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## The Best Laid Plans

*Legality*

BY SCOTT J. SHAPIRO

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With stunning frequency, law makes us do things we do not want to do. It taxes us even if we think taxation is excessive and its uses wasteful. It demands that we adhere to speed limits when road conditions permit faster driving. It bars us from activities we may believe benign or beneficial, such as buying wine on Sunday or assisting a terminally ill friend who wishes to end her life. And at times it conscripts us into military service, though we may believe the wars immoral, the dangers exaggerated, or the enemies imagined. To be sure, law's demands sometimes track what we would do even were there no law on the subject. Quite often, however, laws coerce us into taking actions that, but for the law, we would have avoided. Because the law can send us to prison, extract fines, and compel us to pay those who sue us, it has ample means to force us to do what we do not wish to do and even what we may believe it is wrong to do.

To observe that law is commonly coercive is hardly a revelation, and even less so to those whose goals are far from noble. In criminal circles, after all, "the law" is slang for the police; for criminals know even better than the rest of us that law is the force that can send them to prison for engaging in larceny, assault, and countless other illegal acts. For bad people as well as good, therefore, law's coerciveness looms large. And thus to the typical citizen, attempting to understand and explain law without regard to its force would seem scarcely conceivable.

Yet however unimaginable it may be to most people to contemplate law without considering its power of compulsion, much of the modern analytic jurisprudential tradition does just that. Historically, theorists such as Jeremy Bentham<sup>1</sup> and, especially, John Austin<sup>2</sup> saw law's ability to back its commands with force as central to the concept of law and went so far as to define legal obligation and duty in terms of the threat of sanctions for noncompliance with the state's orders.<sup>3</sup> But although the Austinian picture of law dominated jurisprudence from Austin's time until the mid-twentieth century, H.L.A. Hart's 1961 attack in *The Concept of Law* on the view that coercion was essential

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1. JEREMY BENTHAM, OF LAWS IN GENERAL 1, 133-48, 196-98 (H.L.A. Hart ed., Athlone Press 1970) (completed 1782, first published posthumously 1945).
  2. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 311-20, 357-64 (Robert Campbell ed., London, John Murray, 5th ed. 1885) (1861) [hereinafter AUSTIN, LECTURES ON JURISPRUDENCE]; JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 21-25 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) [hereinafter AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED].
  3. See AUSTIN, LECTURES ON JURISPRUDENCE, *supra* note 2, at 89 ("Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.").

to legality<sup>4</sup> is now widely understood to have delivered a fatal blow.<sup>5</sup> In pointing out that many laws were empowering rather than restrictive and that legality could exist when citizens or officials internalized legal norms even absent sanctions, Hart demonstrated the folly of maintaining that the threat of force was a necessary component of law.<sup>6</sup> Practitioners of legal philosophy<sup>7</sup> in the modern analytic tradition—proud heirs to the Hartian legacy—have accordingly sought to explain the nature of law without reference to coercion.<sup>8</sup>

4. H.L.A. HART, *THE CONCEPT OF LAW* 20-48 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (1961).
5. See, e.g., MICHAEL D. BAYLES, *HART'S LEGAL PHILOSOPHY: AN EXAMINATION* 21-35 (1992) (endorsing Hart's criticism of Austin with respect to sanctions); Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 241, 244-46 (Dennis Patterson ed., 1996) (noting that Hart's notion of the internal point of view explains legal obligation without necessary reference to sanctions); Neil MacCormick, *The Concept of Law and The Concept of Law*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 163, 172 (Robert P. George ed., 1996) (including in an essay honoring Hart the conclusion that the imperative model of law is inadequate); see also P.M.S. Hacker, *Sanction Theories of Duty*, in *OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES)* 131, 160-69 (A.W.B. Simpson ed., 1973) (suggesting that even Hart may have accepted more of a sanction-based account of duty than is justified). For additional sources, see *infra* note 8. Even earlier, Arthur Goodhart, Hart's predecessor as Professor of Jurisprudence at Oxford, pointed out that "[i]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion." A.L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 17 (1953). Similarly, Edwin Patterson preceded Hart in identifying categories of laws that could not be considered imperative. EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 123 (1953).
6. HART, *supra* note 4, at 48 ("The theory of law as coercive orders meets at the outset with the objection that there are varieties of law found in all systems which . . . do not fit this description."); see also *id.* at 27-33 (arguing that power-conferring rules do not fit the model of orders backed by threats); *id.* at 88-91 (maintaining that pressure and compulsion do not explain the internal point of view).
7. Following contemporary academic usage, I do not distinguish "jurisprudence" from "legal philosophy." That said, the widespread conflation of the two has the unfortunate consequence of slighting the theoretical contributions to understanding the phenomenon of law by those who are not philosophers and do not use philosophical methods. See Frederick Schauer, *Re(Taking) Hart*, 119 *HARV. L. REV.* 852, 865-69 (2006) (reviewing NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004)). It might be preferable to reserve "philosophy of law" for jurisprudence performed with philosophical techniques and leave "jurisprudence" to include not only philosophy of law but also theoretical efforts to explain the nature and operation of law that are not explicitly philosophical. But it is probably too late in the day to suppose that such a distinction might develop and so, having announced this caution, I will continue to follow the herd and treat "jurisprudence" and "philosophy of law" as roughly synonymous.
8. Thus, we see Jules Coleman maintaining that "[j]urisprudence is the study, in part, of how law purports to govern conduct. It is not the study of how law secures individual compliance with the rights and duties it creates by its directives." JULES COLEMAN, *THE*

For them, the essence of law exists in its capacity to give reasons, not in its willingness to use force to secure compliance with its directives. Legal coercion may be pervasive, but it is still widely considered incidental to the nature of law and extraneous to the concept of law.<sup>9</sup> Yet, as I shall discuss, this conclusion is largely the product of the prevailing methodological commitments of contemporary jurisprudential inquiry. Proceeding from the premise that only the essential features of law can distinguish it from other normative social institutions, practitioners of contemporary jurisprudence have been largely preoccupied with searching for such essential (or necessary) features. Features of law that are empirically pervasive but not strictly essential consequently find themselves relegated to a decidedly inferior position in the hierarchy of theoretical importance.

The modern tradition of seeking to explain the nature of law in terms of essential properties, and accordingly without reference to force, is well exemplified in Scott Shapiro's *Legality*.<sup>10</sup> In this important contribution to analytic jurisprudence, Shapiro accepts the modern view that only the essential properties of law can explain its nature and that the use (or threat) of force, not being strictly essential, is thereby not a component of the idea of legality. But if the essence of law is not about forcing people to do things they do not want to do, then it must be about something else. And for Shapiro, this essence must

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PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 72 n.12 (2001). And Leslie Green insists that neither a system of “‘stark imperatives’ that . . . bosses people around nor a price system that structures people’s incentives while leaving them free to act as they please” would qualify as a “system of law” at all. Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1049 (2008); see also D.N. MacCormick, *Legal Obligation and the Imperative Fallacy*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES), *supra* note 5, at 100, 100-01 (describing the failure to distinguish the imperative from the normative as “one of the perennial and persistent fallacies in legal philosophy”); Kevin Toh, *An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)*, 27 LAW & PHIL. 445, 457 (2008) (agreeing with Hart that law exists when at least some members of a community treat laws as providing reasons for action). And in the posthumous postscript to the 1994 edition of *The Concept of Law*, Hart explicitly denies that the point of law is to justify state coercion. HART, *supra* note 4, at 248-50 (responding to Ronald Dworkin’s assertions in RONALD DWORKIN, *LAW’S EMPIRE* 93 (1986)). For recent revisionist attempts to reclaim the importance of sanctions and coercion in explaining law, see MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 84-89 (1999); Danny Priel, *Sanction and Obligation in Hart’s Theory of Law*, 21 RATIO JURIS 404 (2008); Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 RATIO JURIS 1 (2010); and Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195 (2008).

9. See *supra* notes 6, 8.

10. SCOTT J. SHAPIRO, *LEGALITY* (2011).

be a function of the purpose that law serves. Just what is law for? And why and how did it develop in the first place? These are important questions, albeit not necessarily or exclusively philosophical ones,<sup>11</sup> to which the answers are by no means obvious. After all, human beings interact with each other in myriad ways, but most of them stand apart from the law. We build families, enter into relationships, make friends, and often even cooperate with each other; but such forms of human interaction—and there are many others—predate the law as we know it. Yet even though human beings had many kinds of interactions before they had law, at some point in history they felt it important to create law. But why and how did this happen? Why did societies create law, if not to coerce, and what made it possible for law to get started in the first place? What allows legal systems to exist and persist? And how do we distinguish law from the other institutions through which people manifest and further their collective existence?

Shapiro's distinctive (at least within the jurisprudential literature<sup>12</sup>) answers to these questions reside in the idea of planning, or more particularly, social planning. Humans are planning creatures, he argues, and when we attempt to make plans socially, collectively, and cooperatively in order to serve group aims, we discover that we cannot do so without the devices and institutions that characterize law as a distinct form of social interaction.<sup>13</sup> We need not only rules but also institutions to determine who makes the rules, who changes them, and who interprets them. These tasks, however, presuppose that the people who perform them have the authority to do so, and social planning for Shapiro thus explains not only law's purpose but also its possibility. By being the precondition for law's emergence, planning is, for Shapiro, essential for legality.<sup>14</sup> His claim thus goes beyond the more modest ones that law facilitates planning or that planning facilitates law. For Shapiro, law simply *is* planning, albeit of a particular institutional kind.

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11. And possibly not even largely philosophical ones. Academic inquiry is ill-served by excess disciplinary fragmentation, imperialism, or isolationism. Although many of the questions Shapiro addresses are ones that could be (and have been) the concern of anthropologists, sociologists, and economists (among others), philosophical analysis and even speculation about them can assist in clarifying the issues and offering hypotheses amenable to more systematic social science examination.

12. Shapiro admirably acknowledges his intellectual debt to the philosopher Michael Bratman, SHAPIRO, *supra* note 10, at 119-22, and to his colleague Robert Ellickson, *id.* at 161 n.6; see also *infra* note 62. For Bratman's relevant work, see *infra* note 65. A closely related perspective in development economics earned a Nobel Prize for Elinor Ostrom. See *infra* note 66.

13. SHAPIRO, *supra* note 10, at 154-81.

14. *Id.* at 181-92.

There is much to learn from Shapiro's planning theory of law, as I elaborate below. At times, however, Shapiro's valuable insights into the goals and operation of law appear imprisoned within a view of the jurisprudential enterprise that compels him not only to search for a noncoercive essence to law, but also to assume that the nature of law can be explained only in terms of law's essential properties and necessary implications.<sup>15</sup> If we understand these methodological and disciplinary constraints—if we understand that in the contemporary jurisprudential milieu force and coercion cannot be part of the explanation for law because only law's essential properties are allowed to explain the nature of law—then Shapiro's planning theory is an example of modern analytic jurisprudence at its best. But it is not clear why these constraints should define the jurisprudential enterprise or even why Shapiro should accept them. Once Shapiro has helped us understand the relationship between law and social planning, we find ourselves with a new tool to appreciate the role of the features that law possesses overwhelmingly but not necessarily. And arguably most prominent among these features is the phenomenon of law's coerciveness. Perhaps ironically, therefore, the full value of Shapiro's insights can be grasped only by freeing ourselves from the constraints that Shapiro's own conception of jurisprudence imposes.

### 1. LEGALITY: A CRITICAL OVERVIEW

As befits a work of serious philosophy, *Legality* proceeds systematically from a problem or puzzle. The puzzle that attracts Shapiro's attention is that of law's origins, both temporally and conceptually. Sometimes he calls it the "chicken-egg" problem,<sup>16</sup> and sometimes the "Possibility Puzzle,"<sup>17</sup> but the basic idea is the same: If local legal authority (*this* statute, or *this* judge, or *this* ruling) rests on higher legal authority, and higher legal authority rests on still higher legal authority, then how does law and legal authority get started initially (the temporal question)? And what grounds the highest legal authority (the conceptual question)? It is all well and good to say that in the United States, for example, congressional, executive, and judicial legal authority is derived from and rests on the Constitution; but where does the Constitution

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15. *Id.* at 8–10.

16. *Id.* at 39–40.

17. *Id.* at 42–50.

get *its* authority?<sup>18</sup> That is the Possibility Puzzle in a nutshell, and it has interested scholars of law for generations.

For the religiously motivated natural lawyer,<sup>19</sup> the Possibility Puzzle is no puzzle at all. The solution is straightforward: God. From a natural law perspective, and especially one informed by a religious view of the foundation of law, the ultimate source of legal authority is the natural or God-given status of law itself. But Shapiro claims to be a card-carrying legal positivist in good standing,<sup>20</sup> and for him natural law solutions to the Possibility Puzzle are no solutions at all.

The Possibility Puzzle provides the gateway to Shapiro's own solution—the planning theory of law—and also allows him to devote the first third of the book to an attractively presented, albeit conventional, tour of the positivist jurisprudential tradition. He describes Bentham and Austin's neat solution to the Possibility Puzzle—legal authority rests on habitual obedience to the sovereign, which typically rests on the sovereign's use of brute force or the threat thereof.<sup>21</sup> But Shapiro then follows Hart in rejecting this solution because of its inability to explain power-conferring rules (such as rules that make it possible to create contracts, wills, corporations, and, of course, laws)

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18. This particular question is discussed extensively (including by Shapiro and by this author) in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (Matthew D. Adler & Kenneth Einar Himma eds., 2009). See also Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 148-56 (Sanford Levinson ed., 1995) (arguing that the ultimate grounding of the Constitution can be a source of constitutional amendments). For a formal approach to the problem of the foundations of law, see PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990).

19. The phrase in the text is not redundant. Although God figures heavily in some natural law theories, see, e.g., RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* (2003), religion is entirely absent from others, see, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 *S. CAL. L. REV.* 277 (1985); Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 *CAN. J.L. & JURISPRUDENCE* 201 (2007), and plays a decidedly minor role in the legal theories of even some theorists with strong personal religious commitments, see, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 48-49 (1980) (distinguishing a theory of natural law from questions about God's existence).

20. See Scott J. Shapiro, in *LEGAL PHILOSOPHY: 5 QUESTIONS* 209, 212 (Morten Ebbe Juul Nielsen ed., 2007) ("As far as I can remember, I have been a confirmed, dyed-in-the-wool, [] stark-raving-mad legal positivist."). Whether a confirmed dyed-in-the-wool legal positivist could claim, as Shapiro does, that "the law is supposed to provide its subjects with moral reasons to comply with its demands," SHAPIRO, *supra* note 10, at 411 n.11, is an interesting question within legal positivism, but I leave it to other scholars or other occasions.

21. SHAPIRO, *supra* note 10, at 51-78.



and its failure to recognize what Hart calls the “puzzled man,”<sup>22</sup> the person who, in contradistinction to Holmes’s “bad man,”<sup>23</sup> simply seeks guidance and is thus disposed to follow the law qua law for reasons other than fear of sanctions.<sup>24</sup> Shapiro also briefly considers Hans Kelsen’s related approach to the questions of legal possibility and legal coercion<sup>25</sup> and finds it wanting, at least in terms of using sanctions<sup>26</sup> to explain the possibility of law and the phenomenon of legality.<sup>27</sup>

Unfortunately, Shapiro reads Bentham, Austin, and Kelsen through Hart’s eyes. And in presenting what are largely Hart’s criticisms,<sup>28</sup> he is saddled with Hart’s uncharitable readings of all three,<sup>29</sup> readings that charge them with ignoring issues that they, in fact, recognized and with overlooking

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22. HART, *supra* note 4, at 39-40.

23. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Holmes’s designation of the bad man as “bad” is unfortunate because it is hardly true that all or even most people who are interested in predicting the legal consequences of their actions are “bad” in any sensible meaning of that word. For sympathetic and non-caricatured explanations of Holmes’s term, see William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973); and William Twining, *Other People’s Power: The Bad Man and English Positivism, 1897-1997*, 63 BROOK. L. REV. 189 (1997).

24. SHAPIRO, *supra* note 10, at 59-78.

25. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., Russell & Russell 1961) (1945); HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW* (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934); HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1960).

26. See HANS KELSEN, *The Law as a Specific Social Technique*, in *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 231, 235-44 (1957).

27. SHAPIRO, *supra* note 10, at 66-68.

28. *Id.* at 54-89.

29. The view that Hart was a flawed and uncharitable reader of the work of others is widely shared, even among his strongest admirers. Neil MacCormick’s appreciative study of Hart criticizes him for his unfortunate “caricature” of Kelsen’s views on legal power and competence. See NEIL MACCORMICK, *H.L.A. HART* 103 (2d ed., 2008). Nicola Lacey’s sympathetic biography notes that Hart’s friend and coauthor Tony Honoré was often frustrated by Hart’s “irritatingly casual” reading of the work of others. See LACEY, *supra* note 7, at 301. And Hart’s cartoonish misreading of the Legal Realists has been the subject of widespread comment. See, e.g., BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered*, in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 59, 60 n.4 (2007); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 148-49, 255, 429 n.68 (1973); Frederick Schauer, *Introduction to KARL LLEWELLYN, THE THEORY OF RULES* (Frederick Schauer ed., forthcoming 2011). Moreover, even Hart himself admitted that his portrayal of Austin departed from Austin’s text in various ways, albeit for what Hart claimed were purposes of clearer presentation of the central issues. HART, *supra* note 4, at 18.

challenges to which they plainly, even if not always successfully, responded.<sup>30</sup> Still, Shapiro's goal is hardly to rescue Bentham, Austin, or Kelsen from Hart's deficiencies as a reader. His portrayal of the views and weaknesses of all three is much the accepted position in contemporary jurisprudential circles, serving for Shapiro chiefly to introduce Hart's own views, again presented lucidly and engagingly.<sup>31</sup>

Shapiro presents Hart's views sympathetically, but he argues that even Hart did not solve the Possibility Puzzle.<sup>32</sup> Shapiro sees this as a deficiency, although Hart may not have agreed. Indeed, Hart likely did not see the Possibility Puzzle as a problem at all.<sup>33</sup> For Hart, the question of *why* or even *how* the ultimate rule of recognition is internalized by officials is simply not part of his account, for it is the very existence of that rule, for whatever reason, that grounds legality. Hart explained legal validity in terms of rules of recognition culminating in an ultimate rule of recognition,<sup>34</sup> with the ultimate

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30. To give two examples, a central theme in Hart's critique of Austin is the neglect of secondary rules—rules about rules. See HART, *supra* note 4, at 77-96. But Austin explicitly recognized laws about other laws (he called them “declaratory laws, or declaratory statutes”), concluding that they constituted “an exception” to the view that laws are a species of commands. See AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, *supra* note 2, at 31-32. Hart also criticized Austin's notion of sovereignty for being incapable of dealing with legal limitations on sovereign power. See HART, *supra* note 4, at 66-76. But Austin again directly addressed the issue (although perhaps not satisfactorily) in AUSTIN, *LECTURES ON JURISPRUDENCE*, *supra* note 2, at 358-59, which noted that wise governments conform their own conduct to their own laws.

31. SHAPIRO, *supra* note 10, at 79-102.

32. *Id.* at 102-17.

33. Much of Shapiro's argument is situated within the problem of so-called legal normativity, the attempt to explain how law can provide oughts—reasons for action—simply on the basis of social facts. *Id.* But Hart did not intend to provide such a thick account of legal obligation; he intended simply to try to explain how law could, for moral, prudential, or other reasons external to law, provide such reasons. See COLEMAN, *supra* note 8, at 89-90 n.26 (arguing that explaining the language of legal obligation is different from explaining legal obligation itself). Nor is it obvious that a satisfactory account of the nature of law need explain legal normativity in a coercion-independent way at all. See Frederick Schauer, *Positivism Through Thick and Thin*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 65 (Brian Bix ed., 1998); Frederick Schauer, *Critical Notice*, 24 *CAN. J. PHIL.* 495 (1994) (reviewing ROGER SHINER, *NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT* (1992)).

34. It is a common misreading of Hart to equate the very idea of a rule of recognition with the ultimate rule of recognition, but the two are different. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (2006), for example, is in part a rule of recognition establishing the conditions for the legal validity of federal administrative regulations. That is, a federal administrative regulation is valid only if “recognized” as such by the rules of recognition in the APA. The validity of the APA is in turn determined by the Constitution, which functions

rule (and its acceptance) lying outside the realm of legal validity simply as a matter of social fact.<sup>35</sup> Thus Hart had no need to consider, let alone solve, the Possibility Puzzle. His focus on the facticity of social practices and on the social (and official) acceptance of the rule of recognition is unconcerned with *why* an ultimate rule of recognition would have been created (or have emerged) and why the ultimate rule of recognition should be accepted at all, whether by citizens, officials, or anyone else. These are the questions that Shapiro's planning theory is primarily designed to answer, although it is a mistake to think that they were Hart's questions. Still, if we are concerned with the origins of legality as well as its raw status, we should be more interested than Hart was in why a society or its officials would accept an ultimate rule of recognition and why it would accept this rule rather than some other. In addressing these questions, Shapiro, to his credit, steps away from what Hart thought was most important about law.

Shapiro's planning theory is thus less a supplement or correction to Hart's theory than an attempt to address a different and important problem. The value of Shapiro's notion of law as social planning, which occupies the middle third and most important part of the book<sup>36</sup> and which I sketch in the ensuing Part, is hence, *pace* Shapiro, not dependent on its location within the positivist dialectic as he describes it. It has its own considerable value even outside the positivist canon.

The basic idea is straightforward. Acknowledging his debt to the philosopher Michael Bratman,<sup>37</sup> Shapiro focuses on planning as a fundamental and characteristic human activity. We are planning creatures, he insists, which means that we not only take particular actions at particular times for particular purposes but also decide in advance on courses of action more simply called "plans."<sup>38</sup> And in addition to making plans for ourselves, we engage in planning as a collective or social activity, coordinating our plans with the plans of others to produce group plans—Shapiro's preferred term is "social planning," although he acknowledges that, thanks to Stalin, Mao, and others,

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as another rule of recognition. But the ultimate rule of recognition is that which determines that the Constitution of the United States, rather than the Constitution of France or a constitution I might write myself, shall determine the validity of acts of Congress. See Schauer, *supra* note 18.

35. See HART, *supra* note 4, at 107-10.

36. SHAPIRO, *supra* note 10, at 118-233.

37. See *supra* note 12; *infra* note 65 and accompanying text.

38. Bratman sees a close relationship between planning and what it is to have an *intention*. See Michael E. Bratman, *Intention, Practical Rationality, and Self-Governance*, 119 *ETHICS* 411 (2009).

the term has come to us with something of a bad odor<sup>39</sup>—that enable groups to pursue collective goals that individuals could not pursue on their own.

Plans are important, especially for the legal philosopher, because they are both committing and constraining. They are, of course, not absolutely committing or constraining, but by being reason-giving they do commit and constrain future actions. If I plan now to go out to dinner tomorrow, not only does that plan give me a (nonconclusive) reason to go out to dinner tomorrow that I would not otherwise have had, but it also provides a (nonconclusive) reason that I would not otherwise have had not to do anything conflicting at that time. In providing content-independent reasons for action,<sup>40</sup> plans are intimately connected with the content-independent notion of legal authority itself.<sup>41</sup>

Shapiro's social planning approach to law derives much of its value from the way in which social planning necessitates the secondary rules<sup>42</sup>—the rules about rules—that are characteristic of law. There is of course a vast literature on coordination and cooperation,<sup>43</sup> and we now understand why and how

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39. SHAPIRO, *supra* note 10, at 154. Of course, there have also been more or less successful instances of social planning, such as the New Deal and the modern welfare states of Northern and Western Europe.
40. On content-independence—the notion of a reason emanating from the source of a prescription and not its content—see especially H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 243, 262–66 (1982). For subsequent explication and development, see R.A. Duff, *Inclusion and Exclusion: Citizens, Subjects and Outlaws*, 51 *CURRENT LEGAL PROBS.* 241, 247 (1998); Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 *LEGAL THEORY* 1, 26–27 (2000); Frederick Schauer, *Authority and Authorities*, 94 *VA. L. REV.* 1931, 1935–40 (2008); and Frederick Schauer, *The Questions of Authority*, 81 *GEO. L.J.* 95 (1992). For a skeptical view of the notion of content-independence, see P. Markwick, *Independent of Content*, 9 *LEGAL THEORY* 43 (2003).
41. Joseph Raz, more than anyone, has helped us understand the nature of legal authority, although Raz's view that law necessarily *claims* to be authoritative is different from the view that law necessarily *is* authoritative. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979) [hereinafter RAZ, *THE AUTHORITY OF LAW*]; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975); see also P.S. Atiyah, *Form and Substance in Legal Reasoning: The Case of Contract*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORÉ* 19 (Neil MacCormick & Peter Birks eds., 1986); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382 (Jules Coleman & Scott Shapiro eds., 2002); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 *CORNELL L. REV.* 707 (1978).
42. HART, *supra* note 4, at 77–96.
43. The seminal work, at least with respect to politics and social policy, is THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960), followed by numerous others, perhaps most prominently DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969).

people come to create and agree on shared norms of behavior.<sup>44</sup> But it is one thing to have a norm that everyone will drive on the right side of the road and not on the left, to take a common example, and something else again to have a collective (or social) plan about having rules of the road in general. When we decide to adopt the latter, the social planning for a regime of rules of the road becomes more complex than a one-off decision that people will drive on the right. The social planning involved in creating the institution of rules of the road requires that there be people or institutions authorized to decide what the rules of the road will be, to determine who shall have the power to change those rules, to designate who is authorized to interpret the rules in cases of indeterminacy of application, and to settle the question of who shall settle disputes about those applications. In other words, it is social plans, and not just collective norms, that explain what Hart described as the essence of law—the union of primary rules with secondary rules of recognition, change, and adjudication.<sup>45</sup>

In developing his claim that legal activity is a form of social planning, Shapiro uses a series of engaging stories about a fictional Cooking Club, whose members end up on the previously uninhabited Cooks Island in the South Pacific and seek to govern themselves.<sup>46</sup> Through the use of these stories, Shapiro demonstrates not only that collective goals would naturally require the development of the institutions we think of as essential components of a legal system,<sup>47</sup> but also that such institutions would be needed and could function even absent sanctions. People of good will engaged in a common enterprise with no desire to depart from the goals of that enterprise might not need to be coerced into following the rules of the enterprise but would still need hierarchies, authorities, rules of recognition, rules of change, and rules of adjudication. In other words, there would be a “point” to law, and there would

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Schelling in turn builds on an earlier tradition of game theory commonly attributed to John von Neumann. See JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944). For a useful and accessible introduction, see DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* (1994).

44. See, e.g., EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977) (analyzing how rules and norms emerge among groups).

45. See HART, *supra* note 4, at 95-96.

46. SHAPIRO, *supra* note 10, at 129-86.

47. Shapiro is vague about whether and when social planning necessarily requires the development of law or law-like regimes of primary and secondary rules, an issue that will become important in Part IV. But it is worth mentioning here that the modest and correct claims that law facilitates social planning and that social planning explains the development of law are different from Shapiro's stronger claims that law *is* social planning and that social planning is an essential property of legality.

be law, even in a community of people of trust and good will who had no call to apply sanctions to the behavior of others. For Shapiro, law is thus the solution not to the problem of disobedience or bad faith or selfish behavior;<sup>48</sup> it is the solution to the problem of moral disagreement—a problem that can exist even among people of good faith, trust, and a shared view of the higher-order goals of the society they constitute and inhabit.<sup>49</sup>

Shapiro's positivist view of law extends to social planning as well. Bad plans still count as plans, and both bad and good plans can generate the structure of hierarchy, authority, and institutional complexity that is essential to law. That there is no moral component in the definition of a plan is especially important to Shapiro because he sees the particular form of social planning that is law as a response not to disagreement in general, but to moral disagreement in particular. And law can manage moral disagreement only if its authority, or at least its claim to authority, is independent of the moral value of the directives it issues.

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48. SHAPIRO, *supra* note 10, at 173-75.

49. That law is driven by the problem of moral disagreement is a proposition to which I wholeheartedly subscribe. See Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579 (2007); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375-77 (1997) (viewing constitutions as solutions to problems of moral disagreement). For further discussion, see the authorities cited in note 74, *infra*. Moral disagreement is important for Shapiro not only to explain the circumstances of law's emergence but also to differentiate law from other social planning enterprises. See SHAPIRO, *supra* note 10, at 209-24. We can imagine, for example, that a football team, whose shared goal is to win games by scoring more points than its opponents, or the Mafia, whose members share a goal of maximizing power and profit, will need to develop systems of primary and secondary rules in order to effectuate the social plan. But such systems are not law, argues Shapiro, because they are not designed to deal with the specific problem of disagreement in the context of a morally motivated (which is not the same as morally correct) master plan. In seeking to distinguish the law of Kansas from the law of the Mafia, Shapiro takes on a problem that has long been central to legal theory, but it is not entirely clear why explaining the distinction is so important. Although issues of sovereignty, territoriality, Shapiro's moral goals, and the monopoly on the use of legitimate force are all candidates for distinguishing the law of the state from the law of a nonstate organization, the similarities between the legal system of New Jersey and the "legal" system of the American Contract Bridge League may be as interesting and important as the differences. Moreover, although Shapiro's use of moral motivation to distinguish legal from nonlegal institutions allows the law of erroneously morally motivated states—Nazi Germany, apartheid South Africa, and Stalinist Russia, for example—to count as law, it also leads to the counterintuitive conclusion that kleptocratic states whose dictators are interested only in their own gain—the Philippines under Marcos, for example, or Zaire under Mobutu—do not have law at all.

Thus, legal positivism, especially the exclusive (or hard) version of it to which Shapiro has been an influential contributor,<sup>50</sup> plays a substantial role in Shapiro's story. In the extensive discussion of legal positivism that follows his argument for a planning theory of law,<sup>51</sup> Shapiro argues that neither legal positivism nor the social planning theory of law entails or even encourages formalist adjudication. The conception of formalism that is Shapiro's foil might well be contested,<sup>52</sup> but that question is best left for another time. For

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50. For examples of Shapiro's contributions to the exclusive positivist corpus, see Scott J. Shapiro, *The Difference That Rules Make*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 33, 56-59 (Brian Bix ed., 1998); Scott J. Shapiro, *On Hart's Way Out*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 149 (Jules Coleman ed., 2001) [hereinafter *HART'S POSTSCRIPT*]; and Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 *LEGAL THEORY* 127 (2000). Exclusive positivism, which holds that a moral test necessarily cannot be part of the rule of recognition (as opposed to incorporationism or inclusive positivism or soft positivism, which holds that a moral test is not necessarily part of a rule of recognition, see COLEMAN, *supra* note 8; W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994); Kenneth Einar Himma, *Inclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, *supra* note 41, at 125), is also represented by, inter alia, RAZ, *THE AUTHORITY OF LAW*, *supra* note 41, at 37-53; JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 185-253 (rev. ed. 2001); Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *HART'S POSTSCRIPT*, *supra*, at 355; and Andrei Marmor, *Exclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, *supra* note 41, at 104.
51. SHAPIRO, *supra* note 10, at 234-81.
52. For Shapiro, formalism claims the completeness of law—its ability to resolve all the disputes that come before it. But except for the subtle and complex version that Ronald Dworkin advances, see, e.g., RONALD DWORKIN, *JUSTICE IN ROBES* (2006) [hereinafter *DWORKIN, JUSTICE IN ROBES*]; DWORKIN, *supra* note 8; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), and which Shapiro argues against (calling it “rump formalism”), see SHAPIRO, *supra* note 10, at 259-306, the formalism to which Shapiro objects and which he claims is not entailed by legal positivism seems largely a strawman. Even Joseph Beale and Christopher Columbus Langdell did not hold the views about the completeness of law that are commonly attributed to them (in, for example, Thomas C. Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1, 6, 29 n.103 (1983)). See, e.g., Joseph Beale, *The Development of Jurisprudence During the Past Century*, 18 *HARV. L. REV.* 271 (1904) (recognizing that Bentham's and Napoleon's aspirations of codified completeness were inconsistent with reality and with what science tells us about how law operates). For a revisionist history of formalism, see BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010), which argues that most characterizations of the so-called formalist age of the nineteenth century are inaccurate. However, Tamanaha appears to misstate the extent to which a variety of formalism did occupy a significant place in nineteenth and early-twentieth-century legal thought. See Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* 111 (2010). If we understand formalism, more plausibly, as a claim about the possibility of legal constraint by rules and not about the desirability or completeness of rule-based decisionmaking, see Frederick Schauer, *Formalism*,

now, we can accept his understanding of formalism as the view that law is complete in itself, that there are no legally-unprovided-for cases (gaps in the law), and that moral considerations have no place in adjudication. Using this definition, Shapiro argues that formalist adjudication does not follow from legal positivism or from understanding law as social planning.

Turning from pure formalism to what he calls “rump formalism,”<sup>53</sup> Shapiro then sets social planning largely aside, focusing on a defense of legal positivism and charging positivism’s most prominent opponent, Ronald Dworkin, with misunderstanding positivism’s core commitments. Followers of current debates about positivism will find this material illuminating even though the connections with social planning are somewhat elusive. And much the same is true of Shapiro’s application of these jurisprudential debates to some concrete legal disputes, where the discussion of formalism and legal reasoning is linked with a critique of the interpretive views of Justice Scalia and the Supreme Court’s decision in *Bush v. Gore*,<sup>54</sup> among other issues both real and current. The planning theory of law fades into the background in these discussions, but Shapiro’s jurisprudential treatments of these issues are illuminating even for those less interested in abstract jurisprudence or unpersuaded by the planning account of legality. The book concludes, however, with an explicit return to law as social planning and to the connection between social planning and questions of trust and distrust. So although some of Shapiro’s digressions are independently valuable, law as social planning dominates the book and provides the focus for considering the totality of Shapiro’s contributions to legal thought.

## II. LAW AS PLAN

Shapiro’s Cooking Club and other fictional examples<sup>55</sup> effectively demonstrate what plans are, what they can do, and what institutional consequences follow from adopting them.<sup>56</sup> When groups make plans to

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97 YALE L.J. 509 (1988), then we can understand why planners might sometimes wish to use the tool of formalism in order to make their plans more effective.

53. SHAPIRO, *supra* note 10, at 259-306.

54. 531 U.S. 98 (2000).

55. These include the example of the Condo Board at Del Boca Vista, which he uses to distinguish law from various nonlegal forms of social planning. SHAPIRO, *supra* note 10, at 217-22.

56. It is curious that Shapiro alleges that legal philosophy has demonstrated a “lack of interest” in the “institutional” side of law and the “institutional structures” that are part of it. SHAPIRO, *supra* note 10, at 6. Lon Fuller would have found the claim surprising, *see, e.g.*,



pursue common goals, they develop a need, as time goes on and as the groups grow, for hierarchies, authority figures, rules that determine who shall make and change the rules, and rules that help in interpreting the rules and determining who shall interpret them.

These are the rules that Hart called secondary rules. They are rules about rules, and they characterize law. Moreover, Shapiro's account of the bottom-up development of secondary rules distinguishes the social planning story from many of the more familiar stories about the development of norms under circumstances of group cooperation and coordination.<sup>57</sup> Scholars such as Thomas Schelling in economics,<sup>58</sup> Robert Axelrod in political science,<sup>59</sup> David Lewis<sup>60</sup> and Edna Ullman-Margalit in philosophy,<sup>61</sup> and Robert Ellickson in law<sup>62</sup> have developed pervasive, influential, and discipline-changing accounts

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LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (Kenneth I. Winston ed., rev. ed. 2001), as would Neil MacCormick, Dick Ruiters, Robert Summers, William Twining, and many others. *See, e.g.*, LAW AS INSTITUTIONAL NORMATIVE ORDER (Maksymilian Del Mar & Zenon Bankowski eds., 2009); NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* (2007); NEIL MACCORMICK & OTA WEINBERGER, *AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM* (1986); DICK W.P. RUITER, *INSTITUTIONAL LEGAL FACTS: LEGAL POWERS AND THEIR EFFECTS* (1993); DICK W.P. RUITER, *LEGAL INSTITUTIONS* (2001); ROBERT S. SUMMERS, *FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY* (2006); WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009).

57. SHAPIRO, *supra* note 10, at 195-201. Shapiro takes the bottom-up incrementalism characteristic of the common law as preferable to codification and as virtually essential to legal planning. *Id.* But that conclusion is odd. Increasingly, common law systems such as the United States rely heavily on comprehensive statutes that do not simply encapsulate or systematize existing law. *See* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303 (documenting this phenomenon). In the wake of recent and massive health care and financial reform statutes, the claim that legal planning in the United States is characteristically incremental or bottom-up seems very open to challenge.
58. SCHELLING, *supra* note 43.
59. ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* (1997); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).
60. LEWIS, *supra* note 43.
61. ULLMAN-MARGALIT, *supra* note 44.
62. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Ellickson's analysis resembles Shapiro's (and Hart's) more than the arguably misleading title of Ellickson's book would suggest. In explaining how a dispute resolution system arose in Shasta County, California, Ellickson pinpoints the development of a dispute resolution system with the primary and secondary rules he calls "constitutive" and "controller-selecting" rules, *id.* at 134 n.33, thus identifying the development of something better characterized as a parallel legal system than one that operates "without law." The same can be said about Lisa Bernstein. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal*

of the nonhierarchical development of norms;<sup>63</sup> and we now have a better understanding of how groups effectuate collective purposes through the virtually spontaneous generation of group norms, even if no leader or hierarchy exists.

Most of the literature on the development of norms, however, is about primary and not secondary norms. It is about rules of behavior—rules about driving on the left or the right remain the classic example—and rarely about the rules about those rules. And if, as Hart maintained, the union of primary and secondary rules is the move from a prelegal to a legal culture,<sup>64</sup> then one aspect of Shapiro's contribution is in connecting a literature largely about primary rules with a literature, pioneered by Hart, that recognizes that a collection of primary rules is not sufficient to constitute a legal system. By showing how groups with common goals need the secondary rules that characterize legality, Shapiro's social planning theory offers a powerful account of what legality is and how it comes into being. Shapiro acknowledges Michael Bratman in providing the more abstract philosophical foundations for this account,<sup>65</sup> and indeed Elinor Ostrom was awarded the 2009 Nobel Prize in economics for her analysis of the development of governance in previously ungoverned groups.<sup>66</sup> But neither Ostrom's work nor Bratman's has much penetrated the legal culture. Shapiro has thus made a substantial contribution to legal thought in showing that the development of law is more than simply the development of primary norms and in showing how and why groups develop the secondary norms that enable legality itself.

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*Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

63. Nonhierarchical in the sense of not being imposed from above by, say, a legislature, but not in the sense of not incorporating an internal hierarchical structure.
64. HART, *supra* note 4, at 91-99.
65. See, e.g., MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON (1987); Michael E. Bratman, *Intention, Belief, and Instrumental Rationality*, in REASONS FOR ACTION 13 (David Sobel & Steven Wall eds., 2009); Michael Bratman, *Intention and Means-End Reasoning*, 90 PHIL. REV. 252 (1981); Michael E. Bratman, *Intention, Practical Rationality, and Self-Governance*, 119 ETHICS 411 (2009).
66. See, e.g., ELINOR OSTROM, CRAFTING INSTITUTIONS FOR SELF-GOVERNING IRRIGATION SYSTEMS (1992); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); ELINOR OSTROM, LARRY SCHROEDER & SUSAN WYNNE, INSTITUTIONAL INCENTIVES AND SUSTAINABLE DEVELOPMENT: INFRASTRUCTURE POLICIES IN PERSPECTIVE (1993); ELINOR OSTROM, ROY GARDNER & JAMES WALKER, RULES, GAMES, AND COMMON-POOL RESOURCES (1994). For Ostrom's overview of her own contributions, see Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010).

Few societies these days lack legal systems. Shapiro's hypothetical Cooking Club and Cooks Island accordingly serve not as a representation of anything close to an actual national legal system, but rather as a heuristic allowing him to show that a society pervaded by trust and cooperation would still need social plans and consequently a legal system. One of Shapiro's foils is thus James Madison, who in *The Federalist No. 51* famously observed that "[i]f men were angels, no government would be necessary."<sup>67</sup> Not so, says Shapiro, for even a community of angels, if it is to be a community at all, would need social plans, and therefore secondary rules, and therefore law—or government. He insists that law is not about bad people, or necessarily about distrust, but about the way in which trusting and cooperating angels would still need to develop what we now think of as a legal system in order to function as a community.

If James Madison is one of Shapiro's foils, however, then Bentham and Austin must be foils as well. A community of trusting angels—or trusting cooks<sup>68</sup>—would still need law, Shapiro argues, but would not need coercion. These good and trusting people would develop a legal system but would have no call to develop sanctions, institutions of organized force, or other forms of coercion. The trusting angels—the community of Hart's puzzled men—would have law but might well not have police, prisons, fines, or sanctions of any kind. Contrary to what Bentham, Austin, and perhaps Holmes believed, Shapiro demonstrates that there can be law without force and law without sanctions. Whatever the ubiquity of coercion in actual legal systems, therefore, it would be error to take coercion as essential to the nature of law or the definition of legality.

### III. WHEN PLANS GO AWRY

Shapiro joins Hart and others in showing that Austin's sanction-dependent definitions of law and legal obligation are unsustainable, in large part because important aspects of law are simply not coercive. For example, the legal rules that empower private transactions, such as contracts and wills,<sup>69</sup> do not compel anyone to do anything, nor do the rules that constitute lawmaking itself.<sup>70</sup> Moreover, the sanction story cannot explain how lawmakers themselves are

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67. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

68. Who might be as rare as trusting angels. See Kate Schwartz, *Pig Cook-Off Ends in Brawl, Head-Butting by Chef*, NEWSER (May 19, 2010, 11:46 AM), <http://www.newser.com/story/89298/pig-cook-off-ends-in-brawl-head-butting-by-chef.html>.

69. HART, *supra* note 4, at 26-48.

70. *Id.* at 80-81.

bound by the law, and Austin's account fits best with a system in which a legally immune sovereign at the apex of a hierarchy gives orders to those below.<sup>71</sup>

Shapiro follows Hart in finding the Austinian account defective for failing to explain so many dimensions of law, but he takes the analysis further. Hart, and Shapiro in the early pages of *Legality*,<sup>72</sup> grudgingly accept that Austin's picture was substantially accurate for the rules of the criminal law (and perhaps also for much of tort and regulatory administrative law).<sup>73</sup> The social planning story, however, puts the lie even to this aspect of sanction theory. Shapiro's cooks need not only power-conferring rules but also conduct rules from central authority telling them how to act.<sup>74</sup> In order for a community to function, its members must know what to do and what not to do. But because the cooks are trusting and inclined to obedience, the community does not need sanctions to secure compliance with even the primary musts and must-nots. Shapiro has thus shown, in ways that Hart did not, that coercion-free law is possible even with respect to the primary behavior-constraining rules that members of a community are expected to follow.

Yet it is surely not irrelevant that Shapiro's community of cooks is a make-believe story. While the make-believe serves valuable heuristic purposes, we know that all real legal systems employ sanctions.<sup>75</sup> Communities of trusting angels are conceptually possible, but the fact that no such communities exist within the realm of governmental legal systems is more than just an interesting but ancillary fact about the legal world. It is evidence, albeit not conclusive, of the nature of the communities that are governed by the law of political states and their subdivisions. And in the world of law as it exists and as it is experienced, coercion is rampant and sanctions are omnipresent.

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71. Hart raises the objection against Austin, *see id.* at 26, but it is a mistake to suppose that Austin did not recognize the issue, *see supra* note 30.

72. SHAPIRO, *supra* note 10, at 59-60.

73. HART, *supra* note 4, at 27.

74. Shapiro's account of the function of law thus bears a close affinity to the settlement function of law developed in LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 11-49 (2001). *See also* Larry Alexander, "With Me, It's All or Nuthin": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999).

75. In a brief endnote, Shapiro acknowledges that law "usually" supplements the moral reasons it provides with sanctions. *See* SHAPIRO, *supra* note 10, at 411 n.11. But in emphasizing that "law need not impose sanctions as a matter of necessity," and in relegating the discussion of sanctions to a brief and grudging note, Shapiro makes clear the subservient role that sanctions play in his account of law. *Id.*

One explanation for the pervasive presence of coercive legal systems goes back to Madison and his observation about the nonangelic qualities of actual humans<sup>76</sup> or back even further to Hobbes and his notoriously pessimistic view of human behavior in the state of nature.<sup>77</sup> In the world that we know, angels exist but are rare, and the self-interested agent misleadingly dubbed the “bad man”<sup>78</sup> by Holmes is all around us. Because many people are inclined to press their own interests even at the expense of others or of the common good, law typically, even if not necessarily, seeks to guard collective welfare against the self-serving behavior of non-public-spirited individuals. Real legal systems are accordingly replete with fines, imprisonment, injunctions, damage awards, and other forms of coercion. To be sure, law enables us to do things we could not otherwise do, and power-conferring rules and institutions are a substantial part of our legal world. But so are rewards<sup>79</sup> and punishments, and accounting for the phenomenon of law while neglecting such incentives seems as incomplete as Austin’s account was in ignoring contracts, wills, and a legally constrained sovereign.

The existence of coercion and other legally constituted incentives in real legal systems should be understood less as an exception to Shapiro’s social planning account than as complementary to it, with the complementarity being chiefly a function of the nonangels<sup>80</sup> described above. Because social plans are as important in the real world as in the fictional one of well-meaning cooks, sanctions are often needed to make plans effective. Consider first the plans that we make for ourselves, such as plans to lose weight or quit smoking. These are not social plans. But they are still plans in Shapiro’s sense, because the fact that I plan to lose weight gives me a reason to lose weight beyond the (good) reasons to lose weight that exist even absent the plan. But as is well known, we

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76. See *supra* note 67 and accompanying text.

77. Hobbes saw the state of nature as one in which people would live in “continual fear, and danger of violent death.” THOMAS HOBBS, *LEVIATHAN* 76 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1651).

78. See *supra* note 23 and accompanying text.

79. Austin’s view of sanctions included punishment and explicitly excluded the promise of rewards. See AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, *supra* note 2, at 24-25. But the distinction is impossible to defend. Moreover, there is no reason to exclude reputation-enhancing or -detracting measures from the realm of sanctions. As long as reputations are important to people, actions affecting those reputations will have coercive effects. See, e.g., Christopher Avery, Paul Resnick & Richard Zeckhauser, *The Market for Evaluations*, 89 AM. ECON. REV. 564 (1999); Nicholas Emler, *A Social Psychology of Reputation*, 1 EUR. REV. SOC. PSYCHOL. 171 (1990).

80. Madison’s characterization in *The Federalist No. 51* is enduring, but even he would not have referred to those who were not angels as “devils.”

often need to make our plans effective by attaching some coercion to them.<sup>81</sup> We hire personal trainers to harangue us, we contrive elaborate systems to reward and punish us, and in other ways we create sanctioning systems to reflect the way in which planning by itself is often insufficient.

The need for sanctions applies as much to social plans as to individual ones. Even apart from the free-riders and others whose selfish desires need to be checked by the threat of sanctions, weakness of the will is also a social issue. Indeed, the weakness-of-the-will problem becomes clearer as we fathom the import of what it is for a social plan to provide a reason for action as a plan. At the heart of Shapiro's planning account of law is the view that social plans have authoritative status. A plan, once made, becomes a reason just because it is a plan, and the reason-giving capacity of plans, like that of rules, precedents, and legal authorities, is content-independent.<sup>82</sup> But the content-independent power of a social plan will make a difference principally when the individual who is expected to follow it has a good content-based reason to do something other than what the social plan demands. Plans have their bite not just because they are reason-giving but also because they are reason-giving even in the face of conflicting reasons for doing something other than what the plan requires.

Because plans are especially important when their addressees see good reasons for doing something else, widespread compliance with social plans will be systematically difficult. The whole point of planning, rather than just doing, is that plans aim to produce action in the face of desires or reasons to do something else. Once we see this systematic conflict between a plan and plan-independent reasons, we can appreciate that supporting social plans with organized coercion is not merely an epiphenomenal accessory. Sanctions are directed not only at the occasional outlier uninterested in pursuing the public good, as even public-minded members of a group (or society) will often have views about the group's ends and means that diverge from the group's plans. For a social plan to be effective, the members of society, absent sanctions, will need to set aside not only their self-interested desires but also their own views of what the group ought now to do for the group's benefits. But this subjugation of individual views, required by the notion of planning, is systematically unlikely to occur without the threat of force. Sanctions are therefore a predictable necessity whose importance emerges once we see the systematically frustrating dimension of social plans.

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81. See Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985); see also STICKK—CHANGE STARTS NOW, <http://www.stickk.com/login.php> (last visited Sept. 4, 2010) (allowing users to sign contract obligations for self-improvement).

82. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 13-84 (2009).

Coercion, even if not strictly necessary for legality as Shapiro conceives it, is legality's natural ally. Madison's point about angels and government can be modified to observe that if people were always inclined to do the right thing, not only would rules be unnecessary but so would plans. Plans are a way of recognizing the suboptimal tendencies of unplanned preferences. We need not hold a dim Hobbesian view of human nature to understand that assisting social plans with coercion is as understandable as assisting my desire for fitness by hiring a personal trainer who not only will instruct me in how to maximize the effectiveness of my workout, but also will, with my advance authorization, hector me when the weakness of my immediate will threatens to overcome the strength of my non-immediate plans.

Hart criticizes Austin for offering a theory that "failed to fit the facts,"<sup>83</sup> but focusing on the bad rather than the puzzled man is an error only if puzzled men exist in significant quantities. Shapiro takes the same tack, asserting that "many" people are inclined to follow the law just because it is the law, even when it conflicts with their antecedent and law-independent desires and preferences.<sup>84</sup> But these are empirical claims. We could, of course, dismiss Hart's and Shapiro's empirical claims as off-hand remarks irrelevant to the project of explaining law's reason-giving character.<sup>85</sup> The ability of law to provide sanction-independent reasons for action for the properly motivated agent would then not depend on the existence of many (or any) people who are actually so motivated. But if Hart's and Shapiro's words are to be taken seriously, and if descriptive accuracy is one measure of a successful theory of law, then the soundness of an account of the nature of law as a social institution depends, at least in part, on its empirical accuracy. The explanatory power of a sanction-independent account of law will accordingly turn on just how common Hart's puzzled man or Shapiro's compliance-inclined "Good Citizen" actually is. And the widespread existence of coercion in real legal

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83. HART, *supra* note 4, at 78; *see also id.* at 91 (insisting that a legal theory must "do justice to the complexity of the facts").

84. SHAPIRO, *supra* note 10, at 69-78. Here Shapiro describes the "Good Citizen[s]" who "accept that the duties imposed by the rules are separate and independent moral reasons to act." *Id.* at 70. But whether there are "many," *id.* at 69, or even any, such Good Citizens, is precisely the matter at issue if we are interested in describing the nature of law as it exists. As an exercise in ideal theory, this question is of course beside the point, but Hart with his "fit the facts" and "complexity of the facts" language, HART, *supra* note 4, at 78, 91, and Shapiro in his discussion of the Good Citizen make clear that they are interested in capturing something or even much that is important about our nonideal world.

85. This appears to be the position in Joseph Raz, *Can There Be a Theory of Law?*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 324 (Martin P. Golding & William A. Edmundson eds., 2005).

systems suggests that Shapiro's mistake is not a philosophical but an empirical one. If the Good Citizens are as rare as the widespread presence of coercion suggests, or even if they are common but joined by large numbers of Not-So-Good-Citizens as well, then an account of the character or nature of law that so deliberately avoids its coercive character seems incomplete for just that reason.

That Shapiro appears to appreciate so much of this makes his resistance to including sanctions in his account of the nature of law especially puzzling. Toward the end of the book, Shapiro responds to the image represented by Ronald Dworkin's Judge Hercules,<sup>86</sup> the judge "of superhuman intellectual power and patience" used by Dworkin to demonstrate what "law as integrity" would look like at its best.<sup>87</sup> In challenging Dworkin's Herculean picture of the nature of law and judicial decisionmaking, Shapiro discusses trust and distrust at some length.<sup>88</sup> But he does so primarily in the service of arguing that trust and, especially, distrust are important aspects of deciding whom to empower to do what and, thus, are vital components of effective social planning. When we have good reason to distrust people's abilities or motivations, as Shapiro acknowledges that we often do, one remedy is refusing to empower or facilitate them. But another, of course, is to punish people when they behave badly. Yes, we do not hire convicted burglars to be bank security guards or child-molesters to be babysitters, but convicted burglars who rob banks get sent back to prison, as do people who abuse children while serving as babysitters. Similarly, although the Occupational Safety and Health Administration (OSHA) frequently inspects workplaces because it does not trust employers to take the steps necessary to maximize worker safety or compliance with OSHA regulations, this distrust does not preclude sanctions, usually civil but occasionally criminal, when employers violate the regulations—the legal rules—that OSHA promulgates.

In light of Shapiro's recognition that the non-Herculean capacities of real judges are a significant flaw in Dworkin's account, it is curious that Shapiro, along with many jurisprudential compatriots, has so downplayed the importance of coercion to law. But it is especially puzzling that Shapiro has done so because coercion is so obviously a facilitator of social planning in a nonideal world and because Shapiro has admirably recognized the role of distrust and the nonideal in understanding law and the design of legal institutions. We are left, then, in search of an explanation for why sanctions

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86. DWORKIN, *supra* note 8, at 238-413.

87. *Id.* at 239.

88. SHAPIRO, *supra* note 10, at 307-30 (criticizing Dworkin for failing to recognize the actual abilities of legal interpreters).



and coercion are excluded virtually entirely from the account of the nature of law that dominates Shapiro's book.

#### IV. ON IGNORING COERCION: A DIAGNOSIS

Those unfamiliar with the norms of contemporary analytic legal philosophy may be surprised to discover that coercion, which plays so large a role in law as it is experienced, has so small a place in the philosophical study of it. If coercion is such a substantial component of how law works and how ordinary people understand law, then why is this dimension of actual legal systems not part of an analysis purporting to explain the nature of law?

The answer to this question, which will not satisfy most of those to whom it might occur to ask it, is that the prevailing norms of analytic legal philosophy demand that an inquiry into the nature of law be a search for the necessary (or essential<sup>89</sup>) features of law.<sup>90</sup> Properties that are not essential but merely common or pervasive, however interesting or empirically important they might be, are not considered part of the nature of the phenomenon that they are contingently associated with, and, as it is sometimes put, not part of the concept of that phenomenon. Hence, only those features or properties of law without which it would not be law at all are understood to count as part of the nature of law.<sup>91</sup>

An appreciation of the jurisprudential task as limited to explaining the essential features of law allows us to grasp the role that the rejection of Austin plays in modern jurisprudence. Hart freely acknowledged that sanctions were a significant part of actual legal systems,<sup>92</sup> but nonetheless showed how a society in which legal officials held the appropriate internal point of view with respect to the rule of recognition would still have a legal system even without sanctions. And he also demonstrated that the sanction-free parts of legal systems—the power-conferring rules and the fact that the commander as well

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89. At least in this Book Review, I treat “necessary” and “essential” as more or less synonymous. See Brian H. Bix, *Raz on Necessity*, 22 *LAW & PHIL.* 537, 537 (2003).

90. See Kenneth M. Ehrenberg, *Defending the Possibility of a Neutral Functional Theory of Law*, 29 *OXFORD J. LEGAL STUD.* 91 (2009); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 *N.Y.U. L. REV.* 1035 (2008); Joseph Raz, *On the Nature of Law*, 82 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 1 (1996); Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *LEGAL THEORY* 249, 255 (1998).

91. See, e.g., JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001); Raz, *supra* note 85; Joseph Raz, *The Problem About the Nature of Law*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 179 (1994); Bix, *supra* note 89.

92. HART, *supra* note 4, at 6.

as the commanded is subject to law – are still components of the legal system and parts of what produce legal obligation.<sup>93</sup>

Shapiro adopts the same approach. Because his cooks are people of good will and trust and because they are predisposed to follow the group's rules in order to help the group achieve the common good, they do not need to be coerced. They embody Hart's puzzled man and Shapiro's Good Citizen, seeking only to know what the law requires of them so that they can conform their behavior accordingly. So when Shapiro shows that even such a group would develop secondary rules of recognition, change, and adjudication and would create institutions of authority, he has shown that a legal system can exist without sanctions, without coercion, and without incentives other than the shared incentive to follow the law in order to make all better off. And if law can thus exist without sanctions, then sanctions are not an essential part of legality and not a component of the concept of law. The community of cooks is fictional, but for Shapiro and others the search for the nature of legality is a search for what is necessarily true of all possible legal systems in all possible worlds. Because the community of cooks exemplifies a possible legal system without coercion, the fictional community shows that coercion cannot be part of the concept of law.

Hart and Shapiro connect their hypothetical analyses with the reality of actual legal systems through empirical assertions about the presence of legal subjects whose inclination to compliance does not need coercive supplementation. For Hart it is the observation that the puzzled man is not only a philosophical construct but also someone who exists in the real world.<sup>94</sup> In charging the Austinian picture of not "fitting the facts," Hart suggests that his own picture of law more accurately portrays legal reality. And Shapiro is even more explicit, insisting that many people follow the law solely because it is the law.<sup>95</sup>

But are these assertions correct? The question is an empirical one, but it must be carefully specified. As numerous scholars have made clear, following (or obeying) the law involves more than just behaving in conformity with it.<sup>96</sup>

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93. *Id.* at 26-76.

94. *Id.* at 40 (connecting the image of the "puzzled man" with "the diverse ways in which the law is used to control, to guide, and to plan life out of court").

95. SHAPIRO, *supra* note 10, at 69-73.

96. See Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3 (1990). For different versions of the same general claim, see Joseph Raz, *The Obligation To Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139 (1984); and M.B.E. Smith, *Is There a Prima Facie Obligation To Obey the Law?*, 82 YALE L.J. 950 (1973). It is worth noting that this framing of

For most of us, our eagerness to avoid murdering our fellow citizens stems not from the fact that such activity is illegal but simply from it being morally wrong. Sanctions play no part in explaining why I do not murder my annoying colleagues when they speak interminably at faculty meetings, but neither does the law. Murder avoidance is typically simply an instance of people's nonuniversal but arguably common willingness to do the right thing.

Once we understand that accidental conformity with law is different from behaving in some way because of the law, the issue sharpens. Although law-based and morality-based reasons may be additive under conditions of uncertainty in a multiple-reason decisional environment,<sup>97</sup> the clear case is one in which someone would have done one thing (including doing nothing) absent the law but in which the law requires something different. Hart, Shapiro, and many others believe that under such conditions, and absent sanctions, an appreciable number of citizens will relinquish their all-things-except-the-law-considered judgment about what to do in favor of doing what the law requires. And perhaps they are right. But that is an empirical question, and the existence of numerous examples to the contrary,<sup>98</sup> coupled with the pervasiveness of sanctions, suggests that we need more evidence of the

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the question presupposes a broadly positivistic perspective. If law's ability to obligate is dependent upon its moral desirability, as it is under some (or even most) natural law perspectives, then morality is doing the work in explaining obligation. We can conceive of law as supporting content-independent reasons for action only if we have a content-independent understanding of law—namely legal positivism. But whether law qua law actually does provide such reasons is, as Hart persistently stressed, a moral question existing outside of the notion of law itself. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617-21 (1958).

97. The phrase in the text is a bit of a mouthful, needing explanation and elaboration. It is possible that some people at some times are unsure of what morality requires of them. They may know that it is morally wrong to murder and steal but are less sure whether it is wrong to drive while talking on a mobile phone, rob from a thief, or engage in statistically justified job discrimination against the elderly. Under such circumstances, nonconclusive moral reasons to refrain from the behavior may be added to the reasons supplied by illegality to produce a stronger reason for refraining than existed absent the law. But whether and when this is true, and for whom, and how often, are again empirical questions, just like the crisper cases discussed in the text. (I thank Bobbie Spellman for continuously pressing me on this point.)
98. For a discussion of numerous examples, see Frederick Schauer, *When and How (if at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769 (2010). Although the title of Tom Tyler's *Why People Obey the Law* may suggest the contrary, Tyler's work is largely about the circumstances under which people obey legal decisions that they think are correct in the abstract but that happen to burden them personally. This question is undoubtedly important, but it is a very different one from the question of how frequently people obey, absent sanctions, legal mandates that they believe mistaken. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (rev. ed. 2006).

widespread existence of such people than has yet been provided before we accept the claim that puzzled men and Good Citizens are all around us.

Under the view advanced by Joseph Raz, the empirical inquiry asks the wrong question.<sup>99</sup> Raz believes that we should be philosophically interested in reasons that would appeal to the properly motivated agent even if such agents are scarce on the ground, and, indeed, even if there are none at all. But this is neither Hart's tack, considering his concern about theory fitting the facts, nor Shapiro's. While not denying the philosophical nature of his enterprise, Shapiro is plainly concerned with illuminating our understanding of law as it actually exists.

This is not the place to determine whether Hart and Shapiro are correct in supposing that law-inclined people exist in significant numbers or whether instead such angelic citizens are scarcely more prevalent than real angels. After all, the dispute is an empirical one, and we already suffer from a surfeit of scholarship in which testable empirical hypotheses are evaluated by nothing more than the intuitions of law professors and philosophers.<sup>100</sup> But I press the issue here to illustrate that the prevalence or rarity of the conceptual possibility sketched by Shapiro's community of cooks is important not in determining the value of ideal theory in philosophical inquiry but rather in understanding the source and limitations of the norms that inhere in the current practice of analytic legal philosophy. Because one of those norms gives pride of place to explaining the essential features of the concept of law and consequently relegates to lower jurisprudential status any inquiry that smacks of jurisdiction-specific particular jurisprudence or conclusions contingent on debatable empirical data, jurisprudential interest in the empirically contingent and nonuniversal features of law tends to be minimal.

Because coercion in law is widespread but neither necessary nor universal, its importance to modern jurisprudence has been demoted to a decidedly inferior place. But this is odd. Consider, by way of analogy, the case of birds. If we wish to identify the individually necessary and jointly sufficient properties of birds—that which makes them birds—we will find only two: having a backbone and having feathers. Birds are feathered vertebrates, and nothing can be a bird if it lacks feathers or a backbone. Thus, having feathers and a backbone are the necessary conditions of the category and the concept of birds; but, perhaps surprisingly to some, the capacity for flight is not. Although almost all birds can fly, and although having feathers is necessary for flight

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99. Raz, *supra* note 85.

100. Emphasizing this problem is a running theme in LEITER, *supra* note 29.

among vertebrates that are not bats,<sup>101</sup> some feathered vertebrates—such as penguins and ostriches, for example—cannot fly. And thus because flight is not necessary for birdness, the capacity for flight is not part of the concept or essential nature of birds.

Yet although flying is not an essential component of being a bird, surely we miss something important about birds if we ignore the fact that almost all of them can and do fly. It is true that penguins and ostriches and emus are birds but do not fly and that bats fly but are not birds. Still, it seems of great interest that almost all birds fly and almost all non-bird vertebrates do not. Accordingly, if we were to consider why, how, and when birds fly, then we would be likely to learn something of considerable practical and theoretical value both about birds and about flying.

Birds are natural kinds, and although it is controversial whether there are essential properties even for natural kinds,<sup>102</sup> it is especially doubtful whether an essentialist analysis is possible for artifacts and social kinds such as law.<sup>103</sup> But even if law did have essential properties, the question remains, as it does for birds, whether properties that are widely and disproportionately concentrated in some class or phenomenon can be of theoretical interest if they are neither universal nor essential. And if the answer is “yes” for an interest in flying on the part of ornithologists, then it seems that it should be “yes” for the theoretical interest in coercion on the part of those who study jurisprudence.

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101. So-called flying squirrels and flying fish, as well as flying frogs, flying snakes, and flying squid (really!), are all gliders and not fliers. Bats are the only non-birds that can actually fly. The foregoing of course assumes a certain concept of flying, but analyzing the concept of flying is plainly not my agenda here.
  102. The loci classici for the view that the extensions of natural kind terms are not determined by concepts representing necessary and sufficient properties are SAUL A. KRIPKE, *NAMING AND NECESSITY* (1980); and HILARY PUTNAM, *The Meaning of “Meaning,”* in 2 *MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS* 215 (1975). For the view that even natural kind terms may not have unitary underlying characteristics, see John Dupré, *Natural Kinds and Biological Taxa*, 90 *PHIL. REV.* 66 (1981); and Joe LaPorte, *Chemical Kind Term Reference and the Discovery of Essence*, 30 *NOÛS* 112 (1996).
  103. See Stephen P. Schwartz, *General Terms and Mass Terms*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LANGUAGE* 274, 281 (Michael Devitt & Richard Hanley eds., 2006) (arguing that “artifacts do not have underlying traits” and cannot “function like natural kind terms”). For application of that idea to law, see DWORKIN, *JUSTICE IN ROBES*, *supra* note 52, at 3; LEITER, *supra* note 29, at 268; and Brian H. Bix, *Joseph Raz and Conceptual Analysis*, *AM. PHIL. ASS’N NEWSL. ON PHIL. & L.*, Spring 2007, at 1. For empirical support for the view that artifact categories are not stable, see Woo-kyoung Ahn, *Why Are Different Features Central for Natural Kinds and Artifacts?; The Role of Causal Status in Determining Feature Centrality*, 69 *COGNITION* 135 (1998); and Steven A. Sloman & Barbara C. Malt, *Artifacts Are Not Ascribed Essences, Nor Are They Treated as Belonging to Kinds*, 18 *LANGUAGE & COGNITIVE PROCESSES* 563 (2003).

The foregoing seems hardly controversial. What could be wrong, after all, with understanding jurisprudential inquiry as sufficiently catholic to allow the philosophical examination of widespread characteristics of law that are neither essential nor universal, including but not limited to coercion? But although such a program of jurisprudential inclusiveness might seem unimpeachable, the facts are otherwise. Raz, for example, writes that “[s]ociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.”<sup>104</sup> Similarly, Julie Dickson argues that “analytical jurisprudence” is, by definition, general jurisprudence, which is, by definition, about all possible legal systems.<sup>105</sup> And Jules Coleman defines jurisprudence as being unconcerned with coercion and incentives,<sup>106</sup> thus suggesting that Austin and Bentham, for example, are not merely mistaken in their jurisprudential theories and conclusions but are not even *doing* jurisprudence at all.

Perhaps it is uncharitable to take such statements as attempts to exclude Austin, Bentham, Dworkin, and others from jurisprudence entirely,<sup>107</sup> but even so, it is plain that the modern jurisprudential center of gravity is the goal of explaining those features that are necessarily part of law wherever and whenever it may exist. Most relevantly here, Shapiro unhesitatingly locates himself close to this center of gravity. He is interested in the “properties law necessarily possesses in virtue of being an instance of law and not a game, social etiquette, religion or some other thing.”<sup>108</sup> And he is interested not only in the properties that law necessarily possesses, but also in what necessarily follows from the fact that something is law.<sup>109</sup> Shapiro emphasizes the differences between the properties that something necessarily possesses by virtue of being that thing and not something else, and the necessary implications of something being what it is and not something else; but the

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104. RAZ, *THE AUTHORITY OF LAW*, *supra* note 41, at 104-05.

105. JULIE DICKSON, *EVALUATION AND LEGAL THEORY* 17-25 (2001). For Dickson, this produces the surprising conclusion that Ronald Dworkin, who unashamedly claims to be describing advanced modern legal systems rather than all possible legal systems, *see* Ronald Dworkin, *Thirty Years On*, 115 *HARV. L. REV.* 1655, 1677-81 (2002) (reviewing COLEMAN, *supra* note 8), is simply not doing analytical jurisprudence at all. DICKSON, *supra*, at 22.

106. COLEMAN, *supra* note 8, at 72 n.12.

107. It is difficult, however, to imagine a more charitable reading of Raz's statement. *See supra* text accompanying note 104.

108. SHAPIRO, *supra* note 10, at 9-10.

109. *Id.* at 12.

notion of necessity dominates both inquiries.<sup>110</sup> He is concerned with necessity and not statistical tendencies, even overwhelming ones, and features that are present in almost all but not all legal systems fail the test of necessity and are excluded from Shapiro's purview. Like an ornithologist uninterested in flying, Shapiro's interest in coercion and other nonessential properties of law is only to show their conceptual irrelevance.

Contemporary analytic jurisprudence's focus on essential properties is commonly defended on three interrelated grounds. The first is that without specifying exactly what we are talking about we cannot even commence examining or evaluating the interesting features of law.<sup>111</sup> If we wish to understand law, whether empirically, philosophically, or normatively, we first have to know what law is—just as we cannot talk about the various properties of, say, toasters without being able to say just what a toaster is in the first place. Second, a central question in jurisprudence is that of distinguishing law from other prescriptive enterprises, such as morality and etiquette. Thus it is necessary to locate the demarcation between morality and things that are in the same neighborhood but importantly different.<sup>112</sup> Finally, the task of conceptual analysis, of which the identification of essential properties is the principal element, is an attempt to understand and explain just how we think and how we understand the social institution of law.<sup>113</sup>

These claimed justifications for understanding (and, at times, defining<sup>114</sup>) jurisprudence as the search for the essential (and important<sup>115</sup>) features of law whenever and wherever it may exist suffer from a common flaw: the assumption that we need a precise demarcation, as opposed to a fuzzy

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110. For a more direct and sustained challenge to the value (and not merely to the exclusivity) of engaging in such an effort to distinguish what follows from something being law as opposed to other systems of normative guidance, see BRIAN LEITER, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, in NEUTRALITY AND THE THEORY OF LAW (forthcoming 2011).

111. See, e.g., COLEMAN, *supra* note 8, at 213-24; David Lyons, *Founders and Foundations of Legal Positivism*, 82 MICH. L. REV. 722 (1984) (reviewing HART, *supra* note 40). For rebuttals, see ROGER A. SHINER, NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT 4-9 (1992); Andrew Halpin, *Concepts, Terms, and Fields of Enquiry*, 4 LEGAL THEORY 187, 190-93 (1998); and Brian Leiter, *Naturalism in Legal Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/lawphil-naturalism/> (last revised Feb. 20, 2007).

112. This is the principal justification offered by Shapiro himself. SHAPIRO, *supra* note 10, at 7-12.

113. See DICKSON, *supra* note 105, at 43 (arguing that we use the concept of law "to understand our social world").

114. See *supra* notes 8, 104-109 and accompanying text.

115. That jurisprudence seeks to explain the properties of law that are both essential and important is the principal theme of DICKSON, *supra* note 105.

differentiation, in order to use and understand a concept. Philosophers indeed debate whether Ludwig Wittgenstein and his circle, with their talk of family resemblance,<sup>116</sup> of cluster concepts,<sup>117</sup> of contested concepts,<sup>118</sup> and (like Hart) of core and penumbral meanings,<sup>119</sup> were actually correct;<sup>120</sup> and it would be misleading to suggest that Wittgenstein, J.L. Austin,<sup>121</sup> and others represent contemporary mainstream philosophy. But although the view that our concepts have fuzzy edges and often cannot be understood in terms of necessary and sufficient conditions – anti-essentialism<sup>122</sup> – has hardly swept the board, neither has the opposing view. More importantly, the nonessentialist view is consistent with a great deal of research in contemporary and not-so-contemporary cognitive science.<sup>123</sup> People simply do not think and use concepts in terms of essences or necessary and sufficient conditions. Although the

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116. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 66-67 (G.E.M. Anscombe trans., 2d ed. 1958).
117. John R. Searle, *Proper Names*, 67 *MIND* 166 (1958); see also MAX BLACK, *CAVEATS AND CRITIQUES: PHILOSOPHICAL ESSAYS IN LANGUAGE, LOGIC, AND ART* 177-79 (1975) (explaining differences between cluster concepts and family resemblance).
118. W.B. Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS ARISTOTELIAN SOCIETY* 167 (1956).
119. See Hart, *supra* note 96, at 607. For an exhaustive (or perhaps just exhausting) analysis, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 *N.Y.U. L. REV.* 1109 (2008). It is curious that Hart, who plainly accepted an anti-essentialist understanding of “vehicle,” maintained that “[t]here are . . . two minimum conditions necessary and sufficient for the existence of a legal system.” HART, *supra* note 4, at 113.
120. One of the most prominent objections is in KRIPKE, *supra* note 102, at 71-97. For a response by Searle, see JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 231-61 (1983).
121. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). Family resemblance and cluster ideas were associated more with Wittgenstein than with Austin, but Austin, based in Oxford and not Cambridge, was Hart’s friend and philosophical companion. See LACEY, *supra* note 7.
122. On anti-essentialism and fuzzy concepts, see Larry Laudan, *The Demise of the Demarcation Problem*, in *PHYSICS, PHILOSOPHY AND PSYCHOANALYSIS: ESSAYS IN HONOR OF ADOLF GRÜNBAUM* 111 (R.S. Cohen & L. Laudan eds., 1983); and Michael E. McCloskey & Sam Glucksberg, *Natural Categories: Well Defined or Fuzzy Sets?*, 6 *MEMORY & COGNITION* 462 (1978).
123. See, e.g., EDOUARD MACHERY, *DOING WITHOUT CONCEPTS* (2009); Eleanor Rosch, *Principles of Categorization*, in *COGNITION AND CATEGORIZATION* 27 (Eleanor Rosch & Barbara B. Lloyd eds., 1978); Ahn, *supra* note 103; Lance J. Rips, *Necessity and Natural Categories*, 127 *PSYCHOL. BULL.* 827 (2001); Eleanor Rosch & Carolyn B. Mervis, *Family Resemblance: Studies in the Internal Structure of Categories*, 7 *COGNITIVE PSYCHOL.* 573 (1975); Sloman & Malt, *supra* note 103; Michael Strevens, *The Essentialist Aspect of Naïve Theories*, 74 *COGNITION* 149 (2000).



opposing view may serve philosophical purposes, it is not an accurate rendering of how concepts and categories are used in ordinary life.

The existence of fuzzy or otherwise loose concepts thus provides an answer to all three justifications for searching only for the essential properties of law. Just as we can understand that “vehicle” has core and penumbral applications, and just as we can understand that there is a useful distinction between night and day even if we cannot specify the essential conditions for night and the exact moment when night turns into day, so too can we use the concept of law to differentiate (which is not the same as demarcate) law from other prescriptive enterprises.<sup>124</sup> And we can also use a loose concept of law to engage in empirical or philosophical examination of numerous characteristics of law, and to explain how people and cultures understand law and legality. There is nothing incomprehensible about the idea of quasi-law, or law-in-some-respects-but-not-all, or nonprototypical law, or failed law,<sup>125</sup> and so on. The search for the essential properties of law consequently not only rests on controversial philosophical foundations and indefensible empirical ones, but turns out also to be unnecessary to other jurisprudential tasks.

Because Hart (surprisingly, given his analysis of core and penumbral aspects of the concept of a vehicle<sup>126</sup>), Shapiro, and many theorists in between have thought it definitional of general jurisprudence to search for the essential features of law and consequently to ignore important or statistically predominant features that are not strictly essential, we can see why they have thought it crucial to demonstrate that law can exist without coercion. No matter how common it is for legal systems to coerce, and no matter how prevalent coercion may be within particular legal systems, as long as there can be (in theory if not in practice) a noncoercive legal system, coercion is not an essential property of law. This explains the attention that Shapiro devotes to his ideal community of well-intentioned cooks, because if he is successful in

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124. For a claim about the differentiation of law from other normative and decisionmaking institutions that is not dependent on a rigid demarcation, whether conceptual or otherwise, see Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909 (2004). Indeed, it would be a substantial error to take the difficulties in crisp demarcation to suggest the absence of legal differentiation. Courts, the legal profession, law schools, bar examinations, bar associations, the West Publishing Company, and *The Yale Law Journal*, among others, are all socially differentiated institutions premised on the noncongruity between law and other prescriptive or decisionmaking institutions. Failing to attempt to explain this differentiation is as misguided as assuming that the differentiation must be a crisp one without fuzzy and shifting boundaries.

125. Cf. Christopher Mag Uidhir, *Failed Art and Failed-Art Theory*, 88 AUSTRALASIAN J. PHIL. 381 (2010).

126. Hart, *supra* note 96, at 606-08.

showing why and how they could create a legal system in which their good intentions make coercion unnecessary, then he has succeeded in showing that coercion is neither a necessary feature nor a necessary implication of law itself.

Shapiro succeeds in this task, but now we have a better appreciation of the nature of the task at which he has succeeded. He has shown that noncoercive legal systems can exist, but the value of his success is a function of the way in which Shapiro and others have defined the jurisprudential enterprise. Although the coercive aspect of law is overwhelmingly salient to numerous people, Shapiro's comparative lack of interest in the coercive dimensions of law does not stem from a denial that coercion is pervasive in law and important to its actual operation. Shapiro does not even reject the importance of coercion in making collective plans more effective. Rather, his decidedly lesser interest in coercion (except to show that it is not a necessary property or implication of law) is a function of how Shapiro understands the jurisprudential task, and the looming question is whether his (and the contemporary) narrow definition of jurisprudence impedes Shapiro from fully appreciating and developing his own valuable ideas.

#### **CONCLUSION: TOWARD A JURISPRUDENCE OF COERCION**

I have no desire to criticize Shapiro for not having written a different book with a different aim. He has written an important book and, in showing how the pervasive activity of social planning requires the institutions that we associate with law, he has provided a novel and valuable addition to the literature on why law exists, how it develops, and what allows it to flourish. We are, as he persuasively demonstrates, planning creatures; but in order for us to carry out and, indeed, even to make plans, we need the secondary rules and structures of authority that mark the transition from prelegal to legal society. In so effectively connecting the idea of planning and insights about social coordination and cooperation with the insights and contributions of jurisprudence in the positivist tradition, Shapiro has produced a work of enduring significance.

It is precisely because of the book's value in connecting the idea of social planning with the idea of law, however, that the limitations of contemporary jurisprudential inquiry become so apparent. Because social planning is so important, the enforcement of plans is not only the normal operation of legal life, but also the expected—even if not necessary—implication of recognizing the way in which plans are frustrating as well as empowering. If this observation is sound, the difficulty with Shapiro's relative inattention to coercion, enforcement, and sanctions is not that a better theory of law might emerge from taking Austin's and Bentham's disreputable ideas more

seriously—although it well might. Rather, the difficulty is that it impairs the development of Shapiro's own important theory, a theory whose worth would expand if allowed to flourish outside the boundaries of the constraining jurisprudential environment in which it was developed.

It should come as little surprise that, historically, numerous theorists have situated coercion at the center of their definitions and understandings of law.<sup>127</sup> One reason for this is that coercion is conducive to making plans, shared intentions, and cooperative behavior more effective. But coercion also serves to distinguish law from numerous other cooperative institutions that also have primary and secondary rules. It is not implausible to talk about the law of private clubs, nor is it silly to recognize that something law-like is in place in universities, corporations, condominium boards, and vast numbers of other complex nongovernmental institutions. And it is valuable to appreciate that many features we commonly see in municipal legal systems are present in other domains as well. Nevertheless, the central cases of law involve the law of France or Ohio and not the rules of the Elks Club, and the way in which this distinction has been traditionally captured is by thinking of municipal law as attached to the state's monopoly on the legitimate use of force.<sup>128</sup> That is why generations of legal theorists have seen force as part of the central case of law, even if they might recognize, persuaded by Hart and his successors, that something quite law-like is theoretically possible without the application or threat of force.

Perhaps Bentham, Austin, and other pre-Hart theorists were mistaken in placing such importance on law's coercive dimension. But it is also possible that much of contemporary analytic jurisprudence, which seems oddly to

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127. See, e.g., FINNIS, *supra* note 19, at 260 (arguing that the “coercive force of law” has an importance that “is not merely a matter of effectiveness”); E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 28 (1954) (“[L]aw may be defined in these terms: A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.” (emphasis omitted)); HANS KELSEN, *The Law as a Specific Social Technique*, in *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 231, 235-44 (1957) (elaborating the view that law is a coercive order that monopolizes the use of force); G.E.M. Anscombe, *On the Source of the Authority of the State*, in *AUTHORITY* 142, 148 (Joseph Raz ed., 1990) (arguing that the “distinctive thing about civil government [is] . . . actual or threatened violence”); see also HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 277 (1949) (noting that Spinoza, Kant, and many others conceived of law as “a form of social control” which had the aim of “ordering . . . human behavior through coercion”). Indeed, even Hart described a system of sanctions and coercion as being, although logically only contingent, a “natural necessity” in any legal system. HART, *supra* note 4, at 199.

128. See, e.g., HOEBEL, *supra* note 127.

dichotomize the world of legal properties into the essential and the irrelevant, is mistaken in the way in which it conceives its enterprise. By limiting itself to the essential properties of law, contemporary jurisprudence marginalizes the various dimensions of coercion and renders their examination difficult even from a philosophical perspective. If jurisprudence and those who practice it were to become less concerned with a conceptual essentialism that is itself open to question,<sup>129</sup> they might discover that the coercive dimensions of law provide fruitful ground for jurisprudential and philosophical examination. And they might also discover that Shapiro's valuable contributions in *Legality* become even more valuable by connecting the idea of law as plans with the various coercive devices and institutions that make planning most effective in the nonideal world we inhabit. All too often Shapiro's book is trapped within a jurisprudential milieu which slights the pervasiveness of coercion and exaggerates the significance of the decidedly counterfactual possibility of sanction-free law. If Shapiro's important ideas are allowed to escape this constraint and can be recognized as a contribution that is partly philosophical, partly sociological, and partly anthropological, then their value to the theoretical understanding of law—to jurisprudence, in its appropriately expansive sense—will be even greater.

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129. See LEITER, *supra* note 110; see also *supra* notes 122-123.