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## LEGALITY, MORALITY, DUALITY

Joshua P. Davis\*

### *Abstract*

*This Article proposes legal dualism as a novel resolution to one of the central debates in jurisprudence—that between natural law and legal positivism. It holds that the nature of law varies with the purpose for which it is being interpreted. Natural law provides the best account of the law when it serves as a source of moral guidance and legal positivism provides the best account of the law when it does not.*

*The Article explores dualism by contrasting it with the defense of legal positivism in Scott Shapiro's justly renowned book, *Legality*. Shapiro offers arguably the most sophisticated defense of positivism to date. This Article argues that it does not succeed when the law imposes moral obligations, suggesting a limitation in positivism itself.*

*Dualism has profound implications. First, it allows us to hold judges accountable for their moral judgments, even when they are merely saying what the law is. Legal positivism can foreclose this possibility.*

*Second, dualism permits moral argument in support of a particular account of the law, including the theory Shapiro offers, the *Planning Theory*. Positivism can render unavailable the moral foundation that a theory of law, like the *Planning Theory*, deserves and that it needs when the law creates moral obligations.*

*Third, and more generally, dualism holds the potential to move us beyond decades—even centuries—of stalemate between proponents of natural law and positivism. By recognizing that each theory has its place, dualism can advance discussion to the more productive issues of whether the law creates moral obligations and, if so, under what circumstances.*

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\* © 2014 Joshua P. Davis. Associate Dean for Faculty Scholarship, Professor, and Director, Center for Law and Ethics, University San Francisco School of Law. I am grateful for comments from Shalanda Baker, Deborah Hussey Freeland, Susan Freiwald, Bill Hing, Alice Kaswan, John Shafer, Steve Shatz, and Michelle Travis. I am particularly indebted for conversations with Josh Rosenberg, Scott Shapiro, and Manuel Vargas. All provided me valuable comments that refined my thinking and saved me from important errors. I am solely responsible for those that remain.

## I. INTRODUCTION

This Article pursues a novel thesis: that the nature of law is not singular but rather dual. More specifically, it explores the possibility that natural law provides the best understanding of the law when it serves as a source of moral guidance and that legal positivism provides the best understanding of the law when it does not. As a way to make this ambitious task manageable, the Article develops legal dualism by contrasting it with the argument in Scott Shapiro's justly renowned book on jurisprudence, *Legality*.<sup>1</sup>

*Legality* is noteworthy for various achievements, including its valuable explanation of the relevance of jurisprudence to the practice of law,<sup>2</sup> its insightful account of fundamental issues in jurisprudence,<sup>3</sup> its clear distillation of the contributions of several great jurists, and its incisive evaluations of those contributions.<sup>4</sup> More generally, *Legality* is rightly perceived as one of the most important books on jurisprudence in recent decades<sup>5</sup> and arguably the most

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<sup>1</sup> SCOTT J. SHAPIRO, *LEGALITY* (2011).

<sup>2</sup> *See id.* at 22–25, 30–32.

<sup>3</sup> *See id.* at 1–34.

<sup>4</sup> *See id.* at 51–117 (discussing John Austin and H.L.A. Hart); *id.* at 259–330 (discussing Ronald Dworkin).

<sup>5</sup> *See* Judith Baer, Book Review, 126 *POL. SCI. Q.* 696, 696 (2011) (“Nevertheless, *Legality* makes a contribution to the field that no student of jurisprudence can ignore.”); Brian H. Bix, Book Review, 122 *ETHICS* 444, 444 (2012) (“In *Legality*, Scott Shapiro offers a theory of the nature of law but also an elaboration and defense of conceptual analysis and an argument about the proper approach to legal interpretation, with sharp insights and provocative arguments spread throughout the work. It is an undoubtedly important contribution to the jurisprudential literature.”); Thomas P. Crocker, *Whom Should You Trust? Plans, Pragmatism, and Legality*, 47 *TULSA L. REV.* 205, 217 (2011) (book review) (“Because of its philosophical richness, *Legality* will undoubtedly structure many conversations in law and philosophy for years to come.”); David Dyzenhaus, *Legality Without the Rule of Law? Scott Shapiro on Wicked Legal Systems*, 25 *CAN. J.L. & JURISPRUDENCE* 183, 198 (2012) (book review) (“Shapiro’s book is an argument in ‘analytic jurisprudence’ and it may be the finest example of this method to date.”); Mark C. Murphy, Book Review, 30 *LAW & PHIL.* 369, 375 (2011) (“[T]his book is throughout a very fine contribution to jurisprudence—imaginative, incisive, fair to interlocutors, and written with elegance and wit. . . . It is essential reading for philosophers of law.”); Frederick Schauer, *The Best Laid Plans*, 120 *YALE L.J.* 586, 619 (2010) (book review) (“[Shapiro] has written an important book and, in showing how the pervasive activity of social planning requires the institutions that we associate with law, he has provided a novel and valuable addition to the literature on why law exists, how it develops, and what allows it to flourish.”); Gideon Yaffe, Book Review, 121 *PHIL. REV.* 457, 460 (2012) (“In drawing attention to the roles that law plays in social planning, and to the implications of the fact that law plays such roles, Shapiro has opened the door to a way of linking traditional problems of jurisprudence with reflection on the actual practice of law. This will be a lasting and important contribution.”).

sophisticated defense of legal positivism to date.<sup>6</sup> *Legality* provides an opportunity to assess the limits of legal monism and of positivism as a general account of the nature of law.

This Article seizes on that opportunity. It proceeds in six parts. Part II begins by reviewing two of Shapiro's primary undertakings in *Legality*. The first is to elaborate a new understanding of the nature of law, which he calls the Planning Theory.<sup>7</sup> Shapiro offers a rich account of how law can be understood as a kind of plan. The second is to provide a defense of legal positivism.<sup>8</sup>

Part II summarizes Shapiro's account of the Planning Theory and legal positivism and explains how the two have the potential to be mutually supportive. Shapiro contends that the Planning Theory permits proponents of legal positivism to overcome the strongest objection to their theory.<sup>9</sup> If he is right, that would furnish a powerful reason to accept not only positivism—by eliminating a key objection to it—but also the Planning Theory because it is capable of solving a major jurisprudential problem.<sup>10</sup> Shapiro also argues that the Planning Theory requires a commitment to legal positivism.<sup>11</sup> Shapiro's defense of legal positivism thus intertwines with his argument for the Planning Theory.

Part III argues that Shapiro is not fully successful in two key ways. First, he does not provide an adequate defense of legal positivism when the law serves as a source of moral guidance. Shapiro may well be persuasive that legal positivism offers the best account when it comes to describing the law or predicting how it

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<sup>6</sup> See Bix, *supra* note 5, at 446 (“Shapiro, in his earlier works and in *Legality*, has defended the approach to law and legal theory known as ‘legal positivism’ (in fact, a fairly unyielding form of legal positivism known as ‘exclusive legal positivism’).”); Crocker, *supra* note 5, at 217 (“Shapiro’s account vindicates the central thesis of legal positivism—that law’s existence does not depend on moral facts.”); Dyzenhaus, *supra* note 5, at 183 (“Rather it is Scott Shapiro, one of the leading positivist philosophers of law of the last 50 years, and whose book *Legality* is perhaps the first major advance in our understanding of legal positivism since Gerald Postema’s *Bentham and the Common Law Tradition*.”); Ian P. Farrell, *On the Value of Jurisprudence*, 90 TEX. L. REV. 187, 188 (2011) (book review) (“[*Legality*] involves, first and foremost, the development of a sophisticated and comprehensive theory of the nature of law—one that, Shapiro argues, resolves questions that, up until now, legal positivism has found impossible to answer.”); Yaffe, *supra* note 5, at 457 (“Scott Shapiro’s important new book, *Legality*, is the most thorough defense in years of legal positivism. It is required reading in the field not just because of its powerful responses to all the major objections to positivism but also because of its important insights about the legal phenomena that theories of law must explain.”); see also Brian Tamanaha, *Legal Philosophers, Alien Civilizations, Monism versus Pluralism (Reflections on Shapiro’s Legality)*, BALKINIZATION, (Jan 5, 2011, 1:38 PM), <http://balkin.blogspot.com/2011/01/legal-philosophers-alien-civilizations.html> (“Scott Shapiro’s new book, *Legality* (2011), is a superb articulation and defense of exclusive legal positivism.”).

<sup>7</sup> See SHAPIRO, *supra* note 1, at 118–233.

<sup>8</sup> *Id.* at 259–400.

<sup>9</sup> *Id.* at 282–352.

<sup>10</sup> *Id.* at 119.

<sup>11</sup> *Id.* at 119, 178.

will be interpreted. But Part III contends that an interpreter morally bound to follow the law<sup>12</sup> needs to reach a sufficiently determinate conclusion about the content of the law. It further argues that at least in complex legal systems, like the American system, achieving that determinacy often involves making judgments about *morality*. Second, the Planning Theory does not in fact require legal positivism; planning can be reconciled with natural law.

These points have ramifications for jurisprudence as a whole. Shapiro is one of the most important voices regarding one of the central clashes in jurisprudence—that between legal positivism and natural law. Given his mastery of legal theory and the significance of his work, the shortcomings in his defense of legal positivism suggest limitations in positivist theory itself.

There is a different way to proceed. If legal positivism founders for interpreters who are morally bound by the law and natural law founders for interpreters who are not, perhaps we can recognize a natural boundary between two jurisprudential terrains. Part IV explores this possibility. In other words, it suggests an understanding of the nature of law as *dualistic*.<sup>13</sup>

Part IV then argues that although Shapiro assumes a monistic understanding of the nature of law, his jurisprudential methodology should permit dualism. It also addresses various challenges Shapiro's analysis poses for natural law. None of them provides a convincing basis for rejecting natural law and, with it, legal dualism. Indeed, one of Shapiro's criticisms of natural law actually applies to his own version of legal positivism.

Shapiro claims that natural law limits the possibility for critique of the law.<sup>14</sup> Part V contends that it is Shapiro's own position that would limit the potential for criticism of the law. Herein lies irony. As Shapiro recognizes, an important motivation behind modern legal positivism is to hold political actors, including lawyers, accountable for identifying the content of the law.<sup>15</sup> Historically, the English treated the law as natural and largely beyond reform. Legal positivists sought to have people acknowledge that "laws were but expressions of human will."<sup>16</sup> They pursued recognition of the gap between what the law is and what it should be so that it could be subjected to critical analysis.<sup>17</sup> Shapiro embraces this legacy.<sup>18</sup>

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<sup>12</sup> Shapiro uses the label "moral legitimacy" when the law imposes moral obligations. *See id.* at 180, 185.

<sup>13</sup> Dualism contemplates two complementary understandings of the nature of law, not the more extensive multiplicity of pluralism. *See* Tamanaha, *supra* note 6 (reflecting on contemporary jurisprudence and the debate between monism and pluralism). I do not mean to take the position that there are only two possible understandings of the nature of law, but rather that only two are relevant for present purposes.

<sup>14</sup> SHAPIRO, *supra* note 1, at 231–32.

<sup>15</sup> *See id.* at 388–89.

<sup>16</sup> *Id.* at 389 (quoting H.L.A. HART, *ESSAYS ON BENTHAM* 26 (1982) (summarizing Bentham's views on legal positivism)).

<sup>17</sup> *See id.* at 388–89.

<sup>18</sup> *See id.*

At the same time, however, Shapiro implies that law has an incorrigible, discoverable nature. He attempts to draw a strong distinction between what the law is and whether it imposes moral obligations.<sup>19</sup> According to his brand of positivism, the first issue does not entail any moral judgments.<sup>20</sup> Identifying the content of the law involves mere description,<sup>21</sup> no matter how strong a moral argument might be made that the law should be understood otherwise.

This view is troubling. It could allow key legal interpreters to avoid taking responsibility for their actions. In a generally just legal system, for example, a judge could claim, first, that she is simply saying what the law is, not what it should be and, second, that she has an obligation to follow the law. If the judge is right on both counts, even if her rulings produce rank injustice, she might bear little responsibility for them. Indeed, many observers may believe judges have an obvious moral obligation to follow the law. Shapiro leaves them little room to criticize judicial decision making. Part V argues that natural law provides the best account of the law for interpreters seeking moral guidance from it. That perspective allows us to hold judges accountable when they make moral judgments in declaring what the law is.

Part VI concludes by addressing some additional implications of legal dualism. It first notes that the commitment to legal positivism comes at a cost to the case for the Planning Theory. Assuming theory informs practice,<sup>22</sup> and assuming the positivist position that the content of the law depends ultimately only on social facts,<sup>23</sup> one would have to abandon positivism to make a moral argument in support of a particular theory of the nature of law, such the Planning Theory.<sup>24</sup> Legal dualism, in contrast, would free us to set forth the moral basis for the Planning Theory that it deserves and that it needs when the law creates moral obligations.

Part VI then explores a more sweeping implication of legal dualism: jurisprudents should shift their focus. For too long natural lawyers and legal positivists have scored points about the relative merits of their theories. If legal dualism is right, neither side will ultimately prevail because each theory has its

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<sup>19</sup> *See id.* at 44–45.

<sup>20</sup> *Id.* at 44–45, 188.

<sup>21</sup> *Id.*

<sup>22</sup> Shapiro makes this assumption. *See id.* at 22–25, 30–32.

<sup>23</sup> *Id.* at 27 (citing JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 75 (2001); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37 (1979); Gerald J. Postema, *Coordination and Conventions at the Foundations of Law*, 11 *J. LEGAL STUD.* 165, 188 (1982)).

<sup>24</sup> Shapiro avoids inconsistency by refraining from making moral arguments in support of the Planning Theory. Indeed, he questions whether morally bad consequences should provide a basis for rejecting any jurisprudential theory. SHAPIRO, *supra* note 1, at 255 (“It is an interesting question whether a jurisprudential theory ought to be rejected simply because its acceptance engenders morally bad consequences.” (citing Liam Murphy, *The Political Question of the Concept of Law*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 371 (Jules L. Coleman ed., 2001))).

own appropriate domain. Natural law governs when the law serves as a source of moral guidance and legal positivism governs when the law does not. The greatest potential for understanding the nature of law lies neither in rehearsing familiar arguments for natural law and positivism nor in devising new ones. It entails mapping out the terrains in which law has moral legitimacy and in which it does not.

## II. LEGALITY

The analysis begins with Shapiro's Planning Theory and its relationship to legal positivism. Shapiro argues that the Planning Theory solves a fundamental problem for a positivist account of the law and, in so doing, offers an important reason to embrace the Planning Theory.

### A. *The Planning Theory*

The Planning Theory lies at the heart of *Legality*. It holds that the law is a kind of plan (or a plan-like norm).<sup>25</sup> The law, so understood, arises to contend with various difficulties that beset complex societies. Shapiro calls these difficulties "the circumstances of legality."<sup>26</sup> They obtain when a community faces numerous and serious moral problems whose solutions are complex, contentious, or arbitrary.<sup>27</sup> So, for example, a society that engages in farming and ranching must make numerous challenging decisions—whether to adopt a system of common or private property (or some combination of the two), how to allocate private property, how to delimit the rights of private property owners, and the like.<sup>28</sup> Various relatively informal means of handling these decisions are likely to prove inadequate, "such as improvisation, spontaneous ordering, private agreements, communal consensus, or personalized hierarchies."<sup>29</sup> The problems are too knotty and intricate, and the solutions too controversial and arbitrary. A coordinating system is required to organize behavior. In other words, in the face of the circumstances of legality, society needs to develop an elaborate plan. Shapiro argues that the legal system meets that need. According to his Planning Theory of Law, "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."<sup>30</sup>

Shapiro's Planning Theory leads to some interesting consequences. His recognition that the law serves as a plan for resolving stubborn controversy, for example, suggests that legal actors should take care when indulging their own views of substantive justice. After all, the purpose of the plan may be to constrain

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<sup>25</sup> SHAPIRO, *supra* note 1, at 225.

<sup>26</sup> *Id.* at 170–73, 213–14.

<sup>27</sup> *Id.* at 170, 213.

<sup>28</sup> *See id.* at 158–89.

<sup>29</sup> *Id.* at 170.

<sup>30</sup> *Id.* at 171 (emphasis removed).

just that sort of individualized judgment and the resulting uncertainty and inconsistency.<sup>31</sup> Along these lines, a judge may undermine efforts to make the outcomes of adjudication predictable by using her own moral judgment in interpreting the law. Shapiro refers to the system for allocating responsibility for exercising moral judgment as the “economy of trust.”<sup>32</sup> This economy may instantiate a great deal of distrust regarding the competence or good faith of judges.<sup>33</sup>

Shapiro not only proposes the Planning Theory but also argues that it supports a particular jurisprudential view called “exclusive legal positivism.”<sup>34</sup> Understanding his position requires two distinctions, one between legal positivism and natural law and the other between exclusive legal positivism and inclusive legal positivism.

### B. Legal Positivism

Shapiro offers two main ways to understand the nature of law: legal positivism and natural law.<sup>35</sup> The difference between the two turns on the role of descriptive and prescriptive claims. Shapiro subscribes to what one might call the Social Facts Thesis: legal positivism holds that “all legal facts are ultimately determined by social facts alone.”<sup>36</sup> Specifying social facts<sup>37</sup> involves only

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<sup>31</sup> See *id.* at 331–52.

<sup>32</sup> See *id.* at 331–77.

<sup>33</sup> See *id.* at 313–29 (arguing the U.S. legal system embodies substantial distrust of legal interpreters).

<sup>34</sup> *Id.* at 119, 271–78.

<sup>35</sup> *Id.* at 27–30.

<sup>36</sup> *Id.* at 27 & n.27 (citing JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 75 (2001); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37 (1979); Gerald J. Postema, *Coordination and Convention at the Foundation of Law*, 11 J. LEGAL STUD. 165 (1982)). Shapiro calls this proposition the “Ultimacy Thesis.” SHAPIRO, *supra* note 1, at 269–70. However, although it may be more precise, I find this label less accessible than the Social Facts Thesis, and it is less commonly used. See William A. Edmundson, *Shmegalaty*, 2 JURISPRUDENCE 273, 273 (2011) (noting the “Social Fact Thesis” is the standard term). Professor Brian Leiter uses the term “Social Thesis.” BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 66 (2007).

<sup>37</sup> Shapiro usefully characterizes the relevant social facts as depending on “what people think, intend, claim, say, or do.” SHAPIRO, *supra* note 1, at 27. Further, although he acknowledges controversy about the nature of the relevant social facts, he suggests a “plausible” understanding of the relevant social facts along the following lines: “the fact that legal officials treat the state conventions as having had the power to ratify the Constitution makes it the case that the Constitution is legally binding on them.” *Id.* The most important point for present purposes is that legal positivists claim that legal facts ultimately depend on only social facts—and that specifying social facts involves only descriptive claims, not moral claims.

description, not prescription—saying what the law is, not what it should be.<sup>38</sup> According to legal positivism, a purely descriptive claim plays the ultimate role in saying what the law is.

Shapiro is not as explicit as he might be about his definition of the word “ultimately” in this context. But his discussion suggests it means something like foundational or fundamental.<sup>39</sup> In other words, the foundation or basis for giving content to the law is descriptive, not prescriptive. And no prescriptive claims are necessary to support that foundation or basis.<sup>40</sup>

Shapiro contrasts legal positivism with what he calls “natural law.”<sup>41</sup> Natural law, according to Shapiro, claims that the content of the law ultimately depends at least in part on moral facts,<sup>42</sup> not just on social facts.<sup>43</sup> So, for example, constitutional law is a kind of natural law if the proper way to interpret the Constitution depends ultimately in part on political theory.<sup>44</sup> If, on the other hand, the right way to specify the content of constitutional doctrine involves only recourse to social facts—if the content depends, say, only on prevailing practice—then legal positivism provides the best understanding of the nature of constitutional law.<sup>45</sup>

Shapiro goes further than committing to legal positivism. He embraces its exclusive version as opposed to its inclusive version.<sup>46</sup> According to Shapiro, both

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<sup>38</sup> *See id.*

<sup>39</sup> Leiter, for example, uses the term “fundamental” at times in defining what I have called the “Social Facts Thesis.” *See, e.g.*, LEITER, *supra* note 36, at 66, 122.

<sup>40</sup> Shapiro hedges in this regard. He attempts to remain agnostic about the nature of social facts themselves and whether they are reducible to other factual claims (e.g., about individual psychology and action) or require recourse to moral facts as well. SHAPIRO, *supra* note 1, at 44. It is not clear this concession is merely marginal, but I will not pursue the point in this Article.

<sup>41</sup> *Id.* at 27. The term “natural law” is awkward—at least as applied to modern theorists, including Lon Fuller and Ronald Dworkin—to the extent it implies some kind of religious commitment. *See, e.g.*, BRIAN H. BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 67 & n.2 (5th ed. 2009); Ronald A. Dworkin, “*Natural*” *Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982). However, similar to Shapiro, I follow other scholars in using this term.

<sup>42</sup> I use the term “moral facts” to be consistent with Shapiro. *See, e.g.*, SHAPIRO, *supra* note 1, at 27. To say the content of the law depends on moral facts, for my purposes, means merely that moral judgment is necessary to identify the content of the law, not that moral judgment is or can be objectively correct or that moral facts can be identified in a particular way. I do not mean to take a position about the ontological or epistemological status of morality.

<sup>43</sup> *Id.* Note that natural law, according to these definitions, is in a sense more modest than legal positivism. If there were true symmetry, one might use the term “exclusive natural law” for the position that *only* moral facts give content to the law and the term “inclusive natural law” for the position that the content of the law depends ultimately only on moral facts. However, in Shapiro’s system, a hybrid approach in which the law ultimately depends on *both* social facts and moral facts, counts as a natural law position. *Id.*

<sup>44</sup> *Id.* at 29.

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

<sup>46</sup> *See id.* at 275.

varieties of positivism embody the Social Facts Thesis.<sup>47</sup> Inclusive legal positivism, however, allows morality to play a role in identifying the content of the law, provided the relevant social facts so permit. Exclusive legal positivism, in contrast, claims that morality plays no role in specifying the content of the law.<sup>48</sup>

So, according to Shapiro, all legal positivists agree that which political actors make authoritative pronouncements regarding the content of the law ultimately depends on social facts—on the conventional practice, for example, in a particular legal system. However, inclusive legal positivists believe those social facts may permit some of those political actors, including judges, to make moral judgments in determining the content of the law, whereas exclusive legal positivists would not.<sup>49</sup> Imagine, for instance, that the relevant social fact—again, let us say prevailing legal practice—allows judges to make moral judgments in specifying the content of constitutional doctrine in the United States. As long as the content of the law depends *ultimately* on only social facts, inclusive legal positivism can account for our legal system. Exclusive legal positivists, however, insist that the content of constitutional law does not depend on moral facts at all. They believe that the content of the law depends only on social facts.<sup>50</sup>

Shapiro claims that the logic of planning requires exclusive legal positivism because the point of a plan is in part to resolve the difficulties caused by the need to make moral judgments.<sup>51</sup> He reasons that it is irrational to allow the very sorts of moral judgments as part of the plan that the plan is designed to resolve.<sup>52</sup> As Shapiro puts the matter, “the content of plans cannot be determined by facts whose very existence the plans are supposed to settle.”<sup>53</sup>

Exclusive legal positivists face a challenge in explaining how the law ordinarily functions. One approach is to adopt what one might call formalism, which Shapiro usefully describes as involving four commitments: (1) judicial restraint—judges should always apply existing law, not modify or correct the law; (2) determinacy—the law contains one and only one correct answer to every legal question; (3) conceptualism—the law can be derived from abstract principles that permit judges to derive proper legal answers in particular cases; and (4) amorality

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<sup>47</sup> *Id.* at 273.

<sup>48</sup> To use Shapiro’s terminology, all legal positivists are committed to the “Ultimacy Thesis,” that is, that “legal facts are *ultimately* determined by social facts alone.” *Id.* at 269. Exclusive legal positivists also adhere to the “Exclusivity Thesis,” that is, that legal facts are determined *exclusively* by social facts. *Id.* at 269, 271.

<sup>49</sup> *See id.* at 270–71.

<sup>50</sup> Exclusive legal positivists may have various reasons for reaching this conclusion. Joseph Raz, for example, believes that the authoritative nature of the law requires that it provide exclusionary reasons for complying with its dictates, that is, reasons that preclude a legal interpreter’s reconsideration of the normative issues that were resolved in devising the content of the law. *See* LEITER, *supra* note 36, at 129 (discussing Raz’s authoritative directives).

<sup>51</sup> SHAPIRO, *supra* note 1, at 275, 278.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 302.

of adjudication—“judges must decide cases without [engaging in] moral reasoning.”<sup>54</sup> A commitment to formalism understood in this way could support exclusive legal positivism. A formalist faces little difficulty explaining the separation between morality and law (although perhaps significant difficulty accounting for actual legal practice).

However, Shapiro rejects formalism. He subscribes to H.L.A. Hart’s view that the law is in significant measure indeterminate.<sup>55</sup> He further claims that in resolving difficult legal issues—involving inconsistencies, ambiguities, or gaps—interpreters often have to resort to purposivism, that is, to take into account the purposes of the law.<sup>56</sup> And he acknowledges that sometimes adjudication—as opposed to legal interpretation—calls for judges to make moral judgments.<sup>57</sup> How, then, can interpreters avoid moral facts in identifying the content of the law?

Shapiro provides a complicated set of answers to this question.<sup>58</sup> He suggests, for example, that in determining the purposes of the law, judges should rely not on their own moral judgments about the law but only on social facts—on a description of the intentions of the relevant political actors.<sup>59</sup> He further defines the law not to include any moral judgments necessary to adjudicate particular cases.<sup>60</sup> So if moral judgment were necessary, for instance, to fill in a gap or resolve a conflict, Shapiro would say that the judge could resolve the case by making new law but not by finding existing law.<sup>61</sup> Similarly, if the law requires the judge to render a moral judgment—to decide, for example, what is unreasonable or unconscionable—then Shapiro would consider that moral judgment to be part of *adjudicating claims* but not part of *interpreting the law*.<sup>62</sup> To be sure, in ordinary legal practice in the United States, interpreters often define the law much more broadly.<sup>63</sup> Most practitioners probably believe that identifying the content of the law, at times,

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<sup>54</sup> *Id.* at 241–42.

<sup>55</sup> *See id.* at 248–52, 277–79 (discussing H.L.A. Hart’s view on indeterminacy).

<sup>56</sup> *See id.* at 252–54.

<sup>57</sup> *Id.* at 276.

<sup>58</sup> *See id.* at 234–81.

<sup>59</sup> *See id.* at 344–45.

<sup>60</sup> *See id.* at 269–81.

<sup>61</sup> *See id.* at 274.

<sup>62</sup> *Id.* at 276.

<sup>63</sup> Ronald Dworkin, a natural lawyer (as that term is defined in this Article), contends that legal interpreters in actual practice understand themselves to be taking morality into account in saying what the law is. RONALD DWORIN, JUSTICE IN ROBES 187 (2006) [hereinafter JUSTICE IN ROBES]; *see also* RONALD DWORIN, LAW’S EMPIRE 264–66 (1986) [hereinafter LAW’S EMPIRE]; Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 894–96 (2011) (reviewing SHAPIRO, *supra* note 1) (noting various ways in which law appears to embody normative judgment). Jules L. Coleman, a legal positivist, concedes this point and offers it as a reason—although not necessarily a dispositive one—to favor inclusive legal positivism over exclusive legal positivism. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 56–57 (2011). *But see id.* at 56 n.64 (claiming that exclusive legal positivism and inclusive legal positivism do not conflict but rather operate at different levels of abstraction).

includes making moral judgments. Shapiro's exclusive legal positivism then requires a somewhat unconventional—but not necessarily untenable—definition of the law.<sup>64</sup>

Shapiro adopts some positions that put tremendous pressure on his commitment to exclusive legal positivism. He contends, for example, that the law by its nature has a moral aim.<sup>65</sup> He needs to take this position because the Planning Theory holds that “the fundamental aim of the law is to rectify the moral deficiencies associated with the circumstances of legality.”<sup>66</sup> Shapiro appears to view his claim about the moral aim of the law as consistent with legal positivism because it is merely descriptive. That the law pursues a moral aim describes the law, the way a shovel might be described as an implement designed for digging. But that does not mean the law succeeds in the moral aim. As Shapiro explains, “What makes the law the *law* is that it has a moral aim, not that it satisfies that aim.”<sup>67</sup> According to Shapiro, this potential gap—between what law aspires to do and what it actually does—makes it possible to identify the content of the law without making any moral judgments about it.

### C. Conceptual Analysis

That last point suggests a larger issue: whether Shapiro can make a nonmoral case for the Planning Theory. He makes clear that he attempts to do so by relying on a methodology he calls “conceptual analysis.”<sup>68</sup> Although he could offer a more complete explication of the methodology, he explains that it involves attempting to account for as many of the self-evident truths about law as possible.<sup>69</sup> According to Shapiro's conceptual analysis, an understanding of the nature of law succeeds, it would seem, if it better accommodates the self-evident truths about law than any of its competitors.<sup>70</sup>

That conceptual analysis aspires not to entail moral judgment is crucial to Shapiro's project.<sup>71</sup> The reason is that he takes two positions that would otherwise

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<sup>64</sup> Shapiro seems to acknowledge that an exclusive legal positivist understanding of the law is not always intuitive. *See* SHAPIRO, *supra* note 1, at 270 (“One attractive feature of inclusive legal positivism is that certain constitutional provisions may thus be taken at face value.”); *see also* Coleman, *supra* note 63, at 56–57 (arguing inclusive legal positivism provides an understanding of the law more consistent with how judges describe their own practice than exclusive legal positivism).

<sup>65</sup> SHAPIRO, *supra* note 1, at 213–17.

<sup>66</sup> *Id.* at 213.

<sup>67</sup> *Id.* at 214.

<sup>68</sup> *Id.* at 13.

<sup>69</sup> *Id.* at 13–22.

<sup>70</sup> *See id.* at 15–16, 49–50.

<sup>71</sup> Shapiro at one point suggests that it is unclear whether “a jurisprudential theory ought to be rejected simply because its acceptance engenders morally bad consequences.” *Id.* at 255.

conflict. He claims, first, that legal theory informs the content of the law<sup>72</sup> and, second, that the content of the law depends only on social facts.<sup>73</sup> Given these two positions, if legal theory required moral justification, then the content of the law would ultimately depend in part on moral facts and the Social Facts Thesis would fail. That would be fatal to Shapiro's exclusive legal positivism and, indeed, even to inclusive legal positivism.

*D. Hume's Law v. Evil Law*

What, then, is the case that Shapiro makes for the Planning Theory based on conceptual analysis? Shapiro never tallies up the relative successes of positivism and natural law in accounting for the truisms about the nature of law. But a central role in his overall argument appears to be played by key challenges that Shapiro identifies for legal positivism and natural law. Legal positivism must contend with Hume's Law and natural law with Evil Law.<sup>74</sup> Shapiro's argument for the Planning Theory seems to run in significant part as follows: the Planning Theory can reconcile legal positivism with Hume's Law, providing a powerful basis for choosing positivism over natural law (which cannot be squared with Evil Law) and for adopting the Planning Theory (it saves positivism from falling prey to Hume's Law). These points require elaboration.

Hume's Law holds that one cannot derive an "ought" from an "is."<sup>75</sup> In other words, descriptive claims cannot yield normative claims. A normative input is necessary to produce a normative output.<sup>76</sup> To the extent that the law creates moral obligations—to the extent the law has what Shapiro calls moral legitimacy<sup>77</sup>—Hume's Law poses a significant problem for legal positivism, especially for exclusive legal positivism.<sup>78</sup> How can an account of law that depends ultimately—or entirely—on purely descriptive claims yield moral obligations?

In a pleasing symmetry, Shapiro suggests that Evil Law creates a similar problem for natural law.<sup>79</sup> Natural lawyers claim that determining the content of the law requires recourse to moral facts.<sup>80</sup> It is hard to see what role moral facts could play in an evil legal system, one that serves nefarious ends. Consider the law

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<sup>72</sup> *Id.* at 22–25, 30–32

<sup>73</sup> *Id.* at 275, 278, 302–03.

<sup>74</sup> *Id.* at 45–50.

<sup>75</sup> *Id.* at 47.

<sup>76</sup> *Id.* at 48.

<sup>77</sup> *Id.* at 180, 185.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 49–50.

<sup>80</sup> Shapiro treats this point as definitional of natural lawyers. *Id.* at 27. He attributes the natural law position, so defined, to Ronald Dworkin, among others. *Id.* at 27 n.28. He does note an alternative natural law position holding merely that immoral or unreasonable laws are "defective as laws." *Id.* (citing Mark C. Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241, 254 (2003)).

of Nazi Germany.<sup>81</sup> What role could morality play in a legal system that is so morally bankrupt? Yet Nazi law appears to qualify as law.<sup>82</sup>

Shapiro attempts to escape this dilemma by arguing that the Planning Theory reconciles legal positivism and Hume's Law.<sup>83</sup> According to Shapiro, the Planning Theory accomplishes this task by distinguishing between identifying the obligations the law *purports* to impose and deciding whether the law actually imposes moral obligations.<sup>84</sup> He also suggests that an interpreter understanding the law as a plan will determine the content of the law through a purely descriptive undertaking.<sup>85</sup> Moral facts play no role in saying what the law is. What the law is and whether the legal interpreter has any moral obligation to abide by it are separate questions.<sup>86</sup> In sum, Shapiro does not contest Hume's Law<sup>87</sup>—he accepts that one cannot derive a prescriptive claim from a descriptive claim—but he argues that the Planning Theory allows the inquiry into the content of the law to be purely descriptive.

Shapiro's main response to natural law then appears to be that it cannot accommodate the truism that Evil Law qualifies as law, whereas his Planning Theory allows legal positivism to account for the truism of Hume's Law.<sup>88</sup>

This brief summary does not do justice to Shapiro's thoughtful and wide-ranging analysis. But it does provide the background necessary to explore the major points in this Article, the first of which is that Shapiro's Planning Theory neither adequately defends legal positivism nor requires a commitment to positivism.

### III. MORALITY

For Shapiro's argument, morality must play no role in identifying the content of the law.<sup>89</sup> Yet Shapiro has trouble maintaining the separation between what the

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<sup>81</sup> Lon L. Fuller and H.L.A. Hart discuss the puzzle of Nazi law in their famous debate. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 633 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617–18 (1958). Additionally, Shapiro offers the law of the Soviet Union as an example. SHAPIRO, *supra* note 1, at 49.

<sup>82</sup> SHAPIRO, *supra* note 1, at 49.

<sup>83</sup> *Id.* at 188.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 192. Frederick Schauer has suggested a similar approach. See Frederick Schauer, *Critical Notice*, 24 CAN. J. PHIL. 495, 507–09 (1994).

<sup>87</sup> Contrast the position of Jules L. Coleman, who has suggested he may contest Hume's Law, although he has not yet done so. Coleman, *supra* note 63, at 76–79. For a discussion of Coleman's position and his need to address Hume's Law, see Joshua P. Davis, *Jurisprudential Jujutsu* 11 (Univ. of San Francisco Law Research Paper No. 2012-01, 2012), available at <http://ssrn.com/abstract=2007307>.

<sup>88</sup> See SHAPIRO, *supra* note 1, at 50, 188.

<sup>89</sup> If morality were to play a role in saying what the law is, then it would not be possible to rely exclusively on social facts in identifying the content of the law.

law is and what it should be, between the descriptive and the prescriptive. This Part explores this point. It notes the ways in which morality plays an ineluctable role in making the law sufficiently determinate to provide moral guidance. It further suggests that, *pace* Shapiro, the Planning Theory does not in fact require legal positivism.

A. *The Ineluctable “Ought”*

A difficulty for Shapiro’s argument is the potential for an implicit judgment about morality—what one might call a hidden “ought.” Legal interpretation appears often to require resolution of various moral issues, at least when an interpreter seeks a sufficiently determinate result to guide conduct. Put differently, in many cases it may be possible to say what the law is with reasonable precision only by taking some position on what it should be. If so, the Planning Theory does not solve legal positivism’s difficulty with Hume’s Law.

So, for example, a judge trying to decide cases will often recognize various ways in which the law is ambiguous, inconsistent, or incomplete.<sup>90</sup> Some of these instances of apparent indeterminacy occur at a relatively concrete level. A judge applying a legal rule may have to take a position on whether a contractual term is unreasonable or unconscionable.<sup>91</sup> At a greater level of generality, in formulating the relevant legal rule—or selecting among potentially applicable rules—the judge may have to decide how best to engage in legal interpretation.<sup>92</sup> The judge may have to choose between relying on the relevant authoritative text, on the most compelling purposes behind the text, on evidence of the intentions of the drafter or drafters of the text, or on variations on and combinations of these and other potential approaches. Similar difficulties may beset the judge’s efforts to identify the authoritative text or texts. At yet greater levels of generality, the judge must decide what the grounds are for choosing between these interpretive approaches, as well as the grounds for resolving disputes about those grounds, and so on.<sup>93</sup>

The cumulative effect of these sources of apparent indeterminacy at various levels of generality is that there is so much play in the joints of the law—at least in complex legal systems like the one we have in America—that legal interpreters operating in good faith can reach different interpretations in a high proportion of litigated cases.<sup>94</sup> Even if most judges would agree in some regards, there are almost always some whose value judgments would lead them to adopt a minority

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<sup>90</sup> See SHAPIRO, *supra* note 1, at 256.

<sup>91</sup> See *id.* at 246.

<sup>92</sup> See *id.* at 256.

<sup>93</sup> See *id.* at 304–05.

<sup>94</sup> This is one of the more persuasive claims of Legal Realism. LEITER, *supra* note 36, at 19–20. Shapiro acknowledges this pervasive indeterminacy. See, e.g., SHAPIRO, *supra* note 1, at 257 (“It is no surprise, therefore, that U.S. constitutional law is highly (though obviously not completely) indeterminate.”); *id.* at 383 (“[I]t is highly likely that meta-interpreters will disagree with one another about the content of the planners’ shared understandings and which methodologies are best supported by them.”).

position. Unanimity about the law is relatively rare. It is in part for this reason that practicing lawyers almost always hedge or speak in probabilities when predicting how a court would rule in a particular case or on a particular issue. Few are the occasions when they will say they know with absolute certainty what the outcome would be.<sup>95</sup>

An obvious way to reduce or eliminate this apparent indeterminacy is to rely on moral judgment.<sup>96</sup> Morality can play a role, for example, in identifying what is unreasonable or unconscionable.<sup>97</sup> Those standards seem to contain a moral element. Morality also can figure in choosing between different potential interpretations of a rule or between different potential rules, a decision that can turn on which rule is best in some moral sense.<sup>98</sup>

More generally still, the right approach to legal interpretation itself suggests judgments about political theory and substantive justice, given that these issues will inform an understanding about the relative legitimacy and competence—and corresponding discretion—of various political actors in resolving the issues a court must decide. Indeed, Shapiro recognizes this last point. He notes, for example, that how a particular actor should go about interpreting the law may depend on why the plan underlying the legal system warrants deference.<sup>99</sup> A plan may deserve deference because it was the product of planners with “superior moral authority or judgment”—what he calls an authority system—or because the plan itself contains “morally good” laws that “further the fundamental aim of the law”—what he calls an opportunistic system.<sup>100</sup> Shapiro suggests that legal interpreters in an authority system should take a different approach than interpreters in an opportunistic system.<sup>101</sup>

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<sup>95</sup> This point likely applies with particular force before potential litigants know which judge will preside in a case.

<sup>96</sup> An alternative might be to adopt, for example, the most likely legal outcome. But such an approach would require normative justification. The most likely outcome is not necessarily the most attractive. Even if it were the most likely to be right, in some sense, we might want to consider the relative harm done if it were to prove erroneous, much like the calculation in deciding whether to grant a preliminary injunction. Moral judgment would then likely figure in assigning that harm. For a discussion of minimizing error costs in granting injunctions, see Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363, 372–97 (2003).

<sup>97</sup> Shapiro acknowledges the role for moral or other value judgments in these circumstances. SHAPIRO, *supra* note 1, at 246. Of course, determining whether a contractual provision is unreasonable or unconscionable could be understood as a descriptive inquiry—an account, for example, of commercial practice. See LEITER, *supra* note 36, at 30. But legal interpretation often will involve a more straightforward moral judgment, a point that Shapiro concedes. SHAPIRO, *supra* note 1, at 246.

<sup>98</sup> SHAPIRO, *supra* note 1, at 246.

<sup>99</sup> *Id.* at 350–51.

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

<sup>101</sup> *Id.*

Shapiro largely accepts this characterization of the indeterminacy resulting from disagreement regarding the content of the law.<sup>102</sup> He also acknowledges, as just noted, that the issues giving rise to disagreement appear to have a moral dimension—that, for example, the appropriate interpretive methodology for a given political actor depends in part on whether the planners of the system had superior moral authority or judgment and whether the plan itself includes rules that are morally good.<sup>103</sup> His burden, then, is to reconcile this state of affairs with a positivist approach to identifying the content of the law.

Note that such legal indeterminacy poses no similar difficulty for interpreters who seek merely to describe the law or to predict legal rulings, not to obtain moral guidance from the law.<sup>104</sup> A historian or sociologist, for example, might be perfectly comfortable offering an account of a particular jurisdiction's law leaving all of the disagreements intact, as might a participant in a legal system concerned about the content of the law for purely prudential reasons. Consider a citizen who believes the law lacks moral legitimacy. She may want to predict the practical legal consequences of her conduct. But she would not care how disagreements or uncertainties *should* be resolved in theory, merely how they *will* be resolved. An accurate stochastic forecast may well be the best she can do and the most she cares to do.<sup>105</sup>

The same is not true, however, for interpreters who see the law as a potential source of moral guidance. Judges offer a likely example.<sup>106</sup> Assuming they have a moral obligation in general to follow the law, judges cannot tolerate pervasive indeterminacy. The law would then not provide them guidance. A straightforward way for them to reach sufficiently determinate results would be to take positions on moral issues regarding which there is disagreement, including how to apply the law, how to determine the relevant legal rule, how to choose the grounds for

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<sup>102</sup> See *id.* at 283 (stating disagreements about interpretive method “seem not only possible, but pervasive”); see also *id.* at 379 (acknowledging the possibility of “pervasive disagreement”).

<sup>103</sup> *Id.* at 350–51.

<sup>104</sup> Thus, a version of legal positivism that limits itself to prediction and description need not contend with Hume's Law, although it then makes no effort to provide an account of the law as providing guidance. That is how I read, for example, Leiter's rational reconstruction of Legal Realism. See, e.g., LEITER, *supra* note 36, at 219; see also *id.* at 275 (“[T]he point is precisely that, so far, *causal power is all we have to go on in ontology.*”).

<sup>105</sup> Of course, predictability in adjudication may be achieved by finding patterns in nonlegal explanations for legal interpretation. See, e.g., LEITER, *supra* note 36, at 62–63. This point, however, depends in part on how one demarcates the outer boundaries of what counts as the law. What a legal positivist like Leiter defines as nonlegal, a natural lawyer like Dworkin might well define as part of the law.

<sup>106</sup> Judges, after all, voluntarily accept a position and take an oath that seems to require them to abide by the law in their judicial capacity. See 28 U.S.C. § 453 (2006) (requiring each judge to take an oath promising to “faithfully and impartially discharge and perform all the duties incumbent upon [them] . . . under the Constitution and laws of the United States”).

picking among potential legal rules, etc. By treating the result of their determinations as the law, judges will be able to fulfill any moral obligation they have to abide by the law. Shapiro, then, must contend with this seemingly crucial and extensive role of morality in saying what the law is.

### B. Theoretical Disagreements

One can frame the challenge for Shapiro arising from indeterminacy in terms of the problem of “theoretical disagreements,” which serves as the basis for an argument made by Ronald Dworkin.<sup>107</sup> The difficulty for Shapiro is that he must specify which social facts matter in interpreting the law, and he cannot seem to do so without taking a position on issues of political morality.

To understand this point, recall that positivism holds that the content of the law is ultimately a matter only of social facts.<sup>108</sup> That does not mean there will always be consensus about those social facts. For example, legal interpreters may generally agree that the plain text of a statute—or, alternatively, its legislative history—controls the outcome in a case, but they may disagree about some facts necessary to interpret the text or the legislative history—about, for example, the definition of a word or the events that produced legislation. As long as the disagreement is about social facts—that is, as long as it is about which factual description is most accurate—it would seem that positivism can provide an adequate account of the law. An inquiry only into social facts is necessary to specify the content of the law. However, theoretical disagreements raise difficulties that do not seem susceptible to resolution by recourse to social facts alone.<sup>109</sup>

Theoretical disagreements arise when legal interpreters have different views not about—or not only about—the social facts necessary to identify the content of the law, but also about which social facts are relevant to legal interpretation.<sup>110</sup> Shapiro thus distinguishes between, respectively, whether the grounds of law obtain and what the grounds of law are.<sup>111</sup> Consider the issue of whether the death penalty constitutes cruel and unusual punishment as proscribed by the Eighth Amendment.<sup>112</sup> Legal interpreters within our legal system may disagree on this issue at various levels of generality, inter alia, about the relevant views of the Framers or the citizenry at the time of adoption of the Bill of Rights, about whether the death penalty is cruel and unusual under a contemporary understanding of those terms, about whether the original understanding or the modern understanding should govern constitutional interpretation, and about the grounds for choosing

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<sup>107</sup> SHAPIRO, *supra* note 1, at 282–83. Dworkin makes the argument, inter alia, in *Law’s Empire*, *supra* note 63, at 4–5. Dworkin is viewed by many scholars as the most formidable proponent of natural law and, judging by Shapiro’s extensive treatment of Dworkin’s arguments in *Legality*, Shapiro likely shares this view.

<sup>108</sup> SHAPIRO, *supra* note 1, at 269.

<sup>109</sup> *See id.* at 289.

<sup>110</sup> *See id.* at 285.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 384.

between those and other potential interpretive methodologies. Some of these disagreements may turn merely on social facts—for example, how to interpret vague or ambiguous texts embodying the relevant views—but others arise over which social facts matter to legal interpretation. The problem for legal positivism is to make sense of the disagreements about which social facts are pertinent, that is, about the grounds of the law—and to do so without recourse to moral facts.

Shapiro's response to this problem is to rely on the decisions made by the planners of the law.<sup>113</sup> According to his theory, an interpreter should consider the planners' objectives in creating the law and the economy of trust instantiated in their plan.<sup>114</sup> Those judgments will then assist the interpreter in determining the grounds of the law. They will enable the judge to choose *how* to decide whether the death penalty violates the Eighth Amendment. Of course, different judges may reach different conclusions about the proper method of interpretation. Crucially, according to Shapiro, the disagreement will turn not on moral facts but on competing views of social facts—facts about the intentions of the planners of the legal system.<sup>115</sup>

To borrow an example from Shapiro, as noted above, interpreters may take a different approach to legal interpretation in an “authority system”—one in which they defer to the political legitimacy or expertise of the planners—than in an “opportunistic system”—one in which they defer to a plan merely because they believe it contains morally attractive laws.<sup>116</sup> According to Shapiro, in an authority system, legal interpreters should defer to the views of the planners regarding the relative competence and good faith of different actors in the legal system, whereas in an opportunistic system, legal interpreters should privilege prevailing modern views.<sup>117</sup> These attitudes, in turn, should shape the decision about the proper interpretive methodology, so that, for example, if our system is authoritative—as Shapiro contends it mostly is<sup>118</sup>—then what matters for determining our economy of trust is the views of the original planners, whereas in an opportunistic system, what matters are the views of current participants in the system.<sup>119</sup>

Unfortunately, this strategy replicates the problem Shapiro seeks to solve, merely framing it at a greater level of abstraction.<sup>120</sup> In attempting to glean the objectives and economy of trust of a legal system, there will be disagreements not only about the relevant social facts, but also about *which* social facts are relevant and even about the *grounds* for resolving those disagreements. Consider the dispute about the Eighth Amendment. Should it be interpreted according to the

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<sup>113</sup> *Id.* at 345. Shapiro sometimes calls them “designers.” *Id.* at 344.

<sup>114</sup> *Id.* at 345

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 350.

<sup>117</sup> *Id.* at 350–51; *see also id.* at 384–85 (highlighting the two interpretative approaches as applied to the death penalty).

<sup>118</sup> *Id.* at 351.

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

<sup>120</sup> For a similar argument, see Davis, *supra* note 87, at 5–6, 9–10 (characterizing this strategy as the retreat to abstraction and arguing it is unsuccessful).

views of the citizenry at the time of its adoption or their views today?<sup>121</sup> This question is about which social facts matter. Even assuming there is some kind of consensus that we are in an authority system, as opposed to an opportunistic system, enlisting the views of the planners is apt to compound the disagreement rather than to resolve it. Who counts as a planner?<sup>122</sup> Why? Shapiro elides this difficulty by referring vaguely to the planners of the law and to the “conceptions of political morality and human nature . . . presupposed by the law.”<sup>123</sup> But these generalities do not suffice.

Nor is this a problem that arises solely at the margins. Shapiro’s approach struggles in resolving a broad range of questions. Regarding interpretation of the Constitution, for example, whose understanding of the original plan matters? The drafters of the provision at issue? Other political representatives who participated in its enactment? The citizenry at large? And is Shapiro right that we venerate the Founding Fathers because of their political legitimacy or is it because of the quality of the political system they put in place? Or is our legal system a hybrid of authoritative and opportunistic, and, if so, how do we decide when each one predominates? And how do we identify the grounds for resolving disagreements on these issues—based on an historical consensus, a modern consensus, and, in either case, a consensus among which actors? And what do we do in the likely case there is no such consensus? In other words, there is no reason to believe legal interpreters will agree about who the relevant planners are, about their conceptions of political morality and human nature, or about the proper *grounds* for resolving those disputes. To the contrary, these questions are all likely to give rise to further disagreements.<sup>124</sup>

Indeed, controversy permeates any effort to identify the content of the law, up to and including legal theory itself. Shapiro, for example, views recourse to social facts alone as the best and only proper means of addressing metainterpretive questions—questions about the proper method of interpretation.<sup>125</sup> Dworkin, in contrast, claims there is no alternative but to base legal interpretation in part on moral and political theory.<sup>126</sup> This disagreement runs to the extremes of generality. Shapiro’s ultimate philosophical methodology appears to eschew moral judgment.<sup>127</sup> As noted above, it must if he is committed to positivism and believes jurisprudence informs legal practice.<sup>128</sup> Dworkin, in contrast, claims legal

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<sup>121</sup> I do not intend to imply that these are the only options or that either is appropriate.

<sup>122</sup> Others have noted this difficulty. *See, e.g.*, John Gardner & Timothy Macklem, Book Review, NOTRE DAME PHIL. REVIEWS (Dec. 8, 2011), <http://ndpr.nd.edu/news/27609-legality/> (reviewing SHAPIRO, *supra* note 1).

<sup>123</sup> SHAPIRO, *supra* note 1, at 399.

<sup>124</sup> Shapiro appears to concede such pervasive disagreement in our legal system. *See id.* at 383.

<sup>125</sup> *Id.* at 345.

<sup>126</sup> RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 405 (2011).

<sup>127</sup> Note that Shapiro questions whether morality can inform our understanding of the nature of law. SHAPIRO, *supra* note 1, at 255.

<sup>128</sup> *See infra* Part VI.A.

interpretation ultimately is a branch of moral theory.<sup>129</sup> How are we to choose between these theories?

Given this dispute, it is hard to see how Shapiro's approach can avoid a vicious infinite regress. He can postulate ever more abstract agreement regarding what social facts are relevant to identifying the content of the law, but he provides no reason to believe any such agreement exists. Disagreement can—and does—infect every level of interpretation, not merely about social facts or about which social facts are relevant to legal interpretation, but also about the *grounds* for resolving disputes about which social facts are relevant, and so on.<sup>130</sup>

Shapiro is too careful to miss this point. He recognizes that disagreements beset efforts to rely on the planners' views and to derive from them guidance about interpretive methodology.<sup>131</sup> He offers two responses. The first is to speculate that there nevertheless may be some consensus—even a thin shared understanding—sufficient to support some interpretive methodologies and to rule out others. But he does not make an adequate case that there is such a thin shared understanding or, if one exists, that it can do the work he would ask of it.<sup>132</sup>

Shapiro is thus left with the following response to the difficulty that theoretical disagreements pose for his theory: “a theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution to them.”<sup>133</sup> But this argument will not do. Shapiro acknowledges that legal positivists do not make disagreement intelligible when they provide no means for identifying *which* social facts matter in determining the content of the law.<sup>134</sup> As Shapiro notes, Dworkin exploits this point by arguing that in various cases interpreters disagree about the grounds for resolving disputes about the content of

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<sup>129</sup> DWORKIN, *supra* note 126, at 405.

<sup>130</sup> Positivists thus can speculate about a consensus at ever-greater levels of generality, but they provide little reason to believe such a consensus actually exists. Jules L. Coleman, in defending legal positivism, pursues an analogous argument by moving beyond metaphysics to rely on meta-metaphysics. *See* Coleman, *supra* note 63, at 69. For a critique of this strategy, labeling it the retreat to abstraction, see Davis, *supra* note 87, at 5–6, 9–10.

<sup>131</sup> SHAPIRO, *supra* note 1, at 383.

<sup>132</sup> Shapiro briefly suggests that such a thin shared understanding *rules out*, for example, Dworkin's theory of law as integrity because it is inconsistent with the economy of trust. *Id.* He further indicates a thin shared understanding may *support* an argument Jeremy Waldron has made for reliance on textualism rather than on purposivism in the face of deep disagreements about principles. *Id.* But Shapiro is unpersuasive regarding Dworkin. As discussed below, *infra* Part IV.C, Dworkin's theory—or a natural law theory similar to Dworkin's—can be applied in a way that accommodates doubts about the good faith and competence of legal interpreters. As to Waldron's argument, Shapiro himself indicates that a purposive approach to interpretation may be appropriate—and, at the least, seems to acknowledge the force of Lon Fuller's argument that it is. SHAPIRO, *supra* note 1 at 252–54. It seems unlikely, then, that there will be any shared understanding, much less one thick enough to guide interpretation. At the least, Shapiro would need to develop these arguments in far greater detail to make them plausible.

<sup>133</sup> SHAPIRO, *supra* note 1, at 384.

<sup>134</sup> *Id.* at 291–92.

the law—that is, they disagree about *which* social facts determine legal content, such as whether the plain text of a statute should always be conclusive or whether it should be set aside when it would produce absurd results.<sup>135</sup> Shapiro does not deny the force of this point, but claims he has solved the problem by relying on the perspectives of the planners. He claims their views on various issues—including on the economy of trust—dictate the grounds for resolving theoretical disputes.<sup>136</sup>

As noted above, however, social facts do *not* suffice to identify the views of the planners. As Shapiro acknowledges, issues of political legitimacy and substantive justice inform who counts as planners, which of their views matter, and whether they should be shown deference.<sup>137</sup> That is the consequence, for example, of his distinction between authority systems and opportunistic systems. Shapiro has not avoided the need to resolve moral issues to determine which social facts are relevant to legal interpretation. He has just substituted one set of moral issues for another—from moral views about how to interpret a statute, for example, to moral views about which views of which planners of a legal system deserve deference in deciding how to interpret a statute. If the necessity of making the former moral judgments renders legal positivism unintelligible, the same is true regarding the latter moral judgments.

In sum, Shapiro does not offer a satisfactory way to resolve theoretical disagreements with recourse only to social facts. The social facts he identifies as candidates to perform this function themselves give rise to controversy, implicating additional moral facts. Shapiro can attempt to address this problem by turning to ever more abstract social facts—addressing disagreements about legal interpretation by turning to social facts about meta-interpretation and, when that fails, to social facts about meta-meta-interpretation, and so on.<sup>138</sup> But there is no reason to think Shapiro can thereby solve the problem rather than simply re-create it.

Theoretical disagreements thus pose a formidable challenge to Shapiro's argument for legal positivism.<sup>139</sup> They suggest why moral judgment will often be

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<sup>135</sup> *Id.* at 287–89.

<sup>136</sup> *Id.* at 382.

<sup>137</sup> Again, this point follows from Shapiro's treatment of authority and opportunistic systems. *Id.* at 350.

<sup>138</sup> A parallel issue arises in Jules L. Coleman's recent article, *The Architecture of Jurisprudence*, where he attempts to respond to Dworkin's criticisms by relying on what he calls meta-metaphysics. Coleman, *supra* note 63, at 69. However, the same concerns arise regarding meta-metaphysics as metaphysics. See Davis, *supra* note 87, at 5–6, 9–10. Further, to anticipate the next round of discussion, the same would also hold true for meta-meta-metaphysics.

<sup>139</sup> The difficulty for Shapiro may extend beyond theoretical disagreements. Even if there were consensus that something is the law and that it has particular content, it is not clear the fact of that consensus alone would be enough to determine what constitutes the law. So, for example, he contends that crime syndicates are not legal systems—apparently regardless of whether participants in a syndicate all believe the system constitutes “the law.” SHAPIRO, *supra* note 1, at 215. It is hard to see how Shapiro's “conceptual analysis” can provide a persuasive argument for this position without recourse to moral facts about

necessary to produce determinate results in legal interpretation. And because moral issues lie at the *foundation* of efforts to specify the content of the law, the challenge arises for all forms of legal positivism, even inclusive legal positivism. When the law serves as a source of moral guidance, it seems the content of the law depends ultimately not only on social facts, but also on moral facts.

*C. Ptolemaic Positivism*<sup>140</sup>

Theoretical disagreements do not pose the only challenge to Shapiro's defense of legal positivism. There is also a risk that in attempting to divorce moral judgments from legal interpretation, Shapiro will be forced to devise a tortured description of the nature of legal reasoning. Indeed, Shapiro himself recognizes at one point that his argument could appear Ptolemaic—that his account of legal reasoning could seem as artificial as efforts to provide a model of the solar system in which the sun orbits around the earth.<sup>141</sup>

Shapiro has good reason to worry. In ordinary legal practice, many judges routinely make value judgments and, in doing so, reach conclusions that they label as “the law.”<sup>142</sup> Shapiro's embrace of exclusive legal positivism requires him to deny the apparently pervasive role of moral facts in legal reasoning.<sup>143</sup>

Shapiro responds in part by defining the law and legal reasoning as not including moral judgments.<sup>144</sup> Unlike his approach to theoretical disagreements, this effort is, in a sense, successful. If, by definition, law and legal reasoning do not include moral judgments, then exclusive legal positivism is right. But this approach requires a strange and counterintuitive understanding of law and legal reasoning. That is a strike against it.<sup>145</sup>

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the nature of law. Shapiro comes awfully close to this position in asserting that law by its nature has a moral aim. *See, e.g., id.* at 213–17. For a concern about this issue, see Gardner & Macklem, *supra* note 122.

<sup>140</sup> I borrow the phrase “Ptolemaic Positivism” from a heading in DWORKIN, JUSTICE IN ROBES, *supra* note 63, at 198–211, both because there are parallels between my critique of Shapiro's exclusive legal positivism and Dworkin's critique of Joseph Raz's exclusive legal positivism, and because Shapiro recognizes the risk that his views could appear Ptolemaic. SHAPIRO, *supra* note 1, at 278.

<sup>141</sup> SHAPIRO, *supra* note 1, at 278 (“Like Ptolemaic astronomy, the Planning Theory must add epicycle upon epicycle to save the doctrine from incoherence.”). To be sure, Shapiro denies that his theory is in fact Ptolemaic. *Id.*

<sup>142</sup> Note that inclusive legal positivism can accommodate this role for morality in legal interpretation. It requires only that the role of morality depends on social facts, i.e., facts about the practice of law dictate when moral judgments are relevant.

<sup>143</sup> Jules L. Coleman identifies this point as supporting inclusive legal positivism and undermining exclusive legal positivism, although he suggests it is not conclusive. Coleman, *supra* note 63, at 56–57.

<sup>144</sup> *See* SHAPIRO, *supra* note 1, at 272.

<sup>145</sup> Coleman, *supra* note 63, at 56–57.

Recall the various ways in which judges appear to rely on morality in making the law determinate.<sup>146</sup> They make moral judgments in applying certain legal standards (e.g., unreasonableness and unconscionability), in applying rules in difficult cases, in formulating legal rules, in choosing between legal rules, in selecting an appropriate interpretive methodology, and so on. In all of these undertakings, judges often take recourse to the purposes behind the relevant law, and their efforts to identify and weigh those purposes involve recourse both to social facts (e.g., what did a legislature or past judge have in mind regarding the content or scope of a legal rule?) and moral facts (e.g., what does the current judge think are the most compelling purposes a legal rule might serve?). Indeed, unlike some other positivists, Shapiro believes that purposivism offers a legitimate way of specifying the content of the law.<sup>147</sup>

Shapiro deploys a complicated strategy for dealing with this problem. He distinguishes, for example, between applying the law and making the law<sup>148</sup> and between interpreting the law and adjudicating disputes.<sup>149</sup> As to the first point, according to Shapiro, judges apply the law only when they are able to reach determinate conclusions without exercising moral judgment.<sup>150</sup> If judges must make moral judgments as a result of inconsistencies, ambiguities, or gaps in the authoritative sources of law, they are making new law.<sup>151</sup> Morality, then, is not required to say what existing law is.

Similarly, regarding the distinction between adjudication and interpretation, Shapiro suggests adjudication may require a judge to exercise moral judgment, but that exercise is not itself a part of the law.<sup>152</sup> So, for example, a dispute about the enforceability of a damages provision in a contract may depend on whether it is unreasonable or unconscionable.<sup>153</sup> If a judge has to make a moral judgment in applying the relevant standard—in deciding whether the damages provision is unreasonable or unconscionable—the moral judgment itself is not part of the law.<sup>154</sup>

Shapiro's strategy gives rise to a welter of difficulties. Indeterminacy is a matter of degree, not kind. If any exercise of moral judgment in legal interpretation renders the law indeterminate—even just a judgment about whether the law in a

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<sup>146</sup> See *supra* Part III.A–B.

<sup>147</sup> SHAPIRO, *supra* note 1, at 252–54 (embracing purposivism in legal interpretation and questioning H.L.A. Hart's apparent rejection of it).

<sup>148</sup> *Id.* at 274.

<sup>149</sup> *Id.* at 276.

<sup>150</sup> *Id.* at 274, 276.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 276.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Shapiro relies in part on analogies to support this argument. Borrowing from Joseph Raz, he claims that foreign law, for example, may be relevant to adjudication in America, as may be the rules of English grammar, but, he reasons, that does not mean that foreign law or English grammar is part of American law. He suggests the same can be said about morality. *Id.* at 272.

particular area is reasonable and should be applied in a straightforward way—Shapiro’s approach might not recognize much law at all, at least not in litigated cases.<sup>155</sup> Although Shapiro at times writes as if legal determinacy is binary—the law is either determinate or indeterminate—in reality determinacy almost certainly forms a continuum.<sup>156</sup> The law is rarely perfectly determinate without value judgments, even if it is also rarely completely indeterminate.<sup>157</sup>

Moreover, drawing the line between determinate and indeterminate cases would be no mean feat. Judges make implicit moral judgments all the time. It may be possible in theory to distinguish between descriptive and prescriptive judgments about the purposes of a law or the best interpretive methodology, but it is almost certainly not possible in practice.<sup>158</sup>

So if anything turns on whether a judge can specify the content of the law purely through social facts or must rely on moral facts—if that dictates whether the judge is finding or making the law, how the judge should go about doing her job, or whether the law has moral legitimacy—the resulting difficulties would be profound.

Of course, in the world of legal practice, these distinctions do not ordinarily matter. Judges, for example, generally do not recognize a shift in interpretive methodology depending on the degree of determinacy in the law. They tend to use the same interpretive techniques in easy cases as in hard ones.<sup>159</sup> Nor, for the most

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<sup>155</sup> This position assumes that the legal realists were right about room for disagreement about how best to interpret the law in most litigated cases. See LEITER, *supra* note 36, at 19–21 (discussing this realist claim).

<sup>156</sup> Contrast Shapiro’s acknowledgment that legality is likely a matter of degree. SHAPIRO, *supra* note 1, at 223–24.

<sup>157</sup> Note Shapiro’s account of legal interpretation as involving merely an inquiry into social fact seems inconsistent with the views of prominent judges. Holmes, for example, recognized legal interpretation as a messier and more complex exercise in judgment: “Behind the logical form [of law] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Judge Richard Posner has similarly acknowledged the way in which values inform views on facts. RICHARD A. POSNER, HOW JUDGES THINK 116 (2008) (“[T]he empirical claims made in judicial proceedings—for example, claims concerning the deterrent effect of capital punishment or the risk to national security of allowing suspected terrorists to obtain habeas corpus—are often unverified. So judges fall back on their intuitions . . .”). The same would seem to hold true for the kinds of social facts Shapiro claims are relevant to giving content to the law.

<sup>158</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting) (“[I]t is impossible for judges to make ‘factual findings’ without inserting their own policy judgments, when the factual findings *are* policy judgments . . .”); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 175–76 (1921) (discussing many influences on legal interpretation, including the subconscious).

<sup>159</sup> Of course, this is not always true. Shapiro discusses, for example, a case in which the plain text of a statute would yield an absurd result. SHAPIRO, *supra* note 1, at 287–88 (discussing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)). Some judges similarly say

part, are they apt to perceive their obligation to follow the law as depending on how mechanical legal interpretation is.

And these criticisms also may not have practical consequences if Shapiro's theory seeks not to inform how legal interpreters should act but merely to offer an outsider's description—however artificial—of legal practice, one that legal practitioners may find odd or unfamiliar but that is not designed to guide their actions in any case.

However, if Shapiro's theory of the law is supposed to influence what interpreters of the law should do—and Shapiro says it is<sup>160</sup>—then the problems he faces are significant. His position may be that judges should proceed differently in cases of legal indeterminacy than in cases of legal determinacy. If so, he must address at least two challenges: first, how judges can meaningfully distinguish between the two and, second, how they should reason in indeterminate cases.

As to the latter, Shapiro needs a theory for how judges should go about their work in cases of indeterminacy, one that he does not adequately provide. Nor does existing law cast much light on this issue. It is true that judges sometimes recognize they are addressing an issue of "first impression." But Shapiro's approach would have far broader application. The number of cases in which judges rely at least in part on their own moral judgment is surely at least an order of magnitude greater than the number in which they indicate they are making new law. Moreover, even in cases where courts recognize existing law as insufficient to yield a clear result, as noted above, they tend to use the same interpretive tools as in ordinary cases—reasoning by analogy to precedent, looking to the purposes of the law, and the like. Any new interpretive methodology in these situations would involve a break with ordinary practice that Shapiro does not adequately develop in *Legality*.<sup>161</sup>

Alternatively, if according to Shapiro's theory judges should proceed in much the same manner whether they are finding the law or making the law, he does not adequately explain why. This shortfall applies not only to the issue of *how* judges should go about deciding legal issues and cases, but also to *why* they may use coercive force in applying new law (assuming at times they may legitimately do

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that they apply the plain text of a statute unless it is ambiguous and then treat legal interpretation as a multiple step process, beginning with a determination of whether the text is ambiguous and proceeding from there. But a great deal of legal interpretation operates otherwise. Judges consider the relevant text, the broader legal scheme, the purposes of the law, relevant case law, and the like, and render an overall judgment. They tend to follow this methodology regardless of how certain they are about the proper legal interpretation in a case.

<sup>160</sup> *Id.* at 22–25, 30–32.

<sup>161</sup> Shapiro recognizes that H.L.A. Hart contemplated a sharp break in judicial methodology between cases in which the law is determinate and cases in which it is not. *Id.* at 255. Shapiro does not make clear his own position on the matter.

so). The reason judges should—or may—apply new law retroactively is not at all obvious.<sup>162</sup>

None of this is to say Shapiro cannot address all of these issues. To the contrary, in theory he can accommodate all of them in one way or another, just as in theory a model of the solar system is possible in which the sun orbits the earth—provided, of course, one is willing to add epicycle on top of epicycle. As noted above, Shapiro at one point acknowledges that his attempt to separate law from morality may appear Ptolemaic in this way.<sup>163</sup> He claims, however, that such a charge is unfounded because the complexities are a natural consequence of his theory.<sup>164</sup> But that is an admission, not a rejoinder. What makes a theory Ptolemaic is that the *difficulties* of matching it to the real world follow naturally from the theory. A defense of the theory involves showing it offers natural *solutions* to those difficulties. But Shapiro's efforts to reconcile ordinary legal practice with legal positivism seem ad hoc. Further, he has left many difficult issues unresolved, difficult issues that would likely require him to suggest various counterintuitive ways of understanding what counts as the law. His Planning Theory, in other words, creates significant problems to which it does not offer straightforward solutions, a mark of Ptolemaism.

Moreover, whether the difficulties discussed above are a natural consequence of Shapiro's theory depends on how one identifies that theory. If his theory is exclusive legal positivism, Shapiro must indeed attempt to maintain a strong separation between law and morality. But if his primary commitment is to the Planning Theory, he need not accept exclusive legal positivism in particular or legal positivism in general.

#### *D. The Logic of Planning*

Shapiro's Planning Theory makes a major contribution to jurisprudence. He contends that it entails a commitment to exclusive legal positivism. If so, that would support his embrace of positivism. But Shapiro is not correct that the Planning Theory logically requires a commitment to positivism. Nor does he offer a compelling case that planning, as a matter of policy, requires elimination of all moral judgments in interpreting the law.

Recall Shapiro's Logic of Planning: the purpose of a plan is to resolve moral conflicts; if application of the plan requires consideration of the very issues the plan means to resolve, then the plan fails.<sup>165</sup> Shapiro suggests that this logic precludes reliance on any moral judgments in identifying the content of the law. After all, he reasons, the point of a plan is “to settle matters about what morality

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<sup>162</sup> To be sure, there are limited exceptions to the general practice of applying new interpretations retroactively, such as some forms of qualified immunity. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 199 (2001) (applying qualified immunity because alleged constitutional right violation was not clearly established).

<sup>163</sup> *See* SHAPIRO, *supra* note 1, at 278.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 275, 278, 302.

requires.”<sup>166</sup> Legal interpreters, he concludes, must identify the content of the law by recourse only to social facts, not to moral facts.<sup>167</sup>

But Shapiro does not fully succeed in supporting this position because he does not adequately develop his account of the role moral judgments play in the circumstances of legality. His position rests, at least implicitly, on two propositions: (1) permitting any moral judgment in legal interpretation would render planning useless; and (2) reliance on social facts poses no similar threat to law as a plan. Neither proposition is true merely as a matter of logic. And both are contestable as a matter of policy.

As to the first point, it is not correct that planning precludes moral judgment in legal interpretation. Planning merely requires reasonable predictability, not absolute certainty. Even assuming that moral judgments are responsible for the circumstances of legality and that the point of the law as a plan is to confine those moral disagreements, the law could do so by framing moral issues in a narrow way or by creating a presumption about how they should be resolved. A plan can work even if participants revisit the matters it addresses, provided they do so with sufficient *deference* to give it stability.

Second, at least in some circumstances, social facts may give rise to disagreements and moral facts may command a consensus. Law as a plan may function better if it sometimes allows (or requires) legal interpreters to rely on moral facts in saying what the law is and prevents them (or discourages them) from making judgments about at least some social facts.

### *1. Planning Need Not Eliminate Any Moral Judgments*

The first problem with Shapiro’s reliance on the logic of planning is that it is too rigid. All that planning requires—as a *logical* matter—is significant stability. Shapiro himself suggests that plans need be only “fairly stable, which is to say that they must be reasonably resistant to reconsideration.”<sup>168</sup> Participants in a plan need not refrain from making value judgments, not even regarding issues the plan addresses. A plan can work if, for example, participants show great deference to the value judgments a plan instantiates.

This point becomes apparent from an analogy that Shapiro offers. He asks readers to imagine hiring a financial advisor to develop an investment plan.<sup>169</sup> He then claims that if we lack the competence to create this plan ourselves, it would be irrational for us to revisit the merits of the very investment decisions we hired the

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<sup>166</sup> *Id.* at 275.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 124.

<sup>169</sup> *Id.* at 332.

advisor to make.<sup>170</sup> After all, he reasons, our examination of the merits would defeat the purpose of hiring the advisor in the first place.<sup>171</sup>

But Shapiro's analysis is unpersuasive as a matter of logic and questionable as a matter of judgment. We could certainly take a quick look at each proposed investment and consider its merits, perhaps in a perfunctory manner unless our initial investigation leads us to think the advisor may have made an egregious error. Such limited reliance on the advisor could well save us considerable time and greatly improve the quality of our decision making, even if it does not eliminate our consideration of the merits of *any* of the investments. Nothing about this strategy is illogical or necessarily unwise.

The same may be true for law as a plan. The purpose of law as a plan may be merely to narrow or frame moral issues, or to offer a default resolution, nonetheless deliberately incorporating—as *part* of the plan—that participants exercise some moral judgment on all issues. Shapiro comes very close to acknowledging this point.<sup>172</sup> He writes:

To serve as a plan, we might say, it is not necessary for a law to *eliminate* moral reasoning. Rather, it need only displace the need for some such deliberation. As long as it takes certain issues “off the table” and channels deliberation in a particular direction, the rule will fulfill its function as a plan.<sup>173</sup>

Given Shapiro's concession that the law as a plan need not eliminate moral reasoning, his position is somewhat arbitrary that moral reasoning can play no role in saying what the law is.<sup>174</sup> Moreover, he does not consider that a plan need not take any issues entirely “off the table” but rather may just facilitate their resolution. As long as the plan constrains judgment, expedites analysis, and enhances coordination, it can help to address the circumstances of legality. It can serve as a corrective to deficiencies in other forms of decision making.<sup>175</sup>

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<sup>170</sup> *Id.* at 124, 333.

<sup>171</sup> *Id.* Shapiro acknowledges that an investment plan may place significant discretion in its beneficiary. *Id.* at 334–35. Note the analogy suggests the law, even as a plan, could vest discretion in interpreters to make moral judgments in saying what the law is.

<sup>172</sup> *See id.* at 276.

<sup>173</sup> *Id.*

<sup>174</sup> To be clear, in the quotation Shapiro is arguing that the law as a plan can work as long as identifying the content of the law does not require moral judgment, even if its application does. My point is that confining moral judgment to the application of the law is arbitrary.

<sup>175</sup> Indeed, Shapiro recognizes the compatibility of moral judgment and the implementation of law as a plan. He explains the moral judgment necessary to decide whether a contract is unconscionable: “Judges who follow such a rule . . . will not engage in unrestricted moral deliberation: they will focus on the issue of unconscionability, ask themselves whether the contract in their case is unconscionable, and refuse to enforce those contracts that they deem to be so.” SHAPIRO, *supra* note 1, at 276.

Shapiro attempts to address the possibility of revisiting plans with the concept of defeasibility.<sup>176</sup> He recognizes that we may choose not to abide by a plan. But he seeks to relegate this possibility to the margins, suggesting we would defeat the purpose of a plan if we were to revisit the decisions we made other than as a result of a change in circumstances or for some other extraordinary reason.<sup>177</sup> Discussing reconsideration of a relatively modest plan—to cook dinner at home rather than eat out—he concludes, “I did not derive any benefit from my earlier planning, for I ended up engaging in the same thought processes that I followed earlier.”<sup>178</sup>

Again, Shapiro’s conclusion does not follow logically. Revisiting an issue does not necessarily mean analyzing it in just the same way. An earlier partial commitment may greatly simplify and expedite later consideration. The thought processes are not necessarily the same, even if the issues under consideration are. By giving deference to past judgments—our own or those of others—we could benefit greatly from earlier planning even if we do not entirely rule out attention to *any* judgments in advance.<sup>179</sup>

## 2. *Planning Need Not Eliminate All Moral Judgments*

But even if Shapiro were right that the law as a plan must eliminate *some* moral judgments—that it would defeat the purpose of a plan for interpreters to revisit the moral judgments a plan attempts to resolve—that would not suffice to support his view that the Planning Theory entails exclusive legal positivism. The law might resolve some moral judgments—perhaps particularly controversial moral judgments—but leave others open to be filled in as part of the plan.<sup>180</sup> Interpreters might then need to resolve moral issues in saying what the law is. Shapiro thus needs to make a further argument about the incompatibility of planning and moral judgments.

Shapiro suggests such an argument by distinguishing moral facts from social facts. He claims social facts are objectively knowable in a way that moral facts are not:

Because the existence or content of the law can be determined only by social facts, there is no danger that the process of legal discovery will

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<sup>176</sup> See, e.g., *id.* at 124, 183, 303.

<sup>177</sup> *Id.* at 124 (“It would defeat the purpose of having plans if I were to review their wisdom without an otherwise compelling reason to do so.”).

<sup>178</sup> *Id.*

<sup>179</sup> Shapiro could, of course, make a normative argument—rather than a purely logical argument—that law as a plan *should* include little, if any, revisiting. Whether he could defend that claim about law in all circumstances is not clear. In any case, as discussed below, see *infra* Part VI.A, such a normative argument is not available to Shapiro as he has structured his position. He thus attempts to limit himself to logic to support his position.

<sup>180</sup> SHAPIRO, *supra* note 1, at 120–22 (discussing “The Partiality of Plans”); see also MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 17 (1987) (noting plans may contain room for further decision making).

defeat the very purpose of having law. Social facts are determined through empirical observation, not moral deliberation. As such, they are fitting grounds for law.<sup>181</sup>

But judgments about moral facts and social facts do not divide neatly in the way Shapiro suggests. Interpreters do not in fact discover social facts simply by empirical observation, as Shapiro claims. Their values inform their views of social facts.<sup>182</sup> More important for purposes of planning, although related, legal interpreters may disagree about key social facts and may agree about equally key moral facts. Under such circumstances, the law might best facilitate planning by encouraging legal interpreters to rely on moral facts rather than social facts.

In overlooking these points, Shapiro makes a kind of category mistake. Plans are eminently practical. They are instruments: a means for achieving ends. It does not matter what *in theory* participants in the plan could know. To the extent a plan is concerned with coordinating behavior, for example, what matters is whether the participants will *in practice* converge on a common perspective. The participants may, as a *practical* matter, reach predictable, common conclusions on some appropriately framed moral issues. Alternatively, they may reach conflicting views regarding some social facts.<sup>183</sup>

Consider school segregation. Today there is little doubt that the overwhelming majority of judges would reach the same conclusions on at least some issues if permitted to take into account moral facts. They would, for example, hold that a law creating whites-only schools would violate the Equal Protection Clause of the Fourteenth Amendment.<sup>184</sup>

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<sup>181</sup> SHAPIRO, *supra* note 1, at 275.

<sup>182</sup> See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting) (“I am saying that it is impossible for judges to make ‘factual findings’ without inserting their own policy judgments, when the factual findings *are* policy judgments.”); Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–26 (2011) (discussing ways in which our ends or goals can shape how we view facts).

<sup>183</sup> Supreme Court Justices routinely rely on—and disagree about—social facts in interpreting the law, often without input from the parties and, indeed, without a sound empirical basis for doing so. See generally Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) (discussing “in-house” fact finding by the Court, that is, fact finding not based on evidence submitted by the parties). Larsen notes that 56% of the most salient Supreme Court decisions in the last ten years contain facts based on in-house research. *Id.* at 1262. She proposes alternative procedures to the current in-house fact finding. *Id.* at 1305–12. In reality, however, the tendency toward motivated thinking suggests a change in process is likely to have at most a modest impact on whether judges will see social facts the way they want to see them. See Kahan, *supra* note 182, at 19–26.

<sup>184</sup> There are two standard readings of Equal Protection: (1) it prohibits classification based on race and (2) it prohibits subordination based on race. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470–73 (2004). These two readings converge in this instance. *Id.* at 1476–77. To be sure, other issues would be more controversial, including

But the same is not true if judges were to take an originalist view, relying on the perspective of the planners of the amendment. Disagreements would arise about whose original perspective might govern, whether segregated schools were originally understood to violate equal protection, and how the relevant issue should be framed.<sup>185</sup>

The problem of segregated schools illustrates that, as a practical matter, reliance on moral facts may at times yield a greater consensus than reliance on social facts. In some contexts reliance on moral facts may be more conducive to planning and, crucially, the moral facts may displace controversial social facts, ultimately improving coordination.

Moreover, as recent empirical work shows, a strong correlation exists between views on moral facts and social facts.<sup>186</sup> In practice the two tend to be inextricably intertwined. One strongly suspects, for example, that modern originalists' assessments of the relevant social facts regarding school desegregation are informed by their desire to conclude that *Brown v. Board of Education* was rightly decided.<sup>187</sup> Our views on moral facts shape our views on social facts. So if any consideration of moral facts defeated planning—if moral judgments were fatally infectious in this way—interpreting law as a plan would be difficult, if not impossible.<sup>188</sup> But it is not. We need not worry about the permeable barrier between moral facts and social facts because planning does not require a categorical rejection of reliance on either one.

### 3. *Shapiro's Effort to Separate Moral Judgment from Legal Interpretation Is Arbitrary*

Indeed, Shapiro's own account of adjudication reveals that planning can function reasonably well even if a plan requires participants to make moral judgments. Recall that Shapiro defines the *law* as including only judgments by legal interpreters about social facts, not judgments about morality. He recognizes,

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the constitutionality of taking race into account to create integrated schools. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (addressing affirmative action in public schools). But the point is that *sometimes* moral facts are less controversial than social facts, not that they *always* are.

<sup>185</sup> *See generally* Derek A. Webb, *Getting Right with Brown: How Originalist Supreme Court Nominees Defend Brown v. Board of Education*, 9 *GEO. J.L. & PUB. POL'Y* 563 (2011).

<sup>186</sup> *See supra* note 183.

<sup>187</sup> *See Webb, supra* note 185, at 564–65 (discussing literature claiming *Brown* cannot be reconciled with originalism and efforts by originalist judicial nominees to take the contrary position).

<sup>188</sup> Supreme Court Justices—and no doubt other judges—routinely rely on their views of social facts in deciding cases, social facts that lack any basis in the record, that are not subjected to the crucible of the adversarial process, and that often have little, if any, empirical support. *See, e.g.,* Larsen, *supra* note 183, at 1290–1305. Reliance on social facts thus creates the risk that judges will rely—consciously or otherwise—on their preferred view of the world in rendering decisions, including on their value judgments.

however, that in adjudication, judges often may—even must—make moral judgments to resolve particular cases.<sup>189</sup>

But what matters for contending with the circumstances of legality are the ultimate conclusions reached by judges or others about how to act. Participants in a legal system want to know how judges will ultimately rule, not how they will specify the content of the law as only one step in their decision making process. If our legal system is a kind of plan and if morality plays a role in adjudication in the ways that Shapiro admits, then the success of our legal system in contending with the circumstances of legality establishes that Shapiro is wrong about the logic of planning. Law as a plan can tolerate a role for moral judgment, as the realities of adjudication establish. Shapiro's account of adjudication shows that moral judgments need not be hermetically sealed off from planning through the law. Planning and moral judgment can comfortably coexist.

The same point applies to when, if at all, judges have a moral obligation to follow the law. Shapiro does not address this issue, attempting to separate it from determining the content of the law.<sup>190</sup> But judges and other legal interpreters seeking to fulfill their moral obligations must decide whether they should abide by the law. Shapiro does not deny that this inquiry requires moral judgment. Indeed, his acceptance of Hume's Law implies such a requirement.<sup>191</sup> Yet he does not adequately contend with its implications.

Consider as a first possibility that the law *never* has moral legitimacy. If not, it is hard to see how the law can be an effective plan. It sets up a system of coordination that no one should follow.

An alternative possibility is that the law at least *sometimes* has moral legitimacy. At first glance, this alternative appears more attractive for Shapiro. Law as a plan may sometimes have utility if it sometimes commands moral allegiance. But this possibility creates its own difficulties. Shapiro must explain how successful planning can accommodate the kind of moral judgment necessary to determine when the law creates moral obligations. He can do so but only, it would seem, by acknowledging the logic of planning does not require legal interpreters to refrain from assessing moral facts.

Shapiro offers no compelling reason why the full decision making apparatus necessary to legal interpretation—including the decision whether the law has moral legitimacy—could not fit in a plan and could not be called the law. Let us further assume—as Shapiro does—that judges must at times exercise moral judgment in particular cases, e.g., in deciding whether to follow the law as a plan in a particular case, in applying the plan to the extent it calls for moral judgment, and so on.<sup>192</sup> Let us also assume—again, as Shapiro does—that whether a judge has a moral

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<sup>189</sup> See *supra* notes 141–147 and accompanying text.

<sup>190</sup> See SHAPIRO, *supra* note 1, at 188.

<sup>191</sup> Hume's Law holds that one can derive an "ought" only from an "ought." *Id.* at 47.

<sup>192</sup> See *supra* notes 141–147 and accompanying text.

obligation to follow the law turns in part on moral judgments.<sup>193</sup> What—other than Shapiro’s definition of the law as a special kind of plan that does not allow consideration of moral facts—prevents us from characterizing the plan as including those moral facts necessary at times to decide what a judge should do? Such a plan would not necessarily be useless. Judgments about some moral facts may impose no greater encumbrance on planning than judgments about some social facts. In some areas, properly defined moral judgments may even enhance the efficacy of the plan, including better coordinating behavior.

In sum, the logic of planning does not require exclusive legal positivism or even inclusive legal positivism. Shapiro confirms this point at least implicitly by recognizing that our system for resolving legal disputes functions reasonably well even though adjudication at times involves consideration of moral facts—indeed, at times, even the very moral facts that the law aspires to settle.

#### IV. DUALITY

Shapiro’s Planning Theory, then, does not and need not reconcile legal positivism with Hume’s Law, at least not in the sort of complex legal systems that exist in the United States and many other jurisdictions. That does not necessarily mean the triumph of natural law. Natural law still faces the daunting task of contending with Evil Law, as well as with various arguments that Shapiro makes over the course of *Legality*. Perhaps jurisprudence remains stuck where it was before Shapiro weighed in—with imperfect options. But there is another way forward. Shapiro assumes the law is monistic. That explains his contention that positivism fails if it cannot account for Hume’s Law and natural law fails if it cannot account for Evil Law. This Article proposes an alternative, a dualism that accommodates key challenges Shapiro identifies for both legal positivism and natural law.

##### A. *Dualism About the Nature of Law*

As Shapiro recognizes, a main difficulty for legal positivism lies in providing an account of the nature of law when it gives rise to moral obligations. Legal positivism then struggles to explain how legal interpretation can proceed without moral judgment. On the other hand, a primary challenge for natural law is to offer an understanding of the nature of law when it lacks moral legitimacy. Evil Law appears to leave no room for moral judgment. Shapiro indicates skepticism that anyone else has solved this dilemma.<sup>194</sup> But his own effort also proves

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<sup>193</sup> This point follows from Shapiro’s acknowledgement of Hume’s Law, which requires a moral input to produce a moral output. Shapiro claims to abide by Hume’s Law. SHAPIRO, *supra* note 1, at 188.

<sup>194</sup> Shapiro makes extended arguments about how past positivists have failed to do so. *See, e.g., id.* at 51–117 (critiquing the theories of John Austin and H.L.A. Hart). For an interesting argument that Shapiro is unpersuasive in particular in criticizing H.L.A. Hart see Gardner & Macklem, *supra* note 122. Gardner and Macklem suggest that Dworkin’s

unsuccessful. So should we accept legal positivism despite Hume's Law or natural law despite Evil Law? The choice may be a false one. It overlooks a third option.

Shapiro's insight about core challenges to legal positivism and natural law suggests a possible natural boundary in the jurisprudential landscape. Natural law may provide the best account of law when it imposes moral obligations and legal positivism when it does not. The content of the law may vary depending on which of these approaches is appropriate for a particular act of legal interpretation.

Shapiro suggests an analogous possibility at one point. He recognizes that different legal interpreters within a system may understand the law as having different content.<sup>195</sup> At first, this conclusion may be surprising. But upon reflection it makes sense. Different legal interpreters—by virtue of their roles within the legal system—should use different interpretive methodologies. Courts, for example, should at times show deference to administrative agencies.<sup>196</sup> If the differences in the interpretive methodologies are meaningful, sometimes they will produce different views of the content of the law. Perspective matters.<sup>197</sup>

A similar analysis can apply to the nature of law. Perhaps law does not have the same nature for all purposes. The question then arises whether Shapiro's philosophical methodology can tolerate this view. Drawing reasonable inferences, it would seem that his approach would permit two (or more) complementary understandings of the nature of law.

Recall that Shapiro characterizes his approach as “conceptual analysis.”<sup>198</sup> He indicates that it involves taking all of the “truisms”<sup>199</sup> about a concept—“the set of statements that strike informed individuals as self-evidently true . . . .”<sup>200</sup>—and attempting to account for them. Of course, he recognizes the possibility that different people do not share a single concept. Two people use the word “bank” to signify different concepts, for example, when one person understands it to mean a financial institution and another person understands it to mean the slope of land alongside a river.<sup>201</sup> According to Shapiro, however, not all disagreements reduce to the use of different concepts. Sometimes investigation of the collection of our intuitions about a concept can lead to revisions in our views. Shapiro explains:

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argument based on indeterminacy is “more testing” than Shapiro's. *Id.* For the reasons set forth in the text, I agree.

<sup>195</sup> See SHAPIRO, *supra* note 1, at 358.

<sup>196</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>197</sup> Shapiro notes another way in which perspective informs legal interpretation. Relying on the work of Donald Davidson, he suggests that legal requirements depend on the description of the actions at issue. SHAPIRO, *supra* note 1, at 278. Different descriptions of actions can lead to different conclusions about legal entailments.

<sup>198</sup> *Id.* at 17–22.

<sup>199</sup> *Id.* at 13.

<sup>200</sup> *Id.* at 16.

<sup>201</sup> *Id.* at 17.

While conceptual analysis proceeds on the basis of our intuition, it is obviously important that we not take any of our reactions as sacrosanct and unrevisable. The fact that an account does not square with some of our intuitions—that it requires us, say, to deny that the Nazis had law—may count against that account but it is by no means fatal to it. We must consider the totality of our reactions and be willing to give up some of our views when they don't cohere with other judgments to which we assign a higher priority and are therefore less willing to abandon.<sup>202</sup>

To be sure, one might question the methodology Shapiro calls conceptual analysis.<sup>203</sup> But even within his approach, there would seem to be room to relinquish the view—which Shapiro adopts at least implicitly—that law has a single nature for all purposes. When we speak of the law, we may be inadvertently employing a kind of polysemy—using the term “law” to talk about two different things, not just one thing, even though the two things have a significant overlap.<sup>204</sup> The sociologist or historian who seeks only to describe the law may use that term in a different way than a judge who generally has a moral obligation to abide by it. The law as a social institution viewed by an outside observer—viewed from what one might call an “external perspective”—may not be precisely the same thing as the law viewed by an internal participant morally bound by the law—from what one might call an “internal perspective”<sup>205</sup>—even though many of the same considerations will figure in identifying the content of the law either way.

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<sup>202</sup> *Id.*

<sup>203</sup> See, e.g., LEITER, *supra* note 36, at 219.

<sup>204</sup> See Andrei Marmor, *Varieties of Vagueness in the Law* 8 (Univ. S. Cal. Gould Sch. of Law, Legal Studies Research Paper No. 12-8, 2012), available at [ssrn.com/abstract=2039076](http://ssrn.com/abstract=2039076) (discussing polysemy). Marmor offers as an example of polysemy three uses of the word “window”:

- (1a) “I broke the window” (the window’s glass)
- (1b) “I opened the window” (the window’s inner frame with the glass)
- (1c) “I entered through the window” (the window’s outer frame)

*Id.* at 7. Each use of the word “law,” to borrow Marmor’s phrasing, may similarly entail only “a particular subset of the definite extension” of the term. *Id.* at 8–9.

<sup>205</sup> The contrast here between external and internal perspectives on the law does not correspond precisely to how others have used the terms. I am persuaded by Shapiro, for example, that H.L.A. Hart understood the internal point of view more broadly than I define it. See Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1157 (2006) (“The internal point of view is the practical attitude of rule acceptance—it does not imply that people who accept the rules accept their moral legitimacy, only that they are disposed to guide and evaluate conduct in accordance with the rules.”). I believe Shapiro adopts an approach similar to H.L.A. Hart’s. See SHAPIRO, *supra* note 1, at 183. I nevertheless use the definitions in the text because I believe treating the internal perspective as limited to those who have a moral obligation to follow the law can allow for a clear understanding of when legal positivism and natural law each provides the best

The incentive to shift our understanding of the nature of law in this way is great. The main challenges Shapiro identifies to legal positivism and natural law then simply dissolve. Evil Law would not pose an obstacle to natural law, no more than Hume's Law would to legal positivism. Each account of the nature of law would work within its own domain.

Of course, there is a cost to abandoning monism about the nature of law. It runs afoul of the principle of Occam's Razor. But at some point parsimony comes at too high a price.<sup>206</sup> The battle between natural law and legal positivism has grown old. Its modern incarnation has been raging for almost two centuries.<sup>207</sup> True, at times one side has declared victory—Ronald Dworkin, for example, claims his arguments have defeated those in favor of legal positivism,<sup>208</sup> and Brian Leiter asserts that the proponents of legal positivism have overcome the criticisms of Ronald Dworkin.<sup>209</sup> But Dworkin is preoccupied with the law as a source of moral guidance<sup>210</sup> and Leiter with a purely descriptive or predictive account of the law.<sup>211</sup> The debate has matured without a satisfying resolution. It may be time to explore a two-state solution with natural law and legal positivism each assigned to its appropriate terrain.<sup>212</sup>

### B. *The Bad Man v. the Good Man*

In *Legality*, Shapiro does not address directly the possibility of dualism about the nature of law. But he does at one point reason in a way that raises a challenge

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account of the nature of the law. My hope is that this benefit outweighs any confusion that may occur regarding semantics.

<sup>206</sup> Leiter makes this point about the potential tradeoff between consilience and simplicity. LEITER, *supra* note 36, at 211. Leiter applies the point in the context of his naturalism, so that his definition of consilience might not embrace the argument made in the text. Still, I think the epistemic values he identifies have application in this setting. In other words, it is a virtue of dualism if it allows us to make not only descriptive and predictive claims about the law but prescriptive ones as well.

<sup>207</sup> Dworkin, for example, attributes to Bentham the first systematic version of legal positivism. See DWORKIN, JUSTICE IN ROBES, *supra* note 63, at 211 (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1823)).

<sup>208</sup> See *id.* at 211–16.

<sup>209</sup> See, e.g., LEITER, *supra* note 36, at 153–81.

<sup>210</sup> Dworkin, for example, does not reject sociological and taxonomic positivism; he simply denies that they have philosophical importance. DWORKIN, JUSTICE IN ROBES, *supra* note 63, at 27.

<sup>211</sup> Leiter attributes a “normative quietism” to Legal Realists and seems content himself to offer only a predictive or descriptive theory of the nature of law. See, e.g., LEITER, *supra* note 36, at 63 n.18, 190–91, 275.

<sup>212</sup> This proposal implicates but leaves unaddressed underlying philosophical issues, including the ontological and epistemological implications of legal dualism. It is unclear, for example, the extent to which legal dualism casts in doubt—or requires a rejection of—the traditional scientific naturalism of, say, Brian Leiter in *Naturalizing Jurisprudence*. See generally LEITER, *supra* note 36.

for legal dualism. In an instructive passage, he suggests that the law must be knowable in the same way to Holmes's proverbial bad man<sup>213</sup> as it is to a good man:<sup>214</sup>

The bad man not only can talk the talk; he can think the thought. He too can "think like a lawyer." Legal reasoning, we might say, 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. Indeed, it would be bizarre if the only people who could understand the law were those who accepted it. The law claims the right to demand compliance from everyone, even those who reject its demands.<sup>215</sup>

One can understand the distinction between Holmes's bad man and a good man as depending on whether the law is viewed as having moral legitimacy.<sup>216</sup> According to this approach, the bad man acts as if the law has no such legitimacy. He interprets the law purely out of prudential concern. He wants to know only the practical consequences of his behavior. In contrast, the good man—again, according to this approach—views the law as having moral legitimacy, that is, as providing a moral reason to act or not to act in a particular way.<sup>217</sup> He contemplates doing what is right and believes the law can inform that decision. Shapiro's view can be understood as suggesting that a person interpreting the law for purely prudential reasons should be able to identify its content in just the same way—presumably, using the same methods and arriving at the same results—as a person looking to the law for moral guidance. If Shapiro is right, that would pose a serious problem for dualism about the nature of the law.

Is it in fact bizarre that the bad man and the good man should have different views of the content of the law? Not at all. To understand why, it is important to recognize how limited the claim is about the dual nature of the law. It has no necessary implications for predicting the coercive use of force by the government. The bad man and the good man may well be similarly situated when it comes to anticipating how a judge—or some other official actor—will view the law. The

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<sup>213</sup> Holmes, *supra* note 157, at 459.

<sup>214</sup> It would be more precise to speak in terms of the "bad person" and the "good person," but, presumably for purposes of clarity, Shapiro follows Holmes in using the terms "bad man" and "good man". SHAPIRO, *supra* note 1, at 112–13. I do the same.

<sup>215</sup> *Id.* at 112.

<sup>216</sup> In other words, the good man adopts an internal perspective, and the bad man an external perspective, as I have defined those terms. To be clear, Shapiro does not draw the distinction in just this way. As noted above, he would allow a broader definition of the "good man," as apparently does H.L.A. Hart. *Id.* But my point is that the distinction I offer in the text is useful in this context.

<sup>217</sup> Note that the good man may not view his legal obligations as dispositive. It may be that the content of the law is relevant to what morality requires, but that countervailing moral considerations make it moral to violate the law.

bad man would seem as able as the good man to forecast the exercise of power in the name of the law.<sup>218</sup> Prediction is related to description. To provide a compelling description of what has occurred is to imply a claim—if only probabilistic—about what will occur, at least under equivalent circumstances.<sup>219</sup>

But, as Shapiro recognizes, a legal positivist account of the law is often indeterminate.<sup>220</sup> That means predictions about how a court may rule will often produce mere probabilities: a certain chance that a judge will view the law one way as opposed to another. That is all the bad man cares about. Recall that his concerns are purely prudential. In the face of indeterminacy, he will engage in stochastic reckoning and nothing more.<sup>221</sup>

The good man, in contrast, may go a step further. To be sure, he too may care about prudence. He may undertake just the same analysis as the bad man about the potential practical consequences of his actions: Will he be prosecuted or sued if he engages in certain conduct? Will he ultimately prevail in court? But the good man need not end his efforts there.

To the extent the good man believes the law provides a moral reason to act or not to act in a certain way—that it has moral legitimacy and, therefore, should be weighed on the scales of proper conduct—he can resolve some or all of the indeterminacy in the law that the bad man cannot. To be more precise, the good man can resolve indeterminacy in a way that would be of no interest to the bad man. The good man can exercise moral judgment, choose among competing interpretations of the law, and decide how to act accordingly. To be clear, he gains no obvious practical advantage over the bad man by doing so.<sup>222</sup> To the contrary, the good man is trying to figure out how the law constrains him—how it shapes what he is morally required, permitted, or authorized to do.

The same reasoning applies to judges. A bad judge may care about the content of the law only for prudential reasons. She may not want to be perceived as lawless or to be overruled by an appellate court. If the law is not morally legitimate, she

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<sup>218</sup> Some qualification seems appropriate because it is at least possible that a bad man is less able to exercise sound moral judgment than a good man and that the moral judgment of a good man may tend to converge with those of official interpreters. It is conceivable that a bad man's badness therefore may impede his efforts at prediction.

<sup>219</sup> For a discussion of this point, see LEITER, *supra* note 36, at 219 (“Thus, to think we have understood the past event we must think that if we had known what we now take to explain that event we would have been able to predict its occurrence—at least with reasonable probability.”).

<sup>220</sup> SHAPIRO, *supra* note 1, at 267.

<sup>221</sup> Note that the bad man would likely find Shapiro's distinction between the law and adjudication as having no practical use. He cares how a judge—or some other legal interpreter—will act based on the law, not how the interpreter parses judgments between the legal and the moral.

<sup>222</sup> Of course, being good may have advantages over being bad. It may, for example, bring peace of mind. Further, the law could take into account efforts to comply with the law, including making good faith or plausible judgments about what the law requires. If so, it may in a sense punish the bad man for being bad. But that hardly seems bizarre.

has no reason to exercise moral judgment in identifying the content of the law. Her concern may be only how others will perceive and react to her actions.<sup>223</sup>

A good judge, in contrast, may have the same prudential concerns as the bad judge. But she also feels a moral obligation to abide by the law. That moral commitment will not place her in an advantageous position compared to the bad judge. Quite the opposite is true. The good judge may at times have to choose between taking the most prudent path and fulfilling her duty to apply the law as she sees it. She may feel morally obligated, for example, to decide a case in a way that will adversely affect her career. There is nothing bizarre about a good judge being able to resolve contested moral issues in interpreting the law in a way that a bad judge finds irrelevant.<sup>224</sup>

### *C. Dworkin, Distrust, and Difficulty*

Even were Shapiro to accept the possibility of dualism about the nature of law, he offers various criticisms of natural law. If these criticisms are persuasive, an understanding of law as sometimes positivist and sometimes natural would be far less compelling. Key points Shapiro makes in this regard address the theory of Ronald Dworkin.<sup>225</sup> Two of them warrant particular attention. Any defense of natural law requires a response to them or a competing account of natural law. The first issue involves distrust and the second the demanding requirements of natural law interpretation.

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<sup>223</sup> She may nonetheless be a moral actor. She may attempt, for example, to rule in every case to produce a just outcome and feel that the law does not inform what is just or even that it at times prevents her—for prudential reasons—from doing what is just.

<sup>224</sup> I realize this view may appear to give rise to various puzzles. But I do not think they are difficult to solve upon reflection. One puzzle involves potential circularity. Legal dualism contemplates that the content of the law depends on whether it has moral legitimacy, but the opposite is likely true as well: whether the law has moral legitimacy is apt to depend in part on its content. Does this leave the interpreter no place to start? No. A person contemplating that the law may have moral legitimacy should interpret it as if it does and, using that charitable approach, then decide if the law, including the resulting content, gives rise to moral obligations. If it does, she would have completed an interpretive task. If not, or if she also has prudential concerns, she can undertake a positivist interpretation.

Another puzzle involves a person who at first believes the law has moral legitimacy and then changes her mind. Has the content of the law changed? The answer is that she was originally able to interpret the law in at least two ways: as morally legitimate, and in light of any moral judgments she would have to make to give it determinacy; and as purely descriptive or predictive, recognizing how different interpreters might view the law. Originally, the former interpretation gave her moral guidance, and the latter interpretation would be of purely prudential interest. After she changed her mind, the former interpretation no longer has significance.

<sup>225</sup> Shapiro pays far more attention to Dworkin than to any other natural law theorist. Lon Fuller and John Finnis finish in a distant second and third place, not necessarily in that order.

### 1. *Natural Law and Dworkin*

*Legality* is in significant part a response to Dworkin's arguments, the natural lawyer whose work Shapiro addresses at greatest length.<sup>226</sup> Dworkin plays such a central role in the book that a brief summary of his views provides important background to assessing Shapiro's position.

Dworkin does not generally call himself a natural lawyer.<sup>227</sup> Nevertheless, he qualifies as one based on Shapiro's definition because he is committed to the position that moral facts play an ultimate role in identifying the content of the law.<sup>228</sup> One of Dworkin's main contributions to legal theory is his claim that the key value in legal interpretation is integrity, that is, that the law should be interpreted so as to promote what one might call principled consistency.<sup>229</sup>

In furtherance of the value of integrity, Dworkin claims legal interpretation involves two kinds of judgment, one about fit and the other about justification.<sup>230</sup> Fit is descriptive.<sup>231</sup> It includes any nonnormative claims relevant to legal interpretation, such as potential definitions of the words in a statute, possible rules that might make sense of binding precedents, or accounts of the workings of political institutions in a jurisdiction.<sup>232</sup> Justification is prescriptive.<sup>233</sup> It involves moral claims pertaining to legal interpretation, including which definitions of a statutory text, which rules gleaned from case law, and which accounts of political institutions would make the law most just.<sup>234</sup>

According to Dworkin, legal interpretation requires nested judgments about fit and justification.<sup>235</sup> A judge determining the applicable law in a case, for example, might have to ask successive questions about what legal rule best fits and justifies the relevant precedents, what approach to interpretation best fits and

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<sup>226</sup> Shapiro dedicates three of fourteen chapters primarily to setting forth and responding to Dworkin's position, as well as additional intermittent pages on the subject. See SHAPIRO, *supra* note 1, at 259–330.

<sup>227</sup> Dworkin, instead, has recently labeled his approach “interpretivism.” DWORKIN, *supra* note 126, at 401.

<sup>228</sup> See *id.* at 405 (arguing that law is ultimately subsumed within political morality); Dworkin, *supra* note 41, at 165 (“If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.”).

<sup>229</sup> Dworkin's most complete development of the concept of integrity can be found in LAW'S EMPIRE, *supra* note 63, at 176–275. For background on why the term “principled consistency” is preferable to “consistency,” see *id.* at 219–24.

<sup>230</sup> See *id.* at 242–49; see also Dworkin, *supra* note 41, at 170.

<sup>231</sup> See DWORKIN, LAW'S EMPIRE, *supra* note 63, at 242, 245–48; see also Dworkin, *supra* note 41, at 170.

<sup>232</sup> See DWORKIN, LAW'S EMPIRE, *supra* note 63, at 242, 245–247; see also Dworkin, *supra* note 41, at 170.

<sup>233</sup> See DWORKIN, LAW'S EMPIRE, *supra* note 63, at 242–44.

<sup>234</sup> The parallel to *stare decisis* in common law strengthens his position. It means his interpretive theory fits practice.

<sup>235</sup> *Id.* at 254–58.

justifies her role in the legal system, what understanding of the legal institutions best fits and justifies them, and so on up to and including fundamental issues of political morality.<sup>236</sup> At each level, the judge must balance fit and justification.<sup>237</sup> The nested judgments allow legal interpretation to remain true to the actual practice in a particular jurisdiction while also pursuing a principled consistency between outcomes across cases, legal rules, political institutions, and the like.<sup>238</sup>

Shapiro makes various points that are applicable to Dworkin's argument. The ones most relevant to legal dualism might be summarized as follows: first, Dworkin's approach is insufficiently attentive to the circumstances of legality and, in particular, to the lack of trust our legal system often places in legal interpreters to resolve moral issues for themselves;<sup>239</sup> and, second, Dworkin's interpretive methodology is just too demanding, requiring ordinary legal interpreters to resolve profound philosophical issues in determining the content of the law.<sup>240</sup> Neither of these points proves fatal to natural law.

## 2. *Distrust and Fit*

Shapiro criticizes Dworkin's theory of interpretation as assuming that legal interpreters in general—and judges in particular—act in good faith and have extraordinary competence.<sup>241</sup> Shapiro rightly points out that our legal system embodies a great deal of distrust—doubts about the intentions and abilities of legal interpreters.<sup>242</sup> In that sense, Dworkin's understanding seems to fit our legal system rather poorly. He contemplates judges engaging in a free ranging philosophical inquiry in deciding cases. Is criticism of such an approach fatal to Dworkin's theory and does it, therefore, strike a serious blow against natural law in general?

The answer requires distinguishing between Dworkin's writings and the best possible understanding of natural law. Shapiro offers a rich and detailed account of what he calls the economy of trust—the way in which distrust can permeate a legal system and shape the proper interpretive methodologies of various legal actors.<sup>243</sup> He also makes a strong case that such distrust plays a large role in our legal system.<sup>244</sup> Dworkin does not take adequate account of distrust. But Shapiro's valuable critique can be understood as offering a friendly amendment—one that

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> For an additional brief summary of Dworkin's position, see Joshua P. Davis, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 809–10 (1993).

<sup>239</sup> SHAPIRO, *supra* note 1, at 307–30.

<sup>240</sup> *Id.* at 325, 329.

<sup>241</sup> *Id.* at 309–10, 329.

<sup>242</sup> *Id.* at 312–29.

<sup>243</sup> *Id.* at 331–52.

<sup>244</sup> *Id.* at 312–29.

does not necessarily conflict with Dworkin's theory or, at least, with a natural law theory that otherwise shares many of the same commitments as Dworkin's.

Natural law can accommodate distrust. Judges—and other legal interpreters—can take into account the economy of trust in deciding how they should go about interpreting the law. Indeed, according to Dworkin's theory, they are obligated to do so. Judges should recognize the extent to which our legal system embodies doubts about legal officials, including judges. In Dworkin's terms, any account of legal interpretation that ignores such skepticism does not fit our legal system very well.

As necessary, natural law theory can be adapted—should be adapted—in a way that incorporates the economy of trust. True, Dworkin asks legal interpreters to undertake a searching inquiry into the nature of the law and the legal system. But that searching inquiry should be pursued with great humility—and deference to other actors—if such an approach would reflect the best understanding of the legal system in which an interpreter finds herself.<sup>245</sup>

Indeed, a natural law understanding could enhance Shapiro's account of the role of trust in legal interpretation. He would ask judges and others to reconstruct the views of the planners of a legal system about the good faith and competence of political actors. But, as discussed above, for an interpreter seeking moral guidance from the law, that attempt will inevitably lead to disagreements that require moral judgment. It may prove more productive—perhaps for the very reason planning is productive—for legal interpreters in some cases to exercise their own moral judgment about what counts as good faith and what counts as competence in legal interpretation and to let those judgments inform their view of the allocation of trust that best fits our legal system. To use Dworkin's language, the implications of trust for legal interpretation are a matter not only of fit, but also of justification. Shapiro's argument about distrust can be understood not as conflicting with natural law but rather as enriching it and being enriched by it.

### 3. *Difficulty: Zeno's Paradox*

If Dworkin's approach to interpretation must be adapted to accommodate distrust, that could strengthen another criticism Shapiro makes. He claims that Dworkin imposes too great a burden on legal interpreters, requiring them to engage in a complex and highly philosophical form of reasoning.<sup>246</sup> Dworkin's selection of Hercules as a model interpreter can be taken to suggest the daunting nature of

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<sup>245</sup> For a thoughtful discussion of Dworkin's commitment to fit, its implications for judicial humility, and the tension with his analysis of particular legal problems, see generally Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997).

<sup>246</sup> SHAPIRO, *supra* note 1, at 325, 329.

the task he proposes.<sup>247</sup> Shapiro claims that many legal interpreters are not capable of the required analysis.<sup>248</sup> Few judges are demigods.

Considerations of distrust may just add another layer to an already formidable undertaking. On top of engaging in the sort of elaborate analysis that Dworkin prescribes, legal interpreters would have to determine how much trust the system places in them and, potentially, make value judgments about how much trust they in fact deserve. If Dworkin's theory of interpretation already asks too much of legal interpreters, taking seriously Shapiro's refinement of that theory could make matters worse.

Before addressing this point, however, note that it is not at all clear that Shapiro's recommended approach to legal interpretation is any easier to apply than Dworkin's. True, Shapiro would spare interpreters a foray into political theory. But Shapiro acknowledges that legal theory is relevant to legal practice and contending with Shapiro's own book on jurisprudence, *Legality*, would be quite challenging for most judges, lawyers, and law students—even though it is extraordinarily well written and lucid. Jurisprudence is simply not that accessible a subject.

Moreover, Shapiro would replace philosophical inquiry with challenging sociological, historical, and institutional analyses, involving a nuanced understanding of who the planners were of a legal system, what their attitudes were regarding the absolute and relative good faith and competence of various actors, and what those views dictate for the interpretive methodologies of various players in a complicated legal system.<sup>249</sup> These difficult judgments are required, for example, because of Shapiro's distinction between an authority system and an opportunistic system and the implications of that distinction. It is no mean feat to identify the relevant authoritative decision makers and determine their views on the extent to which a system of law warrants deference because of the political legitimacy of its planners or because of the justness of its laws.

In this regard, we should not let the word "fact" lull us into a false sense of certainty. Many social facts—especially the social facts that Shapiro concedes his Planning Theory makes relevant—are every bit as contestable and difficult to determine as many moral facts.

From a practical perspective, however, Shapiro's interpretive theory is not nearly as outlandish as it may sound. Most legal interpreters could—and would—do fine to understand the basic ideas behind Shapiro's theory and to apply them as best they can given limited knowledge, time, and abilities.

The same is true for Dworkin as well. Applying Dworkin's approach is not nearly as impractical as Shapiro makes it out to be. Shapiro's argument is a bit like Zeno's dichotomy paradox: he has made sound difficult, if not impossible, something that in practice occurs routinely.

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<sup>247</sup> Dworkin recognizes this issue. See DWORKIN, *supra* note 63, at 263 (noting critics may say Hercules is arrogant).

<sup>248</sup> See SHAPIRO, *supra* note 1, at 312–13.

<sup>249</sup> See *id.* at 350–52 (discussing judgments necessary to decide how to interpret law in a particular legal system).

This point applies with particular force to combining Shapiro's insight about distrust with Dworkin's overall interpretive methodology. It is not that hard for a legal interpreter to understand that she should apply the law as best she can, taking into account how the overall legal system works, what the law says, and her views about what the law is and what it should be trying to achieve. Nor is it all that difficult for her to recognize that in doing so she should be humble and respect the ways in which others might not trust her motives or abilities. Many judges in our legal system would likely view this mindset as quite familiar. They no doubt do all of this at times, even if largely in an intuitive manner.

Indeed, Shapiro's gloss on Dworkin can help to explain the modesty of many judges and the leadership role played by only a few major judicial figures. Most judges may approach legal interpretation in a relatively circumscribed and localized manner, hesitating, for example, to make significant changes in one area of the law to reconcile it with others. These judges may correctly suspect—again, perhaps intuitively and implicitly—that they are apt to err if they adopt too broad a perspective, upsetting expectations, sowing confusion, and creating inconsistencies rather than curing them. A few prominent judges, however, may have an unusual sense of the total interpretive picture, a rare capacity for philosophical reflection, and the prominence to get others to follow.<sup>250</sup> A focus on Shapiro's economy of trust, in other words, may deepen our understanding of how the law in fact evolves and why most judges should engage in legal interpretation as they currently do.

#### 4. *Moral Legitimacy: Distrust and Difficulty Redux*

Shapiro's criticisms of Dworkin face a final obstacle. Although Shapiro takes no position on when the law has moral legitimacy, legal interpreters aspiring to act morally must do so. That includes judges. They must determine when morality requires them to follow the law and when it permits or requires them to stray from it.

In addressing this issue, Shapiro has a few options: he could take the position that legal interpreters *never* have a moral obligation to follow the law. If so, his Planning Theory would seem to be an empty exercise. Law does not provide a very useful plan if no one ever has a moral obligation to follow it. But *Legality* seems to foreclose this approach. To his credit, Shapiro assumes, at least for purposes of argument, that the law at times has moral legitimacy.<sup>251</sup>

A second, more plausible view would be that the law at times has moral legitimacy and that to determine whether it does requires careful analysis. The issue is likely to depend, for example, on political and a complex set of moral and factual considerations. One might imagine that in a particularly just legal order the

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<sup>250</sup> For a discussion of the potential role of prestigious judges in the development of the law, see Davis, *supra* note 238, at 816–18.

<sup>251</sup> Shapiro at least does not rule out the possibility of the law being morally legitimate, SHAPIRO, *supra* note 1, at 184, and at times assumes that it sometimes is. *See id.* at 349.

law often has moral legitimacy, that in a particularly unjust legal order it rarely does, and that in legal regimes between the two extremes no such generalization is possible. It may even be that within many legal systems—perhaps ours—moral legitimacy might vary with the law, its application, the legal interpreter (e.g., judge, juror, lawyer, citizen, legislator), and the context (e.g., attorney arguing in a brief as opposed to advising a client).<sup>252</sup>

Assuming the necessity of some form of analysis along these lines, the issue of moral legitimacy poses grave problems for Shapiro's arguments based on distrust and difficulty. After all, in deciding a case a judge must determine not only what the law is, but also whether she should follow it. Even putting aside the space created for moral judgment by the gap Shapiro's creates between the law and adjudication, a judge must decide if she should act as a good man (or woman) or a bad man (or woman).<sup>253</sup> In other words, should she understand the law according to her best effort at interpretation or should she decide how she wants a case to come out and then determine whether she can provide a sufficiently plausible legal defense of the outcome that she reaches for other reasons?

The judge's determination of how she *should* act seems to entail the sort of discretion and difficulty Shapiro denies is appropriate for a judge. Yet the economy of trust does little work if a judge is constrained in identifying the content of the law but must exercise significant moral judgment in deciding whether she should follow the law. Similarly, even assuming Shapiro's legal positivism imposes a less daunting task on judges than Dworkin's natural law, that difference would seem to be lost if a deep philosophical inquiry is necessary for the judge to decide when the law guides what she should do.

A third possibility is available to Shapiro that would avoid these problems. It may be that legal interpreters always—or almost always—have a moral obligation to abide by the law. If so, the law may function well as a plan, and legal interpreters in deciding whether the law binds them morally may exercise little, if any, judgment and face a minor, if any, challenge. But the possibility that the law generally is morally legitimate gives rise to a separate difficulty for Shapiro. As discussed in the next section, it appears to leave the legal positivist scant room to hold judges accountable for their legal interpretations. If so, it turns out that a criticism Shapiro levels against natural lawyers actually applies with greater force to his own version of legal positivism.

#### *D. The Possibility of a Critique of the Law*

Shapiro implies another argument against natural law. He suggests that only legal positivism allows for a critical perspective on the law:

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<sup>252</sup> An analysis along these lines is suggested, for example, in ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

<sup>253</sup> I rely here on the definition of this distinction in Part IV.B, *supra*.

In fact, the freedom to critique the law depends on its moral neutrality. To see this, imagine the difficulty of criticizing a norm whose content was morally inflected. Suppose the content of a law mandating conscription to an unjust war were best rendered as: “All men between eighteen and forty-five are obligated to enlist in the army for the duration of the war against Oceana.” It would seem to follow that the law obligates conscription. Yet, since the war is unjust, it is proper to criticize the law and even to deny that men between eighteen and forty-five are obligated to enlist in the army. The would-be reformer finds herself in the awkward, even impossible, situation of conceding in the active voice what she denies in the passive voice. She must say that the law obligates persons to act in a manner they are not obligated to act, which is a contradiction.<sup>254</sup>

Shapiro seems to suggest that the natural lawyer cannot explain how a legal interpreter can be critical of the law, much less hold the view that morality could require her to disobey it.

Legal dualism supplies a ready answer to Shapiro’s argument when the law is so unjust as to lack any moral force at all. The way to approach law lacking moral legitimacy is purely descriptive. That is when legal positivism plays its role. In other words, according to legal dualism, natural law provides a way of understanding—and identifying the content of—the law regarding enlistment only if it has moral legitimacy.

Two other possible situations, however, require a subtler analysis. The first occurs if the law has moral legitimacy, a legal interpreter has a moral obligation to follow it, but the law would be more just if it were changed. Shapiro implies that this position is untenable from a natural law perspective. It is not.

The key point here is to distinguish between morality informing the law—or, as Shapiro puts the matter, the law being “morally inflected”<sup>255</sup>—and the law always being perfectly just. Natural law is not committed to the latter proposition: that the law is always perfectly just. According to Shapiro, natural law claims only that the content of the law depends *in part* on moral facts, not *entirely* on moral facts.<sup>256</sup> So, for example, the legal interpreter might make the judgment—based partially on social facts and partially on moral facts—that the legal system in which she finds herself places the authority to make the law and to go to war in the legislature, that the legislature has chosen to pursue an unjust war and to impose an

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<sup>254</sup> SHAPIRO, *supra* note 1, at 231–32.

<sup>255</sup> *Id.* at 232.

<sup>256</sup> Recall the asymmetry in Shapiro’s definition of natural law and legal positivism. See *supra* note 43. Legal positivism holds that the content of the law depends ultimately *only* on social facts. See *supra* Part II.B. But natural law does not entail that the law depends ultimately *only* on moral facts—just that it depends *in part* on moral facts. *Id.* A more aggressive natural law position might claim that the content of the law depends *ultimately* or even *entirely* only on moral facts. These more aggressive positions might be incompatible with a critique of the law.

unjust draft in doing so, and that, despite the unjustness of the war and the draft, the legislature nonetheless has sufficient legitimacy that morality requires obedience to the law. None of this is inconsistent with the possibility that the system would be more just if the legislature abandoned the mandatory draft and, indeed, the unjust war.

In other words, morality could well figure in specifying the content of the law, but the relevant moral and social facts may leave a legal interpreter limited wiggle room. Legal interpretation, to borrow Dworkin's terminology, must still "fit" any properly adopted law.<sup>257</sup> Moreover, the relevant moral facts are not limited to the justness of the ultimate law at issue, but also include the relative political legitimacy and competence of various political actors. Indeed, the interpreter may be all the more constrained by what Shapiro calls the "economy of trust."<sup>258</sup> She may have to emphasize fit over justification in recognition of how little faith the legal system does—and perhaps should—place in her. Given these constraints, the legal interpreter may well conclude that requiring enlistment is substantively unjust—that the ultimate rule taken on its own terms is a bad one—but that the system as a whole is sufficiently just that she nevertheless has a moral obligation to follow the law. Under these circumstances, she could still legitimately agitate for legal reform.

A second situation is similar, although perhaps more subtle yet. A legal interpreter would be perfectly coherent in concluding that a law has moral legitimacy—that it provides *some* reason to act in a particular way—but that other countervailing moral considerations outweigh her moral obligation to follow the law. Again, morality may influence the interpreter's view of the law but may not leave her enough room to resist understanding it as requiring enlistment. The pedigree of the law may give it some moral weight, but the morally noxious nature of the law may have even more moral weight. The balance may weigh against enlistment.

No commitment of natural law prevents this sort of reasoning. Under natural law, moral facts shape legal interpretation but so do social facts, and the law is not always so pliable as to allow an interpreter to conclude that what the law requires is morally defensible, all things considered. In sum, *pace* Shapiro, the freedom to critique—or protest or even disobey—the law does not require moral neutrality but merely some gap between the content of the law and perfect justice.

To be clear, the above reasoning depends in part on judgments about which it attempts to remain neutral. Different theories of morality, political theory, and moral legitimacy may complicate—or simplify—the analysis. The key point, however, is that nothing about the way Shapiro defines natural law makes it inconsistent with legal interpreters criticizing the law, asserting that the law should be reformed, or even concluding that morality requires civil disobedience. Natural law is compatible with a critique of the law. Indeed, as discussed in the next

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<sup>257</sup> Dworkin, *supra* note 41, at 170–71.

<sup>258</sup> SHAPIRO, *supra* note 1, at 331–36.

section, the irony is that Shapiro's legal positivism may limit the possibilities for seeking legal reform whereas he ascribes that flaw to natural law.

## V. PRACTICALITY, IRONY, AUDACITY

The argument thus far has pursued three main claims: first, Shapiro has not explained how positivism can provide an account of the law that is capable of offering moral guidance; second, notwithstanding his argument to the contrary, his Planning Theory can be reconciled with natural law; and third, he has offered no compelling criticisms of natural law and, thus, has not precluded the possibility of legal dualism. If all this is true, a natural query is whether these theoretical points make any practical difference.

### A. *Practicality and Irony*

By this point, the reader may well wonder whether the jurisprudential dispute between natural law and legal positivism matters. Shapiro claims it does; he asserts that legal theory informs legal practice.<sup>259</sup> That is important. It would be odd to put so much energy into an endeavor that has no practical significance.<sup>260</sup> Shapiro's view of the relationship between legal theory and legal practice explains why *Legality* is relevant to the practice of law.

But that commitment also makes Shapiro's argument troubling. If Shapiro's legal theory affects practice, it necessarily constrains legal interpreters, including judges. We can see how it would do so. If Shapiro is right about exclusive legal positivism, for example, judges cannot make moral judgments in saying what the law is. If they do so, they are not following the law. That is a significant constraint.

The extent of this constraint should not be overstated. Shapiro recognizes that legal interpreters may not always have an obligation to follow the law and that in adjudicating disputes, judges may have to make moral judgments, including in creating new law. Still, many judges may well believe that they generally apply existing law (rather than make new law) and that they have a moral obligation to do so. In these instances, if Shapiro is right, judges have limited options. They can choose to follow the law. Or they can choose to flout the law. What they cannot do, however, is take their own moral judgments into account in determining the content of the law. Shapiro's theory precludes that possibility.

This position gives rise to irony. A significant motivation behind modern legal positivism is to enable criticism of the law. To this effect, Shapiro quotes a passage by H.L.A. Hart about Bentham:

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<sup>259</sup> SHAPIRO, *supra* note 1, at 22–25, 30–32.

<sup>260</sup> For this reason it is somewhat disturbing that in attempting to defend exclusive legal positivism, Joseph Raz suggests legal theory may not affect legal interpretation. See JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 33–36 (2009) (responding to DWORKIN, JUSTICE IN ROBES, *supra* note 63, at 201–03). For a discussion of Raz's position—labeling it the retreat from abstraction—see Davis, *supra* note 87, at 6–7, 10–11.

Bentham contemplated and elaborately documented the abuses of the English law of his day, the fantastic prolixity and obscurity of its statutes, the complexity and expense of its court procedure, the artificiality and irrationality of its modes of proof. He was horrified by these things, but even more horrified by the ease with which English lawyers swallowed and propagated the enervating superstition that these abuses were natural and inevitable, so that only a visionary would dream of their radical reform. He believed that only those who had been blinded to the truth that laws were human artefacts could acquiesce in these absurdities and injustices as things to be ascribed to [human] nature; and one way of opening men's eyes was to preach to them the simple but important doctrine that laws were but expressions of the human will. Law is something that men add to the world, not find within it.<sup>261</sup>

In a sense, Shapiro takes the lesson to heart that people make the law rather than merely find it. According to Shapiro, planners create the law and a system for making further law. For any given legal content, his approach should allow us to trace the actor or actors responsible for putting in place the law as it is.

In another sense, however, Shapiro's approach does not fully take account of the extent to which the law is a human artifact, a limitation that has practical and theoretical consequences. At a practical level, Shapiro's theory could blunt criticism of judicial practice, masking the frequency with which judges exercise moral judgment in saying what the law is and making it more difficult to hold them accountable for doing so.

Moreover, at a theoretical level, Shapiro appears to treat the nature of law itself as in part fixed—something to be discovered by investigating truisms rather than open to debate, moral criticism, and reform.<sup>262</sup> It seems the nature of law simply is the way it is. It cannot be adapted to human needs, even when there are good enough reasons to do so.

Shapiro's commitment to the practical relevance of legal theory binds these two points together. If the nature of law is in some sense incorrigible—not subject to criticism and modification on moral grounds—and if theoretical arguments about the nature of law inform legal practice—as Shapiro believes—then to some extent the nature of law introduces rigidity into the content of the law. Some readings of the content of the law—understood broadly, as including *how* the law should be given content and *by whom*—are simply unavailable. Most obviously, according to Shapiro, the law simply cannot be something that depends ultimately in part on moral facts for its content, no matter how attractive that option might be

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<sup>261</sup> SHAPIRO, *supra* note 1, at 389 (quoting H.L.A. HART, *ESSAYS ON BENTHAM* 26 (1982)).

<sup>262</sup> Shapiro at one point questions “whether a jurisprudential theory ought to be rejected simply because its acceptance engenders morally bad consequences,” not necessarily ruling out that possibility, but expressing skepticism about it, implying he is relying on no such moral argument. *Id.* at 255–56.

as a matter of political theory or political morality.<sup>263</sup> Indeed, Shapiro at one point questions whether bad moral consequences can provide a reason to reject an understanding of the nature of law at all.<sup>264</sup>

A more complete account of Shapiro's philosophical methodology would be helpful. Why does he put so much faith in truisms about the nature of law? Why does he believe that those truisms are sufficiently consistent—across different times, cultures, and jurisdictions—to form a single, coherent understanding of law? What is the nature of the truth the truisms produce and how do we gain access to it? And how, finally, can we reconcile a nonmoral account of law's innate features with the lesson from Bentham that law is something that people add to the world, not find within it? Shapiro does not say.

### B. Audacity

Shapiro's position seems to derive in part from a commitment to humility. He is critical of theorists who ask legal interpreters to assume what he calls the God's-eye approach or God's-eye view.<sup>265</sup> Those theorists ask interpreters to resolve moral issues in deciding what the law requires rather than to determine what some other authoritative decision maker thought of those moral issues.

Adopting the God's-eye view seems immodest. No one, we may think, should play God. But at times someone has to do so, at least in the sense that someone has to assume responsibility for exercising moral judgment. And it is worse to play God and pretend otherwise than to take ownership of the role. A false modesty can be a way of evading accountability—arrogance cloaked as humility.

None of this is to say that a particular jurisprudential perspective correlates to a particular interpretive methodology. A proper understanding of our legal system may require a judge in a constitutional case, for example, to defer to legislative judgment, to undertake a robust originalist analysis, to interpret the Constitution as a living document, etc. But however the judge decides to proceed in legal interpretation, in a complex system like ours she can fulfill any duty she has to follow the law only by grappling with difficult moral issues. The moral issues may be abstract. Her exercise in moral judgment may cause her to interpret her role narrowly—perhaps as requiring her to engage in as mechanical a form of legal interpretation as possible.<sup>266</sup> But she must make moral judgments nonetheless. She should feel the full weight of them. And she should rule accordingly.

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<sup>263</sup> See *id.* at 45 (“[I]f the positivist solutions are correct, and the law rests on social facts alone, then the only way to definitively determine the fundamental rules of a particular legal system and its proper interpretive methodology is to engage in sociological inquiry.”).

<sup>264</sup> *Id.* at 255.

<sup>265</sup> *Id.* at 346–49.

<sup>266</sup> A view along these lines underlies, for example, Justice Scalia's preferred approach to constitutional interpretation. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the*

Justice Scalia provides a notable example. He has long championed constraints on judges making moral judgments.<sup>267</sup> He says the point of a written Constitution is to resolve moral issues.<sup>268</sup> Hear the echo in Shapiro.<sup>269</sup> But a written Constitution may serve other purposes. It may, for example, serve to *frame* the moral judgments that later interpreters should make. Choosing between these positions requires consideration of issues of political morality: who should be vested with authority to make moral judgments, how judgments about political legitimacy and substantive justice should figure in allocating that responsibility, and so on. Indeed, when Dworkin raised the challenge in *A Matter of Interpretation* that Scalia's somewhat varying views on how best to interpret the Constitution depend on his views of political morality—in particular, on Scalia's ambivalence about majority rule—Scalia provided no meaningful response.<sup>270</sup> He did not deny that moral judgment lies at the foundation of his interpretive theory.

Shapiro's attempt to avoid this ineluctable role for moral judgment is unavailing. He would have us rely on the views of the planners about the economy of trust. But, as he acknowledges, who counts as a planner and the relevance of the planners' views depend on issues of political morality—on their political legitimacy and the substantive justness of the laws they put in place.<sup>271</sup> Again, these points follow from his distinction between an authority system and an opportunistic system. He can—he does—try to circumvent this problem by suggesting we rely on the views of the planners about these issues.<sup>272</sup> But that just replicates the difficulties. Which planners? Which of their views? Why? It is turtles all the way down.<sup>273</sup> A moral judgment is necessary at some point to determine which social facts matter in specifying the content of the law.

None of this means that legal positivism fails completely in offering an account of the law. To the contrary, if all we are doing is describing or predicting legal practice—and can leave all of its uncertainty intact—legal positivism may well provide a satisfying account—perhaps the only satisfying account—of the law. But when legal interpreters look to the law for moral guidance, they need to

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*Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 40–41 (Amy Gutmann ed., 1997).

<sup>267</sup> *Id.* at 38–41.

<sup>268</sup> *See id.*

<sup>269</sup> Shapiro discusses, with approval, Scalia's deference to the planners' views, including regarding the economy of trust. *See SHAPIRO*, *supra* note 1, at 345.

<sup>270</sup> Compare Ronald Dworkin, Comment, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 266, at 115, 125–27 (arguing that Scalia's commitment to majoritarian ideals regarding statutory textualism contrasts with his "reservations about majority rule" with regard to constitutional interpretation), with Antonin Scalia, Response, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 266, at 129, 144–49 (providing no response to Dworkin's claims of ambivalence toward majoritarian ideals).

<sup>271</sup> SHAPIRO, *supra* note 1, at 350–51.

<sup>272</sup> *Id.* at 382.

<sup>273</sup> *See* STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME: FROM THE BIG BANG THEORY TO BLACK HOLES* 1 (1st ed. 1988).

make moral judgments—even if only foundational moral judgments—to enable them to reach sufficiently determinate conclusions about the content of the law.<sup>274</sup> Recognizing this reality allows us to hold judges and others accountable.

## VI. CONCLUSION

If the analysis so far is correct, Hume's Law appears to pose an insurmountable obstacle to legal positivism when the law serves as a source of moral guidance. This conclusion has implications both for any particular theory about the nature of the law, including the Planning Theory, and for jurisprudence more generally.

### A. *Enriching the Planning Theory*

The Planning Theory constitutes a major contribution to jurisprudence. It provides a rich way to understand the law, one with significant implications, including for what Shapiro calls the economy of trust. But what it does not do is permit legal positivism to overcome the difficulties of Hume's Law.

And an embrace of legal positivism comes at a cost to the development and defense of any theory of the nature of the law, including the Planning Theory. Assuming that legal theory informs interpretation—that it is not merely an academic enterprise, divorced from the actual legal practice<sup>275</sup>—legal positivism greatly constrains the kind of arguments available to support any theory of the law. After all, if legal theory informs legal content, then moral arguments in support of the Planning Theory would mean that the content of the law ultimately—at the abstract level of theory<sup>276</sup>—depends at least in part on moral facts—on how interpreters *should* understand the law. Such an approach would constitute an abandonment of legal positivism in favor of natural law.

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<sup>274</sup> This conclusion follows most readily if there is pervasive disagreement about the content of the law and how to identify it, as Shapiro acknowledges there is. SHAPIRO, *supra* note 1, at 256–57, 283, 379. However, even if there is consensus, it would seem judgments about political morality may be necessary to decide that the consensus suffices for the existence of law. Shapiro himself, for example, attributes an intrinsic moral aim to the law. *Id.* at 213–17. Apparently, according to Shapiro, even if participants in a system agree it is legal and agree about its contents, it may not qualify as a legal system if it does not pursue the appropriate moral aim. *Id.* He offers the mafia as an example. *Id.* at 214–16. So it would seem disagreement may not be necessary to contest Shapiro's attempt to defend legal positivism. Even when there is no disagreement about the content of an institution that its participants call law, a foundational moral judgment may be necessary to determine whether the institution qualifies as law. *See* Gardner & Macklem, *supra* note 122 (raising a concern along these lines).

<sup>275</sup> Shapiro makes this assumption. SHAPIRO, *supra* note 1 at 22–25, 30–32.

<sup>276</sup> As noted above, Shapiro is somewhat vague about what he means by the word “ultimately” in his definition of legal positivism. *See supra* Part II.B. The text assumes that foundational, theoretical commitments count as “ultimate” in the relevant sense.

As a result of this conundrum, Shapiro's case for the Planning Theory is quite constrained. He largely refrains from arguing that interpreters *should* understand the law according to the Planning Theory, contending instead merely that they *can* do so. That is unfortunate. His commitment to positivism prevents him from providing the kind of robust moral defense of the Planning Theory that it deserves—and that it requires when law provides moral guidance. It also restricts him from addressing directly various moral questions relevant to developing the Planning Theory. When *should* legal interpreters defer to judgments made by planners? When *should* interpreters make their own judgments? Who *should* count as a planner?

The Planning Theory is valuable, but it is not morally neutral. The law can serve purposes other than facilitating planning. It can, for example, seek to produce just outcomes or promote political legitimacy. The goals of planning, substantive justice, and self-determination may at times conflict.<sup>277</sup> Moral judgments are necessary to make the case that planning is more important than these other noble ends law serves, at least in some circumstances and to some extent. This issue should be addressed—must be addressed—in unabashedly moral terms to guide a person morally bound to follow the law. Description and logic will not suffice.

#### *B. Offering a Different Way Forward in Jurisprudence*

The significance of legal dualism, however, has far greater scope than merely enriching our understanding of any particular theory of the law, including the Planning Theory. If natural law provides the best account of the law when it serves as a source of moral guidance and legal positivism when it does not, then we can put aside a debate in jurisprudence that has vexed and preoccupied scholars for decades if not centuries. No longer need we worry about the single best account of the law. There isn't one. Natural law and legal positivist theories serve different, complementary purposes.

We can focus instead on determining when the law has moral legitimacy. The line between when it does and does not forms a natural boundary between the terrain of natural law and legal positivism. Recognizing that boundary holds the promise of a new way forward in jurisprudence.

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<sup>277</sup> Of course, any apparent conflict may be illusory. See, e.g., DWORKIN, *supra* note 126, at 1 (arguing for unity of value).