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H.L.A. HART AND THE PRACTICAL DIFFERENCE THESIS

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In H.L.A. Hart's now famous Postscript to *The Concept of Law*,[1] he embraced the Incorporation Thesis, according to which it is possible for a legal system to have a rule of recognition that incorporates moral criteria of validity.[2] In such legal systems, a norm must satisfy certain moral conditions as either a necessary or a sufficient condition for it to be legally valid. According to the Incorporation Thesis, then, the criteria of validity need not consist exclusively of standards that define validity in terms of a norm's source or pedigree.

This seemingly modest thesis has been the target of attacks from all theoretical quarters. Anti-positivists like Ronald Dworkin, for example, argue that the Incorporation Thesis is inconsistent with the Separability Thesis. Exclusive positivists argue that the Incorporation Thesis is inconsistent with claims about the role legal norms play, or should play, in practical deliberations. Joseph Raz, for example, argues that the Incorporation Thesis is inconsistent with law's conceptual claim to legitimate authority. On his view, law's claim to authority implies that the content of a legal norm must be identifiable without recourse to the dependent reasons that justify it. Since the content of moral criteria of validity cannot be identified without such recourse, the Incorporation Thesis is inconsistent with the nature of legal authority.[3]

More recently, Scott Shapiro argues that the Incorporation Thesis is incon-

I would like to thank Jules Coleman for his comments on this article and, in general, for his remarkable kindness. Though he frequently disagrees with the views I choose to defend, he is always there to help me develop my ideas in order to make them as plausible as possible—no matter how much else he might have to do. I have known him for only a year but can say this without the slightest exaggeration: No person has contributed more to my philosophical development than Jules. If I achieve anything worthwhile in this business, he deserves most of the credit.

1. H.L.A. Hart, THE CONCEPT OF LAW 185–86 (2nd ed., 1994). Hereinafter referred to as *CL*.

2. Nevertheless, Hart had some reservations about the Incorporation Thesis. Hart, a skeptic about moral objectivism, believed that the Incorporation Thesis presupposes that moral norms have an objective status and hence conditioned his acceptance of the Incorporation Thesis on the truth of moral objectivism. *See* Kenneth Einar Himma, *Incorporationism and the Objectivity of Moral Norms*, 5 LEGAL THEORY 415 (1999), for a discussion of Hart's worries on this count.

3. Joseph Raz, *Authority, Law, and Morality*, in Joseph Raz, ETHICS IN THE PUBLIC DOMAIN (Oxford: Clarendon Press, 1994). Hereinafter referred to as *ALM*.

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sistent with Hart's functionalist conception of law.[4] In Hart's view, the essential function of law is to guide behavior.[5] This implies, according to Shapiro, that every legal norm must be capable of guiding behavior. But Shapiro argues that it is logically impossible for a judge to be guided simultaneously by an inclusive rule of recognition and by the rules validated under the rule. Thus, he concludes that Hart must give up either the Incorporation Thesis or his functionalist conception of law as providing guides to behavior.

In this article, I will evaluate Shapiro's influential critique of the Incorporation Thesis. I will argue that Shapiro's argument succeeds, at most, against certain accounts of what it means to be guided by a rule. There are other plausible accounts of guidance that not only allow for inclusive rules of recognition, but also satisfy Shapiro's own standard for accounts of motivational guidance. Further, I will challenge two critical theoretical claims on which his argument rests, namely (1) that Hart's view implies a judge must be motivationally guided by the first-order legal norms she applies in deciding a case; and (2) that a commitment to legal functionalism implies the Practical Difference Thesis.

I. TWO COMPONENTS OF THE INCORPORATION THESIS

Positivism's Separability Thesis denies that the legality of a norm necessarily depends on its substantive moral merits; as H.L.A. Hart puts it, "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" (*CL* 185–86). Accordingly, the Separability Thesis implies it is logically possible for something that constitutes a legal system to exclude moral norms from the criteria that determine whether a standard is legally valid. In such a legal system, it is neither a necessary nor a sufficient condition for a norm to be legally valid that it conform to (or cohere with) a set of moral norms.

Knowing there can be legal systems without moral criteria of validity, however, does not tell us whether there can be legal systems *with* moral criteria of validity. Two schools have emerged on this controversial issue. Exclusive positivists deny there can be moral criteria of validity; on their view, the existence and content of law can always be determined by reference to its sources without recourse to moral argument. Inclusive positivists assert there are possible legal systems in which the criteria of validity include substantive moral norms (the Incorporation Thesis). In such legal systems, whether a norm is legally valid depends, at least in part, on the logical relation of its content to the content of the relevant moral norm (or norms).

4. Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY (December 1998). Hereinafter referred to as *HWO*.

5. It is important to be clear at the outset on the locution "essential function." As I use the term, *f* is an essential function of an artifact *A* if and only if it is a necessary condition for being an *A* that an object be capable of performing *f*. The locution "conceptual function" is often used to refer to this kind of function. In any case, I intend by "essential function" nothing more ontologically ambitious than this.

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There are two components to the Incorporation Thesis corresponding to two ways in which the validity of a norm could depend on the moral merit of its content. According to the Sufficiency Component, there are possible legal systems in which it is a sufficient condition for a norm to be legally valid that its content reproduce the content of some moral principle. The Sufficiency Component allows, then, that an unpromulgated norm might nevertheless be legally valid in virtue of its moral content. According to the Necessity Component, there are possible legal systems in which it is a necessary condition for a norm to be legally valid that its content be consistent with some set of moral norms.[6] Thus, the Necessity Component allows morality to serve as a constraint on *promulgated* law; it is not enough for a norm to be valid that it stand in the appropriate logical relation to some moral norm or norms. In any event, both components of the Incorporation Thesis imply that a rule of recognition can incorporate the content of substantive moral norms.

The Incorporation Thesis can be understood as a response to Dworkin's analysis of the role moral principles play in judicial decision-making.[7] In Dworkin's view, courts frequently decide hard cases on the basis of principles that are legally valid in virtue of moral content.[8] In *Riggs v. Palmer*, for example, the court declined to let a murderer take under his victim's will on the ground that no person should profit from her own wrong (the *Riggs* principle), despite the fact that the Statute of Wills did not expressly prohibit such takings. But what explains the validity of the *Riggs* principle, on Dworkin's view, is not its pedigree or source, but rather its content: The principle that no person should profit from her own wrong is legally valid because it is a moral requirement of fairness. According to Dworkin, the existence of legal principles like the *Riggs* principle is inconsistent with Hart's exclusively source-based account of validity.

In response, Hart denies that the criteria of validity must be source-based criteria of pedigree and explicitly accepts the Incorporation Thesis:

> Dworkin in attributing to me a doctrine of 'plain-fact positivism' has mistakenly treated my theory . . . as requiring . . . that the criteria of validity which

6. Note that the relevant logical relation differs in each of the versions. While the relevant relation in the Necessity Version is the consistency relation, the relevant notion in the Sufficiency Version is the conformity relation. The Sufficiency Version could not use the consistency relation because it would validate inconsistent norms; there are many propositions *P* such that *P* and ~*P* are each consistent with morality. A law that requires drivers to drive on the right side of the road is consistent with moral principles, as is a law that requires drivers to drive on the left side. Likewise, the Necessity Version could not use the conformity relation because it would result in too few norms. Many laws are intended as solutions to coordination problems and hence do not reproduce the content of some moral norm.

7. Ronald Dworkin, TAKING RIGHTS SERIOUSLY (Cambridge: Harvard University Press, 1977). Hereinafter referred to as *TRS*.

8. I use the term "validity" to describe the legal status of such principles even though Dworkin sometimes seems to suggest that only all-or-nothing rules can be legally valid (*TRS* 41). Nothing of importance turns on this usage.

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> the rule provides should consist exclusively of the specific kind of plain fact which he calls 'pedigree' matters. . . . [This] ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles (*CL* 250).

According to Hart, Dworkin's claim that the criteria of validity must be exclusively source-based is false: "there is nothing in my [theory that suggests that the] . . . criteria provided by the rule of recognition must be solely matters of pedigree; they may instead be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendments to the United States Constitution" (*CL* 250).

While some inclusive positivists endorse only the Necessity Component of the Incorporation Thesis, Hart is most plausibly construed as committed to both components. For, as Jules Coleman points out, Hart's point in adopting the Incorporation Thesis was to show that positivism could accommodate Dworkin's view that the *Riggs* principle was legally binding, not because it had an authoritative source, but because its content was a requirement of fundamental fairness.[9] Since only the Sufficiency Component can accommodate Dworkin's analysis of *Riggs,* Hart is most plausibly construed as adopting both components of the Incorporation Thesis.

II. SHAPIRO'S CASE AGAINST HART

Shapiro believes that the Incorporation Thesis conflicts with Hart's functionalist analysis of the concept of law. Hart believes that law has an essential function and that therefore any normative system incapable of performing this function cannot be characterized as law. Law's essential function, according to Hart, is to guide conduct; in response to Dworkin's view that the function of law is to morally justify coercion, Hart writes, "I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct." Thus, it is a conceptual truth, on this view, that the essential function of law is norm-guidance.

As Shapiro points out, the concept of norm-guidance is ambiguous. To be guided by a rule, according to Shapiro, "is to conform to the rule for the reason that the rule regulates one's conduct" (*HWO* 490). But there are two ways in which a norm can guide behavior. First, a rule *R* motivationally guides a person *P* if and only if *P*'s conformity to *R* is motivated by the fact that *R* requires the behavior in question. Notice that motivational guidance is different from being motivated to follow a rule by a desire to avoid the sanctions associated with noncompliance. What usually motivates my compliance with the jaywalking law is a desire to avoid the $75 fine. Although I am motivated to follow the rule, the sanction provided by the rule, and not

9. *See* Jules Coleman, THE PRACTICE OF PRINCIPLE, forthcoming.

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the rule itself, is what motivates my compliance. To be motivationally guided by a rule is to conform to the rule *because* one accepts it as a legitimate standard of conduct.

Second, *R* epistemically guides *P* if and only if *P* "learns of his legal obligations from [*R*] . . . and conforms to [*R*]" (*HWO* 490). The idea here is that law informs people of which behaviors are mandatory and permissible by performing what Shapiro calls a designation function: "Given the myriad of norms that might compete for our allegiance, the law designates certain rules as those to which we are required to conform" (*HWO* 491). On this account of guidance, then, *R* need not motivate compliance: *P* can be moved to comply with the requirements of *R* because *R* is backed by a sanction; as long as *P* learns of her obligations from *R*, it does not matter why *P* complies with *R*.

These two concepts of rule-guidance call to mind Hart's distinction between first-order rules and meta-rules. Hart distinguishes two kinds of rules: first-order rules that regulate the behavior of the law-subjects, and meta-rules that distinguish first-order rules that count as law from those that do not[10]:

> [Meta-rules] may all be said to be on a different level from the [first-order] rules, for they are all *about* such rules; in the sense that while rules are concerned with the actions that individuals must or must not do, these [meta] rules are all concerned with the [first-order] rules themselves. They specify the way in which the [first-order] rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined (*CL* 92).

Insofar as the meta-rule governs the creation, modification, and adjudication of first-order rules that count as law, it serves as a standard that governs the behavior of officials with respect to making, changing, and adjudicating those first-order rules.

A legal system exists, on Hart's view, when there is a meta-rule of recognition that satisfies two conditions: "On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials" (*CL* 113). Effective acceptance by officials, of course, requires that they take the internal point of view towards the meta-rule.

Shapiro's distinction between the two kinds of norm-guidance maps naturally onto Hart's distinction between the two kinds of rule. Since Hart's minimum conditions for the existence of a legal system require that citizens

10. The distinction is typically made in terms of primary and secondary rules, but some secondary rules, like those governing formation of contracts, also govern the behavior of law-subjects. For this reason, I prefer to talk in terms of first-order rules and meta-rules.

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generally obey the law but do not require a specific motivation, the first-order legal norms must be capable of epistemically guiding the behavior of the law-subjects. In contrast, because these conditions require that officials take the internal point of view towards the meta-rule and hence accept it as a legitimate standard of official behavior, the rule of recognition must be capable of motivationally guiding officials. Thus, Shapiro concludes, "Hart's claim about the guidance function of the law . . . turns out to be a composite claim: the law's primary function is to epistemically guide the conduct of its ordinary citizens via its [first-order] rules and to motivationally guide the conduct of judicial officials via its [meta-]rules" (*HWO* 492).

Shapiro argues that this composite claim about the guidance function of law is inconsistent with the Incorporation Thesis because it is impossible for a judge to be motivationally guided by both an inclusive rule of recognition and the rules validated by it. There are two versions of the argument corresponding to the two components of the Incorporation Thesis. Let the rule of recognition be a sufficiency rule that validates all and only moral principles. Suppose that the judge must decide whether to allow a murderer to take under the will of his victim and that the moral norm "no person should profit from his wrongdoing" is the only relevant rule. If the judge is motivationally guided by the rule of recognition, then, according to Shapiro, "[t]he moral principle . . . can make no practical difference . . . because the judge will act in exactly the same way whether he or she personally consults the moral principle or not" (*HWO* 496). Thus, a judge cannot be motivationally guided by a sufficiency rule and by the norms it validates.

Likewise for the Necessity Component. Let the rule of recognition be a necessity rule that validates all and only federally enacted rules that are not grossly unfair. Suppose a rule requiring employers to pay employees at least six dollars per hour is federally enacted, and that this rule is not grossly unfair and hence legally valid. Shapiro points out that the minimum-wage rule cannot motivationally guide a judge on Hart's view because, for Hart, law purports to provide peremptory reasons for action that foreclose deliberation on the merits. Thus, insofar as the judge must deliberate on the merits of the minimum wage law to determine whether it is grossly unfair, it cannot motivationally guide the judge in the Hartian sense. Thus, both components of the Incorporation Thesis are inconsistent with the Practical Difference Thesis.

Schematically, Shapiro's argument can be represented as follows:

1. The essential function of law is to guide behavior (the Functionalist Thesis).
2. If the Functionalist Thesis is true, then a norm that is incapable of making a practical difference in the structure of deliberations is conceptually disqualified from being a law.
3. Therefore, a norm that is incapable of making a practical difference in the structure of deliberations is conceptually disqualified from being a law (the Practical Difference Thesis). (From 1, 2)

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4. Hart's minimum conditions for the existence of a legal system imply that the rule of recognition makes a practical difference by motivationally guiding officials, and the rules valid under it make a practical difference by epistemically guiding the law-subjects.
5. Therefore, a rule incapable of motivationally guiding officials is conceptually disqualified from being a rule of recognition. (From 3, 4)
6. A judge cannot be motivationally guided by a rule of recognition incorporating moral criteria of validity and by a rule valid under that rule of recognition.
7. Therefore, a rule incorporating moral criteria of validity is conceptually disqualified from being a rule of recognition. (From 5, 6)
8. The Incorporation Thesis allows that there can exist rules of recognition that incorporate moral criteria of behavior.
9. Therefore, if the Practical Difference Thesis is true, then the Incorporation Thesis is false. (From 3, 7, 8)
10. Therefore, if the Functionalist Thesis is true, then the Incorporation Thesis is false. (From 2, 9)

Thus, Shapiro concludes that "[e]xclusive legal positivism . . . is forced on the legal positivist who is committed to a functionalist conception of law" (*HWO* 507).

III. THE NECESSITY COMPONENT

The Necessity Component is the more modest component of the Incorporation Thesis. For the Sufficiency Component, unlike the Necessity Component, implies that the validity of a norm need not depend at all on its having an appropriate source. Whereas the Sufficiency Component allows that the moral content of a norm may be sufficient to constitute it as legally valid, the Necessity Component allows morality to serve only as a constraint on source-based law. One might expect, then, that the Necessity Component would be somewhat more difficult for an exclusive positivist to refute because of its logical proximity to the Source Thesis.

Accordingly, it is appropriate to begin an evaluation of Shapiro's case against Hart with a closer look at his argument against the Necessity Component. Let *NRoR* be a necessity rule of recognition that validates all and only rules (1) enacted by the legislature according to certain procedures and (2) that are not grossly unfair. Now let R_{mw} be a rule requiring employers to pay employees at least six dollars per hour. Assume R_{mw} is enacted by the legislature according to the appropriate procedures and that R_{mw} is not grossly unfair. The question, then, is whether a judge can simultaneously be guided by *NRoR* and by R_{mw}.

According to Shapiro, if the judge is *motivationally* guided by *NRoR*, she cannot be *epistemically* guided by R_{mw}:

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> The answer is "no" if we have in mind epistemic guidance. As we saw, a legal rule epistemically guides when the agent learns of his legal obligations from the rule. It follows that a rule cannot epistemically guide when the only way a person can figure out whether he or she should follow the rule is to deliberate about the merits of following the rule (*HWO* 501).

The idea here has a Razian flavor: If an agent cannot determine what *R* requires without deliberating on the moral merits of *R*, *R* cannot epistemically guide behavior. On this view, law is supposed to serve a mediating function: "legal norms mediate between rival standards of conduct. *Qua* law, they eliminate the problems that arise when nonofficials must answer all normative questions and resolve all social controversies by themselves" (*HWO* 491). There is no point in my looking to the law to identify my legal obligations if I cannot identify the content of my obligations without deliberating on the moral merits of the law.

Moreover, if the judge is motivationally guided by *NRoR*, she cannot simultaneously be *motivationally* guided by R_{mw}:

> Can the minimum-wage rule at least motivationally guide a judge? . . . Recall that a rule motivationally guides conduct when it is taken as a peremptory reason for action; it follows that a rule cannot motivationally guide if the agent is required to deliberate about the merits of applying the rule. As the application of the minimum-wage rule depends, pursuant to the inclusive rule of recognition, on the [judge] first assessing whether the rule is grossly unfair, he cannot treat the rule as a peremptory reason for action and hence cannot be motivationally guided by it (*HWO* 501).

Insofar as R_{mw} is intended to motivationally guide judicial behavior by providing a peremptory reason that *precludes* deliberation on the moral merits of R_{mw}, it follows that R_{mw} cannot motivationally guide behavior because *NRoR* requires that the judge deliberate on the merits of R_{mw} as a precondition for applying it.

What ultimately causes the problem here is Hart's account of the practical authority of legal norms. According to Hart, laws purport to provide reasons that are special in two respects. First, a legal norm *R* provides (or purports to provide) a reason for action that is content-independent in the sense that the mere legality of *R* provides a reason for complying with *R* regardless of *R*'s content. Of course, the content of *R* may also provide a reason for action; if *R* reproduces the content of a moral norm, then the content of *R* will also provide a reason for action. But the mere status of *R* as legally valid provides, or purports to provide, a reason for complying with its requirements. Second, *R* provides a peremptory reason for action in the sense that *R* precludes any deliberation on its merits:

> [A] commander characteristically intends his hearer to take the commander's will instead of his own as a guide to action and so to take it in place of

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> any deliberation or reasoning of his own: the expression of a commander's will that an act be done is intended to preclude or cut off any independent deliberation or reasoning of his own: the expression of a commander's will that an act be done is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act. . . . Indeed the word 'peremptory' in fact just means cutting off deliberation, debate, or argument.[11]

The idea here is that law purports to preclude deliberations regarding the merits of applying it in any particular case. Thus, to the extent that a law requires deliberation on the merits of applying it, it cannot provide peremptory reasons. Since, for Hart, law provides motivational guidance by providing peremptory reasons, a law that requires deliberation on the merits of applying it as a precondition for its application cannot provide motivational guidance in the Hartian sense.

Nevertheless, it is open to an inclusive positivist to endorse Hart's account of peremptory reasons as an objective account of what kinds of reasons law recognizes as a justification for noncompliance while rejecting it as a subjective account of how law motivationally guides behavior. The difference here is important. Construed as an objective justificatory account, the theory of peremptory reasons implies that, insofar as law *purports* to foreclose deliberation on the merits, failure to comply with the law cannot be (legally) justified by considerations relating to the outcome of such a deliberation. Construed as an account of motivational guidance, the theory of peremptory reasons implies that one who is motivationally guided by a rule will not allow herself to deliberate on the merits of the rule. But the mere fact that noncompliance with law cannot be justified by the outcome of a deliberation on the merits of the law does not imply that one can be motivationally guided by a law only insofar as one refuses to deliberate on its merits. For an agent could deliberate on the merits of a law and simultaneously resolve not to act on the outcome of that deliberation if it conflicts with the law's requirements.

This move is open to the inclusive positivist because Hart's views about peremptory reasons and motivational guidance are extraneous to the other conceptual commitments of positivism. There is simply nothing in the Conventionality, Social Fact, and Separability Theses, which constitute the essential core of legal positivism, that commits any positivist, including Hart, to the view that the only way in which law can provide motivational guidance is by foreclosing deliberations on the merits of a rule. Nor does the general view that the officials must take the internal point of view towards the rule of recognition require Hart to define the internal point of view in terms of acceptance of the rule as providing peremptory reasons that *foreclose* all deliberation on the merits.

11. H.L.A. Hart, *Commands and Authoritative Reasons*, reprinted in H.L.A. Hart, ESSAYS ON BENTHAM 253 (1982).

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And Shapiro is presumably aware of this. In *The Difference That Rules Make*,[12] Shapiro defines necessary and sufficient conditions for determining when it makes sense to say that an agent's conformity to a rule is motivated by the rule:

> The Feasibility Thesis: An agent is being instrumentally guided by a rule *R* if and only if (1) the agent's behavior conforms to *R;* (2) recognition that *R* applies constrains the agent to conform to *R*, making nonconformity infeasible; and (3) the agent believes that absent the motivation of *R*, he might not conform to *R* (*DR* 47).

The idea is that rules constrain behavior by making certain options infeasible or not within the realm of optional behaviors: "The constraint of the rule must therefore be both *sufficient* and believed *necessary* to ensure the behavioral regularity" (*DR* 47). Any particular motivation for following a rule, then, that satisfies the Feasibility Thesis will provide an instance, on Shapiro's view, of being motivationally guided by a rule.

Hart's theory of peremptory reasons taken as an account of motivational guidance satisfies the Feasibility Thesis. For an agent who regards *R* as providing a peremptory reason conforms to *R* and thus satisfies (1) above. Moreover, insofar as the agent regards *R* as foreclosing any deliberations on the merits of following the rule, it follows that the agent regards the behavior as non-optional, which satisfies (2). Finally, since the agent does not allow herself the luxury of deliberating on the merits of following *R*, it seems reasonable to think that she entertains the belief that she might behave otherwise absent the motivation of *R*, which satisfies (3). Treating a rule as providing a peremptory reason is, thus, one way of being motivationally guided by a rule under the Feasibility Thesis.

But it is not the only way. Let *R* be a rule that requires citizens to pay a flat tax of 20 percent on all their earnings and let *P* be a citizen subject to the rule. Suppose the following claims are all true. Citizen *P* accepts the rule as a legitimate standard of conduct and, as a result, always pays exactly 20 percent of her earnings whenever it is required by *R*. Moreover, *P* does this *because* it is required by *R*. It would simply never occur to her to disobey the requirements of *R* because she believes, whether correctly or not, that the rule and the legal system are fair. But she is also quite certain that she would not hand over 20 percent of her earnings if *R* were not a legally valid norm.

Notice that all three requirements of the Feasibility Thesis are satisfied. *P*'s behavior conforms to *R*. She regards disobeying *R* as not feasible. She also believes she would not conform her behavior to *R* absent its motivation. But notice that she does not regard *R* as providing a peremptory reason that prevented her from deliberating on the merits of the rule. While she might have conformed to the rule without deliberating on the rule, it is clear that

12. Scott J. Shapiro, *The Difference that Rules Make*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 33–62 (Brian Bix ed., 1998), hereinafter referred to as *DR*.

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she has thought about the moral merits of both the rule and the legal system as a whole. According to the Feasibility Thesis, *P* is motivationally guided by *R*.

And this suggests how the Necessity Component can be reconciled with the Practical Difference Thesis. Consider again *NRoR*, which validates federal enactments that are not grossly unfair, and R_{mw}, which requires employers to pay at least six dollars per hour. Suppose further that it would be grossly unfair to employees to allow employers to pay less than four dollars per hour and unfair to employers to require them to pay more than nine dollars per hour. Finally, suppose that a judge is motivated by *NRoR*.

Can a judge be motivationally guided by R_{mw}? Not if motivational guidance requires accepting a rule as foreclosing deliberations on the merits, but that is not essential to the notion of motivational guidance as defined by Shapiro's Feasibility Thesis. Suppose an employee sues an employer under R_{mw}, alleging that the employer is paying only $5.50 per hour in violation of the minimum-wage requirement. Suppose the judge requires the employer to pay employees the difference between what they would have received had they been paid six dollars per hour and what they actually received and orders the employer to pay six dollars per hour from now on—and does so because R_{mw} constrains her to do so. Then the judge's decision satisfies clauses (1) and (2) of the Feasibility Thesis.

Moreover, the judge's decision satisfies (3) if she believes, as is quite reasonable to assume, that her decision would have been different had the minimum-wage rule required seven dollars per hour (by hypothesis, such a law would not be grossly unfair). The judge believes that in this counterfactual situation she would require the employer to pay the difference between what the employees would have received had they been paid seven dollars per hour and what they actually received and would order the employer to pay seven dollars per hour from this point on. Thus, it follows from these plausible suppositions and the Feasibility Thesis that the judge is motivationally guided by R_{mw}. Inclusive rules of recognition that require that rules with authoritative sources satisfy certain moral constraints as a condition of validity can make a practical difference—as long as making a practical difference is not equated with the theory of peremptory reasons.

What makes it possible for any rule of recognition to make a practical difference is that it leaves judges with what Shapiro calls elbow room. Shapiro distinguishes between dynamic and static rules of recognition. Exclusive rules of recognition are dynamic in the sense that "the actions that the secondary rule is capable of motivating depends on which primary rules exist at the time of application" (*HWO* 497). For example, an exclusive rule of recognition might validate all and only rules promulgated in accordance with a certain set of procedural requirements. A judge can be motivationally guided by both the exclusive rule of recognition and a rule valid under it because "it is always up to [the judge] to imagine that the norm no longer exists" (*HWO* 498). If the norm no longer exists or is replaced by

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some other norm, then the judge has a reason for doing something different. Thus, according to Shapiro, "[i]t is this 'elbow room' carved out by dynamic rules of recognition that allows the primary legal rules to make practical differences" (*HWO* 498).

But Necessity Rules can also leave a judge with elbow room. Insofar as Necessity Rules require that legislative enactments be consistent with some set of moral principles, they are dynamic because, in most instances, there will be considerably more than one rule pertaining to a behavior that is consistent with the relevant moral principles. There are, for example, many ways that a state could regulate the flow of traffic on an interstate highway without violating the First, Fourth, Fifth and Eighth Amendments. Thus, a judge who is motivated by a Necessity Rule can simultaneously be motivated by a rule valid under it because the judge can always imagine that the rule no longer exists or is replaced by some other rule. For this reason, if Shapiro's argument is intended to show that a positivist must give up either the Necessity Component of the Incorporation Thesis or the Practical Difference Thesis, it fails because it focuses on an account of motivational guidance that is extraneous to all of the other core commitments of positivism. The Practical Difference Thesis does not preclude accepting the Necessity Component.[13]

IV. THE SUFFICIENCY COMPONENT

At the outset, it is worth noting that Shapiro foregoes a very easy argument against the Sufficiency Component. As we saw in the last section, Hart believes law purports to provide peremptory reasons that preclude deliberation on the merits. Insofar as Hart believes law motivationally guides by providing peremptory reasons, Shapiro has a straightforward argument that Hart cannot consistently accept the Sufficiency Component. Since a Sufficiency Rule requires deliberations on the merits of a rule as a precondition for determining whether it is legally binding and hence should be applied, it cannot motivationally guide behavior on Hart's view because he believes law motivationally guides by *precluding* such deliberation.

13. Jules Coleman believes there is no reason to accept the Necessity Component alone because the point of the Incorporation Thesis is to accommodate Dworkin's view that the *Riggs* principle was legally authoritative solely in virtue of its content, and the Necessity Component cannot do this. Thus, he believes the Necessity Component alone can add nothing unique to explanations of how moral principles figure into legal reasoning. Jules Coleman, THE PRACTICE OF PRINCIPLE, forthcoming. Hereinafter referred to as POP.

I find Coleman's view unpersuasive. Written constitutions often contain clauses that seem to make satisfaction of moral criteria a necessary condition of legal validity. The Necessity Component provides a more natural and perspicuous explanation of these clauses than the Source Thesis—and this is a *prima facie* reason in favor of accepting the Necessity Component. If Shapiro shows that the Sufficiency Component is inconsistent with the Practical Difference Thesis, then a theorist who finds an incorporationist explanation of such clauses more attractive than Raz's explanation has a theoretically legitimate reason for adopting the Necessity Component.

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Nevertheless, Shapiro does not pursue this line of reasoning, perhaps because he is aware that Hart need not equate motivational guidance with providing peremptory reasons, and opts instead for an argument that applies to other possible accounts of motivational guidance and is hence more powerful. Let *SRoR* be a sufficiency rule of recognition that asserts "all and only principles of morality are legally valid" and that "judges are bound to apply valid moral principles in hard cases." Let R_{mor} be the moral norm that no person should profit from her own wrong, which is clearly valid in virtue of its moral content. Now suppose that the judge must decide whether to allow a murderer to take under the will of her victim and that R_{mor} is the only relevant rule. On Shapiro's view, if the judge is motivationally guided by *SRoR*, she cannot be motivationally guided by R_{mor}:

> For if the judge were guided by the inclusive rule of recognition, but did not appeal to the moral principle, he or she would still end up invalidating the will. . . . The moral principle, therefore, can make no practical difference once the rule of recognition makes a practical difference, because the judge will act in exactly the same way whether he or she personally consults the moral principle or not (*HWO* 496).

On Shapiro's view, to determine whether R_{mor} makes a practical difference we must look to see what would happen if the judge did not appeal to R_{mor}; if the judge would do exactly the same thing without appealing to R_{mor}, then R_{mor} cannot make a practical difference. But a judge who is motivationally guided by *SRoR* would be motivated to decide the case in accordance with morality. And R_{mor} tells us that withholding the gift is what morality requires. But since the judge is already motivated to decide the case in accordance with morality, she will withhold the gift even if she does not appeal to R_{mor}.[14] *SRoR* and R_{mor} cannot simultaneously make a practical difference.

But notice that Shapiro's Feasibility Thesis seems to leave the inclusive positivist an out: It is enough, on this thesis, that the judge correctly believes she would act differently if R_{mor} were not a rule. And this condition seems to be satisfied by the above case. For a judge who is motivationally guided by *SRoR* is presumably motivated to apply whatever standards are valid under *SRoR* so that the judge would be motivated to behave differently if R_{mor} were not valid under *SRoR*. If so, then Shapiro's Feasibility Thesis implies that the judge can simultaneously be motivationally guided by *SRoR* and R_{mor} because *SRoR* provides some elbow room: If R_{mor} were not a rule under *SRoR*, the judge would do (and believes she would do) otherwise.

Shapiro anticipates this move and dismisses it. On his view, R_{mor} could not fail to be a rule under a rule of recognition that validates all and only moral principles. Exclusive rules of recognition leave elbow room with respect to R_{mor} because whether R_{mor} is valid depends *entirely* on whether R_{mor} has the

14. This, of course, assumes that the judge can figure this out without appeal to R_{mor}—a dubious assumption. Moral principles like R_{mor} play an indispensable role in moral reasoning.

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appropriate social source—and this is a contingent matter; though R_{mor} is a moral requirement of fairness, a legislature could nonetheless decline to enact R_{mor}. Accordingly, R_{mor} can make a practical difference in the judge's deliberations under an exclusive rule that validates it because "it is always up to us to imagine that the norm [R_{mor}] no longer exists." What the judge has reason to do under an exclusive rule of recognition depends on what the legislature has done—and the legislature has discretion with respect to *any* norm to enact, or decline to enact, that norm.

And this, on Shapiro's view, distinguishes exclusive rules of recognition from inclusive rules of recognition:

> The set of possible motivated actions is fixed . . . and never varies. The reason for this is simple: morality is a static system—it has no "rule of change." Morality differs dramatically from law in this respect. While legal rules routinely change over time, moral rules do not. It is incoherent, for example, to say that promises no longer need be kept. If promises must be honored today, they must be honored tomorrow (*HWO* 498).

What distinguishes Sufficiency Rules from exclusive rules of recognition, then, is as follows: While it is a contingent matter as to what rules are valid under an exclusive rule of recognition, it is not a contingent matter as to what rules are valid under an inclusive rule of recognition.

There are a number of problems here. First, it is not always a contingent matter as to what rules are valid under an exclusive rule of recognition. Hart argues convincingly that there are some rules that must be valid in order for a system of rules to operate as a legal system. For it is a conceptual truth that law must conduce to the "minimum purpose of survival which men have in associating with each other" (*CL* 193), and there could not be a society in which theft and violence are not prohibited:

> Reflection on some very obvious generalizations—indeed truisms—concerning human nature and the world in which men live, shows that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. . . . Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law (*CL* 192–3).

Here it is important to note that he is not claiming that such norms are necessarily valid in virtue of their moral content; this, of course, would contradict the Separability Thesis. Rather, Hart is claiming that no ostensible legal system that did not include these rules could be sufficiently efficacious to satisfy the minimum conditions for a legal system. Where there are legal systems, these rules are ultimately valid in virtue of a convention—and this is what distinguishes his view about such rules from a genuine natural law view.

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But the problem this poses for Shapiro's argument is the same in any case. If Hart is correct about this, then it follows on Shapiro's reasoning that exclusive positivism is inconsistent with the Practical Difference Thesis as he construes it. Let *XRoR* be an exclusive rule of recognition and let R_{NL} be a valid rule under *XRoR* that reproduces some portion of the minimum content of the natural law. If the judge is motivationally guided by *XRoR*, she cannot be motivationally guided by R_{NL}. Though R_{NL} is valid in virtue of having an appropriate source, it is a conceptual truth that there *could not* be a legal system in which *XRoR* is a binding rule of recognition and R_{NL} is not a valid rule. For this reason, there is not sufficient elbow room for R_{NL} to make a practical difference in the judge's deliberations. Thus, if Hart's views about the minimum content of the natural law are correct, then Shapiro's reasoning also shows the Source Thesis is inconsistent with the claim that every legal norm must be capable of making a practical difference.

Moreover, Shapiro's argument that a norm valid in virtue of content under a Sufficiency Rule cannot make a practical difference because it cannot be "imagine[d] that the norm no longer exists" (*HWO* 498) assumes that moral principles are necessarily true—a view that is highly controversial. Ethical subjectivists hold that moral principles are (morally) valid because the majority of people in the relevant group believe that such principles are (morally) valid. And what the members of any given group believe about a rule, on this view, is a contingent matter.[15] Thus, if ethical subjectivism is true, then a moral rule valid in virtue of a Sufficiency Rule leaves enough elbow room for a judge who is motivationally guided by the rule of recognition because "it is always up to us to imagine that the [relevant group accepts a different norm], even though the judge remains committed to the same rule of recognition" (*HWO* 498).

In anticipation of this line of objection, Shapiro argues that morality is a static system regardless of whether ethical subjectivism is true:

> But claiming that morality is a static system is not to deny the claims of moral relativists. The validity of moral rules might be relative to specific cultures or tastes, but given that relativity, their validity does not change over time. If female genital circumcision is morally acceptable in some cultures, then those who hold this belief will think that these practices are always acceptable.

15. Though one might argue, in the spirit of Hart, that the relevant groups cannot exist unless certain principles command the assent of most members of the relevant group. Thus, one might argue that there are certain rules that have to be included in a culture's set of ethical principles (*i.e.*, Hart's minimum content of the natural law) even if ethical principles are valid in virtue of a convention. Nevertheless, it is important to distinguish what theories of law purport to do from what forms of ethical subjectivism (like ethical relativism) purport to do. Theories of law purport to provide existence conditions for legal systems—and a legal system cannot exist unless it is minimally efficacious. Ethical subjectivist theories, in contrast, are not attempting to articulate necessary and sufficient conditions for the existence of a culture (or some other kind of group). Hence, it is not obvious that Hart's analysis with respect to the minimum content of the natural law has any real application here.

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> To be sure, cultures do change their views about morality. Someday all cultures might ban female genital circumcisions. But this does not mean that, in those cultures, the people will think that the "true" moral rules have changed; it would simply indicate that their views about which rules are the true moral rules have changed (*HWO* 498).

Unfortunately, this reasoning does not help Shapiro. If ethical subjectivism is true, then the following claim is true:

> (ES): For all norms *R*, *R* is a morally valid rule in group *G* if and only if the majority of the members of *G* accept *R* as a morally valid rule.

Notice that, for any *R* that is accepted by *G*, the right-hand constituent of the biconditional is contingently true. In other words, it is logically (and, for that matter, nomologically) possible that the members of *G* accept instead of *R* some rule *R** that is inconsistent with *R*. Thus, the left-hand constituent of the biconditional, if true, is contingently true. This implies that, for any *R* morally valid in virtue of what people in *G* believe and legally valid in virtue of its moral merit under a sufficiency rule *SRoR*, *R* is capable of motivationally guiding the judge insofar as it is possible that *SRoR* validates some *R** inconsistent with *R*. Since it is possible that people in *G* accept *R** making *R** morally valid in *G*, it is possible that *SRoR* validates *R** in *G*. Under the assumption that ethical subjectivism is true, a judge in *G* can simultaneously be motivationally guided by *SRoR* and *R*.

The most significant problem, however, with Shapiro's argument that a judge cannot be motivationally guided by a Sufficiency Rule and a rule validated by it is that it turns on a problematic inference:

> (1) *R* motivationally guides a person *P* to do *a* if and only if *P* would not have done *a* if *R* had not been a rule.
> (2) It is not possible that *R* is not a rule.
> (3) Therefore, it is not the case that *R* motivationally guides *P* to do *a*.

To see the problem with the inference, it is necessary to get some sense for the truth conditions of a counterfactual sentence. David Lewis expresses the basic intuition about the meaning of a counterfactual as follows: "'*If kangaroos had no tails, they would topple over*' seems to me to mean something like this: in any possible state of affairs in which kangaroos have no tails, and which resembles our actual state of affairs as much as kangaroos having no tails permits it to, the kangaroos topple over."[16] Lewis fleshes out this straightforward intuition using very complicated formal machinery, but the idea can be expressed more simply as follows. Let *C* (the closeness relation)

16. The following analysis adopts the spirit, if not the letter, of David Lewis's analysis in COUNTERFACTUALS (1973). The argument can easily be reformulated in terms of Lewis's more complicated machinery. I suppress the details of Lewis's semantics purely for considerations of readability.

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be defined as follows: A possible world ω_i is *C*-related to the actual world *A* if and only if (i) kangaroos have no tails in ω_i and (ii) ω_i resembles *a* as closely as having kangaroos with no tails permits it to. Then, the counterfactual "if kangaroos had no tails, they would topple over" is true if and only if in every possible world ω_i *C*-related to *A*, kangaroos topple over. Otherwise put, "if kangaroos had no tails, they would topple over" is true if and only if there is no possible world ω_i *C*-related to *A* in which kangaroos fail to topple over.

Dispositional counterfactuals are somewhat more complicated. To say that I would have jaywalked if there were no law prohibiting it is to make the following claim: given my actual values, beliefs, and intentions, I would jaywalk if the law did not prohibit it. For this reason, the closeness relation *DC* must limit the relevant class of possible worlds to those in which I instantiate the same values, beliefs, and intentions that I do in the actual world. Thus, "I would have jaywalked if there were no law prohibiting it" is true if and only if I jaywalk in every possible world in which (i) there is no law prohibiting jaywalking; (ii) I have the same values, beliefs, and intentions that I do in the actual world compatible with there being no law prohibiting jaywalking; and (iii) the resemblance to the actual world is as close as (i) and (ii) permit.

Accordingly, the truth conditions of the dispositional counterfactual schema "*P* would have done *a* if *R* had not been a rule" can be defined by modifying the closeness relation as follows. A possible world ω_i is *DC*-related to the actual world *A* if and only if (i) *R* is not a rule in ω_i; (ii) *P* has the same beliefs, values, and intentions that she does in *A* compatible with *R* not being a rule; and (iii) ω_i resembles *A* as closely as (i) and (ii) permit. Then "*P* would have done *a* if *R* had not been a rule" is true if and only if *P* does *a* in every possible world ω_i *DC*-related to the actual world *A*. Otherwise put, "*P* would have done *a* if *R* had not been a rule" is true if and only if there is no possible world ω_i *DC*-related to the actual world *A* in which it is not the case that *P* does *a*.

With this machinery in place, we are now in a position to see the problem with Shapiro's inference of the claim that it is not the case that *R* motivationally guides *P* to do *a* from the claims (1) *R* motivationally guides a person *P* to do *a* if and only if *P* would not have done *a* if *R* had not been a rule and (2) it is not possible that *R* is not a rule. Let *A* denote the actual world, and suppose that (2) is true; that is, suppose it is not possible that *R* is not a rule. Then it is not the case that there exists a possible world ω_m such that *R* is not a rule in ω_m. Now suppose, per *reductio*, that it is false that *P* would not have done *a* if *R* had not been a rule. Then there exists a possible world ω_n in which (i) *P*'s beliefs, values, and intentions are the same as they are in *A;* (ii) *P* does not do *a;* and (iii) *R* is not a rule in ω_n. This just follows as a matter of definition from the counterfactual assertion. But notice that (iii) contradicts the assumption that (2) is true. What this means is that, *contra* Shapiro, if (2) is true, it must also be true that *P* would not have done *a* if *R* had not been a rule.

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It might be helpful to see this again from another angle. If (2) is true, then *R* is a rule in every possible world. For it to be the case that *R* does not motivationally guide *P* to do *a*, there must be a possible world *DC*-related to *A* in which *P* (holding constant *P*'s beliefs, values, and intentions) does *a* even though *R* is not a rule. But (2) precludes there being such a world because (2) asserts that *R* is a rule in *every* possible world. It follows that (2) implies *the negation* of what Shapiro needs to infer in order to make out his argument against the Sufficiency Component. But notice that this implies that the critical inference above is not just invalid, but incoherent as well: The set consisting of (1), (2), and (3) is an inconsistent set.

What ultimately goes wrong with the inference is that counterfactuals with impossible antecedents are true—and not false as (3) assumes.[17] For this reason, one might object that counterfactuals with impossible antecedents are not true in any meaningful sense; they are true only in the vacuous or technical sense that a material conditional with a false antecedent is true. Thus, on this objection, the counterfactual "*P* would not have done *a* if *R* had not been a rule" is true only in a vacuous sense if the sentence "It is not possible that *R* is not a rule" is also true.

Nevertheless, there are two problems with this response. To begin with, it does not matter whether counterfactuals with impossible antecedents are "only" vacuously true; what matters is that counterfactuals with impossible antecedents are not plausibly characterized as false. As long as these counterfactuals are not false, one cannot infer from "It is not possible that *R* is not a rule" the *falsity* of "*P* would not have done *a* if *R* had not been a rule"—which is what Shapiro needs to make his argument. Insofar as dispositional counterfactuals with impossible antecedents are treated as being vacuously true—or, for that matter, as having no truth value—one cannot infer from "It is not possible that *R* is not a rule" the *falsity* of "*P* would not have done *a* if *R* were not a rule."

But, more importantly, it is not true that dispositional counterfactuals with impossible antecedents are vacuously true if "vacuously true" means true in a technical, unmeaningful sense. To see this, it would be helpful to contrast Shapiro's argument with the following argument:

(1) *R* motivationally guides a person *P* to do *a* if and only if *P* would not have done *a* if *R* had not been a rule.
(2*) *R* is a rule.
(3) Therefore, it is not the case that *R* motivationally guides *P* to do *a*.

Notice that the only difference between the two arguments is in the second premise. Whereas (2) is logically equivalent to the modal claim that *R* is *necessarily* a rule, (2*) asserts the weaker contingent claim that *R* is a rule.

17. *See* Lewis, COUNTERFACTUALS, at 16, 24–5.

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It is clear that this second argument is invalid. (2*)'s assertion that *R* is a rule does not imply, in and of itself, the falsity of the claim that *P* would not have done *a* if *R* had not been a rule. Indeed, it would not make sense for *P* to say "I wouldn't have done *a* if *R* had not been a rule" if (2*) were known to be false. Thus, the truth of (2*) is a precondition for the meaningful assertion of the claim that *P* would not have done *a* if *R* had not been a rule. For this reason, it is clear that (2*) does not logically imply:

(2.1) It is not the case that *P* would not have done *a* if *R* had not been a rule.

(2.1) is the negation of the right-hand constituent of the biconditional asserted by (1), which is needed to infer (3).

A less abstract example here might be helpful. Suppose John Doe is a law-abiding citizen who always obeys legally valid norms. Suppose, further, that there is a legally valid norm that prohibits jaywalking. It follows from these suppositions that John never jaywalks. Yet it makes perfect sense for John to say, "You know, if there weren't a rule prohibiting jaywalking, I would jaywalk on occasion." Indeed, this sentence *presupposes* that there is a rule prohibiting jaywalking. It would make little sense for John Doe to utter this sentence if he knew there were no rule prohibiting jaywalking. The utterance of the dispositional counterfactual "I would do *a* if circumstance *C* were not the case" presupposes, though it does not imply, that *C* obtains. For this reason, the fact that *C* obtains cannot imply the falsity of that counterfactual sentence. Thus, the version of the argument that contains (2*) is invalid.

Ultimately, the reason for this is that dispositional counterfactual statements are principally statements about the speaker's beliefs, intentions, and attitudes with respect to some act. For example, John Doe's statement that "I would act on an intention to jaywalk at time *t* if there weren't a rule prohibiting it" asserts the following: John Doe jaywalks at time *t* in any possible world in which (i) John Doe exists with the same values, motivations, and beliefs he has in the actual world; (ii) there is no rule prohibiting jaywalking; and (iii) the resemblance to the actual world is as close as (i) and (ii) permit. The claim is thus *primarily* about John Doe's state of mind and only *secondarily* about the circumstances obtaining in the actual world. John Doe does not intend to assert that there is a rule prohibiting jaywalking; that is not the point of the statement.[18]

Now one might think that the distinction between (2) and (2*) makes all the difference with respect to the success of the argument. The intuition is, I think, a common one: What states of mind one can have is constrained by what states of affairs are possible. I have heard it said, for example, that a person *cannot* wish for something that is logically impossible. I see no reason

18. Of course, the listener is justified in assuming that there is such a rule (or at least that John Doe believes there is such a rule) because otherwise it would be conversationally odd to utter such a statement.

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to accept this claim. It might be true that there is no reason for me to wish there were square circles, but that does not imply that I cannot wish for them. All such a wish asserts is that I would be so pleased if there were square circles that I have a desire for their existence. Of course, a wish for what is impossible cannot be satisfied, but that is no reason to think I am incapable of forming that state of mind.

Consider a different context. The conclusion of the strongest version of the argument from evil is that the existence of a morally perfect, omniscient, omnibenevolent God in a world in which evil occurs is logically impossible. Assume the argument is successful and that evil exists in the actual world. Then it follows that a morally perfect, omniscient, omnibenevolent God could not exist in the actual world. Nevertheless, it seems clear that this does not preclude someone from wishing in a meaningful way that such a being exists in the actual world with all of its current properties (including the property of instantiating some evil). Again, such statements do no more than express certain kinds of values on the part of a speaker—and the values that are expressed by such a person are perfectly coherent even if they cannot be realized in the actual world. Such a speaker simply believes that, other things being equal, a state of affairs in which there exists a perfect God is preferable relative to her values than a state of affairs in which such a being does not exist. Though such values *cannot* be realized in the actual world (if the argument from evil is sound), a dispositional statement that expresses such values is surely true in some meaningful way.

Now consider a counterfactual. It is nomologically necessary, given the laws of nature and my physical make-up, that I cannot fly unaided and walk through walls. In other words, it is not the case that there exists a *logically* possible world governed by the same laws of nature that govern the actual world in which I exist and have the same physical make-up but can fly unaided and walk through walls. But it nonetheless makes sense for me to say I would live my life somewhat differently if there were such a world. It just so happens that there is not, and could not be, such a world. But, again, it bears emphasizing that my statement is *primarily* a statement about my state of mind with respect to certain circumstances and only *indirectly* a statement about those circumstances. Thus, the mere fact that there could not be a world causally like this one in which I can walk through walls and fly does not make it any less meaningful for me to assert I would live my life very differently if such circumstances obtained.

For this reason, the dispositional counterfactual "*P* would not do *a* if *R* were not a rule" can be meaningfully asserted when there is no logically possible world in which *R* is not a rule. This counterfactual is primarily a statement about *P*'s state of mind with respect to the relationship of her performance of *a* and the status of *R* as a rule. For the claim that *P* would not have done *a* if *R* had not been a rule is a claim about *P*'s beliefs, intentions, and motivations for doing *a:* the idea here is that it is *R*'s status as a rule that explains why *P* does *a*. The mere fact that there cannot be a

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world in which *R* lacks this status does not make it any less meaningful (or interesting) to assert that *P* would do otherwise in such a world. Thus, dispositional counterfactuals with impossible antecedents can be both interesting and true in a meaningful way.[19]

V. TOWARDS AN ALTERNATIVE ACCOUNT OF MOTIVATIONAL GUIDANCE

There is another objection that Shapiro can raise to the argument I made in the last section. I argued that Shapiro's argument against the Sufficiency Component turns on an invalid counterfactual argument: (1) *R* motivationally guides a person *P* to do *a* if and only if *P* would not have done *a* if *R* had not been a rule; (2) it is not possible that *R* is not a rule; and (3) therefore, it is not the case that *R* motivationally guides *P* to do *a*. But the notion of motivational guidance defined in claim (1) differs from the notion that Shapiro uses. Compare

(MG1) *P* would not have done *a* if *P* had not appealed to *R* with
(MG2) *P* would not have done *a* if *R* had not been a rule.

In "On Hart's Way Out," Shapiro explicitly adopts (MG1) as a definition of what it means to say that *R* motivationally guides *P* to do *a:*

> [T]o be capable of guiding conduct, [a rule] must be capable of making a practical difference. To know whether a rule makes a practical difference, we must consider what would happen if the agent did not appeal to the rule. The rule makes a difference to one's practical reasoning only if, in this counterfactual circumstance, the agent might not conform to the rule (*HWO* 495).

The quoted passage, then, makes it clear that Shapiro is using (MG1) and not (MG2).

And here it is worth noting that how the argument comes out *does* turn on which account of motivational guidance is adopted; as we have seen, Shapiro's argument against the Sufficiency Component does not work

19. Lewis does not say much about dispositional counterfactuals, but believes that counterfactuals with impossible antecedents can sometimes be meaningfully asserted. (*See* Lewis, COUNTERFACTUALS, 25). On his view, for example, the counterfactual sentence

If there were a largest prime *p*, *p*! + 1 would be prime.

has an impossible antecedent, but is nonetheless a perfectly sensible (and philosophically interesting) thing to say. In contrast, the sentence

If there were a largest number *n*, pigs would have wings.

is, in contrast, not a very sensible thing to say. Logical consistency demands, of course, that all such sentences be treated in the same way, so it makes most sense to characterize this silly sentence as true, though vacuously so. But it is the fact that counterfactuals with impossible antecedents can be meaningfully and truly asserted that requires the assignment of true to silly instances of such sentences.

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against (MG2). Here it would be helpful to consider Coleman's illuminating account of how Shapiro's argument against the Sufficiency Component works. In explaining why Shapiro employs a different strategy against the Sufficiency Component from the one he employs against the Necessity Component, Coleman observes:

> Shapiro's argument against necessity clauses may have to differ from his argument against sufficiency clauses. . . . In sufficiency clauses, all the reasons for action that could apply to the agent are already contained in that clause of the rule of recognition, so rules valid under it can add no additional reasons. Thus, if one is guided by the rule of recognition, rules valid under it cannot guide because they can provide no additional reasons for action (*POP,* Ch. 10, 16–17).

In this concise passage is the insight that powers Shapiro's argument: More specific moral rules are logical consequences of more general moral principles. For example, the principle that one should act fairly implies, for example, that one should not discriminate on the basis of immutable and irrelevant characteristics when assigning benefits and burdens. Now this should not be taken to mean that the consequences of more general principles are epistemically transparent. They need not be, and often are not, immediately obvious—and this explains why moral philosophers spend so much time developing sophisticated accounts of what distinguishes fair and unfair behavior, along with theories of moral reasoning that enable us to evaluate those accounts.

But notice that Shapiro's strategy, then, will work against any rule of recognition that incorporates a rule that entails a complete set of consequences as to what behaviors are and are not permissible. Consider, for example, the utilitarian-inspired rule of recognition *UR*o*R* that says "all and only rules that maximize well being are legally valid" and a rule *R* that provides punishment for intentional killings in circumstance *C*, which is valid under it. Notice that if (MG1) is the correct account of motivational guidance, it is impossible for a judge to be motivationally guided by the rule of recognition and a rule validated under it. For suppose I am guided by *UR*o*R*. Then I will be motivated to act according to rules that maximally conduce to well being. Can I simultaneously be guided by *R*? Not if (MG1) is the correct account: If I am motivated to act according to rules that maximally conduce to well being and I have a case involving an intentional killing in circumstance *C*, then I will be motivated to punish the defendant even if I do not appeal to *R* because, as a general matter, punishment in such circumstances will maximally conduce to well being. I cannot be simultaneously motivationally guided by both *UR*o*R* and *R* because, as Coleman puts it, all of the reasons for *R* are already contained in *UR*o*R*.

And, as is evident from Coleman's remarks, the general argument has nothing to do with morality. If (MG1) is the correct account of motivational

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guidance, the argument works even if it turns out that rule utilitarianism, as seems likely, is not a morally valid principle. Moreover, it works despite the fact that *URoR* has empirical content; for it is an empirical question, albeit a difficult one, whether adopting a particular rule maximally conduces to well being. If (MG1) is the correct account of motivational guidance, it is impossible to be motivationally guided by a rule of recognition and a standard of behavior logically entailed by that rule of recognition; in such circumstances, all of the reasons for motivating compliance with the latter are already contained in the former—and this is true, again, regardless of whether the relevant standard is a moral standard.

The objection to my argument, then, presupposes an important observation: Shapiro's arguments work against some possible accounts of motivational guidance but not all of them. As we saw in Section 3, his argument against the Necessity Component works only against:

(MG0): *P* does *a* because of *R* without engaging in any deliberation on the merits of *R* or of doing *a*.

(MG0), of course, is a rough attempt to capture Hart's notion of a peremptory reason as *precluding* all deliberation on the merits. According to this account, someone who accepts an authoritative directive treats it as a reason that precludes deliberation—and hence does what the directive requires without thinking about the merits of the directive. Though Shapiro does not mention it, his argument against the Sufficiency Component also works against (MG0): For any rule of recognition that requires deliberation as a precondition to applying a rule is clearly inconsistent with a concept of motivational guidance that is satisfied only if the agent does not deliberate on the rule.

What I have shown in the preceding sections is that the argument against the Sufficiency Component works only against (MG0) and (MG1), and that the argument against the Necessity Component works only against (MG0). Further, I have shown the invalidity of the counterfactual inference Shapiro makes in attempting to show that a Sufficiency Rule does not leave elbow room for the rules valid under it to make a practical difference. What that latter argument also shows, however, is that Shapiro's argument against the Sufficiency Component will not work if something like (MG2) is adopted as an account of motivational guidance.[20] For this reason, the observation that Shapiro adopts (MG0) and (MG1) in his discussion does not provide a reason for rejecting my analysis.

But this raises an important question: Given that there is a plurality of ways in which the notion of motivational guidance can be fleshed out, how do we determine whether any one is adequate? Fortunately, as I noted

20. *See infra* for a discussion of two related problems that require a minor modification of (MG2).

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earlier, Shapiro articulates a general account of what it means to be guided by a rule. According to Shapiro, acting on a generalized normative judgment is not necessarily acting on a rule. For example, infielders know that a third baseman should draw near the plate when he suspects the batter is going to bunt. And third basemen usually act according to the generalized normative judgment, "It is good to draw near the plate when you suspect a bunt." But this normative judgment is not a rule in the sense that the proposition "unless the third strike is a foul, a batter is retired upon receiving a third strike" is a rule.

As Shapiro points out, the normative judgment "It is good to draw near the plate when you suspect a bunt" does not function as a rule in the third baseman's practical deliberations. Rules operate by *constraining* behavior, i.e., by reducing the number of feasible options that are available to the agent. This model of rules (the Constraint Model) implies, according to Shapiro, that "rule-guidance is absent . . . if these constraints are either missing, or present but redundant, that is, the future self would act in the same way even if not constrained" (*DR* 39). In any given case of a suspected bunt, the third baseman will draw near to home plate, regardless of whether he appeals to the generalized normative judgment, because the balance of reasons favors doing so. Thus, under the Constraint Model, a generalized judgment about what a third baseman ought to do in cases where a bunt is suspected does not amount to a rule.

On Shapiro's view, the Constraint Model implies the Feasibility Thesis as a test for determining the adequacy of accounts of motivational guidance. According to Shapiro's Feasibility Thesis, an agent is being instrumentally guided by a rule *R* if and only if (1) the agent's behavior conforms to *R;* (2) recognition that *R* constrains the agent to conform to *R* makes nonconformity infeasible; and (3) the agent believes that absent the motivation of *R*, he might not conform to *R* (*DR* 47). Here it is important to bear in mind that, for Shapiro, "[t]he Feasibility Thesis . . . sets necessary and sufficient conditions for the determination of instrumental rule-guidance."[21] Thus, any principle of motivational guidance that satisfies Shapiro's Feasibility Thesis—and there is no reason to think that there is only one way to be motivationally guided by a rule—is an adequate account of at least one kind of motivational guidance.

(MG0) clearly satisfies the Feasibility Thesis and hence counts as motivational guidance—indeed, a very strong form of motivational guidance. Suppose I take rule *R* as a peremptory reason for doing what it requires and I do what it requires. Then condition (1) of the Feasibility Thesis is satisfied: I conform my behavior to *R*. Condition (2) is also satisfied: That I regard rule *R* as a reason for doing what it requires without deliberation on my part

21. It is clear from Shapiro's discussion and from the content of the Feasibility Thesis that it is a constraint on accounts of motivational guidance—and not on accounts of epistemic guidance. Thus, "instrumental guidance" in this discussion should be construed as synonymous with "motivational guidance."

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implies that I recognize that *R* makes non-compliance infeasible. Finally, condition (3) is satisfied: Insofar as I do not allow myself to deliberate at all on the merits of *R*, I do not know what I would do if not for *R* and hence believe that, absent the motivation of *R*, I *might not* conform to *R*. Hart's (MG0) is, thus, one way to be motivationally guided by a rule.

Shapiro's (MG1) is another way of being motivationally guided by a rule. Suppose I do what *R* requires because *R* is a rule in the sense that I would not have done what *R* requires if had I not appealed to *R*. Condition (1) is satisfied: By hypothesis, I conform my behavior to *R*. Condition (2) is satisfied: Since I would not do what *R* requires if I did not appeal to *R*, *R* operates to constrain my behavior, making non-compliance with *R* infeasible. And condition (3) is satisfied: Since I would not do what *R* requires if I did not appeal to *R*, it seems reasonable to infer that I believe that, absent the motivation of *R*, I might not conform to *R*. Shapiro's (MG1) is, thus, another way of being motivationally guided by a rule.

The question, then, is whether (MG2) satisfies the Feasibility Thesis. As stated, there are a couple of problems with (MG2). First, notice that if *R* is necessarily a rule, "*P* would *not* have done *a* if *R* had not been a rule" and "*P* would have done *a* if *R* had not been a rule" are *both* true. For, as we saw in the last section, a dispositional counterfactual with an impossible antecedent is true. Since both of the above counterfactuals have impossible antecedents, both are true—and this, of course, is problematic.[22]

Second, while (MG2) satisfies conditions (1) and (2) of the Feasibility Thesis, there is nothing in (MG2) that guarantees that condition (3) is satisfied. Suppose I do what *R* requires because *R* requires it in the sense that I would not have done what *R* requires if *R* had not been a rule. Condition (1) is satisfied: By hypothesis, I do what *R* requires. Condition (2) is satisfied: Since I do what *R* requires *only because R* is a rule, I recognize the rule as operating to make non-compliance infeasible. But it is not clear that condition (3) is satisfied: The mere fact that it is true that I would do otherwise if *R* were not a rule does not imply that I believe that, absent the motivation of *R*, I might not conform my behavior to *R*. For, as we have seen, it might be that it is impossible for *R* not to be a rule. In that case, it is true *both* that I would do what *R* requires if *R* were not a rule *and* that I would not do what *R* requires if *R* were not a rule. Thus, we cannot make any inferences about what I believe I would do in such circumstances from true statements about what I would do—at least, not if we assume my beliefs are consistent.

22. As we also saw in the last section, a dispositional counterfactual with an impossible antecedent can be meaningfully true, but this does not mean that they are *always* meaningfully true. *See, e.g.*, note 18, *supra*. In this instance, only one of the two counterfactuals can be meaningfully true—namely, the one that reflects *P*'s own beliefs about what she would do if *R* were not a rule. If she has no such belief about what she would do, then both counterfactuals are vacuously true.

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Fortunately, both of these problems can easily be resolved by reformulating (MG2) as follows:

> (MG2*): *P* would not have done *a* if *R* had not been a rule and *P believes* that she would not have done *a* if *R* had not been a rule.

Notice that the addition of the right-hand conjunct ensures that the claim "*R* is necessarily a rule" does not imply "*P* would *and* would not have done *a* if *P* were not a rule." Moreover, when (MG2*) is true, condition (3) is satisfied along with conditions (1) and (2). Thus, (MG2*) is yet another way of being motivationally guided by a rule.

Each of these three principles, then, provides an adequate account of one way among several in which an agent can be motivationally guided by a rule. Although I do not think it makes sense to claim any of these principles are better than the others, I want to call attention to one feature of (MG2*) that seems to make it an especially appropriate account of what it means to be motivationally guided by law. Notice that what motivates the conformity of an agent motivationally guided by *R* in the sense of (MG2*) is *R*'s status *as a rule*. The content of *R* plays no role whatsoever in motivating such an agent. For all that is necessary to bring about non-conformity in the agent is a change in the status of *R* as a rule: If *R* were not a rule, the agent would not conform to *R*.

And this, of course, gives voice to the idea that the reasons provided by law purport to be *content-independent*. It is the mere status of a rule *qua* law that is supposed to provide a reason for doing what the law requires. As Coleman puts the point:

> [O]ne distinctive feature of law's normativity is that the reasons-for-action that law provides are independent of the content of the law. The claim law makes to provide reasons-for-actions does not depend on the content of the law, but on the fact of legality (*POP*, Ch. 9).

Of course, as we have seen, the content of a law many *also* give rise to a reason to do what the law requires, as with a law prohibiting intentional killings, but the distinctive feature of law's normativity is that a law purports to give reasons-for-action that have nothing to do with its content. The mere status of a rule as law is supposed to provide a reason to do as the rule requires.

(MG2*) captures this feature of law-guidance nicely, making it an especially appropriate model for motivational guidance in law. I suppose Hart's (MG0), as Shapiro has expressed it, may also—if the content of a rule cannot give rise to a reason not to deliberate. But Shapiro's (MG1) is consistent with being guided by a rule because of its content and with being guided by a rule because of its status as a rule. The rule that says theft is wrong operates to constrain my behavior. But it is not its status as a moral

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rule that accounts for my regarding theft as infeasible; it is the rule's content that accounts for my regarding theft as infeasible. Even if it could be shown that theft in a particular instance is morally permissible, I would be strongly disinclined to commit theft.

Here it is worth noting that the way in which morality purports to guide behavior is different from the way in which law purports to guide behavior. Suppose, for example, that the only reason that John refrains from murder and theft is that the proposition "it is wrong to kill and steal" has the status of moral rule. Although John always complies fully with the requirements of the rule, there is a sense in which he seems nonetheless morally deficient. That he is motivated only by the status of the rule as a moral rule seems to taint his compliance; John seems to have missed the point of morality. It is a mark of good moral character that one is motivated to follow the rule, at least in part, because of the *merit* of its content. It is never the case that the status of a rule as a moral rule is a fully adequate reason for complying with the rule—though there may not be much grounds for complaint if the rule is trivial enough and the agent conforms to it.

This is not true of law. There are times when the mere status of a rule as law provides (or is capable of providing) a fully adequate reason for complying with the rule. The mere fact that the law prohibits jaywalking is capable of providing a fully adequate reason for not jaywalking even when there is no other substantive reason to refrain from doing so (e.g., it is the middle of the night and no one is around). Legal norms, unlike moral norms, provide content-independent reasons for action. Law may also provide content-based reasons, but it need not. In contrast, it makes no sense to think of morality as not providing content-based reasons for action.

What is striking about Shapiro's (MG1), then, is that just knowing that *P* was motivationally guided by a rule *R* in the sense described by (MG1) does not tell us whether *P* was guided by *R*'s content or by *R*'s status as a rule. For (MG1) simply tells us that *P* would do otherwise if *P* did not appeal to *R*. But it might be that the reason *P* would do otherwise is that without the reason for action provided by the content of *R* the balance of reasons favors doing something else. In other words, (MG1) is consistent with being motivationally guided by a rule because of its content and with being motivationally guided by a rule because of its status *qua* rule. And this distinguishes it from (MG2*).

This, of course, is not really a problem for (MG1). There is nothing about law that guarantees that a person will be motivationally guided by a rule because of its status as a rule. After all, the claim is not that law necessarily provides content-independent reasons; rather, it is that law necessarily *purports* to provide content-independent reasons. Though it is striking that (MG2*) does, while (MG1) does not, capture the notion of content-independent reasons for action, that is not a reason to reject (MG1) as an adequate account of motivational guidance. Indeed, Shapiro's Feasibility

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Thesis provides a strong reason for accepting it as an adequate description of *one* way in which a person can be motivationally guided by a rule.

But there are other ways, like (MG0) and (MG2*), in which a person can be motivationally guided by a rule. The important point for our purposes, then, is this: If what we mean by motivationally guided is (MG2*), then a judge can simultaneously be motivationally guided by an inclusive rule of recognition and a rule valid under that rule—and this is true regardless of whether the rule is a Sufficiency Rule or a Necessity Rule. This, however, implies that the Practical Difference Thesis can be reconciled with both components of the Incorporation Thesis, in the absence of any non-question-begging reason to think that the Practical Difference Thesis requires that every law be capable of making a difference in the sense described by (MG1).

Such an argument, I think, is not forthcoming. Of course, Hart gets himself into trouble because he endorses (MG0) but, as I have already suggested, (MG0) is not forced on him by any of his more basic commitments. For example, the idea that the purpose of law is to guide behavior, in and of itself, is not enough to imply that law must guide behavior by providing peremptory reasons. Moreover, while Shapiro may be correct in thinking that Hart's views about the internal point of view commit him to claiming that officials must be motivationally guided by the rule of recognition, these views do not force him to accept the claim that the rule of recognition must motivationally guide officials by foreclosing all deliberation.[23] It is consistent, for example, with the idea that officials accept the rule of recognition as a legitimate standard for official behavior that the rule of recognition guide official behavior by precluding the official from *acting* on her own assessment of the balance of reasons, which need not preclude the official from weighing the balance of reasons. And this latter view is consistent with (MG2*), though (MG2*) does not do an especially good job of expressing this view.[24]

23. Here it is worth noting that the problem that motivated Hart's views about the internal point of view was the problem of trying to explain how law gives rise to obligations—and not the problem of how norms motivationally guide behavior. As is well-known, Hart believed that Austin's Command Theory of Law could not account for the fact that legal norms are, in some sense, obligatory. A command backed by sanctions can *oblige*, but never obligate, a person to comply. But this is a very different issue from the issue that occupies Shapiro's theoretical focus. Whereas the notion of motivational guidance focuses on the causal relation in an agent's deliberations between the reasons for actions provided by rules and the volitions, the notion of obligation is concerned with the *justificatory* relation between reasons for action and volitions.

Nevertheless, it is natural to suppose that there will be some relationship between the causal relations and the justificatory relations. Perhaps it is for this reason that Hart's account of peremptory reasons was also motivated by inadequacies in the Command Theory. Still, it is important to realize that these two issues are conceptually distinct.

24. One possible way of capturing this latter idea is:

> (MG4): *R* motivationally guides *P* to do *a* if and only if *P* would have done *a* because *R* requires it, even if *P* judged that the balance of reasons (excluding the reason provided by *R*) favored not doing *a*.

It is clear that (MG4) satisfies Shapiro's Feasibility Thesis.

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What this means, of course, is that the Practical Difference Thesis can be reconciled with Hart's commitment to the Incorporation Thesis provided that Hart gives up his account of peremptory reasons as the only theory of motivational guidance and allows for other forms of motivational guidance than Shapiro's (MG1). And Hart can give up his account of peremptory reasons without giving up much; for the idea that law functions to *foreclose* deliberation by the agent is simply too strong to be plausible if the claim is that (MG0) is the *only* way law can provide motivational guidance. Moreover, as I have argued, it is open to an inclusive positivist to embrace the Practical Difference Thesis, provided she does not commit herself exclusively to (MG0) or (MG1). I have suggested one way in which this can be done consistently with Shapiro's Feasibility Thesis. But there may well be others.

VI. FUNCTIONALISM, JUDICIAL OBLIGATION, AND MOTIVATIONAL GUIDANCE

In the preceding sections, I have argued that Shapiro's case against the Incorporation Thesis works only against certain accounts of motivational guidance. In particular, I have argued that Shapiro's argument against the Necessity Component works only against (MG0) and that Shapiro's argument against the Sufficiency Component works only against (MG0) and (MG1). In addition, I have attempted to show it is possible for a judge to be motivationally guided by an inclusive rule of recognition and the norms validated by that rule if what we mean by motivational guidance is (MG2*).

In this section, I will argue that even if Shapiro succeeds in showing it is impossible *on any plausible account* of motivational guidance for a judge to be motivationally guided by an inclusive rule of recognition and the first-order norms valid under it, his case against Hart fails. First, it is not clear that Hart embraces a form of functionalism that would commit him to the Practical Difference Thesis as Shapiro describes it. Second, it is not clear that Hart's theory commits him to the view that it must be possible for a judge to be motivationally guided by a rule of recognition and the first-order norms validated by it. Third, it is not clear that his theory commits Hart even to the weaker view that it must be possible for a judge to be motivationally guided by first-order norms. Finally, there is little theoretical motivation for such a view about judicial motivation.

A. Hart's Commitment to Functionalism

Crucial to Shapiro's argument is the idea that Hart is committed to the Practical Difference Thesis in virtue of his acceptance of the thesis that the essential function of law is to guide behavior (the Functionalist Thesis). As will be recalled, Premise 2 in my schematic representation of Shapiro's

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argument asserts that if the Functionalist Thesis is true, then a norm that is incapable of making a practical difference in the structure of deliberations is conceptually disqualified from being a law. Thus, on Shapiro's view, it is ultimately Hart's commitment to the Functionalist Thesis that causes the difficulty; insofar as the Incorporation Thesis is inconsistent with the Practical Difference Thesis and the latter is entailed by the Functionalist Thesis, the Incorporation Thesis is inconsistent with the Practical Difference Thesis.

The Functionalist Thesis represents Lon L. Fuller's most lasting contribution to analytic jurisprudence. On Fuller's view, human activity is necessarily goal-oriented or purposive in the sense that people engage in an activity because it conduces to some end. Insofar as human activity is essentially purposive, according to Fuller, particular human activities can be understood only in terms that make reference to their purposes and ends. Thus, since lawmaking is essentially activity, it can be understood only in terms that explicitly acknowledge its essential values and purposes:

> The only formula that might be called a definition of law offered in these writings is by now thoroughly familiar: law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort (*ML* 106).

To the extent that a definition of law can be given, then, it must include the idea that law's essential function is to "achiev[e] . . . [social] order . . . through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior."[25]

The Functionalist Thesis implies that nothing can count as law unless it is capable of performing the essential function of law. And Fuller believes that for a system of rules to be capable of performing the essential function of law, it must satisfy the following principles: (P1) the rules must be expressed in general terms; (P2) the rules must be publicly promulgated; (P3) the rules must be (for the most part) prospective in effect; (P4) the rules must be expressed in understandable terms; (P5) the rules must be consistent with one another; (P6) the rules must not require conduct beyond the powers of the affected parties; (P7) the rules must not be changed so frequently that the subject cannot rely on them; and (P8) the rules must be administered in a manner consistent with their wording (*ML* 39).[26]

Fuller believes that these principles are internal to law in the following sense: No system of rules that fails minimally to satisfy these principles of legality can achieve law's essential purpose of achieving social order

25. Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILLANOVA LAW REVIEW 655, 657 (1965).

26. Fuller's mistake, of course, is in thinking these principles constitute an internal morality of law.

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through the use of rules that guide behavior. A system of rules that fails to satisfy (P2) or (P4), for example, cannot guide behavior because people will not be able to determine what the rules require. Likewise, a system of rules that fails to satisfy (P5) cannot guide behavior because it is not possible for people to simultaneously comply with inconsistent requirements.

Hart, of course, rejects Fuller's view that his principles of legality constitute an internal morality but, as Shapiro points out, seems to accept the Functionalist Thesis: "I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct." But notice that the Functionalist Thesis, as Fuller articulates it, is concerned with the essential function of law *as an institution*—and not with the essential function of a law *as an individual norm*. Thus, for example, Fuller argues that "[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all" (*ML* 39). Likewise, Fuller describes his view as "concerned . . . with the ways in which *a system of rules* for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be" (*ML* 97; emphasis added).

This, however, poses a problem for Shapiro's analysis because the Functionalist Thesis, as Fuller construes it, does not imply the Practical Difference Thesis. Indeed, Fuller acknowledges that "certain departures from the usual practices of lawmaking, such as those involved in retrospective and special or one-man statutes, though thoroughly objectionable in most contexts, may in some cases serve the ends of legality and fairness."[27] But this means that, on Fuller's view, a property that would be fatal to a legal system, e.g., a total failure of prospectivity, is not necessarily fatal to the validity of an individual norm.

Now this suggests that law *as an institution* can succeed in performing its essential function of guiding behavior even if there are individual laws incapable of providing epistemic or motivational guidance. For as long as there are a sufficient number of legal norms that provide the right kind of guidance, the legal system as a whole is capable in principle of guiding behavior. What ultimately matters, as far as the existence of a legal system is concerned, is that laws are generally efficacious—and it is possible for the laws to be generally efficacious even if many of them are incapable of providing the kind of guidance that Shapiro believes is required by the Practical Difference Thesis.

Consider, for example, a simple legal system with a rule of recognition according to which all and only rules that are morally valid are legally valid. Suppose the citizens are amoral in the sense that they do not regard the rules of morality with any especial regard, but take the internal point of view

27. Lon L. Fuller, THE ANATOMY OF THE LAW 65 (1976). Indeed, on Fuller's view, such departures are sometimes *necessary* to cure certain kinds of injustices arising from circumstances not foreseen by lawmakers (*ML* 51–53).

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towards the rule of recognition and conform their behavior to moral rules because such rules are validated by the rule of recognition. It follows, on Shapiro's view, that the citizens are motivationally guided by the rule in the sense that they are now motivated to act morally for the reason that this is required by the rule of recognition. It also follows that citizens are behaving in precisely the way that is contemplated by the legal system. If the officials also take the internal point of view towards the rule of recognition, there is no plausible non-question-begging reason for claiming that this simple legal system has not succeeded in performing the essential function of law as an institution.

For this reason, the Functionalist Thesis, construed as attributing an essential function to law *as an institution*, in and of itself, does not imply the Practical Difference Thesis. In this connection, it is worth noting that many theorists, positivist and anti-positivist, embrace a functionalist conception of law but disagree on whether the appropriate locus of the function is the legal system as an institution or the individual legal norm. John Austin, for example, seems to take the norm as the appropriate site: "[a] law . . . may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[28] In contrast, Dworkin believes it is the institution that is the bearer of the essential function. On Dworkin's view, the point of a legal system is to provide a justification for the use of a society's coercive force, but that justification is holistic in the sense that it depends on the moral quality of a society's legal practices considered as a whole.[29]

Assuming Hart accepts the Functionalist Thesis, the question, then, is which version (or versions) he accepts. This is a complicated issue that cannot be addressed in detail here, so I will have to content myself with the following observations. There is much in Hart's writings that touches on topics related to the way in which law guides both as an institution and as an individual norm. For example, Hart's views about the open texture of language bear an obvious relation to questions about the limits of an individual norm's ability to guide behavior. In contrast, Hart's view that the Austinian concept of a sovereign cannot account for the continuity of a legal system bears on the question of how a legal system can guide behavior over time.

But just citing these kinds of discussions will not resolve the question of which version of the Functionalist Thesis, if any, Hart accepts. First, one can accept the centrality of norm-guidance to many legal practices without holding the much stronger conceptual claim that the essential function of such practices is norm-guidance. This means the passages in which Hart discusses the guidance function of norms can plausibly be construed as asserting that guidance is usually, though not always, the function that is

28. John Austin, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 5 (1977) (hereinafter referred to as *LJ*).

29. Ronald M. Dworkin, LAW'S EMPIRE 93, 109, 127 (1986).

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principally served by a norm. Second, many of the passages that seem to suggest a commitment to functionalism are consistent with both versions of the Functionalist Thesis—and hence cannot help to resolve the issue of which sense of the Functionalist Thesis, if any, Hart accepts.[30]

Complicating this issue, moreover, is the fact that it is not clear that Hart accepts some version of the Functionalist Thesis. Hart, of course, does say that "it is quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct" (*CL* 248–9), which can be construed as suggesting a commitment to functionalism—though, here again, it is ambiguous as between the two versions. But consider the entire passage in which these remarks appear:

> [W]hereas Dworkin's interpretive legal theory in all its forms rests on the presupposition that the point or purpose of law and legal practice is to justify coercion, it certainly is not and never has been my view that law has this as its point or purpose. Like other forms of positivism my theory makes no claim to identify the point or purpose of law and legal practices as such; so there is nothing in my theory to support Dworkin's view, which I certainly do not share that the purpose of law is to justify the use of coercion. In fact, I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct (*CL* 248–49).

What is striking about this passage is the conspicuous skepticism Hart evinces for the project of finding an essential function for law (whether for law as an institution or for law as individual norm). Indeed, Hart seems expressly to disavow that he is committed to such a project in the second sentence: "Like other forms of positivism my theory makes *no* claim to identify the point or purpose of law and legal practices *as such*" (*CL* 248; emphasis added).

Moreover, in the sentence immediately following the passage quoted above, Hart writes tellingly: "This [i.e., the function of guiding behavior] will not of course serve to distinguish laws from other rules or principles with the same general aims; the distinctive features of law are the provision it makes for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards" (*CL* 249). This is significant because the claim that *f* is an essential function of X implies that no other kind of thing than X has *f* as its essential function. The essential function of a knife is not merely to cut things; there are lots of artifacts, like scissors, that are designed to cut things. The essential function of a knife is to cut things in a certain way; thus, any *artifact* that is contrived

30. I am being generous here: The word "law" in the sentence "law has an essential function" is more plausibly construed as referring to law *as an institution*. Indeed, we would not generally refer to the function of legal norms by talking in terms of "law's essential function."

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for the purpose of cutting things in that way counts as a knife and no artifact that is incapable of cutting things in that way can count as a knife. Essential functions distinguish one kind of artifact from another.[31] To the extent that the function of guiding behavior does not, on Hart's view, distinguish laws from other norms, guidance of behavior cannot be an essential function of law.

It is clear that the gist of the passage containing Hart's often quoted remarks on functionalism indicates a skepticism about the very project of identifying such a function for law. Indeed, against this context, the best interpretation of the sentence "it is quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct" seems to suggest that Hart's endorsement of the Functionalist Thesis is at best conditional: *If* law has an essential function, that function is guidance of behavior. But again there is nothing in this passage that would resolve the issue of which version of the Functionalist Thesis is being discussed here.

The important point, for our purposes, is to note that Shapiro's critical Premise 2 thus depends on two problematic assumptions. First, it assumes that Hart is committed to the Functionalist Thesis, in spite of what appears to be an explicit rejection of the project of attempting to identify an essential function of law. Second, it assumes that Hart accepts functionalism with respect to individual norms, in spite of the fact that most of these passages can also be construed as pertaining to the function of law *as an institution*. For this reason, Shapiro's Premise 2 assumes considerably more theoretical ground, I think, than is plausible. An inclusive positivist is free either to reject the Functionalist Thesis or construe it as applying only to the existence of legal systems.

B. Motivational Guidance and Judicial Decision-making

Shapiro's case against Hart turns on a second foundational assumption. Shapiro's argument presupposes Hart is committed to claiming that, in deciding a case, a judge must simultaneously be motivationally guided by a rule of recognition and the relevant first-order norms valid under it (the Simultaneous Guidance Thesis). Shapiro argues that the Practical Difference Thesis is inconsistent with the Incorporation Thesis on the ground

31. If this is correct, it seems to falsify Stephen Perry's view that morally normative argument is relevant with respect to determining the essential function of an artifact. Thus, he writes of a disagreement as to whether the function of nuclear weapons is to kill or to deter: "Whatever may be the relative merits of these two positions, I hope it is at least clear that this is a *moral* disagreement." Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 372 (1996). Perry is correct about this, but neither of these functions can plausibly be characterized as an essential function. What distinguishes nuclear weapons from other weapons is that nuclear weapons produce large explosions that leave long-term radioactive contamination. It is because nuclear weapons have this essential function that they can be used either to deter or to kill.

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that a judge cannot simultaneously be motivationally guided by an inclusive rule of recognition and a norm that is valid under that rule in virtue of its content. But this line of argument, of course, succeeds only insofar as Hart is committed to the Simultaneous Guidance Thesis.

But there is little reason to think this thesis can plausibly be attributed to Hart. Here it is worth noting that the Practical Difference Thesis, as Shapiro expresses it, does not imply the Simultaneous Guidance Thesis. The Practical Difference Thesis asserts only that every law must be capable of making a practical difference *either* by providing motivational guidance or by providing epistemic guidance. It does not say or imply that, given any set of laws, it must be possible for an agent to be simultaneously guided by *every law in that set*—a claim that is implausibly strong. For sometimes it is not possible to be *simultaneously* guided by two rules because the acts that are demanded cannot be performed at the same time. For example, I cannot be motivationally guided at the same time by a rule that requires me to drive at speeds less than 60 miles per hour on the freeway and by a rule that requires me to sweep the sidewalks in front of my business because it is not possible for me to conform simultaneously to both rules. And the fact that I cannot simultaneously be motivationally guided by these two norms is surely not enough to falsify the Practical Difference Thesis.

Indeed, at the most abstract level, the Practical Difference Thesis asserts only the following as a conceptual truth about law:

$$(\text{PDT}): (\forall x)(\forall y)((x \text{ is a law and } y \text{ is an agent}) \rightarrow \Diamond(x \text{ motivationally guides } y \vee x \text{ epistemically guides } y)).$$

It should be clear from its form that (PDT), in and of itself, neither asserts nor implies:

$$(\text{SGT}): (\forall x)(\forall y)(\forall z)\ ((x \text{ is a rule of recognition } \& \ y \text{ valid under } x \ \& \ z \text{ is a judge}) \rightarrow \Diamond(x \text{ and } y \text{ motivationally guides } z)),$$

which is just a formal representation of the Simultaneous Guidance Thesis. If Hart is committed to the Simultaneous Guidance Thesis, it is not because it is entailed by the Practical Difference Thesis. There would have to be some other Hartian commitment that, perhaps together with the Practical Difference Thesis, implies the Simultaneous Guidance Thesis.

The existence of such a commitment, however, is unlikely; for Hart would reject even the Simultaneous Guidance Thesis's component idea that in deciding a case the judge must be motivationally guided by the applicable first-order norms. To see this, it is important to realize that Hart views the rule of recognition as a standard of *official* behavior. The rule of recognition, on his view, defines a set of recipes to which official must conform in making, changing, and adjudicating law; thus, the rule of recognition is explicitly addressed only to officials, and hence defines legal obligations

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pertaining *only* to the behavior of officials *qua* officials. As Raz describes Hart's view, "it is quite clear that [the rule of recognition] is addressed to officials and applies *only* to them" (*AL* 92; emphasis added). Private citizens may, of course, use the rule of recognition to identify their legal obligations, but the rule of recognition is not addressed to them. Thus, while the rule of recognition *makes possible* legal obligations that bind citizens (i.e., by setting up a system by which law can be made), it does not *define* the legal obligations of citizens *qua* citizens.[32]

It is, of course, the first-order rules valid under the rule of recognition that define legal obligations governing the behavior of citizens *qua* citizens—though it is obviously possible to enact a law that requires judges to discharge the judicial function in a particular way. For example, the rule prohibiting murder is addressed to citizens *qua* citizens; while officials must also obey the rules *qua* citizens, the rule prohibiting murder does not define a standard governing the behavior of officials *qua* officials. As Shapiro himself describes the view, "the law's primary function is to epistemically guide the conduct of its ordinary citizens *via its primary rules* and to motivationally guide the conduct of judicial officials *via its secondary rules*" (*HWO* 492; emphasis added).

But if this is true, it is hard to see why judges *must*, as a conceptual matter, be motivationally guided in their *official* behavior by the first-order rules valid under it. Indeed, on Hart's view, it makes no sense to say that a judge who applies the rule prohibiting murder in a criminal case does so because she is legally obligated *by* that rule—just as it makes no sense to say that a murder defendant has violated the rule of recognition because she is legally obligated *by* the rule of recognition. The rule prohibiting murder, by its own terms, governs the behavior of citizens *qua* citizens; it does not define a standard that governs the behavior of judges *qua* judges. The judge's legal obligation, in such an instance, is defined by a rule of recognition that requires the judge to decide cases in accordance with the applicable law.

Of course, to meet *that* legal obligation, the judge must apply the rule prohibiting murder—and to do that the judge must be able to make some sense of it; thus, one might think that it follows that the judge must be epistemically guided by the rule prohibiting murder. Unfortunately, this conclusion is too strong. What follows, at most, from the claim that the judge must be able to make sense of the rule prohibiting murder is that the judge must have *epistemic access* to the contents of that rule; otherwise put, the judge must be able to determine what that rule requires of citizens. But this is not what Shapiro means by epistemic guidance. According to Shapiro, "[t]o be guided by a legal rule in an epistemic fashion . . . is to

32. The idea that the rule of recognition defines a general legal obligation of citizens to obey the first-order norms validated by the rule is implausible. It would be silly, for example, for the state to attempt to prosecute a defendant for murder and for a separate charge of failure to obey a rule valid under the rule of recognition.

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learn of one's legal obligations from the rule and *to confrom to the rule* because of that knowledge" (*HWO* 492; emphasis added).[33]

There are two related problems here. First, according to this construction of Hart, the judge looks to the law prohibiting murder to determine the content of the *defendant's* legal obligations—and not the judge's. *The rule of recognition* tells the judge what her legal obligation is—and in this instance it is to apply the rule prohibiting murder in evaluating the defendant's conduct. Second, on this construction of Hart, it misdescribes the situation to characterize a judge who correctly applies the law prohibiting murder as *conforming* to the law prohibiting murder. When a person refrains from committing murder because of the law prohibiting murder, she conforms

33. Shapiro underestimates the extent to which an inclusive legal system can epistemically guide bahavior. There are two epistemic functions that must be performed for law to be capable of guiding behavior. First, law cannot regulate behavior unless citizens can distinguish those standards that will be enforced by the state as law from other standards. For if citizens do not know which standards define their *legal* obligations, they will be unable to conform their behavior to legal requirements—especially in circumstances in which competing standards articulate inconsistent requirements. Second, legal norms must inform persons subject to those norms what behaviors are required.

It is easy to see these two functions at work in a legal system with an exclusive rule of recognition: The rule of recognition points in the direction of certain utterances that give rise to binding legal norms, and those utterances inform the citizen of what behaviors are permissible. The picture may seem murkier as to how an inclusive legal system can discharge these critical functions, but it is not difficult to see how these two functions come apart. Consider, for example, a legal system *S* with a rule of recognition *RoR* that says, "All and only moral rules are legally valid." Suppose, also, that I am a citizen of *T* visiting someone in *S* and I want to know how to stay out of trouble with the law. The first thing I need to know is which standards are enforced by the state in *S*. *RoR* provides at least a partial answer to that question: All and only moral standards are enforced in *S*.

Now I need to know what behaviors these standards require—and here is where the matter gets a bit more complicated. Unfortunately, the rule of recognition tells me that moral norms are law, but does not tell me how to distinguish moral from non-moral norms. So in order to determine what the norms require, I must also determine which norms are moral. In the vast majority of cases, this will be easy: It is uncontroversial, for example, that moral norms prohibit intentional killing, theft, misrepresenting the truth in order to induce consent to a contract, etc. And in the vast majority of instances, it will be clear what these standards require, so that I can enjoy my visit in *S* feeling fairly confident that I will not get into trouble with the law.

Nevertheless, Shapiro rejects the idea that an inclusive system of law can perform these epistemic functions:

> It is hard to see, however, how the law can serve [these] function[s] with respect to rules that are valid in virtue of their moral content. Telling people that they should act on the rules that they are supposed to act on is not telling them anything! Marks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms. However, a mark that can be identified only by resolving the very question that the mark is supposed to resolve is useless. Therefore, a norm that bears such a trivial mark . . . is unable to discharge its epistemic duties (*HWO* 494–5).

There are two distinct lines of reasoning here—and both seem problematic. First, Shapiro argues that "telling people they should act on the rules that they are supposed to act on is not telling them anything." There are two claims here: (1) an inclusive rule of recognition does no more than tell people they should act on the rules they ought to act on; and (2) that information is incapable of serving any epistemic function. Claim (2) is certainly true, but claim (1) is false as a claim about the informative qualities of inclusive rules of recognition. If

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her behavior to the law prohibiting murder. Applying a norm and conforming one's behavior to it are two different notions.[34] For this reason, epistemic access is not the same as epistemic guidance in the sense in which Shapiro defines it.

The problem this creates for Shapiro's argument is that the most plausible construction of the Practical Difference Thesis asserts that every legal norm must be capable of making a practical difference in the deliberations *of those persons who are addressed and hence obligated to conform to that norm.*[35] For there is no plausible reason for insisting that a legal norm be capable of making a practical difference in the deliberations of persons who are not addressed or obligated by that norm. Thus, the Practical Difference Thesis, along with Shapiro's interpretation of Hart's views about the rule of recognition, might imply that a judge must be motivationally guided by the rule of recognition. But insofar as a judge is not addressed by a first-order legal norm and hence not obligated to conform to that norm, there is no reason for thinking that Hart believes, or should believe, a judge must be motivationally guided by the first-order norms she applies in deciding cases.

Why, then, does Shapiro believe Hart is committed to the view that a judge must be motivationally guided by first-order norms? For the most part, he simply takes it for granted. Indeed, everything Shapiro has to say about this crucial issue is contained in the following remarks:

> When [Hart] claimed that rules of recognition must motivationally guide courts, I think he intended to claim that the primary rules must, at the very

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the rule of recognition in *S* had been "all and only those rules that ought to be valid are valid," I would have absolutely no idea how to behave. The term "ought" can be used to express different kinds of value judgement: You ought to eat your carrots; you ought to use this shade of blue for the sky; you ought to keep your promises. The proposition "only those rules that ought to be valid are valid" tells me next to nothing because it fails to tell me which "ought's" are relevant. But this, as we have seen above, is not true of the proposition "all and only moral rules are valid."

Second, Shapiro argues that "[m]arks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms[, but] a mark that can be identified only by resolving the very question that the mark is supposed to resolve is useless." This line of argument begs the question against the inclusive positivist because it is derived from Raz's controversial account of authority. On Raz's view, the conceptual point of authority is to resolve disputes by providing a directive that weighs the balance of reasons *and* replaces the balance of reasons in the deliberations of the disputants. But an authoritative directive is conceptually incapable of performing that function if its content cannot be identified without deliberation on the very reasons the directive was meant to replace.

34. In applying the rule prohibiting murder to a murder case, the judge, of course, conforms her behavior to the rule of recognition, which requires her to decide cases by applying the applicable law. But the judge's behavior in applying the rule prohibiting murder in a murder case cannot plausibly be characterized as *conforming to* the rule prohibiting murder. Nor can a private citizen who conforms to the law prohibiting murder plausibly be characterized as having (in the relevant sense) *applied* that rule. In the relevant sense of the word, a person applies a legal norm when she is attempting to determine whether another person's conduct satisfies that norm.

35. This, of course, is not to deny that, on Hart's view, some rules cannot obligate unless they guide. I am grateful to Jules Coleman for pointing this out to me.

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> least, motivationally guide them as well. If a judge is motivated to act on a rule about a rule, then it would seem that the judge would be motivated to act on the underlying rule itself (*HWO* 495).

There is a good bit of theoretical ground being assumed here—beyond the implausible assumption that first-order norms define legal obligations to which judges must conform. Shapiro's argument attempts to show judges must be motivationally guided by the first-order rules they apply on the strength of the inference of "the judge is motivated to act on the underlying [first-order] rule [*R*]" from "the judge is motivated to act on a [meta-]rule about a rule [*R*]." There are a number of problems with this inference. First, the idea that one can infer that *P* is motivated by *q* from the claims (1) *P* is motivated by *r* and (2) *r* entails *q* is problematic. As is well-known, mental states do not always behave this way. For example, I might believe proposition *p* but not believe *q* even though *p* entails *q*. Likewise, I might want to comply with a Sergeant's orders but not want to kill someone even though it might also be true that complying with the Sergeant's order requires killing someone. I might also intend to do *p* but not intend *q* even though *p* causes *q*. In some of these instances, of course, the law may impute a mental state to me for liability purposes, but it does not follow that I actually *instantiate* the relevant mental state.

Shapiro seems to think that this inference can be made because of the relationship between the rule of recognition and the relevant underlying rule as meta-rule to first-order rule. But this relationship is not especially helpful. Suppose I have a meta-belief that it is irresponsible to adopt empirical beliefs without good evidence. The first-order beliefs to which this meta-belief applies are empirical beliefs, such as the belief that eating carrots will prevent various forms of cancer. The mere fact that I am motivated to act on the meta-belief says nothing about whether I am motivated to act on the first-order belief. My motivation to act on the meta-belief simply requires me not to give assent to empirical claims without asking for evidentiary support.

Finally, the inference of "the judge is motivated to act on the underlying [first-order] rule [*R*]" from "the judge is motivated to act on a [meta-] rule about a rule [*R*]" is not enough to support Shapiro's intended conclusion. What is really needed to establish that the judge must be motivationally guided to conform to the first-order rules is the less obvious inference of "the judge is motivated to *conform* to a first-order rule *R*" from "the judge is motivated to conform to a meta-rule making reference to *R*." While "the judge is motivated to apply *R*" may clearly follow from this latter claim, the former does not because applying a rule and conforming to it are logically independent notions. For these reasons, Shapiro's argument falls short of establishing that Hart is committed to claiming that the judge must be motivationally guided by the first-order rules she applies in deciding cases.

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C. Motivational Guidance and the Efficacy of Law

One might nonetheless worry that the capacity of rules valid under exclusive rules to motivationally guide (in the sense of (MG1)) judicial decision-making counts in favor of exclusive positivism and against inclusive positivism. There is no question that it is possible for a judge to be motivationally guided by an *exclusive* rule of recognition and simultaneously by the norms validated by it. For it is, after all, clear that what a judge has reason to do under an exclusive rule of recognition depends on what norms are valid—and this is a contingent matter:

> [C]onsider the following rule of recognition: "Act according to all of the rules passed by Congress." Let us say that the legislature passes a law requiring everyone to pay 30 percent of income in taxes under the penalty of imprisonment. The income tax rule makes a practical difference because it now requires the judge to apply it in cases that come before the judge. The law, therefore, changes the satisfaction conditions of the rule of recognition. Should the rule be repealed, the judge would no longer be motivated to act accordingly (*HWO* 497).

Thus, Shapiro concludes, "rules validated by an 'exclusive' rule of recognition can motivationally guide conduct at the same time that the rule of recognition motivationally guides conduct" (*HWO* 497). But if Shapiro is correct in thinking that rules validated by inclusive rules cannot motivationally guide judicial decision-making, one might argue that this is an important difference in the capacity of inclusive and exclusive rules to guide judicial conduct.[36]

Nevertheless, this line of reasoning works as a decisive objection to inclusive positivism only insofar as the failure of inclusive positivism to guide judicial conduct in this way renders a legal system *incapable* of guiding behavior. Otherwise, the most that can be said is that exclusive rules are better than inclusive rules at performing law's essential function of guiding behavior (assuming, of course, that law has this as an essential function). And this is not strong enough to show that the Incorporation Thesis is false or inconsistent with other fundamental commitments of positivism; indeed, an inclusive positivist can agree that exclusive rules of recognition are more effective than inclusive rules at guiding behavior.

The problem, however, is that the efficacy of a system of norms in guiding behavior does not seem to depend in any important way on the idea that judges can be motivationally guided by first-order norms. Consider a possible world in which people have the following admittedly peculiar qualities: They are (1) perfectly amoral; (2) infallible utility calculators; (3) motivationally indifferent towards utility; and (4) motivation-

36. I am grateful to Jules Coleman for suggesting this worry and helping me develop my views in response.

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ally value institutional forms of social organization like law and usually comply with directives that come from such institutions. Suppose for the sake of simplicity that there is only one correct moral rule: Act so as to maximize utility.

Now consider two societies in that possible world. In Inclusia, the citizens and officials agree to a rule of recognition that validates all and only moral rules and that provides for judicial enforcement of valid norms. By hypothesis, the rule "act so as to maximize utility" is valid in virtue of its content. In Exclusia, the citizens and officials agree to a rule of recognition that validates all and only rules enacted by the legislature according to certain procedures and that provides for judicial enforcement of valid norms. Suppose the legislature properly promulgates the rule "act so as to maximize utility." Then the following propositions are true of both Inclusia and Exclusia: (1) citizens and judges are infallible utility calculators; (2) citizens usually act so as to maximize utility and hence to conform to the rule; and (3) judges always arrive at the correct decision under the rule. Assuming Shapiro is correct about motivational guidance, it is also true that Exclusian judges can, while Inclusian judges cannot, be motivationally guided by the rule of recognition and the valid rule "act so as to maximize utility."

But this latter fact seems to do no interesting conceptual or explanatory work. Notice that, on Hart's view, all of the conceptual requirements for having a legal system are met by both Inclusia and Exclusia, as the officials in both societies take the internal point of view towards the rule of recognition and the rules validated by it are generally obeyed. But regardless of whether or not one is tempted to characterize Inclusia as having a legal system or not, this much is clearly true of the system of rules in Inclusia: It is just as successful in guiding behavior as the system of rules in Exclusia. Being infallible utility calculators, the citizens and judges in both societies always know what the law requires. Being motivated to abide by the law, the citizens in both societies generally do what the law requires and the judges in both societies always decide cases correctly. As far as the functional operation of the system goes, the ability or inability of judges in Inclusia to be motivationally guided by the valid first-order rule seems irrelevant.

This, again, is not to deny that exclusive institutional systems of rules might in most cases do a better job of communicating to citizens and judges what law requires than inclusive systems of rules.[37] It is true, for example, that a meta-rule that says just that all and only moral rules are legally valid will likely engender considerable confusion about what law requires. In contrast, an exclusive system of rules that carefully sets out rules that specifically indicate what behaviors are and are not permissible will engender considerably less confusion in the minds of judges and law-subjects.

37. I am avoiding the term "legal system" so as not to beg any questions against the exclusive positivist.

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But, as the example above shows, the truth of this generalization has nothing to do with the idea that only judges in exclusive systems can simultaneously be motivationally guided by the rule of recognition and rules validated by it. This can be seen in another way. There are two ways for an exclusive legal positivist to characterize the system of rules in Inclusia: (1) The exclusive positivist can deny it is a legal system on the ground that the putative rule of recognition incorporates moral standards; or (2) the exclusive positivist can characterize it as a legal system but deny that the rule of recognition incorporates moral standards. According to (2), the rule of recognition simply directs judges to the moral rule "act so as to maximize utility" in making new law in the exercise of discretion.

The issue, then, is whether to characterize Inclusia as having a legal system. As we have seen, the Inclusian system seems to satisfy Hart's minimum conditions for the existence of a legal system, since Inclusian officials accept the meta-rule and the citizens generally obey the rules validated by the meta-rule. If Shapiro is correct, then one way of resolving the issue is to determine whether the judges can be motivationally guided by first-order norms at the same time they are motivated by the meta-rule.

Unfortunately, there is no reliable empirical way to determine whether Inclusian judges are being motivationally guided by the first-order norms. One could, of course, ask an Inclusian judge whether she is motivationally guided by the rule of recognition, but this is not especially helpful for the exclusive positivist. For if exclusive positivism is true, judges are frequently mistaken about what they believe is true of judicial practices. Many, if not most, judges believe, for example, that the Eighth Amendment makes moral standards about cruel punishment part of the law—something that is explicitly denied by exclusive positivism. Judges are even less likely to get right more abstract issues of whether they can be motivationally guided by some first-order norm. And there does not appear to be any independent empirical way for the exclusive positivist to ascertain whether an Inclusian judge's intuitions about her own activity are correct.

Notice, in contrast, that we can tell by using empirical tools whether a system of rules has a meta-rule defining official obligations and whether the rules valid under that meta-rule are generally obeyed, as one would expect since the function of guiding behavior is something that can be ascertained empirically. But there is nothing else that one can empirically identify in Inclusia that indicates whether the system of rules is or is not a legal system.[38] What this tells us is that the idea that it must be possible for judges to be motivationally guided by the rule of recognition and first-order rules

38. Of course, Raz can argue that what determines whether the Inclusian system is a legal system is whether it claims legitimate authority, which can be determined by empirical means. But this, of course, is no help to Shapiro. Chances are, Shapiro would characterize Inclusia as a legal system simply on the strength of the empirical similarities between Inclusia and Exclusia and *then* infer that judges are being motivationally guided by the first-order norms valid under their rule of recognition.

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cannot be theoretically grounded in the Functionalist Thesis, no matter how it is construed, because the ability of first-order norms to motivationally guide judicial decision-making has nothing to do with the capacity of a legal system to guide behavior.

Accordingly, there is little in Hart's theory of law or the Practical Difference Thesis that forces Hart to accept either the Simultaneous Guidance Requirement or its constituent notion that it must be possible for first-order norms to motivationally guide judges in deciding cases. For this reason, it is open to the inclusive positivist to embrace, if she wishes, the Practical Difference Thesis without fear of inconsistency.[39] Thus, assuming Shapiro is correct in thinking the Functionalist Thesis implies the Practical Difference Thesis, there is no reason for an inclusive positivist to give up the Functionalist Thesis.

39. Nevertheless, Coleman provides a number of compelling reasons for thinking the Practical Difference Thesis, as Shapiro describes it, should be rejected:

> We can explain the sense in which law is a normative social practice, the sense in which it makes a practical difference, without committing ourselves to the claim that it is part of our concept of legality that nothing can count as law unless it purports to make such a difference. To be sure, laws generally affect deliberation and action. They do so by offering reasons or by authoritative markings. Most law, most of the time does either or both. Nevertheless, it is hard to see why a putative legal rule would fail to constitute law simply because it could make no practical difference (*POP* 26).

Although I disagree with Coleman's view that a positivist cannot hold the Practical Difference Thesis and the Incorporation Thesis, I find his views on this issue decisive against Shapiro.

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