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J.S.D. PROPOSAL OF STUDY

I. Introduction.....	2
II. Thesis Statement.....	3
III. Literature Review.....	4
A. Positivism	4
B. Natural Law Theories.....	6
C. The Irrelevance of the Positivism/Natural Law Distinction.....	8
IV. An Alternative Approach.....	11
A. The Continuing Relevance of Jurisprudential Questions	11
B. The Concept of Law	13
V. Some Tentative Answers	15
A. The Point of the Law	15
B. Criteria of Validity: When is a law not a law?.....	16
C. Theory of Adjudication	18
D. Moral Skepticism and the Law	26
E. Legislation vs. Common Law	28
F. Obligation to Obey.....	28
VI. Methodology.....	29
A. Conceptual Questions.....	29
B. Meta-jurisprudential Questions.....	30
C. Normative Questions	30
VII. Potential Problems and Objections.....	31
A. Justice and the Rule of Law:.....	31
B. Problems with Instrumentalism.....	32
VIII. Value of the Project.....	33
IX. Suggested Supervisors.....	33
X. Bibliography:.....	34

I. INTRODUCTION

The question 'What is law?' has been explored for centuries. Yet debate between the two dominant factions, positivists and natural law theorists, seems no closer to being resolved now than at any time in the past. What, then, is the value of continuing to ask this question?

In my proposed doctoral research, I intend to explore this question, but from a third perspective. I will argue that the division between the two opposing viewpoints is misguided and has lost any value it once had. The answer I aim to give to the question of what law is cannot be usefully categorized as a theory of natural law or of positivism.

The two opposed positions have changed and matured, but they have in many cases evolved into more and more convoluted stances, in order to respond to challenges from the other side without giving up their status as a 'positivistic' theory or a theory of 'natural law'. Thus, we have natural law theories that seem almost indistinguishable from what was traditionally called positivism, and varieties of positivism that seem to share more with traditional natural law theory than they do with other positivist theories. The problem is that, in responding to one another, proponents of each theory have stretched them so out of shape that they appear indistinguishable from their so-called opponents.

My proposed research agenda for the J.S.D. program is an expansion of the LL.M. thesis I am currently completing. In the LL.M. thesis I argue for a particular method of adjudication, on Rule of Law grounds. I argue that the Rule of Law is

an invaluable aspect of the law, and that justice requires that we place a great deal of importance on upholding Rule of Law values. Following Lon Fuller, I discuss the eight principles that are essential aspects of a legal system in good condition. I show how theories of adjudication that allow or require judges to apply moral arguments in cases where the law is clear infringe upon each of these eight values.

II. THESIS STATEMENT

My argument has three main parts. The first is a meta-jurisprudential argument about the state of the field of legal philosophy. I argue that the two camps have become so internally splintered and so merged with one another that there is no longer any value in talking about jurisprudential questions under the headings 'natural law' and 'positivism'.

I then propose an alternative understanding of what the law is. Whether it can be categorized as a theory of natural law or positivism is irrelevant. I argue for a view of the law that, like Lon Fuller's, prioritizes the Rule of Law, but I do not debate whether or not this constitutes an internal 'morality' of law. Rather, I define and defend my view of what the law is. As a tentative statement, I define the law as follows:

The law is a system of rules that aims to guide citizens' behavior through specific means that exclude terror and aim at ensuring clarity and certainty about the consequences of any given behavior.

This definition will be expanded upon further in following sections.

The third aspect of my proposal is an examination of the implications of that view of the concept of law for various jurisprudential questions, such as what judges should do in hard cases, whether there is an obligation to obey the law, and what constitutes good law. The arguments in this section are normative, focusing on what the law should be.

III. LITERATURE REVIEW

In this section I will briefly discuss the current state of the field of legal theory. Of course, I cannot discuss all the important works of legal philosophy, but the attached bibliography provides a more comprehensive (though by no means complete) survey. I will divide this discussion into theories of positivism and natural law, and the process of doing so will hopefully shed light on the way in which these distinctions are lacking.

A. Positivism

The most influential positivist in modern times is indisputably H.L.A. Hart. Much of my work draws on his important understanding of law as the union of primary and secondary rules.¹ He developed positivism into its current, more sophisticated state, moving beyond Austin's more simplistic command theory of law.² Since the publication of Hart's classic book, 'The Concept of Law', positivism has split into exclusive and inclusive positivism. Exclusive positivism holds that legal facts are determined purely by social facts.³ Inclusive positivists,

¹ H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994).

² John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995).

³ Joseph Raz, "Authority, Law and Morality," *The Monist* 68 (1985), Scott Shapiro, *Legality* (Cambridge: Harvard University Press, 2011).

on the other hand, argue that it is permissible for morality to be part of what determines legal validity, if the moral test has been incorporated into law by some other social fact.⁴ They remain positivists because the law is *ultimately* determined by social facts.

There are many interesting variations on these main positivist positions. I cannot examine them all here, but I will spend a little more time on Scott Shapiro's recent book, 'Legality',⁵ as it has influenced my view of the concept of law. The central thesis of this work is that "legal activity is an activity of social planning."⁶ By reconceiving of law in this way, Shapiro gives a highly original account of what law is and what it means to guide behavior in a lawful manner. Because law is an activity of planning, law must be positivistic in nature, Shapiro argues, in order to fulfill its function. The aim of plans is to guide and coordinate behavior, and if it is to do this, its content cannot be such that it requires moral deliberation to figure out what it is.⁷ Thus, its content must be social facts, not moral ones. This understanding of the purpose of law is very close to mine, as I will discuss further below.

One other positivist view is worth mentioning, as it has a great deal of relevance to the view I will defend below. That is normative, or ethical positivism: the view that the separation of law and morality is a good thing.⁸ This normative form of

⁴ W. J. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994).

⁵ Shapiro, *Legality*.

⁶ *Ibid.* 195.

⁷ *Ibid.* 275.

⁸ Tom D. Campbell, *The Legal Theory of Ethical Positivism* (Brookfield: Dartmouth, 1996), Jeremy Waldron, "Normative (or Ethical) Positivism," in *Hart's Postscript*, ed. Jules Coleman (Oxford: Oxford University Press, 2001).

positivism is not a claim about the nature of law, but an answer to the question of what makes good law. My concern about law's ability to guide behavior leads me to certain views about how the legal system should be, most of which generally sound positivistic, and so my argument could be seen as one of normative positivism. However, I will avoid this term because only certain of my recommendations seem positivistic, and I do not want to be understood as recommending positivism *as a whole* from a moral point of view. This is in part because it is deeply unclear just what features one must endorse when one supports normative positivism. Theories of positivism differ so much that it seems unhelpful to morally endorse something under this name. Below I will make arguments about what it is normatively proper for judges to do, as well as other claims about how the law should be, some of which will seem positivistic and some of which will not. So, although I am sympathetic to the aims of normative positivism, I will limit myself to making specific normative claims, rather than endorsing one view of the law.

B. Natural Law Theories

The classic natural law maxim states that an unjust law is not a law at all. Yet almost no one in the modern natural law tradition adheres to this view. The essential meaning of natural law varies greatly from theorist to theorist. Most believe something like the following: the law's validity is at least in part determined by the moral status of the purported law.

But this does not correctly capture what some of the most prominent natural law theorists believe. Finnis, in particular, has a view of the law that relies on a

strongly positivistic view of validity.⁹ He then has a second sense of law, the focal sense, which depends on moral criteria. But he states clearly that the officials should apply the law in the legal, positivistic sense. However, he claims sincerely, and with good reason, to be defending a theory of natural law. Finnis is not the only legal philosopher whose theory has proven difficult to classify. Fuller also has a view that breaks with the traditional natural law approach. He calls his theory a theory of the internal morality of law, but it does not premise legal validity on a moral test.¹⁰ His requirements aim towards creating predictability and clarity in the law, ensuring that the citizen can identify her obligations without having to resort to uncertain moral reasoning. These formal and procedural requirements have a moral justification and may often bring about justice, but many have wondered whether this really makes his theory one of natural law.

A third non-positivist theorist is Dworkin, who has a view of the way judges find and apply law that focuses on interpretation of the legal materials and finding the best fit and justification among the different options when the law is unclear.¹¹ In this sense his view of what judges should do (and therefore what the law is) is inherently bound up with morality, because it requires moral judgments about what result is best justified by the available materials.

⁹ John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), ———, "The Truth in Legal Positivism," in *The Autonomy of Law*, ed. Robert P. George (Oxford: Oxford University Press, 1996).

¹⁰ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

¹¹ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

C. The Irrelevance of the Positivism/Natural Law Distinction

As the above summaries show, there is a great deal of blurring of the boundaries between natural law and positivism, and much internal division within each camp. Part of the problem is that it is not clear what exactly is being claimed when it is argued that there is or is not a necessary connection between law and morality. One of the main contenders for an answer to that question relates to what judges should do. Some approaches to adjudication endorse and some condemn the use of moral values by judges in determining what law applies to the case at hand. Traditionally, supporters of the moral approach would be associated with the natural law tradition, and those who opposed it would be classed as positivists. However, as the debate has matured and the field of analytic jurisprudence has become increasingly complex, it is no longer possible to maintain such a simplistic view. Legal positivism's divide into inclusive and exclusive positivism has meant that some positivists *do* endorse the use of moral criteria by judges in determining what the law is. And, on the other hand, sophisticated natural law theorists do *not* necessarily endorse a moral approach by judges. Finnis, as mentioned above, is explicit about the judge's responsibility to apply the positive law. The point is that the old division between natural law and positivism is no longer very useful.

Thus, my argument is that the debate between positivism and natural law theory as it has traditionally been conceived is misguided. In the LL.M. thesis, I am exploring this question with respect to adjudication, arguing that there is no approach to adjudication that can be consistently attributed to positivists or non-positivists. In my doctoral research, I propose to take this question further and

argue that the irrelevance of the distinctions goes deeper than the question of adjudication. I will argue that there is no set of necessary and sufficient conditions to which we can appeal to classify a theory of law as one of either positivism or natural law. I should clarify what I mean by making this claim. It is clear that we *could* develop a set of conditions, and many theorists have done just that. There is no conceptual problem with declaring, for example, that the core of positivism is that the law's existence must be a matter of ascertainable fact, and not dependent upon its merit. I do not deny that such claims have frequently been made, nor that they can be sensibly understood as claims about the nature of the law. What I claim is rather that for any formulation that seems to stand as a reasonable claim about positivism or natural law, there is some theory that acts as a counterexample. In other words, for any purported condition we develop to define one of the positions, we will be able to identify a theory that satisfies that condition, yet whose author claims it as a theory of the other kind, *or* we will find a theory that fails the condition yet claims to be part of the tradition we are attempting to define.

How should we understand this mystifying aspect of legal theory? The standard response has been to declare the authors wrong about the classification of their own theories. If we reclassify any errant theory so that it does fit the conditions we have specified, then the problem evaporates and the distinction between positivism and natural law remains intact.

But why take this approach? Why not instead take theorists at their word about their own theories? Far too much ink has been spilled in the debate about whether Finnis *really* ought to count as a natural law theorist, or whether

Fuller's internal morality of law is *truly* a morality,¹² or simply a theory of efficacy in the law. These questions do not yield interesting answers. Theorists claim allegiance to one or another of the opposing 'camps' in legal theory. Disagreeing with their self-categorization and arguing that they belong elsewhere is unhelpful. At most it might count as a sort of 'victory' for one side or the other, but what is won? The substantive recommendations of the theory remain the same regardless of what we decide to call it.

It is important to make one thing clear, however. This argument should not be equated with the skeptical argument that there is little or no value in analytic jurisprudence.¹³ This is not an argument I endorse. On the contrary, I think there is much of substance that is hidden behind the debate between natural law and positivism. There are many questions worth our time and intellectual effort. My argument is that there is nothing to be gained by adhering to the *labels* of positivism and natural law theory.

However, the answers to these important questions of jurisprudence will not separate theorists neatly into two camps. Theorists will divide in myriad ways over the various questions at issue. The way a theorist answers a particular question is far more important than what type of theorist they claim to be, and the latter bears no discernable, consistent relation to the former. In this proposal, I cannot fully demonstrate my claim about the irrelevance of the

¹² See, e.g., Matthew Kramer, "On the Moral Status of the Rule of Law," *Cambridge Law Journal* 63, no. 1 (2004), N. E. Simmonds, "Evil Contingencies and the Rule of Law," *The American Journal of Jurisprudence* 51 (2006).

¹³ Brian Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Skepticism," in *Neutrality and the Theory of Law (Forthcoming)*, ed. J. & Moreso Ferrer, J. (Madrid: Marcial Pons, 2011), Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999).

distinctions, but I aim to explore this question fully in the J.S.D. I will propose several possible sets of necessary and sufficient conditions for positivism and natural law, and will show that each of these attempts fail, because there is a theorist claiming, reasonably, to be part of the opposite camp from the one in which he would be placed by the proposed condition. By showing this, I will demonstrate the irrelevance of the terminology. If no conditions we can specify will allow us to label a theory in a way that might helpfully tell us something in advance about what the content of that theory might be, this shows that the labels with which we have been working are unhelpful.

IV. AN ALTERNATIVE APPROACH

A. The Continuing Relevance of Jurisprudential Questions

Despite the fact that I eschew the familiar labels, there are a number of core questions the answers to which are highly valuable. In my doctoral work I propose to explore the various answers given to each of these questions, by both natural law theorists and positivists, and formulate my own answer to each question. I will thereby 1) show that there is no consistent pattern in how theorists from the different disciplines answer these questions; and 2) develop my own answer to the question of 'What is law?'

What are these important questions?

1. What is the essence of law? What are the criteria of law's validity?
 - i. My answer to this question will draw on the work of Fuller and Shapiro. I will discuss my tentative concept of law further below.

2. How should judges decide cases and to what extent is morality required or permitted to enter into that process?
 - i. I develop an answer to this question in my LL.M. thesis. I will address the responsibilities of judges with respect to law that is clear but the justice of which is in doubt, as well as cases where the law is unclear.
3. Is there a duty to obey the law?
 - i. This question intersects with question one above, insofar as the judge must decide whether to apply a potentially unjust law to a citizen who may be right in disobeying it.¹⁴
4. What is the point or purpose of the law?
 - i. In particular, can we conceive of law as a moral enterprise on the whole, in the sense that it aims at moral goals?¹⁵ Or is it more correctly described as a tool for coordination? Or a mere exercise of brute power?¹⁶
5. Is there inescapable uncertainty in the law?
 - i. Given the evolutionary aspect of the law, as well as its argumentative character,¹⁷ is it ever possible to entirely rid the law of the problem of uncertainty or lack of clarity? And if so, what are the implications of this for judicial decision-making and for how we conceive of the law in essence?

¹⁴ See, e.g., Finnis, *Natural Law and Natural Rights*.

¹⁵ Fuller, *The Morality of Law*, Shapiro, *Legality*.

¹⁶ Austin, *The Province of Jurisprudence Determined*.

¹⁷ Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43 (2008).

6. What is the relevance of skepticism or disagreement about moral values to the question of what the law is?¹⁸
 - i. How can we adjudicate between competing moral claims?
 - ii. How does this affect judicial decision-making?
7. What are the criteria of good law?
 - i. Is legislation or common law necessarily superior?
 - ii. What should the aims of lawmakers (legislators and judges) be?

B. The Concept of Law

I will defend a view of law as an institution that is essentially capable of guiding action. One of its primary aims must be to ensure that the citizen can determine what he is expected to do or refrain from doing, and ascertain the consequences of disobedience. The principles that ensure that the law has the qualities necessary to be able to guide behavior are those usually associated with the Rule of Law. The requirements, according to Fuller, are the existence of general rules, adequate promulgation of these rules, prospective rather than retrospective lawmaking, clarity, consistency, practicability (rules must be able to be followed), enough stability that expectations are not upset, and congruence between the rules as published and as applied.¹⁹ As discussed above, there has been much disagreement about whether these principles are *moral* in nature. I will not address this question, as I do not believe that much turns on the answer to it. A more important question is whether the principles are necessary for the

¹⁸ J. L. Mackie, *Ethics: Inventing Right and Wrong* (London: Penguin Books, 1977), Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999). See especially 'The Irrelevance of Moral Objectivity' in *Law and Disagreement*.

¹⁹ Fuller, *The Morality of Law*.

existence of law, or are merely criteria of *good* law. I will follow Waldron in arguing that these principles are central to the nature of law itself: if a system lacked courts, general public norms, or certain other Rule of Law virtues, we would hesitate to call it a legal system.²⁰ My formulation of the concept of law, then, is as follows:

The law is a system of rules that aims to guide citizens' behavior through specific, defined, means that exclude terror and aim at ensuring clarity and certainty about the consequences of any given behavior.

This definition is tentative, and may need to be reformulated and clarified to accurately capture my sense of law as action-guiding and inherently linked with the Rule of Law. But as a working definition, it captures the important ideas. It brings together elements from Hart's theory,²¹ specifically the element of rules; Fuller's theory,²² in particular the requirement that legal power be exercised through particular, defined methods that conform to the Rule of Law; Waldron's view of the concept of law as necessarily connected with the Rule of Law;²³ and Shapiro's theory,²⁴ insofar as his emphasis on law as social planning captures the behavior-guiding aspects of law.

Should this definition be understood as a natural law theory or a positivistic one? Insofar as it draws on Fuller and prioritizes values that could be seen as moral, perhaps it is a theory of natural law. On the other hand, it emphasizes the

²⁰ Waldron, "The Concept and the Rule of Law."

²¹ Hart, *The Concept of Law*.

²² Fuller, *The Morality of Law*.

²³ Waldron, "The Concept and the Rule of Law."

²⁴ Shapiro, *Legality*.

importance of clarity and effective behavior-guidance, which requires clear, positive laws to which citizens and judges can appeal. There is a necessary connection between law and morality insofar as this definition holds that the law aims at moral goals and is a valuable thing. But Shapiro, who claims to be an exclusive positivist, believes this as well. Do any of these observations matter? I will argue that they do not. In the following section I will examine the implications of my theory for various questions that I do think are important, and it will become clear that any attempt to categorize this theory as one of positivism or natural law will obscure more than it will enlighten.

V. SOME TENTATIVE ANSWERS

In this section I will gesture at some answers to the questions listed above in Section IV. A. I cannot present full arguments for any of them in this proposal, but the argument for a particular form of adjudication is most well developed because I am writing on this topic for my LL.M. thesis. Hence, it should give some idea of how the other sections might appear when they have been more fully explored. But of course, even that section is still a work in progress.

A. The Point of the Law

I argue for a Rule of Law-centered view of the law that will determine the answer I give to each of the important questions mentioned above. My account therefore relies on an underlying sense of purpose in the law. The law has particular aims and answers to these various questions will in part depend on whether or not a connection between law and morality will frustrate these aims.

Some of the claims in the paper are normative and some are descriptive. The claim about Rule of Law as central to the existence of law is both descriptive and normative. It seems correct to say that there is something distinctive about the way the law guides people's behavior that is different from the 'guidance' provided by terror and brute force. But even if it were not the case that law aims at this kind of guidance, we would reasonably argue that it should do so. Given this answer, we could think that the law and morality are inherently connected, since the law aims at a certain morally good way of guiding behavior. But Shapiro, a positivist, has endorsed this kind of connection between the law and morality, and so it seems that positivists need not deny such a connection.

B. Criteria of Validity: When is a law not a law?

Fuller argues that a complete failure of any one of his eight principles "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."²⁵ This provides a partial answer to the question of the criteria of legal validity. The Rule of Law has at its core the goal that citizens be able to plan and order their behavior, and know what the legal implications of their actions will be.²⁶ As Fuller states, "the citizen cannot orient his conduct by law if what is called law confronts him merely with a series of sporadic and patternless exercises of state power."²⁷ I think, as does Fuller, that such exercises of power do not merit the name 'law'. But there is a problem of degree. When does something cross the line into non-law for breaching rule of law values? I will argue that the line must be drawn very conservatively. If the concept of law

²⁵ Fuller, *The Morality of Law*.

²⁶ Ibid, Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979).

²⁷ Fuller, *The Morality of Law*, Raz, "The Rule of Law and Its Virtue."

we endorse throws into doubt the status of laws that are only somewhat vague, or in some other way mildly defective from a Rule of Law perspective, it could result in even less clarity, or in other words, a more problematic Rule of Law violation than the original offending law. If judges invalidate laws on the basis of minor Rule of Law problems, this is in itself a contributing factor towards Rule of Law problems. I will argue that for a purported law not to be considered law at all, it must severely violate the Rule of Law. If it is completely unable to guide behavior – for example, a ‘law’ that is entirely secret – this would not be considered a law. It is clearly a matter of degree. The shades of grey between the clear, paradigmatic case of law, and the deeply defective law pose a complicated problem for my theory, and this is one of the areas I intend to research and develop further. I hope to be able to find a clear, principled way of determining what is law and what is not, but it may be that we can do no better than Fuller, and should agree that there is “no reason to pretend to see black and white where reality resents itself in shades of gray.”²⁸

My account of the concept of law also draws on Waldron’s understanding of the Rule of Law and the importance of procedural aspects that are overlooked in traditional Rule of Law accounts such as Fuller’s.²⁹ The regular operation of open and accessible courts is an important aspect of the Rule of Law, and since my view of the concept of law encompasses Rule of Law values, these procedural requirements are central to what law is. Many systems will not achieve the ideal state of affairs with respect to the Rule of Law, yet we would not wish to deny

²⁸ Fuller, *The Morality of Law*.

²⁹ Waldron, "The Concept and the Rule of Law."

them the name 'law', as long as they do not reach such a state of degeneration that they completely lose the ability to guide the behavior of citizens.

C. Theory of Adjudication

This is the element of my argument that is most well-developed at this stage, because I am exploring it in the LL.M. thesis. I will not set out the full argument here, but simply a summary. The issues discussed here are related to the above discussion of the criteria of validity, in the sense that if judges fall so far below the required standard of judging that the law they apply is no longer capable of guiding behavior, then the purported law will fail my test of legal validity. But this is generally limited to the most extreme circumstances. Fuller's discussion of the morality of duty and the morality of aspiration is useful here.³⁰ Judges have a duty to publicize their decisions, and not to appeal to entirely secret sources of law. Behavior of this sort robs law of its action-guiding power. But beyond this, much of what I will recommend in the following section is in the realm of the morality of aspiration. There is an ideal towards which judges should strive, but they can fall significantly short of this without it being the case their decisions are not law.

Adjudication when the law is clear:

In this section, I am referring to cases where the judge overrides *clear law* in favor of morality. This is where the greatest harm to certainty and predictability occurs. But there are other cases where the law is unavoidably uncertain. The following section will deal with adjudication methods in such cases.

³⁰ Fuller, *The Morality of Law*.

Almost all of Fuller's principles will be jeopardized in some way by a system of adjudication that allows judges to appeal to sources that are outside the written, established law. This occurs most commonly when judges substitute moral judgments for legal ones. But it is important to note that the Rule of Law would be compromised just as much by a judge who illegitimately appealed to some other non-moral, but non-legal fact in order to change the outcome of the case. A judge who made her decisions based on aesthetic preferences, perhaps deciding in favor of the most attractive party, would compromise the Rule of Law as much as one who appealed to morality. One might argue that this is clearly more objectionable than deciding on the basis of morality, as it seems that moral questions are at least relevant to the case at hand. But here I am not concerned with the substantive morality of the decision, only the Rule of Law objections that stem from unpredictable decision-making, and in that sense, a judge's personal views on morality could be just as mysterious and unpredictable as their aesthetic preferences. It may be true that appealing to aesthetics is more problematic than appealing to morality, if it makes it even more difficult for the citizens to predict the judge's idiosyncratic decisions. But that is merely a contingent matter. For convenience, I will focus on morality in judicial decision making, since that is the most common source of uncertainty, but this should be read to include other forms of unpredictable judging.

Here I will briefly discuss potential problems for each of the specific principles.

1. Generality

This requirement ensures that laws are general in application and do not take the form of specific decrees. It is unlikely to be affected by judges applying moral criteria.

2. Promulgation

The extent to which citizens have prior knowledge of the law that will be applied to them will be significantly affected by a tendency among judges to alter the law on a case-by-case basis. What is publicly known or promulgated among the citizens will not be necessarily the same as what the judges will apply.

3. Prospectivity

There will be definite harm to prospectivity. The judge's decision has a retroactive effect on the parties to the case when she determines that something that appeared to be law was in fact not law.

4. Clarity

This is probably the most seriously affected of Fuller's principles. It will be deeply unclear to the average citizen what actually counts as law and what does not, if the law is likely to be revised by judges on unforeseeable moral grounds.

5. Consistency

Judges may interpret the issues differently from case to case, leading to inconsistency, and there may be differences in the moral views of different judges, and therefore in the approaches they would take.

6. Practicability

It will arguably become difficult for citizens to obey the law when it is difficult for them to know what the law is. But this is a less extreme version of what Fuller presents as an example of the impossibility of compliance.

7. **Constancy**

There is a clear likelihood that the laws will be frequently subject to change as judges determine whether something is actually law, and legislatures respond with new enactments.

8. **Congruence**

Congruence will be problematically affected. What the judges apply will not be consistent with what is on the books.

It is clear from just this brief outline that there are problematic results for the Rule of Law when judges overturn clear, established law upon which citizens have been reasonably relying, in favor of uncertain moral principles.

Adjudication when the law is unclear

One of the major problems with the debate between natural law and positivism as it stands is that positivists fail to acknowledge that their position can lead to just as much uncertainty for the law as the natural law view does.

Shapiro is a case in point. He argues that the law has a moral aim: to solve the difficult moral problems that arise in a society where the needed solutions are complex, contentious or arbitrary.³¹ In order to achieve this aim, they need to settle matters in a way that is authoritative and certain. Shapiro argues that it is

³¹ Shapiro, *Legality*. A society that fits this description is one that is in the circumstances of legality – see 171; and see 213 on the moral aim of law.

only possible for the law to settle the problems it aims to settle if it is grounded in social facts. Thus, the Planning Theory is positivistic: law is grounded solely in social facts; normative premises cannot be part of the law.

But Shapiro, like all positivists, acknowledges that social facts cannot resolve all possible scenarios that will arise in the law, and that therefore there will be a certain area left undetermined, in which judges can and should engage in moral deliberations. They will have to exercise discretion.³² He argues that in hard cases “judges are simply *under a legal obligation to apply extra-legal standards.*”³³ Shapiro argues that the exclusive positivist understanding, that the judge is creating a legal norm, is correct, and the inclusive positivist view that the judge is applying an existing legal norm is incorrect. “If the law is to guide conduct in the manner of plans, then it follows that its existence and content cannot be determined by facts whose existence the law aims to settle.”³⁴ On Shapiro’s view, judges in hard cases are simply engaged in additional social planning. But the problem with this explanation is that it validates exclusive legal positivism without really addressing the problem Shapiro identifies. If what we are concerned about is making it possible for citizens to understand their obligations, Shapiro’s theory fails at this just as much as the inclusive positivist or natural law theory. The ‘further social planning’ the judge engages in is just as incapable of settling disputes and eliminating moral reasoning as the ‘legal norm’ the inclusive positivist or natural law theorist thinks the judge is applying. Neither is available to the citizen in advance, and so neither characterization of

³² Ibid. 251.

³³ Ibid.

³⁴ Ibid.

what is happening is actually better equipped at guiding the behavior of citizens. Shapiro's exclusive positivism describes the situation more tidily, but that is its only victory.

Whether we call the filling of gaps in the law 'finding law'³⁵ or 'making law',³⁶ it involves appealing to sources that were not readily apparent to the citizens. Something that now has the name law (whether it existed previously and was found by the judge, or was created by her) was applied to a citizen *who could not have known what it was by appealing to the sources*. This seems to me to be the crucial point.

What is really needed is a further argument about how judges ought to go about "finding legal norms" or "exercising discretion". This is what I intend to develop. Fuller does not have a fully developed theory of what judges should do, but he has an excellent starting point. He argues that judges should be neutral as much as possible between the substantive moral positions in the statute, but not between interpretations of the statute that bear on the Rule of Law. "It would, for example, be an abdication of the responsibilities of his office if the judge were to take a neutral stand between an interpretation of a statute that would bring obedience to it within the capacity of the ordinary citizen and an interpretation that would make it impossible for him to comply with its terms."³⁷ I agree with this view, and think that this gives a good general overview of the approach judges should take to resolving ambiguities. If the apply this method to all the

³⁵ Dworkin, *Law's Empire*.

³⁶ Hart, *The Concept of Law*.

³⁷ Fuller, *The Morality of Law*.

Rule of Law principles, they will bring a relatively unclear law much closer in line with people's ability to obey.

Imagine a judge who makes her decisions on the basis of Fuller's principles, with the idea in mind that the aim of law is to guide citizens' behavior and ensure that they know what consequences will follow from their taking various actions. A first claim that seems quite plausible is that the judge ought not to overturn settled, clear law, on moral or any other grounds. This kind of behavior will upset expectations, and harm predictability among other important Rule of Law values, as discussed above. But what should she do in cases where appealing to morality or to some source outside the law is inevitable? If the law is unclear or gives no answer, then there is no point in telling the judge to apply the law. My approach would recommend that the judge make her decision by appealing to the morality of the community³⁸ and doing what would be most expected by the citizens to whom the law is being applied. It may not be possible to know this with certainty, but aiming to conform the decision to what the community would expect is the approach best suited to safeguarding Rule of Law values.

Beyond the question of what judges should do in cases of uncertainty, there is a further, important point. There are various situations in which it might not damage Rule of Law values to appeal to morality, *even when the law is clear*. An example relates to the current debate about gay marriage in the United States. Even if the law as enacted made it quite clear that gay marriage was not allowed, if a judge appealed to morality to change the law and determine that gay marriage was permissible, this would appear to be a non-problematic example of

³⁸ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

the use of moral arguments. The aim of the Rule of Law is to ensure that people do not face a situation in which laws are applied to them that they could not have predicted. But in the case of a law being changed to be more permissive, there appears to be no one who is adversely affected by the change, even if it is sudden and unexpected. It does not seem correct to say that people were 'relying' on a law that prohibited gay marriage. The only 'expectations' that would be thwarted would be a matter of personal preferences and opinions. Those who supported the ban would possibly feel disappointed, but they wouldn't be punished unexpectedly or retroactively, and none of their actions would have been unduly impacted. Thus, there seems to be an asymmetrical argument in favor of permitting moral argument in cases where rights are expanded, but restricting it when the outcome would result in restrictions on rights, as these kinds of restrictions are where Rule of Law principles become jeopardized.

My argument about how judges should decide cases might seem opposed to Dworkin's view, which endorses a moral approach to interpretation in the judicial realm.³⁹ However, the opposition is not as thorough or as extreme as it may initially seem. The crucial question is about predictability and clarity for the citizens, and so it is possible that in some circumstances, appealing to extra-legal sources to decide the law might not be entirely problematic. There may be instances where it is expected to occur, and the Rule of Law is compromised minimally, if at all. Dworkin's integrity approach increases the likelihood that what judges decide will be predictable by the citizens. If the law really is the best fit from the legal materials, then it should be relatively clear to a citizen who

³⁹ Dworkin, *Law's Empire*.

thinks about the problem. The disagreement stems from the extent to which the citizens can be expected to know or anticipate what Dworkin's judge will consider the 'materials'. If there is disagreement about morality and what it requires, then even if the judge *is* finding the right answer, certainty might still be compromised. This is a complicated issue, and I intend to work out an answer to how much and under what circumstances judges can appeal to morality.

There are other instances where the use of morality might be permissible even though it manifestly *does* infringe on the Rule of Law (as opposed to the cases just discussed, where the use of morality was unproblematic for the Rule of Law). These are cases where the law is deeply unjust, and the judge refuses to apply it even though Rule of Law values might be compromised. It is possible that in such cases, the damage to the Rule of Law would be less than the harm that would have arisen from allowing the injustice. In such cases, it might be permissible to sacrifice the Rule of Law. But there would be a general principle against such behavior, because of the uncertainty that it brings to the law.

D. Moral Skepticism and the Law

One of the questions I intend to explore more deeply in the doctoral work is the relationship between moral skepticism and the nature of law. The most obvious area where skeptical views are relevant is in questions about what judges should do. As I argued above, the use of moral values to decide what the law is diminishes the certainty and predictability of the law. This lack of certainty comes from the fact that there is no widespread agreement about moral values. If universal agreement did exist, then permitting judges to do particular justice in the cases they decide would not be problematic, as citizens would be able to

predict the outcome. However, this agreement does not exist. As Waldron points out, however, the lack of agreement pertains whether or not skepticism is true:

If moral realism is false, then what clash in the courtroom and in the political forum are people's differing attitudes and feelings, and there will seem to be something arbitrary about any one of the them prevailing over any of the others, when none can be certified, so to speak, on any credentials other than the fact that some people find it congenial. If realism is true, then what clash in the courtroom and in the political forum are people's differing beliefs (hunches, hypotheses, speculations, prejudices) about moral matters of fact. But that these are beliefs *about matters of fact* does not detract in any way from what will still seem to be a certain arbitrariness in one of them prevailing over any of the others.⁴⁰

I agree with this point, and it is highly relevant to my arguments about judicial decision-making. But I also intend to explore whether there is a further sense in which moral skepticism affects the law. I think skepticism has more potential value than it is often seen to in legal philosophy.⁴¹ I intend to address Dworkin's arguments against skepticism⁴² and explore the possibility that some form of skepticism is a valid viewpoint. If we are skeptical about the possibility of right answers to moral questions, perhaps giving different views equal weight is one of the ways society can show equal concern and respect for its citizens. This is an idea that I cannot develop here, but which I would like to explore further in the doctorate.

⁴⁰ Jeremy Waldron, "The Irrelevance of Moral Objectivity," in *Law and Disagreement* (Oxford: Oxford University Press, 1999).

⁴¹ See, e.g., Mackie, *Ethics: Inventing Right and Wrong*, Walter Sinnott-Armstrong, *Moral Skepticisms* (Oxford: Oxford University Press, 2006).

⁴² Dworkin, *Law's Empire*, Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," *Philosophy & Public Affairs* 25, no. 2 (1996).

E. Legislation vs. Common Law

One of the debates I would like to explore further is whether legislation or common law is inherently better protective of Rule of Law values, and is therefore to be preferred as a method of lawmaking in society. Again, there is limited space to explore this question here, but it is a question that naturally arises given my view of law as inherently connected with the Rule of Law. It seems that legislation is more likely to be clear and predictable,⁴³ but there are issues of statutory interpretation that can impair legislative clarity, and there are arguments that common law is more inherently protective of Rule of Law values.⁴⁴ Additionally, whether or not judges follow my adjudicative theory in deciding cases will affect the answer to this question.

F. Obligation to Obey

One final question that I propose to examine in depth in the doctorate is the question of citizens' obligation to obey the law. This question has traditionally divided along positivist/natural law lines, because if law is inherently morally good, then the obligation to obey follows naturally. For positivists, obligation is a more open question. I will discuss the extent to which a citizen might have an obligation to obey the law in a system that is generally just.⁴⁵ I will also address the question of what judges should do when faced with unjust laws, and answer this from the perspective of my Rule of Law-centered concept of law. Does the importance of the Rule of Law counsel judges to apply unjust laws for the sake of

⁴³ Jeremy Bentham, "Truth Versus Ashhurst," (1823).

⁴⁴ See, e.g. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

⁴⁵ Finnis, *Natural Law and Natural Rights*. See Ch XI on Obligation and XII on Unjust Laws.

certainty? If so, there is a contradiction if citizens can rightfully disobey yet judges can rightfully apply the law.⁴⁶

VI. METHODOLOGY

A. Conceptual Questions

My project is primarily one of analytic jurisprudence, though some of the questions I will explore fall under the heading of normative jurisprudence. The methodology I will use is chiefly that of conceptual analysis. My primary aim is to mount an argument about the essential nature of law. In order to do this, I will read, analyze and dissect arguments from both sides of the debate between natural law and legal positivism. These debates have persisted over hundreds of years, and there is a great deal of material, but I will focus primarily on the 20th century debates dominated by the deep divide between positivists such as Kelsen, Hart, and Raz, against the natural law theorists, specifically Finnis, Fuller, and Dworkin. There are of course many different theorists who have responded to these main thinkers, and I will address their responses as well. The attached bibliography gives some sense of the scope and emphasis of my research, and encompasses most of the writers and arguments upon which I will focus. My argument is primarily philosophical, and so will involve examining these arguments for logical problems, inconsistencies, and counterintuitive conclusions. But I am interested in how these questions bear on the real world, and so the project will involve close reading and analysis of case law, particularly hard cases, to see what methods judges use to decide cases. To this extent there

⁴⁶ I discuss this problem in a paper I wrote about Finnis and judicial decision-making.

is some empirical research involved; in order to make an argument about the nature of a concept such as law it is essential to understand how that concept is employed in the real world. I will also examine legislation, specifically looking at how it compares to a common law approach as far as the Rule of Law is concerned.

B. Meta-jurisprudential Questions

Part of my project goes beyond arguing for a particular conception of the essence of law, and addresses the debate itself. I argue that the divided, partisan nature of the debate between positivists and non-positivists is problematic and that we should reevaluate how we understand the disagreement and what is really at stake between those on opposing sides of the debate. To the extent that my argument engages in these kinds of questions, the methodology will be entirely that of conceptual analysis at a high level of abstraction. Empirical observations will not bear on the value of different theoretical positions and how we should define their limits.

C. Normative Questions

A further aspect of my thesis will consist of normative arguments. Separate from the argument about what the law necessarily, conceptually is, I will argue about the way the law *ought* to be, and what that implies for specific actors within the system: how judges should decide cases, what sort of legislation the legislature should enact, and so on. These arguments will obviously have a different form from the conceptual arguments about the nature of law. I will need to address deep questions about value, moral truth, and moral epistemology. The answers

to these questions will impact the more specific prescriptions I will present about how the law should be.

The conceptual and normative elements of the argument are related, because any plausible suggestions for how the law ought to be are obviously limited by its essential nature and what it is therefore capable of being. If, for example, it turns out that it is conceptually impossible for the law's existence to depend on moral facts, then it would be incoherent to recommend that judges engage in moral deliberation in the course of determining what law applies in the situation.

VII. POTENTIAL PROBLEMS AND OBJECTIONS

A. Justice and the Rule of Law:

One possible problem that must be addressed in the thesis is the question of whether limiting discretion and prioritizing the Rule of Law really is the best approach. It may be argued that the Rule of Law is merely one value among many, and that certainty and predictability should be compromised in favor of doing what is truly right or just. There is a complicated balance that must be struck between doing justice in particular cases and doing justice by following the Rule of Law. This is one of the areas in which I need to do more research. But some interesting answers might be found in the debate about moral skepticism and moral realism. If it turns out that there is no way to determine what the demands of justice are in many cases, then it is incoherent to argue that we should seek to do what justice requires.

B. Problems with Instrumentalism

Murphy is right to argue that instrumental arguments for viewing the law in a certain way fail.⁴⁷ This is in part because of the nature of concepts like 'positivism' and 'natural law'. As discussed above, theories claiming these labels differ so much from one another that there is no coherent claim we can make about the instrumental value of following 'positivism'. Inclusive positivism would recommend very different approaches to certain problems than exclusive positivism, particularly in the realm of judicial-decision making, so it becomes essentially meaningless to claim that it is 'better to see the law' as positivists do.

Yet some of the arguments I have mounted here are instrumentalist. I will argue, however, that they are instrumentalist about the right kinds of things. The question of what judges should do is a normative question, and so an answer appealing to good consequences and the moral value in taking a certain approach is appropriate. This is not the case when discussing *what the law is*, and as Murphy argues, it does not even work in arguing about *how we should all think about what the law is*, in part because it isn't possible to convince all people to see the law in a certain way. Advocating for a particular method of adjudication, on the other hand, is precisely the kind of thing that can bring about change. Those to whom the criticism is directed can benefit from observations about the consequences of different approaches to adjudication.

Of course, the instrumental view is not appropriate for all questions. The question of what constitutes a valid legal enactment, for example, does not seem

⁴⁷ Liam Murphy, "Better to See the Law This Way," in *Symposium on the Hart-Fuller Debate at Fifty* (New York University School of Law 2008).

Admissions Identification Number: 639180971

to be appropriately answered by discussing what sort of view of validity would serve the community best. Instead, we should look at community practice and see what is treated as valid law to answer this question. However, it is permissible to argue that it is *better* if judges refrain from appealing to morality as much as possible, while acknowledging that there are some systems in which moral criteria do appear to be part of the criteria of validity. There is a further question about whether or not such systems are to be preferred, but I am not precluded from bestowing on the products of their courts the name 'law'.

VIII. VALUE OF THE PROJECT

My project will make a valuable contribution to the field of legal philosophy. Much of the value comes from my unique approach to the natural law/positivism debate. I eschew the partisan nature of the debate, and thereby focus more on the questions that matter. I intend to craft a coherent and interesting argument for how the law is and how it ought to be, without taking sides in the long-running debate between natural law and positivism. This will contribute to the field by showing that these questions can be answered fruitfully without engaging in the often semantic and inert debate between natural law and positivism. I will also demonstrate the continuing relevance of many crucial jurisprudential questions, which some have seen as irrelevant and pointless due to the nature of the debate.

IX. SUGGESTED SUPERVISORS

The project proposed here is related to the LL.M. thesis I am currently pursuing under the supervision of Professor Jeremy Waldron. Because of this, and

because the questions I intend to explore are closely related to Professor Waldron's areas of expertise, he would be a natural possibility for a supervisor. Professor Liam Murphy also specializes in this field, and so he would be another excellent choice to supervise my project. I deeply respect the work of both professors and would be honored to pursue my research under the supervision of either.

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