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AUTHORITY AND THE PRACTICAL DIFFERENCE THESIS:

A Defense of Inclusive Legal Positivism

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I. INTRODUCTION

To what extent are the existence and content of law dependent on morality? Legal Positivism is generally understood to answer: Not at all; the existence of law is one thing, its merit or demerit another thing entirely. Positivism's historical rival, Natural Law Theory, is widely understood to answer: To a very large extent indeed: An unjust law seems to be no law at all. Recent developments in jurisprudence have rendered these understandings highly questionable and potentially misleading. Natural law theorists like John Finnis and Robert George deny that justice was ever thought by contemporary or traditional defenders of natural law theory to be a necessary condition of law,[1] whereas positivists like H.L.A. Hart, Jules Coleman, and this author assert that morality can indeed play a key role in determining the existence and content of valid laws. But not all self-avowed positivists agree with the line pursued by Hart et al. Many follow the lead of positivism's greatest contemporary critic, Ronald Dworkin, in claiming that this new brand of positivism, variously termed "incorporationism,"[2] "soft positivism,"[3] or "inclusive legal positivism,"[4] is either an untenable version of positivism or no version of positivism at all. Among the central challenges to ILP posed by its positivist critics is an objection first raised by Joseph Raz: that ILP (like Natural Law Theory and Dworkin's "law as integrity") is

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1. *See, e.g.*, John Finnis, *The Truth in Legal Positivism*, and Robert P. George, *Natural Law and Positive Law*, both *in* THE AUTONOMY OF LAW (R. George ed. 1996).

2. *See, e.g.*, Jules Coleman, *Authority and Reason*, in THE AUTONOMY OF LAW, *supra* note 1; and *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 LEGAL THEORY 381–425 (1998).

3. H.L.A. Hart, *Postscript* in THE CONCEPT OF LAW (P. Bullock & J. Raz eds., 1994).

4. Waluchow, INCLUSIVE LEGAL POSITIVISM (1994), hereinafter referred to as *ILP*. Inclusive positivism, the legal theory, will be referred to as ILP.

inconsistent with the practical authority that law necessarily claims for itself. One critic of ILP, Scott Shapiro, has gone beyond this first criticism to suggest that inclusive rules of recognition—that is, rules of recognition that contain moral criteria for legality or legal validity—render laws purportedly valid under them incapable of making any practical difference in our deliberations concerning what we ought to do.[5] In other words, it is Shapiro's argument that inclusive recognition rules not only strip laws of the difference that authority can make, they strip laws of any practical force whatsoever. According to this second objection, only exclusive rules of recognition—that is, rules of recognition containing content-independent, pure pedigree criteria for legality—can secure a practical difference for laws. Since few legal positivists would wish to deny that the existence of law at least sometimes makes a difference in our practical reasoning, positivists must, according to Shapiro, abandon the inclusive option.

In this article I address the above two lines of argument against ILP. I begin with a brief sketch of Raz's influential *authority argument*, which purports to show that exclusive legal positivism[6] is alone in being consistent with the authority that law necessarily claims for itself. I then provide a very brief sketch of arguments I put forward in *ILP* purporting to show that Raz's authority argument does not in fact threaten ILP. I then turn to a number of objections to my arguments raised by Tim Dare in a recent article.[7] In answering Dare's critique, I hope to clarify and refine my arguments in ways which advance our understanding of legal authority and enable me to meet not only Dare's objections, but further objections to ILP recently made by Brian Leiter and Scott Shapiro. Utilizing the insights of Larry Alexander and Fred Schauer, I will again try to show that ILP is consistent with the authority of law because the authority of law does not necessarily consist, exclusively, in its normative power to provide us with exclusionary reasons for action. There are different types of authority (or ways in which authority can be exercised) and the power to create exclusionary reasons for action is only one possible type. Not only is it only one possible type, it is a type that law can seldom reasonably claim to possess and that we are seldom justified in acknowledging. Following this further discussion of the authority argument, I turn to Shapiro's critique of ILP and to Jules Coleman's attempt to fashion a response to it. Although I am sympathetic to Coleman's attempt to blunt the force of Shapiro's argument by flirting with the idea that law may not always make a practical difference, my hope is to avoid this option. Instead I will argue that Shapiro's argument fails to undermine ILP because it applies to only one, highly suspect form of ILP.

5. Scott Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469–507 (1998). Some theorists, Shapiro included, distinguish between legality and legal validity. For reasons of simplicity, and because nothing in my arguments hinges on a distinction between the two, I shall treat the two as equivalent. For similar reasons I shall also treat validity and authority as equivalent.

6. Hereinafter referred to as ELP.

7. Tim Dare, *Wilfrid Waluchow and the Argument from Authority*, 17 OXFORD JOURNAL OF LEGAL STUDIES 347–366 (1997).

II. RAZ'S AUTHORITY ARGUMENT[8]

According to Raz, it is in the very nature of legal systems that they necessarily claim justified practical authority over a population.[9] This claim is, somewhat paradoxically, almost always false, but it must be made by those who represent the legal system, if what they represent is truly to count as law.[10] From this fundamental conceptual claim about legal systems, Raz infers that a legal system must be the type of entity which is logically capable of possessing authority (even if it does not in fact do so), and that legal directives, e.g., laws and judicial decisions, must at least purport to have a special status. Any legal directive which purports to be authoritative must purport to serve a mediating role "between people and the right reasons which apply to them."[11] It must "occupy, as all authority does, a mediating role between the precepts of morality and their application by people in their behaviour."[12] The mediating role of legal authority is of a very special kind, however. The purported role of an authoritative legal directive is not only to provide us with a first-order reason to do or refrain from doing what it specifies. It is also intended to serve as a second-order reason which "preempts" or "excludes" what Raz calls "dependent reasons," the first-order, right reasons (including moral reasons) which would otherwise apply to us. In accepting the authority of the legal directive, we acknowledge that we are precluded from acting directly on the excluded dependent reasons. According to what Raz terms "the normal justification thesis," an authoritative directive should be based on the subjects' dependent reasons,[13] and the actual (*de jure*) authority of a directive—assuming it has this property—depends on its relationship to those dependent reasons.[14] More specifically, unless following the authoritative directive is more likely to lead us to act in accordance with right reason, i.e., the balance of dependent reasons which would otherwise apply to us, than if we attempted directly to decide for ourselves what those reasons require, then the directive has no authority over us. Raz's claim is that we are sometimes better able to act in accordance with right reason if we follow someone's directives than if we try ourselves

8. What follows is, necessarily, a very brief sketch of a very sophisticated, and I hope familiar, argument.

9. A practical authority is capable of affecting our reasons for action. A theoretical authority, on the other hand, is capable of affecting our reasons for belief. Typically, legal theorists who ascribe authority to law have practical authority in mind. There are exceptions: Heidi Hurd argues that law's authority is theoretical or epistemic, and Larry Alexander defends the thesis that it is partly epistemic. *See* Hurd, *Challenging Authority*, 100 YALE LAW JOURNAL 1611–1677 (1991); Larry Alexander, *Law and Exclusionary Reasons*, 18 PHILOSOPHICAL TOPICS 5–22 (1990).

10. Raz further believes that there is seldom, if ever, an obligation to obey the law based upon the legitimate authority of its directives. The proposition that there is even a *prima facie* obligation to obey the law has been "refuted by various writers in recent years." Raz, THE AUTHORITY OF LAW 97 (1979).

11. Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 299 (1985).

12. *Id.* at 310.

13. *Id.* at 299.

14. *See id.*

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to apply those reasons directly to our conduct. If this is at least sometimes true of legal directives, then it is at least sometimes true that law has practical authority and that we ought to accept its guidance.

But now comes a crucial premise in Raz's authority argument. If in order to identify the authoritative directive, or its content (i.e., what it means), one must appeal to any of the dependent reasons that it was meant to preempt or exclude, then the authoritative directive fails to be the kind of thing it must logically be if it is to serve its special mediating role. This premise has crucial implications for the relationship between authoritative legal directives and morality.

> Since it is of the very essence of [an] alleged authority that it issues rulings which are binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in a justificatory argument, i.e. as issuing from certain activities and interpreted in light of publicly ascertainable standards not involving moral argument.[15]

Law's claim to practical authority requires, then, that it be possible to determine the identity and content of a legal directive without appeal to any of the dependent moral reasons which it is, by its very nature, meant to exclude. This is a necessary, though not sufficient, condition of the directive's authority. ILP, however, permits moral reasons sometimes to function as constraints upon the existence and content of authoritative legal directives. Yet if Raz is right that dependent moral reasons are, as a matter of conceptual necessity, irrelevant in determining the existence and content of authoritative directives, it follows that ILP is logically inconsistent with law's essential claim to practical authority.[16]

In defending this view of law's purported authority, Raz draws upon an analogy with an arbitrator whose role, he argues, is to issue an authoritative directive which is binding on the parties to a dispute. Raz notes that, like legal directives, the arbitrators' directive should be based on the dependent reasons for action which apply to its subjects, in this case the disputants. It must also be possible, he says, for the parties to identity the directive and its content without appeal to disputed dependent reasons. Its binding, authoritative nature requires this; it also requires that the directive must be accepted as excluding, as a basis for action, the dependent reasons about

15. Raz, *supra* note 10, at 51–2. In further explanation of his position, Raz notes that income tax laws are intended to settle authoritatively "what is the fair contribution of public funds to be borne out of income." And in order to determine the existence and content of such laws, all one need do is "establish that the enactment took place, and what it says. To do this one needs little more than knowledge of English (including technical legal English), and of the events which took place in Parliament on a few occasions. One need not come to any view on the fair contribution to public funds." Raz, *supra* note 11, at 306.

16. As we shall see more fully below, there is an ambiguity in the argument as stated. The class of moral reasons is not identical with the class of dependent moral reasons which an authoritative directive is meant to adjudicate upon and settle. This ambiguity has important implications for the debates between defenders of ILP and ELP respectively.

which there was dispute. That *option 1* exceeds *option 2* in point of fairness is, for example, no longer a relevant reason for accepting and acting on *option 1* (or *option 2* if that happens to be the one chosen by the arbitrator). That the arbitrator issued decision *d*—'accept and act upon *option 1*'—is now, as a conceptual matter, the only relevant reason upon which the disputants are entitled to act. Yet if *d* and its content cannot be identified independently of the disputed dependent reasons, or if the disputants do not exclude those reasons as bases for action, "they defeat the very point and purpose of the arbitration,"[17] which is "to settle the dispute," to "settle for them what to do."[18] The subjects of an authority "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle."[19] This is as true of law as it is of arbitration. Hence ILP, which permits moral reasons to serve as constraints on the validity of legal directives, is inconsistent with the purported authority of those directives.

III. OBJECTIONS TO RAZ'S AUTHORITY ARGUMENT, ROUND 1

My response to Raz's authority argument revolved around the following central claims.[20]

1. The issuing of directives that exclude all moral factors is only one possible way in which practical authority can be exercised.
2. It is not true, as a matter of conceptual necessity, that directives must exclude any and all moral factors in order to be authoritative.
3. The set of all moral reasons is not identical with the set of dependent moral reasons underlying an authoritative directive.
4. It is conceptually possible that the identity and interpretation of an authoritative directive might in some way depend on moral reasons, some of which might not be identical with the dependent moral reasons underlying the directive.
5. The type of authority appropriate to a given context depends, in part, on the goals sought by the exercise of authority in that context.
6. Settling disputes conclusively is neither the only, nor a necessary, goal of the exercise of practical authority.
7. That authoritative legal directives do not violate certain fundamental moral rights recognized in or by the rule of recognition is a goal, among others, which a legal system can coherently pursue.
8. It follows that the issuing of authoritative legal directives whose identity and content partly hinge on moral factors is a strategy which a legal system can coherently pursue.

17. Raz, *supra* note 11, at 298.
18. *Id.* at 297.
19. *Id.* at 304.
20. I must, of necessity, be brief. For the full response, *see ILP*, *supra* note 4, at 129–141.

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9. According to ILP, the identity and content of valid, authoritative legal directives can, as a conceptual matter, depend on moral factors recognized, e.g., in a constitutional document.
10. ILP is therefore not conceptually inconsistent with the authority of law.

In support of my central claims, I followed Raz in noting that there are different kinds of authorities. The concept of practical authority includes legislative authority (lawmakers) and adjudicative authority (judges and adjudicators). We might add executive authority to account for authoritative figures like police officers and tax officials. Legislative authorities (typically) introduce general directives, adjudicative authorities (typically) decide disputes under general directives, and executive authorities (typically) issue particular directives in accordance with powers granted and circumscribed by the general directives of legislative and adjudicative authorities. It is also widely acknowledged that, in addition to practical authority, there is theoretical authority which is based upon special expertise. In an attempt to bolster my thesis that practical authority need not be fully exclusionary of moral factors, I looked to theoretical authority where an analogous claim can be made. It is not true, I argued, that accepting a pronouncement as theoretically authoritative *requires* that one accept it as exclusionary of all relevant reasons. Within her sphere of expertise, a theoretical authority's claim that *p* is true can indeed provide us with a reason for believing or accepting *p,* which is independent of the content of *p* and the reasons which argue in its favour. That the authority accepts *p* is a reason for me to accept *p* independent of *p*'s content and the evidence in its favor.[21] But the content-independent reason for belief provided by a theoretical authority need not be treated as fully exclusionary. Depending on such things as (a) the level of expertise of the theoretical authority; (b) my own level of relevant knowledge; and (c) whether I have sufficient time to pursue the inquiry myself, I might have a content-independent reason to accord the claims of the theoretical authority greater or lesser weight in my deliberations. If I am wholly ignorant of the matter at hand, but must come to a decision before I can acquire the requisite expertise, then I may well be justified in treating the authority's claims as fully exclusionary. But this is by no means necessary. If, for example, I am to some degree competent, and have sufficient time to consider the matter somewhat, there seems absolutely nothing *conceptually* amiss in my considering the evidence myself and regarding the authority's pronouncement as providing something less than a fully exclusionary effect in my thinking. That the authority accepts *p* counts as a content-independent reason to accept *p,* but not necessarily to the exclusion of all other relevant factors or reasons bearing on the acceptability of *p.* And this is true even though these further factors or reasons are not content-independent.

21. The evidence in favor of (or against *p*) is analogous to the dependent moral reasons underlying an authoritative directive.

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Having made these observations about theoretical authority, I went on to suggest that they provide reason to ask whether something similar might be true of practical authority. What compels us to deny that the directive of an acknowledged practical authority might properly be accepted as providing a content-independent, *but not fully exclusionary,* reason for action? There is, I argued, in fact nothing in the notion of an authoritative directive which compels this denial. In support of this hypothesis, I pursued Raz's arbitrator analogy.

First, I tried to show that arbitration is "goal sensitive," and that the kind (or degree) of authority it is appropriate for an arbitrator to exercise depends on the goals of its practice. If, on some occasion, these goals include something other than, or in addition to, the conclusive settling of a dispute, then something other than the issuing of an exclusionary directive might be appropriate. One can imagine, for example, an arbitrator who wishes his decisions partly to serve an educative or facilitative role. He may wish the parties to see that they really do have the ability and means to discover fair solutions themselves, thereby encouraging them to try harder in future rounds of negotiation. Or perhaps the arbitrator thinks that agreements originating from the parties themselves tend to be more stable, being based on collegiality rather than the imposition of a thoroughly authoritative solution. It is not uncommon for arbitrators to think this way: For example, they are often prepared to suspend proceedings temporarily, thereby providing the disputants with an additional opportunity to settle the dispute themselves. But in so doing, I was careful to note, the arbitration, and thus the power to issue an authoritative ruling, is itself suspended. Of more interest and relevance, I added, would be a case where the arbitrator does issue a ruling but the ruling's interpretation or implementation requires partial appeal to some of the contested dependent reasons. In such a case, I argued, the arbitrator would have provided only partial guidance, still leaving the disputants with a bit of a puzzle concerning the disputed issues. But the puzzle might be one whose pieces were fewer in number and, it might be hoped, easier for the parties to deal with and resolve amicably. The number of pieces could be reduced in at least two ways. First, the arbitrator could narrow the range of acceptable options between which the parties must choose. Second, he could narrow the number of reasons upon the basis of which one of the available options is to be selected by the parties.

A second important point I made about arbitration is that the reasons' further recourse to which would defeat what is normally one of its central purposes—i.e., the settlement of disputes—are the *contested* reasons the arbitrator's directive is meant to replace if, in the end, he is compelled to issue an exclusionary directive. Should other possible reasons for action enter into the identification, interpretation or implementation of the directive, then it is not obvious that dispute settlement would not be possible. Perhaps the dispute is not over what a particular principle (e.g., fairness)

requires but over whether this is the only relevant principle, or one of overriding importance. If so, then the issuing of a directive which makes reference to an agreed principle of fairness could well serve to settle the dispute. And this is so even though the directive's interpretation and implementation requires appeal to a dependent moral reason—fairness—which is relevant to the dispute.

Having made these observations about arbitration, I went on to ask whether analogous points might be made about law. If the goals of a legal system are other than, or include more than, the conclusive settling of disputes about dependent reasons, then the possibility emerges that laws might provide partial authoritative guidance without being fully exclusionary of any and all moral reasons. Laws whose interpretation, implementation, and identification as valid require appeal to some moral reasons can be authoritative. They can provide (partial) guidance by providing content-independent reasons which are no more fully exclusionary than the reasons for belief sometimes provided by a theoretical authority. As examples I cited familiar legal systems which appear to enshrine certain moral principles and values as constraints upon the validity, and hence authority, of subordinate laws. Such systems require, for the interpretation, implementation, and identification as valid of authoritative legal directives, that one appeal to moral reasons. And if this is so, then we seem to have good reason to question the claim that law's authority cannot be acknowledged without thereby accepting that its directives fully exclude any and all moral reasons. I further concluded that the purported authority of law is not elided by ILP, as long as we do not restrict ourselves to the severe type of authority Raz describes. As Ronald Dworkin once observed, "Raz thinks law cannot be authoritative unless those who accept it never use their own convictions to decide what it requires, even in [a] partial way. But why must law be blind authority rather than authoritative in the more relaxed way other conceptions [of law] assume?"[22]

IV. DARE AND LEITER, ROUND 2

A. Theoretical and Practical Authority: The Phenomenological Objection

Tim Dare sets out to defend Raz's authority argument against my objections. He does so by defending what he calls "a conceptual constraint upon authoritative directives."[23] This is the premise "to the effect that the identification and interpretation of [authoritative] directives cannot involve reference to the very matters those directives were intended to resolve."[24] It is

22. Ronald Dworkin, LAW'S EMPIRE 429 (1986).
23. Dare, *supra* note 7, at 350.
24. *Id.*

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this conceptual constraint, Dare adds, "which is said to exclude appeal to moral or evaluative considerations allowed by inclusive legal positivism and required by natural law . . ."[25] Dare's conclusion is that none of my objections "succeeds in removing the conceptual constraint."[26]

Dare begins his defense of the conceptual constraint by questioning my use of the distinction between practical and theoretical authority. Here he has two basic claims: (1) that my analysis fails to distinguish different ways in which the claims of a theoretical authority can be preemptive or exclusionary; and (2) that my argument against Raz rests upon a "telling caveat" that, when fully appreciated, leads to the conclusion that "legal directives are among the class of directives we should treat as pre-emptive."[27]

With respect to (1), Dare claims that I fail to acknowledge two different ways in which directives can be exclusionary. First, there is the sense in which to say that a directive is exclusionary with respect to subject S is to say that S *ought* to treat the directive as excluding other dependent reasons. In this sense of the term, the excluded reasons no longer have any proper bearing on S's practical reasoning; it would be wrong for her to act directly on them even if she believed otherwise. For want of a better term, we might refer to this as the *objective* sense of 'exclude.' Then there is the *subjective* sense of 'exclude.' It is this sense of the term which is in play when, in providing a phenomenological account of S's reasoning, we say that S *treated* a particular reason as preempting consideration of (some) other relevant reasons. In other words, S treated reason, *R*, as excluding other (possibly) competing reasons, whether or not she was justified in doing so. It is this subjective sense of 'exclude' which is in play when we describe Ann, the cautions investor, as having treated "I am tired" as a reason not to evaluate the dependent reasons (directly) for and against the making of an investment.[28]

It is true that my analysis did not make use of the distinction to which Dare draws attention, and that I relied, in an unacknowledged way, on the objective sense of 'exclude.' My assertion that the reasons provided by the claims of theoretical authorities need not be exclusionary was a claim about what we are sometimes justified in believing. But the incompleteness of my analysis seems not to be Dare's major complaint. His point is a quite different one:

> Though we *can* explain the role of theoretical directives in terms of the balance of reasons, where, weighted to reflect the expertise of their proponents, they compete with other relevant first order reasons, it may be that phenomenologically we at least often reason 'Einstein says P, so P'. At the time we employ theoretical directives they operate pre-emptively . . . I wish to

25. *Id.*
26. *Id.* at 350–1.
27. *Id.* at 356.
28. Ann's case is found in Raz's PRACTICAL REASON AND NORMS 37–8 (1975).

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> suggest . . . that the distinction between practical and theoretical authorities might not be as troubling for the argument from authority as Waluchow and others hint. If the phenomenological account of Ann's case does work, Raz may not need to make any concessions over the parallel between theoretical and practical authorities.[29]

Dare's argument seems to be this. Even if the pronouncements of a theoretical authority do not *objectively* exclude S's otherwise relevant reasons for belief, it is undeniable that they sometimes do so *subjectively*. By analogy, even if legal directives do not *objectively* exclude otherwise relevant dependent reasons for action, they may nevertheless do so *subjectively*. And when they do perform this role in S's practical reasoning, they are treated as authoritative in Raz's sense of the term—i.e., as the conceptual constraint requires. Hence, "the distinction between practical and theoretical authorities might not be as troubling for the argument from authority as Waluchow and others hint."[30]

I am not sure what to make of this argument. For I in no way denied the possibility that authoritative directives or pronouncements can sometimes exclude dependent reasons—subjectively or objectively. My point was that, as a conceptual matter, they *need not* do so if they are to be authoritative, or if they are to be treated as such. Neither theoretical pronouncements not practical directives *have to be* exclusionary if they are to be, or be treated as being, authoritative. It is, of course, perfectly consistent with this claim to assert the possibility that sometimes authoritative directives or pronouncements may in fact exclude otherwise relevant reasons, or may be treated as serving this role. In other words, there is nothing in Dare's argument that threatens my claim that, just as the pronouncements of theoretical authorities need not be, or be treated as being, exclusionary, practical authority might be present in the absence of directives that exclude, or are treated as excluding, otherwise relevant reasons.

Dare's second objection is, he believes, more telling than the first.

> There is a potentially more telling response to . . . Waluchow's argument which we can approach via Waluchow's own presentation of the situation in which one is confronted by a theoretical authority. Of course, he writes, if I have reasons for regarding my own views as suspect, perhaps knowledge of my own ignorance of physics, and 'I am for some reason required to decide between *p* and not *p*, then I might be warranted in treating Einstein's belief in *p* as exclusionary, as not merely outweighing but rendering irrelevant whatever feeble grounds I might have for believing (or disbelieving) *p*.[31] The suggestion here, I take it, is that the fact one is 'required to decide' might warrant treating a directive as pre-emptive even though there is nothing in the nature of the directive itself to give it this pre-emptive status.[32]

29. Dare, *supra* note 7, at 355.
30. *Id.* at 355.
31. *ILP*, *supra* note 4, at 131.
32. Dare, *supra* note 7, at 355.

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Dare continues:

> . . . Waluchow's caveat is telling since it directs attention to just that feature which marks the boundary between the practical and the theoretical so that we move from the sphere of theoretical reason to that of practical reason just where we are 'required to decide' between options. If this is right, then the appeal to the division between theoretical and practical authority does not of itself take us very far. We might think it more profitable to divide authority between authoritative directives which bear upon decisions which are 'required to be made' and those which do not, and now our question is 'on which side of this divide do the directives of law fall?' If we understand 'required to decide' in terms of the likelihood that our decision will have practical consequence . . . we should conclude that legal directives are among the class of directives we should treat as pre-emptive.[33]

In Dare's view, the 'required to decide' caveat is the "undoing" of my arguments drawing upon the nature of theoretical authority. While it may be true that *sometimes* a pronouncement by a theoretical authority, TA, that *p* is true fails to exclude otherwise relevant reasons bearing on the truth of *p*, this occurs only when S is not required to decide on the truth or falsity of *p*, i.e., when it is unlikely that S's decision will have practical consequences. However, in any case in which S *is* required to decide, i.e., any case in which S's decision is likely to have practical consequences, she *should* treat TA's pronouncement as exclusionary. Dare now asks whether the same is true when the authority in question is practical, not theoretical. His reply is that it is indeed true, leading to the following important conclusion. Since the decision to follow any legal directive is likely to have practical consequences, it follows that we are always required to decide whether to accept the law's guidance. And since we are required to decide whether to follow the law, it further follows that we are required to treat the law's directives as exclusionary.

If Dare's analysis is correct, then my argument fails because it draws support from cases involving theoretical authority which are relevantly different from cases involving the practical authority of law. They are different because the former involve situations where S is not required to decide, either because she is able to suspend judgment or free to figure things out for herself. She is free not to decide because nothing of practical import turns on her decision and she is therefore not required to accept the authority of TA's pronouncement on *p*. But nothing follows from this, Dare argues, concerning cases where S *is* required to decide because her decision (including the decision not to decide on the truth of *p*) has practical consequences. Here she *is* required to accept TA's pronouncement on *p* as exclusionary, just as she is in any case involving the practical authority of law.

33. *Id.* at 356.

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So goes Dare's argument. Is it sound? I think not. Just as there is nothing in the nature of a theoretical authority as such which requires that we treat TA's pronouncements as exclusionary, there is nothing that necessitates such treatment *whenever* we are required to make a decision that has, or is likely to have, practical consequences. Of course, we *may* be justified in according this status to TA's pronouncements *if the context is right.* But whether the context is right depends on more than just whether the decision has practical consequences, or whether S is able to avoid making a decision. It can depend, for example, on S's own level of expertise. If S has little or no expertise, and if, as is sometimes the case, S is indeed required to come to a decision, then she *may* be justified in treating TA's pronouncement concerning the truth of *p* as exclusionary. But if S has some degree of expertise in the relevant area, there is nothing in her acceptance of TA as a theoretical authority which bars S from trusting her own judgment to some degree. She can herself consider and weigh the evidence bearing directly on *p,* while at the same time according considerable weight to the content-independent fact that TA has judged *p* to be true. If this is so, then we are still left with the question I posed in *ILP:* What prevents us from saying similar things when the authority in question is practical, not theoretical? What prevents us from thinking that, if the context is right, the authority of a practical directive need not require that it be treated as exclusionary? Of course, whether the context is right will depend on more than whether decisions to follow the law have practical consequences and cannot be avoided. There is, in short, no "telling caveat" to my argument against the conceptual constraint.

Although Dare's objection is, I believe, ultimately unsuccessful in undermining my appeal to the parallel between theoretical and practical authority, it does highlight an important fact about authority upon which I perhaps did not elaborate sufficiently: The kind of reason provided by an authority's directive or pronouncement depends very much on context. That context will determine, among other things, whether we are *warranted, required,* or *at liberty* to treat the content-independent fact that an authority has pronounced *p,* or has issued directive, *d,* as a reason for belief or action. It will also, in conjunction with the goals of the enterprise in which the authority's claims or directives are made, determine whether that reason should be treated by us as exclusionary, or as something else entirely.

B. The Role of Context

The importance of context in determining the practical force of directives issuing from an authority has been an important aspect of recent work by Fred Schauer and Larry Alexander. Schauer introduces the concept of "decisionmaking environments" in which different types of rules with dif-

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ferent types of force are appropriate.[34] In some such contexts; rules with exclusionary force may be warranted and decisionmakers, those who must apply the rules to their own conduct as well as those (e.g., judges) who must apply these same rules in assessing the conduct of others, may be justified in treating the rules as preempting dependent reasons. But as Schauer notes, this is but one type of decisionmaking environment. Sometimes rules may have a *presumptive*, as opposed to an exclusionary, force.[35] In explanation, Schauer notes that there are "two types of presumptions, the *epistemic* and the *justificatory*."[36] Epistemic presumptions deal with the implications of factual uncertainty in contexts where, for substantive and procedural reasons, a proposition is presumed to be true, unless there is some special reason for believing that it is false. Justificatory presumptions, on the other hand, operate in a decisionmaking framework in which one is required to act in accordance with a rule, principle or decision unless there is some special reason not to do so. "[T]ime and again reasons that are sufficient for some purposes are insufficient for others. For instance, the existence of a quite good reason for restricting speech or taking race or gender into account may still turn out to be insufficient because of the overwhelming justificatory burden that such a reason must meet."[37] As Schauer notes, American law incorporates many such justificatory presumptions without which numerous cases would have been decided differently.[38] I argued in *ILP* that the same is true of Canadian and English law. In *Regina v. Oakes*, the Canadian Supreme Court enunciated several principles to govern the application of Section 1 of the *Canadian Charter of Rights and Freedoms*, which permits limitation of certain Charter rights provided that the limitation can be "demonstrably justified in a free and democratic society."[39] The Court further declared in *Oakes* that it must be proven that the objectives served by a measure limiting a Charter right are "sufficiently important" to warrant overriding a constitutionally protected right or freedom.[40] Charter rights, then, are not fully exclusionary, but they do enjoy a very heavy presumption in their favor. The same is true of decisions by the

34. *See* Schauer, *Rules and the Rule of Law,* 14 HARVARD JOURNAL OF LAW AND PUBLIC POLICY, 645. *See also* PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE *passim* (1991).

35. In *ILP* I argued that rules, principles and decisions can vary in what I called their "institutional force" and that the institutional force of a precedent can vary from one court to another. Much the same point could be made by saying, along with Schauer, that judges are faced with prior rulings whose justificatory presumption can vary from one decisionmaking context to another. On the differing institutional forces of law, *see ILP,* ch. 3.

36. Schauer, *Rules and the Rule of Law, supra* note 34, 675. Schauer adds in a footnote: "I am extraordinarily dissatisfied with the latter term, but have yet to come up with anything better." Neither have I.

37. *Id.*

38. *See Id.*, note 65.

39. See *Constitution Act, 1982,* Part 1: Canadian Charter of Rights and Freedoms, s.1. *Regina v. Oakes,* [1986] 1 SCR 103.

40. For discussion of the Charter and the way in which it incorporates appeal to a limited range of dependent moral reasons, *see ILP, supra* note 4, at chapter 5.

English House of Lords. In their famous 1966 Practice Statement, the Lords expressed an intention to modify their long-standing practice of treating their earlier rulings as (in effect) fully exclusionary, and "while treating former decisions of [the] House as normally binding, to depart from a previous decision when it appear[ed] right to do so."[41] As became clear in the months and years following the Practice Statement, the Lords intended to depart from their own precedents only under very special circumstances. For example, in *Fitzleet Estates Ltd. v. Cherry*, Viscount Dilhorne remarked that "If the decision in the *Chancery Lane Case* was wrong, it certainly was not so clearly wrong and productive of injustice as to make it right for the House to depart from it."[42] In other words, while the earlier decision was not exclusionary, it did have a very strong presumption in its favour, a presumption which in this case was not overridden. As I argued in *ILP*, and as Schauer's analysis illustrates, the presumption in favor of a directive can vary in strength. It can also vary in terms of the type of factor which can weigh against the presumption. As Raz himself notes, the range of reasons or factors affected (in Raz's case excluded) by an authoritative directive can be subject to scope restrictions. As with a theoritical authority in physics whose pronouncements on the morality of abortion carry no presumption in their favour because these lie outside the physicist's domain of expertise, the directive of a practical authority may lack practical force entirely if it is *ultra vires*. And if my arguments in *ILP* are sound, the directives of legal authorities may lack practical force, authority, if they impinge sufficiently on substantive moral constraints such as one finds in the due process clause of the American Constitution or the Canadian Charter of Rights and Freedoms.[43]

As we have seen, different decision making contexts can require different

41. *The Practice Statement*, 26 June 1966, cited in R. Cross, PRECEDENT IN ENGLISH LAW 109 (3rd ed. 1977).

42. *ALLER*, 996, at 1000. For further discussion of cases in which earlier decisions of the House are not treated as exclusionary but rather as enjoying a heavy justificatory presumption in their favour, *see ILP*, ch. 8, especially pp. 258–63.

43. One must be careful at this point. An Exclusive Positivist may not wish to deny that provisions like the "due process" clause of the American Constitution, or the "equality" section of the Canadian Charter, impose substantive moral constraints on the legal validity, and hence authority, of subordinate directives like statutes or judicial rulings. He also need not deny that the interpretation and application of these constraints require some measure of moral/political argument. In determining, for example, whether a suspect Act of Congress violates due process of law, Courts may be forced to consider the extent to which the Act violates justice or fairness. But the Exclusive Positivist will have a particular explanation of the moral argument in which the Court is engaged in such a case. To the extent that it considers what justice or fairness, in themselves, require as a condition of validity, the Court will be said to have stepped beyond the application of law. In asking whether the Act is invalid because it violates justice or fairness, the Court will be viewed as asking a moral question—one licensed by law, but a moral question nonetheless. And if the Act is struck down, this is because of its conflict with a standard—*e.g.*, justice—which lies outside the legal system. In *ILP* I discuss in some detail this particular account of challenges to the legal validity and authority of subordinate directives, concluding that it provides a distorted picture of constitutional adjudication under bills and charters of rights. *See ILP, supra* note 4, at 155–165.

exercises of authority. It can also require different treatment of whatever authoritative directives (or claims) are issued by one in authority. Larry Alexander expands on this latter point.

> We may have—and I believe we *do* have—compelling first-order moral reasons to establish institutions that demand that their decisions be complied with regardless of our views of their moral merits. Put differently, we may, for compelling first-order moral reasons, want institutions that demand that we act *as if* their decisions were morally preemptive of all first-order moral reasons. But even if we do have compelling moral reasons to establish such institutions, their decisions cannot in fact be morally preemptive. They cannot *be* exclusionary reasons; they can only be backed by a demand that they be treated *as if* they were exclusionary reasons.[44]

As Alexander notes, his position requires rejection of the Reflection Principle, first enunciated by Sartorius, that agents whose actions are justified ought never to be treated as wrong and penalized.[45] As Sartorius argued, "It is partly because the reflection principle can break down, due to the fact that individuals playing different institutional roles will have different consequences to consider in deciding what to do . . . that a system of legal norms can redirect human behavior into channels that it would otherwise not take."[46] Only if we reject the Reflection Principle, then, can we accept the proposition that an institution like law might be fully justified in issuing and enforcing exclusionary directives that we, as autonomous agents, are nonetheless warranted in treating as non-exclusionary. As this is a proposition that we have reason to accept, we should perhaps follow Alexander's lead in rejecting the Reflection Principle, recognizing, once again, that the force of an authoritative directive can vary with context—in this case between the context of an authority whose role it is to issue and enforce directives, and the context of one who must decide what to do in the face of such directives.

One of the virtues of Alexander's analysis is that it allows him to find room for Raz's claim that laws necessarily purport to provide exclusionary reasons without being forced to one of two troubling conclusions: that the law's claim to authority can never be justified, or that the existence of authoritative law requires the abandonment of moral autonomy—the right

44. Larry Alexander, *supra* note 9, at 10.

45. In INDIVIDUAL CONDUCT AND SOCIAL NORMS 66 (1975), Sartorius writes: "What I shall call 'the reflection principle' . . . embodies the following claim: Where an individual has correctly decided that he ought to do X, any higher-order judgment about his decision to do X or his actual act of doing it ought to license or approve of, rather than disapprove of or penalize, the decision and/or the act itself." Alexander argues in his *Pursuing the Good—Indirectly*, 95 ETHICS 323–5 (1985), that the Reflection Principle should be rejected. As Alexander notes in *Law and Exclusionary Reasons*, *supra* note 9, at 11, his position also requires rejection of the "Publicity Principle" which "rejects the legitimacy of any moral principle that cannot be publicly advocated without undermining itself."

46. Sartorius, *supra* note 45, at 57.

to decide for oneself what the balance of moral reasons requires of us. The second conclusion is perhaps the most troubling, though anyone but a philosophical anarchist will be troubled by the first as well. As Philip Soper nicely puts it:

> The right of the individual to dissent, to conclude that the obligation to obey is outweighed by other obligations, is the irreducible core of autonomy which authority can never invade. Autonomy collapses if de facto authority must always be followed; authority collapses if it is defined as de jure to include only those demands that are legitimate as measured by the autonomous calculation of ultimate obligations.[47]

That its context-sensitivity allows us to find room for both autonomy and authority counts heavily in favour of Alexander's theory. The authority of law is secured by the claim that an institution whose authoritative directives are treated as if they are exclusionary can be fully justified, can be said to be (truly) authoritative. The autonomy of agents subject to the law is secured by the claim that "we may want our authorities to claim and coerce obedience that we, on the balance of our first-order reasons, should withhold."[48] But is this the only way in which to strike an acceptable balance between autonomy and authority? Indeed, is it the best way in which to do so? Perhaps here too the answer is: It all depends on context. In some contexts directives which exclude all appeal to moral reasons might be desirable or necessary—when, e.g., there is widespread disagreement about dependent moral reasons, or compelling reason for a directive which solves an intractable coordination problem or a prisoner's dilemma.[49] But if my earlier arguments are correct, i.e., if (a) authoritative directives need not necessarily be exclusionary, but can, e.g., be "presumptive"; and (b) the exercise of authority is goal-sensitive; then (c) the possibility exists that a proper balance might be struck in some way other than the issuing of directives which are treated, by the relevant authorities, as though they were fully exclusionary of all moral reasons.

This is no place to consider the question in full,[50] but consider briefly what is lost if courts are prohibited from considering any and all dependent

47. Soper, A THEORY OF LAW 77 (1984).

48. Alexander, *supra* note 9, at 17.

49. Alexander nicely summarizes the three basic problems for which exclusionary directives can often serve as a solution: "First, there is the problem of *frequent moral error.* Many people cannot weigh first-order reasons competently. Second, there is the problem of *predictability/coordination*. It is important that people's weighing of first-order reasons be relatively predictable. Third, even when people can weigh first-order reasons correctly and can predict others' behavior, they frequently find themselves in prisoner's dilemmas . . . " Alexander, *supra* note 9, at 6.

50. For a more thorough discussion of these points, *see ILP, passim,* especially pp. 95–8. For an extremely valuable, though I believe ultimately unpersuasive, account of the reasons in favor of fully exclusionary legal directives, *see* Tom Campbell, THE LEGAL THEORY OF ETHICAL POSITIVISM *passim* (1996).

moral reasons in assessing the validity, and hence authority, of legislation and precedents. What is lost, among other things, is a public platform upon which ordinary citizens can affect the exercise of power over them by legal and legislative authorities by appealing to moral reasons enshrined, for example, in a constitutional document. They lose a public platform on which they can directly challenge, in an open and often dramatic way, and on the basis of important moral reasons explicitly recognized in their constitution, the authority of directives issued by legal and legislative officials. The loss of this platform has a number of potential consequences. For one, it deprives the individual of an important source of political power. With few exceptions, it is very difficult for a dissenting individual who believes that legislation flouts important moral values to bring about a desired change by legislators. It may not be quite so difficult to convince a court. But perhaps this is the problem that leads Alexander and Campbell to opt in favor of fully exclusionary directives. It might be argued that the more power we give individuals to thwart the democratic will,[51] the less we can expect them to accept the authority of their legal and political institutions. And the less we can expect individuals to acknowledge the authority of their legal and political institutions, the less likely we are to secure the acceptable balance between authority and autonomy that Soper describes and that Alexander finds essential. Perhaps. But there are reasons for thinking that the desired acceptance of law's authority might in fact be *encouraged* if substantive moral limitations on the authority of legal directives are acknowledged. A system of political and legal authority that formally recognizes its own moral limitations is one whose authority is likely to earn the respect of a morally enlightened citizenry. When individuals are shown respect, they are much more likely to show it in return. Individuals are prepared to accept the authority of others, but only on terms that recognize its reasonable and rightful limitation and provide significant means for resisting abuse. If this is so, then we have reason to question Alexander's claim that we have "compelling first-order moral reasons to establish institutions that demand that their decisions be complied with regardless of our views of their moral merits."[52] We may, in fact, have compelling moral reasons to avoid such institutions. The practical success of legal authority may not depend on the use of exclusionary directives. It may in fact require quite the opposite: that not all dependent moral reasons be excluded by legal directives—as they are applied by citizens as well as courts.[53]

51. For purposes of argument I am assuming, as most discussions do, that the society the authority of whose legal directives is in question is a democratic one.

52. Alexander, *supra* note 9, at 10.

53. Once again one must be very careful here. There is nothing in *Raz's* account of legal authority which prohibits challenges to legal validity and authority based on moral principles enshrined in a constitutional document. But as noted above (note 43), Raz views such appeals as steps beyond the application of law, a view which, I have argued, distorts our understanding of them. *See ILP, supra* note 4, at 155–65.

C. Arbitration and Multiple Functions

Following his critique of my attempt to draw helpful analogies between practical and theoretical authority, Dare takes direct aim at my use of Raz's arbitrator analogy. Here Dare once again has two main points: (1) that my analysis of "the adjournment strategy" sometimes used by arbitrators is misleading; and (2) that my talk of issuing a directive that only partially settles a dispute fails to support the conclusions I wish to draw concerning the possibility of partial settlement by authoritative legal directives. My response to Dare draws heavily on points made in the preceding section, so I will be brief.

In supporting my contention that arbitration is goal sensitive, and that sometimes there are means of achieving its goals other than by the issuing of fully exclusionary directives, I pointed out that arbitrators sometimes adjourn to allow the disputants an additional opportunity to come to an agreed settlement themselves. Self-imposed agreements are often more stable, and so the adjournment strategy is often a good one. According to Dare, "Waluchow himself seems to acknowledge that the adjournment strategy does not really provide a counter-example to Raz's model of arbitration" because, as Dare notes, I say that in such a case "the arbitration, and thus the power to issue an authoritative ruling, is itself suspended."[54] It is not clear whether Dare thinks I may have made a mistake here, since in his view I only "seem to acknowledge" that the adjournment strategy fails to provide a counter-example to Raz's model of arbitration. So let me be clear that I in no way intended the adjournment strategy to serve as a counter-example to anything. My point was simply to highlight the goal sensitivity of arbitration, and the fact that sometimes there are ways of achieving the goals of arbitration—including the settling of a dispute—other than the issuing of fully exclusionary directives. I then asked the question: Might not the same be true of law?

Following his discussion of the adjournment strategy, Dare takes issue with my thoughts on the possibility of partial guidance by the arbitrator. Here we have, not the suspension of the power to issue an authoritative directive, but the issuing of an authoritative directive that only partially settles the dispute. I said that partial settlement could be achieved in at least two ways. The arbitrator could either (a) narrow the range of acceptable options by saying, e.g., that options 1 and 2 are acceptable but 3 and 4 must be rejected; or (b) narrow the dependent reasons upon the basis of which the parties are themselves to try to select among options 1–4. I also noted that an arbitrator could, without jeopardizing the success of the arbitration, issue a directive whose interpretation or understanding required partial appeal to some of the relevant dependent reasons. The dependent reasons further recourse to which would normally defeat the normal goal of arbitration (i.e., to settle a dispute) are only the *contested* reasons under dispute. Should other dependent reasons enter the picture, then it is not at all clear

54. Dare, *supra* note 7, at 357, quoting *ILP,* 132.

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that the (normal) goal of arbitration would be thwarted. There could, e.g., be complete agreement among the parties on what the fairest decision is, but disagreement about whether the agreed facts of relative fairness are sufficient to outweigh, e.g., reasons of inefficiency, loyalty or compassion. A directive that makes reference to fairness, and whose understanding or interpretation therefore requires appeal to agreed moral reasons of fairness, can therefore be quite serviceable in accomplishing the goals of this particular case of arbitration.

The most important point arising from my discussion of arbitration was this: The authority of a directive does not require the exclusion of any and all moral reasons, dependent or otherwise. If this is so, then we have good reason to think that legal directives whose validity depends on moral reasons enshrined, for example, in a constitutional document do not necessarily lack authority. Once again, we should distinguish among the following: (a) the set of all moral reasons; (b) the set of dependent moral reasons underlying a particular legal directive; and (c) the moral reasons enshrined in a constitutional document that serve as conditions upon legal validity. If we do, then we are left with the following conclusion: ILP, which allows the reasons described in (c) to serve as conditions for the validity and authority of legal directives, "cannot be refuted on the simple ground that it would make the identification of a valid [authoritative] legal directive dependent 'on the considerations the weight and outcome of which it was meant to settle.'"[55]

Dare objects that "there is more than one sense of 'partial' being employed here. The plausibility of one kind of partial directive is called upon to support the plausibility of a directive partial in quite another sense."[56] First, there is the sense of 'partial' in which to say that the directive was partial is to say that it does not deal with every disputed issue—some are dealt with while others are left unresolved. It is this sense that is presumably in play when the arbitrator rules out options 3 and 4 but leaves the disputants to choose between 1 and 2, saying nothing about the reasons upon which the choice must be made. Another case might be where an arbitrator does say something about the relevant reasons. Here he might declare that reasons of loyalty are irrelevant in choosing between 1 and 2 and that the parties must choose on basis of fairness and efficiency alone. Alternatively, he might say something about the relative weights of the disputed reasons. And of course there is the possibility of a mixed strategy: ruling out certain options and either ruling out or commenting on the relative weights of certain disputed reasons. In such cases, I argued, "the puzzle would be one whose pieces were fewer in number and, it would be hoped, easier to deal with and resolve amicably."[57]

The second sense of 'partial' to which I supposedly appeal is not, like the first sense, "a sense of partial which goes to 'scope'" but rather a sense of

55. *ILP*, 139, quoting Raz, *Authority, Law and Morality*, *supra* note 11, 304.
56. Dare, *supra* note 7, at 358.
57. *ILP*, *supra* note 4, at 132.

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'partial' "in the more telling sense of requiring . . . appeal [to disputed reasons]."[58] And now the question is, "What does Waluchow say in favor of directives 'partial' in the more telling sense of requiring such appeal?" The answer to that question, I think, is nothing: We are simply told that an arbitrator might issue directives that require such appeal. But that is simply to beg Raz's question.[59]

I believe Dare is right that I did not clearly enough distinguish different senses of 'partial' when discussing what I took to be the possibility that an authoritative directive might provide partial guidance in arbitration. But I am puzzled by his suggestion that I have nothing to say in favor of the conceptual possibility that an authoritative directive might require, for its understanding and interpretation, appeal to dependent reasons—and in this particular sense provide "partial" guidance. Suppose the parties to a dispute are agreed on which of two options is the fairest. Suppose, further, that the arbitrator rules that fairness is the only, or perhaps the overriding, reason for choosing between options. Then we have a situation in which the following can happen: (1) The parties will settle on one of the two options; (2) they must rely on their understanding of fairness, a dependent reason whose relative weight is at issue, to decide among these options; (3) the dispute will be settled without the issuing of a fully exclusionary directive that, by its very nature, requires for its understanding appeal to none of the dependent reasons involved in the dispute. Is it true that I say nothing at all to justify my claim that this is possible? As my earlier discussion reveals, I argue extensively that the exercise of authority is not as a conceptual matter restricted to the issuing of exclusionary directives. I further argued that the type of directive that it is appropriate to issue depends on the context and the goals of the practice in question, which in arbitration and law might include more than the conclusive settling of disputes. I then argued that a directive whose understanding required appeal to a dependent reason, or some other moral reason unrelated to the dependent reasons underlying the directive, might serve these other goals. It might even, as in the example sketched above, serve the goal of settling a dispute about the relevance of certain dependent reasons. Dare might not like my arguments in support of these conclusions, but they are there to be considered and have yet to be refuted.

D. The Identity of Dependent and Disputed Reasons

Dare's next criticism takes issue with my claim that there might be agreement between the parties to a dispute on what, e.g., the principle of equality requires but disagreement about whether equality is the only relevant issue, or an issue of overriding importance. As illustrated in the example discussed above, I suggested that an arbitrator might, in such a case, rule that

58. Dare, *supra* note 7, at 358.
59. *Id.* at 358–9.

equality (or fairness) is the only relevant issue, thus settling the dispute for the parties. Dare responds:

> As the case is described the parties *do not have* a consensus on equality which settled their dispute. Such consensus as there is leaves unsettled how equality is to be ranked with other possible principles and, on the facts of Waluchow's hypothetical, *that* is the crucial factor. A directive the understanding and interpretation of which required appeal to equality to settle their dispute about ranking would take them no further ahead — they stand before the arbitrator because they fail to agree upon the relevant implications of the principle of equality for their dispute.[60]

I am puzzled by this assessment of my example and the conclusions I draw from it. The point is not that the parties in such a case are not in need of a ruling because they agree about the impact of the principle of equality on their dispute. The point is that they do *not* agree on the impact of equality, even though they know what equality would require if it were the only relevant consideration. If the arbitrator rules that equality is indeed the only relevant factor, then their dispute is settled by way of an authoritative directive whose shared understanding requires shared beliefs about which option best promotes equality.

Dare next turns to the uses to which I put my analysis of arbitration in developing my case that legal directives need not be exclusionary to be authoritative. I pointed to a variety of cases in which the validity of a legal directive was challenged on the ground that it violated a moral right incorporated into the Canadian Charter of Rights and Freedoms. I cited as a good example *Andrews v. Law Society of British Columbia*,[61] where Mark Andrews, a British citizen but permanent resident of Canada, challenged s. 42 of British Columbia's Barristers and Solicitors Act, which restricted membership of the bar to Canadian citizens. The relevant question before the courts was whether s. 42 violated s. 15(1) of the Canadian Charter, under which every individual is "equal before and under the law." I argued for two conclusions: (1) That "whatever the dependent reasons for this statute might have been, they were not the reasons of moral equality upon which the Court's declaration of invalidity was based;"[62] and (2) that the validity and thus authority of s. 42 hinged on moral reasons of equality that were not identical with the dependent moral reasons underlying s. 42. Dare objects to my argument in the following terms:

> . . . s. 42 posed no difficulty for the conceptual constraint [that legal directives must be exclusionary to be authoritative]. We [are] to regard it as an authorita-

60. *Id.* at 359–60.

61. *Andrews v. Law Society of British Columbia* [1986] 4 WWR 242 (BCCA). The decision in the BC court was later upheld by the Supreme Court of Canada in *Law Society of BC v. Andrews* [1989] 56 DLR (4th) 1.

62. *ILP, supra* note 4, at 139.

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> tive directive which settled the dispute between those who affirmed and those who rejected the dependent reasons set out in the Law Society's submissions, a directive which, as per the conceptual constraint, must be capable of being identified and interpreted independently of those disputed dependent reasons . . . We can I think offer essentially the same account of the decision of the Court of Appeal . . . [T]he conceptual constraint entails that we must be able to identify and interpret the Court's directive without appeal to the very thing under dispute, where this dispute *does* include the application of the equality rights entrenched in the Charter. Here, as elsewhere, the argument from authority claims, the Court's directive necessarily operates as a reason for action independently of the dependent reasons the parties may have thought relevant prior to the decision. Thus inclusive positivism *would* make the identification of the Court's directive dependent on 'the considerations the weight and outcome of which it was meant to settle', namely the scope and application of the moral rights entrenched in the Charter.[63]

This objection also has no force against my account of authority. My point was not that s. 42 failed to settle disputes about the dependent reasons specifically underlying s. 42. My point was that the validity and authority of s. 42 hinged on *other* moral reasons, the reasons of equality that the Charter establishes in s. 15(1). So even if s. 42 did settle disputed reasons underlying its enactment, it remains true that its authority can be denied for moral reasons unrelated to those contested reasons that it was intended to adjudicate upon and settle.[64] As for the claim that I make identification and understanding of the Court's directive (its decision concerning the validity of s. 42) dependent on the considerations the weight and outcome of which it was meant to settle, it is clear that this is in no way an implication of my argument. A ruling by the Court that s. 42 is invalid because it violates s. 15(1) of the Charter can be easily identified and interpreted without knowing the conception of equality upon which the Court made its decision.

E. Discretion and the Charter

If documents like the Canadian Charter and the American Bill of Rights place moral constraints on the validity and hence authority of legal directives, then it is not a necessary condition of the authority of legal directives

63. Dare, *supra* note 7, at 361–2.

64. Raz's claim, it should again be stressed, is not only that the authority of a legal directive requires that it be identifiable and understandable independently of the dependent moral reasons which it adjudicates upon and settles. It also requires that this be possible independently of *any and all moral reasons period*. This claim is the defining element of ELP, one which Raz's analysis of authority is meant to support. *See* text at *supra* note 12, where Raz says that an authoritative legal directive must be identifiable and understandable independently of standards involving moral argument. Raz requires that the identity and content of valid legal directives turn on no moral reasons whatsoever. My reply is that the authority argument, and its constituent arbitrator analogy, establish at best that they cannot turn on *dependent* moral reasons, and issues about these particular reasons which are *in dispute*.

that they "settle disputes" without appeal to any and all moral reasons. Moral arguments may be necessary to determine whether a moral constraint on validity has been violated by a purportedly authoritative directive. Dare now asks whether the fact that moral arguments are used to challenge legal validity, which he appears willing to concede, threatens the exclusionary account of legal authority. In his view it does not:

> The concession is consistent with the argument from authority if we suppose that judges are settling by decision a dispute as to what is to count as equal or just. They are doing exactly what the argument from authority supposes: namely settling a dispute, here over the extension and application of the moral terms in the Charter, in a way that would make direct appeal to those values self-defeating in just the way the argument and the conceptual constraint suggest.[65]

Dare further suggests that the role of the Charter itself is not to settle disputes about equality, fundamental justice, and so on. The Charter tells us "that the community believes that the values named in it are important and invites courts to specify, through authoritative directives, what those values require in this case or that. . . . Here it is the judge's determination which has significance and not the motivating substantive value which led to the enactment of the Charter."[66]

Though Dare's remarks are intended to show that ELP can be reconciled with the existence of provisions that purport to incorporate morality into the law, they serve to highlight an important presupposition of ILP: That the moral values enshrined in a constitutional document like the Canadian Charter are, to a degree at least, determinate. In other words, the claim that constitutionally recognized moral values can serve as constraints upon the validity and hence authority of legal directives presupposes that these values are determinate enough to serve this role. Of course they need not be fully determinate, any more than a statute must be fully determinate in order to constrain most of the decisions to which it applies. As Hart said long ago, even if we must agree that there are always "borderline cases," we must insist that there first be borderlines. If the incorporated values are to some degree indeterminate, then of course, judges who strike down legislation for violation of these values may sometimes be exercising a discretionary power.[67] They will do so when the incorporated value is indeterminate with respect to the issue at hand. When judges do in such cases strike down legislation, they will be invalidating what was, until the point of invalidation, valid, authoritative law.[68] In such cases judges will be settling a dispute about

65. Dare, *supra* note 7, at 364.

66. *Id.*

67. According to ELP, this is what happens *whenever* a court uses a moral premise in an argument concerning the validity, authority and interpretation of an impugned directive.

68. Again, according to the most plausible account consistent with ELP, this occurs *whenever* a court strikes down a directive because it conflicts with a (legally recognized) moral value or principle.

moral values by issuing an authoritative directive which might, and probably should, be exclusionary in nature. And if, as some would argue,[69] moral values are completely indeterminate, then Dare's vision of the Charter and Bill of Rights would be correct, and it would indeed follow that Charter cases should always result in exclusionary directives which settle otherwise intractable disputes about moral values. But if we reject such wholesale moral skepticism, then we can continue to accept one of the main tenets of ILP: That the validity of legal directives like s. 42 can, as a conceptual matter, depend on moral values and principles without jeopardizing their authoritative status. And when a judge makes a ruling in a case where the relevant value is determinate, she does not, unless she is mistaken, invalidate what was, up until the point of invalidation, a valid, authoritative directive. On the contrary, she determines that the directive was invalid, lacked authority, all along. In such cases the judge purports to *discover*, not *invent*, a conflict between the directive and a moral condition of its authority.

F. The "Perry/Waluchow" Theory of Precedent

Dare's final criticism of my analysis of legal authority is one he shares with Brian Leiter.[70] In *ILP* I drew upon the theory of authoritative directives developed by Stephen Perry to support my contention that authority need not be exclusionary of all moral reasons and that ILP is therefore consistent with the authority of law. According to Perry, an authoritative directive provides "a second-order reason [which is] a reason for treating a first-order reason as having a greater or lesser weight than it would ordinarily receive, so that an exclusionary reason is simply the special case where one or more first-order reasons are treated as having zero weight."[71] One charged with the responsibility of accepting the guidance of an authoritative directive, e.g., a precedent, will follow the directive "unless [he] is convinced that there is a *strong* reason for holding otherwise."[72] From this Perry and I were prepared to conclude that recognizing the authority of legal and legislative directives need not require conceiving them as providing exclusionary reasons. It is enough, I argued, "that they be thought of as affecting the weight of other reasons for action, unlike non-authoritative decisions which lack this normative property."[73]

Both Dare and Leiter believe, for different reasons, that Perry's theory fails to advance my argument for an alternative account of legal authority

69. Dare appears not to be among those who believe that all moral values are wholly indeterminate. *See* Dare, *supra* note 7, at 362–4.

70. Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 LEGAL THEORY 533–47 (1998).

71. Stephen Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD JOURNAL OF LEGAL STUDIES 223 (1987).

72. *Id.*

73. *ILP*, *supra* note 4, at 138.

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which is consistent with ILP. According to Dare, the appeal fails because it relies upon the prior rejection of Raz's claim that authoritative directives must be exclusionary of dependent moral reasons. If so, then "Perry's model does not even get started . . . Waluchow cannot advance Perry's argument as *another* reason to reject the argument from authority; it is a reason only if one already accepts the other arguments he gives for doing so."[74] I find Dare's assessment of my appeal to Perry's theory puzzling. Revealing that there is a coherent and plausible alternative to a theory that has been shown to have troubling implications is, to my mind at least, always something worth doing. If one is also able to show that the alternative avoids these troubling implications, then one has a powerful new argument in its favor. That this strategy necessarily depends on prior arguments against the original theory is an objection of little if any force.

Leiter's complaint is different. He questions whether Perry's theory of precedent in fact serves as a counter-example to Raz's account of authority. On that theory, it will be recalled, a precedent can be authoritative even though it is ultimately overruled. As long as the judge "bound" by the precedent is not prepared to overrule the precedent unless she is "convinced that there is a *strong* reason" for doing do, she can be said to have respected the precedent's authority. She need not, in other words, have taken the precedent to have excluded the strong reason. Leiter replies as follows:

> If a court overrules a precedent, surely the natural thing to say is that the overruling court did not treat the precedent as authoritative. It is natural to say this precisely for Razian reasons: the overruling court went back and struck the balance among the dependent reasons differently. . . . That is, it did not treat the prior court's decision as constituting an exclusionary reason . . . and in failing to do so, it did not treat the precedent as authoritative. . . . But on the Perry/Waluchow view, an overruled precedent may still be spoken of as authoritative insofar as the overruling court was required to "weigh [it] . . . more heavily than normal, i.e., more heavily than in other contexts in which authority is not present and reasons compete equally on their respective merits alone."[75] Yet this way of looking at the matter entails the bizarre conclusion that an overruled precedent may be described as "authoritative," when that is precisely what it seems not to be in virtue of having been overruled! Should we really say that an overruled precedent is "authoritative" just because the overruling court says, "We accord this precedent considerable weight in our decision, but in the end we decide the same issue the opposite way"?[76]

Leiter of course intends his last question to be rhetorical. But I don't believe it is. It is no more "natural" to say of an overruling court that it viewed the

74. *Id.*
75. *ILP*, *supra* note 4, at 137.
76. Leiter, *supra* note 70, at 544.

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precedent as having *no* authority, than to say that it deemed the precedent's authority to be *outweighed* by *especially strong* reasons. For again, the precedent would have continued to stand were there no such reasons which argued against it. It would have stood, even if there were (lesser) reasons that, absent the authoritative status of the precedent, would have been strong enough to justify a decision at odds with the precedent. Putting it in Schauer's terms, the precedent stands with a justificatory presumption in its favor, unless and until there are reasons of a special weight and/or type which argue for its overruling.[77] This is not to say, of course, that an overruled precedent *continues* to enjoy authority once it is overruled. The authority of the new precedent will replace the authority of the old. So we are not, on this account, forced to say that "an overruled precedent *is* authoritative" just because the overruling court accords the precedent considerable weight in its ultimate decision. But we can say that "an overruled precedent *was* authoritative" even though it was overruled by a decision which both respected and replaced its authority.

G. Leiter on Dependent v. Moral Reasons

According to Leiter, defenders of ILP have "three noteworthy rejoinders to Raz's argument from authority."[78] One of these is the rejoinder discussed in the preceding section. A second, developed by Jules Coleman, rests on a distinction between the "identification" and "validation" functions of the positivist's rule of recognition. I have commented elsewhere on the use to which Coleman puts his distinction[79] and will leave its defense to Professor Coleman. Leiter points to a third rejoinder that he characterizes and criticizes as follows:

> [Inclusive] Positivists might contest whether identifying laws by reference to moral considerations necessarily requires taking into account the dependent reasons on which those laws are based. "The set of all moral reasons," Waluchow notes, may "not [be] identical with the set of dependent reasons under dispute. . . . "[80] Even if this were right, it wouldn't prove enough. For

77. On Perry's account, the weights of the reasons that compete against the precedent are affected by the second-order reason the precedent provides. On Schauer's account this is not so. Rather the precedent has a presumption in its favor, which means that the competing reasons (whose weights are not affected by the precedent), must be particularly strong before they can defeat the precedent. The two accounts may in fact be equivalent if we conceive of weight as a relative property. In any case, I now prefer Schauer's account over Perry's. But the justification of this preference is a matter best left to another time. My reply to Leiter's objection does not depend on which of these two accounts is more acceptable.

78. Leiter, *supra* note 70, at 541.

79. *See The Many Faces of Legal Positivism*, 48 UNIVERSITY OF TORONTO LAW JOURNAL 387, 425–30 (1998).

80. *ILP*, *supra* note 4, 139. For a similar point, *see Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis*, *supra* note 2, at 541.

> it suffices to defeat [Inclusive] Positivism as a theory compatible with the law's authority if there exists *any* case in which the dependent reasons are the same as the moral reasons that are required to identify what the law is; that there remain some cases where these reasons "may" be different is irrelevant. Moreover, if moral reasons are always overriding . . . then moral reasons will *always* be among the dependent reasons for any authoritative directive. Therefore, if identifying that directive requires recourse to moral reasons, the preconditions for authority will fail to obtain.[81]

So according to Leiter, my point that the moral reasons that undermine the authority of a particular legal directive need not be identical with disputed, dependent moral reasons underlying the directive offers no support for ILP. It fails to do so because there may be other cases in which the two sets of reasons *are* identical. And in these cases, the identity of the directive as an authoritative legal directive will depend on the factors the directive was intended to adjudicate upon and settle—i.e., exclude. As long as there is at least one case where the two sets of reasons are identical, ILP is shown to be inconsistent with law's authority.

Leiter's argument rests on two assumptions. The first is that a directive cannot be authoritative unless its identity and meaning can be established independently of all reference to any of its dependent reasons. This assumption was addressed above in section IV (C) where, in response to Dare, I argued that authoritative directives can, as a conceptual matter, provide partial guidance. Leiter's second assumption is that the "preconditions for authority" of law are met only when *all* legal directives are authoritative. Only then does it follow from the premise that some legal directives fail to be authoritative—because, according to Leiter, their identity and meaning hinge on dependent reasons—that the authority of *law* is undermined. But if, as Raz himself suggests, an individual directive is authoritative or non-authoritative, depending on whether we are more likely than not to act in accordance with right reason if we follow that directive than if we appeal to dependent reasons directly, the preconditions of the authority of *some* directives does not require the authority of *all* directives. Thus, even if we were to accept the premise that a directive cannot be authoritative if its identity and meaning hinge on dependent reasons it was meant to adjudicate upon and settle, we are left with the possibility I sketched—that the identity and meaning of some authoritative directives hinge on moral reasons unrelated to their dependent moral reasons, and that the authority of law (i.e., the authority of these particular directives) is compatible with the existence of these directives. Their authority, at least, cannot be denied on the basis of the argument that their identity and meaning depend on "the very same issues which the authority is there to settle."[82]

81. Leiter, *supra* note 70, at 541.
82. Raz, *supra* note 11, at 304.

V. SHAPIRO AND THE PRACTICAL DIFFERENCE THESIS

A. ILP and the Practical Difference Thesis

Dare and Leiter both argue that ILP robs law of the practical difference which its authority can make. Shapiro goes one step further: ILP, he argues, robs law of any practical difference whatsoever. It not only precludes laws from providing *exclusionary* reasons for action, it precludes laws from providing *any* reason at all. In short, ILP is inconsistent with what Jules Coleman calls the Practical Difference Thesis (PDT). This is "the claim that, in order to be law, authoritative pronouncements must in principle be capable of making a practical difference: a difference, that is, in the structure or content of deliberation and action."[83]

According to Shapiro, laws can make a practical difference by providing either epistemic or motivational guidance. Epistemic guidance occurs when legal rules "inform people which actions have been designated as obligatory in virtue of their bearing the mark of authority."[84] "To be guided by a legal rule in an epistemic fashion . . . is to learn of one's legal obligations from the rule and to conform to the rule because of that knowledge. It does not imply [however] that one is motivated because of the rule."[85] In short, legal rules which provide epistemic guidance inform us what our legal duties are under standards validated by the rule of recognition. Motivational guidance occurs when legal rules provide us with reasons for action. "Someone is motivationally guided by a legal rule when his or her conformity is motivated by the fact that the rule regulates the conduct in question."[86] In other word, legal rules motivationally guide conduct when the agent takes the fact that the rules require a particular form of conduct as a reason to engage in that form of conduct.[87] It is Shapiro's argument that an inclusive rule of recognition robs any and all rules legally valid under it of their inherent capacity to provide motivational and epistemic guidance. In short, ILP is inconsistent with the PDT. Any version of positivism that accepts the PDT is therefore inconsistent with inclusive rules of recognition, leaving a positivist who accepts the PDT with only two options. She must either accept ELP or abandon positivism altogether. Wishing to remain an inclusive positivist, Coleman's answer to Shapiro is to entertain the idea of abandoning the PDT. But it is far from clear that all versions of ILP are inconsistent with the PDT. In what follows,

83. Coleman, *Incorporationism, Conventionality and the Practical Difference Thesis*, *supra* note 2, 383.

84. Shapiro, *supra* note 5, at 491.

85. *Id.* at 492.

86. *Id.* at 490.

87. Although he sometimes refers to rules which "regulate conduct," Shapiro focuses on duty or obligation imposing rules. In other words, although his analysis is, I believe, intended to cover both primary and secondary rules, his arguments focus primarily on primary rules.

I shall argue that much depends on how one understands the relation of morality to an inclusive rule of recognition.

Shapiro's argument that ILP is inconsistent with the PDT[88] can, I believe, be summarized as follows:

1. According to legal positivism, it is an essential function of law to make a practical difference by providing citizens and judges with epistemic and motivational guidance.[89]
2. Rules supposedly validated by an inclusive rule of recognition are incapable of providing epistemic guidance because it is hard to see . . . how the law can serve this function with respect to rules that are valid in virtue of their moral content. Telling people that they should act on the rules that they should act on is not telling them anything! Marks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms. However, a mark that can be identified only by resolving the very question that the mark is supposed to resolve is useless. Therefore, a norm that bears such a trivial mark . . . is unable to discharge its epistemic duties.[90]
3. Rules supposedly validated by an inclusive rule of recognition are incapable of providing motivational guidance because "[g]uidance by the inclusive rule of recognition *by itself* is always sufficient to give the judge the right answer."[91]
4. Therefore, ILP is inconsistent with the PDT.

Shapiro's argument is intended to challenge all versions of positivism which permit morality a role in establishing legal validity. According to Shapiro, there are at least two versions of ILP that differ in the roles they permit morality to play.[92] First, there are "sufficiency versions" of inclusive legal positivism "that allow morality to be a sufficient condition of legality."[93] Sufficiency versions are, Shapiro argues, the only versions of ILP capable of

88. Henceforth referred to as "Shapiro's argument."

89. According to Shapiro, Hart's internal point of view is best explained in terms of motivational guidance. Whenever one takes the internal point of view towards a rule, one is motivated by the rule to engage in the conduct it prescribes. Hart argued that only judges need take the internal point of view. Since Shapiro is interested in challenging Hart's commitment to ILP, he assumes that only judges need to be motivationally guided by the law if a legal system is to exist. Like Hart, however, Shapiro asserts that many citizens, as a matter of fact, find both epistemic and motivational guidance in the law. I will not here consider whether Shapiro's account of the internal point of view is adequate, or whether it provides a plausible account of Hart's intentions.

90. Shapiro, *supra* note 5, at 494–5.

91. *Id.* at 496.

92. Near the end of his article (p. 506), Shapiro follows Raz in distinguishing between legality and legal validity, suggesting that not all standards that are legally valid within a legal system, *e.g.*, the laws of foreign jurisdictions, are laws of that system. I will continue to treat the relevant questions of validity as concerning only those standards which are part of the system. Accordingly, I will continue to treat 'legality' and 'legal validity' as equivalent.

93. Shapiro, *supra* note 5, at 500, 501.

challenging Dworkin's claim that some moral principles are legal standards independent of pedigree.[94] They are also inconsistent with the PDT. Alternative, there are "necessity versions" according to which morality is "construed as a necessary condition on legal validity." These, Shapiro argues, are incapable of meeting Dworkin's challenge. And they are also inconsistent with the PDT.

In arguing that ILP is inconsistent with the PDT, Shapiro focusses on a sufficiency version of ILP, although he believes that his argument can be generalized to cover necessity versions as well. Shapiro has us imagine a (purported) legal system whose rule of recognition says: "In hard cases, act according to the principles of morality."[95] Next, we are asked to consider how judges guided by such a rule would have dealt with *Riggs v. Palmer.*[96] According to Shapiro, the "judges guided by this inclusive rule of recognition would conform with the principles of morality when deciding whether to invalidate the will." We are further asked to assume that the only relevant principle of morality is that people should not profit from their own wrongs and that the court believed this to be so. A judge, he writes, "guided by the rule of recognition . . . would invalidate the will."[97] Now comes Shapiro's objection: "It follows, I think, that the principle that no man should profit from his own wrongs cannot itself make a practical difference as a legal norm. For if the judge were guided by the inclusive rule of recognition, but did not appeal to the moral principle, he or she would still end up invalidating the will." Since "[g]uidance by the inclusive rule of recognition *by itself* is always sufficient to give the judge the right legal answer," it follows that this inclusive rule strips the non-profit principle of the capacity to make a practical difference to our deliberations.[98] If, however, all laws must in principle be capable of making a practical difference to our deliberations and actions, the non-profit principle cannot be law and the imagined inclusive rule must be rejected.

In defending his claim that this inclusive rule of recognition renders the non-profit principle of no practical difference, Shapiro expands upon his example:

> Let us imagine, for example, that in an effort to conform to the inclusive rule of recognition, the judge consults a very wise rabbi about what justice requires in this case. Because the rabbi will appeal to the principle that no person should profit from his own wrong, he will tell the judge that Palmer must lose.

94. It is here that Shapiro utilizes the distinction between legality and legal validity. He suggests, following Raz, that a better way to answer Dworkin is to argue that legally binding moral principles which lack pedigree are legally valid even though they lack legality, i.e., even though they are not *legal* principles. For my response to this particular construal of legally binding moral principles, see *ILP,* chapter 5.

95. Shapiro, *supra* note 5, 496.

96. *Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889).

97. Shapiro, *supra* note 5, 496.

98. *Id.*

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> The moral principle, therefore, can make no practical difference once the rule of recognition makes a practical difference, because the judge will act in exactly the same way whether he or she personally consults the moral principle or not. Guidance by the inclusive rule of recognition *by itself* is always sufficient to give the judge the right legal answer.[99]

So it *appears* as if the judges in *Riggs*, because they were guided by an inclusive rule of recognition, were also guided by the moral principle it validates: That no person should profit from his or her own wrongdoing. It *appears* that the non-profit principle made a practical difference to the judges' reasoning, if only because they invoked it in justifying their decision; but this appearance is illusory. Since the judges in *Riggs* could have reached the same decision by applying the inclusive rule alone (possibly with the help of their rabbi), the non-profit principle added nothing to their deliberations. The judges were therefore not guided by it; it made no practical difference to their decision, either motivationally or epistemically. "Guidance by [an] inclusive rule of recognition *by itself* is always sufficient to give the judge the right legal answer."

In explanation of why ILP, unlike ELP, robs laws of the capacity to make a practical difference, Shapiro draws attention to what he calls the "dynamic" nature of exclusive rules of recognition. It is this aspect of exclusive rules of recognition which enable them, and the directives they legally validate, to make a practical difference. It is because one and the same exclusive rule of recognition can validate either *L* or *not-L* that its directives can guide epistemically and motivationally. In other words, one can know the validity conditions of an exclusive rule of recognition, and know that these have been met by a legal directive without thereby knowing the content of the directive valid in accordance with these conditions. One can know, e.g., that enactment by parliament is a criterion of validity and was satisfied by directive *d* without knowing what *d* says. Because an exclusive rule of recognition

> is dynamic, its guidance does not necessarily entail that judges will act in a manner specified by any primary rule. It is this "elbow room" carved out by dynamic rules of recognition that allows the primary legal rules to make practical differences. They guide conduct because it is always up to us to imagine that the norm no longer exists and hence the behavior witnessed [i.e., the judge applies the primary rules] no longer results, even though the judges remain committed to the same rule of recognition.[100]

In contrast, Shapiro argues, an inclusive rule is "static." "The set of possible motivated actions [*i.e.*, the judge applies laws validated by the inclusive rules for the reason that they are valid] is fixed at its inception and never varies."[101]

99. Shapiro, *supra* note 5, at 496.
100. *Id.* at 498.
101. *Id.*

The reason is that "morality is a static system—it has no 'rule of change.'"[102] And because morality is static, the outcomes of decisions made in accordance with inclusive rules are "fixed at the outset."[103] It is, therefore, conceptually impossible for a judge to act, and be motivated to act, in accordance with the inclusive rule of recognition without thereby acting in accordance with the moral rules or principles validated by it. "This means that these moral rules cannot make practical differences *qua* legal rules."[104]

B. A Reply to Shapiro

In responding to Shapiro's argument, it is perhaps best to begin with Premise 1. This ascribes to positivists the view that an essential function of law is to provide motivational and epistemic guidance. An important question arises immediately: Should the functions noted by Shapiro be ascribed to individual laws or to legal systems in general? This is an important question, if only because if fails to follow from the fact that a function is attributable to the legal system that it must be attributable to any and all laws within the system. This no more follows than it follows from the fact that the function of the army is to defeat the enemy that the function of Private Bailey, chief cook and bottle-washer, is to do the same. So even if, as Hart and others have argued, it is an important function of legal systems that they provide something like the kind of guidance Shapiro describes, there is no reason to think the same must be said of all laws. In short, it fails to follow from the proposition that a legal system must make a practical difference that all its rules must do likewise.[105]

I suspect Shapiro would deny the effectiveness of this reply. For on his view, inclusive rules of recognition strip all laws purportedly valid under their moral criteria of the capacity to make a practical difference. But is this so? Much depends, I want to suggest, on the particular rule of recognition one has in mind and how one views its relationship to moral standards.

Let us return to Shapiro's example, *Riggs v. Palmer*, and begin by asking the following question. Was the non-profit principle (a) a law *validated by* an inclusive rule of recognition? Or was it (b) a principle *contained with* an inclusive rule of recognition, as a criterion of validity for other legal standards? If option (b) is the correct one, and the non-profit principle is indeed contained within an inclusive rule of recognition as a condition for the validity of other laws, then yet another question arises: Does the non-profit principle specify a necessary or sufficient condition for validity? One gets very different results depending on how one answers this third question.

102. *Id.*
103. *Id.*
104. *Id.*
105. Coleman makes a similar point in his reply to Shapiro. *See* Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *supra* note 2, at 423–4.

On Shapiro's construal of *Riggs*, option (a) was the correct one. On this construal, truth as a moral principle is the relevant, sufficient criterion of validity, and the non-profit principle is a legal norm valid by this general criterion. Shapiro's aim is to show that, under these conditions, the non-profit principle "cannot guide conduct . . . as a *primary* legal norm."[106] Before addressing this particular construal, let us first consider the alternative. On option (b) the non-profit principle is not a primary legal norm validated by a criterion found within the rule of recognition, but is itself such a criterion. Now our further question arises: Does (or could) the non-profit principle serve as a sufficient condition for validity; or does (or could) it serve as a necessary condition for the validity of other standards? It is difficult to see how it could serve as a sufficient condition for the following reasons. There is a potentially infinite number of standards that satisfy this criterion. For any given situation, there is a potentially infinite number of standards that *could* govern that situation without anyone profiting from his own wrong. Yet if we accept what has been variously described as "the limits of the law thesis" or "the limited domain thesis," we must rule out this possibility.[107] Yet another troublesome implication is this: For any situation governed by such a condition of validity, there will be a potentially indefinite number of norms which are not only valid by the criterion but also incompatible with each other. They will be incompatible in the way in which a rule setting a speed limit of 50 miles per hour is incompatible with a similar rule setting the limit at 55. Both rules cannot govern behavior simultaneously, even though each could (or would?) be valid according to the relevant "safety principles." Such a situation is indeed inconsistent with the law's ability to provide practical guidance.

So the non-profit principle cannot serve as a sufficient condition for the legal validity of other standards. That a potential rule conforms with the non-profit principle can never alone be sufficient for validity. But is there anything in Shapiro's argument, or the considerations just sketched, to rule out the possibility that the non-profit principles serves as a *necessary* condition? According to Shapiro, that we must rule out this possibility is "remarkably easy to prove."[108]

> Consider an employer who is guided by a rule of recognition requiring everyone to follow any rule passed by Congress, provided it is not "grossly unfair." Assume that Congress passes minimum-wage legislation mandating that employers pay their employees at least $6 an hour and that such rules are not grossly unfair. Can the employer be guided by the minimum-wage rule?

106. Shapiro, *supra* note 5, at 496.

107. The thesis that the law has limits was defended by Joseph Raz in *Legal Principles and the Limits of the Law,* 81 YALE LAW JOURNAL 823 (1972). The limited domain thesis is defended by Gerald Postema in *Law's Autonomy and Public Practical Reason,* in THE AUTONOMY OF LAW (R. George ed. 1996).

108. Shapiro, *supra* note 5, at 501.

> The answer is "no" if we have in mind epistemic guidance . . . [A] legal rule epistemically guides when the agent learns of his legal obligations from the rule. It follows that a rule cannot epistemically guide when the only way a person can figure out whether he or she should follow the rule is to deliberate about the merits of following the rule.[109]

Motivational guidance is also impossible:

> Can the minimum-wage rule at least motivationally guide a judge? The answer to this question is also "no." [A] rule motivationally guides conduct when it is taken as a peremptory reason for action; it follows that a rule cannot motivationally guide if the agent is required to deliberate about the merits of applying the rule . . . [110]

It is far from clear that these considerations undermine versions of ILP that assert the possibility that conformity with a moral principle can be a necessary condition of legal validity. As the above quotations illustrate, Shapiro's argument against necessity versions depends on a strict Razian account of authoritative directives. It is, in effect, a version of the authority argument considered above in my response to Dare's critique. For "the settlement of disputes concerning dependent reasons," one needs only substitute "the provision of epistemic and motivational guidance." But if this is so, then my response to Shapiro is virtually identical to my response to Dare. Just as an arbitrator's directive can provide partial guidance, the minimum wage rule can serve an epistemic function by providing partial epistemic guidance. It can also motivate. It provides motivational guidance by settling on one among an indefinite number of possible minimum-wage rules that are not grossly unfair. We will know, as employers, that we must pay at least six dollars per hour, not $6.25, $6.26, etc.—since this possibility has been chosen and is not grossly unfair. And the chosen rule will provide us with motivation to pay at least six dollars, a motivation that is clearly not provided by the rule of recognition itself. The latter does not discriminate among all those possible rules that are not grossly unfair. Since on Shapiro's own description of the case, the six dollars per hour law is *not* grossly unfair, this rule, once chosen by the law, provides both epistemic and motivational guidance.

It is difficult to see, then, why an inclusive rule which specifies conformity with morality, or with a particular set of moral principles, *M*, as a *necessary* condition for the validity of a law, *L*, would be thought to rob *L* of any practical significance, understood in terms of the possibility of guidance or motivation. This is true if only because there will always be other conditions, e.g., enactment or "crystallization," which must be met for *L* to be valid. One would have to know, as one must with exclusive rules, which particular

109. *Id.*
110. *Id.*

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rules were enacted or which principles had crystalized—as well as whether these violated *M*—in order to know what to do. In short, because conformity with *M* is insufficient for validity, one has to know more than that *L* conforms with *M* in order to determine what to do. *L* and its content therefore clearly make a practical difference. It is also true that the inclusive rule of which *M* is a part would be dynamic in Shapiro's sense of that term. It is equally true that most, if not all, defenders of ILP argue for a necessity version. That is, they argue that it is possible that conformity with one or more moral principles counts as a necessary condition for legal validity. This was certainly my intention in ILP—and Hart's in his various writings on the topic. As Shapiro notes, "the only example [Hart] gives of an inclusive rule of recognition is the Fifth Amendment to the US Constitution, which is best construed as a necessary condition on legal validity."[111]

If the above considerations are correct, Shapiro's argument fails to undermine any version of ILP that allows moral principles to serve as necessary conditions for validity contained within the rule of recognition. Since there are, as far as I am aware, no versions of ILP that allow moral principles to serve as sufficient conditions for validity, defenders of ILP needn't concern themselves with the abundant absurdities that follow if we try to imagine that moral principles could serve this role. That leaves us with the alternative, option (a), which Shapiro argues is inconsistent with the PDT. It is also, he argues, the version of ILP to which its defenders are committed. On this option, it will be recalled, the non-profit principle was a primary legal norm purportedly validated by an inclusive rule of recognition according to which truth as a moral principle is a sufficient condition for legal validity. On this particular reading, truth as a moral principle was alone in determining the legal status of the non-profit principle in *Riggs*.[112]

How should a defender of ILP respond to this particular possibility? One option is simply to accept Shapiro's argument. One might, in other words, accept that a rule of recognition could not possibly license *morality as such* as a sufficient condition of legality, and that it could not, as a result, validate any and all particular moral principles, like the non-profit principle, without violating the PDT. For defenders (like myself and Hart) of the view that moral principles can serve *in the rule of recognition* as *necessary* conditions for legal validity, this has obvious appeal. We can continue to assert the possibility that the existence and content of laws sometimes depend on some moral conditions recognized in something like the Canadian Charter or the American Bill of Rights without accepting the possibility that the law might contain any and all moral standards. The latter possibility might indeed be inconsistent with the view that an essential function of a legal system, though not each individual law, is to provide practical guidance. A legal

111. *Id.* at 500.

112. If we assume that the principles of morality are limited, and that they form a consistent set, then we avoid the difficulties sketched above, where we entertained the possibility that conformity with the non-profit principle might be sufficient for legal validity.

system that simply told us to act according to the principles of morality might not in fact mark a significant step beyond a society without law. In *ILP* I made a similar point in regard to a possibility once contemplated by Philip Soper, that a society might adopt a rule of recognition that simply stated, "All disputes are to be settled as justice requires."[113] As I argued, if such a rule were adopted, then the set of purportedly legal standards for public and private use within that society would undoubtedly be no more dependable and stable than it would be were there no rule of recognition at all. Following Shapiro's lead, we can now add the point that the adoption of such a rule, or a rule that adopted morality as a sufficient condition for validity, would provide little if any epistemic or motivational guidance either. One might, in other words, well agree with Dworkin that "the adoption of such a 'rule of recognition' would introduce no further determinacy and could not mark a transition [from a society without law] to anything of much significance, least of all anything remotely like a modern legal system."[114] Of course, one could go on to add that no known legal system attempts to govern by way of such a rule of recognition, and that there is nothing in ILP that commits its defenders to accepting this possibility. There is, in other words, nothing in ILP that commits its defenders to accepting the possibility of option (a), let alone the option entertained by Soper, where moral truth is not only a sufficient condition for validity, it is the only sufficient condition for validity.

So defenders of ILP can escape the force of Shapiro's argument by pursuing a necessity version of option (b). But what are we to make of Shapiro's assertion that option (a) *must* be taken by an inclusive positivist if Dworkin's fundamental challenge to positivism is to be met? How might a defender of ILP respond? The obvious reply is to deny Dworkin's premise that some moral principles are legal principles absent a relevant pedigree such as enactment or crystallization. Contrary to Dworkin's claim, it is not at all clear that the *Riggs* principles were applied by the court simply because of their moral worth. It is arguable that the non-profit principle, for example, had a longstanding history of use in the courts.[115] It is equally arguable, as many positivists pointed out in their early responses to Dworkin, that any principles deemed by the courts *to be legally binding* have always had such a history, history of use being, of course, a perfectly acceptable pedigree criterion.[116] If all this is true, then there may be no legally binding principles lacking in some sort of pedigree. Moral principles figure as legally binding only to the extent that the law recognizes their role in some fairly determinate way, for example through enactment, as with the Canadian

113. Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICHIGAN LAW REVIEW 512 (1977)

114. *ILP*, *supra* note 4, at 185.

115. For an attempt to show that the principles cited in Dworkin's two pivotal cases, *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors, Inc.*, each had an acceptable pedigree, *see* my ADJUDICATION AND DISCRETION (1980).

116. *See, e.g.*, Neil MacCormick, LEGAL REASONING AND LEGAL THEORY (1978).

Charter, or through judicial recognition in a long line of decisions. As Dworkin himself seems to acknowledge, certain "fundamental maxims of the common law," like the non-profit principle, or the principle that courts will not allow themselves to be the vehicles of injustice, acquire their status as law not through enactment but through longstanding judicial recognition. In both instances the relevant moral principles acquire their status as law by acquiring the appropriate pedigree. Truth as a moral principle is not sufficient for validity even if it is necessary.

VI. CONCLUSIONS

In this article I have further developed and defended an account of law's authority that is consistent with ILP. The normative power to create and enforce directives that provide, or are treated as if they provide, fully exclusionary reasons for action is but one possible form of legal authority, or one possible way in which legal authority can be exercised. An authority that rests on substantive moral limitations is conceptually possible. I further argued that the type of authority appropriate to a given decision-making context largely depends on the goals sought by the creation and exercise of authority in that context. As in the case of arbitration, the goals of a legal system might include more than the conclusive settling of disputes. They might include, for example, respect for constitutionally protected moral rights recognized as criteria for the validity and authority of legal directives. Indeed, if legal authority is to be compatible with moral autonomy, there is good reason to think that a legal system ought to include such criteria for the validity and authority of its directives. In other words, a legal system ought to adopt inclusive rules of recognition and avoid fully exclusionary recognition rules. Inclusive rules are necessary if law's authority is to be compatible (and be viewed as compatible) with moral autonomy. We should not fear, along with Shapiro, that inclusive rules will somehow rob legal directives of any practical effect. Inclusive rules of recognition cite compliance with morality, or with specified moral principles, as a necessary, though insufficient, condition of validity. In so doing, they permit rules valid under them to make a practical difference.