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Heather N. Kuiper
McMaster University, kuiperhn@mcmaster.ca

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UNDERSTANDING FUNDAMENTAL SECONDARY RULES

UNDERSTANDING FUNDAMENTAL SECONDARY RULES AND THE INCLUSIVE/EXCLUSIVE LEGAL POSITIVISM DEBATE

By HEATHER KUIPER, B.A., M.A.

A Dissertation Submitted to the School of Graduate Studies in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy

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ABSTRACT

Within legal positivism, the theory which holds that there is no necessary connection between legal validity and morality, there is dissensus about whether there can be a contingent connection. Inclusive legal positivists suggest that it is possible for morality to play a role in determining a norm's legal validity while exclusive legal positivists argue for the opposite. This dissertation examines this debate between inclusive legal positivism and exclusive legal positivism focussing on how paying attention to all of the fundamental secondary rules in a legal system can affect arguments about the coherence of either theory. The fundamental secondary rules being the rules which identify other rules, identify authority and authorize changes. I will be demonstrating that three exclusive legal positivist arguments against inclusive legal positivism are unconvincing because of the role that fundamental secondary rules play in our legal systems. Shapiro and Raz offer arguments against inclusive legal positivism based on different important features that they believe the law possesses. However, given their commitment to a particular type of fundamental secondary rule, specifically a directed power, exclusive legal positivism is unable to better capture these important features. Himma suggests that inclusive legal positivism cannot explain how a court can have final authority to determine constitutional cases involving moral criteria. Again, however, we examine what fundamental rules an inclusive legal positivist could employ to explain the phenomenon, we find that exclusive legal positivism is in no better position. At the end of the dissertation, I will suggest why I think continuing with these types of arguments will continue to be fruitless and briefly examine how similar inclusive and exclusive legal positivism are through investigating how one might determine whether a given legal system had an inclusive rule of recognition or exclusive one.

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DECLARATION OF ACADEMIC ACHIEVEMENT

The following is a declaration that the content of the research in this document has been completed by Heather Kuiper and recognizes the contributions of Dr. Wilfrid Waluchow, Dr. Stefan Sciaraffa, Dr. Michael Giudice and Dr. Matthew Kramer in both the research process and the completion of the thesis.

CHAPTER 1: Introduction

In 1961, H.L.A. Hart wrote *The Concept of Law* and renewed British and North American interest in analytic jurisprudence and, particularly, interest in legal positivism. In 1967, Ronald Dworkin wrote "The Model of Rules" which took issue with Hart's positivistic theory of law. Legal positivists, responding to Dworkin, split into two broad camps, inclusive legal positivists and exclusive legal positivists.[1] This dissertation examines the ensuing debates between proponents of these two theories.

I will be examining the arguments of three theorists who suggest that morality cannot play a role in legal validity, namely Scott Shapiro, Joseph Raz and Kenneth Himma. By examining these arguments while focussing on the oft-ignored functions of fundamental secondary rules that are not the rule of recognition, I aim to show that the arguments advanced by these three theorists do not favour exclusive legal positivism over inclusive legal positivism.[2] Ultimately, I believe this suggests that arguments between these two camps will most likely

[1] Matthew Kramer, an inclusive legal positivist, suggests a third group, incorporationists. Loosely, incorporationists believe that a norm being a moral norm can sometimes be sufficient for that norm to be law. Often, incorporationists are incorporated into the inclusive legal positivist group. When this occurs, one can talk about two types of inclusive legal positivism, one where moral norms serve as necessity criteria for a law's validity and one where moral norms serve as sufficiency criteria. The arguments in this dissertation do not deal with the incorporationist stream of inclusive legal positivism, focusing rather on the necessity stream of inclusive legal positivism.

[2] Hart refers to secondary rules as rules which with confer power and primary rules as rules which impose duties. This usage of the terms "secondary" and "primary" does not accord perfectly with his categorization of rules of adjudication, change and recognition as secondary rules. I think it is possible and not *contra*Hart's main tenets for these types of rules to be duty imposing as well as power conferring. Nevertheless, for the sake of clarity, to differentiate between these types of rules and others, I will refer to this group as "the fundamental secondary rules" meaning rules which are fundamental to the existence of the legal system and will not constrain them to only being power conferring.

continue to be fruitless. Both theories can explain the same legal systems using two different accounts because while the particular fundamental secondary rules differ, the overall content of the fundamental secondary rules is similar and in the end, can function the same way within a given legal system. By calling attention to other fundamental secondary rules such as rules of adjudication and change, I hope we can refine our theories of legal systems to account for how important all the fundamental secondary rules are and help us better understand how officials work within them. I think by focussing on all of the secondary rules we will be able to alleviate concerns that have been mentioned recently by theorists regarding the rule of recognition and the overburdening of it.[3]

In *The Concept of Law*Hart identified flaws in previous legal positivist theories of law, in particular John Austin's command theory of law and built a theory of law based on solutions to those flaws. Hart took his new theory and contrasted it with natural law theories, emphasizing that there is no necessary connection between legal validity and morality. Hart's theory has since become the base of most modern legal positivism.

Hart posited that legal systems have both primary rules (laws about what citizens can and cannot do) and secondary rules (rules about the rules). Some of these secondary rules had been detrimentally ignored by previous theorists. Hart spoke of three types of fundamental secondary rules in *The Concept of Law*, rules

[3] In particular, claim such as those made by Scott Shapiro about Hart's version of a rule of recognition made in "What Is the Rule of Recognition (and Does it Exist)?"

of recognition, adjudication and change.[4] The rule of recognition picked out which norms were legally valid within a given legal system. Rules of adjudication announced who could adjudicate, what they could adjudicate on and how they could adjudicate disagreements about legal rules. Rules of change allowed for the ability of legal officials to modify legal rules by specifying who could change what rules and how they could change said rules. These fundamental secondary rules are, according to Hart, social in nature. The existence of these rules depends on the officials of the legal system recognizing them and accepting them as rules that govern their legal system. To accept them means doing two significant things. One, to adjust one's own conduct to follow the secondary rules and two, to criticize other officials when they deviate from these social rules. Hart and legal positivists since him have paid particular attention to how the rule of recognition is supposed to work within a legal system.

Dworkin, in 1967, wrote "The Model of Rules I" critiquing Hart's legal positivist theory of law. According to Hart, legally valid rules are picked out by the rule of recognition of a given legal system. Dworkin suggests that this rule of recognition contains some sort of pedigree criteria (e.g. being passed by parliament, or signed by the Queen). Dworkin critiqued this position by claiming that in certain cases judges take moral principles to be legally binding. In particular, Dworkin examined the case of *Riggs v Palmer*. In *Riggs v Palmer*, a grandson who was also the heir in his grandfather's will murdered his grandfather.

[4] People sometimes now also add rules of interpretation as a type of secondary rule.

The legal question was whether the grandson could still inherit under his grandfather's will despite having killed his grandfather. The majority identified a moral principle "no one shall profit from his own wrong" as underlying much of the positive law in the jurisdiction. Based on this moral principle, the justices decided that the grandson should not in fact inherit from his grandfather. Dworkin argued that Hart could not account for this type of judicial reasoning since moral principles *qua* moral principles could not be picked out by a system's rule of recognition.[5]

After "The Model of Rules," legal positivists, attempting to understand how morality and legal validity might relate, split into two broad camps. Inclusive legal positivists think that moral principles can be part of a system's validity criteria if they are part of the rule of recognition. The rule of recognition would still be a social rule. Its content may, but need not, contain moral criteria; so inclusive legal positivists can still maintain the thesis that there is no *necessary* connection between morality and legal validity. Exclusive legal positivists argue that moral principles are never part of a system's validity criteria and suggest that moral principles may enter into judicial decisions through rules of adjudication and change.

[5] Of course, moral principles and laws may happen to have the same content (e.g. "Don't murder anyone") and the reason there may be a law is because people consider something morally reprehensible. However, in these sorts of cases, the law still has a legal pedigree, such as having been enacted by the Queen in parliament. In the *Riggs v Palmer* case, the judges argued that there was a moral principle that was underlying much of the positive law in that system and hence, they should legally decide the case in accordance with that moral principle despite it not having the type of legal pedigree that most law does.

Subsequent to this divide, exclusive legal positivists started to argue that inclusive legal positivism was conceptually incoherent or practically impossible. I will be examining threeof these arguments against inclusive legal positivism, specifically ones that deal with law's claim to authority, law's guidance function and the final authority bestowed to courts. The first two of these arguments rely on further claims about necessary properties of law and, as such, claim that inclusive legal positivism is incompatible with these further claims. I aim to show that by applying these same arguments to exclusive legal positivism and in particular to exclusive rules of adjudication and change, we are able to see that these further claims about law are in fact also incompatible with exclusive legal positivism. The final argument attempts to demonstrate that inclusive legal positivism cannot capture the actual workings of a mature legal system as well as exclusive legal positivism can. Again, by looking at how rules of adjudication and change interact with the rule of recognition in judicial decisions, I aim to show that inclusive legal positivism can describe this type of legal system equally well.

In order to examine the inclusive/exclusive debate closely, it is necessary to summarize Hart's initial arguments and Dworkin's critique in more detail than above. The majority of this introduction will be dedicated to those two objectives. Subsequent to this, we will briefly review what a generic inclusive position and a generic exclusive position look like. The following three chapters will examine Shapiro's, Raz's and Himma's arguments against inclusive legal positivism.

Hart's Concept of Law

The notion of "a rule" is central to Hart's theory of law, so it is worthwhile to first examine his understanding of this concept. Hart was interested, in particular, in the idea of a social rule. He was concerned with how social rules differ from habits, and in what sense these rules can be said to obligate people. Of particular importance is Hart's characterization of the internal point of view for social rules; it helps us understand how they can be at one and the same time both social and rules.

Hart was unhappy with attempting to use habits or habitual obedience to explain the idea of legal obligation, a central task in developing a theory of law. He realized that there is a distinction between a habit or habitually obeying and feeling like one is obligated to do so. This distinction can be elucidated using the notion of a social rule. Social rules are like habits insofar as the practice must be widespread. However, social rules differ from habits in three ways. Firstly, deviation from habits need not result in criticism. Deviation from social rules does. Secondly, the criticism that arises when deviation occurs is considered justified or legitimate when dealing with a social rule but not a habit. Thirdly, social rules require people to take an internal point of view towards a pattern of conduct. People must accept the pattern of conduct as a standard to be met in order for a social rule requiring conduct in accordance with that pattern to exist.

No one has to accept a pattern of conduct as a standard of conduct for thatpattern to display a habit.[6]

This third difference is incredibly important for legal systems. From an external perspective, the patterns of behaving habitually and following a social rule may look identical. However, only with social rules do people have a reflective critical attitude towards the pattern of behaviour.[7] This internal perspective can be seen in any rule governed activity. When people play chess, they take a reflective critical attitude towards the way in which they move their pieces. This perspective can be determined by examining whether people criticize others for deviance, demand conformity and are judged to be legitimately doing so by others. This perspective is not internal in the sense of being a 'feeling'. Whether people have an internal point of view is in no way dependent upon whether people 'feel bound'. One must only examine whether there is criticism for deviation, demands for conformity and the acknowledgment that such criticism and demands are legitimate. These are expressed using our normal normative vocabulary, such as 'ought', 'should', etc.[8]

As should be obvious by our use of vocabulary regarding rules, many rules appear to be related to obligations. Hart elucidated what he believed the connection to be. "Rules are conceived and spoken of as imposing obligations

[6]Hart, H.L.A. *The Concept of Law: Second Edition*. (Oxford: Oxford University Press, 1997) 55-6 hereinafter "CoL"
[7]*Ibid.*, 57
[8]*Ibid.*

when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate...is great."[9] The pressure associated with these rules need not result in physical sanctions. It is when a rule is perceived from the internal point of view that we *say* that there is an obligation attached to the rule.[10] There are two other characteristics of obligations which Hart attaches to these rules. One, rules supported by this pressure are considered necessary to social life or some highly prized value associated with social life. Two, the conduct required by these rules may not always be what the individual desires to do. This is why obligations are often thought of as involving sacrifices.[11]

Now that we have covered the basic ideas behind Hart's understanding of rules and obligations, we can begin to look at his theory of law. Hart sets up his own theory by looking at what the differences between a society with law and a society without law are. He suggests that while both societies will have primary rules, a society with a legal system also has fundamental secondary rules, rules about rules. These rules are designed to alleviate issues that arise in a non-law society, specifically issues with uncertainty, the static character of rules, and inefficiency.

In a society governed by primary rules, there is no dispute resolution mechanism if uncertainty regarding a rule arises. The non-law society must

[9] *Ibid.*, 86
[10] At this point, Hart is not interested in explaining what type of obligation we believe to be attached, whether there is a relationship between legal obligations and moral obligations, nor whether/what type of obligations attach to social rules. He is interested in what occurs that causes us to ascribe obligations to people regardless of the verity of those ascriptions.
[11] CoL, 87

govern itself based on social rules which have widespread acceptance. These rules are not related to each other in a way which could be called a system since the only thing they may have in common is that the society generally accepts them. Within this society, it is possible that questions may arise regarding the scope of a rule or whether a norm in fact has the status of a social rule and there is no authoritative way to settle these questions. This society is *ex hypothesi* guided only by primary rules; were there to be a dispute resolution mechanism, it would have to be based on a different type of rule. It must be based on a rule that acknowledges an authority on the subject or creates a test that all laws must pass in order to be law. Hence, there are issues of uncertainty that can arise in this non-law society which cannot have a conclusive resolution.[12]

A non-law society also cannot adapt its rules quickly when needed. Since social acceptance of each and every rule is required and widespread social acceptance takes a long time, it is not possible to change rules or add rules in an immediate manner. To be able to quickly change primary rules, it is necessary to have a different type of rule that specifies details about how and who can change and create rules. Primary rules then within a non-law society are fairly static in nature.

Finally, a non-law society must rely on social pressure to guarantee general conformity with the rules.[13] This means that when there is not widespread

[12]*Ibid.*, 92
[13]The conformance need not be perfect but it must be very widespread.

agreement about whether a particular rule has been broken, the social pressure may be too diffuse to actually motivate people to conform. The pressure in these instances will not be uniform and is likely to be haphazard and unorganized since it is relying on people to individually pressure others into conforming with the social rule. This decentralized pressure results in non-law societies having issues of inefficiency. These issues can be resolved by centralizing this pressure and the subsequent sanctions and creating rules which allow certain people to authoritatively determine violations and sanctions.

The rules introduced into a non-law system to deal with these issues are the fundamental secondary rules. Now, we shall examine what exactly a fundamental secondary rule is, how it differs from a primary rule and what the different types of fundamental secondary rules are, according to Hart.

When a society first adopts fundamental secondary rules, they are social rules. In particular, these secondary rules are social rules about the legally valid rules of a given society (hence, the name 'secondary rule').[14] They tell us how to identify the legally valid rules, who can change them, who can determine if a rule is broken, who can execute a sanction and how they can do all of the above. One can find fundamental secondary rules in any *system* which contains primary rules. It is these secondary rules which unite myriad primary rules into one system.

[14] I believe that it's possible, once some set of fundamental secondary rules are established socially to begin to use that set of rules to change and create new fundamental secondary rules which may not directly rely on social pressure for creation and maintenance but rather on a chain of legal validity tracing back to the initial set of fundamental secondary rules.

The fundamental secondary rules of a legal system, as a subset of social rules, require acceptance of them as rules in order to exist. However, the secondary rules of a legal system require acceptance by a particular group of people, the legal officials of that system. Officials must take "an internal point of view" towards these rules. In other words, officials must consider these fundamental rules to be standards which they ought to adhere to and that form a basis of justifiably criticizing others when others do not adhere to them.[15]

There are three main types of fundamental, official-centred secondary rules which Hart recognizes in *The Concept of Law*. These are rules of recognition, adjudication, and change. The content of these rules is legal system dependent but their function in every system is the same and mature legal systems will have rules of each of these sorts. These three types of rules allow us to resolve issues of the non-law society, specifically the issues of uncertainty, the static character of primary rules, and inefficiency.

A rule of recognition allows officials to identify what the law is in a given legal system. This alleviates problems of uncertainty. There is no longer a need for a rule to have widespread social acceptance to be considered binding once a rule of recognition has been introduced. The rule of recognition can specify particular characteristics that the legally valid rules of a system may have, and/or particular criteria they must be compatible with, etc. The actual content of a system's rule of recognition, of course, will be system dependent. A rule of

[15]CoL, 56

recognition can have multiple criteria within it but, overall, Hart writes as if there is only one rule of recognition for a given system no matter how complex it may become. A simple example of a rule of recognition would be "any statute having received support from the majority of the electorate is law".[16]

Rules of adjudication are rules which inform officials of who counts as an adjudicator, how they must adjudicate, and what they can adjudicate on. These rules solve issues of inefficiency. Once rules of adjudication are introduced into a system, there is a person or group of people who can authoritatively determine if a particular legally valid rule has been broken. There are multiple rules of adjudication within a complex legal system specifying many different things about the adjudication process. Examples of rules of adjudication would be "persons appointed to the role of judge by the President are allowed to decide cases for the Supreme Court," "this particular court can only hear non-criminal cases," or "the majority of the court must rule in favour of one side."

Finally, rules of change inform officials of how they can change laws, when they can change laws, and what they can change. These rules eliminate issues with the static nature of law. Once rules of change have been introduced into a system, legally valid rules can be changed quickly and immediately by certain officials by following the proper procedures outlined in the rules of

[16] I'm not suggesting any system actually has this specific formulation with this specific logical form for the rule of recognition. I believe this example captures the very basic idea of what sort of content may go into a rule of recognition regardless of what form (conditional, biconditional, litmus test like criteria) the rule of recognition takes.
Similarly, the examples listed for rules of change and adjudication may have the same drawbacks. I'm merely attempting to suggest the type of content that may go into these types of rules.

change. There are multiple rules of change within a mature legal system. Different types of legal officials can change different rules and in different ways. Examples include "legislatures may repeal or change normal statutes by majority vote", and "superior courts may overrule precedents established by inferior courts."

It is with the introduction of these fundamental secondary rules governing conduct about primary rules that we move from a non-law to law society. Hart believed that this union of primary and fundamental secondary rules forms the basis of explaining law and legal systems.

Hart's Rule of Recognition

Much of the debate since Hart's theory was introduced has focussed on the rule of recognition so we'll spend a little more time examining exactly what Hart says about it in *The Concept of Law*. The rule of recognition is supposed to provide authoritative criteria for identifying the legally valid rules of the system.[17] The criteria provided can vary, including things such as "reference to an authoritative text; to a legislative enactment; to customary practice; to general

[17] Jules Coleman suggests that perhaps we are not identifying primary rules using the rule of recognition but that it captures common properties that all valid legal norms of the system possess. He distinguishes between a semantic and an epistemic rule of recognition. For the purposes of this dissertation, I am using the term "identifying" loosely to capture either type of rule of recognition since nothing in my argument requires the rule of recognition to be epistemic or semantic.

declarations of specified persons, or to past judicial decisions in particular cases."[18]

Rules of recognition are rarely stated in whole, though courts may occasionally explicitly state a portion of the rule or how two of the many criteria contained in the rule of recognition relate to each other. Rather, one can determine if there is a rule by looking at how others identify the law with particular import attached to how officials (such as courts) identify the law. This added importance is due to the fact that officials' judgements on what the law is have a "special authoritative status".[19] This status is conferred on the officials' judgements because of the other fundamental secondary rules of the system, granting officials special roles within that legal system.

Simple systems with one source of law will have a simple rule of recognition. Modern legal systems tend to have multiple sources of law and consequently have much more complex rules of recognition. Usually, the multiple criteria within a rule of recognition are ranked in order to avoid irresolvable conflict. This subordination should not be confused with derivation. It is not that the lower criteria must derive their law identifying characteristics from higher criteria; rather they are all independently part of the rule of recognition.[20]

[18]CoL, 100
[19]*Ibid*., 102
[20]*Ibid*., 101

When there is a complex rule of recognition, we can talk of a supreme criterion. When there are multiple criteria within the rule of recognition, there is the possibility of a conflict between two criteria when it comes to identifying law (criterion *x* identifies norm *p* as law, criterion *y* identifies norm *p* as not law). One of the criteria is usually ranked higher than the other within the rule of recognition. A criterion which is ranked higher than all the others is the supreme criterion of the rule of recognition for that legal system.[21] This criterion always determines the law when there is a conflict between it and other criteria contained in the complex rule of recognition.

The supreme criterion is not to be confused with how the rule of recognition can be said to be the ultimate rule of the legal system. We can ask in virtue of what is a particular city bylaw valid law and in most cases, we can point to some law which grants legal power to create law to a city government. We can then ask the same question about the law which grants legal power to the city government and we can answer by pointing to some provincial law authorizing provincial legislatures to delegate power to cities. We can continue to ask and answer in this fashion, until the answer is some criterion within the rule of recognition. When we reach this point, we can answer no further. It makes no sense to ask whether the rule of recognition is valid law, rather its existence is a matter of fact about that particular legal system. It determines the terms of validity within that legal system and hence, can't be said to be valid or invalid

[21] *Ibid*., 106

since rules aren't self-validating. We can only query its existence and not its validity; although the validity of the rules of the system rely upon the criteria within the rule of recognition.[22] In this sense, it is the ultimate rule of the system.[23]

The rule of recognition, then, can contain a supreme criterion which identifies the law even when there are conflicts between it and other criteria within the rule of recognition and is, in some sense, the ultimate rule of the system. When inquiring into the validity of any given rule in a system, eventually the answer to why the rule is valid is because it matches criteria within the rule of recognition. The rule of recognition, itself, however, cannot have its legal validity questioned. Its existence is demonstrated through the practices of law identification used by citizens and particularly officials. These practices include both how the law is identified and how officials react when someone deviates from identifying norms picked out by the criteria in the rule of recognition as law, specifically reacting with criticism that is considered justified by other officials.

So, we have seen, then, how Hart's account of law focuses on the concept of "rules" and in particular, on "social rules". Some of these social rules, which are determinable by people's practices and perspectives, constitute the meta-rules

[22] In these pages in *The Concept of Law*, Hart does not say explicitly say that validity of ALL primary rules relies upon the rule of recognition. He also doesn't explicitly say that it isn't the case that the validity of all primary rules relies on the rule of recognition. I'm not sure how much, if anything hangs on this, but I do find it interesting. Also and I believe importantly (for my own theory at least), Hart does not say that rule of recognition must identify the other fundamental secondary rules in the system. In fact, although I won't argue it here, I believe that Hart thinks that it need not identify the other secondary rules and I think he's correct in believing so.
[23]CoL, 107-108

of a legal system, *i.e*. the fundamental secondary rules. It is the combination of the fundamental secondary rules and primary rules that is the key to Hart's analysis of law. The secondary rules of change, adjudication and recognition allow us to alleviate the potential ailments of a non-law society. The rules of adjudication allow for certain authoritative rulings on the scope of rules and other questions concerning their application. The rules of change thwart the static nature of social rules by providing mechanisms for deliberate changes to the legally valid rules and the rule of recognition identifies the laws and alleviates the problems associated with uncertainty of the primary rules in a non-law society. This rule of recognition will often contain criteria which are ranked relative to one another with one often being the supreme criterion which identifies the law even when it conflicts with other criteria within the rule. The rule of recognition can also be said to be the ultimate rule of a legal system since the primary rules rely upon it for their validity and the rule of recognition, itself, cannot be valid or invalid.

At this juncture, we shall turn to Dworkin's initial critique of Hart in "The Model of Rules". While I do not think that Dworkin's critique is correct on all counts nor do I think his understanding of Hart is right across the board, it is important to see what Dworkin's argument is, for responses to Dworkin's argument are what created the split of legal positivism into inclusive and exclusive legal positivism.

Dworkin's Critique

I will be focussing on the parts of Dworkin's critique which are most relevant to the subsequent division in legal positivism.[24] Dworkin characterizes the tenets of legal positivism as the following:

1) Law is a special set of rules used by a community. This special set of rules can be identified by specific criteria that specify the rules' pedigree. Identifying the rules in this fashion also answers the question of whether they are valid.

2) The set of valid legal rules picked out by their pedigree exhausts the law in that system.

3) A person has a legal obligation if and only if there is a valid legal rule which requires or forbids them from doing something.[25]

Dworkin believes that these three tenets are inconsistent with how judges in fact decide cases. When judges decide cases, they treat certain principles as legal and yet these principles cannot be picked out by the test specified in tenet 1 above. Principles are standards to be observed because of some aspect of morality.[26] The difference between legal rules and legal principles is logical, according to Dworkin. Rules are either applied or not and application is decisive

[24] I'm going to forgo looking at Dworkin's three types of discretion since that can be and has been responded to separate from his concerns about whether a rule of recognition can pick out legal principles.
[25]Dworkin, R. "Model of Rules I" , 17-18, hereinafter "MoR"
[26]*Ibid*., 23

of the outcome.[27] Principles are applied in a weighted fashion.[28] Conflicting rules result in one rule becoming invalid, according to Dworkin,[29] whereas there is no resulting invalidity when principles conflict.

Let's look then at how judges use principles when deciding cases. Dworkin suggests that judges use legal principles to create legal rules. The legal rule does not exist prior to the decision although the legal principle does.[30] Judges can cite one principle or many.[31] If legal obligation attaches only to legal rules, as Dworkin believes is required by legal positivism, then there was no legal obligation prior to the decision. This is undesirable since it means the court is retrospectively declaring a legal obligation where there was none.

Dworkin suggests that there are two ways to attempt to understand the relationship between legal principles and legal obligations. One, we can attempt to show that legal principles are binding in the same fashion as legal rules and hence, can support a legal obligation to require or forbid something. With this approach, one would say that the law includes legal principles. [32] Alternatively, we could say that the principles used in legal decisions are in fact extra-legal principles which the court turns to when the law has run out on the matter at hand. The court, then, is not bound by principles in the same way as the first approach.

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[27]*Ibid*., 25
[28]*Ibid*., 27
[29]*Ibid.*
[30]*Ibid*., 29
[31] Dworkin uses *Riggs v Palmer* as an example of a court citing one principle and *Henningsen v. Bloomfield Motors, Inc* as an example of the court citing many principles, some conflicting.
[32]MoR, 29

They are free to use them and generally do indulge in this freedom but are not obligated to do so.[33]

Dworkin suggests that it would be a mistake for legal positivists to suggest that principles cannot be binding and hence, that judges use principles only in the second sense. He points out that there is nothing in the concept of "a principle" that would prevent it from being binding.[34]Also, if a judge failed to take account of principles that other judges had been attentive to, then that judge would be rightly criticized for failing to fulfill her duty. Moreover, the plaintiff or defendant is entitled to have the judge consider those principles.

Another out for legal positivists, according to Dworkin, would be to suggest that principles cannot count as law for two reasons: one, their authority is controversial and two, their weight is controversial. Dworkin suggests that while it is true that there is no litmus test for a principle's authority and weight, we can argue for both using the practices of the legal system and its community.[35]

If Dworkin's above responses to potential positivist understandings of principles are true, the question then becomes can a positivist rule of recognition account for principles as part of the law? Dworkin thinks not. He believes that there is no possible test of pedigree (rule of recognition) that will capture principles as law. If there is no pedigree test that can capture principles and

[33]*Ibid*., 30
[34]*Ibid*., 35
[35]*Ibid*., 37

principles are part of the law, then, based on Dworkin's understanding of legal positivism, legal positivism must be false.

Let's look more closely at why Dworkin believes that no positivist rule of recognition can allow for principles to be part of law. In order for Hart's positivism to be true, we must be able use some sort of test that picks out all and only the laws of a system, according to Dworkin. For the most part, we identify valid law by looking at whether an institution entrusted with creating law enacted that norm in a particular way. Trying to identify an institution that enacted principles in a particular way is fruitless. Principles develop their legal standing through "a sense of appropriateness developed in the profession and the public over time."[36] When identifying a principle as part of the law, we cite previous cases that use that principle and statutes which exemplify it and if we cannot find cases and statutes, then our argument that a particular principle is law is likely to fail. However, it is impossible to state a test which could define exactly how much and what kind of institutional support is required for a principle to be legal in nature. According to Dworkin,

> "we argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of

[36] *Ibid*., 41

> precedent, the relation of all these to contemporary moral practices, and a host of other such standards."[37]

This means that even if we could, at a moment in time, find a test to determine when a principle has the appropriate institutional support, it would look very little like the relatively stable rule of recognition that Hart imagined. Furthermore, the arguments advanced showing institutional support for a particular principle are better categorized as arguments about the principle's acceptability than its validity for Dworkin.

Dworkin thinks that perhaps looking at how Hart handles customary law might help one understand how principles can be part of the law for a positivist. Customary law, like principles, cannot draw its validity from institutional enactment. Rather, Hart believes, that the test is something like whether the community regards the custom as legally binding.[38] Dworkin believes that this test cannot apply to principles, however. Dworkin believes that to say any norm is legally binding because the community believes it to be legally binding avoids providing a test for us to determine which rules are in fact legally binding. While perhaps not problematic within the realm of customary law, Dworkin thinks that applying this same thought to principles would wreak havoc on the positivist understanding of law. This is because principles undergird so much of our legal

[37] *Ibid*., 41
[38] *Ibid*., 43

system and when decisions are made using these principles, the rules, themselves, rely on the principles for their validity.[39]

Since positivism cannot account for legal principles according to Dworkin, legal positivism's first tenet, that the law of a community is distinguished from other norms by some test constituted by a rule of recognition, must be wrong. Principles play an important role in our legal systems and help determine legal obligations in certain cases, and Hart's legal positivism, as understood by Dworkin, is unable to accommodate that role.

Responses to Dworkin

Legal positivists responded to Dworkin's critique in "Model of Rules I" in two broad manners. These two broad manners can be categorized as inclusive or 'soft' legal positivism and exclusive or 'hard' legal positivism.[40] Inclusive legal positivists include Hart, Waluchow, Kramer and Coleman. Exclusive legal positivists include Raz, Shapiro and Marmor.[41] While each of these theorists differs in the detail of their understanding of legal positivism, it is possible to paint a rough picture of what the two theories look like. Inclusive legal positivists believe that there is no necessary connection between legal validity and morality. Exclusive legal positivists believe that there is necessarily no connection between

[39] *Ibid*., 44
[40] I will be using the terms' inclusive' and 'exclusive' rather than 'soft' and 'hard'.
[41] Neither list is exhaustive.

legal validity and morality.[42] We will explore what this means in more depth one position at a time.[43]

Generic Inclusive Legal Positivism

Generic inclusive legal positivism is a broad conceptual theory which states that there is no necessary connection between legal validity and morality but there may be a contingent one in any given legal system. This means that as long as there is one conceivable legal system where the rule of recognition does not contain moral criteria the first half of the conjunct is true. As long as there is one conceivable legal system where there is at least one moral criterion in the rule of recognition, the second half of the conjunct is true.

Inclusive legal positivism responds to Dworkin by denying that the rule of recognition must be pedigree based. Rather, it is possible that the rule of recognition may contain moral criteria (though it need not). A rule of recognition contains moral criteria when moral criteria are accepted by officials as criteria for determining the legal validity of norms. This is the same manner that the content of any social rule is created. It is possible, under inclusive legal positivism, to

[42] While some people have characterized it as a connection between law and morality, I think a connection between morality and legal validity is more accurate characterization. As John Gardner has pointed out in "5 ½ myths," there are plenty of connections and necessary connections between law and morality.

[43] I'm not particularly interested in how effective a response each theory is to Dworkin's critique nor do I think it's possible to explore that without going into specific parts of each position that not all proponents of that camp may agree to. Rather, I will attempt to show how what Dworkin said motivated this division and the apparent differences between inclusive and exclusive legal positivism.

characterize charters and bills of rights as setting out moral criteria which a law must be compatible with in order to be legally valid. Compatibility with moral criteria in a constitution can be necessary for a norm to be legally valid within a particular system if there is acceptance that those moral criteria function that way within the rule of recognition. If moral criteria can form part of the rule of recognition, then it is possible to explain how moral principles can underlie a rule's validity such as in *Riggs v. Palmer*.

A subset of inclusive legal positivism is incorporationism. [44] Incorporationism posits that in certain legal systems, a norm being a moral norm is sufficient for it to also be a legal norm. Of course, in order for this sufficiency condition to obtain, there must be the same official acceptance as is required for determining the rule of recognition in general. If officials take the internal point of view towards "moral norms are legal norms", then the system is incorporationist. Incorporationism can be particularly useful in explaining how moral principles which may have no previous legal standing can be used to determine a legal case.

Generic Exclusive Legal Positivism

[44] Kramer belongs to this subset albeit in a particular fashion. He believes in modest incorporationism which applies only in deciding particular legal cases. While all incorporationists are inclusive legal positivists, not all inclusive legal positivists are incorporationists.

Exclusive legal positivists agree with Dworkin's characterization that a rule of recognition must specify particular pedigrees for all norms which are to be identified as laws. *Contra* inclusive legal positivism, they do not believe that there is a conceivable legal system where there are moral criteria within the social rule of recognition. For exclusive legal positivism to be true, it must be the case that all legal systems, actual and conceivable, contain no moral criteria within their rules of recognition. A single counter example would prove exclusive legal positivism false.

Exclusive legal positivists responded to Dworkin's critique by pointing out that judges may be legally required to consult extra-legal norms when deciding particular cases.[45] Dworkin assumes that all standards which are being applied in a judicial decision must belong to that system. However, this is observably not the case. Sometimes judges may be required to consult and apply the rules of a foreign legal system when deciding a conflict of laws case but that does not mean that the rules of the foreign system are mystically adopted into the judges' legal system. Raz and Shapiro refer to this legal duty as a 'directed power'. Charters and bills of rights can be thought of as requiring judges to exercise their decision making power in a particular way by examining whether the law is compatible with the charter or bill of rights. When it is found to be incompatible, the judges are empowered to strike the law down, that is, remove the offending norm from

[45] Inclusive legal positivists can follow this same tact for responding the types of cases that Dworkin has highlighted. They need not do so though since morality can affect legal validity on an inclusive understanding.. Exclusive legal positivists must respond this way, however since morality plays no role in determining a norm's legal validity.

the set of legally valid rules. This directed power can explain how moral principles can and legally must be weighed when deciding certain legal cases.

Conclusion

Since the division within legal positivism, inclusive and exclusive legal positivists have been arguing about which account offers a better understanding of law. This argument typically focuses on whether there is a conceivable legal system which contains moral criteria within its rule of recognition. This claim is a conceptual claim and hence, the arguments have typically been conceptual in nature. For the most part, they have focussed on some condition that a theorist considers to be a necessary condition of law (e.g. law necessarily claims authority) and whether that condition is compatible with there being any moral criteria in the rule of recognition. In the second chapter, we will examine one such argument advanced by Shapiro.

CHAPTER 2: Shapiro's Guidance Function and Exclusive Legal Positivism

Introduction

In this chapter of my dissertation, I will begin examining arguments raised against inclusive legal positivism and in favour of exclusive legal positivism. This chapter specifically focuses on the guidance function argument by Scott Shapiro. This argument is designed to show that inclusive legal positivism is incompatible with what Hart may have claimed to be one of law's necessary features, namely law has the function of guiding people's actions. Shapiro claims that Hart wants to believe both that inclusive legal positivism is true and that law necessarily serves a guidance function in society. Since, according to Shapiro, law cannot fulfill this necessary function and have an inclusive rule of recognition, Hart's acceptance of inclusive legal positivism is incorrect.[46] Consequently, Shapiro believes that exclusive legal positivism is the best theory of law for Hart and any other legal positivists who attribute a guidance function to law because, according to Shapiro, exclusive rules of recognition are, unlike their inclusive counterparts, fully compatible with law's guidance function. I believe this conclusion to be problematic however. Shapiro fails to realize that his guidance function argument applies to his own exclusive positivist position. Shapiro's account of exclusive legal positivism is also susceptible to his guidance

[46] By "inclusive rule of recognition" I mean a rule of recognition that contains at least one moral criterion which provides a constraint on which norms can be recognized as legally valid. This criterion may not be the supreme criterion in the rule of recognition. By "exclusive rule of recognition" I mean a rule of recognition which contains no moral criteria. This means that moral criteria do not provide a necessary constraint nor can a norm's identification as a moral norm be sufficient for it to count as law. An inclusive legal positivist can believe that all actual legal systems have exclusive rules of recognition. The only thing they must maintain is that at least one hypothetical legal system has an inclusive rule of recognition.

function argument because of how directed powers work. By neglecting to examine how his argument affects the ability of all fundamental secondary rules to guide conduct, Shapiro fails to realize its full implications.

Shapiro, in his arguments, is primarily interested in what Hart believed. However, even if he isn't explicitly attributing a guidance function as necessary to law, I believe he implicitly does so.[47] Hence, his arguments could have a broader application than just to Hart's position. If law does indeed necessarily function to guide conduct, then it's not only Hart's theory that is in trouble as a result of the guidance argument but all other legal positivist theories as well.

Prior to examining Shapiro's actual argument, I will spend a section of the chapter elucidating how arguments of this general type work. This argument type is often used by exclusive legal positivists to argue for problems with inclusive legal positivists' theory. In fact, both the authors being studied in the next two chapters, Raz and Himma, also use variants on this type of argument. Hence, it is worthwhile to briefly examine the overall structure of the argument, looking at things such as, what it can prove, and how it can be refuted.

After looking at the general type of argument, we will examine Shapiro's specific argument. Briefly, Shapiro asserts that guiding conduct is an essential feature of law. If an official is attempting to follow an inclusive rule of recognition, then primary rules cannot guide conduct. Hence, inclusive legal positivism is incompatible with an essential feature of law.

[47]See for example page 137 of "Law, Morality and the Guidance of Conduct" where he states what type of rule guidance legal positivists must be committed to.

Following Shapiro's argument, I will briefly examine Wil Waluchow's argument against Shapiro and a potential response from Shapiro. Waluchow makes a similar argument to mine. However, I think Shapiro can respond to Waluchow's in a way that isn't available as a response to my arguments. Briefly, Waluchow argues that exclusive legal positivism, due to directed powers, is in no better position regarding guiding conduct than inclusive legal positivism. I think, Shapiro can respond to this by differentiating between providing legal guidance and providing all things considered guidance. Exclusive legal positivism can still provide legal guidance in a way that inclusive legal positivism can't based on Waluchow's argument. However, I will subsequently present two arguments designed to show that Shapiro's account of how the law guides conduct is in fact not just problematic for inclusive legal positivism. Exclusive legal positivism also has problems explaining how the law can provide legal guidance to officials and citizens. First of all, I will show that Shapiro's account of exclusive legal positivism is in fact incompatible with law's guidance function. This is because Shapiro, like some other exclusive legal positivists, posits a rule of adjudication which will raise the same issues that an inclusive rule of recognition does regarding the guidance of conduct. Secondly, I argue this guidance function as Shapiro understands it creates potentially undesirable limitations on what can be enacted as primary law. This point will be raised using a hypothetical system which attempts to ensure that a citizen's legal obligations are also moral through enacting various primary rules. Hence, Shapiro's account of law is in no better

position than inclusive legal positivists' accounts with regard to how he can accommodate his explanation of law's guidance function.

Argument Structure

The argument structure used by Shapiro is a common one utilized by exclusive legal positivists against inclusive legal positivists. This argument structure points out a tension between two commitments and suggests resolving this tension by abandoning one. Within this debate, the argument points out a tension between a feature of law and an inclusive rule of recognition and suggests that to resolve this tension we should abandon inclusive legal positivism (in favour of exclusive legal positivism).

Of course, the fact that there is a tension between two commitments doesn't provide a reason for us resolving the conflict in favour of either commitment. Commonly in jurisprudence, exclusive legal positivists argue that the conflict is between inclusive legal positivism and a *necessary* feature of law. If this is in fact the case, then the conflict must be resolved by abandoning inclusive legal positivism. A legal theory ought to be able to account for law's necessary features. Any theory which cannot is not a good theory of law.

So, overall, the arguments we'll be examining in the next three chapters follow roughly the following structure (with sub-arguments for each premise).

1) X is a (necessary) feature of law.[48]

2) X is incompatible with inclusive legal positivism.

3) X is not incompatible with exclusive legal positivism.

4) Theories of law must be compatible with necessary features of law.

Therefore, inclusive legal positivism is incorrect and exclusive legal positivism is the preferable legal theory, at least with respect to its ability to capture necessary feature, X.

Legal theory arguments with this structure are countered in three general ways corresponding to the first three premises. Since both inclusive and exclusive legal positivism are generally aimed at providing the best descriptive explanatory theory of law possible, they generally agree to some version of the fourth premise and hence, this premise within the inclusive/exclusive discussion is not particularly debated.[49]

My argument against Shapiro will focus on proving the third premise false as does the one by Waluchow which we're examining in this chapter. By itself, this argument doesn't actually rescue inclusive legal positivism from Shapiro's claims; rather it points out that the same issues arise with exclusive legal positivism. I am arguing that in fact, legal positivism as a whole is in tension with

[48] Necessary is in brackets here because while Shapiro does not call law's ability to guide conduct a necessary feature explicitly, he does treat this function as if it is at times and at the very least, as something that ought to be captured by a theory of law.

[49] I am admittedly leaving aside the whole debate on whether there are necessary features of certain institutions, such as law. It is possible that some legal positivists who do not believe there are necessary features of law may not agree to the exact formulation put above but would perhaps agree to a conditional formulation such as "if there are necessary features of law, then theories of law must be compatible with these necessary features".

the guidance feature that Shapiro assigns to law. If guidance, as Shapiro understands it, is a necessary feature of law, then neither inclusive nor exclusive legal positivism is able to adequately explain the concept "law". The fact that inclusive and exclusive legal positivism cannot account for this feature might suggest that perhaps it is not necessary and perhaps Shapiro would rescind this argument were he aware of its implications for exclusive legal positivism.

Shapiro's Guidance Function Argument

Shapiro's argument against inclusive legal positivism relies heavily on his particular view of what the guidance function of law requires and his definition(s) of guidance. Prior to actually examining his argument, it is worth going over each of these things so we can be clear about what Shapiro is attributing both to legal systems and inclusive legal positivism.

In order to motivate his guidance function argument against inclusive legal positivism, Shapiro must elucidate what exactly it means to be guided by a rule. He takes "rule guidance" to be ambiguous[50] and suggests that there are two central ways to understand the term, epistemic guidance and motivational guidance. Epistemic guidance focuses on the rule providing information to a person. A person is epistemically guided as long as they conform to the rule and the rule informed them about what counts as conforming.[51] Motivational

[50] Shapiro, S. "Law, Morality, and the Guidance of Conduct", 146 hereinafter "Guidance of Conduct"
[51] *Ibid.*

guidance, on the other hand, takes into account a person's reasons for conforming to a rule. A person is motivationally guided when that person "takes the rule as the sole source of his motivation for conformity."[52] In order to be motivationally guided by a rule, I must take the rule as providing a peremptory reason for action. It provides me with a reason to not deliberate about the value of following the rule but rather to simply comply with it.[53]If I don't jaywalk because I don't want to face fines or punishment, I'm being epistemically guided by the rule against jaywalking. If I don't jaywalk simply because there is a rule telling me not to, I'm being motivationally guided by the rule against jaywalking. After establishing this distinction between epistemic and motivational guidance, Shapiro then asks "what type of guidance is required for legal rules?"

Shapiro is primarily concerned with arguing against incorporationism. He takes this version of 'inclusive' legal positivism[54] to be the more intuitive of the two since it straightforwardly appears to be responding directly to Dworkin's critique of Hart's position.[55] However, since I'm more interested in the necessity version of inclusive legal positivism, I'll only briefly examine his argument regarding incorporationism before moving on to focus on his argument against inclusive legal positivism when understood as the necessity version.

Shapiro suggests that there are three theses that may be held by inclusive legal positivists that are incompatible; these are the Conventionality Thesis,

[52]*Ibid.*
[53]*Ibid.*, 163
[54] I'm not using 'inclusive legal positivism' to refer to incorporationism for my own purposes. However, Shapiro does.
[55] Guidance of Conduct, 160-161

Inclusive Legal Positivism and the Practical Difference Thesis. The Conventionality Thesis states that all legal systems "contain a conventional rule that imposes a duty on courts to evaluate conduct in light of rules that bear certain characteristics."[56] "Conventional rule" in this thesis should be understood as a fundamental secondary rule, a social rule which elucidates how legal officials may operate within a legal system. The Conventionality Thesis is how inclusive legal positivism understands the Social Fact Thesis, "which states that all legal facts are ultimately determined by social facts."[57] This is generally thought to be a basic tenet of modern legal positivism, since Hart.[58] Exclusive legal positivism need not elucidate the Social Fact Thesis in the same way as inclusive legal positivism. The Conventionality Thesis leaves open the possibility of a legal system being based in social facts yet still having (contingently, not necessarily) moral criteria for legal validity. The secondary rule is a social rule (conventional rule) that specifies that laws must "bear certain characteristics". The characteristics specified by the conventional rule need not be social; they can be moral or otherwise. Inclusive legal positivism doesn't close off this possibility. Shapiro characterizes the central tenet of inclusive legal positivism as "there is some possible legal system where the legality of a norm does depend on some of its moral properties."[59]

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[56] *Ibid*., 128
[57] *Ibid*., 127
[58] I don't mean to suggest that it is a necessary tenet of legal positivism but rather that it is thought to be accepted by a legal positivist theorist unless the theorist explicitly states/argues otherwise.
[59] Guidance of Conduct, 129

The final thesis held by (some) inclusive legal positivists is The Practical Difference Thesis. This thesis is supposed to capture the function that Shapiro believes Hart to have assigned to law, the guidance function. This thesis states that "legal rules must in principle be capable of securing conformity by making a difference to an agent's practical reasoning."[60]Shapiro suggests that a rule makes a practical difference when it "motivates an agent to act in a way that he might not have acted had he not appealed to the rule in his practical reasoning."[61]In order to determine whether any particular rule is capable of doing this, we must construct a counterfactual where an agent does not appeal to the rule in their practical reasoning. If, consequently, the agent may not have conformed to the rule, then the rule is capable of making a practical difference.[62] If all agents still would conform despite not appealing to a particular rule, then that rule is incapable of making a practical difference. Shapiro adds a further addendum stating that if the agent does not appeal to a legal rule *qua* legal rule and still conforms to it, then the rule makes no practical difference *qua* legal rule (although it may still make a difference as a moral norm). The Practical Difference Thesis will, no doubt, be further elucidated throughout this chapter as we examine Shapiro's arguments and my responses. Shapiro believed Hart to be one of the inclusive legal positivists

[60]*Ibid*., 129
[61]*Ibid*., 132
[62] Shapiro has a broad understanding of rule conformity which understands non-addressees as being capable of conforming to a rule. For example, a judge can conform to a rule about murder when she correctly evaluates conduct of others based on that rule.

who held all three of these theses and hence, Shapiro focusses his argument on Hart's account of inclusive legal positivism.[63]

Shapiro's Argument against Incorporationism

Shapiro suggests that The Practical Difference Thesis is the best way to describe what is required for law to guide conduct, a function he believes that Hart attributed to law when Hart said "the principle functions of the law as a means of social control are...to be seen in the diverse ways in which the law is used to control, to guide and to plan life out of the court."[64] Shapiro suggests that Hart had epistemic guidance in mind when discussing the ability of law to guide the conduct of citizens.[65] Hart was not concerned with why citizens conformed to the rules so it is unlikely that he thought that laws must motivationally guide conduct. Shapiro infers that Hart should be understood as believing that laws must epistemically guide conduct. So when we examine incorporationism, we should be asking "can incorporationist primary rules make a practical difference epistemically for citizens?" Shapiro thinks not.

[63] Again, Shapiro outright states that his argument is not attempting to prove inclusive legal positivism incoherent, only Hart's version of inclusive legal positivism (or any version which holds these three theses). However, Shapiro believes that The Practical Difference Thesis is of much more import to Hart than inclusive legal positivism. He believes that Hart should rightly give up inclusive legal positivism over rejecting The Practical Difference Thesis and he believes in The Practical Difference Thesis himself. Therefore, it is reasonable to believe that Shapiro believes that a legal positivist theory which contains The Practical Difference thesis is stronger than a legal positivist theory which does not.
[64] CoL, 40
[65] Guidance of Conduct, 146-147

The Practical Difference Thesis requires that legal rules perform two roles. First, a legal rule must be capable of motivating a person to act in a way she might not otherwise.[66] Second, a legal rule should motivate an official to evaluate the conduct of citizens in a way that she might not have had she not appealed to the legal rule.[67]

Shapiro believes that incorporationist primary legal rules will fail to perform this second role.[68] If a judge is motivated by an incorporationist rule of recognition stating something like "a norm is a legal norm if it is a moral norm," then the norms picked out by this rule of recognition will fail to make a practical difference. The rule of recognition requires judges to evaluate conduct in accordance with morally appropriate rules so the moral norms picked out will fail to make a practical difference *qua* legal norms. If the judge failed to appeal to the moral norms *qua* legal norms but was motivated by the incorporationist rule of recognition, she would still reach the same decision. The norms make a difference as moral norms but not as legal norms.[69] Shapiro characterizes the argument in the following manner:

> 1) If P is guided by an incorporationist rule of recognition, then P will be guided by M only if P might not have conformed to M if P had not appealed to M as a legal rule but continued to be guided by the incorporationist rule of recognition.

[66] Shapiro uses the term "motivate" here but does not mean motivational guidance. I believe he means simply that the agent may have acted otherwise were they not to appeal to the rule. Hence, I can still be motivated by a rule in the sense required by The Practical Difference Thesis while still only complying with a law because I fear sanctions.
[67] Guidance of Conduct, 133
[68] By "incorporationist primary legal rule" I mean a rule picked out by a criterion in a rule of recognition which specifies that a norm which is a moral principle is also a legal norm.
[69] Guidance of Conduct, 133

> 2) Necessarily, if P is guided by an incorporationist rule of recognition, then P conforms to M.
> 3) Therefore, if P is guided by an incorporationist rule of recognition, then P will not be guided by M.[70]

The above argument, according to Shapiro, illustrates how incorporationism is incompatible with law's guidance function since all legal rules picked out by an incorporationist rule of recognition will fail to make a practical difference as long as the official is guided by an incorporationist rule of recognition.

Shapiro's Argument Against Inclusive Legal Positivism

Shapiro's argument against inclusive legal positivism focuses more heavily on what role deliberation can play in a legal system. Recall from the first chapter that Hart suggests that the fundamental secondary rules can help solve problems of deliberation regarding what primary rules should be followed in any given community. They may do this by providing criteria for 'authoritative marks' that the primary rules of a system must bear. Inclusive legal positivism allows compatibility with moral criteria to be part of the 'authoritative mark' that primary rules bear. Because of this allowance, Shapiro believes that an inclusive rule of recognition, *i.e.* a rule which states that compatibility with moral criteria is a necessary condition for a rule's legal validity, re-opens the problems of deliberation within a society. Hence, a system which has an inclusive rule of

[70] *Ibid.*, 138

recognition will fail to have primary rules which make the necessary practical difference and are capable of guiding conduct.

An inclusive legal system fails to mediate properly between officials and non-officials. Shapiro states that legal norms epistemically guide in two ways. First, as rules, they eliminate the need for particularized orders. Second, they eliminate problems which arise when non-officials must answer normative questions and resolve social issues themselves.[71] An inclusive system fails to epistemically guide in this second manner. A non-official cannot learn their legal obligations solely from examining the primary rules. The non-official must deliberate about the merits of a duly enacted norm (whether it comports with the moral criteria in the rule of recognition) in order to determine if she in fact has any legal obligations stemming from that norm.

Consider a system where all legal rules must comport with a person's fundamental rights. A citizen, when attempting to determine whether they should follow a rule *qua* legal rule, must then deliberate on whether that rule comports with their fundamental rights. In order to do this, according to Shapiro, the citizen must deliberate on the value of following the rule to begin with.[72] The primary rules within an inclusive legal system are unable to epistemically guide conduct. In order for a person to determine whether she should follow them, she must

[71] Shapiro, S. "On Hart's Way Out", 491 hereinafter "Hart's Way"
[72] Shapiro doesn't elaborate on how determining whether a rule is compatible with certain moral rights entails deliberating on whether one should follow the rule. I imagine that there are some additional premises about "people should follow morally innocuous or morally good norms" and that "if a rule is compatible with certain moral rights, then it is morally good or at least innocuous."

already have deliberated on the value of following them.[73] This problem is highlighted further when examining what judges must do to evaluate cases. Judges also are unable to be epistemically guided by primary rules in an inclusive legal positivism legal system. Since judges are required to deliberate on the moral worthiness of a rule to determine if it is a legally valid rule of the legal system, it cannot provide them with a peremptory reason for action to evaluate behaviour a particular way.

Shapiro's Exclusive Legal Positivism

Given Shapiro's worries about inclusive legal positivism and incorporationism, we might wonder how Shapiro responds to Dworkin's critique of Hart's positivism and how does Shapiro suggest that Hart should respond given Hart's 'commitment' to law's guidance function? Shapiro believes that moral norms can guide judges' adjudication. A moral norm can help a judge figure out what the rule of recognition requires but it cannot guide conduct as a primary rule.[74]Shapiro differentiates between legal validity and legality. Legal validity is a mark borne by the norms that judges are required to apply in particular cases. Hence, moral principles such as the one used in *Riggs v Palmer* can be legally valid principles for Shapiro. Judges can be under a duty to apply such principles. The same principle, however, cannot be a legal principle; it is, instead, an extra-legal one. Legal norms are a subset of legally valid norms, specifically the legally

[73] Guidance of Conduct, 162
[74] Hart's Way, 496

valid norms which belong to the system in question.[75] Judges can have an obligation, a directed power, stemming from a fundamental secondary rule to apply legally valid moral norms when deciding particular types of cases. This secondary rule may point to specific moral criteria such as those enshrined in a constitution. If the legal rule does not comport with these legally valid norms, then the legal rule must be changed so that it does.[76]

Waluchow's Response

Waluchow suggests that an exclusive positivist account is going to have trouble explaining how the law can guide the conduct of citizens given their commitment to a directed power. What an inclusive legal positivist could call "criteria of legality", an exclusive positivist would call "criteria of invalidation." There is, according to the exclusive positivist, a fundamental secondary rule in mature legal systems such as ours which requires judges to invalidate legal norms if they are incompatible with certain moral criteria. Waluchow suggests that this

[75] Hart's Way, 306 I should note that Shapiro and I use the term "legally valid" slightly differently. Since in some inclusive legal positivist accounts a norm may be a legal norm but not a legally valid one if it fails to comport with moral criteria in the rule of recognition, I've used "legally valid" to refer to norms which are duly enacted and comport with the moral criteria.

[76] Shapiro extrapolates how exclusive legal positivism works in comparison to how incorporationism works. I've attempted to demonstrate how it would work with regard to situations where inclusive legal positivism describes the phenomenon differently. I believe he would agree based on what he's said about how exclusive legal positivism works with regard to the types of cases that Dworkin has brought up and in accord with what's been said elsewhere and by others about directed powers.

secondary rule will cause the same problems for the law's ability to guide citizens as an inclusive legal positivist rule of recognition does.[77]

Waluchow suggests that, as citizens, we are primarily concerned with determining "which actions I will be expected to have performed should I ever find myself before a court of law."[78]In an exclusive legal positivist system with directed powers, this means determining what norms a judge will uphold in the decision. When I am determining what I ought to do, a statute which is invalid on an inclusive account will be invalidated on an exclusive account. Waluchow believes that this statute cannot provide me with any more guidance under an exclusive understanding than it does under an inclusive understanding since the judge will strike it down if my case comes before the court.[79] But to determine whether he will do so, I need to engage in the very moral reasoning the rule was intended to allow me to avoid. In order to determine what I ought to do, then, I must deliberate on what will be struck down were it to be brought to court. This deliberation will be identical between inclusive and exclusive legal positivism since the same moral criteria that are found in an inclusive rule of recognition will be part of the conditions for the exercise of the exclusive directed power. Exclusive legal positivism, then, cannot account for law's guidance function any better than inclusive legal positivism can.

[77] Waluchow, W. "Legality, Morality and the Guiding Function of Conduct", 94
[78]*Ibid.*
[79]*Ibid.*

I believe Shapiro can respond to Waluchow's argument by differentiating between legal guidance and all things considered guidance. The law must guide citizens' conduct legally. Shapiro in his more recent work talks heavily about a "legal point of view".[80]I think he can respond to Waluchow by suggesting that it is only from this point of view that the law must guide conduct. Inclusive legal positivism is incapable of this type of guidance because a citizen cannot determine what their legal obligations are without deliberation on the law's merits. Exclusive legal positivism, however, still allows citizens to determine what their obligations are at the current time. While their obligations may change with court decisions or new statutes, a citizen can currently determine what the law requires of them without deliberation on the norm's merits. These laws *can* make a practical difference to a citizen's reasoning. Whether they are likely to remain laws and hence, continue to create legal obligations on citizens, may figure into a citizen's attempt to figure out what they should do "all things considered" but does not figure into what they should *legally* do. Similarly, a citizen may choose not to follow a horribly unjust law or one where they think the likelihood of punishment is slim (*e.g.* jaywalking) but these are all things considered judgements in practical reasoning and not specifically legal judgements in practical reasoning.

While I don't necessarily find this type of response satisfactory and I think Shapiro may be giving up a lot of what is intuitive about assigning the function of

[80] See Shapiro's "Was Inclusive Legal Positivism Founded on a Mistake?" and "What Is the Rule of Recognition (And Does it Exist?)"

guiding conduct to law, it does seem to be a possible response in line with his further work in the area. I will attempt to not leave an opening for such a response with my arguments and will be focussing first on how exclusive legal positivism affects officials' ability to be legally guided by primary and secondary rules and second on how Shapiro's guidance function eliminates certain seemingly possible legal systems from being conceptually possible without good reason.

My Response to Shapiro

To begin with, I'd like to point out the similarities between a directed power that Shapiro believes judges to have and an inclusive rule of recognition. Both of them specify a set of moral norms which judges are supposed to turn to when deciding a case. For inclusive legal positivists, the judges must use these moral norms to determine whether a duly enacted norm is in fact legal. For exclusive legal positivists, judges must use these moral norms to determine whether they must change or invalidate a legal norm. The actual content of the conditions set out in this inclusive rule of recognition and the exclusive directed power is identical and how a judge must decide a case if a particular norm fails to meet those conditions is similar. With both theories, the judge must not apply that particular norm.

Given these similarities, it seems reasonable to ask, how does Shapiro's own theory work for guiding judges in their role as evaluator of others' conduct?

To use Shapiro's terminology, in a constitutional case, a judge is required to deliberate on the merits of a primary rule and only enforce said ruleif the rule's merits warrant it, that is, if the law doesn't contradict a person's fundamental rights. It seems then that primary rules cannot guide judges' conduct as evaluators under an exclusive schema any better than they can under an inclusive schema. However, Shapiro explicitly states that primary rules do provide guidance for judges. He, in fact, broadens his view of how one can conform to a rule in order to account for the fact that primary rules guide judges in their role as evaluator.[81]

Perhaps, Shapiro might respond by saying that once a primary rule was determined to not contravene the moral norms, then that primary rule guides a judges' conduct in her role as an evaluator. Once a primary rule is determined to be compatible with a person's fundamental rights, a judge is able to determine what their legal obligations are regarding applying that rule to the case at hand. Hence, the primary rule is still able to provide some guidance for the judge. It seems, however, that the same option would be open to an inclusive legal positivist, using different terminology. For inclusive legal positivism, once a norm has been determined to be a legally valid primary rule of a legal system, then the primary rule can guide a judges' conduct in her role as an evaluator. Yet, Shapiro denies this is possible for inclusive legal positivism. Furthermore, I don't believe this is an area that Shapiro is even capable of forcefully pursuing given

[81] Guidance of Conduct, 132-133

the weight he puts on deliberation interfering with the guidance function of a law. He states "Once the process of identification is contaminated by someone's deliberation,...the chain of authoritative guidance is broken."[82] A judge cannot determine their legal obligations with regard to a primary rule if they must deliberate about whether to in fact apply it to a given case.

Again, Shapiro may try to respond by saying that while occasionally a primary rule may be found to conflict with the moral norms picked out by a fundamental secondary rule, for the most part, primary rules do not and hence, overall, the law guides officials' conduct.[83] The problem with this response is

> a) Shapiro believes that a primary rule cannot be a primary rule if it is incapable of guiding conduct.
> b) For every primary rule, there is the possibility that a judge must deliberate about the rule's merits in order to determine whether to apply it to the case at hand.
> c) It is possible for a legal system to ask a judge to review a rule's merits for every case that comes before her.
> d) Therefore, for any given primary rule, in any given case, it may be possible that it requires deliberation before being applied.

These three premises together mean that an exclusive legal system could be such that *all* primary rules must be deliberated on by judges before applying them in *all* cases and hence, cannot guide judges' conduct in their role as evaluator based on Shapiro's criteria.

With regard to premise b, sometimes the deliberation may be quite quick and it may obviously be the case that the primary rule comports with the moral

[82] *Ibid*., 151
[83] Shapiro himself is probably not interested in this sort of response since he suggests that all laws must be capable of guiding conduct.

norms in question. However, just because the answer is obvious does not mean that the evaluation of the primary rule doesn't occur; simply that it occurs quickly or without conscious thought.

Also, a further word should also be said about premise c. Whether we agree or not about whether certain actual legal systems have this requirement, I see nothing conceptually incoherent in positing a possible legal system in which this is the case. There's no need to discuss about whether Canada or the United States actually require particular judges to always evaluate primary rules' compatibility with the fundamental rights of that system. Given that Shapiro must believe that it is possible for a legal system to require judges to do this sometimes, since that is what he attributes to actual legal systems, I don't think that he can reasonably draw a conceptual distinction between this happening sometimes and it happening often or all the time. To do so would seem rather question begging since the reason behind it (that laws must guide conduct) is one of the contentious issues with his argument. Furthermore, one need only think of a system similar to ours but where the only cases that are brought to the justice system are ones where the primary rule needs to be deliberated on to see that this type of system is at least possible.[84] It seems then that with an exclusive legal positivist account, primary rules cannot provide officials with the legal guidance that's required of them according to Shapiro's argument.

[84] It would simply require that a separate institution within the legal system was created to deal with cases where there was no question about the law's compatibility with the moral criteria set out in a directed power, if such cases even existed.

A further problem occurs for Shapiro's conception of guidance when we examine the types of primary rules that can be enacted. First, it will be necessary to state a hopefully uncontroversial fact about primary rules and their interactions with each other. It seems that sometimes primary rules provide legal obligations in tandem with other primary rules. For example, any details about my particular obligations regarding filing my taxes (e.g. not having to declare my scholarships as taxable income) relate to overall primary rules about filing taxes each year. In Canada, such a rule might be S.2(1) of the Income Tax Act "An income tax shall be paid, as required by this Act, on the taxable income for each taxation year of every resident in Canada at any time of the year." The content of my particular legal obligation is generated both from the particular rules that relate to my situation and the general rule about filing taxes in Canada. We can classify this obligation as coming from the particular rule about taxable incomes and the general rule to file taxes each year taken together.

Given this way of generating legal obligations, it is possible to construct a thoroughly exclusivist system where citizens must deliberate about their legal obligations with regard to every primary rule. Imagine a legal system which takes its commitment to protecting fundamental rights very seriously, so seriously in fact that the legislators enact a norm (*R1*) which states that "all citizens must bring any law which conflicts with fundamental human rights to the attention of the officials and need not comply with said law". This system is still exclusive since it acknowledges that these laws that are in conflict with human rights are still

valid laws of the system; it simply requires that citizens bring these laws to the attention of officials so that they can rectify them and tells them that these morally problematic primary rules do not generate normal legal obligations for them.[85]

We can now ask, what are a citizen's legal obligations with regard to *R1*? It seems that this primary rule can only generate legal obligations when combined with other primary rules. For any other primary rule, the citizen may have one of two legal obligations. One to obey the rule as it bears an authoritative mark and the second to bring it to the officials' attention that this primary rule conflicts with fundamental human rights. The problem for Shapiro is, in order to determine which legal obligation a citizen has, it is necessary to deliberate on the merits of the primary rule. For every primary rule, deliberation is necessary for determining one's legal obligation yet nonetheless, the overall legal system is an exclusive legal system; morality plays no role in determining a law's current legal validity. *None* of the primary rules can guide a citizen's conduct based on Shapiro's notion of guidance.

It is possible for exclusive legal positivism to limit the types of primary rules that can be enacted and hence, state thatit's conceptually impossible for a legislature to enact *R1*, that is a primary rule that governs a citizen's obligations to other primary rules. However, in this instance, I can't see a reason for doing so other than because all laws must be capable of guiding conduct and this sort of

[85] Wil Waluchow pointed out that someone might argue that these rules may not be legally valid if they don't generate legal obligations. They do generate a particular type of legal obligation though, specifically one to bring the conflicting law to the attention of the officials.

rule would prevent that and that is precisely one of the premises at issue. To insist that *R1* cannot be a valid primary rule in an exclusive legal positivist framework seems question begging and certainly should count against exclusive legal positivism if it turns out to be necessary.

Furthermore, I think one could actually argue that there are elements of this hypothetical legal system in mature legal systems such as ours. If our system is an exclusive one, then arguably a reasonable way to interpret S.52 of the Canadian Charter is as stating that primary rules which do not comport with the moral criteria in a judge's directed powers do not generate legal obligations on citizens. Similarly, the fact the officials treat incompatible laws as null and void once the incompatibility is discovered supports an understanding of our legal system where these laws do not generate legal obligations on citizens. If these laws don't generate legal obligations for citizens, then they don't guide conduct in the way that Shapiro thinks laws must. The situation is more dire however, since, in order to determine whether a norm is one of these types of laws or a legal obligation generating law, I must engage in moral deliberation. Therefore, none of the primary rules can guide my conduct if my exclusivist account of the Canadian legal system is correct. Even though this is not the only way an exclusive legal positivist can explain the constitutional workings of the Canadian system, the fact that it is a plausible way to explain an actual legal system increases the tension between Shapiro's exclusive legal positivism and his understanding of law's guidance function. He must be able to eliminate my

explanation of S.52 and official's conduct regarding primary rules which are incompatible with the moral requirements of the Canadian Charter as a possible explanation and he must be able to do so without using his understanding of law's guidance function as a premise in his argument.

Conclusion

Exclusive legal positivism faces the same hurdles as inclusive legal positivism with regard to Shapiro's formulation of the guidance function of law and hence, the solution should be the same. Specifically, we should reject Shapiro's formulation of the guidance function of law.

As we have seen, Shapiro suggests that an inclusive rule of recognition prevents primary rules from being capable of guiding conduct, of making a practical difference in a person's reasoning. This is because an inclusive rule of recognition requires that people deliberate on the merits of a rule in order to determine what their legal obligations are in regard to that rule. Since people must deliberate on the merits of the rule to determine whether it is in fact a valid rule which generates legal obligations within an inclusive legal system, the primary rule itself cannot provide epistemic guidance, *i.e.* guidance that informs a person of their obligations. Furthermore, judges are incapable of being motivationally guided by primary rules within an inclusive system since they must also deliberate on the merits of following a primary rule and hence, the rule cannot provide a peremptory reason for action.

Unfortunately, for Shapiro, exclusive legal positivism faces the same hurdles with regard to providing guidance to officials. When one examines not just the exclusive rule of recognition but also how officials' directed powers are supposed to work within a system, one finds that officials are required to deliberate on the merits of the primary rules within a case. This means that those primary rules cannot provide officials with peremptory reasons for evaluating conduct in a particular fashion.

Furthermore, it is possible to think of an exclusive legal positivist system for which this problem expands beyond the ability of primary rules to guide officials' conduct to citizens' legal obligations as well. If one posits a primary rule which affects the legal obligations of other rules and requires deliberation about the merits of all primary rules, then citizens also cannot be guided by primary rules in the way required by Shapiro. They cannot determine their legal obligations without deliberating on the merits of every primary rule. This, to me, suggests that perhaps Shapiro's guidance function is ill formed. If neither inclusive nor exclusive legal positivism can meet the demands of this constraint (nor to my knowledge can any other theory of law since they connect law and morality more heavily than legal positivism does or reject the guidance theory beyond merely being able to predict how a judge will determine a case), it seems reasonable to re-examine whether the guidance function as elucidated by Shapiro is in fact something we want to capture within our legal theories.

This chapter highlights the importance of looking beyond the rule of recognition in order to understand how arguments about necessary features of law may affect the strength of our legal theory positions. While the exclusive rule of recognition has no problems providing the guidance required by Shapiro, that unfortunately is not the end of the story. By examining what other fundamental secondary rules affect an official's obligations, we can see how problematic Shapiro's notion of guidance really is.

CHAPTER 3: Raz's Argument from Authority

Introduction

In this chapter, I will be examining Joseph Raz's argument from authority against inclusive legal positivism. This argument takes a similar form to the one used by Shapiro that we addressed in the previous chapter. Raz believes that law necessarily claims authority. Since this is a necessary feature of law, any theory of law which is incompatible with it, must be incorrect. Raz argues that both Dworkin's theory and inclusive legal positivism are incompatible with law's claim of authority. Rather than arguing that inclusive legal positivism is in fact compatible with law's claim of authority (which has already been admirably done by several inclusive legal positivists such as Kramer, and Waluchow)[86], I will be examining how Raz's understanding of authority and law's claiming of authority affect exclusive legal positivism, Raz's own preferred legal theory. Again, I will highlight how paying attention to a legal system's fundamental secondary rules above and beyond its rule of recognition illustrate issues with theorists' arguments against inclusive legal positivism. In this instance, by looking at the rules of adjudication and change as understood by exclusive legal positivists, we can see that Raz's argument from authority generates problems for an exclusive legal positivist understanding of modern mature legal systems such as ours.

[86] See Kramer's, *Where Law and Morality Meet*, Waluchow's, *Inclusive Legal Positivism* and "Authority and Practical Difference" for some of the inclusive legal positivist arguments against Raz's argument that inclusive legal positivism cannot account for law's claim to authority.

In order to undertake the above, it will be necessary to look at Raz's particular conception of authority, the service conception of authority, and what requirements it places on legal systems. Furthermore, we will examine how this argument from authority works against Dworkin's position and incorporationism in order to better understand how this argument can be reconstructed to work against the kind of inclusive legal positivism of interest in this dissertation, specifically the kind that states that a rule of recognition can contain moral criteria which a norm must be compatible with in order to be legally valid.

After examining Raz's arguments against other legal theories, we will examine his own positive theory which will require delving deeper into what exactly a directed power is and how it supposedly works in modern mature legal systems such as ours. Following this, I will begin to respond to Raz's argument against inclusive legal positivism by raising concerns with how his service conception of authority affects exclusive legal positivism, specifically by making it impossible for fundamental secondary rules to claim authority over officials. We will examine why this is problematic before moving on and reviving the hypothetical legal system from the previous chapter where a legal system enacts a primary rule which obligates citizens to bring to court any other primary rules which conflict with the moral criteria enshrined in that system's constitution while also stating that the conflicting primary rules generate no obligations. The final part of this chapter is dedicated to examining how Raz would be required to

understand such a legal system and why this suggests that we abandon his service conception of authority.

Raz's Service Conception of Authority

In order to examine Raz's argument from authority, it is necessary that we first examine what Raz's conception of authority is.[87] Raz is primarily concerned with practical authority here and while he does spend some time discussing the difference between theoretical and practical authority, he does not worry himself with whether and how a legal system's authority may be theoretical.

Raz divides authority into two broad categories, legitimate and *de facto* authority.[88] Legitimate authority can be either theoretical or practical. Directives issued by practical authorities supply reasons for actions for their subjects whereas statements issued by theoretical authorities provide reasons for beliefs for their subjects. Anyone can provide others with a reason for action or a reason for belief. What distinguishes non-authoritative assertions that still provide reasons for action from authoritative ones is that authoritative ones claim a special peremptory status.[89] A legitimate authoritative directive creates a pre-emptive

[87] Interestingly, Raz believes that the same arguments he makes against inclusive legal positivism and Dworkin's theory could be made with much weaker premises. (see Authority, Law, and Morality, 204) I won't be examining the validity to that claim and those premises in this chapter since most of the debate involving Raz has focussed on his service conception of authority and its entailments and it is the position that he himself endorses.
[88]Raz, Joseph. *Ethics in the Public Domain*. 1994. Oxford University Press Authority, Law and Morality, 195 hereinafter "ALM"
[89]*Ibid*., 196

reason for action. This pre-emptive reason reflects the reasons that someone may have had for action prior to the directive being issued and creates a new reason, the directive, based upon those pre-decision reasons. Raz highlights this feature using the example of an arbitrator making a decision. The arbitrator's decision is supposed to take into account the reasons relevant to the two disputing parties; her decision is dependent on the reasons pertaining to the disputants. Once her decision has been made, the disputants are no longer supposed to decide what to do based upon the reasons used to make the decision; rather they should take the arbitrator's decision as a reason for action. The authoritative directive pre-empts their previous reasons for action.

Raz suggests three theses based on the example of the arbitrator (which he takes to be a typical example of practical authority). They are the dependence thesis, the normal justification thesis and the pre-emption thesis.[90] The dependence thesis states that directives should be based on reasons which apply to the subjects of those directives. The normal justification thesis states that normally a person has legitimate authority over another only if a subject can better comply with their own reasons for action by following the directives of the alleged authority than by following their own reasons directly. Finally, the pre-emption thesis states that reasons for action created by an authoritative directive replace some other reasons for action for the directive's subjects.

[90] The normal justification thesis is not explicitly contained within the arbitrator example. However, Raz mentions that the disputants are not likely to accept arbitration as an authoritative process unless something like the normal justification thesis is met. (ALM, 198)

The first two of these theses create what Raz calls "the service conception of authority" and the pre-emption condition ensures that the authority carries out its appropriate mediating role. Raz believes that this particular conception of authority is the type of authority that legal systems claim to possess. These features highlight the mediating role that authorities play in the lives of their subjects. Authorities are not supposed to introduce new reasons for action that don't rely on their subjects' previous reasons for action. Legitimate authorities and their directives introduce reasons for action which help their subjects better comply with their subjects' own reasons.

Law's Claim to Authority

In order for Raz to construct his argument against natural lawyers and inclusive legal positivists, he first must prove that the law claiming legitimate authority is a necessary feature of law. The law's claim of legitimate authority is a complex one and Raz spends a large amount of time defending it and spelling out what some of the intricacies and implications are. I will make some brief remarks before examining Raz's position.

First of all, Raz is arguing that the law claims legitimate authority. The claim is of *legitimate* authority which is why the normal justification thesis stated above is part of Raz's service conception of authority. Also, it is important to note that the law is only *claiming* legitimate authority. It need not possess it. In

fact, Raz believes that often the law does not possess legitimate authority nor need it ever. The law necessarily *claims* legitimate authority but does not necessarily have it, according to Raz. The fact that the law claims legitimate authority does have implications for how a legal system must be set up but not as many as if the law in fact necessarily had legitimate authority (as spelled out by the service conception of authority).

Raz begins his argument to establish law's claim of legitimate authority as a necessary feature of law by suggesting that we try to imagine a state where political authorities do not claim that citizens have an obligation to obey them but the population does follow their directives.[91] Raz suggests that courts would be imprisoning people without finding them guilty of anything; legislatures would be saying that people will suffer if they perform certain activities without cause and damages could be found with people having to pay for them yet not being found legally responsible. Raz points out two features of this hypothetical system. First, that it probably has never existed and second, that such a society would not be viewed by us as being governed by an authority. *De facto* authorities must claim to be legitimate authorities or be recognized by others as such in order to act as authorities at all.[92]Our concept of authority includes authorities and institutions claiming the right to bind their subjects.[93]

[91]Raz. J "Authority and Justification", 6 hereinafter "A and J"
[92]*Ibid.*, 14
[93]*Ibid.*, 6

Raz goes on to enumerate what is entailed by law necessarily claiming authority. He points out that in order for law to claim legitimate authority it must be the type of thing that could possess legitimate authority. Otherwise, the law's claim would be conceptually false rather than being true or false based on empirical facts.[94] Raz thinks it cannot be the case that legal officials are so confused about the law that they utter conceptually false claims when they claim that the law is a legitimate authority. Hence, the law's claim to legitimate authority is true or false based on empirical facts about that particular legal system rather than false based on being a conceptual contradiction. Raz uses the example of trees to illustrate his distinction. Trees fail to possess legitimate authority. However, they fail to possess legitimate authority in a way that is different from how the law in a given state may fail to possess legitimate authority. Trees are not a type of thing that is capable of possessing authority. Hence, we can answer the question of whether trees possess authority without empirical facts. If we know what the concept "tree" entails, then we know that trees do not possess legitimate authority. If we look at the concept "law" and what it entails, it seems to be that we cannot determine whether the law does or does not possess legitimate authority. Raz states that while legal officials can occasionally be conceptually confused, they cannot be systematically confused. If "law" were like "tree," then legal officials and institutions would be systematically

[94] ALM, 201

confused.[95] Raz suggests that this means that it must possess certain features associated with having legitimate authority; those which allow it to be a type of thing which conceptually could possess legitimate authority.

Raz statesthat there are two different ways a claim of legitimate authority may fail. The first is by failing the normative conditions for legitimate authority. The second is by failing the non-normative requirements of legitimate authority. If the directives provided by an authority fail the normal justification thesis, then the authority fails the normative conditions for legitimate authority. In this case, the directives are such that following them does not result in subjects acting more in accordance with the demands of right reason than if those same subjects were to attempt to act directly on the reasons that apply to them. The latter requirements, Raz believes, are identical to the conditions which must be met in order to say that something has the capacity to claim legitimate authority.[96] These latter requirements are only fulfilled if the pre-emption thesis and the dependence thesis are true within a given system. Since the law claims legitimate authority, it must have the capacity to be a legitimate authority. Hence, the law must meet all the non-normative requirements for legitimate authority; legal systems must be such that the pre-emption thesis and the dependence thesis are true.

Raz highlights two features possessed by authoritative directives based on the above argument for necessary conditions of law. One, a directive can be

[95] *Ibid*.
[96] *Ibid*., 202

authoritatively binding only if it can be thought of as expressing a particular person's perspective on how people ought to behave. This first condition is due to the fact that directives must look like they are the product of weighing reasons in order to satisfy the dependence thesis. Hence, they must be presented as someone's judgement of what subjects should do. Raz is careful to note that it may not in fact be someone's view on how subjects ought to behave because deceit and pretence can run rampant in a legal system.[97] It must nevertheless be presented as someone's view on the matter. The second feature is a personmust be able to identify the directive without relying on the reasons which formed the basis of the directive.[98] If she cannot identify the directive without first needing to identify and deliberate on the reasons which formed the basis of the directive, than the pre-emption thesis does not hold in that system. Hence, the two features which Raz suggests authoritative directives must possess in order for law to claim legitimate authority dovetail nicely with the dependence thesis and the pre-emption thesis, two of the theses that Raz identifies as forming part of his service conception of authority. The third thesis, the normal justification thesis, must be true for the authority to be legitimate but not for the authority to claim legitimacy.

Raz's Argument against Dworkin's Theory

[97] *Ibid*., 203
[98] *Ibid*., 202

Raz points out that Dworkin's theory of law fails both criteria required for law to claim legitimate authority, specifically that directives can be seen as expressing a person's judgments on matters and secondly, that they can be identified without recourse to the reasons for action that they were supposed to adjudicate on.[99] Raz suggests that these failures are due to the fact that Dworkin's theory holds the thesis that "The law consists of source-based law together with the morally soundest justification of source-based law."[100]

Briefly, Dworkin's own positive theory states that judges must make decisions based on political morality. In every case, there is a correct answer to the question "What does the law require?" and judges are obligated to find that answer based on the political morality implicit in their legal system. In order to do so, they must look at both the fit and the justification of their interpretation of the law in reaching their decision for the case at hand. Their interpretation of the law must fit with the existing law up to a certain point. Past that threshold, the interpretation must extend the political morality implicit in the legal system. They must use the interpretation which paints the law in the best moral light after ruling out any interpretations which do not pass the fit threshold.[101] This best interpretation uniquely determines the correct answer to what the law requires regarding the case before the judge.

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[99] Raz, intentionally, remains mum on whether this is how judges ought to decide cases where the law is indeterminate. (ALM 209) His argument is against Dworkin's theory as a theory of law not as a theory of adjudication.
[100] ALM, 195
[101] See "Hard Cases" (88 Harvard Law Review 1057 (1975) reprinted in Ronald Dworkin, *Taking Rights Seriously*ch 4 (Harvard University Press, 1977))

Raz points out that this theory fails to meet both of the criteria required for the law to be capable of claiming legitimate authority. Dworkin admits that the law may not be able to be seen as expressing a judgment on how its subjects ought to behave. The morally best justification of the settled law may have never even been thought of let alone expressed by any of the political officials of a system. It may, in fact, be at odds to some degree with the morality expressed by some of the officials at some point in the history of that particular legal system.[102]

Secondly, Dworkin's theory cannot meet the criterion for identifying the law required for the law to be capable of claiming legitimate authority. According to Dworkin's conception, the law cannot be determined without returning to the considerations which the law was supposed to settle.[103]The court, by interpreting the pre-law statutes and precedents in their best light according to political morality, must always be asking the questions which the law was supposed to answer. In order to determine what the law is, one must always be asking what the law ought to be. For Dworkin, what the law ought to be is always part of determining what the law in fact is.

Raz's Argument Against Incorporationism

Raz also offers an argument against incorporationism along the same lines as the one offered against Dworkin above. He identifies incorporationism as

[102] ALM, 208
[103] *Ibid.*, 209

committed to the thesis that: "All law is either source-based or entailed by source-based law."[104] This version of incorporationism was elucidated as a response to Dworkin's argument against legal positivism from "The Model of Rules". Recall that Dworkin stated that legal positivism could not account for the role of moral principles as legal principles in adjudication. Raz interprets incorporationism as responding to Dworkin by suggesting that legal positivism was consistent with the idea that the moral principles used in cases such as *Riggs v Palmer* could count as legal principles since they were entailed by source-based law.[105]

Raz suggests that this understanding of incorporationism also fails to meet the criteria required by the service conception of authority. Raz points out that we cannot attribute to people that they believe everything entailed by their known beliefs.[106] We also cannot suggest that people have advised things that they themselves don't believe or at the very least, don't present themselves as believing (to cover the cases of insincere advice). Given these two premises, one can see how incorporationism fails to meet the first of Raz's two criteria. The logical consequences of source-based law cannot be presented as being the

[104] ALM, 194
[105] Neither I nor others I have discussed this with understand incorporationists as making this claim or responding to Dworkin in this way. Nevertheless, Raz does attribute this claim to incorporationists and hence, argues against this understanding in his work. I'm using his arguments against his understanding of incorporationism to support my creation of an argument against inclusive legal positivism. Hence, even if this isn't a position that can be attributed to any incoporationist, it is useful to examine Raz's argument against it in order to construct a Razian argument against the necessity version of inclusive legal positivism that I'm interested in defending.
[106] ALM, 212

legislature's perspective on how people ought to behave since the logical consequences of source-based law may be in exact opposition to what the legislature believes.[107]

I believe that Raz would suggest that incorporationism fails the second criterion also. If identifying the law requires identifying moral principles that are supposedly undergirding legal statutes, then one cannot identify the law without returning to considerations which the law was supposed to settle. Incorporationism fails the second criterion for a legal system in the same way that Dworkin's theory does.

Argument against Inclusive Legal Positivism

Based on the above arguments, we can construct a Razian argument against the view I'm interested in defending, specifically a necessity version of inclusive legal positivism which states that it is possible for the legal validity of a norm to depend on its being compatible with certain moral criteria, if this requirement is part of a set of social rules which constitute the rule of recognition of the legal system in question. I am using Raz's arguments against the two other

[107] Raz elaborates and makes the point a bit more complex by discussing the complexity of legislating and legal institutions. I've represented the argument here in a simpler sense.

legal theories above to construct an argument against inclusive legal positivism based on the service conception of authority.[108]

I think that inclusive legal positivism is consistent with the first feature of a legal system necessary for the law to claim authority. Raz's claim about the first feature is a necessity claim. He states that "a directive can be authoritatively binding *only if* it is, or is at least presented as, someone's view of how its subjects ought to behave."[109] It is necessary but not sufficient that a directive is presented as someone's view of how people should behave. Inclusive legal positivism would have trouble with this feature were it a sufficiency claim but not with the necessity version. With the necessity version of inclusive legal positivism, norms are authoritative legal directives if they meet all the same non-moral criteria as exclusive legal positivism and meet the added requirement of being consistent with certain moral criteria as well. Hence, all authoritative directives can be seen as expressing someone's view on how people should behave because the norms are created in ways sanctioned by exclusive legal positivism. What inclusive legal positivism adds, however, is that just because a properly created norm is incontrovertibly expressing an authority's view of how their subjects should behave does not mean that this norm is authoritatively binding.

The problem for the necessity version of inclusive legal positivism is with Raz's second feature of a legal system, specifically, that one must be able to

[108] I don't necessarily agree with the argument that I'm constructing but I do believe it to be the one that Raz would make if he were presented with this version of inclusive legal positivism.
[109] ALM, 202

identify the legal directive without recourse to the considerations which the directive ought to have weighed and decided on. If a norm is a law only if it comports with certain criteria of morality, then the question arises whether we can identify the law without returning to the considerations that it was supposed to settle. Raz would suggest that we cannot. If we return to his argument against Dworkin, he uses the example of a tax law. He states that, with regard to Dworkin's theory, in order to determine what tax liability is with regard to the law, one must examine what fair tax law should be.[110]This, he suggests, would violate the second criterion, fulfilment of which is required for a legal system to claim authority. Similarly, then, with inclusive legal positivism, when one is attempting to identify what the tax law is, one must determine if the duly enacted norms comport with the moral criteria in the rule of recognition. Raz would suggest that this violates the second criterion also. It is not possible, from Raz's perspective, to identify what the law is without looking at the considerations that the law is supposed to settle.[111] Intuitively, this makes some sense. It is reasonable to believe that the legislators, when creating the tax laws, took into account what sorts of laws would be fair. If fairness is a moral criterion in the rule of recognition in the inclusive legal positivist account of that legal system, one could say that in order to identify the tax law one is forced to reconsider the reasons the legislators ought to have weighed when creating the tax law in the

[110] ALM, 209
[111] I don't find this argument convincing but will not take issue with it here. One can find arguments specifically against this by other inclusive legal positivists. For example, see Waluchow's "Authority and the Practical Difference Thesis"

first place. Hence, an inclusive legal positivist system cannot claim legitimate authority based on the fact that it fails to account for one of the features a legal system must have in order to do so.

Raz's Exclusive Legal Positivism

Now that we've seen how Razian arguments against inclusive legal positivism work, we need to examine what Raz's own positive theory of law is. It's important to remain cognizant of the fact that Raz's theory is an exclusive legal positivist theory but not the only one. It differs from Shapiro's, which we looked at in the previous chapter, in some aspects and is argued for slightly differently. Hence, we need to examine exactly what Raz says about his understanding of exclusive legal positivism and his specific account of it.

Raz adheres to the sources thesis which states "All law is source-based". He points out that this can be read in either of two ways, narrowly or widely. In the narrow version "law" means only "pure legal statements."[112] The wider reading takes "law" to mean "all legal statements, including applied ones." The narrow thesis is true if it is possible to identify what the legal statutes, precedents and other legal norms are in a source based fashion. The wide thesis requires the same as the narrow thesis and also that all legal statements which describe particular actions and particular decisions in specific situations are source based in

[112] ALM, 215

order to be true. This means that when attempting to determine what I am legally required or permitted to do in a particular situation, the applied legal statement can be identified in a source based manner. Raz interprets the source based thesis in the wider manner. In order for the wide interpretation of the thesis statement to be possible, Raz suggests that the truth conditions for whether a person acted fairly in a certain situation are based on a brute fact about whether a certain action was performed and that the description of this action is value neutral. Hence, where laws call for fairness or other moral attributes, it is possible to describe the actions of people that are within the purview of that law by value neutral means and it is this latter description which makes the applied legal statement true. Raz believes that all actions which can be described morally can also be described in value neutral ways. It is in this way that all applied legal statements can be source based. If a law requires someone to act fairly, a judge deciding the case can determine that the person acted legally based on some value neutral description and it is based on this contingent fact that the judge can use the law to determine how it should be applied in this particular situation.[113]According to Raz, since applied legal statements can be determined without recourse to moral evaluation, they are capable of being source based.[114]

[113]*Ibid.*, 218

[114] Raz doesn't explain exactly how moral actions can be described in value neutral ways which he believes is necessary for the wider interpretation of the sources thesis to be true since he isn't particularly arguing for the wider interpretation. I am a bit confused as to how this double description of action would work for all moral terms and am hesitant to describe it in a way that Raz wouldn't support. Nevertheless, Raz does seem to think that this is true and, furthermore, I think there are more easily graspable reasons for why Raz needs to be committed to the wider interpretation of the sources thesis.

While Raz doesn't strongly argue for the wider interpretation of the sources thesis, I do believe that he needs to use this interpretation to explain law's mediating role in people's practical reasoning. With the narrow thesis, I can identify the content of norms without recourse to moral deliberation but may not be able to tell whether those same directives apply to the situation that I find myself in. If I don't know whether the rules are relevant to my practical deliberation about what I should do in a particular situation, they cannot serve the mediating role that Raz suggests that they do. They cannot provide me with a pre-emptive reason for action in the situation that I find myself in. For example, suppose that I'm figuring out my taxes for this past year. Certain parts of tax law are clearly not relevant to my deliberation, *e.g*. tax laws relating to upper brackets, spouses and dependents. But other sections clearly are relevant, *e.g*., those dealing with students who rely on scholarship support to get by. If I could not determine that the former parts of the tax law did not apply to my situation but the latter ones did, then the tax law could not help me determine what I ought to do in order to file my taxes properly. I must be able to determine which laws, and which parts of laws, are directly relevant to my practical reasoning about paying taxes in order for those directives to create pre-emptive reasons for action for me. With respect to the above-mentioned sections of the relevant tax laws, I do not need to deliberate morally in order to discern the reasons for action that apply to my situation. But if, on the other hand, I needed to deliberate morally in order to determine what parts of the tax law applied to the particular situation in which I

find myself, then I may find myself re-examining the reasons which were used to settle the law in the first place. Hence, in order for that law to serve its mediating role and generate pre-emptive reasons for action for me, I must be able to identify what laws apply to the particular situations which I'm practically reasoning about. The same is true of all other laws. If the law couldn't provide us with the information that we needed in order to determine how to act in particular situations which fell within law's purview, it would be difficult to argue that the law provided us with pre-emptive reasons for action. The wider interpretation of the sources thesis must be true in order for law to serve the mediating role that Raz assigns it.

Directed Powers

In order to respond to Dworkin's critique of Hart's positivism, Raz makes use of a very particular notion, specifically a "directed power". Recall that Dworkin suggested that legal positivism cannot account for the role of moral principles as legal principles in decisions made by judges. Inclusive legal positivists and incorporationists responded to this critique by suggesting that moral principles can be part of the criteria of legal validity in a legal system. Conformity with these principles is part of the rule of recognition in the same way other criteria are, specifically because officials take an internal point of view towards these criteria and there is a pattern of behaviour that can be explained by positing conforming to these principles as a criterion of legal validity. Exclusive

legal positivists, on the other hand, deny that moral principles can serve this role in a legal system and so must come up with another way to explain cases that Dworkin cites, such as *Riggs v Palmer*. To do this, Raz created the concept of a "directed power".

Raz notes that within the legal system there are things called legislative powers. The possession of legislative powers is not in and of itself a reason for exercising them, however.[115] In some cases though, the possession of a power is coupled with a duty to use it in certain circumstances (for example, one may have the power to vote coupled with the duty to do so). Raz believes that it is often the case that legislators have legal duties regarding their legislative powers. He calls one such duty, the duty to use a power to achieve certain objectives and only to achieve them, a directed power.[116]

Raz distinguishes between two types of directed powers, those where the exercise of the legislative power may require some moral deliberation and all the others. Raz uses two examples to illustrate how an agent can be trusted with a directed power which requires moral judgment. In one case, the Secretary of State may have a directed power to increase old age pensions and unemployment benefits annually by the rate of inflation.[117]Another is an agency given power to make legal norms for the protection of public safety and the freedom of the individual. In the first case, determining how to calculate the rate of inflation may

[115] Raz, J. "The Inner Logic of Law" *Ethics in the Public Domain*, 1994 pg 225 hereinafter "ILL"
[116]*Ibid*., 226
[117]*Ibid*., 227

require moral judgement. In the second case, the two goals may conflict and a solution may require moral judgement. Also, what counts as protecting public safety and individual freedom itself requires moral judgement. The above two cases are examples of directed powers which require moral judgement to exercise. In contrast, another legal institution may be directed to create legal norms which ensure that everyone with the right to vote has access to election ballots with the definition of "access" being clearly stated in non-moral terms. This directed power may not require moral deliberation since the agency isn't determining who ought to have the right to vote. Raz mentions that directed powers which do not require moral judgement are *exceedingly* rare. Much more common are administrative powers which do not require moral judgement, for example, providing license plate stickers when someone fills in the paperwork and pays the yearly fee, that do not require moral judgment. He may in fact disagree with me about my example above but he provides no other so it is my guess at an acceptable situation where a directed power does not require moral judgement. The laws which create these directed powers, Raz states, are designed to achieve a division of power and labour.[118] Courts, along with legislators, may have directed powers. They may have either of the two types mentioned above, ones which perhaps require moral deliberation and all the others.[119] It is because courts may have directed powers that Raz is able to explain what happens in cases such as *Riggs v Palmer* with regard to moral principles.

[118]*Ibid.*
[119]*Ibid*., 228

Courts' Directed Powers

Raz, briefly, points out two things. One, that a judicial decision will be based on a general proposition even though it is offering specifics about the case at hand. Two, that judicial decisions are a source of law.[120] Raz explains how a court's directed power works through examining a case involving a particular legal doctrine "a contract that tends to corruption in public life is illegal."[121] He considers a decision examining a contract where a property developer will contribute to an election campaign in return for a commitment that the candidate will propose that the construction of a particular road construction is illegal. For this decision, Raz explains that the judges will have to exercise a directed power as the only doctrine pertaining to it is "a contract that tends to corruption in public life is illegal".[122] He notes that normally decisions can change the law or they can reflect what the law already is. For this case, he believes that the decision must develop and change the law. There are no other legal rules which directly determine the outcome of the case prior to the decision. Raz suggests that someone may argue that the outcome of the case is determined by the doctrine about contracts not being legal if they lead to corruption. However, it would be legally acceptable if the decision were in fact incongruous with what the general

[120]*Ibid*., 229
[121]*Ibid*., 228 Raz uses the phrase "doctrine" as opposed to "rule". I believe he might be doing so to differentiate primary rules from secondary rules. Doctrines can provide officials with a duty to decide cases in a particular way but they are not primary rules which obligate citizens to conform to them in and of themselves. When a doctrine is used to create a precedent, the precedent can obligate citizens to conform to the doctrine.
[122]*Ibid*., 230

doctrine requires. If the decision were *contra* the doctrine about contracts, everyone would believe that the decision changes the law (albeit mistakenly). Raz's further claim is that the decision changes the law even if it accords with the doctrine about contracts.

In instances where judicial decisions change the law, they can do so in several ways. As discussed above, they can be mistaken and change the law *contra* to what the law was.[123] Also, they can settle a matter on which the law was previously indeterminate (and hence, develop the law, usually in accord with previously existing legal principles/facts but still creating a new legal rule).[124] If the doctrine about contracts is indeterminate in the case at hand, then the decision must create new law since the doctrine did not entail a decision either way. The decision, however, will be treated as a legal norm once it is delivered and will cover any similar cases in the future, hence, settling the law in a particular way. The decision is further refining a general doctrine and developing the law in the same spirit as the initial doctrine. Raz suggests that perhaps our trouble with understanding this decision as creating new law is that it doesn't defy the previous doctrine and normally we think of change as a change in direction. If the doctrine about contracts is determinate, however, judges can still change the law by deciding the case in accord with the doctrine. This is what Raz believes to be happening in the example given above. This type of law creation is the hardest to see and argue for. However, Raz believes that it is reflected in the norms and

[123] ILL, 229
[124] *Ibid*., 231

practices of mature legal systems such as ours. Prior to a court decision in examples such as the one above with no specific legal rules dictating an outcome, a lawyer will advise her client that the judge ought to decide a particular way based on the general doctrine about contracts but also warn them that this is not guaranteed. She may tell her client that the case will establish a precedent which is currently not part of the legal system.[125] Finally, a judge can invalidate a valid legal rule and replace it with another one if that is what is required by their directed power in the case.[126] I think these are the cases that we most often are talking about when we discuss what judges do in charter cases where a law is incompatible with some moral criterion contained in the charter. In these cases, the law itself requires changing a valid legal norm according to Raz.

Raz notes that there are several areas where legal statements may be true even though they don't repeat precisely the content of any statutes or precedents.[127] These types of legal statements are true because they are entailed by the content of legal statutes and precedents combined with some true factual premises. The contract example above does not belong to this category because a decision in this case is not entailed by the general doctrine combined with any factual premises. The justification of the decision requires moral reasoning. This means that attempting to call the decision "law" prior to the decision flaunts the Source Thesis to which Raz subscribes. Since there was no way to justify the

[125] *Ibid*., 232
[126] *Ibid*., 233
[127] *Ibid*., 232

decision prior to the case without resorting to moral reasoning, the judge is exercising a directed power and creating new law which is in accord with the general doctrine about contracts. The law has provided a direction for its own expansion and the judge has expanded it appropriately.

Raz counters Dworkin's critique by pointing out that judges have a directed power in the cases highlighted by Dworkin where judges use moral principles undergirding the law to decide the case. These decisions develop and change the law but the judges are nonetheless under a duty to develop the law in a particular way. Similarly, a charter or bill of rights may list (some of) the moral considerations which a judge has a directed power to weigh when examining a case that comes before them. This does not mean that the moral criteria are part of the rule of recognition. Rather they are specified in other fundamental secondary rules of the system (rules of change/adjudication), in particular in directed powers for courts of that legal system. The moral criteria can provide direction for judges to expand the law in the same way that the general doctrine about contracts does. Judges are under a duty to change the law in the case at hand if the law is incompatible with the moral criteria in the charter or bill of rights. Judges, of course, can be mistaken in their decisions regarding these moral criteria and may fail to change the law when they ought to or may change the law when they ought not to but they are nevertheless guided under a directed power to make the law of the system adhere to the moral criteria better.

This means that exclusive and inclusive legal positivism can describe the same set of legal events in different ways. For example, a case came before the Canadian Supreme Court about whether a statute in British Columbia requiring practicing lawyers to be Canadian citizens was incompatible with the equality section of the Canadian Charter of Rights and Freedoms. The Charter includes a provision which states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination". The Supreme Court decided that the statute was discriminatory and did not afford equal benefit to immigrants, a historically disadvantaged group.[128] Raz would explain this course of events as the Supreme Court having exercised a directed power to develop the law in accord with the moral criteria in the Charter. The court created new law with their decision. They created new law because even though they ought to have decided the case the way they did, the case required moral deliberation to reach a final decision. They had to investigate such questions as "what is equal protection" and "what counts as discrimination," and so, on a Razian account, the decision could not have reflected pre-existing law. Inclusive legal positivists can describe the same case by saying that the Supreme Court was confirming the invalidity of the statute requiring practicing lawyers to be citizens.[129] The statute was never valid law in

[128] *R v Andrews*, 1989

[129] I say "can describe" because an inclusive legal positivist need not describe the situation this way. It is quite possible for an inclusive legal positivist to say that the Canadian legal system is an exclusive legal system or that the equality section of the Charter is expressing a directed power. Inclusive legal positivism is about the conceptual possibility of moral criteria constraining legal

Canada since it was incompatible with the equality clause of the Canadian Charter. The court did not create new law since the statute was never valid law to begin with. For Raz, however, the judges could not reach the conclusion "the statute is incompatible with S. 15 of the Canadian Charter" without moral deliberation; therefore, that conclusion could not be identified by legal sources and factual premises alone and hence, the norm reflected in the judges' conclusion could not have been an authoritative legal directive prior to the decision.

My Response to Raz

Given the above exegesis, I can now construct my argument against Raz's Argument from Authority. Recall that, for Raz, a legal system must claim legitimate authority in order to serve a mediating role for its subjects. In order to do this intelligibly, without contradiction, authoritative directives must a) be capable of being expressed as a person's perspective on how people ought to behave and b) be identifiable without recourse to the reasons which they were supposed to weigh and resolve. Also, recall that Dworkin's theory, incorporationism and inclusive legal positivism all fail to satisfy at least one of these two criteria. We can now ask how directed powers mesh with Raz's account of authority. Particularly, will Raz's account run into similar problems as inclusive legal positivism when we examine how a legal system's secondary rules

validity; it does not adhere to the thesis that any actual legal system has moral criteria functioning in this way.

which create directed powers claim legitimate authority over the system's officials?

To begin, we must first examine if rules which create directed powers can be said to claim authority over officials. If so, how and what type of authority are they claiming? In order to examine this, it will be necessary to draw comparisons with what Raz has said about duty imposing primary rules and authority. There are important parallels between how primary rules can be authoritative for citizens and how rules creating directed powers can be authoritative for officials. Raz's claims about the service conception of authority are claims about how the duty imposing primary rules of a system are capable of being authoritative for the citizens in that system.[130] However, what he says about authority can be extrapolated for examining how rules which create directed powers of a legal system are capable of being authoritative for officials in that legal system.

The first step is establishing that directives creating directed powers can be authoritative in a similar manner to how duty imposing primary rules can be authoritative. Recall Raz's discussion of why the law must claim authority; he suggests that otherwise courts would be imprisoning people without finding them guilty of anything; legislatures would be saying that people will suffer if they perform certain activities without cause and people would be forced to pay for

[130] Again, in this chapter, I'm using primary rules to refer to rules which principally govern citizens and are the laws of the legal system. "Fundamental secondary rules" refers to the rules about the legal system (e.g. the meta-rules of that system). These rules are social rules and generally govern the behavior of the officials in that legal system.

damages that they weren't legally responsible for. Imagine if officials did not believe that rules which create directed powers had authority over them. I would posit that much of the same activity would be happening as above. We would be left with a system of "scorer's discretion" to use Hart's term.[131] Officials would decide cases and produce legislation however they desired. Fundamental secondary rules which impose duties on officials wouldn't really be secondary rules because one of the conditions for a social rule to exist is that people feel bound by it and critique others when they perceive that the rule has been broken. Raz suggests that it is evident that the law claims authority based on the language it adopts and the opinions expressed by legal officials.[132] Legal institutions are designated as authorities, officials regard themselves as having the right to impose duties on others and claim that citizens ought to obey the law. Similarly, legal officials believe that secondary rules, such as those that create directed powers, can impose duties on themselves and others and that legal officials ought to obey these duty imposing rules. Furthermore, Raz states that directed powers are a way for the law to provide guidance for its own growth.[133] If the rules which create directed powers were not authoritative for officials, Raz would not be able to claim that the law is providing for its own expansion since the officials of the system would not be taking these rules creating and regulating directed powers as

[131]*Concept of Law*, 141-143 Hart discusses how there are rules which determine how an official scorer can count the score in competitive games. While it can be true that "whatever the scorer says is the score, is the score" for a particular game, there are still scoring rules which the scorer is attempting to apply and is bound by.
[132] ALM, 199
[133] ILL, 228

giving them a power and the duty to exercise it under specified circumstances. It seems reasonable to suggest that the fundamental secondary rules of a legal system must be recognized as authoritative for officials of that legal system. With regard to primary rules, Raz points out that *de facto* authorities must claim to be legitimate authorities *or* be recognized by others as such in order to act as authorities at all.[134] This must also occur with the directives that are the fundamental secondary rules. The officials of the legal system must recognize these directives as authoritative since without that recognition, these norms could not fulfill their role as fundamental secondary rules. Rules which create directed powers must be recognized as authoritative by officials.

Rules providing for the directed powers of legal officials must be put forward and recognized by judges as being authoritative; how does this affect Raz's theory given his commitment to the service conception of authority? Recall that Raz suggests that a legal system must have certain features in order to be the type of thing that is capable of claiming legitimate authority over its citizens. Raz believes that these features are necessary features of "anything capable of being authoritatively binding."[135] Since secondary rules which create directed powers are authoritative directives for legal officials, these secondary rules must also possess these features. Such secondary rules must possess all the non-moral attributes of authority. The two features necessary with regard to primary rules are a) the directives must be capable of being presented as expressing a person's

[134] A and J, 14
[135] ALM, 202

perspective on how people ought to behave and b) the directives must be identifiable without recourse to the reasons which the directives were supposed to weigh in the first place. These features are necessary because in order for a system to claim legitimate authority it must meet the truth conditions for the pre-emption thesis and dependence thesis from Raz's service conception of authority. Raz's understanding of the law's claim to authority requires that directivesoffer a new, pre-emptive reason for action for citizens.

When we were looking at inclusive legal positivism's problems we noted that Raz could argue that some duly enacted norms were designed to force people to weigh moral considerations and come up with an optimal solution yet we couldn't determine that these norms were in fact law without returning to the moral considerations that they were designed to pre-empt.[136] Does the same problem arise with directed powers? I believe so, but we will need to delve yet further into what a directed power is to prove it.

Recall, Raz believes that (but did not argue strongly for) the wider interpretation of the sources thesis is true. He believes that applied legal statements are true in virtue of contingent non-moral facts and source based law. Also, recall that I suggested that in order for the law to serve the mediating role that Raz claims for all *de facto* authorities, the wider interpretation of the sources thesis must be true. In order for directives to generate pre-emptive reasons for

[136] While I do have doubts about the success of such an argument, I won't address such doubts here. The purpose of my argument is only to show that Raz will have to deal with the same argument against his own account.

action in a citizen's practical reasoning, the citizen must be able to determine that the directive applies to the situation she finds herself in without returning to the reasons that should have been weighed when creating the directive. Is this also true of directives about directed powers? In order for them to generate pre-emptive reasons for action, must legal officials be able to identify which situations they apply in? I believe so.

When we look at how Raz discusses how courts can create law, he mentions several possibilities; one, judges can be mistaken as to what the law requires, make a mistaken decision and that mistake can solidify through judicial custom. Two, the law can be indeterminate and judges can make a decision that becomes law since there was no law on the matter previously. This type of change can be broken down into two subsets. One, where judges change the law with no particular guidance from the law itself and two, where judges, under a directed power, extend the law in accordance with general legal doctrines. It may not be the case in any given legal system that judges are required to settle indeterminacies in a particular fashion but it is possible that the legal system has created directed powers for its own development in situations of indeterminacy. Judges may have a directed power with regard to legal indeterminacies. They may have the ability to settle indeterminacies and a duty to do so in a particular way, with particular ends and goals in mind. Also, judges may have a directed power to decide a case in accordance with a general doctrine which is determinate for the case at hand. The decision creates a new legal norm but was required by

the general doctrine specified in the rule creating the directed power. Finally, courts may have a directed power to invalidate one authoritative directive and possibly replace it with another. When we look at cases where courts in systems such as ours strike down laws when there is a conflict between a duly enacted norm and moral criteria in charters or bills of rights, courts are changing the law in this final manner (assuming they decide the case correctly and the moral criteria were in fact incompatible with the legal norm, otherwise they are mistakenly changing the law). Depending on the case, they may replace the directive which conflicts with the moral criteria with another directive which is compatible with the moral criteria or they may merely invalidate the duly enacted norm.[137]

In order for the court to correctly exercise the type of directed power that we're interested in (the type which allows them to invalidate a law based on moral criteria) and fulfill their legal duty, the law must actually be incompatible with the moral requirements and the court must recognize this. If the law isn't incompatible and the court recognizes this, the directed power isn't exercised since the law isn't even changed. Also, if the court mistakenly believes that the law is incompatible and strikes it down, the directed power related to the moral criteria isn't properly exercised, rather the court has made a mistake which may

[137] In Canada, at least, what they do depends on the details of the case at hand. Sometimes the Supreme Court has "read up" the statute to a more moral version which did comport with the Charter requirements. Other times, the court has just struck down the law without implementing any other law in its staid.

have changed the law.[138] This suggests that in order for the directed power to serve its mediating role as an authoritative directive, it is not sufficient to only identify the general content of the power but also whether it applies to the case at hand. The pre-emptive reason generated by the directed power should only enter into a judge's practical reasoning about how to decide a case when the case actually requires a law to be invalidated. This parallels the situation with my practical reasoning about paying my taxes from earlier in the chapter. An official must know whether this situation is one where their directed power should be exercised in order to determine if the pre-emptive reason for action generated by that directed power should enter into their decision making. In order for directed powers to serve their mediating role, we must be able to identify not only their content (e.g. any laws which treat citizens discriminatorily should be struck down) but also when they apply to a case (e.g. should affirmative action programs be struck down because they are discriminatory).

Additionally, I think Raz must hold that judges can identify the duty created in particular situations by directed powers in order to maintain that the law is providing for its own development through the creation of directed powers. Raz states that directed powers are a way for the law to control its own creation and development and they help explain the types of cases that Dworkin brought up in "Model of Rules I" where judges are legally bound to decide a case using

[138] I say may change the law because different systems have different secondary rules about how courts can create law. Some systems allow for courts to create binding precedent while in others, courts only create law through judicial custom. In the latter system, it may be the case that the mistaken decision never crystallizes into judicial custom. However, it is possible that it will.

legal principles. In order for directed powers to serve these functions, it seems necessary for officials to be able to determine if a particular directed power generates a duty for that official in the case at hand. It would be bizarre of Raz to state that the law is controlling its own creation and extension by stipulating that judges must invalidate discriminatory law if judges never did invalidate discriminatory laws. If we can only identify the directed power and not if/how the judge must exercise it in the case before her, this situation would be perfectly intelligible. All judges may believe that they have a directed power to invalidate discriminatory laws but always incorrectly identify the situations where this directed power should be exercised. I think Raz's understanding of the control that directed powers give the law for its own development suggests that officials *must* be able to identify both the directed power and whether it must be exercised in a particular situation in order for the directives which create those powers to serve their mediating role and their role in law's controlling its own development.

Returning to the two criteria that a system must possess in order for it to claim authority, directed powers fail the second. The first criterion, that the directive can be presented as someone's opinion on what her subjects should do, is met by directed powers of the type we're interested in. These directed powers, the ones that require judges to invalidate laws based on certain moral requirements, are presenting an opinion on what judges should do: specifically, they should strike down laws which are incompatible with certain moral requirements.

When we examine the second criterion, however, the situation is less clear. While I can identify the content of the directed power without recourse to the reasons which it was supposed to weigh on, I cannot identify whether it applies in a particular case without engaging in moral deliberation. Based on a thin reading of this criterion, then, it seems that Raz's theory of directed powers can meet his requirements for claiming authority. However, I think that this second criterion needs to be read more robustly. In order for the directive which creates the directed power to actually serve its mediating role in the judges' practical reasoning and its role in shaping the law's development, we must be able to identify more than just the content of the directed power. I must be able to determine not only that I have a duty but also when that duty occursif the directive creating that duty is to serve its special mediating role in my practical reasoning. A judge must be able to determine whether she must strike down the law in the case at hand by exercising a directed power in order for the directive creating the directed power to be authoritative. This also follows from the strong interpretation of the sources thesis which Raz endorses and I argued he must adhere to. So, similar to how duties in particular cases must be identifiable without moral deliberation for citizens, I believe we must be able to identify how to apply the directed power without moral deliberation, particularly deliberation on the moral reasons which were (or should have been) weighed in the creation of the directive in the first place. However, this is not possible. For example, suppose that a judge knows that she must strike down all laws which are

discriminatory and is trying to determine whether she must exercise that power in the case at hand. Presumably, the creation of the directed power was the result of weighingthe very moral reasons that she must now consider to determine if the directed power is relevant to the case she must decide. At the very least, the creation of the directive ought to have been the product of weighing up those reasons.[139] The directed power cannot serve its mediating role as envisioned by Raz because the judge cannot determine if the pre-emptive reason for action that it generates should figure into her practical deliberation without returning to the reasons for its creation in the first place. Hence, the directed power conflicts with the pre-emption thesis which serves as part of Raz's service conception of authority. But the directed power must be is authoritative for Raz's response to Dworkin to be reasonable.

There is a further issue with Raz's conception of authority. Recall the hypothetical legal system from the previous chapter, where there is a law (*R1*) which requires citizens to bring forward any laws which conflict with the morality contained within the charter and declares conflicting laws to impose no normal obligations on citizens. The legal officials created this directive because they really wanted the law to be morally correct. While the officials do attempt to

[139] I don't believe it's necessary to prove that all directed powers in fact do arise from the weighing of the same reasons which the judge must weigh again. As long as it's conceivable, Raz's account has a problem in explaining how the directed power can fulfill its mediating role in the judge's deliberation. It seems to me that it is certainly conceivable, especially when looking at directed powers relating to morality that some of the moral reasons that the directed power highlights as being relevant to deciding a case were also reasons for creating the directed power in the first place.

weigh the moral constraints in the charter every time they enact a new statute, they also want the citizens to be able to call their attention to cases where they have failed to do so successfully. The officials also want citizens to have no legal obligations to follow the directives which conflict with the moral criteria, so they explicitly state that there are no legal obligations to follow these directives since the system is an exclusive legal system and these directives would generate legal obligations otherwise. One could say, using Razian terminology, that the officials do not want directives that conflict with certain moral criteria to generate their normal pre-emptive reason for action in situations where these directives would normally apply to their subjects. Rather, when taken in tandem with the *R1*which states that laws which conflict with the moral criteria of the charter should be brought to the attention of the officials, these conflicting laws generate a pre-emptive reason for a citizen to alert the officials that the rule conflicts with the Charter requirement. These conflicting directives cannot be authoritative in the normal manner that primary rules can be authoritative. Although they could arguably be authoritative insofar as taken in tandem with the primary rule about what to do with conflicting laws they do generate a pre-emptive reason; a reason to alert officials of the conflict. The problem for Raz's exclusive legal positivism is how citizens identify these conflicting rules and hence, what their obligation is. When a citizen is attempting to determine what directives are authoritative and what her pre-emptive reasons for action are in this particular legal system, she must examine the moral criteria listed in the charter. These are the same moral

criteria that the legal officials are deliberating on when creating laws. The addition of the *R1* causes all directives in this legal system to be incapable of being the kind of thing that could be legitimately authoritative.

The above legal system fails to meet Raz's two criteria for being capable of possessing legitimate authority. In order to determine whether any applied legal statement is true, a citizen must deliberate morally; she cannot determine what the law requires of her without deliberating on the reasons which the officials creating the law were initially supposed to weigh. The law cannot serve as a pre-emptive reason for action in the way that is required by the service conception of authority. Raz must state that the above hypothetical legal system isn't a possible legal system but I cannot see a way to do so without presuming the truth of the service conception ofauthority whose truth value is at stake in this argument.

A final issue with the combination of Raz's directed powers and the sources thesis involves how practical an authority the law actually is in mature legal systems such as ours.[140] Let's say that I am trying to figure out what my legal obligations are regarding a contract that I signed. I identify the directives and the applied legal statements stemming from them as they pertain to my situation and follow the pre-emptive reasons for action that are generated. However, the directives that I identified and followed in fact conflict with charter morality which informs a directed power which officials in my system possess to

[140] I am indebted to Wil Waluchow for his help in visualising and expressing this problem.

declare such laws null and void. Let's assume that the directives also obviously and unarguably conflict, that is, no reasonable person would suggest that the laws did in fact comply with charter morality. Let's also assume that I am better off getting the contract declared null and void than fulfilling it. It seems then that the law does not really provide me with a pre-emptive reason for action. I am much better off attempting to determine what the officials of the system would decide if they heard this case and acting in accord with the reasons that would be generated by the outcome. The law, in this case, does not provide the mediating role that Raz suggests that it does. This can extend beyond this case to all directives which apply to me. A rational person would realize that it can sometimes be more reasonable to act in accord with how one thinks officials are obligated to change the law than with the law itself and in order to determine this, one may often end up deliberating morally in the process. This issue with acting in accord with practical reason is further complicated by Raz's suggestion that citizens have rights and duties which stem from directed powers. It makes even more sense for me to engage in moral deliberation to determine if the duty imposing primary rules conflict with legal rights which I possess prior to following the primary rules. These directives then cannot serve the role that Raz envisions for them.

Conclusion

It seems then, that Raz is in no stronger position than Shapiro or the inclusive legal positivist. The argument from authority generates similar issues

for Raz's account of legal systems as it does for inclusive legal positivist accounts. This is because of the similarities between the content of an inclusive rule of recognition and exclusive directed powers. It seems that whatever tension is generated between inclusive legal positivism and a supposedly necessary feature of law, the same tension can be generated between exclusive legal positivism and the same feature by examining the role of judges. Furthermore, it can be tested by positing a primary rule which contains moral criteria which other primary rules must comport with in order to generate legal obligations. The arguments in this chapter and the previous one call into question one of the features which exclusive legal positivism is often thought to explain better; the ability to guide citizens. If laws must provide guidance or pre-emptive reasons for action if they are to serve as practical authorities, then it seems necessary that citizens be able to act on the basis of these laws without having to worry that a judge would in fact be mistaken to not change the law and declare it null and void at a later time. As long as exclusive legal positivism uses directed powers to explain how moral constraints can affect legal validity (by generating duties to change the law), the system cannot generate reasons for action in the manner suggested by Raz and Shapiro.

Conceptually, neither positivist side seems to be stronger. However, that's not all to the inclusive-exclusive debate. In the next chapter, we will be examining a non-conceptual argument. We will be looking at Himma's argument which suggests that while inclusive legal positivism is conceptually possible, it is

not in fact possible in legal systems such as ours and given basic facts about humans.

CHAPTER 4: Practical Inclusive Legal Positivism and Himma's Final Authority Argument

Introduction

If inclusive legal positivism is conceptually possible, another interesting question arises. Are any current legal systems inclusive legal systems? Obviously, to engage with this question, one grants (perhaps just for the sake of argument) that inclusive legal systems are conceptually possible.[141] If one believes that inclusive legal positivism is conceptually incoherent then trivially no actual systems can be inclusive.

Nevertheless, there has been debate about whether there are current inclusive legal systems or whether, given certain institutional facts about how mature legal systems operate, inclusive legal systems could even occur in our world. Wil Waluchow argues that inclusive legal positivism is actually the best descriptive theory of Canada's legal system.[142] Michael Giudice argues otherwise.[143] Kenneth Himma, making a broader argument, argues that no contemporary legal systems are likely to be inclusive.[144]How an inclusive legal positivist can respond to arguments such as Himma's differs slightly from how one can respond to Shapiro or Raz's argument. Against arguments such as

[141] Michael Giudice is an example of someone who simply granted that premise in order to make arguments against Wil Waluchow's claim that inclusive legal positivism better describes Canada's legal system. Nevertheless, the question about conceptual possibility is logically prior to questions about whether there are any inclusive legal systems in the world.
[142] See, Waluchow's *Inclusive Legal Positivism*
[143]See Giudice's "Unconstitutionality, Invalidity, and Charter Challenges"
[144] Himma specifically states "genuine inclusive legal systems are very unlikely in worlds that resemble ours in salient respects." Himma, K. "Final Authority to Bind with Moral Mistakes: on the Explanatory Potential of Inclusive Legal Positivism" 24 Law and Philosophy (2005) 2 hereinafter "Final Authority"

Shapiro's or Raz's an inclusive legal positivist just has to prove that there is one possible legal system where moral criteria are found within the rule of recognition. Against arguments such as Himma's, it's necessary to show that legal systems that bear a substantial resemblance to systems such as ours, could be inclusive.[145] Given this, it seems beneficial to acknowledge a distinction between arguments against conceptual inclusive legal positivism and practical inclusive legal positivism. Raz and Shapiro's arguments from the previous chapters are examples of the former, whereas Himma's argument (the focus of this chapter) is an example of the latter.

The central argument Himma uses occurs in "Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism". Himma argues that inclusive legal positivism is not compatible with a particular legal institution (e.g. a Supreme Court) having final authority to decide whether a legal norm is compatible with moral norms elucidated in a constitution. I argue, to the contrary, that by examining all fundamental secondary rules within a legal system, not just the rule of recognition, it is possible to describe the same legal systems Himma describes using inclusive legal positivism.

While the arguments made by Himma and myself focus on practical arguments about inclusive legal positivism, they need not focus on actual legal systems obtaining in this world. Since the arguments are about whether an

[145] An inclusive legal positivist need not argue that any actual system is inclusive. She can believe that all current legal systems are exclusive in nature. She only must argue that a similar legal system (e.g. similar institutions, functions, roles for officials) could be inclusive.

inclusive legal system can occur within certain parameters and with certain restrictions, we can construct possible legal systems that meet those parameters and restrictions but they need not be identical to any actual legal system. The parameters and restrictions for the arguments in this chapter are set out by Himma and myself below.

The Concept of Final Authority

Himma's argument rests heavily on the notion, "final authority". Hence, we will devote a section of this chapter to illuminating what Himma means when he says that a court has final authority in a legal system. After this, I will go over Himma's practical argument against inclusive legal positivism from final authority. Also, I will briefly examine Matthew Kramer's inclusive legal positivist response to Himma, and finally, I will suggest a different inclusive legal positivist response. This final suggestion is not designed to conclusively prove that legal systems such as Canada's, the United States' or the United Kingdom's are inclusive systems. Rather, it is intended to demonstrate that it is equally plausible that systems such as these (that is, those where a court has final authority) are inclusive or exclusive systems. Hence, Himma's argument is not a definitive blow to the practical inclusive legal positivist position.

To start the examination of final authority, Himma explains what it is to have authority. He states "a court has *authority* to decide a substantive legal issue

only insofar as its decision creates, at the very least, presumptive *obligations* on the part of other officials to apply and enforce its decision in relevant cases."[146] To have authority, it is not necessary that it is final authority. A court can have authority even if its decisionsare subject to appeal. This is why Himma says the obligations are presumptive. Nevertheless a court has authority if and only if its decision binds some class of people barring appeal. Having authority, according to Himma, is having the capacity to bind others regardless of whether it's exercised.[147]

A court has *final* authority if there is no official institution to which a further appeal can be made.[148] A court with final authority cannot have their decisions reviewed or repealed by any other institution. These obligations are final since there is no possibility of reversal. Hence, a court with final authority creates final obligations over other officials and citizens (all things considered).[149] These obligations are legal in nature. The court has final authority as a matter of law and hence creates *legal* obligations with their decisions.[150]

Himma suggests that just because the findings of a court are legal in nature does not mean that they determine the content of law. According to Himma, when courts determine disputes that involve laws of other jurisdictions, their

[146]*Italics in original* Final Authority, 4
[147]*Ibid*.
[148]*Ibid*.
[149] Himma often uses the phrases "all things considered" and "other things being equal" when discussing the obligations that courts with final authority create. These qualifiers will be important later in the chapter.
[150]Final Authority, 5

decisions do not determine the content of law within their system.[151] However, in mature legal systems, Himma believes that the holdings of a court with final authority are not understood this way. Officials treat those holdings as law even if they disagree with them.[152] For example, some officials believe that the *Roe v. Wade* decision is *contra* the constitutional protection of personsyet still enforce the decision as law. Hence, Himma suggests that the holding of a court with final authority on constitutional matters does determine the content of law on that matter in legal systems such as the United States.

The fact that courts determine the content of law does not mean that courts with final authority are entirely unconstrained when making their decisions. Himma discusses the relationship between final authority and constrained authority to elucidate how he believes most mature legal systems function. Himma believes that courts with final authority can still be constrained. These constraints come from certain conventional practices which are viewed as creating second-order legal norms (fundamental secondary rules).[153] Officials of any given legal system may converge on treating certain practices as being norms which are obligatory. These norms constrain what counts as correct judicial decision making within that system. To use Hartian terminology, if officials take an internal point of view towards certain norms, these norms are considered to be the fundamental secondary rules of a legal system (e.g. rules of adjudication,

[151]*Ibid*. 8-9
[152]*Ibid*., 9
[153]*Ibid*., 12

recognition, change and interpretation). These secondary rules are viewed as creating powers and duties for officials within that legal system. Of course, these rules need not be causally efficacious in all instances in the same manner that primary rules aren't causally efficacious in all instances (people do still manage to murder each other despite a law saying otherwise). Nevertheless, Himma suggests that since fundamental secondary rules are based on official acceptance, these rules should be at least minimally efficacious insofar as officials typically *attempt* to conform their decisions to these standards.[154]

Himma's Final Authority Argument

Having given the background theory and definitions, it is now possible to see how Himma's argument comes together. Himma suggests that, given that officials treat the decisions of courts with final authorityas law, officials in that system use a rule of recognition which includes the holdings of a court with final authority as a source of law. Furthermore, given that these decisions must be decided by trying to conform to the morality requirements within a constitution, and officials are criticized on the basis of whether decisions do conform to these requirements, it seems that there is a rule of adjudication (a second-order norm) which says courts with final authority must decide cases based on the

[154]*Ibid.*, 8

requirements in the constitution.[155] Hence, in legal systems such as the United States, courts with final authority are still legally constrained.[156] However, even with this constraint, Himma points out that a court with final authority can bind other officials by deciding a particular case in more than one way.

Himma uses an example to elucidate the above claim. Imagine a legal system where there is a court (HC) granted with final authority to decide substantive issues of law. Also, imagine that there is a moral norm *p* which purports to be a necessary condition of law.[157] A case comes before the court where the issue is whether a particular legal norm does conform with*p*. Since the court has final authority, it can bind other officials (other things being equal) either way with its decision.[158] Hence, it is not *p* that is establishing the content of law but HC's decision which does, since HC can decide this case either way. HC could be mistaken about whether a given norm does, in fact, conform with *p*, but that mistaken decision will still be treated as law, other things being equal. Since satisfying *p* is neither sufficient nor necessary for determining the content of law, *p* cannot be part of the rule of recognition.

[155] Himma often uses the phrase "standard of legal correctness" to refer to these second order norms.
[156] Officials are of course further constrained by other secondary rules but the rule about conformity to constitutional requirements is the most important for Himma's argument.
[157] Himma says necessary or sufficient but since I'm not arguing for incorporationism in this dissertation, I am focussing solely on the necessity of conformity with *p*.
[158] The phrase "Other things being equal" is supposed to ensure that there is a certain amount of conformity with other fundamental secondary rules in the legal system. Himma suggests, for example, that HC deciding based on a coin flip would not create a legal obligation for other officials.

Himma suggests that the other secondary rules can be seen as standards of legal correctness that HC is legally obligated to meet when deciding issues of law.[159] Deviations from these standards are justifiably criticized by other officials. However, this does not mean these standards are criteria of legality. As long as officials are willing to treat HC's mistaken decisions as law, the standards are neither sufficient nor necessary for determining the content of law.[160]These standards constrain what the HC ought to do when deciding a case. However, since they do not determine the content of law, something else must explain the deference to the highest court when the court makes decisions. Therefore, one of the validity criteria within a rule of recognition may look something like:[161]

> "A proposition is a law if the court with final authority holds that it represents the best interpretation of the relevant legal materials that comports with the existing institutional history"[162]

where 'relevant legal materials' includes morality criteria within a constitution.[163] Also, there is a rule of interpretation that says

[159]Final Authority, 25

[160] Himma points out that this can be understood as a counterfactual. HC need never actually be mistaken in order to determine whether officials would be willing to treat HC's mistaken decisions as establishing the content of law.

[161] For Himma, criteria of validity are expressed in non-normative language and the set of the validity criteria together are necessary and sufficient for a norm to be law. The particular criterion above is only a sufficient condition since many norms are law without ever coming before the court. The rule of recognition is normative and expresses a duty for Himma but the criteria of validity within that rule of recognition are not. See "The U.S. Constitution and the Conventional Rule of Recognition" 98-99

[162] Final Authority, 13

[163] I believe Himma is attempting to express that it's the highest court's idea of the best interpretation and not necessarily the objectively best interpretation but this criterion doesn't make that obviously clear.

> "Courts have a duty to decide whether a duly-enacted norm is law according to whether that norm satisfies the best interpretation of the substantive norms of the Constitution."[164]

While Himma is not wedded to the exact content in the above statements, he does suggest that any formulation of the rule(s) of recognition of legal systems such as ours must reflect the following facts about our legal systems: a) there is a duty to decide cases based on the best interpretation of the constitution consistent with previous precedent, b) officials are bound to treat even mistaken decisions as establishing law and c) the Supreme Court has final authority to decide whether a duly enacted norm is law. He suggests that it is not possible for an inclusive formulation to account for these facts.

Kramer's Response

Matthew Kramer does attempt to account for those facts while maintaining that an inclusive rule of recognition figures in a credible explanation of legal systems such as the United States' and Canada's. We'll now examine what his response to Himma's argument is, and briefly, why it is an unsatisfactory response to a pragmatic argument like Himma's.

Kramer's argument focuses heavily on Himma's ignoring certain properties of the rule of recognition. Kramer believes that rules of recognition are both duty imposing and power conferring. Without having these properties, he

[164] Final Authority, 23

thinks officials would be free to identify whatever they wanted as law and be unable to identify anything as law.[165] Also, Kramer believes that officials can disagree about certain criteria within the overarching rule of recognition while still maintaining an efficacious legal system. The important point is that the disagreement occurs over lesser criteria. This means two things: one, the rule of recognition can contain multiple criteria which are ordered in some way; and two, "there need not and typically will not be a wholly uniform rule of recognition in this or that particular regime of law."[166] The first of these two properties is the one which Himma most egregiously ignores, according to Kramer. Furthermore, Kramer states that some criteria in the rule of recognition manifest acceptance behaviour in officials differently. For example, deference-requiring criteria (e.g. deference to precedent) affects lower officials' behaviour differently (they adhere to higher courts' decisions) than to the highest officials (they criticize other officials for not adhering to their decisions).[167] Hence, one cannot determinewhat the rule of recognition is by looking for convergent behaviour, since behaviour differs depending on what tier an official finds herselfin (e.g.in a higher or lower court) and on what type of official (e.g. legislator or judge) the relevant official happens to be.

[165]Kramer, M. *Where Law and Morality Meet*. (Oxford: Oxford University Press, 2004), 105 hereinafter "Where Law and Morality Meet"
[166]*Ibid*.
[167]*Ibid.*

Given a rule of recognition with these properties, Kramer is able to generate a response to Himma's Final Authority argument.[168] Kramer begins by agreeing with Himma that Supreme Court decisions establish the content of law even when mistaken, by stating,

> "Whenever the Court pronounces on the validity or invalidity of some norm as law, its ruling settles the status of that norm and also settles the status of any other norm which is relevantly similar and which is thus within the precedential ambit of the ruling"[169]

However, Kramer believes this does not rule out morality criteria being part of the rule of recognition since the rule of recognition can have many criteria that are ranked. Hence, Supreme Court decisions may supersede morality criteria when determining the law but these decisions are limited in their scope. Mistaken decisions only determine what the law is for the norm at hand and other relevantly similar norms. The morality criteria continue to determine the law for all other cases.

The empirical basis for suggesting that there is, in fact, an inclusivist criterion within the rule of recognition stems from the justificatory orientation of officials, according to Kramer.[170] Since officials attempt to justify their decisions

[168] Kramer illustrates multiple points of tension within Himma's own argument which I will not delve into in this paper. Rather, I will focus on how Kramer's own positive understanding of how legal systems such as Canada's work responds to Himma's worries. Also, the section I'm using from Kramer (*Where Law and Morality Meet*, 134-140) focuses on defending modest incorporationism. Following Kramer's suggestion (134), I am adapting these to defend the necessity version of inclusive legal positivism.
[169] Where Law and Morality Meet, 134
[170] *Ibid*., 129

or disagreement with other decisions on the basis of the morality criteria in the constitution, it is reasonable to believe that those criteria have some function in law ascertainment. When the justification is incorrect (i.e. the decision is mistaken), the decision determines the content of law displacing the content that the morality criteria required in that area of law. Since there is multiplicity and ranking within the rule of recognition, Kramer believes, *pace*Himma, that an official can adopt an internal point of view both towards mistaken decisions determining the content of law and an inclusivist rule of recognition criterion as determining the law.[171] They won't both determine the content of law in a particular case because the former supersedes the latter, but both do determine the content of law in different cases.

Hence, it seems that Kramer has been able to capture the three facts about mature legal systems that Himma claims an inclusive legal positivist cannot (there is a duty to use the best interpretation of the constitution that comports with precedent, there is a duty to apply mistaken Supreme Court decisions, and the Supreme Court has final authority) while maintaining a role for inclusivist criteria within the rule of recognition. He does this by explaining that the inclusivist criteria are lower ranked than Supreme Court decisionswhen determining the content of law. When there is no Supreme Court decision on a particular topic (or a relevantly similar topic), the inclusivist criteria determine what the law is. When there is a Supreme Court decision on the issue, that decision determines

[171]*Ibid*., 137

what the law is. This means that officials accept both criteria as being part of the rule of recognition, and hence, the system is inclusivist.

Issues with Kramer's Response

Unfortunately, Kramer's response may not be satisfying for all inclusive legal positivists, for reasons that will be elucidated below. By examining why this response seems unsatisfying, I will concurrently be setting up some conditions which my response to Himma aims to meet. By meeting these conditions, I hope to create an argument for the most robust inclusive legal positivist position that could reasonably obtain in this world.

First, one of the benefits of understanding particular legal systems as being inclusive is that this theory describes certain practices better and takes certain legal norms at face value. As Wil Waluchow points out,[172] S. 52 of the Constitution of Canada states that

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

This suggests that the morality criteria within the Constitution are not superseded by any other criteria within the rule of recognition. Rather, they are individually necessary and when taken in tandem with the other constitutional criteria, are

[172] A fair portion of *Inclusive Legal Positivism* is devoted to demonstrating that inclusive legal positivism is a viable way to understand actual legal systems, such as Canada's and the United States'.

usually jointly sufficient for ascertaining a norm's status as law. Furthermore, given that officials treat norms which they believe to conflict with these morality criteria as null and void (rather than as being invalidated by the court decision), we have a reason to think that constitutional morality criteria *may* be a part of the highest criterion of the rule of recognition within these types of legal systems.[173] This is in direct contrast to how Kramer treats morality criteria in his response to Himma. If possible, it would be beneficial to maintain this descriptive accuracy within an inclusive framework and I believe my account manages to do so.

There are further problems with Kramer's understanding of the rule of recognition. As stated above, morality criteria are subordinate to judicial decisions when determining the content of law. Himma points out that there are often norms that are never subjected to a constitutional challenge, or are not subjected to one for a very long period of time. These duly enacted norms are treated as valid law until a court decides otherwise, even if they conflict with the morality requirements. This means, for Himma, that these norms are law; there is a convergent pattern of behaviour among officials of treating the duly enacted norms as law. Kramer disagrees with Himma's conclusion and believes that these norms are, in fact, not law and will only become law if a HC reaches a mistaken

[173]Of course, it could be that how officials act in this regard is mistaken or misleading but the onus is on someone claiming that to prove why in this one phenomenon we treat officials' conduct differently from other phenomenon in the legal system. Some have taken on this explanatory burden and attempted to show that parallels between courts and legislatures, and more generally a conception of how the law changes, demonstrate that we cannot take at face value officials' self-understanding of what they do when they strike laws down which they find inconsistent with moral provisions in constitutions. See Giudice, 2002, 2003, and 2008, eg.

decision about their validity.[174] Allowing court decisions to supersede morality criteria but not allowing legislative interpretations to do the same, seems too*ad hoc* to me.[175]If one is going to allow for other criteria to be higher ranked in the rule of recognition, I see no reason based on legal practices to only allow court decisions to be so and it would be exceedingly odd for a democracy to privilege judicial decisions over the decisions of elected legislatures in this regard.

Kramer's interpretation means that a duly enacted morally incompatible norm can be treated as law by the legal system and yet be not law for years and years. However, once the court mistakenly rules that it is law, the norm becomes law. This seems bizarrebecause how the norm is enforced, viewed, and treated within the legal system doesn't change pre- and post-decision yet the norm's status as law does in fact change. If one wants to grant that the highest court's decisions can supersede morality criteria because of the insights provided by Himma, particularly that the decision will be enforced regardless of whether other officials believe it is counter to moral criteria in the constitution, it is hard to suggest that legislative enactments can't supersede morality criteria since those enactments are enforced regardless of whether people believe them to be incompatible with moral criteria in the constitution. While it may be possible to

[174] Waluchow reads Kramer otherwise regarding these norms. (see "Four Concepts of Validity: Reflections on Inclusive and Exclusive Legal Positivism"). However, having talked with Kramer about his response to Himma in *Where Law and Morality Meet*, I have been assured that my understanding of Kramer is the one he wishes attributed to him.

[175] I'm using the phrase "legislative interpretations" to refer to instances where the legislature is making a good faith attempt to adhere to the moral criteria in the rule of recognition but may interpret said criteria differently from the courts or may be incorrect but not grossly so.

justify a distinction between pre-court enforcement and post-court enforcement, I think there needs to be further motivation for believing that mistaken decisions trump morality criteria but not legislative enactments and Kramer gives us none. I believe a strongerinclusive legal positivist response will be able to explain both pre and post court enforcement of morally invalid norms without creating a distinction between them.[176]

Introduction to Robust Inclusive Response

I aim to suggest an understanding of mature legal systems which places the morality criteria enshrined in a constitution as part of the supreme criterion in a rule of recognition (along with the other procedural constraints of a constitution). *Pace* Kramer, this would mean that no other criteria, such as the decisions of a court with final authority, could rank higher and supersede the morality criteria in specific cases. The satisfaction of the morality requirements of a constitution is *always* necessary for a norm to be law.[177] At the same time, I want to ensure that my analysis is able to interpret the facts that Himma states occur in these mature legal system (with a few caveats), such as the Supreme Court having final authority in Canada and the U.S. In order to do this, it will be

[176] The ability to explain more things using the same theory is considered to make that theory more likely to be true and hence, a stronger theory.
[177] Satisfaction of morality requirements also includes any constitutional exceptions to the morality requirements. Examples of such exceptions include S.1 and S. 33 of the Canadian Charter. Since these exceptions are stated within the Charter, it makes sense to think of them as part of the constitutional morality requirements.

necessary to examine what the content of the fundamental secondary rules other than the rule of recognition may be in these types of legal systems.

Also, it is worth noting briefly what I am not aiming to do with my proposed response to Himma's final authority argument. I am not aiming to defend incorporationism of any type. Hence, I am focussing solely on morality requirements as individually necessary (but not sufficient) for a norm to be valid law. Furthermore, I am not attempting to prove that my proposal is better than a less robust inclusive legal positivist understanding of the same legal systems nor an exclusive legal positivist one. Relatedly, I am not aiming to show that any actual legal system is in fact robustly inclusive. Himma's point is that given certain facts about mature legal systems, inclusive legal systems are highly unlikely.[178] I am just aiming to show that a robust inclusive legal system is practically possible given the facts that Himma elucidates. It is possible to concurrently maintain that no current legal system is robustly inclusive and that they are practically possible. Also, it is possible for an inclusive legal positivist to believe that Canada has an inclusive legal system while believing that the United States does not or vice versa.[179]

To begin my response, I will go over some facts about the mature legal systems Himma is arguing about, such as the United States' and Canada's. Some

[178]Final Authority, 2

[179] In fact, a practical inclusive legal positivist need not be a robust inclusive legal positivist at all. It is not necessary to think that my account of an inclusive legal positivist system is correct to be an inclusive legal positivist. Finally, it is also possible to be a practical inclusive legal positivist and believe that no current system is an inclusive one.

of these facts Himma also explicitly states and the others, I believe, Himma must acknowledge as true given what else he says. First of all, I agree that in these types of mature legal systems there is an institution (normally a court) granted with final *legal* authority to decide whether a particular norm is constitutional or not. Secondly, I agree that these court decisions are legally binding on other officials and make law (although *how often* they make law is a point of difference between Himma and me). Also, I believe that courts have a duty to rationalize their decisions based on their best interpretation of the moral provisions laid out in a charter or bill of rights in these types of legal systems. Finally, I believe, along with Himma, that there can be instances where 'other things are not equal' and hence, the highest court may fail to create a duty for other officials. An example of such an instance might be deciding a constitutional case on the basis of a coin flip. All of these beliefs Himma and I hold in common, for the reasons outlined in the section on Himma's position.

There are further facts about these systems that I would like to make explicit. All of these facts involve what happens in cases where judges may bind other officials with a decision either way. First of all, in these cases, the deciding judges must rationalize their decision based on a reasonable interpretation of the morality requirements of the constitution.[180] It is not sufficient for them to simply

[180] This isn't to say that it must be the best interpretation of the constitution, particularly since there is a good deal of controversy about what the best interpretation is within constitutional theory. What I mean by 'reasonable interpretation' is that it is an interpretation which a reasonable person could make. Furthermore, reasonable interpretations may change over time so

cite sections from the constitution in order to create a binding decision. They must be interpreting them reasonably as well. Most of the time, it is reasonable to think that judges are making a good faith attempt to determine what the constitution requires based on what they believe to be the best interpretation. Himma supports this fact since he states "judges are probably required to decide substantive issues of law by determining whether they satisfy certain interpretations of some canonical formulations of *p*."[181] Since this is a stronger claim than I'm making, I believe Himma must assent to my claim of judges being bound to use reasonable interpretations. Furthermore, Himma also suggests that judges are, for the most part, making a good faith attempt at determining what the constitution requires when he states that

> "most judges...are committed in virtue of their own motivations and convictions to satisfying the legal standards governing judicial decision making" where 'legal standards' means secondary rules which determine legal correctness.[182]

Secondly, in these controversial cases where judges can bind others with either of two decisions, the disagreement about how to decide the case is also reasonable. This means that reasonable people can and do disagree about whether the duly enacted norm does, in fact, comport with constitutional morality. Himma's support of this fact can be seen in his constant inclusion of the "other things being equal" clause in his formulation of recognition norms. If both sides

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an interpretation of S. 15 (the equality clause) of the Canadian Charter that was reasonable in 1986 may not be reasonable now.

[181] Final Authority, 16

[182] *Ibid*., 8

of a case before the highest court did not have a reasonable argument supporting the validity/invalidity of the statute, and the court sided in favour of the unreasonable side, this would seem to count as "other things not being equal". Of course, for the most part, cases reach the highest court because both sides have a strong case and hence, for the most part, the disagreement is reasonable. The reason this disagreement is reasonable is because we have no litmus test for constitutional validity in these instances. It is not definitively clear to humans what the morality provisions require.[183] Since it's unclear what is required, it is possible for rational, reasonable people to believe opposing decisions are correct.[184]

Finally, judges, being human, do make mistakes about what constitutional morality requires. This means that, at least occasionally, judges have created legal obligations for other officials*contra* what the constitution requires. Himma mentions that the Due Process Clause must have been improperly interpreted in either *Plessy v Ferguson* or *Brown v the Board of Education*.[185][186] However,

[183] Whether it is unclear because of a metaphysical constraint or epistemological constraint is irrelevant to my position. All that is necessary is that it is unclear.
[184] Interestingly, Himma believes that the law may fail to dictate a unique outcome in these cases. (see "The U.S. Constitution and the conventional Rule of Recognition" pg 113) Depending on how to interpret that claim, it is possible that Himma actually believes a stronger proposition; specifically, that the morality criteria do not dictate a specific outcome in these cases. This is a metaphysical claim and not the epistemic claim I'm making above. However, it is certainly the case that if the moral criteria don't dictate a particular outcome, then there is no way for us to know which outcome they dictate. Also, although I won't delve deeply into this here, it seems to me that if there is no uniquely correct outcome, then the highest court cannot in fact make a mistaken decision and Himma's entire argument is in peril.
[185] Final Authority, 19
[186] I don't necessarily agree that at least one of these decisions was mistaken. I remain agnostic as to whether the best interpretation of the constitution can change over time. If it can, then it is possible both were made using the best interpretation at the time of the decision.

given the fact that it's not always clear what the moral criteria require, we don't always know when these mistakes are made. Since it is unclear to us what is required by the constitution in these cases, no matter which way judges decide the case, there will be reasonable disagreement. The court could make the right decision, but others will still criticize it based on the fact that they don't believe that the decision comports with constitutional requirements. Hence, criticism of a judicial decision does not prove that it is, in fact, the wrong decision.[187]

Given the above claims, it is now possible to carve out a robust inclusive legal positivist response to Himma's argument from final authority. By starting with the premise that systems such as ours contain an inclusive rule of recognition, we can examine what other fundamental secondary rules may account for the facts above and we can see how inclusive legal positivism is also descriptively accurate for the types of cases that Himma highlights, specifically those where the court with final authority can bind other officials with a decision either way.

A Robust Inclusive Legal Positivist Analysis of Final Authority

We know that officials *feel* bound by the moral provisions in the constitution. We also know that in systems such as Canada's, when a norm is found to conflict with those provisions, it is *treated* as null and void, and that the

[187] Kramer states the point quite eloquently in a section elucidating inconsistencies in Himma's position. See *Where Law and Morality Meet* 128-129

constitution is written in such a way to *suggest* that it is the supreme criterion in that system's rule of recognition. These facts, I believe, are sufficient to give us *prima facie* reasons to treat the morality criteria in the constitution as part of the ultimate criterion in the rule of recognition in these systems. Of course, if we cannot come up with a response to Himma's final authority argument, *prima facie* reasons amount to nought.

If we suppose that the morality criteria are part of the recognition norms in a robust way, how do we explain that in certain types of cases judges with final authority can bind other officials with either of two decisions? Since these judges have final authority in a legal sense, and other officials feel and are bound by these decisions either way they are decided, this suggests that there is another secondary rule of the legal system being used which produces this authority and consequent duty. In particular, I suggest that this phenomenon can be explained using a robustly inclusive rule of recognition (which recognizes the highest court as a source of law) and a rule of adjudication which can be roughly formulated as: when it is unclear within reason whether a higher court's decision comports with the rule of recognition, the decision will be treated as legally binding.[188] The

[188] I am not tied to it being specifically a rule of adjudication. It could be any type of fundamental secondary rule. I am also not tied to this specific formulation. The important thing is that this secondary rule can legally bind other officials' when decisions are mistaken. I am using the phrase "treated as legally binding" to differentiate these cases from ones where the norm is in fact picked out by the rule of recognition. When we examine what happens in legal systems, there is no discernible difference in phenomena between legally binding norms and treated as legally binding norms. Also, I happen to think that legal obligations can come from more than just primary rules picked out by the rule of recognition and it makes sense to talk of these norms that are treated as legally binding as generating legal obligations on officials and citizens, just not

decision will be treated as if it establishes valid law. This does mean that courts may be obligated to enforce L1 when in fact L2 is law and L1 and L2 contradict each other. This rule of adjudication could be (but need not be) explained by looking at the secondary rules which grant final authority to a particular court or other institution.[189] To respect the final authority of these officials and the rules which give them that authority, lower courts must be bound by the higher courts' decisions.[190] This respect can be considered as stemming from the law since it stems from fundamental secondary rules which partially constitute that particular legal system. Hence, the lower courts' deference is legal in nature in the exact same way that the higher courts' authority is legal in nature. This is not to say that all judicial decisions are binding because of a rule of adjudication, but only ones that are reasonably mistaken about constitutional requirements. This means that there can be a separation between what norms are law and what norms are treated as law in that particular legal system. Lower courts may be under an

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obligations that stem from the rule of recognition. Further examination into this is beyond the scope of this project, however.

[189] Similarly, lower officials have presumptive authority granted to them by secondary legal rules. This presumptive authority grants them permission to decide a case according to constitutional morality until a court with higher authority decides a relevantly similar case. This does allow for the possibility of a sizeable gap between what is law and what the courts are bound to enforce. How big of a gap there must be before we start suggesting that officials are all very mistaken about the criteria in the rule of recognition is a question to which I do not know that answer. It seems like it might be legal system dependent.

[190] In a similar fashion, certain officials, such as police officers, aren't given authority at all to examine whether rules comport with constitutional morality. They must respect the decisions of officials who do have authority on this matter (legislature, lower courts and the highest courts, only the latter having final authority in systems such as Canada's and the United States').

obligation to treat as law a norm which in fact is not law and may not be allowed to treat as a law a norm which in fact is law.[191]

When a decision is right (regardless of whether it is obviously right or not), the holding *may*create the content of law through the inclusive rule of recognition, which recognizes court holdings as a valid source of law.[192] Judicial decisions can create law similar to the way that legislation creates law, only when the decision or duly enacted legislative norm comports with the morality requirements in the rule of recognition and wasn't already law.[193] Hence, judicial decisions and legislative enactments are similarly or lower ranked than the morality criteria.[194]

Understanding the fundamental secondary rules in this fashion allows us to account for the exact phenomenon that Himma believes spells the downfall for

[191] I happen to think that citizens are also bound by the mistaken decisions that occur based on a good faith attempt by the courts to determine what the moral criteria require. It makes sense to me to think of all fundamental secondary rules as being able to impose legal obligations on citizens since they all work together to form the legal system. An argument for this position goes beyond the scope of this paper however.

[192] I say "may" because there are many ways a court may issue their ruling. It is possible that they completely nullify a legal norm or that they "read up" a norm so that it does comport with morality. Depending on what they do in a particular decision, they may establish new law (e.g. if there is more than one way to read up a norm so that it is compatible with the moral requirements, they are establishing new law when they read it up a particular way). If they simply nullify a legal norm that is incompatible with the moral requirements, they haven't created a new law since that legal norm was never valid law to begin with.

[193] See my previous footnote about how judicial decisions may not create new law in instances where they just nullify a norm which was incompatible with the moral criteria since that legal norm wasn't valid law. How often judges create law is also related to one's understanding of morality and how it works with legal validity. If the moral criteria establish thresholds, then judges create law more often than if the moral criteria pick out a uniquely correct way to do things.

[194] It is not important for my argument if they have the same or a lower rank. If they have the same rank it is because they are part of the ultimate criterion along with the morality criteria. If they have a lower rank, they are not. Either option seems possible to me depending on one's views about incorporationism among other things.

practical inclusive legal positivism, cases where judges can bind other officials with either of two decisions. Going back to Himma's example of a legal system with a highest court, HC, who is given the task of deciding whether a duly enacted norm is compatible with moral criterion, *p*, we are able to see that the reasoning in the case will unfold the exact same way under this robust inclusive analysis as under exclusive legal positivism. The difference is which type of fundamental secondary rule the officials are following. For Himma, if HC makes a reasonable decision (an 'other things being equal' decision) and attempts to follow the rules of interpretation, other officials are bound, due to the rule of recognition. For my proposal, if HC makes a good faith attempt to decide the case correctly and gets it wrong but reasonably so, the rule of adjudication binds other officials to respect HC's decision. If HC decides the case correctly, then the rule of recognition binds other officials.[195] Of course, most of the time we are unable to tell which rule is doing the binding, because there is not an epistemically available correct answer in most cases that reach the highest courts. If HC's decision is unreasonable (a.k.a. other things are not equal), officials may not be bound according to Himma or me.

Conclusion

[195] The rule of recognition may already have been binding the other officials to do the same thing as what HC decides or the rule of recognition may be binding the officials to do something new depending on the nature of the HC decision.

It seems then, that we may be at an impasse, for judging between the contemporary legal positivist accounts with regard to mistaken decisions in actual legal systems. However, recall, that Himma is making a slightly stronger statement than that no actual legal systems are inclusive legal systems. Himma believes that an inclusive legal system was nigh impossible given certain facts about how mature modern legal systems are set up, specifically that some institution within that system is granted final legal authority to decide whether a norm conflicts with moral criteria in a constitution. The fact that inclusive legal positivism can provide a coherent account of the phenomenon that Himma points out is sufficient to refute his argument.

Himma attempted to show that inclusive legal positivism should be left in the dustbin of impractical conceptual possibilities by highlighting a particular phenomenon in modern mature legal systems: highest courtsare usually granted final authority to determine whether a particular norm comports with constitutional morality. They can decide these cases in either of two ways, and no matter which way they decide the case, that decision will be binding. This means that they can bind others with a decision that in fact does not comport with the morality requirements in the constitution and hence, morality criteria cannot be within that system's rule of recognition. According to Himma, it is the judges' beliefs about whether a norm comports with the moral requirements and not the moral requirements themselves which determine whether a norm is valid law.

As we have seen, inclusive legal positivists have more than one way to respond to this claim. Kramer suggests that moral requirements are ranked lower than the highest court's decisions within a legal system's rule of recognition. I have suggested that it is possible to keep the moral criteria within the ultimate criterion in the rule of recognition and still address the phenomenon that Himma points out. One can explain what happens in these cases by looking beyond the rule of recognition at other possiblefundamental secondary rules. When looking at how these secondary rules work with each other and intermingle, one can see that it is possible to explain what happens in cases with mistaken decisions about the requirements of an inclusive rule of recognition. One need only posit another fundamental secondary rule, a rule of adjudication, to account for such cases.Appealing to this rule of adjudication isn't *ad hoc*since it is derived from the set of fundamental secondary rules which grant an institution final authority in the first place. The rule states that "when there is reasonable disagreement, the decision is mistaken, but the court has made a good faith attempt to determine whether a norm in fact comports with the moral criteria in the constitution, lower court judges are bound by the mistaken decision." Although the norm may objectively be at odds with moral criteria in the constitution, this fact is epistemically indeterminate. This is perhaps the main reason that we respect higher court decisions in this situation. When the decision isn't mistaken, the rule of recognition identifies the legal norms as law.

Himma's argument from final authority cannot do what he wants it to do. It doesn't prove that inclusive legal positivism isn't possible in legal systems such as ours. Inclusive legal positivism can provide explanations for the phenomenon that Himma highlights, a court's ability to bind others with mistaken decisions about moral requirements. To do this, we must examine what other fundamental secondary rules could be operating within the system. In this instance, rather than showing that exclusive legal positivism is susceptible to the same counter arguments as inclusive legal positivism as I did in previous chapters, I was able to show that inclusive legal positivism is capable of explaining the same phenomenon as exclusive legal positivism.

CHAPTER 5: Concluding Remarks

In the previous chapters we have seen how exclusive legal positivism and inclusive legal positivism seem to be more similar than has been given credit for. Both these legal theories are in tension with the necessary features of law as suggested by Shapiro and Raz and both are equally capable of explaining mature legal systems envisioned by Himma. Finally, both theories fit within the criteria specified for identifying the rule of recognition and the other secondary rules given by various legal positivists.

Shapiro had suggested that inclusive legal positivism could not account for a function which is reasonably assigned to law, the function of providing guidance to its citizens. If inclusive legal positivism is true and compatibility with certain moral values can serve as criteria for legal validity, then laws cannot guide citizens since what the written statute says may not be what the law actually is. We looked at how exclusive legal positivism purports to account for this same guidance function and found it lacking. Shapiro states that the law must guide officials as well as citizens.Yet if moral values can function as criteria for changing a law within a directed power, officials cannot be guided by the law any more than citizens can be guided by law in determining their legal obligations.

There are further worries with exclusive legal positivism. We examined a hypothetical legal system where there was a primary rule enacted stating that any law which conflicted with certain moral values must be brought to the courts' attention by citizens and that the conflicting law would produce no legal

obligations for citizens. In this situation, citizens, according to Shapiro's understanding of law's guidance function, could not be guided by the laws of the system since they would have to deliberate on the merits of each of the laws to determine their legal obligations. There is no obvious non-question begging way to suggest that this hypothetical legal system isn't possible, yet exclusive legal positivism, when tied to Shapiro's guidance function, must rule it out. Hence, Shapiro's guidance function argument, if true, damns both inclusive and exclusive legal positivism. I suggest that instead we re-examine how the law may guide citizens and officials and whether we think that guiding conduct in the manner suggested by Shapiro is a necessary feature of law.

Raz, similarly, identifies a necessary feature of law, law's claim to legitimate authority, and suggests that inclusive legal positivism cannot account for it. We have seen, however, that the tension isn't restricted to inclusive legal positivism. Exclusive legal positivism has the same problem accounting for law's claim to legitimate authority as specified by Raz. Officials, in an exclusive legal positivist account of systems of law with what appear to be moral criteria of legal validity, have a directed power to change the law when the law does not meet said moral criteria. Raz believes in a strong sources thesis that states that both pure and applied legal facts can be identified without recourse to moral deliberation. Yet when we take into account that the law must also claim legitimate authority over officials, we see that it cannot do so in the systems in question since

judgescannot identify applied legal statements with regard to directed power cases without deliberating on the reasons which the law was supposed to settle.

Furthermore, we can again return to the hypothetical legal system set up in the Shapiro chapter. The primary rule which states that citizens must bring all laws that conflict with certain moral criteria to the attention of the courts, and that the conflicting laws generate no legal obligations for citizens, causes problems for exclusive legal positivism when combined with Raz's service conception of authority. In this hypothetical system, law cannot claim legitimate authority over citizens according to Raz because citizens must weigh the reasons which the law was supposed to settle in order to identify the applied legal statements related to their actions.

When we move from looking at conceptual arguments to practical ones, the situation does not get better. Himma suggests that inclusive legal positivism cannot account for certain facts about the way mature legal systems occur in our world given human nature. Specifically, Himma suggests that inclusive legal positivism cannot account for the final authority given to courts to determine if a law conflicts with the moral criteria enshrined in charters and bills of rights. These highest courts can bind others with a mistaken decision regarding the moral criteria, so inclusive legal positivism cannot be correct in suggesting that the moral criteria determine legal validity. Exclusive legal positivists, according to Himma, can account for this feature of contemporary mature legal systems. They can allow for the moral criteria to be part of a rule of adjudication

wheneverprecedent is a source of law. As we have seen, it is possible for inclusive legal positivism to also account for Himma's insights about contemporary legal systems. Similar to exclusive legal positivism, inclusive legal positivism also utilizes both a rule of recognition and a rule of adjudication to account for the phenomena being discussed. The rule of recognition contains moral values which serve as conditions for legal validity while there are other secondary rules according to which a decisionmade in good faith by the highest court must be treated as binding law. This secondary rule makes perfect sense given that this court is given final authority to decide these cases. Both inclusive and exclusive legal positivism can account for a court's final authority in similar ways.

I think that this similarity extends much further than theorists have realized. In fact, up until now, the tests suggested for determining the content of the rule of recognition of a given legal system will have great difficulty in actually informing us if a system has an inclusive or exclusive rule of recognition. If we are going to move forward with legal positivism, we need to understand how difficult it will be to pick between these two accounts of law. While the following argument is not a decisive one, I hope that it will elucidate the types of problems which legal positivists face when attempting to defend one account over the other. Also, I believe it lends support for moving forward by examining how all of the fundamental secondary rules relate to each other, the primary rules and the participants in the legal system and to stop focussing so heavily on what the rule

of recognition specifically does. If it is as difficult to determine what the rule of recognition is as the argument below will suggest, I think we should pursue other avenues in order to better understand law.

At this point, I'd like to examine how one might even determine if any given system is inclusive or exclusive. I think that determining the content of a rule of recognition in a legal system is far more complicated and elusive than legal positivists have thought. While it has been noted that due to the complexity of legal systems, determining the content of the rule of recognition is difficult, I think the tests which have been suggested to do so are less determinate than we have historically believed.[196] This is not necessarily due to the same sort of complexity which has been noted by other scholars but due to what the tests suggest we examine and the relationship officials have with all of the fundamental secondary rules. I believe that it would be exceedingly challenging to look at any mature legal system and attempt to determine whether it has an inclusive or exclusive rule of recognition using the criteria to determine the content of rule of recognition as stated by positivists, such as Hart and Himma. The two theories are too similar for determining the content of the rule of recognition in any straightforward way. The tests for determining the rule of recognition that theorists have suggested so far are unable to definitively demonstrate that either theory provides the correct account of a particular legal system.

[196] See Greenawalt's "The Rule of Recognition and the Constitution", Shapiro's "What is the Rule of Recognition (and Does it Exist)?", Dickson's "Is the Rule of Recognition Really a Conventional Rule" and Waldron's "Who Needs Rules of Recognition?" for some of the difficulties that have been discussed about determining the content of the rule of recognition in complex legal systems.

To examine this issue, we'll be returning to Himma's theory and my theory from the previous chapter. Recall that Himma suggests that mature legal systems, such as ours, have an exclusive rule of recognition and moral criteria can and do function in directed powers for the courts when deciding cases. The highest court has final authority and can bind other courts with a mistaken decision about whether a legal norm comports with the moral criteria. I suggested that, instead, the moral criteria are part of a rule of recognition and there is a rule of adjudication that binds other courts to mistaken decisions, assuming, of course, that a few other conditions obtain (e.g. judges routinely make good faith efforts to interpret the relevant moral criteria correctly).

I will now devote some space to showing that, given the way legal systems and judicial decisions currently work, it is well nigh impossible to show that one account of them is better. They both do an adequate job of explaining how these legal systems, and the decisions of judges within them, function.

Furthermore, both positions have at least an initially plausible reason for believing their rules of recognition to be *the* rule of recognition. Whenever there are two or more rules which bind people, there is a chance that these rules will conflict and consequently, create conflicting duties. One example would be a rule which says highest court decisions create valid law and another rule which says certain requirements of morality constrain what is valid law.[197] Without some

[197]Neither of these rule formulations is exact. What I am trying to demonstrate here is that the basic content of the rules can create a conflict which inclusive and exclusive legal positivists

way of ranking these two rules, we may end up in situations where there are conflicting obligations arising from them. When we go on to rank them, it seems that the rule which creates the superseding obligation is the one which is ranked higher.[198]

If we can determine which 'rule' creates overriding obligations in the type of cases Himma brings up, we should be able to tell whether Himma is correct or I am. Himma's formulation captures the fact that the majority of the time judicial decisions made by superior courts are followed, even if officials *think* the decision is constitutionally incorrect. At the very least, there are some (perhaps many) occasions where judicial precedent creates an obligation that overrides any moral requirements. Himma's rule of recognition reflects the fact that frequently judicial precedent is followed.

It should be noted, however, that judicial precedent need not always be followed. According to both Himma's and my understanding of these legal systems, when there is an egregious decision that cannot reasonably be thought to comport with the moral criteria in the constitution, obligations stemming from the moral criteria may override obligations stemming from judicial precedent. The robust inclusive rule of recognition reflects that fact. Whenever we can definitively tell that there is a conflict between these two rules, Himma and I both

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attempt to solve differently (and hence, change the wording of these rules to reflect how they are ranked relative to one another).

[198]I am assuming that criteria contained within the rule of recognition are generally thought to be of more importance than other secondary rules and hence, override other secondary rules when there is a conflict. This seems to be supported by Himma's distinction between criteria of legality (recognition norms) and standards of legal correctness (other secondary norms).

think that the rule about constitutional morality may be followed. This suggests that, at least at first blush, both positions have a reasonable explanation for why their analysis of this phenomenon is correct. The difficulty in determining the rule of recognition is greater than just that however. As we will see in the next section, trying to separate the rule of recognition from the other fundamental secondary rules is much more challenging than theorists have realized and if we're unable to separate the rule of recognition from the other fundamental secondary rules, I think we should start paying more attention to these other fundamental secondary rules in explaining law.

Determining the Rule of Recognition

At this juncture, it is valuable to examine Himma's criteria for determining the rule of recognition to see if it allows us to determine the content of the rule of recognition in a mature legal system.He states that there are two elements in determining what rule(s) of recognition are at play within a legal system. How these elements converge determines the rule of recognition in a particular legal system.

> "The rule of recognition has both a behavioural and cognitive element. The behavioural element consists in a convergent pattern of conduct; officials converge on conforming to the requirements of the rule. The cognitive element consists in acceptance of the rule as a standard of criticism; officials adopt a critical reflective attitude (i.e., the internal

> point of view) towards the rule and criticize deviations from that rule by other officials."[199]

If the behavioural element were enough for determining the rule of recognition, it would be possible to infer a rule through officials' patterns of behaviour. If we look at what officials treat as law, we can build expectations about what they will treat as law. Furthermore, the fact that the officials converge on the same patterns would ensure that they are following the same rule.

The problem with this criterion is that it *only* looks at the behaviour of officials, and not at their cognitive understanding of a rule of recognition. This allows for problems of inductive reasoning. Given the same pattern, there is always more than one possible explanation. Hence, it is possible that judges are not following one rule, but more than one. Even though this might result in their pattern of behaviour converging up until this point in time, it does not necessarily mean it may do so in the future.

An example may help elucidate this problem. Let us suppose a nation called "Precedentia". In this nation, there is a constitution with principles of morality set in it. There has been convergent behaviour for the past 20 years in citing the highest court's previous rulings on the requirements of the morality in the constitution, when dealing with new cases. Presumably, this would mean that the rule of recognition is similar to the one that Himma suggests. However, it

[199]Himma, K. "Making Sense of Constitutional Disagreement: Legal Positivism, the bill of Rights, and the Conventional Rule of Recognition in the United States" 4 *Journal of Law in Society* (2003) p 153 hereinafter "Making Sense"

turns out that half of the lower officials were citing the highest court's decisions because they believed them to be the fully reasoned out morally correct ones, whereas the other half were citing them because they believed the decisions to be binding, regardless of mistakenness. Half the officials were following a rule which stated that laws must comport with constitutional morality while the other half were following a rule stating that the highest court decisions create the law regardless of whether the norm in fact comports with the moral requirements in the constitution. Hence, there is no *one*rule of recognition being followed, and officials might not take the appropriate cognitive attitude towards any combination of the above two.[200] This means that examining the behavioural element is not sufficient for us to determine a rule of recognition.

This issue with the rule of recognition could perhaps be resolved by also examining Himma's cognitive aspect. Maybe we could determine whether the officials of Precedentia are following two rules of recognition, and if so, who is following which, if we drew upon the second aspect of rules highlighted by Himma, namely, the cognitive aspect. Recall that, for Himma, the cognitive element is the officials' adoption of an internal point of view towards a rule and their disposition to critically assess others' behaviour when it deviates from that rule.

[200] No judges believe themselves to be following a rule which combines the two through disjunction or conjunction.

The problem with the cognitive aspect is that it may tell you what judges feel bound by, specifically it may highlight*all* the fundamental secondary rules of a particular legal system, but not identify what the content of the rule of recognition is. Officials also feel bound by rules of adjudication, interpretation and change. Officials take an internal point of view towards all the fundamental secondary rules and critically assess other officials' behaviour when deviating from any of them without necessarily specifying what type of rule they think the other official has broken. When officials are criticizing other officials, they may not elaborate that the official broke the rule for identifying the law, merely that the official did not uphold their duty with regard to some fundamental secondary rule. If I believe that officials are duty bound to change any laws which do not comport with certain moral requirements, my criticism may look the same as someone's who believes that any legal norms which do not comport with those same moral requirement are not valid law. Hence, examining what judges feel bound by and what deviations they criticize will not obviously lead us to determine what the rule of recognition is.

Looking at the Precedentia example again, we can see that the situation is improved but probablyonly slightly. When we examined only the behavioural aspect, it was possible that the officials weren't even following the same rules. Once you add in the cognitive aspect, we should at least be able to determine that the judges are all following the same rules, because we can determine what norms they take an internal point of view towards. The problem then becomes how to

categorize the rules that they are following. It is conceivable that for 20 years, all the lower court judges cited Supreme Court decisions, stating that they were bound by Supreme Court decisions and Supreme Court decisions create law. Also, for those 20 years, the Supreme Court attempted to justify their decisions based on the moral criteria in the constitution, and all of the officials criticized lower court and Supreme Court decisions on the basis of whether they believed the decision fulfilled the moral requirements of the constitution.

These facts do not allow us to infer that the rule of recognition states that *all* Supreme Court decisions are law, nor that it states that the moral criteria in the constitution *must* be fulfilled in order for a norm to be law. What we can infer from the Precedentia example is that there are *some* fundamental secondary rules which state that lower court officials are bound to *some* extent by Supreme Court decisions, and that Supreme Court decisions *can* create law. Nothing stated thus far has ruled out the possibility that the decisions *may* have to meet further criteria, such as constitutional moral provisions, in order to be valid law. We can also infer that there is some secondary rule which specifies *some* relationship between the moral criteria in the constitution and law. This relationship could be one where the moral criteria are part of the ultimate criterion in the rule of recognition. It could also be one where the moral criteria are subservient to the judicial decisions within a rule of recognition, or it could be one where the moral criteria serve in a rule of adjudication but not in a rule of recognition. The legal system of Precedentia can be explained by Himma's account, Kramer's account

or mine, since all three allow us to understand Supreme Court decisions as binding, as creating law and as creating legal obligations for other officials. All three accounts may be able to capture both the convergent behaviour and the cognitive aspects displayed by the officials in this hypothetical system. Looking at these two elements alone does not allow us to conclusively determine which rule(s) should be categorized as the rule(s) of recognition, and which should be categorized as other fundamental secondary rules. There is a convergent pattern of conduct and the internal point of view towards all of the fundamental secondary rules, not only the rule of recognition.

When examining the cognitive aspect, maybe it would be beneficial to examine how officials' justify their use of particular rules. Perhaps officials, along with explaining what they are doing, also explain why they are doing it. Rather than simply looking at what judges feel bound by, we can also look at why they feel bound by it. If an official citing a higher court decision does so using phrases like "I don't believe this Supreme Court ruling to be the law, but I must still uphold it when deciding this case", then it seems like my analysis is the best one for that legal system. If an official were to instead say something like "Even though the Supreme Court decision was constitutionally invalid, it nevertheless created the law that I must apply to this case", it seems that Himma offers a better understanding of that legal system.

However, I am doubtful that the immediately preceding suggestion would be a fruitful pursuit in all mature legal systems for several reasons. First of all,

when I think of decisions I've read, I can recall judges stating that they feel bound by certain criteria but not *why* they feel bound by them. This leads me to believe that judges explaining why they feel bound to use higher court decisions is rare and may not occur at all in some mature legal systems. Secondly, if and when they do, it's possible that their explanation will not conclusively favour one theory over another in the way the hypothetical statements above do. Many judicial statements explaining why the judge felt bound could be interpreted to support either of the theories, particularly if we were to start examining to what extent judicial rhetoric which is false or descriptively inaccurate may be used in these explanations.[201] Finally, even if officials do occasionally explicitly support one theory over another in their explanation of why they feel bound, it may not happen often enough nor from enough officials for us to infer convergence amongst all the officials for that one theory. Simply put, there is no guarantee that the tests suggested by Himma for determining the content of a rule of recognition will in fact be able to do so in mature legal systems, although it does allow us to determine the content of the fundamental secondary norms in general.[202]

The question then arises, are there other means for determining if a particular rule should be categorized as a rule of recognition or as a rule of

[201]Both inclusive and exclusive legal positivists have to take some of what is said in judicial decisions as rhetoric in order for their theories to work. While I'm not interested in delving into this topic at depth at the moment, it is certainly conceivable that judicial rhetoric would be an issue when examining what judges say about why they feel bound to decide certain ways.
[202]Of course, a legal system could change in such a way that judges did explain why they felt bound frequently and clearly. If this were to occur, then one would have a stronger case for supporting one theory over another for that particular legal system but not for other legal systems.

adjudication? A good way to determine this would be to examine more closely how a particular rule functions within the judicial decisions. If the judges used Himma's rule of recognition to identify law pre-decision and then changed the law based on Himma's other secondary rules which constitute standards of legal correctness, it would support Himma's understanding of cases where a court with final authority can bind officials with either of two decisions. Similarly, if judges attempted to identify the law pre-decision and post-decision based on whether a duly enacted norm was compatible with the morality provisions in the constitution, it would support my account.[203] However, judicial decisions do not currently make the function of the fundamental secondary rules clear. In theory, judges could identify the content of the law using the rule of recognition, and then identify what other (if any) secondary rules apply to this case, and apply those rules to create their decision. The rule of recognition would pick out the law prior to the decision, as well as the law after the decision, and the other secondary rules would explain why the pre-decision law becomes the post-decision law. Currently, however, judicial decisions do not help us identify what officials considered to be law prior to deciding, and then how they changed it. They only identify what the deciding judges believed to be the law post-decision.[204]

[203]Post-decision is a slight misnomer since the 'new' law is used to decide the case.
[204]One change which could occur that would allow us to determine how a rule functions, would be if court decisions were written more like a functional equation, where they establish the input (the law pre-decision as determined by a rule of recognition), the function (the secondary rules which affect the pre-decision law, such as rules of adjudication, interpretation, and change) and the output (the law post-decision). Since they aren't written like this, it's hard to tell which secondary rule(s) judges believe to be filling the input and function parts of the equation.

When examining the phenomenon Himma points out, we find that both accounts are able to explain the phenomenon equally well and when we examine Himma's criteria for determining the rule of recognition, we find that may not in fact uniquely pick out either of the accounts as the correct account for any mature legal system. Finally, after canvassing other options for determining what the best account may be, it may still not be possible to determine the answer. I believe this is because both of the theories are designed to account for the same phenomena using almost identical mechanisms. The content contained within the set of fundamental secondary rules for either account is almost, if not exactly, identical. The content may be categorized as different rules (e.g. rule of recognition, adjudication) but the actual content is identical. Based on the complex and myriad ways these rules can interact with each other, any theory will most likely be able to account for any legal phenomena that some legal theorist picks out.

This leaves us in an interesting conundrum. Conceptual arguments against inclusive legal positivism seem to apply equally well to exclusive legal positivism and both theories are able to account for the phenomena found in legal systems. This is not particularly surprising given that both theories must account for the same content that officials feel bound by but do so in slightly different ways.

When you combine the above with the fact that our tests to determine the content of the rule of recognition is unable to differentiate that content from the content of the other fundamental secondary rules, I think that as we continue to do

work and ask questions about general jurisprudences, we should do so without such a narrow focus on the rule of recognition. We must spend more time being attentive to all of the fundamental secondary rules of legal systems. I think there has been a lot of work recently which overburdens the rule of recognition and which results in casting doubt on whether a rule of recognition is actually helping us explanatorily.[205] Given the importance of other secondary rules to our understanding of how legal systems actually work, it may be possible to re-examine the arguments made against the rule of recognition as a helpful tool and see if we can begin to unpack the burdens being placed on it. I think by shifting our focus to all secondary rules we will begin to achieve greater clarity with regard to how legal systems actually work and it will allow us to account for more phenomena than we've previously been able to do. My hope is that there will be a shift in the focus of general jurisprudence and legal positivists can work towards explaining legal systems more thoroughly rather than attempting to determine which version of legal positivism is the correct one.

[205] See Shapiro's "What is the Rule of Recognition (and Does it Exist?)"

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