Ripstein's Kant, the innate right to freedom is self-enforceable in a state of non-law (i.e. a pre-civil condition). Flikschuh asks: 'as self-enforcer of my innate right to freedom, what reason do I have for entrance into the civil condition with regard to that right?'[658] If the innate right is

[655] ibid. at 400.

[656] ibid. at 400-401.

[657] ibid. at 401.

[658] Flikschuh (n 589) 301-302.

'conclusively enforceable by yourself in the pre-civil condition,' then 'the reasons for entering into the civil condition on the grounds of innate right [...] appear to be prudential reasons, have to do with problems of subjective interpretation and lack of assurance.'[659] This, however, takes us away from a Kantian justification and moves very close to 'Lockean natural rights thinking where entrance into the civil condition is ultimately based on considerations of greater convenience.'[660]

Flikschuh's critique, though appealing with respect to Kant, is inapplicable to the acceptance model. Given that the acceptance model does not propose a political obligation or an obligation to enter a civil condition, there is no justification for such a proposal that can be undermined by Flikschuh's reasoning. A legal system's provision of several choices to subjects does not, and is not meant to, establish an obligation to enter a civil condition.

We can see that, although the acceptance model is less ambitious than Kant's theory of law, its modesty shields the model from criticisms such as these that can be directed towards Kant.

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[659] ibid. at 302.

[660] ibid.

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