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## The Model of Plans and the Prospects for Positivism\*

*Scott Hershovitz*

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In *Legality*, Scott Shapiro builds his case for legal positivism on a simple premise: laws are plans. Recognition of that fact leads to legal positivism, Shapiro says, because the content of a plan is fixed by social facts. In this essay, I argue that Shapiro's case for legal positivism fails. Moreover, I argue that we can learn important lessons about the prospects for positivism by attending to the ways in which the argument fails. As I show, the flaws in Shapiro's argument reveal structural problems with a family of prominent positivist views, including the one defended by Joseph Raz.

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H. L. A. Hart built his case for legal positivism on what Ronald Dworkin called the *model of rules*. He argued that a legal system is constituted by two kinds of rules—primary rules that govern conduct and secondary rules for recognizing the rules of the system, changing them, and adjudicating disputes arising under them. One of those secondary rules—the rule of recognition—plays a foundational role in a legal system. Other rules of the system enjoy their status as law because they satisfy criteria that the rule of recognition sets out for identifying law. The rule of recognition, in contrast, is not validated by a further rule of the system. Instead, it is a social rule, that is, a rule whose existence and content is fixed by a so-

\* This is a critical study of Scott J. Shapiro, *Legality* (Cambridge, MA: Belknap, 2011). Parenthetical citations in the text are to this book. Thanks to Jules Coleman, Heidi Li Feldman, Mark Greenberg, Don Herzog, Lewis Kornhauser, Mark Murphy, John Gardner, Henry Richardson, Steve Schaus, Nicos Stavropoulos, Mark Van Roojen, and a reader from *Ethics* for helpful comments and conversations. Special thanks to Scott Shapiro for writing a book worth writing about, and for always being up for an argument over it.

cial practice. And therein lies Hart's positivism: according to the model of rules, the content of the law—the set of rights, obligations, privileges, and powers in force in a legal system—is fixed (at least ultimately) by social facts about the practice that constitutes that legal system's rule of recognition.

The model of rules attracted many critics, but none more persistent than Dworkin, who challenged both of Hart's central claims. Legal systems, he argued, are not composed of rules, and their content is not fixed by social facts. In place of the model of rules, Dworkin offered an antipositivist picture of law. He argued that social practices play a role in justifying legal requirements but do not fully determine them, as moral facts play a part in fixing the content of the law too. Most contemporary positivists reject Dworkin's critique of Hart's positivism, but Scott Shapiro takes it seriously. Indeed, he worries that positivists never adequately responded to the most powerful versions of Dworkin's objections to Hart.<sup>1</sup> Nevertheless, Shapiro holds fast to the positivist thesis that the content of the law is determined by social facts. He does not, however, defend the model of rules. Instead, he builds his case for positivism on a different picture of law, which we might call the *model of plans*.

At the heart of the model of plans lies a simple idea: laws are plans (194).<sup>2</sup> If you follow Shapiro that far, his defense of legal positivism requires just one more step. The content of a plan, Shapiro says, is fixed by social facts about the adoption and acceptance of the plan. Put those claims together, and legal positivism follows from plan positivism, coupled with the fact that laws are plans (177–78).

At least, that is how Shapiro's argument goes. I do not think that it works, and my primary aim in this essay is to explain why. But I hope to show more than that Shapiro's argument fails. It fails, I shall argue, in ways that reveal structural problems with a family of prominent positivist views, including the one defended by Joseph Raz. But all that is a long way off. To start, I should say a bit more about the model of plans.

## I. THE MODEL OF PLANS

Shapiro takes his inspiration for the model of plans from Michael Bratman's writings about the role of planning in human agency. Bratman calls human beings planning creatures, on account of our capacity to pursue complicated ends by adopting plans to coordinate our actions

1. See Scott J. Shapiro, "The Hart-Dworkin Debate: A Short Guide for the Perplexed," in *Ronald Dworkin*, ed. Arthur Ripstein (Cambridge: Cambridge University Press, 2007), 25–55, 24.

2. To be more precise, Shapiro says that laws are either plans or planlike norms. This exception makes space for customary law, which does not result from planning (*Legality*, 225). It will not affect the argument that follows.

over time and with one another.<sup>3</sup> To get a sense of what Bratman means, think about all that is involved in something so simple as the dinner you will eat tonight.<sup>4</sup> At some point, you must decide where to have dinner—at home or out. If you decide to eat at home, you face the question whether to cook, eat leftovers, or get takeout. If you decide to cook, you must decide what to cook, and if you settle on something that requires ingredients you do not yet have, you must figure out where to buy them and when.

On some days, you might defer all decisions about dinner right up to the moment at which you are hungry enough to eat. But if you do that, your options are likely to be limited, both as to what you eat and who you eat with. So on most days, you plan dinner in advance. You might decide to have dinner at home, but of course that plan will not be enough to make it happen. As Shapiro emphasizes, planning typically has a nested structure (120–22). Your plan to have dinner at home requires subplans about what to eat and when. And those subplans might require further subplans. If you decide to cook pasta, you need to settle on a recipe, and you may need a plan for acquiring the ingredients too. Indeed, Shapiro argues that once you have set yourself an end—like cooking dinner at home—you are rationally required to flesh out the plans necessary to make it happen (123).

To say that you are rationally required to flesh out your plans, however, is not to say that you must do so immediately. You might plan all at once, or you might plan in stages (123). You might decide, for example, that you will stop by the grocery store on the way home but leave the question what to cook until you see what looks good. But, however you assemble your plan, it is easy to see that planning in advance opens many more options than leaving things to the last minute. And it might help you make better decisions too (122). If you wait until you are hungry, you may be tempted by food that is bad for you. If you decide in advance what to eat, you stand a better chance of choosing something healthy, since your deliberation will not be clouded by hunger.

Of course, planning to eat something healthy is not much good if you reconsider when the moment arrives and leave yourself open to temptation. To get the benefit of planning in advance, Shapiro contends, you must accord your plan a certain sort of stickiness (124). That is, you must resist reconsidering your plan, unless you have a good reason to rethink it (as you would if you learned that you could not get the food you planned to eat). According your plans this sort of stickiness allows you to shift your deliberation from a time at which you are likely to make a bad

3. See Michael E. Bratman, *Intention, Plans, and Practical Reason* (Stanford, CA: CSLI, 1999), 2–3, 30.

4. This example is adapted from Shapiro, *Legality*, 120–22.

decision to a time at which you are likely to make a good one. And, Shapiro points out, it helps you to economize your deliberative resources (122). If you spend all your time thinking about what to eat, right up until the moment that you take the first bite, you will have little time to consider anything else. Better to consider the matter settled once you have reached a decision, absent good reason to reconsider. Indeed, Shapiro considers it a requirement of rationality that you treat your plans as resistant to reconsideration in this way (124).

To this point, I've imagined that you are planning dinner on your own. But, of course, you will sometimes want to eat with others, and that may require that you make a plan with them (or perhaps for them). At the least, you need to make sure that everyone is at the same place at the same time, and making a plan is usually the best way to go about that. You may also need to coordinate contributions to the meal. The planning might proceed informally, as when you and I agree to order pizza while we watch the game. Or we might be part of a group that has procedures for planning. We might, for example, belong to a club whose president has the power to set a date for our monthly dinner and assign each of us a dish to prepare.

Shapiro says that groups are likely to need plans whenever their activities are complex, contentious, or involve an element of arbitrariness (133–34). You might succeed in having dinner with your roommate most nights, even without a plan, simply because you tend to end up in the same place around the same time. The more people involved, however, the more complicated it will be to get everyone together, and there may be no substitute for a shared plan as to when and where to meet. Likewise, the more contentious an activity is among the group, the less likely people will coordinate their actions without a plan. They may each go in their own direction. And even where an activity is not contentious, arbitrariness may get in the way of coordination. We may not care much when we eat, but if we don't set a time in advance, we may not succeed at the thing we do care about—eating together.

The central insight of the model of plans is that political communities face many problems whose solutions are complex, contentious, or arbitrary (170–71). Consider, for example, the task of raising revenue to support the activities of government. In a large community, this is extraordinarily complicated. There are more than 300 million people in the United States, spread across nearly four million square miles. There is no chance that they will improvise a solution, all mailing a check for just the right amount to just the right place at just the right time. Indeed, it is difficult to see how any individual in a community as vast as the United States could determine precisely how much she ought to pay. The answer depends on too many factors for one person to process. And the complexity is compounded by the fact that the answer is con-

tentious. We disagree about the proper grounds for taxation, so if we are left to our own devices, we are likely to take different views as to what our fair share is. Moreover, the knowledge that other people have different views than we do might make it the case that we are not even willing to pay what we judge we ought to pay, as we worry that others will free ride. Finally, any solution to the problem will involve an element of arbitrariness. We could pay on January 1, or by April 15, or on any other day of the year. We could pay all at once, or periodically. There may be better or worse options among these sets, but it is doubtful that reason picks out single solution, which we can all be expected to recognize.

And so we plan. Or at least some of us do. The US Congress has enacted the Internal Revenue Code, which sets out in great detail who must pay what and when. In 2013, for example, it provided that married couples filing joint returns had to pay 39.6 percent of any income in excess of \$450,000.<sup>5</sup> The code does not settle every question, of course. It leaves some open for the Internal Revenue Service—itsself a creature of statute—to answer by issuing regulations, thus delegating power to flesh out the plans set out in the code. And it grants the agency powers to apply and enforce the provisions of the code, so that people have more motivation to do their share than goodwill alone might provide.

Taken together, the plans set out in the code and related regulations help us to do something quite staggering, which we would have no shot at achieving but for those plans. The code helps coordinate the activity of hundreds of millions of people. And it is not the only statute that pulls off that feat. Open any page of the United States Code, and you are likely to find a plan addressing some problem whose solution is complicated, contentious, and arbitrary. The solutions the statutes adopt may not be good ones, and one suspects that they are almost never the best. Some may even be so bad that we would do better to have no plan at all. But most statutes address problems we could not solve but for planning, so the effort makes sense, even if the outcome often does not.

This is the picture Shapiro has in mind when he says that laws are plans. But he does not think that we just happen to have a plan for raising revenue, a plan for protecting endangered species, and a plan for income security in retirement, all unrelated to one another. These plans, Shapiro says, are part of our legal system because they were created pursuant to another plan—the legal system's master plan, which is a plan for planning (169). When you have a large enough group, planning itself presents problems whose solutions are complicated, contentious, and arbitrary (177–78). Thus, Shapiro says, it is desirable to have a plan for creating plans, and a key move in the development of a legal system is the emergence of just such a plan for planning. The master plan of a

5. 26 U.S. Code § 1 (2013).

legal system settles the constitutional essentials of government. It establishes who has the power to make plans for the rest of us and what procedures they must follow to do so.

Of course, many groups have plans for planning. My faculty has a plan for planning our curriculum. And several of my friends share a plan for planning an annual gathering. But neither my faculty nor my friends have managed to create a legal system. According to Shapiro, the plans that constitute a legal system are marked by several characteristics: they locate planning power in offices rather than individuals; they provide procedures for the exercise of planning power; they generally do not permit people to opt out of legal requirements; they presume that legal officials have the authority to enforce legal norms without first seeking permission from other groups; and they aim to solve moral problems, or at least represent themselves as doing so (193–224). Taken together, Shapiro argues, these features distinguish legal systems from other planning organizations. They also help to explain why law is an efficient and effective way for large groups to plan.

For Shapiro, the master plan of a legal system plays a foundational role, similar to the role that the rule of recognition played for Hart. Other plans have legal authority in virtue of the fact that they were created pursuant to the master plan. The authority of the master plan, in contrast, does not rest on some further plan. Its authority derives from the fact that we are planning creatures, subject to rational pressure to plan and to stick by the plans we make, lest we fail to achieve our complicated ends. Shapiro is careful to say that this authority is limited. Only those who have accepted the legal system's master plan—a group that presumably includes most legal officials—are rationally required to follow it. But the key point for Shapiro is that law is a manifestation of people's rational capacity to create and share plans. The model of plans tells us that, properly understood, legal activity is planning activity, and that laws are plans (194).

## II. PLAN POSITIVISM

There is more to the model of plans, and there are reasons to doubt it too. But we have enough of the picture to proceed, and I plan to set all doubts aside, at least for now. As I said at the start, my aim in this essay is to show that Shapiro's argument for legal positivism fails, even if he is right to think that laws are plans. So let us grant that they are.

Shapiro's argument has two premises. We have just sketched the picture he paints in support of the first—the claim that laws are plans. The second premise is that the existence and content of a plan is fixed by social facts. We can call this thesis *plan positivism*. Shapiro thinks that plan positivism is obviously true. He writes: "Plan positivists believe that the existence and content of plans never depend on moral facts. Plan

positivism is uncontroversially true. No one believes that there are moral constraints on the existence of plans; even natural lawyers are willing to concede that evil plans are still plans. Terrorist plots, for example, exist even though there are no moral facts that justify their existence; rather, they exist just because terrorists share certain plans" (178). But though he thinks plan positivism obviously true, Shapiro also offers an argument for it. A plan can only fulfill its function, he says, if its content is determined solely by social facts. He writes:

Shared plans are supposed to guide and coordinate behavior by resolving doubts and disagreements about how to act. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation or bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts, not moral ones, can serve this function. (177)

Once again, I have doubts. I do not think it obvious that plan positivism is true, nor am I sure that for a plan to fulfill its function, its content must be determined solely by social facts. But I do not want to raise my doubts just yet. Rather, I want to grant Shapiro this premise too, so that we can see what follows.

### III. TWO KINDS OF CONTENT

Now that we have both premises in hand, we can assess Shapiro's argument for legal positivism. It runs like this:<sup>6</sup>

[P1] Laws are plans.

[P2] The content of a plan is determined by social facts.

[C] The content of the law is determined by social facts.<sup>7</sup>

As I just said, I have concerns about both premises, but the possibility that they are false is not the most pressing problem with Shapiro's ar-

6. Shapiro first advances this argument to support a claim about the fundamental rules of a legal system (*Legality*, 177–78), but he later makes clear that it generalizes to cover the complete content of the law (274–75).

7. Shapiro argues that both the existence and content of the law is determined by social facts (*ibid.*, 177–78). I've restricted the argument to his claim about content because this better locates what is at issue between positivists and antipositivists, who are not necessarily committed to a claim about the existence conditions of law.



gument. The most pressing problem is that the argument is not valid, at least not as it stands. In the transition from P2 to C, “the content of a plan” is replaced by “the content of the law.” But P1 does not provide adequate ground for the substitution. For the substitution to be warranted, we would need a further premise, which is missing from Shapiro’s argument:

[MP] The content of the law just is the content of the plans that constitute it.

If MP were true, then legal positivism would follow from plan positivism. But MP might be false. That is, even if we grant that laws are plans, the content of the law may not be the same as the content of the plans that constitute it.<sup>8</sup>

To appreciate the potential for a gap between the content of the law and the content of the plans that constitute it, it might help to consider an argument with a similar structure. We can call this the *statute-text argument*:

[S1] Statutes are texts.

[S2] The linguistic content of a text is determined by social facts.

[SC] The legal content of a statute is determined by social facts.

So far as I can tell, both of these premises are true. Yet, the conclusion does not follow. Taken together, S1 and S2 are sufficient to guarantee that the linguistic content of a statute is determined by social facts, but they do not establish that the legal content of a statute is. To render the argument valid, we would need to add an additional premise, providing that the legal content of a statute just is its linguistic content. But as every lawyer knows, that need not be true. The law is replete with statutes whose legal content does not track their linguistic content.

Among philosophers, the best-known example is *Riggs v. Palmer*.<sup>9</sup> The defendant, Elmer Palmer, knew that he stood to inherit most of his grandfather’s estate. But his grandfather had suggested that he might rewrite his will. Elmer put a stop to that. He murdered his grandfather before he had the chance, and it fell to the court to decide whether Elmer could inherit under the will he killed to preserve. The relevant statute

8. One might wonder here about the relationship between *the law* and *laws*. Shapiro takes *the law* to be constituted by *laws* (ibid., 225). Since he argues that *laws* are plans, this has the consequence that he takes *the law* to be constituted by plans (i.e., the plans that happen to be laws).

9. 22 N.E. 188 (N.Y. 1889).

clearly directed that the grandfather's estate be distributed in accord with his not-yet-rewritten will. But the court nevertheless blocked Elmer's inheritance on the ground that the legislature could not have intended that result. The court explained that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of its makers."<sup>10</sup> And *Riggs* is not just a historical curiosity. Courts today are a bit more circumspect about departing from statutory language, but they continue to hold that statutes generate legal rules that are not expressed in their text.<sup>11</sup> Of course, some lawyers find this regrettable. They call themselves textualists, and they argue that the legal content of a statute should track its linguistic content.<sup>12</sup> And perhaps they are right, but they have a fight on their hands precisely because legal content need not track linguistic content, and indeed, it often does not.

The statute-text argument wears its invalidity on its sleeve, as S2 and SC refer to different kinds of content—linguistic and legal. But there is a lesson to learn from it. One object can bear multiple kinds of content. Statutes are texts, and as such they are bearers of linguistic content. But they are also bearers of legal content, and the legal content need not be the same as the linguistic content.<sup>13</sup> Though it is less obvious, Shapiro's argument has just the same problem. If laws are plans, then they are bearers of plan content. But they are also bearers of legal content, and for all we know, the two might come apart, just as the linguistic and legal content of a statute can and often do.

Now, I do not plan to defend the claim that the content of the law comes apart from the content of the plans that constitute it. My point is simply that the possibility that it could undermines Shapiro's claim that legal positivism follows from plan positivism. Nevertheless, it might help to illustrate how the content of the law could differ from the content of the plans that constitute it. To that end, consider Dworkin's suggestion that the content of the law is a function of the principles that best fit and justify a community's legal practice.<sup>14</sup> I doubt that Dworkin would sign up to Shapiro's claim that legal activity is planning activity, but he might. He might also allow that legal activity gives rise to plans, the content of which is determined by social facts. And he might even allow that the laws in a community are the plans that legal activity generates. Still, he would be in

10. *Ibid.*, at 189.

11. See, e.g., *Zuni Public School Dist. No. 89 v. Dept. of Ed.*, 550 U.S. 81 (2007).

12. Or perhaps, more precisely, some subset of it, like semantic content.

13. See Mark Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication," in *Philosophical Foundations of Language in the Law*, ed. Andrei Marmor and Scott Soames (Oxford: Oxford University Press, 2011), 217–56.

14. Ronald Dworkin, *Law's Empire* (Oxford: Hart, 1998), 225.

a position to deny that the content of the law just is the content of those plans. He might instead maintain that our legal rights and obligations are not simply the ones that legal officials planned for us to have but rather are the ones that flow in a principled fashion from the all the plans that they made, such that the content of the law might extend beyond or fall short of what they planned.

On this quasi-Dworkinian picture, the content of the law is not simply the sum of the contents of the plans that constitute it. Thus, this is a picture on which MP is false. It is also a picture on which particular laws, like the Statute of Wills, might be said to bear two kinds of content—plan content and legal content. The plan content of a law would be a function of the planning activity that gave rise to that law. In contrast, the legal content of a law would be the difference that law makes to the content of the law. But though that difference might be just what was planned, it need not be. When the legislature adopted the statute at issue in *Riggs*, it may have planned for property to be devised according to properly executed wills. But the court held that the statute did not require distribution to Elmer, valid will notwithstanding, so the statute did not change the content of the law in just the way the legislature planned.

Of course, I have not said anything to motivate this quasi-Dworkinian picture. But my aim here is not to defend Dworkin, let alone a quasi-Dworkin. It is to assess Shapiro's case for legal positivism, and from what we have seen so far, his argument falls short. We can grant Shapiro's premises—laws are plans, and the content of a plan is determined by social facts. But it does not follow that the content of the law is also determined by social facts, as nothing in the argument precludes the possibility that the content of the law differs from the content of the plans that constitute the law. Thus, to complete his case for legal positivism, Shapiro must defend a bridge principle that establishes that the content of the law just is the content of those plans.

#### IV. TWO KINDS OF POSITIVISM

Shapiro does not defend MP, or any bridge principle like it, at least not explicitly. But there is an aspect of the model of plans we have not yet explored, which might support it. In Shapiro's view, it is not an accident that laws are plans. They are plans because "legal systems are institutions of social planning, and their fundamental aim is to compensate for the deficiencies of alternative forms of planning" (171, emphasis omitted). What does that mean? "Legal institutions," Shapiro says, "are supposed to enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone" (171). If Shapiro is right about this, then it might seem that the content of the law must be the same as the content of the plans that constitute it. Otherwise,

making decisions according to law would not be a way of obtaining the benefit that law is supposed to provide.

And that is just the complaint that Shapiro lodges against Dworkin. If Dworkin is right about how law works, then to figure out what the law requires, we have to take up a moral inquiry. We have to ask what principles best fit and justify the community's legal practice. In Shapiro's view, this gets things backwards: "Having to answer a series of moral questions is precisely the *disease* that law aims to cure. Dworkinian legal interpretation thus ends up reinfecting the patient after the contagion has been neutralized" (310). Less colorfully, Shapiro says, "it would defeat the purpose of having plans if, in order to figure out whether a plan exists or what its content is, one had to resolve a question that the plan was designed to answer" (310). That, you will recall, is just the argument Shapiro gave in favor of plan positivism. So we might summarize this new argument as follows: legal positivism follows from plan positivism, coupled with the fact that the law aims to solve problems in the way that plans do.

I have several worries about this argument, but the most important is that, once again, the conclusion does not follow from the premises. Suppose that Shapiro is right to say that the fundamental aim of a legal system is to solve problems in the way that plans do. And suppose that he is right to think that law can only help do that if the content of the law is same as the content of the plans that constitute it. When you put these claims together, what you learn is that if the content of the law differs from the content of the plans that constitute it, law will not achieve its fundamental aim. But that does not entail that the content of the law must be the same as the content of those plans. To reach that conclusion, we would need to add the further premise that the law must be capable of achieving its fundamental aim. But Shapiro does not offer us an argument to that effect, and I doubt that he could.

Take a step back from law and think about another tool that people use to solve problems. I take it that you do not have a complete grasp on what knives are if you fail to appreciate that knives are for cutting. So it seems fair to say that a fundamental aim of knives is to cut. But that is fully compatible with the fact that some knives cannot cut. Through long use and neglect, any particular knife might become so blunt and dull that it no longer cuts. But though a knife that could not cut would be a terrible knife, it would still be a knife. If you took it to get sharpened, you'd be making it a better knife, not making it a knife once again. And there is a lesson here: the fact that a tool of a certain sort has a fundamental aim does not entail that every tool of that sort can achieve that aim.<sup>15</sup> So even

15. Cf. Leslie Green, "Introduction," in H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), xv–lv, xxxv.

if we follow Shapiro so far as to say that the fundamental aim of law is to solve problems in the way that plans do, it does not follow that every legal system can do that. Some might be blunt and dull.

Now I suppose it would be odd to attribute to law a fundamental aim that it could not possibly achieve. So if Shapiro is right about law's fundamental aim, he might have the makings of a valid argument against Dworkin, who thinks that the content of the law necessarily depends on the answer to moral questions that Shapiro thinks law must take off the table if it is to achieve its aim. But suppose—as many philosophers argue—that it is a contingent question whether, in a given legal system, moral facts play a part in determining the content of the law. If that were the case, then Shapiro's argument would give us reason to regard as defective any legal system whose content is determined in part by moral facts. A legal system like that would not be capable of achieving its fundamental aim. But a defective legal system is still a legal system.

The problem with Shapiro's argument is that it has the wrong sort of premise for the conclusion he aims at. An argument that rests on the claim that law has a fundamental aim is more apt to establish positivism as a success condition for law than as a necessary truth about it. Instead of guaranteeing that the content of the law is determined by social facts, Shapiro's argument gives us reason to think that we should arrange our law so that its content is determined by social facts. That is a kind of positivism, but it is normative, not conceptual. It presupposes that it is possible for moral facts to play a part in determining the content of the law. But that is a possibility that Shapiro aims to rule out, not one that he wants to endorse (273–75).

## V. WHAT DOES LAW AIM TO DO?

What we have learned so far is that legal positivism does not follow from plan positivism. It does not matter whether we append the claim that laws are plans, or the claim that the fundamental aim of law is to compensate for the deficiencies of other forms of planning, or both. These premises just do not add up to the conclusion that the content of the law must be determined solely by social facts.

But maybe I am demanding too much. Even if Shapiro's arguments fall short of guaranteeing the truth of legal positivism, they might nevertheless give us good reason to think that law works the way he says it does. If law aims to solve problems in the way that plans do, then why would the content of the law be anything but the content of the plans that constitute it? At the very least, we might think that Shapiro has given us grounds to treat his position as a default. Absent an argument that the content of the law comes apart from the content of the plans that constitute it, we ought to assume that they are the same.

I think this would be a fair assessment of the state of play if we had good reason to grant Shapiro's claim that the fundamental aim of law is to solve problems in the way that plans do. But I am skeptical that law has a fundamental aim, or that if it does, it has the aim that Shapiro claims. Notice that Shapiro cannot rely on the picture sketched earlier, which portrayed law as a powerful tool for social planning. That an object is well suited to perform some task does not establish that doing so is its fundamental aim. Knives are good for opening packages. But that is just one thing they happen to be good for; it is not what they are for.

More importantly, Shapiro would run into a problem if he defended his claim about law's fundamental aim by arguing that law is well suited to solve problems in the way that plans do. According to Shapiro, law would only be well suited to do that if its content were determined solely by social facts. But, of course, that is just what is up for grabs, and as we saw in the last section, Shapiro's argument for thinking that law's content is determined by social facts is that if it were not, law would not be capable of achieving its fundamental aim. If it turned out that Shapiro's claim about law's fundamental aim rested on the claim that law is well suited to solve problems in the way that plans do, we would be traveling around a very small and vicious circle.

I suspect this is why Shapiro marshals other reasons for thinking that law's fundamental aim is to solve problems in the way that plans do. He claims two virtues for that view. First, he says that attributing that aim to law explains why we think law valuable. He writes:

Given the complexity, contentiousness, and arbitrariness of modern life, the moral need for plans to guide, coordinate, and monitor conduct are enormous. Yet, for the same reasons, it is extremely costly and risky for people to solve their social problems by themselves, via improvisation, spontaneous ordering, or private agreements, or communally, via consensus or personalized forms of hierarchy. Legal systems, by contrast, are able to respond to this great demand for norms at a reasonable price. Because of the hierarchical, impersonal, and shared nature of legal planning, legal systems are agile, durable, and capable of reducing planning costs to such a degree that social problems can be solved in an efficient manner. (172)

At the same time, Shapiro says, seeing that law aims to compensate for the deficiencies of other forms of planning explains why we do not think law valuable for all societies. "It would be odd," Shapiro says, "to criticize or pity simple hunter-gatherer groups for not having law" (172). In small, homogeneous societies, informal methods of planning are likely to be sufficient, leaving "no compensatory need for sophisticated technologies of social planning" (173).

The second virtue Shapiro claims for his view is that it explains why we sometimes criticize legal systems for being poorly designed. A legal system is poorly designed, Shapiro says, if it cannot provide the plans that society needs to solve its problems. To illustrate, Shapiro points to the Articles of Confederation, which made the early United States difficult to govern, on account of the limited powers accorded the national government. “Confederation following Independence,” Shapiro says, “generated so much complexity, contentiousness, and arbitrariness that the system could not meet the nation’s new demands for social planning” (173).

I would not take issue with the claim that law can be valuable, nor would I contest the claim that a legal system can be poorly designed. But I do think it important to note that there are other plausible explanations for these facts. Suppose, for example, that law does not aim to make a rational difference, of the sort that plans make, but rather aims to make a moral difference.<sup>16</sup> Dworkin held a view like this. He suggested that the fundamental aim of legal activity is to provide moral justification for the state’s use of force.<sup>17</sup> The idea is that when we pass laws that prohibit rape, for example, we are not just aiming to coordinate action by planning our response to rape. Rather, we are aiming to confer on the state the moral standing to punish rapists. Likewise, when we prohibit parking in front of a loading dock, we are not just aiming to keep the curb clear for deliveries. We are aiming to morally obligate people keep the curb clear, so that we will be justified in holding them accountable if they do not.

If Dworkin were right about law’s fundamental aim, then he would have no trouble explaining why law is valuable. Law would be valuable for the same sort of reason that promising is valuable: we often have reasons to restructure our moral relations. Dworkin would also have resources to explain why law is more important to some societies than others; smaller, more homogeneous societies may get by with more informal mechanisms for restructuring moral relations, like promising. Finally, Dworkin would have little trouble accounting for the fact that a legal system could be poorly designed. If its powers were too limited, or too difficult to invoke, then people may not be able to change their moral relations in ways that would be desirable.

Add all this up, and it is clear that the virtues Shapiro claims for his view are not distinctive to it. But the problem for Shapiro runs deeper

16. Shapiro thinks that law aims to solve moral problems (*Legality*, 213). But he thinks it aims to do so by providing plans that affect how it is rational for people to behave, not by directly rearranging people’s moral relations. The difference here is roughly akin to the gap between our merely planning to go to a party and our promising one another that we will go.

17. Dworkin, *Law’s Empire*, 93.

than that. Dworkin defends his antipositivist picture of law in part on the ground that law must manifest the virtue of integrity if it is to legitimize the state's use of force. That is why he argues that the content of the law is a function of the principles that best fit and justify past political decisions about when force should be used; only if that is true will the law have integrity.<sup>18</sup> So, as to this point, at least, we are in a symmetrical standoff. We have two candidates for law's fundamental aim, and they point in opposite directions on the question how the content of the law is determined.

How might we adjudicate the dispute? Well, to start, we should not assume that one side or the other must be right, as it may be that law has no fundamental aim.<sup>19</sup> But we might make progress with the following test. When an object has a use strongly associated with it, then putting it to some other use tends to strike us as a repurposing of the object. For example, one can use a knife as a paperweight, but it seems fair to say that when one does so, one repurposes it. Holding down papers is not what a knife is for, even though it might get the job done. By this measure, using law for the purpose Dworkin suggests does not seem like a repurposing of the institution. Law may be used for other tasks, but creating moral obligations that the state may legitimately enforce is surely among the standard aspirations people have when they engage the institution. To be sure, this does not establish that law's fundamental aim is to provide moral justification for the state's use of force. But it does suggest that law does not have some other fundamental aim—like solving problems in the ways that plans do—such that using law for Dworkin's purpose would be like using a knife as a paperweight.

This is a problem for Shapiro, but not because it shows that Dworkin is right. As I said, I am skeptical that law has a fundamental aim, and that skepticism applies as much to Dworkin's claim as to Shapiro's. I think people use law for all sorts of purposes: restructuring moral relations, solving problems in the way that plans do, expressing their values and aspirations, and for less happy purposes too, like suppressing dissent, extracting rents, and so on. I am hesitant to conclude that any one of these aims is more central to what law is than any other. But at this point in the dialectic, that is what Shapiro needs. If he is to persuade us that the content of the law cannot come apart from the content of the plans that constitute it, then he must give us reason to think that planning has primacy among all the purposes to which law is put.

Shapiro knows about this problem. He acknowledges, for example, that the law might be used for expressive purposes. But he contends that

18. *Ibid.*, 192–93, 225.

19. See Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), 113.



“when the law serves an expressive function, it does so through *planning*,” not by “giving sermons, issuing advice, [or] performing ritual dances” (203). Likewise, he allows that law might aim to make a moral difference; indeed, he says it must. Law, Shapiro argues, is supposed to help people overcome moral problems whose solutions are complicated, contentious, and arbitrary. But he insists that law aims to solve these problems in the way that plans do, by affecting how it is rational for the people confronting these problems to act (213).

Since I have been conceding that laws are plans, I will not take issue with Shapiro’s claim that law pursues its other aims through planning. Instead, I will observe that even if that is true, it does not establish that law’s fundamental aim is to solve problems in the ways that plans do. Law pursues all the aims mentioned through communication too, but communication is not law’s fundamental aim. Communication is just a tool that law uses to achieve its aims, and the content of the law need not match the content of legal communications.<sup>20</sup> (That is why the statute-text argument was invalid.) Planning might occupy the same sort of status; it might be central to how law does what it aims to do, without being what law aims to do. And if planning, like communication, is one of law’s tools, rather than its aim, then the content of the law might come apart from the content of the plans that are made in pursuit of its aims.

The bottom line is that I see no reason to think that law’s fundamental aim is to solve problems in the way that plans do. I would happily concede that this is one purpose to which people put law. But all that suggests is that when people attempt to use law to solve the problems in the way that plans do, the content of the law should track the content of the relevant plans. As we saw in the last section, that might lend support to a normative positivism, but not a conceptual one. And here, the normative positivism would be restricted in scope, as it would leave open the possibility that when people use law for other purposes—like restructuring moral relations—its content should be determined differently. But notice that we are far from what Shapiro needs—a claim about law’s aim that gives strong ground to think that the content of the law is never anything but the content of the plans that constitute it.

## VI. THE PROSPECTS FOR POSITIVISM

Of course, nothing that we have seen so far establishes that the content of the law comes apart from the content of the plans that constitute it. For all we know, there is an argument just around the corner, which will establish MP and complete Shapiro’s case for legal positivism. But I

20. See Greenberg, “Legislation as Communication?,” 256.

doubt it, and my plan now is to see what Shapiro's arguments have to teach us about the prospects for positivism.

The positivism that Shapiro defends is known as *exclusive legal positivism*, since it rules out the possibility that moral facts play a part in determining the content of the law. One competitor to Shapiro's view is an antipositivism, like Dworkin's, which insists that moral facts must play a part in determining the content of the law. Another alternative is *inclusive legal positivism*, a view I alluded to earlier, when I imagined that it might be a contingent question whether, in any given legal system, moral facts are among the determinants of the content of the law. Inclusive legal positivism is a form of positivism because it holds that the content of the law is ultimately determined by social facts. But it allows that moral facts might be among the determinants of the content of the law, if the relevant social practice assigns them that role.

The best-known argument for exclusive legal positivism is Joseph Raz's argument from authority.<sup>21</sup> It bears a striking resemblance to Shapiro's argument. Raz contends that law must be capable of making the kind of normative difference that authority makes. Moreover, he argues, law could not make that difference unless its content were determined solely by social facts. Shapiro argues that law must be capable of making the kind of normative difference that plans make. Moreover, he argues, law could not make that difference unless its content were determined solely by social facts. Thus, both arguments depend on the claim that law must be capable of making a certain kind of normative difference; the point of departure is over what kind of normative difference that is.

I do not think this similarity is accidental, and I want to see if I can explain why the leading arguments for exclusive legal positivism take the form that they do. Let us start with this observation. The content of some normative systems is determined by both social and moral facts. Indeed, morality itself is such a system.<sup>22</sup> If I am morally obligated to keep a particular promise, that is in part because of moral facts about promises. But it is also because I said or did something that triggered that obligation. And morality is not the only normative system that works that way. To take a simple case, we can imagine a normative system that is like morality in all respects, except that within it promises are not binding. The content of this normative system would be determined by both social and moral facts, as there are many features of morality that are, like promises, sensitive to social facts. For example, in this system, the question

21. See Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), 210–37.

22. John Gardner suggested to me that morality lacks systematicity. I don't agree, but if you share this worry, then you can substitute "sets of normative arrangements" for "normative system," without undermining the argument that follows.

whether you are permitted to retaliate against a person who has wronged you would plausibly depend on moral facts about the circumstances in which revenge is permissible and on social facts about the availability of civil alternatives.

The fact that there are normative systems whose content is a function of both social and moral facts poses a puzzle for those who would defend exclusive legal positivism. To see the puzzle, suppose that a group of people decide that they want one of those normative systems as their legal system. To make this vivid, you might imagine that the group reads *Law's Empire* and decides that they want what Dworkin describes—a legal system whose content flows in a principled fashion from the political decisions that they make. That is, they decide that their legal rights, obligations, privileges, and powers will be a function of the principles that best fit and justify their decisions about how and when the state may deploy force, and they recognize that by setting things up this way they will make it the case that the content of their law will be determined by both social and moral facts. Dworkin might think their decision superfluous; these people have decided to have their law work the way that it in any event would.<sup>23</sup> In contrast, inclusive legal positivists might think their decision conclusive; these people's law will work the way they decided it would because they decided that it would work that way. But exclusive legal positivists, like Raz and Shapiro, are committed to the view that this project must fail. Try as they might, these people cannot create the law they intend to create.<sup>24</sup>

The puzzle is why. The answer must be that something about these normative systems makes them ineligible to be law. But what could that

23. In one of the oddest passages in *Legality*, Shapiro attributes to Dworkin the claim that “those who create legal systems necessarily intend for the content of the law to be determined by the principles and policies that portray the particular legal system in its best light” (312). But Dworkin's argument for thinking that the content of the law is determined in that fashion does not rest on the supposition that the creators of legal systems must so intend. Rather, it rests on an interpretation of legal practice, which is attentive to the kinds of disagreements lawyers have about the law and the way in which they go about resolving them. Indeed, Dworkin would think that he could not possibly win an argument about how the content of the law is determined by pointing to the intentions of the people that created the legal system, because the relevance of their intentions to the content of the law is itself a legal question. See *Law's Empire*, 364: “He might say that the declarations of the framers are decisive because they intended them to be. That is silly for two reasons: we have no evidence of this meta-intention, and even if we did, enforcing it would beg the question once again. (Suppose that a Congressman said ‘oui’ when asked if his statutes were valid if written in French.)”

24. Raz and Shapiro might allow that these people have created law, just not with the content intended. They might argue, for example, that the only legal requirement in this community is that legal officials apply Dworkin's method. But that hardly solves the puzzle, as it leaves it mysterious why these people have law that requires only that, when they intend for the content of their law to encompass much more.

be? Raz and Shapiro give what strikes me as the only answer one could give to this question. These normative systems are ineligible because they cannot play the role in these people's lives that a legal system is supposed to play. For Raz, the law must be capable of making the difference that authority makes. For Shapiro, it must be capable of making the difference that plans make. The details are different, but the arguments take the same form because only an argument of that form seems apt to explain why these normative systems are ineligible to be law.

But if this is the form an argument for exclusive legal positivism must take, then what we learned in the last two sections gives us reason to doubt that any argument in its favor will succeed. As we saw a moment ago, it is doubtful that there is one task, so central to what it is to be law, that nothing could be law if it could not do it. The most famous skeptic on this score was, of course, Hart, who pronounced it "quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct."<sup>25</sup> And I do not think it a coincidence that Hart endorsed inclusive legal positivism. He thought that law was distinctive because of the "provision it makes by secondary rules for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards."<sup>26</sup> He did not think that the secondary rules had to be structured so as to enable law to achieve some task, and that meant that he had no ground for holding that people could not choose to have the content of their law depend on moral facts.

Of course, Hart may not have been right to think that law lacks a distinctive purpose. But even if he wasn't, the case for exclusive legal positivism would still run up against the problem we saw in Section IV. The claim that law has a fundamental aim more naturally supports a normative positivism than a conceptual one. If law has a task to do, and the task is worthwhile, then we should regard a legal system that cannot do it as defective. But a defective legal system is, nonetheless, a legal system. Put all this together, and the exclusive positivism that Raz and Shapiro defend seems the least promising positivism of all.

## VII. TAKING MORALITY OFF THE TABLE

But we are not done yet. Even if the case for exclusive legal positivism could overcome those problems, there is another lying in wait. Raz thinks that law must be capable of making the normative difference that au-

25. H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 249.

26. *Ibid.*

thority makes; Shapiro thinks it must be capable of making the normative difference that plans make. There are important differences here, but a deep similarity lurks beneath the surface: both think that law's task is to restructure deliberation by taking at least some moral questions off the table. This similarity is not accidental. Both Raz and Shapiro aim to show that moral facts cannot play a part in fixing the content of the law, so they owe us reasons to think that moral facts would muck things up. Raz makes his case in terms of authority, Shapiro in terms of plans, but they are up to the same thing, and they have to be, since there is only one way to get where they aim to go. Here, I plan to take up Shapiro's argument for thinking that the content of the law cannot be determined by moral facts, as we are already deep into his model of plans. But with minor adjustment, everything that I am about to say could be applied to the case that Raz makes too.<sup>27</sup>

Recall that Shapiro says that it would defeat the purpose of having a plan if one had to engage in moral deliberation to discover the content of that plan. Here again is his argument:

Shared plans must be determined exclusively by social facts *if they are to fulfill their function*. . . . Shared plans are supposed to guide and coordinate behavior by resolving doubts and disagreements about how to act. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation or bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts, not moral ones, can serve this function. (177)

How persuasive is this? Not very, I think, and for a simple reason. We can have doubts and disagreements about social facts—*where was Barack Obama born?*—that are every bit as intense as our disagreements about moral facts. And we can be as united in our assessment of moral facts—*slavery is wrong*—as we are in our assessment of social facts. So if the point of a plan is to guide and coordinate conduct, it seems that what we need to do is make sure that the content of the plan is determined by facts that the people who must apply the plan agree upon, whatever sort of facts those are.

27. Indeed, Raz offers a planning case immediately after his more famous authority case. See *Ethics in the Public Domain*, 219: "If I decide what would be the best life insurance to buy, it is no good trying to remind me of my decision by saying that I decided to buy the policy which it is best to buy."

Of course, Shapiro knows that people sometimes agree in their assessment of moral facts. But he nevertheless denies that the content of a plan could be contingent on them. He writes: “To be sure, the group that shares a plan might know and agree on the moral facts and hence would not have to deliberate or bargain about how to act. But this does not show that the plan is capable of resolving doubts and disagreement in such an instance; rather, since there are no doubts and disagreements to resolve, there is no way for the plan to fulfill its function in this case” (421 n. 19). But there is a problem with this passage: a plan might aim to coordinate action in the face of disagreement about one sort of moral fact among people who agree on other moral facts.<sup>28</sup> For example, the members of a club may disagree about who should be their president, and they might plan to resolve that disagreement by holding a fair election. If they disagree about what makes an election fair, this plan might fail to coordinate their action. But if they agree about that, then their plan might allow them to resolve disagreement about who should be their president, even though the question whether they acted in accord with their plan will depend on moral facts about fairness.

Now Shapiro would resist the thought that the content of this plan is determined in part by moral facts. He would say that the plan only resolves the standard by which an election is to be judged; it does not rule particular election procedures in or out (276). If fairness requires a secret ballot, then Shapiro would agree that the members of the club must employ one if they are to carry out their plan. But he would insist that their plan requires a secret ballot only under a certain description—hold a fair election—and not under another—hold an election with a secret ballot—even if you can’t do the former without doing the latter (277).

This is a clever move, and it is one that Shapiro has to make. To see why, suppose that the content of the plan does not just specify the standard by which the election is to be judged, but that it is transparent to assessment by that standard, so that the club’s plan requires that its members employ a secret ballot (under that description). So long as members agree about what fairness requires, the plan will help them select a president. Shapiro cannot say that this shows that there was no disagreement for the plan to resolve, for the plan resolves disagreement about who should be president. It is true that there was no disagreement about what fairness required in this case. But that was all along built into the hypothesis that a plan might serve its function even if its content were determined in part by moral facts, so long as the relevant people agree on the moral facts on which the content of the plan depends.

28. Jeremy Waldron raises a similar worry in “Planning for Legality,” *Michigan Law Review* 109 (2011): 883–902, esp. 894–96. See also W. J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon, 1994), 133.

Now we can see why Shapiro must say that the content of the plan only extends to the standard to be applied, not to application of it. Otherwise his claim that determination by moral facts would prevent a plan from fulfilling its function would be subject to a straightforward counterexample. Should we accept Shapiro's move? I don't think so, but it will take some work to see why. The inspiration for the maneuver is Donald Davidson's observation that an action is only intentional under a certain description.<sup>29</sup> If a person flips a switch to turn on a light and unwittingly scares away a burglar, the act was intentional under the description "turning on the light" but not under the description "scaring away a burglar." What makes Davidson's observation compelling is that when you ask the person who turned on the light whether she intended to scare away the burglar, she will say "no," even after she learns that turning on the light scared away the burglar. At the same time, she would say "yes" to the question whether she intended to turn on the light. The description makes all the difference.

Shapiro suggests that Davidson's observation can be extended to cover plans. Writing about the legal case, he says "strictly speaking, a person can be legally obligated to perform some action *only under some description of that action*" (277). As we will see shortly, this is not true. But it is an easy mistake to make, as Davidson's observation does indeed extend to plans, so long as we think about them in a certain way. What way do we have to think about them? Well, Bratman draws a distinction between plans as abstract structures and plans as mental states, and he builds his theory around the latter.<sup>30</sup> He says that plans, in the second sense, are "intentions writ large," that is, intentions with special features that allow them to serve functions that relatively simple intentions cannot.<sup>31</sup> Though Shapiro borrows a lot from Bratman, he works with a different picture of what plans are. For Shapiro, plans are not mental states. Rather, they are "abstract propositional entities that require, permit, or authorize agents to act, or not to act, in certain ways under certain conditions" (127). In other words, plans are a kind of norm.<sup>32</sup> To adopt a plan, Shapiro says, is to place yourself under the governance of a norm (127). In Shapiro's view, plans are the objects of mental states, rather than mental states themselves.

29. See Donald Davidson, *Essays on Actions and Events* (Oxford: Oxford University Press, 2001), chap. 3.

30. Bratman, *Intention, Plans, and Practical Reason*, 28.

31. *Ibid.*, 29.

32. Shapiro's plans are abstract structures, but I do not know whether they are the sort of abstract structure Bratman has in mind. There are other ways to cash out the notion of a plan as an abstract structure. For example, a plan may consist in a set of propositions about what one intends to do or will do, in which case, plans would be descriptive entities rather than normative ones.

Davidson's observation extends to plans if we think about them the way that Bratman does—as intentions writ large. An action is planned (read: intended) only under a certain description. If I plan to buy the SUV with the best gas mileage, and unbeknownst to me that happens to be the Ford Escape, it would be a mistake to suppose that I plan to buy the Ford Escape. Of course, I might form that plan upon being told that the Ford Escape is the SUV with the best gas mileage. But I might not; I might instead revise my initial plan. Does this mean that all along I planned to buy the SUV with the best gas mileage unless it turned to be a Ford? Not necessarily, as it may have never occurred to me that it could be a Ford. Here again, the descriptions make all the difference to pinning down my plans (read: intentions).

But Davidson's observation does not neatly fit plans of the sort Shapiro invokes. Though an action is planned (read: intended) only under a certain description, a plan (read: norm) might govern an action however it is described. We can see this by considering a familiar legal case. The Eighth Amendment prohibits cruel and unusual punishment. If you ask a lawyer whether a particular punishment—say, torture by the rack—is prohibited by it, she will surely say “yes,” if she takes torture by the rack to be cruel and unusual. The legal prohibition is transparent to application of the evaluative terms. Indeed, any description will do. If you ask her whether the Eighth Amendment prohibits the Duke of Exeter's Daughter, she might say “no,” or just stare at you blankly. But if you add that the Duke of Exeter's Daughter is just another name for the rack, she will surely switch her answer. Once she learns that the Duke of Exeter's Daughter is the rack, she cannot say “The rack is prohibited, but the Duke of Exeter's Daughter is not.” At least, she can't without contradicting herself. And that makes this case different than the ones Davidson sought to explain. There is no contradiction in saying that you intended to turn on the light but not scare away the burglar, even after you learn that turning on the light scared away the burglar. And there is no contradiction in saying that you planned to buy the SUV with the best gas mileage but not the Ford Escape, even after you learn that they are one and the same. In those cases, the description does work in sorting out the content of your intentions. But in the legal case, the description does not make a difference to whether the action is prohibited.<sup>33</sup>

Of course, if we shift back to thinking about plans in Bratman's sense, then the description will do work once again. (This is why this is an easy mistake to fall into.) The people who adopted the Eighth Amendment may have planned (read: intended) to prohibit the rack but not the Duke of Exeter's Daughter. But they adopted a plan (read: norm) that

33. Cf. Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap, 2006), 237.



prohibits cruel and unusual punishment, and that covers the Duke of Exeter's Daughter as surely as it does the rack.<sup>34</sup>

The upshot of this digression is that Shapiro cannot avoid counterexamples like the fair election case by relying on Davidson's observation. And that case shows that a plan can fulfill its function, even if its content is determined in part by moral facts. Of course, determination by some moral facts will pose a problem. If in order to identify the content of a plan, one has to reopen the very question the plan was meant to settle, then the plan will not help guide and coordinate action. If we disagree about who should be president, it would be pointless to plan only that we will pick the person who should be president.

This is the insight that lies at the heart of both Raz and Shapiro's arguments for exclusive legal positivism.<sup>35</sup> But the lessons they draw from cases like these are much too strong. The problem with this plan is not that its content depends on moral facts that bear on who should be president. The problem is that to apply the plan, we must reopen the very question that we disagree about, so the plan does nothing to resolve our disagreement. If we varied the plan even slightly—perhaps we plan to pick the person most deserving of the presidency—then our plan might help us break our logjam, even though applying it requires us to consider moral facts that bear on the initial dispute about who should be president. There is no guarantee, of course. We might disagree about who should be president because we disagree about who is deserving. But my point all along has been that to fulfill its function, the content of a plan must be determined by facts that people agree upon, whatever sort of facts those are.

Indeed, we can generate precisely the problem that worries Raz and Shapiro with disputed social facts. Suppose that we want to hold the election on the day of the week that typically has the best attended meetings. You think that is Tuesday, but I think it is Wednesday. It would be pointless for us to plan only that we will hold the election on the day of the week that typically has the best attendance, even though it is a straightforward matter of social fact which day that is. It would be pointless because the plan would do nothing to resolve our disagreement about what to do. Obviously, we should not infer from this case that the

34. There is a dispute about how to read "cruel and unusual" in the Eighth Amendment. Some think that the phrase invokes a moral concept, so that to apply it one must figure out what is cruel. Others think that its prohibition applies to punishments that would have been regarded as cruel at the time the provision was adopted. This is a dispute about what plan (read: norm) was adopted, and the right answer might well depend on the intentions of the amendment's framers, though not all lawyers would concede that. But whichever plan you think was adopted—the moral prohibition or the dated one—it will remain true that a punishment that falls within its ambit is prohibited on any description.

35. See Raz, *Ethics in the Public Domain*, 219; Shapiro *Legality*, 275.

content of a plan can never be determined by social facts. That would be crazy. But that is just what Raz and Shapiro encourage us to do in the moral case.

The bottom line is that social facts and moral facts are not differently situated as potential determinants of the content of a plan. We can disagree about both. And it would be a mistake to think that disagreements about social facts are always more tractable.<sup>36</sup> An awful lot of people have yet to be persuaded that Barack Obama was born in the United States. And that has led to some controversy over the content of our law, since some contend that the acts he has taken in office lack legal force. If doubt was more widespread, we might have serious coordination problems. Happily, we do not. But the lesson is clear: if we want plans that help us resolve disagreements, we need plans whose content depends on facts we agree about, whatever sort of facts those are.

#### VIII. CONTROVERSY AND COORDINATION

Before I close my case against Shapiro's argument for exclusive legal positivism, I want to put the bigger picture back in focus. The story that Shapiro tells runs like this. A political community of any significant size will confront problems whose solutions are complicated, contentious, and arbitrary. Plans are a powerful tool for solving these sorts of problems, because when people have a plan, they no longer need to debate what to do. The plan settles the question. So political communities need plans. Lots of them. And law is a powerful tool for generating those plans.

On this picture, law solves problems by displacing controversy; it coordinates action by substituting plans whose content we can agree upon for the moral disputes we cannot resolve. One might think, then, that Shapiro would count it as a strike against the theory that we so often disagree about what the law is. But he does not. Instead, he says that it is a virtue of the model of plans that it can explain why we disagree about what the law requires. According to the model of plans, the law is a function of social facts, but the function might be complicated. Indeed, on Shapiro's rendering, it is very complicated. To know how legal texts should be interpreted, he says, one has to "[figure] out which conceptions of political morality and human nature are presupposed by the law, and which methodology best furthers the law's objectives in light of these conceptions" (399). This, Shapiro says, "is undoubtedly a difficult

36. Raz acknowledges this. As a fallback, he suggests that moral facts are not ruled out because they are controversial, but because they are irrelevant to determining what directives legal institutions issued. See *Ethics in the Public Domain*, 231. The problem with this argument is that the content of the law might come apart from the content of legal directives, in just the way that the content of the law might come apart from the content of legal plans.

and contentious task,” and he allows that “some legal systems may be so complex that excellent meta-interpretive arguments can be made for rival interpretive methodologies.” He even allows that there may be “no ultimate truth about which interpretive methodology is uniquely appropriate” for some legal systems (399).

Shapiro is right to think it a virtue for an account of law to explain why people so often disagree about what the law is. But this is a virtue that Shapiro cannot claim for the model of plans without undercutting the case he makes for it. If figuring out the right way to interpret the law is bound to be difficult and contentious, if good arguments might be made for rival methodologies, and the possibility that there is no ultimate truth lurks in the background, it is difficult to see how law will solve problems in the way that plans do. We will not be leaving our disagreements behind, so much as we will be trading one sort of disagreement for another.<sup>37</sup>

Shapiro recognizes the problem. “To be sure,” he writes, “the fact that the law aims to settle questions about what is to be done does not imply that there will be agreement about what the law is” (398). Thus, he says, “there are no assurances that the law will always succeed in settling questions about what is to be done” (399). But now we are left to wonder: If the law can tolerate disagreement born of controversy over social facts, why not disagreement born of controversy over moral facts? We have already dispatched the thought that moral controversy poses a different sort of risk than controversy over social facts. Controversy gets in the way of coordination, regardless of the source.

This might seem a place for pessimism. If you think that the law is supposed to coordinate action by resolving disagreement, and its content is bound to be controversial however it is determined, then the law seems destined to fail. But this pessimism is misplaced, because the law does not always need to resolve disagreement in order to coordinate action. Think back to the controversies that spawned *Bush v. Gore*. Americans were deeply divided about who should be president. But they had a long-standing plan for sorting that out. The American electoral system is a Rube Goldberg contraption, but it worked, right up until it didn't. A closely divided vote in Florida set off a sprint to the courthouse, where lawyers contested whether there should be recounts, where they should be held, and what standards they should follow. They even contested which courts had jurisdiction to answer those questions. Ultimately, the conflict came to an end when the Supreme Court ordered Florida officials to stop counting votes. Al Gore conceded the election, and George W. Bush became president.

37. Shapiro agrees. He says that “it 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” (*Legality*, 383).

But Bush did not become president because the court resolved disagreement about whether he should, either as a moral or legal matter. Both controversies raged for years after the court handed down its decision, which many still doubt that it had jurisdiction to issue. The court's decision ended the conflict because Al Gore and his partisans thought that they ought to respect the decision the court reached, even though they thought it wrong. And in that respect, this extraordinary case was as ordinary as could be. Every day, litigants make the same decision that Gore did; they decide to respect the decision of a court, even though they think the court has got the law wrong. Shapiro is surely right to think that the law will struggle to coordinate action if it cannot settle what ought to be done. But the law can coordinate action in the face of lots of controversy about what it requires. It just has to bottom out in decisions that do not generate that sort of controversy.

The lesson here is that even if dependence on moral facts might make the content of the law controversial, the law might nevertheless coordinate action. Of course, not every case can go to court, let alone the Supreme Court. But not every case is controversial. I think coordination looms too large in legal theory. But to the extent we worry about whether the law can provide it, we need not fear the possibility that the content of the law is determined by moral facts. The law can handle lots of controversy about what the law requires. And when it cannot handle controversy, it does not matter whether the disagreement that gets in the way is about a social fact, like who got the most votes, or a moral fact, like what it takes to treat voters equally. The disagreement is the problem, not the sort of facts that spawn it.

## IX. LOOSE ENDS

I've exhausted the plan I set out at the start of the essay. We've seen that Shapiro's case for legal positivism falls short. And we've seen that there are serious reasons to doubt that any case can be made for his preferred version of the thesis—exclusive legal positivism. But, I've left a couple loose ends, and I want to gather them together for a few inconclusive remarks.

*Are laws plans?*—All along, I have conceded that they are, but as I said up front, I have doubts. To start, consider Shapiro's claim that "if legal activity is the activity of planning, then it follows that all norms generated by this activity are plans" (225). This is not true. If legal activity is planning activity, then it might follow that some of the norms the activity generates are plans. But an act of planning can generate norms that are not plans. For example, if I plan to commit a murder, my act of planning generates a moral obligation to abandon my plan. And if planning activity can give rise to moral norms that are not plans, it might also

give rise to legal norms that are not plans. Indeed, we could construct another quasi-Dworkinian view, on which the law is composed of norms generated by the acts of planning that are part of legal practice, but which are not the plans that are generated by that activity. The legal norms would be the ones that follow from the principles that best fit and justify the relevant acts of planning.

The upshot is that even if we think that legal activity is planning activity, there is space to doubt that laws are plans. But there are also reasons to doubt that legal activity is best construed as planning activity. To see why, take a step back from law and consider my relationship with my wife. She would not think it odd if I planned for her to go to the grocery store. She would not even think it odd if I asked her to go, on account of my plan. But she would think it odd if I commanded her to go. Indeed, she would find it offensive. And that suggests that planning and commanding are different sorts of acts. Of course, they might be related. It may be that I cannot command my wife to go to the grocery store unless I plan for her to go. But even if planning is a precondition of commanding, commanding is something more, and in this case, it is the more that might get me in trouble.

What does this have to do with law? Well, if we learn anything from Hart, it should be that not all laws are commands. But some of them are commands, or at least something close. When Congress adopted the Internal Revenue Code, it did not just plan for people to pay the taxes specified in the statute; it demanded that they pay. A typical provision begins, "There is hereby imposed on the taxable income of every individual . . . a tax."<sup>38</sup> And the imposition is what gets people exercised. The worry here is that saying that legal activity is a kind of planning activity is a bit like saying that playing the trumpet is a kind of respiratory activity. To be sure, you cannot play the trumpet unless you breathe, but the music is the point, not the respiration. I am not convinced that legal activity is planning activity. But if it is, it is more too, and it may be that the more is more important to understanding what law is.

*Is plan positivism true?*—A few moments ago, I rejected Shapiro's argument in favor of plan positivism. But what of his claim that it is obviously true? If you think of plans as Bratman does—as intentions writ large—then, yes, the content of a plan is determined by social facts. Plans are just mental states, and by stipulation, mental states are social facts for the purposes of this debate. But if you think of plans as Shapiro does—as norms—then it is far from obvious that plan positivism is true.

The question is whether the content of a plan—that is, what the plan requires, permits, and authorizes—is determined solely by social facts. And there is space for doubt. Consider the terrorist attacks of Septem-

38. 26 U.S. Code § 1(c) (2013).

ber 11, 2001. From what I understand, the nineteen terrorists who hijacked planes that day expected that a twentieth would join them, but he did not show at the appointed hour. Imagine that they all meet up in hell one day, and the nineteen complain to the twentieth that he failed to do what their plan required of him. I think it would be plausible for him to deny that. Indeed, I think he would be right to deny it; nothing anybody could do would require him to help hijack a plane and fly it into an occupied building.

Now, you might protest: "The nineteen are not saying that the twentieth was morally required to help hijack a plane. They are saying that their plan required him to help, which is a different thing altogether." But this puts us into familiar territory. We must now figure out whether planning gives rise to requirements that are not moral, and if so, we must figure out how those requirements are determined. This is the plan version of the debate between positivists and antipositivists. And I suspect that we could recapitulate the recent history of jurisprudence as an argument over how the content of plans are determined, with minimal adjustment to the views on offer.

Again, you might protest: "Surely, the terrorists had a plan to hijack planes and fly them into buildings." And I agree, so long as we are thinking of plans as mental states. Presumably, what earns the twentieth hijacker his title is that he planned (or others planned for him) to participate in the hijacking. But this is just to say that he intended (or others intended for him) to participate. It is not to say that he was placed under the governance of a norm that required him to participate in the hijacking. Indeed, I doubt that his intending to participate (or others intending for him to participate) could place him under the governance of a norm requiring that.

One last protest: "If he planned to help hijack the plane, then he was subject to rational pressure to do so, since plans must be resistant to reconsideration in order to serve their purpose. To say that the plan required him to help hijack the plane is just to say that he was subject to rational pressure to help hijack it." Shapiro might say this, but Bratman would not, and I think Bratman has it right. What Bratman says is that an agent is rational if she manifests reasonable habits of (non)reconsideration of her intentions, where the reasonable habits are the ones that will have good consequences in the long run. But, he adds, this is a principle "for the external assessment of the agent, not a principle to be used internally, in the agent's deliberations about what to do."<sup>39</sup> An agent, Bratman says, cannot appeal to an intention as a reason against its own reconsideration; otherwise, having an intention would license "unacceptable stubbornness."<sup>40</sup> The upshot is that merely forming an intention does

39. Bratman, *Intention, Plans, and Practical Reason*, 68.

40. *Ibid.*, 68–69.

not place one under rational pressure to follow through on it. And having a plan—in Bratman’s sense—does not subject one to a rational requirement to carry it out, even though one’s failure to do so might, in a given instance, manifest irrationality.

Obviously, there is much more to say here, but I will stop. My aim is not to persuade you that plan positivism is false; it is to show you that the question whether plan positivism is true is much more complicated than Shapiro lets on. He says that plan positivism is uncontroversial, and that might be right, if he was speaking of plans as Bratman does. But Shapiro employs his own notion of a plan, and positivism about the entities he has in mind should be anything but uncontroversial. Indeed, it should be every bit as controversial as positivism about law.

## X. CONCLUSION

At this point, it might seem that there is little left of the model of plans. I have taken issue with the idea that laws are plans, with plan positivism, and with the claim that legal positivism follows from plan positivism. But even if I am right about all that, I still think there is much to learn from the model of plans. For all the flaws in Shapiro’s argument, he is right about this: legal institutions plan, and their plans can help solve moral problems. For Shapiro, this observation lays the groundwork for exclusive legal positivism. But I think that its ultimate importance will lie elsewhere—as a premise in an argument for normative positivism, or even as a component of an antipositivist account that emphasizes different features of legal practice than Dworkin does. And that is a testament to the power of the model of plans. It promises to deepen our understanding of law, even if it does not push us toward the positivism that Shapiro prefers.