Legal Positivism and the Moral Aim Thesis

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Abstract—According to Scott Shapiro's *Moral Aim Thesis*, it is an essential feature of the law that it has a moral aim. In short, for Shapiro, this means that the law has the constitutive aim of providing morally good solutions to morally significant social problems in cases where other, less formal ways of guiding the activity of agents won't work. In this article, I argue that legal positivists should reject the Moral Aim Thesis. In short, I argue that although there are versions of the Moral Aim Thesis that are arguably compatible with legal positivism, all of the different ways of making it compatible face serious philosophical difficulties. Following a discussion of what these difficulties are, I provide an alternative to the Moral Aim Thesis, a thesis that I call the 'Represented-as-Moral Thesis'. This thesis avoids the problems that I raise for the Moral Aim Thesis and better resonates with some of the core intuitions behind legal positivism. Furthermore, a version of Shapiro's Planning Theory of Law that is developed with the Represented-as-Moral Thesis (as opposed to the Moral Aim Thesis) can explain all of the things that Shapiro uses the Moral Aim Thesis to explain.

Keywords: the moral aim thesis, legal positivism, the planning theory of law, the nature of law, Scott Shapiro

1. *Introduction*

Scott Shapiro argues in his recent book *Legality* that the law has a constitutive aim—and, moreover, that this aim is a distinctively *moral* one. In somewhat more specific terms, Shapiro argues that the law has the constitutive aim of

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providing morally good solutions to morally significant social problems in cases where other, less formal ways of guiding the activity of agents will not work. Following Shapiro, call the thesis that the law has such an aim—and, moreover that it is an essential property of the law that it has such an aim—the *Moral Aim Thesis*.[1]

In putting forward the Moral Aim Thesis, Shapiro does not intend to endorse the thesis that the law in fact usually (or in fact ever) accomplishes its moral mission. As he puts it, 'the sheer diversity of political objectives that actual legal systems have attempted to secure throughout human history suggests that the law often fails in its primary mission. What makes the law *the law* is that it has a moral aim, not that it satisfies that aim'.[2] In this way, Shapiro thinks of the law as akin to such things as clocks or toasters, which are ordinary and non-mysterious objects that one might reasonably claim have a constitutive aim (eg the aim of correctly telling the time or the aim of effectively toasting things such as slices of bread). The basic thought is that just as there can be broken toasters that fail to toast slices of bread effectively, there can be legal systems that fail to make a positive moral impact on the world. Nonetheless, thinks Shapiro, it is still the case that these defective things have a constitutive aim—indeed, thinks Shapiro, part of what makes them defective *as toasters* or *as the law* is that they are failing to do what things of that type essentially aim to do. This, he thinks, gives us a compelling explanation of why we are disposed to make the following sort of claim: 'To use a well-worn analogy, unjust regimes are like broken clocks...They do not do what objects of their type are supposed to do.'[3]

Many philosophers have been drawn to the idea that it is an essential property of the law that it has a moral purpose and that, insofar as a given legal system fails to live up to that purpose, it is defective *as* a legal system. Thus, in advancing the Moral Aim Thesis, Shapiro is making a version of a claim that many philosophers have already put forward. Nonetheless, Shapiro's defence of the Moral Aim Thesis is striking given the history of the philosophy of law. The main reason for this stems from the fact that most of major philosophers who have explicitly endorsed a version of the claim that the law essentially has a moral purpose—including, for instance, John Finnis, Lon Fuller, Ronald Dworkin, Mark Greenberg and Mark Murphy—are critics of the legal positivist tradition in the philosophy of law.[4] In marked contrast to this, Shapiro

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[1] Scott Shapiro, *Legality* (Harvard University Press 2011) 212.
[2] ibid 213.
[3] ibid 391.
[4] See Lon Fuller, *The Morality of Law* (Yale University Press 1969); Ronald Dworkin, *Law's Empire* (Belknap Press 1986); Mark Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006); Mark Greenberg, 'The Standard Picture and its Discontents' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law, Vol. 1* (OUP 2011); John Finnis, *Natural Law and Natural Rights* (reprinted with corrections, OUP 2011). It is a crucial question of what exactly unifies the legal positivist tradition that these philosophers have been critical of—and, perhaps more importantly, what it takes to endorse the thesis of legal positivism as such. I will turn to these issues shortly.

explicitly positions his general theory of the nature of law (what he calls the 'Planning Theory of Law') as a thoroughly positivist one. Moreover, rather than working as a critic of the legal positivist tradition, a tradition that runs through the work of such figures as Jeremy Bentham, John Austin, Hans Kelsen, HLA Hart and Joseph Raz, Shapiro's aim in *Legality* is to make good on what he sees as the central philosophical aspirations of that tradition. As Shapiro emphasizes in *Legality*, the dominant view among positivists is that it is *not* an essential property of law that it has a moral purpose. Indeed, as Shapiro emphasizes, the dominant view among positivists has been to deny that the law has any theoretically interesting constitutive aim *whatsoever*, let alone a distinctively moral one. This is a reflection of the fact that, as Leslie Green puts it in his article 'Law as a Means', one of the core ideas animating much of the positivist tradition has been that 'law can only be identified by focusing on its (species-typical) means rather than on its ends'.[5] Thus, as Shapiro puts it, 'by asserting that legal systems have a characteristic aim, the Planning Theory bucks the trend among legal positivists who have been sceptical of such claims'.[6] In short, Shapiro's embrace of the Moral Aim Thesis involves an important departure from the standard views associated with legal positivism.

However, that being said, it is important to emphasize up front that Shapiro is not alone among legal positivists in endorsing the thesis that law necessarily (and perhaps essentially) has a moral purpose. Most importantly, Joseph Raz, unquestionably one of the most important figures in the positivist tradition in recent history, also endorses a version of this basic claim in some of his recent work. In his 2003 article 'About Morality and the Nature of Law', Raz endorses the thesis that 'law by its nature has a moral task'.[7] Raz's reason for endorsing this thesis stems from one of his central claims about the nature of law: namely, that the law necessarily claims legitimate moral authority over its subjects. Because the law necessarily claims legitimate moral authority, Raz holds that insofar as a law is not a legitimate authority, the law fails in its mission. For Raz, then, the moral purpose of the law 'arises out of the law's character as a structure of authority, that is a structured, co-ordinated system of authorities'.[8] Based on this idea, Raz then glosses his view of the law's moral purpose as follows: 'the law's task, put abstractly, is to secure a situation whereby moral goals which, given the current social situation in the country

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[5] Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010) 173. It should be underscored that, in claiming that this is one of the core ideas animating the positivist tradition, I do not mean to claim that all positivists have endorsed this idea, or that positivists are the only philosophers of law to do so. It should also be underscored that I do not here mean to endorse Green's particular way of developing the idea that the law itself lacks a constitutive aim (moral or otherwise). While I am deeply sympathetic to much of what Green says in 'Law as a Means', a discussion of Green's views here is beyond the scope of this article.

[6] Shapiro (n 1) 214.

[7] Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 Am J Juris 1, 11. For Shapiro's discussion of Raz's relationship to the Moral Aim Thesis, see Shapiro (n 1) 446, fn 4. My discussion here about the relationship of Raz to the Moral Aim Thesis draws heavily on this footnote from Shapiro.

[8] ibid 12.

whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized.'[9] Thus, even though Shapiro is indeed right that (as he puts it) he is 'bucking the trend' among positivists by endorsing the claim that the law essentially has a constitutive moral aim, Shapiro is endorsing a claim that strongly resonates with themes already present in Raz.

Nonetheless, I think that Shapiro is right to think that his discussion of the Moral Aim Thesis is historically significant within the philosophy of law. To see why this is so, consider some of the important ways in which Shapiro's specific version of the claim that law necessarily has a moral aim—namely, the Moral Aim Thesis—is different from Raz's version of this claim. To start with, Shapiro's version of the claim that the law has a moral aim is not generated by the idea that law necessarily claims legitimate moral authority, and it hence involves a different characterization than Raz's of what exactly the moral aim of law *is*. Second, and more importantly, Shapiro explicitly claims that the law's moral aim is part of what makes the law what it *is*. It is not clear whether or not Raz also endorses this claim. Put more precisely: Shapiro explicitly claims that it is an *essential* property of the law that it has a moral aim, whereas the core of what Raz says in 'About Morality and the Nature of Law' is compatible with the claim it is a necessary property (but not essential property) that law has a moral aim.[10] This is part of the reason, I take it, that Shapiro, in contrast to Raz, emphasizes that his particular version of the claim that law necessarily has a moral purpose—namely, the Moral Aim Thesis—involves what he takes to be a philosophically significant departure from the default view among positivists. A third difference between Shapiro and Raz is tied to this fact that Shapiro (unlike Raz) explicitly claims that it is an essential (and not just necessary) property of law that it has a moral aim. The difference is this: Shapiro, unlike Raz, presents the idea that law has a moral purpose as a central feature of his overall theory of law—an idea that, crucially, is supposed to have important payout in explaining the nature of law. Put another way, whereas Raz argues that it simply follows from his overall view of the nature of law that the law has a moral aim, Shapiro argues that positing that the law has such an aim (which, as I just emphasized, Shapiro takes to be an *essential* property of law) has important explanatory payout, and attempts to make clear exactly what that explanatory payout is. In short, for Shapiro, the Moral Aim Thesis is meant to do serious explanatory work. In contrast, Raz makes no such claims

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[9] ibid.

[10] It should be noted that some of the things that Raz says *do* point in the direction of his thinking of the moral aim of law as an essential property, rather than a necessary (but not essential) property. For instance, he writes: 'Just as we do not fully understand what chairs are without knowing that they are meant to sit on, and judged (*inter alia*) by how well they serve that function so, the claim is, we do not fully understand what law is unless we understand that it has a certain task, and is to be judged (*inter alia*) by how well it performs it'. Raz, 'About Morality' (n 7) 12. However, given that Raz puts things here in an epistemic rather than metaphysical key, even what Raz says here in this quote is compatible with the claim that it is necessary (but not essential) property of law that it has a moral aim.

on behalf of his thesis that the law necessarily has a moral goal. Finally, it is also worth noting here that some of what Raz has said seems to pull in the opposite direction of what he says in 'About Morality and the Nature of Law'—and squarely in the direction of the more common position among positivists that the law does not have any necessary aim (let alone constitutive aim) whatsoever. For instance, just a few years prior to 'About Morality and the Nature of Law', Raz writes in 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' that '[i]t is important to remember that the law has no specific function (though it, or parts of it, have many such functions)'.[11]

Putting all of this together, I think we can thus conclude that Shapiro's endorsement of the Moral Aim Thesis does indeed represent an important departure from standard lines of thought on this basic topic within the positivist tradition. It therefore makes sense to consider Shapiro's work on the Moral Aim Thesis in its own right, and, in particular, consider whether or not Shapiro has given positivists good reason to think that the law has an essentially moral aim. Among other things, doing so might help us better understand what connections positivists should (and should not) grant hold between law and morality.

In thinking about Shapiro's Moral Aim Thesis, it is good to keep in mind what—at least on the surface—looks to be a basic tension between the Moral Aim Thesis and legal positivism. On the one hand, the Moral Aim Thesis asserts an intimate connection between law and morality, a connection that Shapiro understands as involving an explicit departure from the main currents of positivist thought and that is meant to have important payout in explaining the nature of law. On the other hand, legal positivism is canonically understood to be a view that asserts a specific sort of *lack* of connection between law and morality.[12] Thus, we might then legitimately wonder: can we endorse the sort of connection that Shapiro posits in the Moral Aim Thesis and still maintain a viable form of legal positivism? More generally, there is simply the question of whether or not Shapiro has given legal positivists (or at least those with broadly positivist sympathies) a convincing argument that we should follow his lead in endorsing the Moral Aim Thesis, and, more generally, for endorsing the claim that law has a constitutive moral aim of one sort or another (a claim that, as I just glossed above, resonates with ideas also endorsed by Raz). These are the main issues that I will take up in this article.

In tackling these issues, I will primarily address myself to those who already have some background sympathy to the legal positivist tradition—or, more precisely, at least to some of the main currents within that tradition. Thus, I will proceed for the most part by treating the question of whether or not to

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[11] Joseph Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 374.

[12] It is an important question exactly what connection between law and morality legal positivists should be understood to be denying. I will turn to this issue shortly.

adopt the Moral Aim Thesis as an intramural debate among those tied to the legal positivist tradition—or more precisely, as I will soon discuss, certain dominant ideas within that intellectual tradition—rather than directly tackling the all-things considered question of whether the Moral Aim Thesis is true without presupposing any positivist sympathies. However, as I soon hope to make clear, what is ultimately at issue in this article is how certain propositions about the nature of law relate to each other—propositions that are philosophically significant regardless of the labels that one uses to describe them. As I will soon underscore, acceptance of these propositions is not even clearly limited to those who are generally understood to be working within the positivist tradition, such as Raz and Shapiro. More importantly, regardless of which philosophers accept these propositions or not, the question of the relationship between these propositions is relevant to the philosophy of law as a whole, rather than just to a certain subset of the field. For instance, if one is convinced by Shapiro's arguments for the Moral Aim Thesis as well as by an argument that this thesis is incompatible with certain core theses associated with the legal positivist tradition (or, less dramatically, in significant tension with those theses of the legal positivist tradition), then this provides a significant reason to think that those positivist theses are false.

The core argument that I will advance in this article is that legal positivists— or, more precisely, those philosophers drawn to accepting certain key theses associated with the legal positivist tradition in the philosophy of law—should reject the Moral Aim Thesis. In short, I argue that although there are versions of the Moral Aim Thesis that are *at least arguably* compatible with the core thesis of legal positivism as such (a thesis that I will define shortly), all the different plausible ways of making the Moral Aim Thesis compatible with legal positivism face serious philosophical difficulties. Following a discussion of what these difficulties are, I provide an alternative to the Moral Aim Thesis, a thesis that I call the 'Represented-as-Moral Thesis'. This thesis avoids the problems that I raise for the Moral Aim Thesis and better resonates with some of the core intuitions behind legal positivism. Furthermore, a version of Shapiro's Planning Theory of Law that is developed with the Represented-as-Moral Thesis (as opposed to the Moral Aim Thesis) can explain all of the main things that Shapiro uses the Moral Aim Thesis to explain.

I break up my work in what follows into four main sections. In Section 2, I will explain how I will understand what *legal positivism* as such amounts to for the purposes of this article. In so doing, I will put forward a single thesis that (for the purposes of this article) I will take to be definitive of *legal positivism* as such, as opposed to the broader intellectual tradition ('the legal positivist tradition') that this thesis has historically been associated with. In Section 3, I will more carefully explain what Shapiro's Moral Aim Thesis is, as well as why he thinks that we should believe it. In Section 4, I argue that it is difficult to explain what the Moral Aim Thesis ultimately amounts to such that it (i) is

compatible with legal positivism (where this is understood along the lines I sketch in Section 2); (ii) is compatible with our best understanding of what *aims* are in general; and (iii) helps to explain the data that Shapiro wants to use it to explain. In short, I argue that although there are versions of the Moral Aim Thesis that are *at least arguably* compatible with legal positivism, all the different promising ways of making it compatible face serious philosophical difficulties. More importantly, I argue that even if the Moral Aim Thesis can be shown to be compatible with legal positivism, the intuitions that have driven many to endorse legal positivism in the first place should give positivists some reason to be sceptical of the Moral Aim Thesis.[13]

In Section 5, drawing on my argument in Section 4 for why positivists should be sceptical of the Moral Aim Thesis, I then provide an alternative to the Moral Aim Thesis. My goal is to show how *even if* one grants Shapiro almost all of the crucial pieces of evidence he cites in favour of the Moral Aim Thesis, and even if one hews very closely to his general jurisprudential picture (including, crucially, granting him all of the other theses that comprise his general Planning Theory of Law), there is an alternative thesis that is arguably a better one for positivists to endorse. The alternative thesis that I develop, which I call the *Represented-as-Moral Thesis*, states that it is an essential property of the law that certain officials within a legal system *represent* that legal system as having a moral aim. I argue that this thesis avoids the philosophical difficulties that I raise for the Moral Aim Thesis, better resonates with some of the core intuitions behind legal positivism (as well as animating the legal positivist tradition more generally), and can be developed as part of a jurisprudential theory that still accounts for all of the main evidence that Shapiro cites in favour of the Moral Aim Thesis.

I should emphasize up front that my aim in this article is not to fully defend the Represented-as-Moral Thesis. Indeed, for reasons that I sketch at the end of this article, I think that there are compelling reasons to think that this thesis is ultimately mistaken. My argument is that a proponent of this thesis can do an equally good job as the proponent of the Moral Aim Thesis in accounting for the core evidence job than Shapiro's Moral Aim Thesis purports to explain—and, moreover, that a proponent of the Represented-as-Moral Thesis can do so in a way that avoids all of the issues that I put forward in this article

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[13] It should be underscored that I will not argue that this last result gives all philosophers a compelling reason to think that the Moral Aim Thesis is wrong. This is because, in this article, I will not seek to defend the arguments or intuitions that have driven many to endorse legal positivism in the first place. My aim rather is to use this scepticism—in conjunction with arguments about the nature of *aims* (arguments which do present general worries about Moral Aim Thesis)—to give an argument about why *positivists* should be sceptical of the Moral Aim Thesis. Along the way, especially in my discussion of what in general we should take *aims* to be, I will provide arguments that touch on the broader question of whether or not Shapiro has given a good general argument to positivists and others alike—one that hangs free from any considerations about positivism per se—for thinking that the Moral Aim Thesis is *true*. However, my main aim will not be to address this broader question, which would take me well beyond the confines of this article to address with the care that it deserves.

for the Moral Aim Thesis. In putting the Represented-as-Moral Thesis on the table, then, I aim to (i) put pressure on Shapiro's argument for the Moral Aim Thesis and (ii) lay the foundation for an alternative thesis about the nature of law to be explored in future work.

2. *Legal Positivism*

In order to make progress in thinking about the relationship between legal positivism and Shapiro's Moral Aim Thesis, we first need to regiment our discussion about legal positivism. In this section, I propose a way for doing so, as well as briefly explain how my proposed way of defining 'legal positivism' relates to important definitions that have been offered by others.

In the introduction, I spoke of a legal positivist *tradition* within the philosophy of law. However, like most interesting intellectual traditions in philosophy, there are many different strands to the legal positivist tradition, and many different ideas that have been understood to be a part of it. In order to make philosophical progress on the question of the relationship between the Moral Aim Thesis and legal positivism as such—and not just a loose intellectual tradition—we will need to identify which thesis (or, alternatively, which set of theses) is definitive of legal positivism as such for the purposes of this article.

In *Legality*, Shapiro picks out a central thesis that he takes to be definitive of legal positivism, and which he aims to vindicate with his Planning Theory of Law. For reasons that I will explain shortly, I will use Shapiro's definition of legal positivism for the purposes of this article.

However, before I turn to what those reasons are, we first need to understand what the thesis *is* that Shapiro takes to be constitutive of legal positivism as such. To get a sense of what the thesis is, and where it comes from, consider the following quote from Joseph Raz: 'H. L. A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which...regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious.'[14] In *Legality*, Shapiro puts the thesis that Raz is gesturing at here as follows. To start with, he introduces the following notion of a *legal fact*: 'a legal fact is a fact about either the existence or the content of a particular legal system'.[15] By the 'content of a particular legal system', Shapiro means to refer to the facts about what the law *is* in a given jurisdiction (at a given time). For our purposes here, we can think of the 'content of a particular legal system' (or, equivalently, 'legal content') as referring to the totality of the legal norms that obtain in a given jurisdiction (at a given time). Or, to put it another way—a way that ends up being

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[14] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) 210.
[15] Shapiro (n 1) 25.

equivalent on Shapiro's theory of law—the 'content of a particular legal system' refers to what general legal duties, rights, permissions, powers, etc. there are in a given jurisdiction (at a given time).[16]

With this definition of 'legal facts' in hand, Shapiro then understands legal positivism as a claim about what explains the legal facts, where the sense of 'explain' here is a constitutive sense of 'explain' that is often used in metaphysics, rather than a causal one. More specifically, according to Shapiro, legal positivism is a claim about what he calls the 'ultimate determinants of legal facts'[17]—roughly, those facts that explain (in a constitutive sense) the obtaining of the legal facts, as well as the explanatory role of any of the facts that are used in that constitutive explanation of the obtaining of the legal facts.[18] This thesis is that legal facts are ultimately determined by (or, henceforth, 'grounded' in) social facts alone, and not moral facts.[19] In contrast, according to Shapiro, the central claim of natural law theory involves the endorsement of what he calls the *natural law thesis*, according to which 'it is a necessary property of the law that its existence and content are ultimately determined by social and moral facts'.[20] Following one standard convention within the philosophy of law, Shapiro takes *moral facts* (eg facts about justice) to be a certain subset of normative facts about what ought to be the case or evaluative facts about what would be good if it were the case. In contrast, he takes *social facts* to be to contingent, empirical facts about what people have done and about the products that they have produced—facts that, in this context, are assumed to be non-identical to the moral facts.

In framing legal positivism as a view about the ultimate grounds of legal facts, Shapiro makes a departure from one standard way in which positivists have put forward their position: namely, in terms of a view about a test for *legal validity*, which is, roughly, a test for whether or not any purportedly legal norm really *is* a legal norm of a given jurisdiction (at a given time). John Gardner provides a representative example of this way of proceeding when he defines

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[16] I discuss the relationship between these two ways of defining 'legal content' in David Plunkett, 'The Planning Theory of Law II: The Nature of Legal Norms' (2013) 8 Philosophy Compass 159.

[17] Shapiro (n 1) 25.

[18] This final condition is added to make sense of the so-called 'inclusive' legal positivist idea that the obtaining of certain social facts can make it that certain moral facts play a role in the determination of legal facts. Because such a story claims that the explanatory role of these particular moral facts is due to the obtaining of certain social facts, Shapiro does not think that such moral facts are among the 'ultimate' determinants of legal facts. For discussion, see Shapiro (n 1) 267.

[19] Shapiro (n 1) 28.

[20] ibid. It should be noted that Shapiro's framing of the debate between positivists and natural law theorists is quite close to that offered by Mark Greenberg. Greenberg also frames the debate (which he puts as one between positivists and *antipositivists*) as one about the ultimate grounds of legal facts. See Mark Greenberg, 'How Facts Make Law' and 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006). One important difference is that Greenberg uses the term 'legal facts' to refer solely to facts about the legal content of a given legal system, whereas Shapiro uses it to refer to facts both about the existence of legal systems, as well as facts about their legal content. Thus, Greenberg's framing focuses us in on a more limited topic. I discuss Greenberg's way of understanding the distinction between positivism and antipositivism in David Plunkett, 'A Positivist Route for Explaining how Facts Make Law' (2012) 18 LEG 139.

legal positivism as consisting in the following thesis: '(LP⋆) in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).'[21] Shapiro's definition of legal positivism and Gardner's LP⋆ are similar in many important respects. Most importantly, both can be seen as attempts to more precisely state the basic view that Raz articulates (in the quote I cited above) as marking a core of the positivist tradition of which Hart is 'heir and torch-bearer'[22]. But why does Shapiro not use this notion of 'legally valid' in stating his basic definition of legal positivism? One potentially compelling reason stems from an argument from Mark Greenberg. In his recent paper 'The Standard Picture and Its Discontents', Greenberg has argued that some accounts such as Dworkin's and Greenberg's own that understand legal content holistically rather than atomistically are difficult to make good sense of using the idea of a single norm either having the status of legally valid or not.[23] Thus, by putting things in a way that doesn't assume that everyone involved in the debate over positivism will be using the idea of legal validity—although, of course, many parties to this debate (perhaps rightly) will make use of this idea in their own jurisprudential theories—Shapiro's account of what is at stake in the debate over legal positivism gives him a broader definition than Gardner's definition, allowing Shapiro to more smoothly make sense of a range of possible positions in the field. Nonetheless, it is important to emphasize that any view that qualifies as positivist on Gardner's definition will also qualify as positivist on Shapiro's definition: a reflection of the fact that, in basic terms, if one starts with Shapiro's definition of legal positivism and then takes on board the idea of a test of 'legal validity', then the result is essentially a variant of the basic type of definition that Gardner offers with his LP⋆.

What should one make of Shapiro's proposed way of defining the positivist thesis, and, on the other side of the debate, the natural law thesis? It is worth emphasizing from the start that there are serious concerns that one can raise about whether or not these two theses that Shapiro picks out in fact do a good job of identifying a central issue that separates the positivist and natural law traditions in the philosophy of law. For instance, on one compelling and influential reading of John Finnis's work in *Natural Law and Natural*

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[21] John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 Am J Juris 199, 201.

[22] Raz, *Ethics* (n 14) 210.

[23] See Greenberg, 'The Standard' (n 4). In broad terms, Dworkin's view in *Law's Empire* is plausibly read as the view that either (i) the content of law consists of the set of principles (or standards) that best justify legal practices or (ii) the content of the law is determined by such principles. See Dworkin (n 4). For this reading of Dworkin, see Greenberg, 'The Standard' (n 4). In broad terms, Greenberg's own view is that, at least when the law is operating properly, 'the content of the law consists of a certain general and enduring part of the moral profile [ie the set of moral obligations, rights, etc. that obtain at a given time and place]. The relevant part of the moral profile is that which has come to obtain in certain characteristic ways, typically as a result of actions of legal institutions such as the enactment of legislation and the adjudication of cases.' Greenberg, 'The Standard' (n 4) 57. For reasons that I will explain shortly, both Dworkin's and Greenberg's theories are paradigmatic instances of jurisprudential theories that accept the thesis that I will be calling 'antipositivism'.

Rights—which is surely one of the most important statements of a jurispru-
dential view from within the classical natural law tradition in recent years—it is
the case that, at least in one sense of the term 'law', a norm can count as
legally valid, and hence part of the content of the law, based on social facts
alone, and not on moral facts.[24] Now, of course, it is open to Shapiro or other
defenders of his way of carving up the philosophical terrain to argue that the
sense of 'law' that Finnis uses here—where it picks out what Finnis regards as a
peripheral, and not central case of law based on considerations of moral
merit—means that Finnis's view here really does *not* count as accepting a form
of the thesis that Shapiro has labelled 'legal positivism'.[25] However, at the very
least, the example of Finnis brings out the general point that, just as with the
positivist tradition in the philosophy of law, the natural law tradition in the
philosophy of law—not to mention the broader *antipositivist* tradition in the
philosophy of law that includes both so-called 'classical' natural law theorists
such as Finnis, as well as philosophers such as Ronald Dworkin and Mark
Greenberg—is a tradition that has multiple strands. Identifying a clear thesis
that is accepted by all of the philosophers within the natural law tradition (let
alone the antipositivist tradition more generally) is thus a tough task—and,
moreover, as Mark Murphy has argued, one that positivists have generally not
approached with the care it deserves.[26] Moreover, as the above discussion of
Finnis indicates, one might worry that the natural law thesis that Shapiro
defines—as well as attributes to those working within the natural law
tradition—not only fails to grasp what is essential to that tradition, but in
fact rests on a strikingly false and misleading claim about how to understand
the core jurisprudential theories within that tradition.

   There are important and complex interpretative issues in settling whether or
not that charge is true. Yet, given my focus in this article, I will not wade into
these interpretative issues in any depth. Instead, having noted these important
worries, given my argumentative aims in this article, I will simply stick with
Shapiro's basic understanding of what legal positivism amounts to, as well as
what the natural law thesis amounts to. The one departure from Shapiro's
terminology that I will make on this front is that, henceforth, I will refer to the
thesis that Shapiro calls 'the natural law thesis' as legal *antipositivism*. I do so (i)
in order to make clear that the thesis is endorsed by philosophers such as
Greenberg and Dworkin, neither of whom are plausibly read as working
directly within the classical natural law tradition as well as (ii) in order to
further distance myself from making any contentious interpretative claims

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[24] Finnis (n 4). For a representative example of this sort of reading of Finnis, see Gardner (n 21) 227. It
should be noted that it is also plausible to read Lon Fuller, another leading critic of the legal positivist tradition,
as also accepting this thesis. See Fuller (n 4). For a sympathetic and careful discussion of the natural law
tradition in jurisprudence, see Mark Murphy, 'Natural Law Jurisprudence' (2003) 9 LEG 241 and Murphy,
Natural Law (n 4).
   [25] This is, I think, the best way to understand Shapiro's reading of Finnis in *Legality*. See Shapiro (n 1) ch 14.
   [26] See Murphy, 'Natural Law Jurisprudence' (n 24).

about what unifies the natural law tradition in particular within the philosophy of law.[27]

I will use Shapiro's definitions of legal positivism and antipositivism for three main reasons. First, by using Shapiro's definitions, it will allow me to smoothly address the question of whether or not Shapiro's argument for the Moral Aim Thesis works in Shapiro's own terms—which includes, among other things, that it fits well with his endorsement of legal positivism as he understands and defines it. Second, as my discussion in this section illustrates, Shapiro *is* picking out a version of a thesis that many positivists have taken to be central to—and, indeed, often definitive of—what legal positivism is. Thus, by using Shapiro's definition of legal positivism, this will allow me to address a version of a thesis that many self-identified positivists have taken to be of central concern. Third, Shapiro's definition of legal positivism picks out a *philosophically interesting* and substantive thesis about the connection between law and morality. Since the Moral Aim Thesis also picks out a philosophically interesting thesis about the connection between law and morality—and one, moreover, that most leading legal positivists have (at least seemingly) denied—it is worth considering how the two theses relate to each other.[28] As my brief earlier discussion of possible readings of Finnis indicates, I take it, the relationship between these two theses, under consideration—namely, the Moral Aim Thesis and the thesis of legal positivism (as defined by Shapiro)—is something that might be directly relevant to *many* philosophers of law, and not just to those who have understood themselves as legal positivists.

Before moving on, it is important to emphasize here an important feature of Shapiro's understanding of the nature of legal positivism—a feature that will be significant in evaluating whether or not the Moral Aim Thesis is compatible with legal positivism (as Shapiro has defined it). As Shapiro has defined legal positivism, legal positivism is actually the conjunction of two theses; one about

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[27] It should be emphasized that, in using Shapiro's definitions positivism and antipositivism, I do not intend to fully endorse these definitions as the most philosophically fruitful ones to use in general. Rather, I think that they are the best ones to use *for the purposes of this paper*. In fact, I think that there are some significant issues about the type of definitions of positivism and antipositivism that Shapiro gives here—issues that I take up at length in other parts of my work. For further discussion of these issues, see my discussion in Plunkett, 'A Positivist Route' (n 20) of Greenberg's similar definitions of positivism and antipositivism.

[28] It is worth contrasting this situation here with how it would look if we used what Hart termed 'the separability thesis' HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593. According to Hart, this thesis consists in the claim that there is no necessary connection between legal and moral norms. Hart claimed that positivism consisted in the acceptance of the separability thesis. If positivism is understood in this way, then the Moral Aim Thesis looks to be clearly incompatible with positivism. This is because the Moral Aim Thesis *does* assert some necessary connection between legal and moral norms: roughly, as I will soon explain in depth, it asserts the thesis that legal norms are those norms created, applied, and enforced by a type of social organization that aims to follow certain moral norms in its activity. However, it is now widely acknowledge that Hart's separability thesis is not a good way of explaining what legal positivism is. In part, this is because there are *many* different potentially necessary connections between legal and moral norms that one might be concerned with. These include fairly superficial ones that look to be obviously true: for instance, the fact that both legal and moral norms are necessarily *norms* that in some way seek to govern practical activity by setting standards by which activity can be deemed successful or not. This general point about the separability thesis is emphasized in Leslie Green, 'Positivism and the Inseperability of Law and Morals' (2008) 83 NYU L Rev 1035.

the grounds of legal systems (in the sense where this means *legal institutions*), and the other about the grounds of the legal content of that legal system. This follows from the way in which Shapiro has defined a legal fact: 'a legal fact is a fact about either the existence or the content of a particular legal system'.[29] Thus, I will take that in order for Shapiro's Moral Aim Thesis to be compatible with legal positivism, it needs be compatible with the following two claims: (1) what makes it the case that a given organization is a *legal institution* does not include any moral facts, such as facts about the moral merit of that organization and (2) the ultimate grounds of legal content include only social facts, and not moral facts. These two theses are closely connected. Nonetheless, it is important to keep in mind that it is at least conceptually possible to defend one claim without the other: for instance, one might accept (1) but deny (2).[30]

3. *The Moral Aim Thesis*

In the last section, I discussed how I am understanding what legal positivism amounts to, for the purposes of this article. With this understanding of legal positivism in hand, we are now in a better position to address the question of what legal positivists should make of the Moral Aim Thesis. However, in order to address this question with the care it deserves, we also need to get a better grip on what exactly the Moral Aim Thesis itself amounts to. This is an important task. If the history of the philosophy of law is any guide to the likely responses of people reading this article, then it is likely that although the Moral Aim Thesis will resonate with some readers on first-pass, others will find it objectionable (or perhaps even unintelligible) upon first encountering it. In this section, I will attempt to at least help make the thesis more intelligible (even if not fully intelligible) as well as explain the reasons that Shapiro thinks that we should believe it. In so doing, I will also thereby situate the Moral Aim Thesis in the context of Shapiro's overall theory of the nature of law.

As I stated in the introduction, the Moral Aim Thesis is a thesis that the law has a certain essential property. In order to understand roughly what sort of thing (or group of things) Shapiro intends this claim to be *about,* one needs to distinguish between two different relevant ways in which we use the term 'law' in the context of legal discourse. One way in which we use the term 'law' is to refer to *legal norms,* such as in 'intellectual property law in America', 'the laws in America that regulate intellectual property', or, more generally (in order to refer to all the legal norms that obtain in America in certain conversational

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[29] Shapiro (n 1) 25.

[30] It is worth emphasizing here that some combinations of views are more difficult to hold than others. For instance, suppose one denied (1). Insofar as (i) the correct account of legal content shows that legal norms are legal norms partly in virtue of their connection to legal institutions and (ii) the type of grounding relations that matter in this context are transitive, then the view that facts about the existence of legal institutions are ultimately grounded in moral facts will yield the view that facts about legal content are also grounded in moral facts.

contexts) simply 'American law'. Another way in which we use the term 'law' is to refer to *legal institutions,* such as in 'the law normally claims the right to use force to ensure compliance with its rules'.[31] In this latter use of the term 'law', we are not referring to legal norms, but rather to the legal institutions that apply and enforce those norms.

Shapiro is careful to distinguish these two different ways of using the term 'law' and is explicit that the Moral Aim Thesis concerns the nature of legal institutions. Somewhat more specifically, Shapiro puts the thesis as one about the activity of exercising legal authority (what he calls 'legal activity'[32] for shorthand). In *Legality*, Shapiro takes discussion of 'the exercise of legal authority' to be a largely neutral way of describing the essential activity of legal institutions as such, a description that he thinks should be unobjectionable to most contemporary philosophers of law. Thus, in advancing a claim about the essential nature of the activity of exercising legal authority (ie what Shapiro calls 'legal activity'), Shapiro aims to be making a claim about the nature of legal institutions.

The overall thesis about the nature of legal institutions that Shapiro defends in *Legality* is that legal institutions are a specific type of social organization that is engaged in the activity of creating, carrying out, and enforcing social *plans* for guiding and coordinating the activity of agents. This thesis is the core of what Shapiro calls the Planning Theory of Law, a theory that we can understand to encompass both an account of the nature of legal institutions and an account of the nature of legal norms. In the next section of this article when I consider the status of Shapiro's Moral Aim Thesis with respect to legal positivism, I will sketch why Shapiro thinks that the Planning Theory's basic account of legal norms constitutes a positivist theory of law. However, for now, what matters is how the Moral Aim Thesis fits together with the Planning Theory's broader account of the nature of legal institutions.

Shapiro introduces the Moral Aim Thesis in large part because he thinks that his theory of the nature of legal activity would be extensionally inadequate without it. Thus, in order to appreciate this motivation for the Moral Aim Thesis—as well as situate what the Moral Aim Thesis *is*—it will be helpful to have a grip on what other theses Shapiro advances about the nature of legal activity. There are six other main theses on this front, all of which Shapiro argues for at length in *Legality*. In what follows, I will simply outline what these claims are so that we have a working sense of the overall shape of the Planning Theory's account of the nature of legal institutions.[33] Understanding the basic gist of these claims can help us better understand the explanatory role that the

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[31] Shapiro (n 1) 5.
[32] ibid 195.
[33] My discussion in what follows is closely modelled on my more comprehensive discussion of Shapiro's account of the nature of legal institutions in David Plunkett, 'The Planning Theory of Law I: The Nature of Legal Institutions' (2013) 8 Philosophy Compass 149.

Moral Aim Thesis is meant to play within the Planning Theory, as well as what the Planning Theory might amount to when developed without the Moral Aim Thesis (eg when developed using the Represented-as-Moral Thesis that I will put forward later in this article).

A. *The Planning Thesis*

'Legal activity is an activity of social planning.'[34] There are two main claims involved in this thesis. The first claim is that legal activity is planning activity. The second claim is that this planning activity is specifically a form of *social* planning. In making the first claim, Shapiro intends to be drawing on a largely intuitive sense of 'plan' that most of us are familiar with from everyday life. Consider here my plan to go running tomorrow morning or the shared plan my friend Anna and I have for playing video games together next weekend with her husband Alexi. According to Shapiro, legal activity consists in the same sort of prosaic planning activity that is involved in making these everyday sorts of plans. Shapiro goes into great detail of what exactly plans are and how planning activity works in *Legality*, but, for our purposes at hand, we can put those details to the side for now.[35] In claiming that legal activity is 'social' planning, Shapiro means to highlight three features of legal activity, which I will just list here rather than explain. These features are: (i) 'the activity creates and administers norms that represent *communal standards of behavior*';[36] (ii) 'the planning regulates most communal activity via *general policies*';[37] and (iii) 'the planning regulates most communal activity via *publicly accessible standards*'.[38]

B. *The Shared Agency Thesis*

'Legal activity is a shared activity.'[39] Shapiro claims that legal activity is *shared* in the following sense: those engaged in legal activity are engaged in carrying out a shared plan. There are three things that are worth noting here. First, as we are familiar with from everyday life—such as when Kenny grudgingly follows his basketball coach's plans for what position he will play in the big upcoming game—people can be alienated from the overall shared plan that they are following. Secondly, as the above example also illustrates, people can also lack any role whatsoever in creating or modifying that plan. Thirdly, the people carrying out a shared plan need not ever have the content of the overall plan as the object of their intention. Instead, they need only *carry out* the part

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[34] Shapiro (n 1) 195.
[35] I discuss some of Shapiro's core thoughts about the nature of plans in Plunkett, 'The Planning Theory of Law I' (n 33).
[36] Shapiro (n 1) 203.
[37] ibid.
[38] ibid.
[39] ibid 204.

of the overall plan that concerns them. This will be a particular subplan, or particular subplans, of the overall plan.

C. *Legal Activity is Official Activity*[40]

By this, Shapiro means that legal activity is planning activity in which individuals occupy *offices*—eg the office of the prime minister or the office of a justice of the Supreme Court. As Shapiro emphasizes, one of the key features of offices is that 'the rights and responsibilities that attend the office do not depend on the identity of those who inhabit the office'.[41] This stems from the fact that offices are usually created in order to deal with a set of recurring issues in a community, where those issues don't depend fundamentally on the identities of those inhabit the offices. Because of this fact, it is also the case that (i) offices are generally (though need not necessarily be) relatively stable and (ii) the identities of those who occupy the office not only *can* change but, indeed, it is often expected that this will be so (eg we don't expect someone to be a justice of the Supreme Court for 300 years).[42] Shapiro uses the term *master plan* to refer to the plan that regulates the planning activity of those planners who plan for a group as a whole. In cases involving officials planning for the group as a whole, the master plan is therefore the plan that regulates the activity of social planning among officials who perform this activity. Importantly, this master plan is a shared plan for the planners, rather than for the group as a whole.[43]

D. *Legal Activity is Institutional Activity*[44]

Shapiro's key thought here is this: 'legal relations may obtain between people independent of the particular intentions of those people'.[45] This is what, for him, makes 'the normativity of law "institutional" in nature'.[46] This feature of law, claims Shapiro, stems from a fact about the structure of master plans in the law. As he puts it, 'master plans contain not only authorizations but instructions as well, namely, plans that specify how the authorized power should be exercised. These instructions will typically set out formal procedures that allow people to exercise power even without the intention to do so'.[47]

Shapiro claims that groups that engage in planning activity that is shared, official, and institutional make up a theoretically important subclass of groups engaged in planning. He therefore introduces a term—'organization'—to refer

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[40] ibid 209.
[41] ibid.
[42] ibid 209.
[43] ibid 165.
[44] ibid 210.
[45] ibid.
[46] ibid.
[47] ibid.

to such groups.[48] With this definition in hand, Shapiro's view about the nature of legal institutions can then be put as follows: legal institutions are organizations of a particular type. Shapiro aims to identify exactly what type with two further theses, one of which concerns the compulsory nature of legal activity and the other of which is the Moral Aim Thesis.

E. *Legal Activity is Compulsory Activity*[49]

In some cases, the plans of an organization apply only to a given person if that person accepts to be governed by those plans. For instance, suppose that there is an organization called EPIC that owns and regulates the use of a ski resort called Epic Mountain in Colorado and requires that users behave in a certain way (eg abide by certain specific safety protocol) when skiing at Epic Mountain. EPIC requires that all skiers who wish to ski at Epic Mountain sign a form consenting to the rules that EPIC has in place before skiing there, rules that it then enforces at Epic Mountain (but not at other resorts that EPIC doesn't own). Suppose that Jill lives in Colorado and frequently skis at resorts. Given the way that EPIC has set things up, if Jill wants to ski at Epic Mountain, she then needs to voluntarily sign a form that allows her to ski there, part of which will involve her consenting to be governed by certain plans that EPIC has in place for how skiing activity will be regulated at the resort. Without Jill's consent, EPIC's plans will not directly apply to her. This is different than with the law. Instead, as Shapiro puts it, in the case of law, 'consent is not a necessary condition for the applicability of its requirements'.[50] The planning activity of an organization is 'compulsory' whenever consent is unnecessary in this way.[51]

F. *Legal Activity is Self-Certifying Activity*[52]

Shapiro's claim here stems from the following observation: some organizations (eg state governments in the United States such as the Florida state government) are free to enforce their plans without first gaining permission from a superior planning organization, whereas other planning organizations (eg the private board of a condominium complex in Florida) cannot do this. Shapiro introduces the phrase 'the general presumption of validity' to capture this feature that state governments have but that private condo boards lack.

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[48] ibid.

[49] ibid.

[50] ibid 212.

[51] It should be stressed that, for Shapiro, when the activity of an organization is compulsory, this does not entail that the moral legitimacy of that organization's plans can be established in the absence of consent. Whether or not that is so is a separate topic for normative theory in moral and political philosophy. Shapiro's point here is a descriptive one that some organizations apply and enforce their plans on subjects regardless of facts about either the hypothetical or actual consent of those subjects. Shapiro's claim is that legal institutions are such an organization.

[52] ibid 220.

He defines this notion as follows: 'X enjoys a general presumption of validity from a superior planning organization Y whenever Y does not require X to demonstrate the validity of its rules before they are enforced.'[53] In turn, Shapiro calls an organization a 'self-certifying' one if it enjoys such a general presumption of validity. As he puts it, on this stipulative usage of 'self-certifying', a planning organization is self-certifying 'whenever it is free to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid'.[54] Or, to put it another way, a planning organization 'will be self-certifying whenever it is supreme or enjoys a general presumption of validity from all superior planning organizations'.[55]

It should be noted that this last thesis about self-certifying activity is meant to capture some of what people have wanted to capture with the thesis that all legal systems enjoy a monopoly on the legitimate use of force within its territory. Shapiro rejects that thesis about the monopoly of coercive force for the following basic reason: 'if the Condo Board does not enjoy a monopoly on the legitimate use of force within its territory, neither does the Florida legal system. After all, Floridians are permitted to use force in certain circumstances'.[56] To make this point, Shapiro asks us to imagine that the president of the condo board sees one of the residents of the condo complex trying to burn down a building, perhaps one of the buildings in the condo complex itself. Shapiro writes that 'Florida law would permit the president to use nondeadly force, and in some instances deadly force, to restrain the resident. Hence, even the state of Florida does not have or claim a monopoly on the legitimate use of force within Florida'.[57] The key difference that explains why the condo board is not a legal institution and the state of Florida, claims Shapiro, must therefore be found elsewhere. His proposal that 'legal activity is self-certifying activity'[58] is meant to locate exactly where that difference lies.

Put together, Shapiro thinks that the six theses that I have just sketched above do much to illuminate the nature of legal activity. However, he thinks that were proponents of the Planning Theory to stop with these six theses alone, they would then be left with an account that is extensionally inadequate. To see why this is so, Shapiro asks us to consider highly advanced criminal organizations, such as the Japanese Yakuza or the Sicilian Mafia. Shapiro states the following about these organizations:

> These firms are compulsory planning organizations: their members engage in collective planning designed to further shared criminal ends, they occupy offices (for example, the don, consigliores, capos, lieutenants, bodyguards, hitmen, and so

[53] ibid 221.
[54] ibid.
[55] ibid.
[56] ibid 219.
[57] ibid.
[58] ibid 220.

forth), their normativity is institutional in nature (for example, the Yamaguchi-gumi of Japan has tens of thousands of members and as a result has an extremely complex hierarchical structure), and they do not require consent before imposing their demands on their victims.[59]

Yet, despite these facts, Shapiro thinks that these organizations are *not* legal institutions. This, he thinks, is supported by our own reflective judgments about what is and is not a legal institution.

It should be noted here that when Shapiro first makes this claim about the Yakuza and the Sicilian Mafia, he does not explicitly consider them as meeting all six of the above theses I sketched above. Rather, he only explicitly says that they meet the first five, excluding the thesis that legal activity is self-certifying activity. However, it is fairly straightforward to see how an advanced criminal organization could be self-certifying in Shapiro's sense—eg if they were the most superior planning organization in their community, or perhaps in the entire world. Shapiro evidently does not think that such an organization would constitute a legal system. Otherwise, he would have no reason to introduce the Moral Aim Thesis given the other obvious resources of his Planning Theory. Hence, we can assume that Shapiro thinks that criminal organizations that meet all six theses that we have on the table are not legal institutions, and that this is supported by our own reflective judgments about what is and is not a legal institution.

If this claim about our reflective classificatory practices is right—and if it is also right that that our classificatory practices here are onto something important about the nature of the things that we are classifying in this way—then we need an explanation of why these criminal organizations are not legal institutions. The best explanation of this fact, claims Shapiro, is that these complex criminal institutions do not have a moral aim, whereas legal institutions do. His core thought here is that although an advanced criminal organization *might* in fact produce morally good benefits, it is not part of their essential mission to do so. However, claims Shapiro, it is precisely part of the fundamental mission of legal institutions that they do so. In particular, Shapiro claims that it is part of the essential mission of legal institutions to provide morally good solutions to morally significant social problems—for instance, the problem of figuring out how to divide material resources among a large group of agents or the problem of figuring out how to regulate the use of vehicles that people use for transportation—in cases where other, less formal ways of guiding the activity of agents won't work.

Shapiro sometimes puts this point in terms of what legal institutions can do in providing moral solutions to problems that arise within 'the circumstances of legality'. By 'the circumstances of legality' Shapiro means to refer to those conditions that typically give rise to the need to introduce legal institutions in

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[59] ibid 215.

the first place—the conditions, in short, where non-legal methods of guiding human conduct aren't able to accomplish all of the things that people want to do (or at least should want to do) with those methods given social issues that arise as groups become larger and more diverse in their composition. Shapiro's understanding of what these conditions are stems from the basic idea that as a group of agents increases in size, as well in the diversity of the views of the agents that compose it, the group will likely face a number of morally important issues, including, for instance, the moral issues that I just sketched above. As Shapiro sums it up, the circumstances of legality are ones in which a 'community faces moral problems that are numerous and serious, and whose solutions are complex, contentious, or arbitrary'.[60] In such a scenario, claims Shapiro, other existing ways that the group has for guiding the activity of its members will run into problems, for instance, 'improvisation, spontaneous ordering, private bargaining, communal consensus, or personalized hierarchies will be costly to engage in, sometimes prohibitively so'.[61] According to Shapiro, the aim of legal activity is to provide a way of guiding the activity of agents that allows the group to effectively deal with these morally important social issues that it faces. This leads Shapiro to his official formulation of the Moral Aim Thesis in *Legality*: 'the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality'.[62]

It is crucial to understand that Shapiro does *not* think the Moral Aim Thesis is true in virtue of the fact that the agents involved in legal activity—eg judges, police officers, etc.—are generally morally good people or people who have generally moral goals that they themselves are pursuing. Neither does he think it is true because the legal institution itself can be said to be *actually trying* to bring about morally good results. In fact, as we have seen, Shapiro is explicit that legal actors (as well as legal institutions) often are trying to bring about results that are morally bad. As he writes, 'it is easy for me to imagine legal systems that are evil. In fact, human history is littered with examples of precisely such wicked regimes; in the last century alone, there have been the Nazis, the Soviet Union, the Taliban, the Iraqi Baathists and the Burmese junta, to name only a few of the many possible candidates.'[63] The existence of morally bad legal systems might lead one to think that the Moral Aim Thesis is false. However, according to Shapiro, this would involve a fundamental misunderstanding of what the Moral Aim Thesis is. According to Shapiro, the Moral Aim Thesis is true in virtue of what *legal activity* as such aims to do, regardless of whether or not any legal institutions in fact fulfil that aim or not.

As I discussed above, Shapiro thinks that one important piece of evidence for the Moral Aim Thesis is that it helps explain the difference between legal

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[60] ibid 213.
[61] ibid.
[62] ibid.
[63] ibid 16.

institutions and certain highly advanced criminal organizations. Shapiro also cites three further considerations that he thinks support the Moral Aim Thesis.

First, Shapiro argues that the Moral Aim Thesis 'explains why we think that law is invaluable in the modern world but not, say, among simple hunter-gatherers'.[64] This is because simple hunter-gatherers do not exist in the circumstances of legality that are a crucial reality in the modern world. Thus, claims Shapiro, there is no need for simple hunter-gatherers to have legal systems. The Moral Aim Thesis smoothly captures why this is so.

Second, Shapiro argues that 'the Moral Aim Thesis explains why legal systems that are unable to solve serious moral problems are criticizable'.[65] Consider, for instance, the fact that as, Shapiro puts it 'no one blames baseball for failing to alleviate poverty or protecting populations from natural disasters, but a legal system that ignores such problems, or addresses them incompetently, is subject to rebuke'.[66] As I understand it, Shapiro's thought here is that the Moral Aim Thesis explains this fact as follows: just as all toasters are apt to be criticized for not making good toast *in virtue of being toasters*, and not apt to all be criticized for failing to be good doorstops (despite the fact that they can be used in that way), legal institutions are apt to be criticized for failing to solve serious moral problems simply *in virtue of* them being legal institutions. In contrast, consider the advanced criminal organizations again that we discussed earlier. In broad terms, I take it that Shapiro's thought here is that we criticize such criminal organizations based on the fact that *everything* is in principle criticizable for being immoral, even if *being moral* isn't an internal norm of the thing itself.

Third, Shapiro argues that 'additional support for the Moral Aim Thesis can be gleaned from the diverse reactions we have to situations in which morally good consequences are produced'.[67] Shapiro suggests the following. On the one hand, he claims that when criminal organizations produce morally good results 'these occurrences are treated by us as *serendipitous,* as happy accidents'.[68] On the other hand, he claims that we do not see the morally good results that are brought about by legal institutions as happy accidents at all. Rather, when legal institutions bring about good results, we think that this is exactly what legal institutions are supposed to do. The Moral Aim Thesis explains this as follows: just as we do not view toasters effectively toasting things as a happy accident *because* of the constitutive aim of toasters as such, we do not view producing morally good results of legal systems as happy accidents *because* of the constitutive moral aim of legal institutions as such.

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[64] ibid 214.
[65] ibid 212.
[66] ibid 214.
[67] ibid 216.
[68] ibid.

4. *Should Legal Positivists Accept the Moral Aim Thesis?*

What should legal positivists—or, more broadly, those philosophers that are generally sympathetic to legal positivist tradition—make of the Moral Aim Thesis? In order to tackle this question, I will first start with the question of whether or not the Moral Aim Thesis is even *compatible* with the core thesis of legal positivism as such. I will argue that there is good reason to think that there is *at least* one version of the Moral Aim Thesis that is compatible with legal positivism. Furthermore, I will claim that this is arguably the version of the Moral Aim Thesis that Shapiro is trying to defend. However, I will also argue that the aspiring positivist faces significant difficulties in arguing for this version of the Moral Aim Thesis. Following this, I will then put forward an argument that positivists should be sceptical of the Moral Aim Thesis even if these difficulties can be overcome.

A. *Is the Moral Aim Thesis Compatible with Legal Positivism?*

In considering whether or not Shapiro's Moral Aim Thesis is compatible with legal positivism, it is crucial that we have a good grip on what exactly legal positivism *is*. For the reasons that I stated at the start of this article, I will adopt Shapiro's own understanding of what legal positivism is for the purposes of this article. To repeat, on this understanding, *legal positivism* is the thesis that legal facts are ultimately determined by social facts, and not moral facts, whereas, in contrast, *legal antipositivism* is the thesis that legal facts are ultimately determined by both social facts and moral facts.

In order to evaluate whether or not Shapiro's Moral Aim Thesis is compatible with legal positivism thus defined, recall that legal positivism thus defined is actually the conjunction of two theses; one about the grounds of legal systems (in the sense where this means *legal institutions*), and the other about the grounds of the legal content of that legal system. This follows from Shapiro's definition of 'legal fact' that I am working with. Recall that Shapiro defines 'a legal fact' as follows: 'a legal fact is a fact about either the existence or the content of a particular legal system'.[69] Thus, in order for Shapiro's Moral Aim Thesis to be compatible with legal positivism, it needs be compatible with the following two claims: (i) what makes it the case that a given organization is a *legal institution* does not include any moral facts, such as facts about the moral merit of that organization and (ii) the ultimate grounds of legal content include only social facts, and not moral facts.

With this understanding of legal positivism in hand, it is then clear that if we wanted to evaluate whether or not Shapiro's Planning Theory *on the whole* delivers a form of legal positivism or not, we need to know more than just its account of the nature of legal institutions. In particular, we need to have on the

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[69] ibid 25.

table the second half of Shapiro's Planning Theory of Law—namely, its account of the nature of legal norms.[70] With this in mind, in order to lay the groundwork for the discussion of the Moral Aim Thesis in particular, let me briefly pause here to introduce the Planning Theory's account of the nature of legal norms.

In basic terms, according to the Planning Theory, the legal norms of a given legal system (the norms that Shapiro takes to comprise the legal content of that legal system) consists in the full set of plans created, applied, and enforced by legal institutions, regardless of the moral merits of those plans or those institutions. In addition, Shapiro thinks that legal institutions sometimes apply and enforce what he calls *plan-like* norms: norms that are like plans in every crucial respect except for the fact that they were not intentionally created with the aim of guiding human activity. For Shapiro, an example of plan-like norms (perhaps *the* crucial example in the context of the law) are norms of custom. When legal institutions apply and enforce such plan-like norms, Shapiro claims that these norms also form part of the content of the law as well.

Shapiro thinks that what plans legal institutions have (as well as what the content of those plans is) depends on social facts, but not on moral facts. This is, for him, directly parallel to how the plans that a group of terrorists have to blow up a building does *not* depend on moral facts, but rather on descriptive facts about the terrorists and their behaviour, as well as, perhaps, certain environmental facts about their situation or non-moral norms that figure into content-determination in general. Thus, at least when legal positivism is understood along the broad lines advocated by Shapiro, Shapiro's Planning Theory seems to qualify as a form of legal positivism if we are considering the Planning Theory's view about the grounds of legal content. Moreover, at least on the face of it, none of the conditions that we looked at in the last section in Shapiro's account of what it takes for an organization to count as a legal institution explicitly make mention of the *moral merit* of that organization. This suggests that Shapiro's Planning Theory also seems to qualify as a form of legal positivism if we are considering the Planning Theory's view about the nature of legal institutions.

In the context of this article, the crucial question is this: does Shapiro's endorsement of the Moral Aim Thesis jeopardize the positivist status of what otherwise appears (at least on the initial characterization of the Planning Theory above) to be a thoroughly positivist view? A reasonably good test for figuring out whether this is so is to see what the view yields if we suppose that there are no moral facts. If Shapiro's view then yields the result that there are no facts of legal content (or, alternatively, no legal institutions) then we have reason to hold that his view is an antipositivist one. Alternatively, if it does not

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[70] My discussion in what follows stems from my more comprehensive discussion of Shapiro's account of the nature of legal norms in Plunkett, 'The Planning Theory of Law II' (n 16).

yield this result, then we have reason to hold that his view is a positivist one. The reason why this is a reasonably good test—even if not a perfect one—is for the following reason: if there are only legal facts insofar as there are moral facts, then this gives us good *prima facie* reason to think that legal facts are partly grounded in moral facts.[71]

What, then, does Shapiro's view yield if there are no moral facts? To answer this question, we need to distinguish some different things that one might have in mind when one talks of something (X) 'aiming' at something else (Y). One way in which we say that 'X aims at Y' is when a person has an intention to accomplish something—eg when Sheila intends to apply to medical school this coming fall, we might say that she aims at applying to medical school this coming fall. Call this the *intention-based* sense of 'X aiming at Y'. A second way in which we say that 'X aims at Y' is when someone is heading in the direction of accomplishing Y, regardless of that person's intentions to accomplish Y or not—eg when John's career as a corporate lawyer at a firm is going well, and he is thus on his way to making partner, we might say that his activity is aimed at making partner. In this case, the activity 'aims' at something insofar as that activity seems describable with reference to a certain telos that it is actually heading toward. Call this the *trajectory-based* sense of 'X aiming at Y'. A third way in which we say 'X aims at Y' the context of describing something akin to the success-conditions for that activity in question—eg when philosophers talk about how 'belief aims at truth' or 'the aim of toasters is to toast things'. Call this the *success-conditions-based* sense of 'X aiming at Y'.

Which of these senses of 'X aiming at Y' matters for understanding and developing the Moral Aim Thesis? Let's start with the intention-based sense of 'aim'. Most of the obvious ways of developing the Moral Aim Thesis using this sense of 'aim' will straightforwardly run into trouble maintaining compatibility with legal positivism: for if we require that legal actors (or legal institutions)

[71] There are a number of different important worries about this proposed test. One important worry is tied to questions about the grounds of moral facts. Suppose (i) that moral facts and legal facts are both partly grounded in X facts and (ii) that legal facts are not grounded in moral facts. Such a picture appears to be a coherent positivist account of the nature of law. Yet, if we imagine that there are no moral facts, we might arguably be thinking (or perhaps that we *have* to think, depending on the details of the account of moral facts) that there are no X facts—which will also have the result that there are no legal facts. My proposed test would suggest that the view is then an antipositivist one. And this seems like the wrong result. A second worry about my proposed test stems from the fact that many philosophers think that moral facts are necessary facts. If so, it thus becomes hard to see how one can reason about possible scenarios in which there are no moral facts. After all, if moral facts are necessary facts, then there are no possible scenarios in which there are no moral facts. There is much to say in response to both worries. For instance, in response to the second worry, one might respond by arguing either that (i) moral facts are contingent facts or (ii) *insofar as* there are any moral facts, then those moral facts must be necessary facts, but that is quite a separate matter to show that are in fact any moral facts. However, it is beyond the scope of this article to discuss these proposals—as well as the broader relevant issues here that matter in responding to these two basic worries about my proposed test—with the care that they deserve. I therefore ask the reader that is sceptical of my proposed test to either (i) allow me the use of this test for my limited purposes of argument in this article or (ii) simply wait and see if what I say in what follows is convincing even without relying on my proposed test as a literal test of the positivist status of a view. Thanks to Billy Dunaway, Alexi Burgess, and Dustin Locke for helpful discussion about these and related worries about this style of proposed test for distinguishing positivist and antipositivist views about the nature of law.

actually have morally good goals in order to be as legal institutions, we then are using facts about moral merit in our account of the nature of legal institutions. Perhaps there is a more complicated story that one could tell here to avoid this result. But I do not see an obvious way of doing so. Perhaps more importantly, as I discussed in the last section, Shapiro is explicit that the Moral Aim Thesis does *not* require that agents involved in a legal system actually have what we would think of as morally good intentions. Indeed, he thinks that, in many cases, the agents involved in legal activity have morally bad intentions—eg intentions to accomplish goals that are morally bad. And he also thinks that legal institutions themselves—insofar as we can describe them as having goals or intentions—can also have morally bad intentions or goals. Thus, it does not seem that the Moral Aim Thesis—at least as Shapiro is defining it—should be developed using the *intention-based* sense of 'X aiming at Y'.

Now consider using the trajectory-based sense of 'X aiming at Y'. Most of the obvious ways of developing the Moral Aim Thesis using this sense of 'X aiming at Y' will again straightforwardly run into trouble maintaining compatibility with legal positivism: for if we think that the (purported) fact that legal institutions are historically heading in a morally good direction is part of the nature of legal institutions as such, we then are using facts about moral merit in our account of the nature of legal institutions. Crucially, however, Shapiro never stakes out any historical claim in *Legality* that legal systems in our world are actually developing toward accomplishing morally good aims. Indeed, his discussion of bad legal regimes in recent history suggests that he might in fact be deeply sceptical of such an optimistic historical claim. Thus, it does not seem that the Moral Aim Thesis—at least as Shapiro is defining it— revolves around the *trajectory-based* sense of 'X aiming at Y'.

If this is right, then we are left with the *success-conditions-based* sense of 'X aiming at Y' (or else some other sense that I have not canvassed here). And, indeed, as our earlier quotes from Shapiro indicate, something like this *success-conditions-based* sense of 'X aiming at Y' is the version that Shapiro appears to want, and which I have been using to put forward the outlines of his view. Thinking that this is the way to read the Moral Aim Thesis, for instance, makes good sense of why Shapiro says things such as 'unjust regimes are like broken clocks....They do not do what objects of their type are supposed to do'.[72]

There is at least good *prima facie* reason to think that using a *success-conditions-based* sense of 'X aiming at Y' in an account of the metaphysics of law is compatible with thinking that law can exist even if there are no moral facts. Consider, by way of analogy, a religious organization that aims at achieving communion with God.[73] This organization might be said to be successful only if it actually achieved such communion. This success might,

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[72] ibid 391.
[73] Thanks to Tristram McPherson for suggesting this particular example.

however, be impossible—eg if God does not exist. Similarly, suppose we grant Shapiro that legal institutions are only successful if they actually accomplish morally good results by morally good means. If there are no moral facts, then they might never be successful. But, in this regard, legal institutions would then be no different than religious organizations that (assuming God does not exist) are doomed to failure because of the impossibility of communion with God.

The trouble for Shapiro here is that the reason we would likely hold that a religious organization aims at communion with God is because of intentions that members of that organization have to actually commune with God. Absent such intentions, it is not clear why communion with God is a success-condition for their activity at all. Similarly, consider the case of toasters. Why is it a success-condition of toasters that they toast things? One good explanation is, again, because of the intentions of people to actually toast things. Indeed, we might say that, roughly, toasters are the sorts of things that fall into the class of artefacts both *designed by* and generally *used by* people to toast things.

To take one final example, suppose we are inclined to say 'the fundamental aim of hospitals is to promote health' (or, similarly, 'the fundamental aim of schools is to promote education'). Imagine a situation in which people generally do not use hospitals to promote health and in which people did not initially design hospitals in part to promote health. Furthermore, imagine that they have not used hospitals in such a way for thousands of years. Now suppose that someone says in this context 'the fundamental aim of hospitals is to promote health'. In such a context, one way to read this claim as a covert normative claim about how we should be running hospitals. Another way to read it is as deploying what is really a covert thick normative term. Neither of these options would help provide Shapiro—or, more generally, the legal positivist who wants to argue for the Moral Aim Thesis—with a helpful analogy. What would be helpful is, if, in such a context, we would be right to make the claim that 'the fundamental aim of hospitals is to promote health' as a way of making a claim about the *nature of hospitals* (understood as a purely sociological kind, rather than as a partly normative kind). However, it is not clear to me that this *would* be a correct claim. Relatedly, perhaps such a claim would be right in this context, but only because the organizations in this context are not themselves actually *hospitals*. Maybe these intuitions are off-track. However, the crucial point is that, even if this is so, it will not be much help to Shapiro without an explanation of exactly *why* they are off-track. In particular, he would need an account of what (if not social facts about the actual goals and intentions of people) warrants the use of a success-based sense of 'aim' talk in such a claim about the nature of hospitals. The crucial point here is that Shapiro does *not* (and, as a positivist, *should* not) want to make the success-conditions of legal activity depend on the (purported) fact that certain people had moral intentions in either creating or running legal institutions. Shapiro is explicit that the people who create and run legal institutions often

lack such intentions—and, moreover, I think that he is entirely correct in making this claim. So we need a way of accounting for why we are able to talk about the success-conditions of legal activity that doesn't fundamentally involve reference to such facts about intentions.

What, then, is the explanation of why the success-conditions of legal activity involve actually accomplishing morally good ends? One good option here is for Shapiro to appeal to an analogy with the way in which belief aims at truth. This is a good option because, however exactly it is that belief aims at truth, it seems that one can hold that *being true* is success-condition for belief regardless of the intentions of believers. Or, at the very least, one can hold that *being true* is a success-condition for belief even if one knows that many (perhaps most) people involved in the activity of believing do not themselves have a standing intention to believe truly. Perhaps, then, something parallel is true in the case of law (and, perhaps also, in the case of hospitals or schools).

There is also, however, a serious worry here for Shapiro if he goes this route. The worry is that it is a complicated question of exactly in what sense belief aims at truth (and, importantly, whether it can be said to so aim even if there is no truth). The basic thought seems to be that belief is subject to a certain norm of assessment—a norm that sets a standard which any given token belief can either successfully meet or not. However, it is not at all clear how exactly we should flesh this thought out further, or how we should explain *why* belief is an attitude that is regulated by this norm. Moreover, even if we could accomplish this above task, we would still be faced with the question of how the model we get from belief aiming at truth can coherently be carried over to a claim about the aims of an organization. In short, then, if the proponent of the Moral Aim Thesis appeals to the case of belief aiming at the truth, we might have a good route for developing a thesis that is compatible both legal positivism as well as with Shapiro's (correct) claim that the grounds of legal institutions do *not* include facts about the moral intentions of the agents involved in legal activity. However, at the same time, we are then left with a large new task at the centre of our theory of law: namely, to show that our best account of how belief aims at the truth can carry over to an account of how a given organization has a certain aim. It is not clear that this task can be accomplished—and, importantly, we do not yet have anything resembling a full account here from Shapiro on the table about how this will go. In short, any attempt to go this route must (i) engage systematically with the range of leading views on what it is for belief to aim at the truth;[74]

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[74] For different views on this topic see J David Velleman, 'On the Aim of Belief' in J David Velleman (ed), *The Possibility of Practical Reason* (Clarendon Press 2000); Nishi Shah and J David Velleman, 'Doxastic Deliberation' (2005) 114 Philosophical Review 497; Ralph Wedgwood, 'The Aim of Belief' (2002) 16 Philosophical Perspectives 267; Allan Gibbard, 'Rational Credence and the Value of Truth' in Tamar Gendler and John Hawthorne (eds), *Oxford Studies in Epistemology,* Vol. 2 (OUP 2008). For connected discussion of some of the key issues about epistemic normativity involved here, see Daniel J Singer, 'Doxastic Normativity' (University of Michigan 2012). It is worth emphasizing that these philosophers do *not* all agree on how to best cash out the core slogan that 'belief aims at truth'.

(ii) argue for a version of one of these views in particular (or argue for an entirely new view on this topic); (iii) show how this view helps illuminate the (purportedly) parallel way in which the law has a moral aim; and (iv) do so in a way that is compatible with Shapiro's claim that the grounds of legal institutions do *not* include any moral facts. This is work that Shapiro has yet to do, and—especially without a sustained engagement with the literature on how belief aims at the truth—it is far from clear that it can successfully be accomplished.[75]

It is worth noting another option that Shapiro might want to pursue here. Consider the following statements: 'eyes aim at seeing' and 'ears aim at hearing'. Such statements are plausibly read as involving the success-conditions-based sense of 'X aims at Y'. But it is also not the case that we designed eyes or ears or, indeed, that anyone did. Rather eyes and ears evolved via evolution. Moreover, it does not seem that we make these statements because of what we currently do with eyes and ears. Thus, we seem to have on the table here a way in which we can use the success-conditions base sense of 'X aims at Y' but without this being grounded in social facts about the intentions of agents. Perhaps, then, Shapiro can use such biological cases as the model for explaining the Moral Aim Thesis. However, the basic issue here is the same as with the above case of attempting to draw an analogy with how belief aims at truth. In short, to go this route, Shapiro would need to (i) engage systematically with the range of leading views on what it is for things such as eyes and ears to have success-conditions; (ii) argue for a version of one of these views in particular (or argue for an entirely new view on this topic); (iii) show how this view helps illuminate the (purportedly) parallel way in which the law has a moral aim; and (iv) do so in a way that is compatible with Shapiro's claim that the grounds of legal institutions do *not* include any moral facts. This would require significant argument beyond what Shapiro has provided in *Legality*.

The upshot of this discussion, then, is this. First, most straightforward ways of developing the Moral Aim Thesis using either the intention-based or trajectory-based sense of 'aim' clash with legal positivism. Furthermore, neither sense of the term 'aim' here fits well with Shapiro's own stated commitments in developing the Planning Theory. Nonetheless, it seems possible to develop a way of understanding the Moral Aim Thesis that both makes it compatible

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[75] Suppose that Shapiro, instead of appealing to the case of the constitutive aim of belief appeals to the constitutive aim of *assertion*. This idea is implicitly suggested by Shapiro when he writes the following: 'Imagine a legal system staffed by officials who merely pretend to pursue noble aims, but are solely after their own material gain. It would nevertheless be true that the aim of legal activity in that system is moral in nature (much as the aim of assertion is to convey true information even though the asserter is lying). It is simply an essential truth about the law that it is supposed to solve moral problems.' Shapiro (n 1) 216. Without a further story about what is involved in thinking that the aim of assertion is conveying true information—and, moreover, without a further story about *in virtue of what sort of facts* assertion has this aim—appealing to a parallel with how assertion aims at conveying true information won't be much help to Shapiro here. Furthermore, as with the case of belief aiming at truth, there is going to be significant philosophical debate about how to understand what is involved in thinking that assertion aims at conveying true information. Thus, an appeal to the constitutive aim of assertion faces the same basic difficulties that I outlined above with the appeal to the constitutive aim of belief.

with positivism, as well as fits with what Shapiro himself says about the Moral Aim Thesis: namely, to develop the Moral Aim Thesis using a version of the success-conditions-based sense of 'X aiming at Y'. However, it is not clear that any particular way of developing the thesis along these lines is simultaneously (i) compatible with Shapiro's other claims about the grounds of law (eg that actual moral intentions are not part of the grounds of law and that agents often use legal regimes to pursue morally bad goals); (ii) capable of doing the explanatory work that Shapiro wants the Moral Aim Thesis to do in his theory of law; and (iii) sufficiently developed to allow us to test whether or not the thesis is true. In sum: although the Moral Aim Thesis is potentially compatible with legal positivism, each way of developing the Moral Aim Thesis such that this is true faces some serious issues.

B. *Law as an Instrument*

With these issues on the table, I now want to turn to another, perhaps more serious, problem for the proponent of the Moral Aim Thesis. This is the question of whether—and to what extent—the Moral Aim Thesis is responsive to one of the major lines of thought that has pushed philosophers to endorse positivism in the first place. This line of thought concerns the idea that law is essentially a *tool* for agents to accomplish a wide range of goals. Shapiro himself captures this line of thought with admirable force when he writes as follows at the end of *Legality*:

> Although it is not a particularly inspiring or romantic description, the law is, in the end, an instrument. And like all instruments, it can be used for good or bad purposes. When the law is used for bad purposes, it is imperative not to paper over this fact by denying the identity of the instrument doing the damage. And when the law is used for good purposes, it is important not to become complacent and assume that it is guaranteed to succeed.[76]

Now, as Shapiro then notes following this statement, 'as with all instruments, there are correct and incorrect ways to use the law; if we use it incorrectly, it will not do what it is supposed to do and authorities will not do what they are entitled to do'.[77] Thus, it is open to Shapiro to hold that just as certain tools are what they are in virtue of what they are properly used to accomplish—for instance, perhaps the thesis that hammers are for hammering as opposed to being doorstops—so too is the law an instrument that itself has internal norms for its proper use, given the sort of thing that it is. However, part of the core idea for many positivists behind thinking of the law as an instrument is that it is the sort of thing that can be used properly for a wide range of human ends with different moral merit—for instance, just as a hammer can be used either to

[76] Shapiro (n 1) 399.
[77] ibid.

help make a home for someone in need or to build a weapon to kill innocent people. In those cases, we evaluate the moral merit of each respective activity differently, but we do not think that in one case the agent is failing at the activity of *hammering* whereas the other is not. This, of course, is precisely the sort of intuition that Shapiro's Moral Aim Thesis denies. Yet, in rejecting this intuition it is not clear that Shapiro can effectively draw on the metaphor of the law as a tool or instrument that has motivated many to legal positivism, and which Shapiro himself wants to use in his favour in arguing for the Planning Theory.

   None of this so far gives us conclusive reason to reject the Moral Aim Thesis. But it should, I think, give positivists some significant reason to be wary of accepting it. A crucial question, then, is whether or not there is an alternative, more attractive explanation of the data that Shapiro cites in order to motivate the Moral Aim Thesis, or whether we should reject that Shapiro has properly located the data that needs to be explained. For the purposes of this article, I want to largely grant Shapiro his description of the data that needs to be explained—and which he thinks provides strong evidence for the Moral Aim Thesis. However, in the next section, I will argue that there is an alternative explanation of the same data, which, crucially, denies that law has a constitutive moral aim and which, if I am right, better fits with the positivist line of thought that I just canvassed above. The explanation that I will offer appeals to facts about how people present what they are doing, facts that are, at least in the context of the philosophy of law, understood to be an uncontroversial sort of social fact. If I am correct, then appeal to such facts can explain the data that Shapiro appeals to the Moral Aim Thesis to explain but without involving us in the problems I have canvassed in this section for the Moral Aim Thesis. The result will ultimately be a different way of developing the Planning Theory of Law.

5. *The Represented-as-Moral Thesis*

Suppose for the sake of argument that all of Shapiro's theses about the nature of legal institutions are correct except for the Moral Aim Thesis. In Shapiro's terms, this means holding that legal institutions are compulsory planning organizations that are self-certifying. Furthermore, suppose that Shapiro is right that one needs to add a *further* thesis (or theses) in order to fully explain the nature of legal institutions. This is based on the idea that not all compulsory planning organizations that are self-certifying are legal institutions (for example, certain highly advanced criminal organizations). Now suppose that we want to introduce a further thesis that includes nothing about the fundamental *aim* of those institutions as such, let alone a further thesis that this aim is a specifically moral one. On such a theory, legal activity would turn out to be simply a type of planning activity that takes a certain form, but without an aim that is definitive of it being legal activity. Can such a theory be made to work?

One way to develop such a theory would be to draw on other theses that have been developed in the philosophy of law to distinguish legal institutions from other institutions. One obvious option here would be to pursue a Razian line that appeals to the way in which the law claims a particular kind of *authority* over its subjects (where this claim is then supplemented by an account of what that sort of authority amounts to).[78] There are things to be said here in favour of this option, and it deserves careful attention as a possible way of developing the Planning Theory of Law (in addition to simply being an interesting general thesis in its own right). I will return briefly later in this article to this proposed Razian line, when I discuss how it relates to the Represented-as-Moral Thesis that I will soon propose. However, for now, what I want to do is attempt to develop a theory that begins by granting Shapiro as much of his jurisprudential picture as possible—as well as grants Shapiro as much of his description of the relevant purported evidence in favour of the Moral Aim Thesis as possible—while nonetheless rejecting the Moral Aim Thesis. In the context of this article, my reason for this choice is purely strategic: I want to show how, even granting Shapiro almost everything he cites in favour of the Moral Aim Thesis, there is another option that is a better fit with positivism.

In order to develop a theory that accomplishes this goal, I want to first introduce another important element of Shapiro's discussion of the Moral Aim Thesis. Shapiro argues in *Legality* that, in order to impute a moral aim to an organization, one has to first show that high-ranking legal officials avow (perhaps insincerely) that their practice as officials in that organization has a moral aim.[79] This needs to be done, says Shapiro, both explicitly and implicitly. It needs to be done explicitly through such things as speeches, ceremonial steles, preambles to constitutions, prologues to legal codes and judicial dicta. And it needs to be done implicitly through such things as rituals, architecture, iconography and using moral discourse to describe their activity.[80] Second, Shapiro thinks that low-level officials must be involved in some of this activity as well. For instance, he claims that low-level officials must also use moral language to describe the law, even if, in so doing, they do not intend to in any way convince others that they endorse the legal institution that they are participating in. Instead, as Shapiro puts it, 'they may just be doing their job, one that requires them to evaluate conduct from the legal point of view [roughly, the point of view in which the law's norms are all morally valid]'.[81] Call these criteria *the moral-representation criteria*.

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[78] See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, OUP 1980); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 2002).
[79] Shapiro (n 1) 217.
[80] ibid.
[81] ibid.

One question for Shapiro is whether he intends an epistemological or metaphysical reading of how the fulfilment of these moral-representation criteria relates to the institution in question having a moral aim. On an epistemological reading, the moral-representation criteria would provide us with a good guide for figuring out when an institution has a moral aim. On the metaphysical reading, the moral-representation criteria would be constitutive of what it is for an institution to have a moral aim. Shapiro's discussion in *Legality* suggests the second, constitutive reading. This is emphasized, for instance, by Shapiro's claim that '[t]he law possesses the aim that it does because high-ranking officials represent the practice as having a moral aim or aims. Their avowals need not be sincere, but they must be made.'[82]

Against Shapiro, I think that there is good reason to deny that when a given organization fulfils the moral-representation criteria this provides *either* (i) epistemic support for judging that the organization has a moral aim or (ii) is constitutive of that organization having such an aim. In order to support this claim, consider that, at first blush, all that fulfilling the moral-representation criteria establish is (i) that there is some sense in which certain high-ranking officials that are part of an organization either believe or *are pretending* (eg for the sake of duping others and maintaining a form of social power) that the organization they are part of has a moral aim and (ii) that other lower-ranking officials use moral language to describe the law.

Now, it is open to Shapiro to argue that once people do this, it then follows that the organization in fact *has* a moral aim. Among other things, such an argument might be based on a more general principle that explains the conditions under which representing yourself as ϕ-ing makes you subject to constitutive norms that apply to ϕ-ing. The strongest such principle would claim that *whenever* you represent yourself as ϕ-ing this makes you subject to constitutive norms that apply to ϕ-ing. One might perhaps argue for this principle based on what it is involved in *representation* as such. There are, however, significant worries about such a strong principle. For instance, suppose that Oliver is acting in a play. His character in the play is a murderer that kills other characters in the play. So Oliver therefore represents himself as murdering people. Does the fact that Oliver here represents himself as murdering people mean that he is subject to the constitutive norms of murdering? That seems wrong. A more plausible answer would be that Oliver is subject to the constitutive norms of acting. Based on such cases, a more promising principle would likely look something like this: when such-and-such conditions hold, representing yourself as ϕ-ing makes you subject to constitutive norms that apply to ϕ-ing. Now, perhaps Shapiro can develop a principle here that will allow to him show that when certain officials represent themselves in accordance with the moral-representation criteria, it then follows

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[82] Shapiro (n 1) 216.

that the organization has a moral aim. I think this is a potentially promising way for Shapiro (or any other proponent of the Moral Aim Thesis) to go. However, Shapiro has yet to give us any such argument.

Moreover, in the context of this article, the more important point is this: we do not even need to develop such an argument to support the Moral Aim Thesis. This is because there is an alternative thesis that gives positivists a more attractive way of accounting for the data that Shapiro wants to explain. It is enough to capture the relevant considered intuitions here about what separates legal institutions from non-legal ones (namely, at least those intuitions of those sympathetic to the legal tradition)[83]—to draw on the following idea: that it is part of the essence of some organizations that they involve the sort of surface-level moral self-presentation that Shapiro's moral-representation criteria draw our attention to. This leads to an alternative to the Moral Aim Thesis. It is that legal activity involves *at least* the different forms of surface-level moral presentation identified by that organization meeting the moral-representation criteria (or some slightly revised version of them). Call this the *Represented-as-Moral Thesis*.

Now, it should be obvious that many legal philosophers will not like the Represented-as-Moral Thesis. Most antipositivists, for instance, will think that the Represented-as-Moral Thesis totally misses the point of what legal institutions are and makes it possible for certain legal systems to be too close to criminal organizations that have a cynical veneer of moral self-presentation. However, as I will suggest shortly, I think that is exactly what some legal organizations are. Furthermore, the fact that my proposed Represented-as-Moral Thesis will strike many as wrong is no different than the Moral Aim Thesis—which likely will be rejected by a wide range of both antipositivists and positivists. In the context of this article, the crucial question is which view is a better one for positivists to endorse given the phenomena that Shapiro has drawn our attention to (and, which, for the sake of argument, I am granting he has correctly represented). Here, I think, the Represented-as-Moral Thesis does a better job. Or, more precisely, I think that it does the better job if we take ourselves be concerned with the sort of non-moral descriptive concept that positivists have thought the concept *legal institution* is—roughly, one that we do not apply to certain institutions as a sort of honorific based on moral criteria, but rather simply on the basis of descriptive features of those institutions.

It should be underscored that the Represented-as-Moral Thesis is part of a metaphysical thesis that I am putting forward about the nature of legal institutions. It thus does not involve taking a stand on the phenomenology of what it is like to participate in a legal institution. Thus, the Represented-as-Moral Thesis is consistent with the claim that, when viewed from an internal

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[83] I restrict myself here to making a claim about the intuitions of those drawn to the legal positivist tradition, rather than the intuitions of everyone working within the philosophy of law (or people more generally), because of the restricted argumentative aims of this article. To repeat, the main argument in this article concerns whether or not *legal positivists* should accept the Moral Aim Thesis.

participant's perspective within legal institutions, part of the social meaning of those institutions consists in part in their having a moral mission. What is important is that the third-personal *metaphysical* account on offer here—the sort of account that Shapiro aims to give in *Legality*—does not itself include the idea that part of the essence of legal institutions is that they have a moral aim. Indeed, to repeat, on the proposed metaphysical account on offer, no facts about the actual aim of those institutions are mentioned whatsoever.[84]

In order to begin my argument for the Represented-as-Moral Thesis, let me start by showing that proponents of the Represented-as-Moral Thesis are capable of explaining much of the phenomena that Shapiro uses the Moral Aim Thesis to explain. For my purposes here, I am simply going to grant Shapiro that he has identified real phenomena that call out for an explanation.

Let's start with Shapiro's claim that the Moral Aim Thesis can help explain the difference between legal institutions and criminal organizations of a certain advanced type—namely, those that, according to the Planning Theory, meet all of the other conditions for counting as a legal institution. The proponent of the Represented-as-Moral Thesis can also point to a (purported) difference here between legal institutions and such criminal organizations. The difference concerns whether or not the relevant individuals in that organization represent their activity as moral or not in the relevant ways set out by the moral-representation criteria. The proponent of the Represented-as-Moral Thesis can thus account for the Shapiro's idea that such criminal organizations are not legal institutions. Indeed, she can do so by pointing to *exactly* the same difference in the surface-features of those organizations that Shapiro thinks is crucial to recognize in developing an account of the nature of legal institutions.

One might object that the Represented-as-Moral Thesis would make it *too easy* for a powerful criminal organization (one that met the Planning Theory's first six criteria for counting as a legal institution) to turn itself into a legal institution by simply fulfilling the moral-representation criteria. I am sceptical that this is a good objection. For I in fact think that our considered judgments here might indeed support the idea that this is exactly what many legal institutions essentially are—namely, things closely akin to highly advanced

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[84] It should be emphasized that the distinction I am drawing on here—namely, the distinction between (i) what is involved in the legal participant's point of view and (ii) the metaphysics of law—leaves ample room for one to advance a metaphysical account of law that gives an important explanatory role to facts about what is involved in a participant's point of view. For instance, on one influential way of reading HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994), Hart advances a view about the metaphysics of legal institutions and legal norms that gives a constitutive role to facts about what is involved in the internal participant's perspective within certain social practices. On this way of reading Hart, given Hart's reading of what is involved in that participant's point of view—and given the particular sorts of explanatory roles he does (and does not) want to grant that facts about what is involved in that point of view play in our account of law—the result is a view in the metaphysics of law that is thoroughly positivist. Moreover, it turns out that the resulting metaphysical view is positivist in *precisely* the way I have defined 'legal positivism' in this article. A separate question, of course, is whether the view is correct, or even fully coherent. For representative examples of this basic way of reading Hart, see Joel Feinberg and Jules L Coleman, *Philosophy of Law* (7th edn, Thomson/Wadsworth 2003); Greenberg, 'Hartian Positivism' (n 20); Shapiro (n 1). For a criticism of this type of reading, see Kevin Toh, 'Hart's Expressivism and his Benthamite Project' (2005) 11 LEG 75.

criminal organizations that have transformed themselves in certain ways in their self-presentation. However, the important point here is that, even if this turns out to be a good objection to the Represented-as-Moral Thesis, it is no more of an objection to the Represented-as-Moral Thesis than it is to the Moral Aim Thesis. This is because, as I glossed earlier, Shapiro holds that fulfilling the moral-representation criteria make it the case that an organization has a moral aim (in the relevant sense of 'moral aim' that matters for the Moral Aim Thesis). I deny that this is so. But that is all that I am here denying. Thus, the crucial point here is that, absent a further development of the Moral Aim Thesis, it appears that, according to Shapiro's view, it is just as easy for a criminal organization to turn themselves into a legal institution as it is on the version of the Planning Theory that involves the Represented-as-Moral Thesis. This means that this objection—the objection that the Represented-as-Moral Thesis makes it too easy for a criminal organization to turn itself into a legal institution—won't do any work in our argumentative context, a context in which we are considering the relative merits of the Moral Aim Thesis and the Represented-as-Moral Thesis.

This leaves us with the next three additional pieces of evidence that Shapiro cites in favour of the Moral Aim Thesis. I will here argue that one can account for all of the relevant data that Shapiro here draws our attention to (and which I am simply granting him for the purposes of argument) without drawing on *either* the Moral Aim Thesis or the Represented-as-Moral Thesis. Thus, the explanations that I am about to offer are ones that can be taken on board by those who want to develop the Planning Theory in a different way altogether. Moreover, the explanations that I am about to offer are ones that (in at least some modified form) can be taken on board by those who reject the Planning Theory altogether. How useful these explanations will be for such theorists will, of course, depend on the details of their other jurisprudential commitments.

The first additional piece of evidence that Shapiro gives in favour of the Moral Aim Thesis is that the Moral Aim Thesis can help explain why 'we think that law is invaluable in the modern world but not, say, among simple hunter-gatherers'.[85] In order to explain why we are prone to think this sort of thing, we can say the following: given (i) the facts about what agents are capable of doing with the sort of large-scale planning organizations that legal institutions are and (ii) given the basic evaluative and normative views people in the modern world are likely to have, it is then no surprise that we are disposed to think that law is particularly valuable or important in certain social–historical settings as opposed to others.

It should be underscored here that a proponent of this sort of explanation can grant that legal institutions are particularly useful for providing morally good solution to morally important social problems, including, crucially, those

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[85] Shapiro (n 1) 214.

moral problems that obtain in what Shapiro calls the 'circumstances of legality'. Indeed, a proponent of this sort of explanation can even grant that legal institutions are the *only* sorts of organizations that could even possibly solve such problems in a morally good way, in some reasonable sense of 'possibly' here that would need to be further clarified. The crucial point is that this can be claimed while denying that this tells us something about the distinctive *aim* that all legal institutions as such have.[86]

The next consideration that Shapiro cites in favour of the Moral Aim Thesis is that 'the Moral Aim Thesis explains why legal systems that are unable to solve serious moral problems are criticizable'.[87] As I take it, what Shapiro thinks needs to be explained is the fact that we are generally disposed to criticize legal systems that are unable to solve moral problems. Moreover, the explanation should fit with the normative fact that we are right to be so disposed. In order to give an alternative explanation of the relevant phenomena—namely, the fact that we are generally disposed to criticize legal systems that are unable to solve moral problems—let me start by introducing a helpful analogy.

Consider the felicity of different judgments one might make about *guns* being good or bad. In particular, consider the TEC-9, a relatively small, relatively cheap, rapid-fire gun that is used in many gang-related shootings in America.[88] Suppose Susie is a concerned citizen who is walking with her friend Boris by a gun store in her neighbourhood in which many people, gang members and non-gang members alike, have been killed as a result of gang violence involving the use of TEC-9s. She sees a TEC-9 in the window for sale at a reduced price. With the regrettable history of gang violence using TEC-9s in mind, Susie might very well utter to Boris: 'that is a bad gun'. In a different context, one might, however, judge that very same gun to be a 'good' one. Suppose, for example, that Susie is now working at her job the following week as a police officer. That very same gun that she saw in the window with Boris the week before has now been purchased, used in a violent shooting that resulted in multiple deaths, and confiscated to be stored at the police department as part of the investigation into that shooting. Susie is walking through a room of various confiscated weapons with another police officer Kate, and the two of

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[86] It is worth noting here that one might also think that something else needs to be explained: namely, historical facts about how, when, and why legal institutions emerge (and are sustained in history). There are two things to say here. First, this is a difficult and complicated historical question, and it is not at all clear that much of the explanation here is going to come from understanding the nature of legal institutions as such. Secondly, as Shapiro himself underscores in *Legality*, what we arguably see by looking at human history is evidence *both* for the ability of agents to use legal institutions for morally good purposes as well as morally bad ones (and, indeed, sometimes morally *awful* ones). What we therefore need from the philosopher of law is an account of what properties legal institutions have that would help explain how they can be used in these various ways, and that, in turn, could help shed light on how, when, and why legal institutions emerge (and are then sustained). The proponent of the Represented-as-Moral Thesis can explain this just as smoothly as the proponent of the Moral Aim Thesis.

[87] Shapiro (n 1) 212.

[88] Thanks to Eliot Michaelson for suggesting that I use the example of the TEC-9 in order to illustrate the point I make in this pargraph.

them are having an extended discussion about how effective various weapons are for the purposes of killing people. Susie picks up the Tec-9 and says 'this is a good gun', and then picks up an old gun that is quite heavy, inaccurate, and takes forever to reload and says 'this is a bad gun'.

What this example brings out is that, in contexts where one is concerned about the moral effects of using certain instruments, one is likely to judge that instrument good or bad based on how it contributes to certain states of affairs, actions, etc. that one is morally concerned with. In other contexts, where one is concerned with the effectiveness of instruments for performing certain actions, one might very well employ entirely different standards for judging whether that instrument is a good or bad one.

The upshot of this is that one can draw on this basic fact of contextual-variation in our assessment of instruments to explain the prevalence of judgments of a law being a 'bad law' when it does not promote morally good ends. In short, one can claim that those judgments are made from a context in which we are assessing the moral impact of the use of a certain kind of instrument—a sort of context which might form a highly prevalent sort of context for the assessment of certain instruments (including, perhaps, the default context one assumes when no further details have been given)—and use this to help explain why those judgments are felicitous and coherent. Of course, if this line of thought is on the right track, then, in certain contexts, it will also be felicitous and coherent to judge that a morally bad law is a 'good law', as well as that in a morally good law is a 'bad law': for instance, in contexts where one is discussing how *effective* a law is at accomplishing certain immoral ends, or, less drastically, when one is discussing how easy it is to understand what certain tax laws require (and hence how 'user-friendly' they are). And, in fact, this seems like exactly the right result for a theory to predict in such cases. To sum up: by drawing on this idea of the way in which our application of the terminology of 'good' and 'bad' to instruments is context-dependent, one has the ability to offer a powerful alternative explanation of the fact that we are quick to criticize legal institutions for being immoral. Furthermore, the proposed explanation also offers a compelling account of other linguistic data that Shapiro does not discuss (eg facts about the felicity of judging, in certain contexts, that a morally bad law is a 'good law', as well as that in a morally good law is a 'bad law').

The final consideration that Shapiro cites in favour of the Moral Aim Thesis is its ability to account for 'the diverse reactions we have to situations in which morally good consequences are produced'.[89] Recall that Shapiro claims that, on the one hand, when criminal organizations produce morally good results 'these occurrences are treated by us as *serendipitous,* as happy accidents'.[90] On the other hand, Shapiro claims that we do not see the morally good results that

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[89] Shapiro (n 1) 216.
[90] ibid.

are brought about by legal institutions as happy accidents at all. Rather, he argues, when legal institutions bring about good results, we think that this is exactly what legal institutions are supposed to do. Does a proponent of the Represented-as-Moral Thesis have any explanation of this fact?

I think that the best sort of explanation open to a proponent of the Represented-as-Moral Thesis here is to draw on basic historical, sociological and psychological facts about what we have generally come to expect certain things from legal institutions. In short, the explanation is this: we react the way that we do because (a) we accept some general normative claim to the rough effect that socially powerful organizations *should* be moral (perhaps by ultimately providing morally good solutions to pressing moral problems of the modern world) and (b) because many people (though not everyone) hold that legal institutions have the capacity to help solve certain pressing moral problems. It should be relatively uncontroversial that most people in the modern world accept something along the lines of (a). And, given the sort of functional role that many legal institutions have in fact played in the world, it would make sense that (b) is true as well. But note here that, if (b) is true, this need not be because we are responding to deep facts about the nature of legal institutions as such. All that we need to be responding to is facts about what sorts of things we might reasonably hope that legal institutions can accomplish, relative to what other planning organizations might accomplish. The combination of these two facts about us can go a long way in explaining our diverse reactions to the morally good consequences produced by some planning organizations as opposed to others. Finally, consider the fact that (according to the Represented-as-Moral Thesis) legal institutions represent themselves in a certain moralized way. It is a reasonable hypothesis that, *other things being equal*, when a planning organization presents itself as trying to do morally good things, we will be more likely to expect that this organization will produce morally good things than those organizations that make no such claims. If so, then this would also help explain when we are likely to view certain morally good results as happy consequences or not.[91]

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[91] It is worth underscoring here that our expectations about what certain organizations will or will not do can vary a lot from depending on the relevant social-historical facts. To emphasize this point, consider the following case. Suppose that, in a part of a large city inhabited entirely by people that are very poor, the city government as failed to provide electricity, water and heat for years. In turn, this has led to powerful criminal organizations (that make most of their money selling illegal drugs) reliably providing such resources to the residents for a very reasonable price. The residents are (on the whole) very happy with this arrangement. Suppose that this sort of practice then goes on for a long time—perhaps for generations—such that the residents come to rely on these criminal organizations for such resources. In turn, this also leads to massive community support for these criminal organizations—and increased frustration with a city government that the residents regard as corrupt, classist, and racist. Now suppose that Maureen is a resident of this part of the city, living in a home that has received electricity, water and heat from criminal organization for generations. It is not at all clear that Maureen will think of her electricity provided by a criminal organization as the result of a 'happy accident'. Indeed, given her general scepticism of governments that has emerged from her own experiences, she might even think that criminal organizations are, in general, more likely to provide such goods to people in her basic situation—and, thus, that is the sort of thing that criminal organizations should be doing. Furthermore, it is not at all clear that Maureen would not be quick to criticize those criminal organizations for doing things that she thinks are morally bad. For instance, if the criminal organizations stopped providing electricity after hundreds of years, it is highly likely that Maureen would criticize those criminal organizations for not doing what she thinks they should.

In sum, then, the proponent of the Represented-as-Moral Thesis can account for the same data that Shapiro uses to motivate the Moral Aim Thesis. Moreover, insofar as the Represented-as-Moral Thesis does not rely on any claims about the constitutive moral aims of legal institutions—claims that, as I argued in the last section, legal positivists should have scepticism of (at least absent considerable further argument from Shapiro)—I submit that the proponent of the Represented-as-Moral Thesis has the *better* overall explanation of the relevant data here. Or, more precisely, I submit that she has the better overall explanation of the relevant data here insofar as we hold fixed a commitment to legal positivism.

As further support of the claim that the Represented-as-Moral Thesis does a better job than the Moral Aim Thesis in accounting for the nature of legal institutions, consider the following thought experiment. In a possible world, there are a variety of groups that are compulsory planning organizations that are self-certifying and that meet the moral-representation criteria. Call such groups 'X groups'. As a matter of contingent fact, in this possible world, the only people who have been involved in X groups for 2000 years have been people whose main aims are some mixture of the following: persecution of minorities (including women, homosexuals, and people with certain racial or ethnic identities), the spread of some traditional religious beliefs, and the appropriation of money from the poor to use for the benefit of the rich. Most of the plans these groups have created, plans that cover many small parts of everyday human life and interaction, are all oriented to accomplishing some mixture of these aims. Nonetheless, as a form of propaganda, high-ranking officials in the X groups have always pretended that they have moral aims in just the way that the moral-representation criteria set out, and that low-ranking officials use moral language to describe the plans they have in just the way the moral-representation criteria set out. Because of the bad effect that these organizations have on the world, people criticize them regularly, just as they do for those criminal organizations that have systematic bad effects on the world. The only major difference is that people love to point out the hypocrisy involved in the propaganda used in X groups, propaganda that is lacking from the criminal organizations. Now suppose that, after 2000 years of this situation, an X group emerges where some officials actually have morally laudable aims, including, for instance, fighting persecution, promoting scientific inquiry, abolishing poverty, and seeking environmental sustainability. This new X group quickly starts having some very good moral effects. People are initially shocked given the history of X groups in their world, but are quite happy with this new development.

Here are three hypotheses about this thought experiment, which, taken together, help bolster the case for the Represented-as-Moral Thesis relative to the Moral Aim Thesis. First, all of the X groups are legal institutions in this world. Second, to explain why this is so, we do not need the Moral Aim

Thesis, but only the Represented-as-Moral Thesis. Third, insofar as one thinks that the X groups are not legal institutions, one possibility is that one has an antipositivist intuition that legal institutions must be ones that actually tend toward morally good results or part of some sort of reasonably (even if not fully) just social order. But neither the Moral Aim Thesis nor the Represented-as-Moral Thesis can vindicate that sort of antipositivist intuition. An additional reason to doubt that the X groups are legal institutions would be because one thinks that legal institutions make a certain claim to *comprehensiveness* that these groups do not.[92] Shapiro rejects this idea in *Legality* when developing the Planning Theory.[93] The crucial point here, however, is that this idea is an additional thesis that a proponent of *either* the Moral Aim Thesis or Represented-as-Moral Thesis can (or cannot) take on board, and thus doesn't cut in favour of the Moral Aim Thesis as opposed to the Represented-as-Moral Thesis. Put together, these hypotheses suggest that the difference between my proposed thesis and Shapiro's Moral Aim Thesis turns on whether fulfilment of the moral-representation criteria either (i) gives one good evidence for believing that the organization has a moral aim or (ii) is constitutive of an organization having a moral aim. Absent an argument that this is so—and especially given the background worries I put forward in Section 4 about the Moral Aim Thesis (namely, worries about the ultimate compatibility with positivism as well as mesh with core intuitions in the positivist tradition)—I submit that the Planning Theory is better developed with the Represented-as-Moral Thesis instead of the Moral Aim Thesis.

This concludes my argument in this article in favour of the idea that positivists (and perhaps others too) would do well to accept the Represented-as-Moral Thesis as opposed to the Moral Aim Thesis. Before wrapping up, however, I here want to pause to revisit the Razian thesis that it is an essential feature of the law that it claims legitimate authority (which I will henceforth call the *Claiming-Authority Thesis*). The Represented-as-Moral Thesis and the Claiming-Authority Thesis bear a strong surface similarity, and it will thus be helpful to briefly canvass how my Represented-as-Moral Thesis relates to this Razian Claiming-Authority thesis. There are three crucial differences between these two theses. First, in contrast to the Claiming-Authority Thesis, the Represented-as-Moral Thesis does not invoke the idea of authority at all, let alone the particular well-known account of authority that Raz has developed, and which he uses to flesh out his particular version of the Claiming-Authority Thesis. Second, in contrast to the Claiming-Authority Thesis, the Represented-as-Moral Thesis, does not state that anyone—or any institution—in fact *claims* anything (whether it be authority or anything else) with respect to its *actual* moral standing with regards to subjects. Instead, the Represented-as-Moral

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[92] For discussion of this type of idea, see Joseph Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain* (n 14); Finnis (n 4); Leslie Green, *The Authority of the State* (OUP 1990).
[93] Shapiro (n 1) 218.

Thesis only states that certain actors within a legal institution must *present* themselves in a certain way that involves certain characteristic surface-features, a way in which that does not entail that they in fact claim authority or any other legitimate moral standing. This is because those actors might present themselves this way entirely cynically without actually claiming any moral standing. Third, whereas the Claiming-Authority Thesis makes a claim about *the law* claiming something, the Represented-as-Moral Thesis is a claim about how certain *individuals* within organizations need to behave and talk in certain ways in order for those organizations to be legal institutions.[94] Finally, a further important difference here returns to my discussion about Raz in the introduction of this article. As I stated in the introduction, Raz understands and develops the Claiming-Authority Thesis in such a way that, at least as he understands things, it yields the result that 'law by its nature has a moral task'.[95] In contrast, The Represented-as-Moral Thesis yields no such result.[96]

This is not to say, however, that there aren't interesting connections between the Claiming-Authority Thesis and the Represented-as-Moral Thesis that deserve further exploration. For example, suppose that some version of the Claiming-Authority Thesis is true. Holding fixed the intuitive idea that the only way for an institution to be a legitimate authority is for it to have a certain moral standing (eg the basic sort of moral standing that Raz attributes to practical authorities in general)[97] this suggests that there might be good reason for legal institutions to be populated by actors in high-level offices who represent the aims of that institution as moral ones in order to convince subjects that those institutions are in fact authoritative.[98] Of course, if this idea is correct, this still does not mean that it is an *essential* feature of legal institutions that they are populated by such actors. Rather, it only suggests a potential connection between the activity of claiming authority and the activity of representing oneself as moral. Nonetheless, it does demonstrate that—despite the important differences that I just canvassed between the Claiming-Authority Thesis and the Represented-as-Moral Thesis—there are interesting and important connections between aspects of the Claiming-Authority Thesis and the Represented-as-Moral Thesis that are worth exploring further.

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[94] It is worth noting here that this last difference may or may not be that deep, depending on how one understands talk of 'the law' claiming something.

[95] Raz, 'About Morality' (n 7) 11.

[96] It should be noted that Raz's claim here might be understood as a claim about an essential property of law, or about a necessary (but not essential) property of law. For our purposes here, it does not make a difference. This is because The Represented-as-Moral Thesis yields neither result.

[97] See Joseph Raz, 'Authority and Justification' (1985) 14 P&PA 3.

[98] Thanks to Tristram McPherson and Eliot Michaelson for helpful discussion on this point, as well as for more general discussion of the relationship between the Represented-as-Moral Thesis and the Razian Claiming-Authority Thesis.

6. *Conclusion*

In Section 5, I introduced a rival to the Moral Aim Thesis, a thesis that I am calling the 'Represented-as-Moral Thesis'. I argued that the Represented-as-Moral Thesis can account for the same data that Shapiro uses to motivate the Moral Aim Thesis while also avoiding the problems I put forward for the Moral Aim Thesis in Section 4. If I am right, the Represented-as-Moral Thesis gives positivists an alternative (and I think better) way of developing the Planning Theory of Law, as well as introduces a new thesis about the nature of legal institutions that is interesting in its own right.

In closing, I want to stress that, despite thinking that the Represented-as-Moral Thesis is an interesting thesis, I do *not* want to commit to it as a claim about the nature of legal institutions. In order to establish either this thesis or the Moral Aim Thesis, much more work needs to be done. Among other things, one would need to more carefully work through the various other philosophical options available here—eg adopting a version of the Razian Claiming-Authority Thesis instead of (or perhaps in addition to) either of these theses. Furthermore, one would need to more carefully work through some of the main thought experiments that matter here. For instance, I am in fact not convinced that one cannot have a legal institution in which virtually none of the high-ranking legal officials represent their official activity as oriented toward moral ends. Consider the following three cases. First, imagine that high-ranking officials in an organization have a completely *amoral* representation of their ends (which, importantly, is consistent with their activity actually resulting in morally good outcomes, or even morally *optimal* outcomes). Second, consider an organization in which high-ranking officials are simply being brutally honest that they are using the tool of planning to pursue ends that are both ones that they view to be immoral and are in fact immoral (eg taking money from the poor simply to benefit themselves and their rich friends). Third, suppose that a political party—let's call them 'The Satanists'—have recently won lots of elections and taken over all of the major posts in the British government.[99] The Satanists are enemies of morality. Thus, their goal is to promote *immoral* ends—a goal that is explicitly reflected in all of their official speeches, etc. A proponent of either the Moral Aim Thesis or the Represented-as-Moral Thesis would need to convince me that I would be wrong to categorize such organizations as legal institutions. In short, I am not sure that she would be successful. Taken together, these cases suggest that perhaps the Represented-as-Moral Thesis captures a widespread feature of most legal institutions in our world but not an essential feature of legal institutions as such.

[99] Thanks to Bob Goodin for suggesting this particular example.

My aim here, however, has not been to take a stand on such cases. Rather, my aim has been a more modest one. It has been to show that (i) even if one grants Shapiro all of the evidence that he cites in favour of the Moral Aim Thesis, this evidence isn't by itself enough to establish the Moral Aim Thesis and (ii) there is a compelling alternative to the Moral Aim Thesis (namely, the Represented-as-Moral Thesis) that can be developed as part of a general theory of law that has a good account of the very same evidence. Moreover, if I am right, then the Represented-as-Moral Thesis has the following advantages. First, insofar as it does not assert any moral aim that is constitutive of legal institutions, it avoids any of the worries about the ultimate compatibility of that idea with legal positivism. Second, it does a better job than the Moral Aim Thesis of resonating with one of the core lines of thought that has motivated philosophers to accept a version of legal positivism in the first place (roughly, the idea that law is essentially a *tool* for agents to accomplish a wide range of goals). Especially with the Represented-as-Moral Thesis on the table, I conclude that Shapiro has yet to give positivists a convincing argument to abandon the claim that the law lacks a constitutive moral aim.