

Transcending the Debate between Inclusive and Exclusive Legal Positivists

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Jeffrey Brand-Ballard, J.D., Ph.D.
523 Phillips Hall
Department of Philosophy
The George Washington University
Washington, DC 20052
(202) 994-6911
jbb@gwu.edu

I. Introduction

According to the standard positivist picture of law, each legal system contains a master rule that specifies criteria of legality for primary rules.¹ A central debate in legal philosophy during the past twenty-five years has concerned the content of the master rule. Exclusive positivists (“exclusivists”) insist that the master rule can only make reference to social facts or sources: “pedigree” criteria.² As Ronald Dworkin emphasizes, however, some rulings can’t be justified exclusively by reference to pedigreed legal norms.³ Judges sometimes exercise

¹Primary rules are those which require agents “to do or abstain from certain actions.” H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), p. 81. Hart calls the master rule the “ultimate rule of recognition.” *Ibid.*, p. 94.

²Exclusive positivism is also known as “hard” or “hard facts” positivism. Prominent exclusive positivists include Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001); Brian Leiter, “Realism, Hard Positivism, and Conceptual Analysis,” *Legal Theory* 4 (1998): 533-547; and Scott Shapiro, “On Hart’s Way Out,” *Legal Theory* 4 (1998) 469-507, reprinted with modifications in Jules Coleman, ed., *Hart’s Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001), page references herein to the reprint.

³Ronald Dworkin, “The Model of Rules I” in *Taking Rights Seriously* (Cambridge: Harvard University Press 1977); *Law’s Empire* (Cambridge: Belknap Press, 1986). I use the terms ‘rule’ and ‘norm’ interchangeably in this paper, though we often need to distinguish between rules, principles, standards, etc.

discretion, and sometimes they deviate from pedigreed norms.⁴ According to exclusivists, such judges make new law.⁵

Inclusive positivists (“inclusivists”), by contrast, deny that the mere fact that a ruling isn’t authorized by pedigreed legal norms entails that the judge has made new law.⁶ According to inclusivism, non-pedigreed norms can also authorize rulings, including rulings that conflict with pedigreed norms. Inclusivists think master rules can specify moral features, such as fairness, rather than pedigree features, as criteria of legal validity.

In recent years, a brilliant young philosopher, Scott Shapiro, has taken center stage in the inclusive/exclusive controversy, putting pressure on inclusivism.⁷ Shapiro has drawn attention to what is now known as the

Practical Difference Thesis (PDT): Legal rules must in principle be capable of securing conformity by making a difference to an agent’s practical reasoning.⁸

Shapiro claims that many positivists, notably H.L.A. Hart, are committed to both PDT and the view that the master rule is conventional. Shapiro argues that one can’t consistently endorse inclusivism, PDT, and conventionality. Although Shapiro doesn’t claim that all versions of inclusivism are indefensible, he favors retaining PDT and conventionality and abandoning inclusivism for exclusivism.

Inclusivists have offered several responses to Shapiro’s arguments. Some have

⁴In this paper I focus on cases of *deviation* from pedigreed norms, though I think most of what I say applies, *mutatis mutandis*, to cases of judicial discretion.

⁵Though exclusivists acknowledge that such deviation may be morally justifiable, in some cases.

⁶Inclusivism is also known as “incorporationism” and “soft positivism.” See Wilfred Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994); Jules L. Coleman, *The Practice of Principle* (Oxford: Oxford University Press 2001), lec. 8; “Negative and Positive Positivism,” *Journal of Legal Studies* 11 (1982): 139-64; David Lyons, “Moral Aspects of Legal Theory” in *Moral Aspects of Legal Theory* (Cambridge: Cambridge University Press, 1993); E. Philip Soper, “Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute,” *Michigan Law Review* 75 (1977): 473-519; and Hart, *The Concept of Law*, 2nd ed., “Postscript.”

⁷Scott Shapiro’s contributions to the debate are: “On Hart’s Way Out”; “The Difference that Rules Make” in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998); “Judicial Can’t,” *Noûs* 11 Supp. (2001): 530-557; “Law, Morality, and the Guidance of Conduct,” *Legal Theory* 6 (2000): 127-70.

⁸Shapiro, “Law, Morality, and the Guidance of Conduct,” p. 129.

disavowed PDT, altogether.⁹ Others retain some version of PDT, but argue, against Shapiro, that inclusivism is consistent with PDT, properly understood.¹⁰ Shapiro has responded imaginatively to these criticisms.¹¹

Even those who reject PDT, moreover, recognize that legal rules *sometimes* secure conformity by making a difference to an agent's practical reasoning. So, regardless of whether one accepts PDT in some form, it's important to get clear what sort of practical difference legal rules make when, as often, they make one.

I'll defend an unorthodox position that combines insights from exclusive and inclusive positivism. With Shapiro, I accept PDT. Against Shapiro, I think non-pedigreed norms can satisfy PDT. However, I think there's an important difference between adhering to a pedigreed norm and deviating from one in favor of a non-pedigreed norm. I interpret exclusivism as a particular (and, in my view, extreme) way of capturing the notion that pedigreed norms, as such, enjoy a certain privilege, compared to non-pedigreed norms. Inclusivists have concentrated on demonstrating that non-pedigreed norms can enjoy legal validity, but they haven't given much attention to some important differences between deference to pedigreed norms and deference to non-pedigreed norms. I'll argue that, while both types of norms can make practical differences, they do so in different ways. I'll highlight some of these contrasts as I defend my view.

II. Shapiro on Rule-Guidance

First, let's review what I consider Shapiro's main argument against inclusivism. Shapiro observes that many positivists, including Hart, are committed to PDT.¹² Shapiro understands

⁹See Coleman, *The Practice of Principle*, lec. 10; Jules Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," *Legal Theory* 4 (1998): 381-425; Matthew Kramer, "How Moral Principles Can Enter Into the Law," *Legal Theory* 6 (2000): 83-108.

¹⁰See Kenneth Himma, "H.L.A. Hart and the Practical Difference Thesis," *Legal Theory* 6 (2000): 1-43; Wil Waluchow, "Authority and the Practical Difference Thesis," *Legal Theory* 6 (2000): 45-81;

¹¹Shapiro responds to Himma, Coleman, Waluchow, and Kramer in "Law, Morality, and the Guidance of Conduct."

¹²Shapiro published the first versions of his arguments in "On Hart's Way Out," but has since refined them in

PDT in terms of *rule-guidance*, which he defines as follows:

A legal rule R guides a person P to do A only if P might not have done A if he had not appealed to R as a legal rule.¹³

Pedigreed rules have the power to guide conduct, on this definition. Imagine a master rule which specifies: “All statutes enacted by the Virginia General Assembly are valid.” The Assembly enacts a statute criminalizing the purchase of beer on Sundays. Meg, a Virginia resident, is guided by this provision of Virginia’s master rule and she’s aware of the statute. As a result, she refrains from buying beer on Sunday. However, it was physically possible for the state legislature not to enact (or to repeal) the beer statute. In that case, even though Meg was guided by the master rule, she would not have appealed to the statute as a legal rule, for the simple reason that the statute would not have *been* a legal rule in that case. She might, in that case, have bought beer on Sunday. Therefore, the statute guides Meg not to buy beer.¹⁴

Shapiro argues that non-pedigreed rules can’t guide conduct in this way. Consider any action that a non-pedigreed rule would forbid or require. An agent who is guided by the master rule that validates this rule is already guided to act or refrain from action, accordingly, just in virtue of being so guided. Consider, for example, a master rule that validates primary rules in virtue of their fairness. An agent who is guided by this master rule will already be motivated to avoid the actions prohibited by fair rules, Shapiro claims. There’s no guiding work left for the “fair rules” to do after the master rule validates them.¹⁵

That’s a crude summary of Shapiro’s ingenious argument, as I understand it. He means to show, via his counterfactual constraint on rule-guidance, that non-pedigreed rules can’t guide,

response to criticism. I present my understanding of his current position. See references in note 7.

¹³Shapiro, “Law, Morality, and the Guidance of Conduct,” p. 136.

¹⁴The same counterfactual applies, perforce, to judges and other public officials in Virginia, since they are guided by the master rule, according to Hart. See Hart, *The Concept of Law*, pp. 116-17.

¹⁵Shapiro, “On Hart’s Way Out,” pp. 177-80.

and therefore can't make a practical difference. It's a powerful argument, indeed, if one accepts Shapiro's conceptions of rule-guidance and the master rule. These I shall now question.

III. Generalizing Rule-Guidance

As Shapiro defines rule-guidance, a rule guides an agent to Φ only if she might not have Φ -ed had *she herself* not appealed to that rule as a (legal) rule. This is a familiar and straightforward way for rules to influence agents. But it isn't the only way.

When we think of a rule guiding an agent, we naturally think of cases that are regulated¹⁶ by the rule, as Meg's Sunday beer purchase is regulated by the statute. In regulated cases, the rule guides by discounting certain reasons that would otherwise apply. *Unconditional discounting reasons* are second-order reasons to treat specified first-order reasons as having less force than they otherwise would.¹⁷ Discounting reasons can themselves be discounted. When an agent defers to a conflicting rule, she discounts the discounting reasons supplied by the first rule, thereby allowing the first-order reasons again to play their usual role.

Shapiro concentrates on cases of unconditional discounting. But rules can also discount conditionally. A *conditional discounting reason* is a second-order reason to accept a conditional according to which, if some condition is met, then one will treat specified first-order reasons as having less force than they otherwise would. Notice, finally, that the condition in question could concern virtually anything, including the conformity of other agents to other rules.

The following scenario illustrates the previous points all at once. It shows how a rule, R,

¹⁶I take the term "regulation" from Joseph Raz, "Law and Value in Adjudication" in *The Authority of Law* (Oxford: Oxford University Press, 1979), p. 181.

¹⁷What Joseph Raz calls "exclusionary reasons" are simply the limit case of unconditional discounting reasons. They are second-order reasons to treat certain first-order reasons as having no force at all. Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1990); Stephen Perry effects a similar generalization of Razian exclusionary reasons. Perry calls discounting reasons "weighting reasons." Stephen R. Perry, "Second-Order Reasons, Uncertainty, and Legal Theory" *Southern California Law Review* 62 (1989): 913-94. See also the related discussion of "indicator rules" in Donald H. Regan, "Authority and Value: Reflections on Raz's *Morality of*

can guide an agent, in a case not regulated by R, by providing conditional discounting reasons, where the specified condition concerns the conformity of another agent to another rule.

Cordelia and Goneril are teenage sisters. Goneril, the elder sister, has an 11pm curfew, while Cordelia's curfew is earlier. Goneril sits at home at 10:30pm one night. She wants to attend a late-night concert that would require her to violate her 11pm curfew. She's considering leaving the house when she notices Cordelia coming home. Goneril doesn't know whether Cordelia has missed her curfew, however, because Goneril can't remember if her parents have changed Cordelia's curfew from 10 to 10:30pm. Goneril has special reason to care about Cordelia's curfew because Goneril is eagerly anticipating a family vacation and she knows from experience that her parents will cancel the vacation if both sisters violate their respective curfews, but not if only one of them does so. If Cordelia has missed her curfew then Goneril must stay home, or lose the vacation. If, however, Cordelia's curfew has been moved to 10:30pm then Goneril has the option to attend the concert, thereby violating her own curfew without jeopardizing the vacation.

Goneril's own curfew remains 11pm, regardless of whether Cordelia's has changed. Goneril could decide to guide her conduct exclusively on the basis of her "own" curfew rule, and take no account of Cordelia's rule, or Cordelia's behavior.

Goneril's situation resembles that of a judge deliberating about a case that's regulated by a pedigreed rule. Suppose, that, if the judge enforces the pedigreed rule, he'll violate a non-pedigreed rule, by perpetrating unfairness, for example. Much as Goneril could decide to consult only her own curfew rule, so could the judge refuse to consult the non-pedigreed rule, just in virtue of its lack of pedigree. But Shapiro doesn't just claim that judges *could* ignore non-

Freedom," *Southern California Law Review* 62 (1989): 995-1095, endorsed by Larry Alexander, "Law and Exclusionary Reasons," *Philosophical Topics* 18 (1990): 5-22

pedigreed rules. He denies that non-pedigreed rules can guide. Presumably, Shapiro would also deny that Cordelia's rule guides Goneril. But this position seems arbitrary. Cordelia's curfew rule influences Goneril's deliberations in an obvious way. Although Goneril could decide to ignore Cordelia's rule and behavior, she could also decide to respond strategically to Cordelia.

Suppose Goneril takes the strategic route. In that case, Cordelia's curfew rule provides Goneril with a conditional discounting reason, a second-order reason to accept the following conditional: if Cordelia comes home later than the hour specified in Cordelia's curfew rule then Goneril shall discount her reasons to attend the concert. Cordelia's rule (CR) addresses Cordelia, directly, but it also addresses Goneril, indirectly, by providing conditional discounting reasons. If Goneril is trying to obey the rules that apply to her then, as the content of CR fluctuates, so does Goneril's behavior in response. I take this to suggest that CR is guiding Goneril, albeit indirectly. So a rule can indirectly guide an agent, even in a case that's not regulated by that rule.

Shapiro, by contrast, assumes that a rule can't guide an agent as a legal rule must unless it provides unconditional discounting reasons. In one sense, this is correct. If R is a legal rule then there could, in principle, exist an agent for whom R provides unconditional discounting reasons. However, Shapiro's argument depends on a stronger condition. His argument supposes that R can't constitute a legal rule for a certain agent unless R provides unconditional discounting reasons *for that very agent*. This isn't so. Indeed, no agent for whom R provides unconditional discounting reasons need actually exist in order for R to constitute a legal rule for other agents, by providing them with conditional discounting reasons.

This last point becomes clearer if we modify our scenario. Suppose Cordelia and Goneril are twins, each with an 11pm curfew. They encounter one another downtown at 10:45pm. Still

assuming their parents' vacation rule to be in effect, Cordelia's rule provides Goneril with a conditional reason and Goneril's provides Cordelia with a conditional reason. Cordelia's rule guides Goneril and Goneril's rule guides Cordelia, in both cases indirectly. Neither rule provides either teenager with an unconditional discounting reason. Yet the curfew rules clearly play as important a role as ever in their deliberation. The parents have effectively issued the following command, "Girls, you mustn't *both* break curfew!"¹⁸

I suggest that what Shapiro describes as rule-guidance is, in fact, a special case of a more general phenomenon, which I'll call *generalized rule-guidance*:

A legal rule R guides (in the generalized sense) a person P to Φ only if P might not have done Φ if a person Q had not appealed to R as a legal rule (where Q might or might not be the same person as P and Q actually does appeal to R as a legal rule).

In terms of my condition on generalized rule-guidance, Shapiro describes the special case in which Q is the same person as P. I call this *direct rule-guidance*, in contrast to *indirect rule-guidance*, where Q and P are different persons. It's true that Cordelia's curfew rule can't guide Goneril directly. Shapiro's position, again in my terms, is that a legal rule can't make a practical difference for a certain agent unless it guides her directly.¹⁹

IV. Two Objections

Someone might object that what guides Goneril isn't Cordelia's rule, simpliciter, but rather the conjunction of CR and the parents' vacation-canceling rule. True, CR guides Goneril

¹⁸I see important parallels with the structure of collective intentionality explicated by Michael Bratman, "Shared Intention" and "Shared Cooperative Activity," both in his *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge: Cambridge University Press, 1999); and Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000). Interestingly, Jules Coleman and Scott Shapiro have both recently adapted Bratman's theories of shared cooperative activity and jointly intentional activity to explicate the rule of recognition and legal authority. Coleman, *The Practice of Principle*, pp. 96-100; Scott J. Shapiro, "Law, Plans, and Practical Reason," *Legal Theory* 8 (2002): 387-441.

¹⁹Compare Jules Coleman's remark, in response to Shapiro: "Even if . . . guidance [is] the function of law, it is not obvious why each rule must be conceived of as contributing to the guidance function in the same way. Traditional functional explanations of systems – biological or other – do not suppose that every component part of the system

only if the vacation rule is also in force. But if the vacation rule is in force then CR does, indeed, guide Goneril. The vacation rule simply makes it the case that CR guides Goneril. It doesn't supplant Cordelia's rule, but rather extends to Goneril that rule's capacity to guide.²⁰

Alternatively, Shapiro could object that CR doesn't guide Goneril because Goneril doesn't appeal to it *as an authoritative rule*. Indeed, Goneril doesn't "follow" CR. If Cordelia's curfew is 10pm, that fact won't motivate Goneril to get home by 10pm. Nevertheless, Goneril appeals to CR as a rule that's directly authoritative for Cordelia and indirectly authoritative for Goneril. Compare Goneril's attitude toward a rule announced by her little brother (who has no authority over Cordelia): "Cordelia must return by 8pm!" Goneril doesn't appeal to this rule as authoritative, whereas she does appeal to CR as authoritative.

V. Application to the Judiciary

Now let's see how my generalized conception of rule-guidance applies to the judiciary. Exclusivists portray pedigreed rules as supplying judges with unconditional discounting reasons. These reasons, moreover, are supposed to reference only facts that are specific to the regulated case-type. I contest both points. First, I suggest that we needn't understand pedigreed rules as providing real judges with anything more than conditional discounting reasons. Secondly, I suggest that the conditions can reference facts that aren't case-type specific.

Shapiro denies that non-pedigreed rules can guide. He might be correct that they can't guide directly and unconditionally. I don't venture an opinion on this issue. But I think he's wrong if he also means that non-pedigreed rules can't guide indirectly and conditionally, as I shall now explain.

contributes to the overall function in the same way." Coleman, *The Practice of Principle*, p. 146. Coleman doesn't develop this insight.

Suppose Goneril takes the strategic route. She decides to understand her parents as having established a violation threshold: two curfew violations cancels the vacation. In that case, Goneril would understand CR as providing her with a special kind of conditional discounting reason, one that references the violation threshold.

What would be the parallel strategy in the judicial case? Here's one possibility. We could understand valid legal rules as providing judges with conditional discounting reasons that reference a violation threshold. Much as Goneril has reason both to attend the concert and to protect the vacation, so our judge has reason to deviate from the pedigreed rule, thus adhering to the non-pedigreed rule and avoiding unfairness in the case at bar, while protecting the rule of law. The relevant threshold, for judges, is the level of deviation in the legal system such that any increase in aggregate deviation threatens the rule of law. At some point, an expanding practice of deviation produces additional negative effects (e.g., too much unjustified deviation, erroneously incited by justified deviation) without additional benefits sufficient to compensate. Call this point the *deviation density threshold*, or "threshold," for short.

On my view, a legally valid rule gives judges reasons of two kinds: first, an unconditional reason to discount certain reasons in cases regulated thereby; secondly, a conditional reason to discount certain conflicting rules, unless the system is at its threshold.

Now suppose that enforcing a pedigreed rule, in a certain case, violates a non-pedigreed rule. Still assuming that the system isn't at its threshold, the non-pedigreed rule can discount the pedigreed rule, if it's sufficiently important. This parallels the case in which Cordelia hasn't actually violated her own curfew. In that case, given Cordelia's conduct and her curfew rule, the condition specified in the parents' vacation rule isn't met. Therefore, Goneril's own curfew rule

²⁰Drawing a distinction popularized by moral particularists, the vacation rule *enables* Cordelia's rule to guide Goneril, though it doesn't *favor* Goneril's making any particular decision. See, e.g., Jonathan Dancy, *Ethics Without*

gets discounted. Rather than providing Goneril with a second-order reason to discount her first-order reasons to attend the concert, Goneril's curfew rule gives her, at most, an ordinary first-order reason to stay home, one that must compete with her reasons to attend the concert.

I conclude that non-pedigreed rules can guide, after all. At least, they can do so conditionally, in conjunction with indirect guidance from pedigreed rules.

VI. Implications

My conception of guidance partially aligns me with inclusivists in their denial that judges make new law whenever they deviate from pedigreed norms in favor of non-pedigreed ones. However, I agree with exclusivists that there's an important difference between cases of deviation from pedigreed rules and cases of simple fidelity. Here's how I see the difference. Given human cognitive, moral, and informational limitations, deference to non-pedigreed rules "costs" the rule of law, as an institution, more than does deference to pedigreed rules. When a judge deviates (or exercises discretion) from pedigreed rules, in accordance with non-pedigreed norms, she incites her fellow judges to more *unwarranted* deviation/discretion (deviation that doesn't accord with non-pedigreed rules) than she does when she defers to pedigreed rules over non-pedigreed norms. Deviation from a rule pushes the system toward its threshold *faster* if the rule is pedigreed than does deviation from the same rule if it's non-pedigreed. This, I suggest, is a fundamental difference between pedigreed and non-pedigreed rules. But the difference does not, as exclusivists hold, concern the idea that deviating from pedigreed rules in favor of non-pedigreed rules, but not vice versa, involves judicial lawmaking.²¹

Exclusivists correctly hold that there's an important difference between pedigreed and

Principles (Oxford: Oxford University Press, 2004), p. 38.

²¹An implication of my view is that the difference between legal validity and legality, which exclusivists like to emphasize, is one of degree, not of kind. Shapiro, "On Hart's Way Out," p. 190; Joseph Raz, "Legal Validity" and "The Identity of Legal Systems," both in *The Authority of Law*.

non-pedigreed norms, but they mischaracterize that difference. Exclusivists claim that only pedigreed norms can guide. I've argued that norms of both kinds can guide. The important difference between pedigreed and non-pedigreed norms concerns not their relative guidance capacities, but rather the systemic consequences when judges reject the guidance offered. Thus, there remains at least one respect in which non-pedigreed norms really are less "lawlike" than pedigreed norms: deviation from non-pedigreed norms doesn't compromise the rule of law to the same extent. I'm not sure inclusivists want to deny this comparative point, but it's worth making explicitly.

If my generalized conception of rule-guidance is tenable then the relationship between legal norms and judicial agency is considerably more complex and multidimensional than legal philosophers have assumed. We'll want to investigate, among other issues, what reasons judges might have for strategic deliberation about their patterns of deference, discretion, and deviation.²²

²²See Jeffrey Brand-Ballard, "Rules That Bend Without Breaking," presented at the Pacific Division of the American Philosophical Association, Pasadena, 2004; "Legal Formalism, Stage-Neutrality, and Comparative Justice," presented at the Central Division of the American Philosophical Association, Chicago, 2005; "Judicial Minimalism, Formal Justice, and Relational Properties," presented at the Midwest Political Science Association, Chicago, 2004.

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