

WHAT'S GOOD ABOUT LEGAL CONVENTIONALISM

A CASE OF PHILOSOPHICAL ECLECTICISM

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1. Introduction

That the current jurisprudential scene is deeply and, one might say, irredeemably fractioned would be no news to anyone even remotely familiar with contemporary analytical legal philosophy. The moment someone utters words like 'interpretation', 'authority' and 'moral principles' (not to mention 'natural law' and 'legal positivism'), flags are raised, together with eyebrows and hands. The audience becomes agitated and demands to speak either in order to expose the fallacies in the opposite view or to defend their own favored ideas from misinterpretation and other forms of intellectual maltreatment.

In a sense this is a good thing. Images of war may serve to spur one's intellectual powers and bring one to give one's better self to a task that non-philosophers, even those close to legal philosophers, often regard as so much idle reflection. However this may be, it should not make us forget the beneficial effects of peace and reconciliation. In this paper, I seek to do just that. My interest is with one of those flag-raisers, the concept of legal convention. Reviewing the legal conventionalist scholarship, I will attempt to map out some of the common ground that legal philosophers of different persuasions might be thought to share despite their fierce and persistent disagreements. I will try to do this by identifying some ideas, which, once they are severed from their more controversial ultimate conclusions, must have theoretical appeal that transcends the boundaries of particular schools of thought. I will call these ideas 'the conventionalist package' so as to denote their intellectual origin.¹ My aim being in this sense to reach out beyond the no-man's-land between opposing camps, I will avoid treading on the theoretical minefields, which will only take me back to the state of mutual animosity, hoping that not much in terms of the substance of the ideas I discuss is lost along the way. On the other hand, I do not pretend merely to report some areas of overlap. So, while it is more or less reconciliatory, my project will inevitably require some tweaking here and there. Again, I hope not to tweak the ideas I discuss beyond recognition.

I said earlier that I will explore the concept of legal convention, but this is not exactly true. It is more accurate to say that I will explore some ideas that theorists have put forward in defending ways in which the concept of convention may be

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¹ It is not, of course, my intention to imply that the ideas that comprise the conventionalist package are definitive of the conventionalist position or that they are the most important among the theses advanced by legal conventionalists.

applied to account for salient features of legal practice. Hence, in a sense I will be more preoccupied with *legal conventionalism*, understood as a tradition in jurisprudence or as a cluster of theories and ideas developed by a group of legal theorists. Besides, according to one prominent philosopher whose work will figure extensively in this paper, the term ‘convention’ may not even be apt to denote many of the directions that legal conventionalist scholarship has taken in recent years.²

My argument will have the following structure. In the next section, I shall present the conventionalist package. I shall then address the question whether natural law theory may draw on the insights contained in it. More specifically, I shall examine Scott Shapiro’s suggestion that the conventionalist package is actually incongruent with certain basic commitments of the natural law position (section 3). To this end, I shall further elaborate an understanding of the basic tenets of the natural law position that is fine-tuned to meet Shapiro’s challenge, while also echoing the themes of the conventionalist package (section 4). Finally, I shall briefly consider a skeptical challenge that, if sound, undermines the proposed understanding of natural law theory wholesale (section 5).

2. *The conventionalist package*

Legal conventionalism states that the existence of law ultimately depends on a social fact of a specific sort, namely a social practice. ‘Social practice’ is here to be understood very broadly to encompass all the different and widely divergent views about the nature and structure of the practice of law currently on offer. The term ‘practice’ that unites those views is rather evidence of their association with the theory of law of H.L.A. Hart. As is well known, Hart held that every legal system is based on a conventional practice among legal officials that specifies the criteria for a standard’s membership in the legal system.³ In fact, legal conventionalist theories are typically offered as elaborations of Hart’s rudimentary account. Their aim is to explain what it takes for a practice to give rise to obligations. Although many practices create reasons, not all do, and even fewer create reasons that have the force of an obligation. Yet, we think of legal practice as one that does produce normative effects of that kind, and a theory of law that does not account for this fact is *pro tanto* defective.

It is obvious from these sketchy remarks that legal conventionalism is primarily thought of as a theory about the nature of law. It aims to state the conditions that are necessary for the existence of law as a distinct type of normative system. More specifically, it is regarded as a variant of legal positivism, the still dominant jurisprudential tradition, whose main tenet is that law is a matter of social and not moral fact. As such legal conventionalism is competitive with other theories of law, either legal positivist (like the theory of Joseph Raz, which states that the essence of

² S. Shapiro, ‘Law, Plans and Practical Reason’ *Legal Theory* 8 (2002), 387-441 at 441. [Hereafter *LPPR*]. Christopher Kutz makes an analogous point in his ‘The Judicial Community’ 11 *Philosophical Issues* (2001) 442-469. Michael Bratman has also expressed doubts whether it is warranted to say that contemporary theories in this tradition are about conventions, properly so called (M. Bratman ‘Shapiro on Legal Positivism and Jointly Intentional Activity’ 8 *Legal Theory* (2002) 511 at 515-6.

³ H.L.A. Hart, *The Concept of Law* (2nd edition, Oxford: OUP 1994), esp. chapter VI.

law is given by the concept of practical authority)⁴ or non-positivist (like the theory of Ronald Dworkin, which states that the essential properties of law are determined by the set of principles of political morality that best explain and justify legal practice).

Since the question about the essential features of law is the battleground where legal conventionalism clashes with other theories of law, I will not focus on legal conventionalism's answer to this question in this paper. To be more precise, I will not test the adequacy of legal conventionalism's response to the problem of law's normative force. Nor is it my aim to offer a definitive statement of the core of all legal conventionalism or even a common denominator of the various theories that have come to be called by that name. Rather, the conventionalist package I intend to put together comprises themes that are relatively salient or perhaps just better explored in legal conventionalist literature. These themes have to do with 1) the ways in which – or the positions from which- someone might participate in the practice of law, and 2) the interaction involved in the practice of law. Let's take each of these themes in turn.

a) Participants

Who are to count as participants in the practice of law? When he addresses this issue, Hart usually refers casually to 'officials of the system'. Other times he distinguishes judges from other officials, but treats them collectively as participants in the rule of recognition,⁵ while elsewhere he focuses on courts, leaving it unclear whether he also thinks that judges are somehow more important than other officials in determining the content of the rule of recognition.⁶ Importantly though, he invites us to distinguish the requisite attitudes expected from legal subjects and legal officials. He insists that in order for law to exist it suffices that the bulk of the population by and large obeys the law. In a celebrated passage from *The Concept of Law* he readily acknowledges that '[i]n an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system'.⁷ Contrary to legal subjects, we cannot speak of a legal system in Hart's sense, unless the officials of the system are regarded as participants in the rule of recognition in the sense that 'there should be a unified or shared official *acceptance* of the rule of recognition containing the system's criteria of validity';⁸ put differently, unless officials accept the rule of recognition 'as a public, common standard of correct judicial decision, and not as something which each judge does for his part only'.⁹

⁴ There are also hybrid theories, like Shapiro's, that seek to combine both versions of legal positivism.

⁵ See for instance *CL* 114-5.

⁶ *CL* 101-102. In the Postscript Hart revisits the issue by saying that the rule of recognition 'is in effect a form of *judicial* customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts'. *CL* 256. (Emphasis added) But again I am not sure whether Hart means to restrict the rule of recognition to courts or he is just taking the most straightforward case.

⁷ *CL* 117.

⁸ *CL* 115. (Emphasis added)

⁹ *CL* 116. This is not to deny that ordinary citizens may also 'acknowledge an obligation to obey' the law as a public common standard, in the way that legal officials must of necessity do. Hart of course allows for this possibility. But it is an interesting question if he also thinks that they thereby become

Hart's descendants have departed from this view in two important respects. First, they explicitly distinguish different types of participation in the practice of law. Second, in many cases they make more room for meaningful participation of legal subjects. I will give a couple of examples now, but their importance will become apparent only once we have seen in the next section how the different roles are associated with different forms of interaction. An illustration of the first point of departure from Hart's account is Scott Shapiro's version of legal conventionalism. Shapiro contends that a) the practice of law involves a variety of officials performing different roles or occupying different positions in the cooperative enterprise and b) this practice of officials has a hierarchical structure. At the top are those participants who assume a position of authority over others, that is, those who have the power to dictate how others must act in matters relating to the joint endeavor. Shapiro is here alluding to the distinction between legislatures and courts. It is courts, he says, that are 'subject to the authority of the legislature, for they are required to apply the rules enacted by them [sic]. Indeed, the legislature has the authority it has precisely because judges are committed to treating their directives as reasons for action and modifying their intentions and actions accordingly'.¹⁰

As to the second point of departure, the most forceful advocate of the inclusion of legal subjects in the practice of law is Gerald Postema. He maintains that the point of the practice of law has to do with the guidance of legal subjects (whether his more specific construal of law's point is correct need not detain us here). From this he argues that officials ought to calibrate their acts and decisions not only with a view to the acts and decisions of other officials, but also with a view to the patterns of expectation and understanding latent in the society, to which the rules they enunciate are meant to apply. There exists, as he puts it, interdependence between officials and the populace.¹¹ In fact, he vehemently rejects the suggestion that officials need only heed the 'beliefs, attitudes and expectations' of other officials without any concern for ordinary citizens. He writes that 'to believe that this attitude could be, not just exceptional or parasitic, but systematic and dominant in the judiciary is to reject the normativity thesis. For if law is still regarded as a means of influencing or directing social behavior, but those who identify, interpret, and apply the laws systematically ignore how those rules figure in the practical reasoning of law-subjects, they must regard the laws and their decisions as devices for tripping trained responses, like the teamster's "gee" and "haw"'.¹²

As already suggested, in order to appreciate the significance of this differentiation of types of participants, we need to explore the kind of interaction

actual participants in the social practice of the rule of recognition or whether they merely vicariously partake in it.

¹⁰ *LPPR* 419. Legislatures are of course not absent in other accounts, although they are not awarded such a prominent role. Thus, for Postema legislatures provide a way of facilitating coordination, his version of the point of legal practice, by rendering certain solutions to coordination problems salient. See his 'Coordination and Convention at the Foundations of Law' 11 *Journal of Legal Studies* (1982) 164 at 185-6. [Hereafter *CCFL*].

¹¹ *CCFL* 189.

¹² *CCFL* 191. Interestingly, even Shapiro, who insists that 'it strains ordinary usage to describe [ordinary citizens] as "participants in the legal system"' (*LPPR* 418) nevertheless concedes that '[i]n democracies, for example, citizens are generally entitled to vote for officials and hence they do participate in the operations of the legal system' (*LPPR* 418, note 43).

contemporary legal conventionalists claim is involved in the practice of law. It is to this topic we now turn.

b) Interaction

What is the nature of the practice of law? Once again, let me contrast the contemporary position to Hart's. Hart was not particularly interested in describing the form of interaction that gives rise to and sustains the practice of law. It was sufficient for his purposes to assert that there is a rule of recognition -and hence also a legal system-, just in case all participants apply the same criteria of legal validity and develop the proper attitude, which he called acceptance, toward this practice of applying the same criteria. Once a settled pattern of behavior of this sort is in place, he thought, newcomers have merely to attend to it in order to figure out what their duties are under the practice.¹³ But he did not elaborate on how the settled practice comes about, nor did he take care to analyze the structure of the reasons that support the attitude of acceptance. Of course, to contrast his view to the natural law position he maintained that these reasons are not necessarily moral. He allowed, instead, that 'allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do'.¹⁴ These disparate reasons then generate the attitude of acceptance that is mapped on the settled practice.

But being primarily concerned with *how* practices may give rise to obligations of the proper kind, contemporary legal conventionalism cannot afford Hart's explanatory minimalism. It has to flesh out the relationships between participants in legal practice that it takes to be the foundation of legal obligation, in a way that makes it possible for such relationships to generate obligations. Two are the ideas most commonly invoked: coordination and joint activity.

As is well documented, the coordination model takes its lead from David Lewis' account of convention.¹⁵ It supposes that legal practice is a pattern of

¹³ For an illustration of this point see H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982) 158: 'When a judge of an established legal system takes up his office he finds that though much is left to his discretion there is also a firmly settled practice of adjudication, according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criteria or sources. This settled practice is acknowledged as determining the central duties of the office of a judge and not to follow the practice would be regarded as a breach of duty, one not only warranting criticism but counter-action where possible by correction in a higher court on appeal. It is also acknowledged that demands for compliance would be regarded as proper and are to be met as a matter of course. The judges not only follow this practice as each case arises but are committed to it in advance in the sense that they have a settled disposition to do this without considering the merits of so doing in each case and indeed would regard it not open to them to act on their view of the merits. So though the judge is in this sense committed to following the rules his view of the moral merits of doing so (at least so far as the rules are clear and provide him with determinate guidance) is irrelevant'.

¹⁴ *CL* 203.

¹⁵ Apart from G. Postema other theorists who have been at times attracted to the coordination model include Jules Coleman, 'Authority and Reason' in R. George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 278 and *idem*, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: OUP 2001) 92-94, C. Gans, 'The Normativity of Law and its Coordinative Function' (1981) 16 *Israel Law Review* (1981) 333. The coordination model in law has suffered heavy blows from criticism by L. Green, 'Positivism and Conventionalism' 12 *Canadian Journal of Law and Jurisprudence* 1 (1999), 35-52, and A. Marmor, 'Legal Conventionalism' 4 *Legal Theory* 4 (1998) 509-31.

normative expectations that evolves as a response to a set of recurring coordination problems. We have law because we seek to ‘guide actions and structure social interaction, thereby providing rational agents with reasons by which they can direct their own behavior’, but on the way to doing this we come up against a host of coordination problems.¹⁶ And law is a way to settle on a solution and thus resolve these coordination problems. More specifically, law structures social interaction in one or –according to some theorists- two ways. First, it is understood to structure the interaction between legal officials. On this account, legal officials seek to ensure that they will apply the same criteria in determining whether a standard is a legal rule. This, it is argued, is a coordination problem. Legal officials will settle on one scheme of such criteria, if they know that this is the scheme that the rest of the officials will also adhere to. The fact that others will abide by it is at least part of the reason why they ought to go along, provided of course that they have a reason to find some common scheme of criteria for membership in the legal system in the first place. Second, recall that for Postema the practice of law is primarily oriented to the guidance of legal subjects’ behavior. This generates the obligation on officials to try to situate the rules by which they intend to guide legal subjects within the context of the patterns of understanding and expectation that are already embedded in the wider society. Rules must make sense to their addressees and, once it is accepted that legal subjects are participants in the practice of law, it is a short step to say that officials must, in order to achieve coordination of the requisite type, also take into account the patterns of the subjects’ reasoning, so as to ensure that what they direct legal subjects to do is at least intelligible.¹⁷

In light of the serious doubts that have been raised as to the applicability of the coordination model to the legal context, the second strand of legal conventionalism drops the idea that the practice of officials aims to provide a solution to a coordination problem altogether. Instead, it takes its lead from contemporary accounts of joint activity. One of the main sources of inspiration is Michael Bratman’s influential theory of shared cooperative activity. Interaction for Bratman takes the general form of ‘responsiveness to the intentions and actions of the other’ with an eye to realizing a certain common endeavor and in the knowledge that others have the same responsiveness (this element is captured by Bratman’s conditions of mutual responsiveness and commitment to the joint activity).¹⁸ Responsiveness requires that participants form and act on individual plans in pursuit of the common goal that -at the very least- do not conflict in a way that makes *joint* pursuit of the goal impossible. In other words, responsiveness requires of participants to strive to make their plans ‘mesh’. In its most demanding version, interaction also involves a commitment to

¹⁶ CCFL 187.

¹⁷ CCFL 187-90.

¹⁸ This is the barest outline of the position that of course doesn’t do justice to its sophistication. But it does not seem to me to be necessary for present purposes to go into more detail. For the full account see M. Bratman, ‘Shared Cooperative Activity’ *Philosophical Review* 101/2 (1992), 327-341, M. Bratman, ‘Shared Intention’ 104 (1993) 97-113. Jules Coleman who initially sided with the coordination-based understanding of the rule of recognition later came to reject it in favour of a Bratman-like understanding. See his *The Practice of Principle*, op. cit., footnote 14, 94ff. Other theorists who have propounded similar views include K. Himma, ‘Inclusive Legal Positivism’ in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford: OUP, 2001) and Shapiro who nevertheless denies that the joint activity of law necessarily includes something like a commitment to mutual support (See *LPPR* 429-431).

mutual support, whereby each of the participants in the joint activity undertakes to help others in the completion of the task assigned them.

Legal conventionalists who sign up to this account of joint activity see law as a collective enterprise of officials, whose aim is –glossing over differences between the various accounts- to create and maintain a system of law, where this aim crucially includes the application of a common set of criteria for determining a standard’s membership in the legal system. Participation in this enterprise gives rise to an obligation on the part of officials to ‘mesh’ their actions with those of others, so as jointly to achieve the common aim. On this view, unless judges take into account how their colleagues determine what is to count as law, they will fail to fix on a common set of criteria and thus the legal system will break apart. Now, presumably the meshing of individual action may be achieved in many ways. One particularly effective strategy that Scott Shapiro explores is to bestow upon one of the participants the power authoritatively to determine how tasks are to be distributed among the group. When this happens, the common endeavor becomes a ‘joint activity with authority’ (JIAA). In this case, the participant holding the position of authority ‘intends his or her orders to be reasons for the subject to adopt the content of the order as a subplan as well as reasons to revise the subject’s subplans so that they mesh with the orders’ and ‘[t]he subject intends the authority’s orders to be reasons to adopt the content of the orders as subplans as well as reasons to revise his or her subplans so that they mesh with the orders’.¹⁹ Shapiro calls this type of interaction that is shaped by authoritative intervention ‘vertical interlock’. The concept of vertical interlock characteristic of JIAAs is central in Shapiro’s account of the interaction between different types of participants. We have already suggested how it is supposed to work in the legal case. Shapiro takes the joint activity of law to be constituted by the cooperation of different types of officials to the exclusion –in principle- of ordinary citizens. One type of officials, judges, has their contributions to the joint activity determined in large part through orders by another type of officials, legislators. These orders judges regard as reason-giving.

It is important to note that neither the coordination nor the joint activity version of legal conventionalism insists upon total concord among participants. In effect, both versions make ample room for disagreement. First of all, they maintain that the practice of law may be sustained even against the backdrop of disagreements over ultimate values and goals;²⁰ second, that participants need not agree on all matters pertaining to their joint activity itself. Most conventionalist accounts in fact insist that, so long as participants share a sufficiently strong sense of the joint activity they engage in and of what kinds of mutual accommodation are necessary for it, they may disagree over the requisite course of action in specific circumstances.²¹ Jules Coleman has gone as far as to suggest that the pattern of the joint enterprise itself is subject to continuous negotiation, with disagreements over it being even ‘settled by an appeal to substantive moral argument’.²² Negotiation will be needed precisely because

¹⁹ LPPR 407.

²⁰ LPPR 414.

²¹ CCFL 178: ‘There may even be substantial differences of opinion in the community regarding what the convention requires in some specific instances. To achieve coordination there need only be a wide area of overlap in the descriptions of the regularity (and no significant intersecting of mutual expectations), so that the standard situations needing coordination are provided for’.

²² See *The Practice of Principle*, op. cit. footnote 14, at 99.

and insofar as participants will not agree with respect to what it takes to carry on with the joint enterprise. However, this bargaining process still takes place ‘within a particular framework’, the one supplied by one’s engagement in the joint activity of officials.

On his part, Shapiro explains the existence of disagreement in joint activity by pointing out that the content of the joint activity and the assignment of tasks it entails are not always transparent to participants. Due to this lack of transparency, disagreement is likely to arise over how to read off one’s rights and duties under the practice from its structure.²³ Importantly, Shapiro, following Bratman, has even allowed for the existence of some level of competition within the framework of a joint activity. Individual participants or groups may take diverse views about the goals to be pursued or about the means to be employed in pursuit of common goals.²⁴ Shapiro reasonably supposes that his conception of JIAA may account for this type of competition-fraught joint activity. One of the functions of authorities within the framework of joint activity, he argues, is to resolve competition or at least channel it in ways that don’t make it detrimental to the pursuit of the joint activity. Of course, he acknowledges that apart from the types of competition that are accommodated through the introduction of an authority, there are other types that are allowed to play out and indeed are constitutive of the joint activity. Bratman’s example for this situation is chess. When we play chess, we don’t intend that our intentions mesh ‘all the way down’. No doubt, we would be unable to play a complex game like chess – actually any game, complex or not, insofar as it is a rule-governed activity-, if we didn’t agree on some ground-rules and we weren’t assured that others would follow them. But we would also not be playing a competitive game like chess, unless we competed over winning it.²⁵

Unlike Bratman, other theorists in the second camp opt for what they see as a less demanding conception of joint activity that drops the requirement of mutual support (as a necessary condition of joint activity in general, though perhaps still characteristic of *certain* types of joint activity). According to proponents of such *minimalist conceptions*,²⁶ the possibility of joint activity is based solely on the existence among participants of the appropriate *participatory intention*. This is ‘an intention to do my part of a collective act, where my part is defined as the task I ought to perform if we are to be successful in realizing a shared goal’.²⁷ Arguably, this participatory intention is compatible with very low levels of responsiveness. Thus, we can say of an employee in a large corporation that he is engaged in a joint activity with his fellow-employees, although he merely carries out his assigned task without having to heed how the others perform theirs, just by virtue of the fact that he does what he is supposed to do to contribute to the collective goal. Still, even in such a case I am inclined to think that there is room to speak of some form of interaction at least in the sense of a prior division of labor and the existence of an expectation that I will not obstruct my fellow-employees in the performance of the task assigned them. We

²³ LPPR 440, note 62.

²⁴ LPPR 415.

²⁵ Bratman, ‘Shared Cooperative Activity’, op. cit. fn. 17.

²⁶ The term has been coined by Christopher Kutz in ‘Acting Together’ 61 *Philosophy and Phenomenological Research* 1 (2000) 1-37. Kutz has extended this conception to the case of law in his ‘The Judicial Community’, op. cit. fn. 2.

²⁷ *Ibid* at ???.

can see how such a minimalist view maps on certain familiar aspects of legal practice. Once an official has performed his assigned task, as defined by the rules that shape his office, his act acquires institutional significance and hence must be reckoned with by other officials. To use Kutz's terminology, it constitutes 'grounds for deliberative response'.²⁸

To sum up: the conventionalist package contains the idea that law is *a practice of interaction between participants occupying different roles within it (who may -and in some variants of legal conventionalism must- include citizens). The idea of such a practice is compatible with the existence of a certain measure of disagreement over its content (and maybe also with a degree of competition between participants).*

3. Can natural lawyers be part of this?

Although the 'conventionalist package' has drawn on the work of legal positivists, I think it can be adopted –or at least taken seriously- by jurists that are other than legal positivist, especially natural lawyers. But the legal conventionalist might reject this offer of reconciliation. He might insist that natural lawyers cannot be part of this, in the sense that the 'conventionalist package' (even after its more contentious parts have been removed, as I have tried to do) is in fact incompatible with certain fundamental commitments of the natural law position.²⁹ This is the view taken by Scott Shapiro. Shapiro, recall, thinks that legal practice is in essence a joint activity of officials whose goal is the 'creation and maintenance of a unified system of rules'. Officials acquire obligations to 'mesh' their actions with those of others just because they participate in an ongoing practice of this sort, 'not because of the principles of morality'. In this sense, he maintains, his account of legal practice in terms of the notion of joint activity is 'parsimonious'.³⁰ 'The principles of morality', he writes, 'do not enter into this analysis'.³¹ Well, Shapiro is definitely right about one thing. The principles of morality need not enter the analysis of plans in general. Unsurprisingly, morality will have no place in the account of a plan to cook dinner, sail to Nova Scotia or sing a duet. But of course no natural lawyer I know of thinks otherwise. Natural lawyers do not have to worry about the supposedly painful dilemma that Shapiro puts to them: Either give up on the claim that moral considerations serve to identify the nature and content of any cooperative enterprise or embrace the idea that the Nazis did not have a *plan* to exterminate the Jews. In fact, natural lawyers can without regret reject both horns of the alleged dilemma. What they must in any case hold on to is that moral considerations are essential in the account of the joint activity of law. This claim does not commit them to saying of the *Endlösung* anything other than that it was indeed a plan -and a diabolic one for that matter-, or of sailing trips to Nova Scotia that they make sense even if participants do not have a copy of *A Theory of Justice* along with the instructions manual.

²⁸ C. Kutz, 'The Judicial Community', op. cit. fn. 2, at 464.

²⁹ Note that henceforth I shall assume that the natural law position states that moral principles are among the necessary conditions for the existence of law and/or for the truth of propositions of law. It is evident from this definition that I am using natural law theory in an idiosyncratic way. Many theorists, for example, would hesitate to count among natural law theories Dworkin's conception of law, which holds that the ground of all propositions of law is necessarily in part moral. But in my definition it is classified as one.

³⁰ *LPPR* 437.

³¹ *Ibid.*

Now, most legal conventionalists have given accounts of why their theories do not *entail* a natural-law position, in the sense that they do not derive the normative force of legal practice from the moral merit of the content of the practice. As announced, I will not take issue with this claim.³² But Shapiro goes further than this. He argues that his theory of the practice of law is actually incompatible with a natural-law position, insofar as it holds that the existence of the joint activity of law depends solely on its ‘being adopted and practiced’ by a group of participants, and not on its moral properties. If he is right, the distinction between practices in general and the practice of law that I drew in the previous paragraph doesn’t help natural lawyers, since none of them can resist the proposition that all practices, including the practice of law, must somehow be adopted and practiced. We thus need to pay attention to Shapiro’s claim. Many of the ideas that make up the conventionalist package have pride of place in Shapiro’s account. If it turns out that natural lawyers may not have recourse to them, as Shapiro supposes, the reconciliatory project will not get off the ground.

But it is hard to see which argument supports this contention, at least insofar as it applies to law. Let’s take a closer look. Shapiro says that ‘legal participants take the internal point of view towards their practice when they possess the intention to apply the same rules that pass the same criteria of validity as well as the intention to resolve disputes that might arise with respect to the application of such rules’.³³ The implication seems to be that the internal point of view, thus understood, does not necessarily involve any further, especially moral, component. The intention to apply the same criteria of validity in determining which rules belong to the legal system and to use those rules in resolving disputes is not, it might be thought, value-laden. It is present, even when the criteria of validity that all legal participants are committed to applying do not discriminate between morally ubiquitous and morally commendable legal rules. This ‘parsimonious’ account of the intentions of participants in the joint activity of law follows from Shapiro’s view of its point, which he takes to consist in the creation and maintenance of a unified system of rules. If you think that this is the point of the joint activity of law, you are naturally led to think that the intentions supporting it must have that content. But what is the ground for going along with this view? Hart and legal positivists would accept it, but other legal philosophers don’t. They might argue for example that the activity of law is an activity whose purpose it is to justify the use of collective force by appeal to past political decisions.³⁴ On their view, we cannot make sense of what those engaged in legal practice are doing unless we appeal to moral considerations that may be said to explain and justify how it can ever be that past political decisions affect our rights and responsibilities and license coercion.

Of course, this is just a description of the alternative position, not an argument for it. I am introducing it for the following purpose: I want to suggest that the thesis that the existence of joint activities depends on the social fact that they are adopted and practiced does not suffice to rule out natural law theories. The natural law position, I argued, will crop up again in the determination of the purpose of the joint activity of law. *This* question seems to be independent from –and not prejudiced by–

³² Dworkin has made this claim on a number of occasions and more recently in ‘Thirty Years On’ 115 *Harvard Law Review* (2002) 1655-87.

³³ *LPPR* 438

³⁴ R. Dworkin, *Law’s Empire*, 93.

our accounts of how collective action is made possible in general. Another way of putting the same point is this: Natural lawyers need not deny the importance of social facts in a theory of the nature of law, including the fact that the practice of law must be adopted and practiced. Recall Dworkin's position sketched earlier. At the very least, his position presupposes that there is an existing system of governance that produces political decisions, that is to say, a whole host of social facts. Moreover, as is well known, Dworkin also contends that law is a *practice* of a certain kind, namely an interpretive practice.³⁵ So, what distinguishes Dworkin and other natural lawyers from legal conventionalists does not lie in the former's putative indifference to social facts –including the fact of a practice being adopted and practiced, but rather in their respective explanations of how social facts like political decisions or social practices are connected to legal rights and duties.³⁶ Importantly, the natural law explanation includes reference to moral considerations that are considered part of the essence of legal practice, while legal conventionalists dismiss such reference. But until we get to this stage, there seems to be nothing that precludes the two approaches going hand in hand.

At this point, it may be objected that Shapiro presents his characterization of the joint activity of law as 'the *weakest* description that must be true of [the participants'] commitments in order for it to be the case that they are committed to the joint legal activity. Stronger descriptions may also be apt, as will typically be the case. But stronger descriptions necessarily entail the weaker ones'.³⁷ It may be inferred from this statement that Shapiro's minimalist description must enjoy some kind of priority over the maximal, value-laden view advocated by natural lawyers. To this the reply is first that the alternative position I outlined a couple of paragraphs ago denies that Shapiro's description is a true one to begin with. But even if we grant Shapiro both his description of the joint activity of law and the claim that it is 'the weakest description that must be true' of participants' intentions, we have not thereby left natural law theory behind us –although we have probably excluded some variants of it. That something is the weakest condition that must be satisfied before we can say of a group of participants that they are engaged in a joint activity of law does not by itself exclude the possibility that a stronger description also states necessary conditions. Consider for example a theory that says that the content of the joint activity of law is the creation or maintenance of a unified system of rules for the purpose of establishing a just and well-ordered society. On this theory, it is true that if participants do not intend to establish or maintain a unified system of rules they have not set up a joint activity of law. But it is also true that there still won't be law unless their activity is calibrated to establishing a just and well-ordered society.

In response, a different understanding of what is meant by 'the weakest description' may be offered. It may be contended for instance that the weakest

³⁵ Recall the distinction Dworkin drew in 'Model of Rules II' between concurrent and conventional morality. In both cases there is some agreement over what to do. What differs is the ground of that agreement. Conventional morality treats the fact of the agreement itself as part of the reason why we ought to do such-and-such. Concurrent morality doesn't. What makes the difference is not agreement but the account one gives of it.

³⁶ For illuminating discussions of this point see M. Greenberg, 'How Facts Make Law' 10 *Legal Theory* (2004), 157-198, N. Stavropoulos, 'Interpretive Theories of Law' E. Zalta (ed.), *Stanford Encyclopaedia of Philosophy* (Winter 2003) <http://plato.stanford.edu/archives/win2003/entries/law-interpretivist>

³⁷ LPPR 421. (Emphasis in the original)

description enjoys some kind of analytical *priority* over stronger descriptions that involve reference to a moral aim that the law is supposed to serve. Here is how the point might be put: The kind of obligation the weakest description designates as foundation of legal practice is derived solely from the fact that legal officials participate in a joint activity, irrespective of the goals they thereby pursue. They could have gone on a sailing trip. Instead, they opted to play law. If something as trivial as a sailing trip can generate obligations, why do we have to be so fussy about the goal of the joint activity of law? Put differently, if we can make sense of legal obligation just by appeal to the notion of joint activity, isn't the extra move –the invocation of a moral end of law- in an important sense dispensable? It is in this sense that the weakest description may be said to 'entail' the stronger ones.

To fully address this objection, I would have to assess the plausibility of the legal conventionalist account of legal obligation. But such a task would go far beyond the scope of this paper. For present purposes it suffices to examine whether a natural law account of the joint activity of law would be committed to the 'weakest description' in the sense outlined in the foregoing paragraph. I think the answer is clearly no. Recall that natural lawyers insist that the moral aims that law serves must figure in an account of the joint activity of law. In their view, when participants undertake to take part in legal practice, they intend to achieve a morally worthy goal, such as the establishment of a just and well-ordered society. When they mesh their contribution with those of other participants, they do it with this goal in mind. A sailing trip is more likely to be successful when a number of people work together to make it happen. Even more so when the goal the group pursues is as far-reaching as the establishment of a just and well-ordered society. The understanding of the 'weakest description' rehearsed in the previous paragraph would invite us to think that participation in the joint activity of law under the natural law approach is governed by two independent types of consideration, a consideration driving participants to contribute to the joint activity as such and another, distinct, consideration driving them to establish a just and well-ordered society, where the former is essential and the latter dispensable and redundant. But surely, this hair-splitting cannot carry the day. It is more natural to think of participants as contributing to the joint project and doing what is necessary in order to sustain it (such as being responsive to other participants) by virtue of the fact that this project is a morally worthy one and it will be more effectively carried out if people join forces than if each tries on one's own. We will come back to this point in section 4.

As we have just seen, Shapiro gives rather sparse argument to make good the claim that the intentions that underlie the joint activity of law are necessarily of a positivist hue. But he does give two arguments to the effect that natural lawyers are not able to accommodate the structure of the joint activity of law within their general outlook. I will call them respectively the *organizational argument* and the *Stachanov argument*. Here are characteristic formulations of each:

Organizational argument: '[H]aving officials look to comprehensive moral theories would lead to the promotion of very deep political objectives that would fail to mesh. The organizational difficulties that would attend such a strategy would likely be a nightmare'.³⁸

³⁸ LPPR 439.

Stachanov argument: ‘[T]he natural-law approach presupposes a certain extreme conception of the participants’ cooperative enterprise. It assumes that the participants are highly cooperative, for it gives each official a tremendous amount of discretion in determining the existence or content of the fundamental plans of the system...More interesting, it presupposes that the participants trust each other implicitly, for it reposes in each the competence and good will to arrive at the morally correct solution’.³⁹

The first argument emphasizes the strain that the natural-law approach presumably places on a joint activity by making the content of participants’ plans depend on their background moral theories. Different people hold different comprehensive moral theories and it would be, on this view, unrealistic to suppose that the area of overlap will be sufficiently deep and concrete to sustain a scheme of meshing plans. However, at least in Shapiro’s account, unless individual plans mesh, the joint activity disintegrates.

The second argument draws attention to the level of cooperative spirit and mutual trust that natural-law theory demands from participants in the joint activity of law. It would definitely boost cooperation if each participant could reasonably assume that everybody else was as committed to the joint activity as Aleksej Stachanov, the semi-mythical figure who in the midst of Stalin’s 5-year plan allegedly outdid the productivity norms just for the sake of the realization of the socialist utopia and was subsequently hailed as a model for the citizen of communist society. But, while such level of trust may be appropriate in the context of certain joint activities (rafting may be one example, I wouldn’t be so sure about the 5-year plan), it is by no means an essential feature of joint activities in general (as Shapiro seems to argue follows from the natural-law approach). And it most definitely is not to be expected from participants in the joint activity of law, more so in a vast bureaucratic state. In cases like this participants need some kind of assurance that is, so to speak, more tangible than the declared or presumed goodwill of their fellow-participants. If they don’t get it, they are unlikely to do their share in the joint activity, the result being that the joint activity breaks down.

4. *Straight to morality?*

I think both arguments rest on a fundamental assumption about the implications of natural-law theory, which I will call the *straight-to-morality assumption*. The following passage is indicative:

‘The natural-law position also implies that legal participants are radically not in control of their own practices. For it is doubtful that legal participants would want each other to determine the existence or content of plans *by looking directly to moral theory*’.⁴⁰

I believe that the straight-to-morality assumption poses a formidable challenge to natural law theorists. It does not just threaten to break down the compatibility of natural law theory and the ‘conventionalist package’. Actually, as I am going to argue in the next chapter, on at least one interpretation, it would probably provide a knockdown argument against natural law theory as a distinctive account of law. But in this chapter my interest with it will be more focused. I want to examine what ‘looking

³⁹ LPPR 440.

⁴⁰ LPPR 439. (Emphasis added)

directly to moral theory' might be taken to mean and whether it has the consequences that Shapiro thinks for a natural-law approach to the joint activity of law.

Let's start by getting a better idea of what Shapiro himself understands by the straight-to-morality assumption. It will help connecting the assumption with the organizational and the Stachanov argument. So, supposing that participants under the natural law approach must 'look directly to moral theory', what's the problem with it? One idea might be this: The organizational argument seems to suggest that, when participants look directly to moral theory, they will not engage in the joint activity unless there is some way for the personal moral convictions of each to agree *all the way up*, so to speak. So for instance if some of the participants are, say, consequentialists and some deontologists, a way must be found to reconcile the consequentialist's concern for the good, impartially conceived, with the deontologist's concern for individual integrity. Now, although much moral philosophy is devoted to bringing together consequentialism and deontology, it is implausible to suppose that the very possibility of joint activities can be made to stand and fall on the success of this otherwise admirable philosophical project.

Such an absurd position, however, cannot be attributed to natural law theory. The success of most ordinary joint activities depends not on individual plans agreeing all the way up, but on their meshing at some appropriate level. As Shapiro puts it: 'Members of a group need not agree on every matter related to the sought-after outcome in order to work together in order to achieve it'. Each participant can intend to engage in a joint activity but do so for very different reasons'.⁴¹ But since 'deep meshing' of sub-plans is not required in the easy cases, why insist upon it in the hard ones? Stated differently, if at some appropriate level both the deontologist and the consequentialist have reasons to engage in the joint activity and work together, why must they stick to a counter-productive and stubborn strategy? Shapiro himself acknowledges this when he writes that on the natural law approach participants 'might concur on shallower goals'.⁴²

Here is another suggestion: Even if both the consequentialist and the deontologist eventually find a shared basis for engaging in the joint activity of law, disagreements are likely to arise. Maybe the consequentialist does not give claims of individual rights as much weight as the deontologist, the result being that in certain cases one would decide for the defendant and the other for the plaintiff. Now, a good deal of disagreement will be endemic among people who 'look directly to moral theory'. But this type of disagreement cannot be thought a threat to the continuation of their joint activity, at least not without further argument. Admittedly, it sometimes takes a civil war to settle some deep-rooted moral conflict within society. But most moral conflicts do not end up in civil war. Nor is the existence of some disagreement in itself at odds with the very notion of a joint activity. People disagree about the nature of the project they are engaging in and about the acts they ought to perform in its pursuit, even when they do not have to invoke moral arguments to make a case. They disagree whether it is their job to pack the suitcases or run a routine car-check before going on holidays. When they do, it is often in good spirit and, even when they unjustifiably insist that having done it last year is a good enough reason for not doing

⁴¹ LPPR 414.

⁴² LPPR 439.

it this year, they do not thereby manifest a lack of the requisite intention to carry on the joint activity.⁴³

Let's consider a third possibility. The Stachanov argument says that by accepting that one's participation in the joint activity is to be governed by one's own personal moral convictions, participants under the natural law approach are required to place considerable trust in each other's motives. Without such trust they would have no reason to give each other such a 'tremendous amount of discretion' over the content of the plans that constitute the joint activity. This statement, we will see, gives us a more fruitful lead about how 'looking directly to moral theory' may be understood by theorists like Shapiro. Of course, Shapiro does not mean to say that *moral theory itself* gives participants tremendous discretion. Moral theory is more likely to issue requirements, which those who look directly to it are bound to follow. It may leave many moral issues indeterminate, thus licensing a choice from among several options. But it is unlikely that Shapiro has discretion of this circumscribed sort in mind, if only because it does not seem to be tremendous.⁴⁴

Perhaps then what is in play here is the sense of discretion that Dworkin has labeled 'weak'. He writes of it that '[s]ometimes we use "discretion" in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment'.⁴⁵ True, under the natural law approach many, indeed all, questions about the content of the joint activity of law and the rights and duties flowing from it are apparently left to each participant's personal judgment of the merits. For every course of action participants must on this view ask: Is this the morally right thing to do? Or more precisely: Does this course of action pass the appropriate moral test of legality? If they answer affirmatively, they will conclude that they must pursue it. Otherwise, they won't. But again, the question arises: If it is true that natural law theory grants participants in the joint activity of law 'weak discretion', what's wrong with it?

I think the suggestion is that under the natural law approach, when participants are figuring out what to do, they are presumably totally indifferent to what their fellow-participants do. This strategy, it seems, undermines the point of having a joint activity. Joint activities of the kind legal conventionalists are interested in make collective action possible by somehow constraining the behavior of participants. Either for the purpose of coordination or for the purpose of carrying out a joint enterprise participants are understood to undertake to heed each other's actions and fine-tune their own behavior accordingly. This central assumption, we have seen, is captured in Bratman's condition of mutual responsiveness. In section 2 we reviewed some of the modes of interaction reflecting this assumption that legal conventionalists have envisaged. Importantly, some legal conventionalists invite us to understand authority structures as themselves modes of interaction, whereby participants, in order more effectively to 'organize' their behavior, agree to treat the decisions of one among them as binding. The various forms of interaction provide participants guidance, when they are uninformed, and assurance, when they are uncertain, and

⁴³ As we have seen Shapiro agrees that the notion of joint activity is compatible with the existence of widespread disagreement. See above section 2b.

⁴⁴ The *locus classicus* for a discussion of various senses of discretion is R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) 31ff.

⁴⁵ *Ibid* at 31.

make each other's actions more predictable. Having participants look directly to moral theory, on the contrary, seems to introduce a good deal of instability in the joint activity, since it putatively encourages participants to ignore others and orient themselves to the course of action that by their own lights appears morally optimal. Where mutual responsiveness ought to have called the shots, now reigns the individual quest for justice.

Here is a different, broader, and perhaps more suggestive way of putting the same point: It is a central desideratum of theories of law that they demonstrate the way in which the law makes –or claims or strives to make- a *practical difference* to the practical reasoning of legal subjects.⁴⁶ Of course, in the context of Shapiro's objection we are only talking about officials and only secondarily about legal subjects. But even though the law probably doesn't make the same kind of practical difference in the two cases, it is difficult to doubt that it does make a practical difference to officials as well. Take the case of a judge. We tend to think that his role is crucially determined by the decisions of the legislature. We casually assume that it makes a huge difference to the way he decides a case, if the legislature passes a law that is pertinent to it. Notice how the idea of vertical interlock (and more generally the idea of plan-meshing) tracks the same general theoretical concern. It is this aspect of legal practice that on the view we are considering sits uneasily with natural law theory. If the official is guided by his sense of justice, it seems attenuated to say that he need in any way be interested in what other officials have said and done –let alone that what they have said and done may make a practical difference to his institutional duties.

Now, this might well be what Shapiro means when he writes that under the natural law approach participants look directly to moral theory. But we still need to know whether this is what the natural law approach is *really* committed to and whether this is what 'looking directly to moral theory' *really* means. To score an easy point first: We can easily think of a version of natural law theory that maintains that, although the purpose of law is moral and hence we cannot make sense of what is going on in legal practice, unless we see it in the light of certain morally significant goals that we achieve by having it, still this doesn't mean that *individual participants* need have recourse to moral considerations when they are deliberating what it takes to go on with the practice.

This is a position that I think a natural lawyer can conceivably hold but I am setting it aside, because I want to examine whether the more robust –and also more interesting- versions of natural law theory are also immune from Shapiro's charge. Besides, I wouldn't be offering much by way of reconciliation, if it were tailored to theories that are shading into legal positivism anyway. Suppose then a theory advocating that participants in the joint activity of law cannot but take moral considerations into account in order to figure out what duties and rights they have under that practice. Would such a theory be committed to saying that each participant decides what to do totally unconstrained by what his fellow-participants do?

⁴⁶ I have only mentioned three of the most common modalities. There may be others. For Shapiro's own take on the idea of law's practical difference see his 'On Hart's Way Out' 6 *Legal Theory* (2000), 127-170.

Paradoxically, it is Shapiro himself who suggests a negative answer to this question. In his discussion of substantive goals in stable systems he writes that ‘[i]f a legal system is geared toward, say, ensuring the equality of resources, officials need not always allocate goods or services on a strictly equal basis. Such behavior is likely to be extremely inefficient and/or counterproductive. In a legal system, the goals of the system are generally achieved indirectly through the rules that determine the powers and duties of particular officials. Officials pursue the basic goals of the system by following the rules that are designed to achieve such goals’.⁴⁷ Of course, the term ‘looking directly to moral theory’ does not convey this indirect strategy of pursuing some goal, but, terms aside, there seems to be no reason why natural lawyers should be indifferent to considerations of efficiency or dismissive of the two-level, indirect pursuit of substantive goals that Shapiro refers to in the passage just quoted.

In what follows, I wish to elaborate on this insight and outline a conception of natural law theory that accommodates it. But, before I do this, let me introduce a distinction that is important for the argument I am about to develop and will reappear in various places in the next chapter. This is the distinction between first- and second-order considerations. First- and second-order considerations are here understood as two different *parameters of good governance*. It follows from this definition that the distinction I have in mind makes sense in a setting that involves institutions making decisions that are binding on a group of people –call them agents of governance. It is morally relevant when we already live under institutions that are assigned this sort of power and secondarily when we want to set up new ones. In turn, absent some such institutional arrangement or some desire to set one up, there seems to be no room to make it. In other words, the distinction between first- and second-order considerations forms part of our answer to the question: How is institutional power and especially political power to be exercised in order justifiably to lay claim to our allegiance?

Henceforth, I shall focus solely on political institutions that obviously qualify as agents of governance.⁴⁸ I will say that first-order considerations bear on the content of the decisions such institutions have produced. Ordinarily our understanding of good governance and therefore our answer to the question just mentioned make reference to the goals that the agents of governance must pursue, the states of affairs they ought to promote or try to attain and so forth. Political institutions are there to protect our rights, promote justice and facilitate social cooperation among other things, and part of what it means to say that they are doing well is that they are achieving these goals. The extent to which they are will of course also depend on such things as their effectiveness, but it is primarily a question of the content of their decisions, of whether their decisions actually track what is the right way to order society. On the other hand, our assessment of political institutions –our judgment as to whether they are governing well- will also focus on the makeup of those institutions as well as the processes they have followed in producing their decisions. Assessment of the latter kind will draw on what I have called second-order considerations.

⁴⁷ *LPPR* 426.

⁴⁸ A full account would flesh out which institutions may count as agents of governance for the purposes of the distinction. Is family, for example, an institution that may be so regarded? This question and others like it are no doubt of importance, but since I am interested in what seems to be a central case, namely political institutions, I don’t consider it necessary to include a more detailed discussion of this point.

Take the decision of an administrative authority imposing a duty on automobile manufacturers to install airbags in cars. In assessing whether this is a good decision, we must of course take into account the value of safety, the manufacturers' freedom to do business, consumers' rights etc. *Relative to this decision, these are the relevant first-order considerations.* But we will also be interested to know such things as whether in reaching its decision the administrative authority has observed standards of fairness and natural justice, whether it strayed beyond the powers that were delegated to it by the legislature etc. *Relative this decision, these are the relevant second-order considerations.* Notice how the two types of consideration are distinct. So, for example, it makes sense to ask whether the decision, though duly passed, has properly addressed the demands of safety. And conversely, we can imagine the authority violating fair-hearing requirements and yet arriving at a just outcome.

It is important not to confuse the distinction I have just introduced with the more familiar distinction between 'substantive' and 'procedural' values. No doubt, there will be many cases where the two distinctions will map on each other. But this will not always be the case. Suppose the legislature enacts a rule granting those accused a right against self-incrimination (assuming that they don't have such a right by virtue of the constitution). Protection against self-incrimination is surely a procedural value, but *relative to this decision*,⁴⁹ it is also a first-order consideration. So, procedural considerations can function as either first- or second-order considerations, depending on the legal issue we are facing. However, the same does not apply to substantive considerations, as traditionally understood. Thus, I cannot think of a substantive consideration that may play the role of second-order consideration. However this may be, the thing to note is that the distinction between first- and second-order considerations, is, as it were, relational, whereas the distinction between procedural and substantive values is supposed to track some deep, metaphysical line in the moral universe.⁵⁰

What is the appropriate response to second-order considerations, especially insofar as they apply to political institutions? I take it that the character of the response depends on the role one performs –or the position one occupies- in an arrangement that includes agents of governance, but I will not elaborate on this point here.⁵¹ Rather, I shall focus only on the response that attaches to the role of a judge in a legal system with courts and a legislature, assuming that the legislature is democratic and that it is a good thing to have ourselves governed by democratic institutions. I shall try to show that familiar aspects of the courts-legislature relationship and especially those that Shapiro refers to as 'vertical interlock' between different institutional actors in the joint activity of law can be explained by appeal to democracy as a second-order consideration.

⁴⁹ I write 'relative to this decision', because I take the most common case, where there is a decision that adjudicates on a specific issue. But perhaps the following more general formulation is more accurate: 'Relative to this question of law'.

⁵⁰ There are, I believe, important similarities between the account presented here and the account of decisions in terms of 'purely pragmatic second-order reasons' advanced by T. M. Scanlon in 'Reasons: A Puzzling Duality?' in R. J. Wallace, P. Pettit, S. Scheffler, M. Smith (eds.), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press, 2004) 231 at 240-246.

⁵¹ J. Rawls, 'Two Concepts of Rules' in *Collected Papers*, edited by Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999) 20 at 39.

The judge in our example of a legal system with courts and a democratic legislature may of course take pride in the fact that he is part of a legal system with a democratic legislature, and such a reaction too would be perfectly in order.⁵² But the value of democracy is not like the value of a beautiful painting. It is not something just to be looked at. When we live in a democratic state, we do democracy a good service if, among other things, we have the life of our political community effectively governed in accordance with democratic principles. Now, because the judge is a state official and occupies a critical place in the political order, he is expected to contribute to the promotion of democracy in a special way. He is expected, when delivering a judgment, to implement and possibly also further the decisions that have been made by the democratically elected legislature. He may think that on some particular occasion the balance of first-order considerations actually supports a solution that is different from the one dictated by the legislature, but the second-order consideration of democracy gives him reason –though perhaps not always an overriding one- to prefer the latter to the former. By assuming the role of a judge in the legal order he has, to use Rawls' terminology, 'abdicated his title' freely to act on the balance of first-order moral reasons.⁵³ For convenience, I will henceforth say that the judge has a *duty of respect* toward the legislature, by which I mean at a minimum that, as far as his official capacity is concerned, he must do his share to give effect to the legislature's decisions.

Now, let me try to connect this account of the judicial role to the problem at hand. How does the duty of respect help us rebut the straight-to-morality assumption? The answer is that the duty of respect crucially shapes the moral test that determines the judge's duties and powers under a natural law account. The proper formula is not 'What does justice require in this case?' but rather 'What is in my power to do given that I participate in the joint activity of law and owe a duty of respect to the legislature?' If on the natural law approach the judge's role were governed by the former question, Shapiro would be right to argue that natural law makes the judge –or any other participant in the practice of law- indifferent to the behavior of his fellow-participants. The latter question, by contrast, blocks such a conclusion. For, it makes evident that, in order to perform his role adequately, the judge must always look over his shoulder to see whether the legislature has decided something that is relevant to the case before him. If he finds in the record of legislative decisions something pertinent, he must give it effect. His reason will not just be that he happens to take part in a joint activity. It is rather the more complex reason that, insofar as the joint activity is relevantly governed by the principle of democracy, it is *pro tanto* a morally worthwhile activity, to which he has a moral duty to contribute. And the duty this more complex reason gives rise to will be very similar in content to the duty to have one's individual plans mesh in the relevant way with the acts and decisions of one's fellow-participants in a joint activity; that is, the type of duty legal conventionalists routinely make reference to. In short, while it is true that on this view judges look to moral theory, it is still not accurate to say that they look *directly* to it. By contrast, their reliance on moral theory is crucially mediated by second-order considerations.

⁵² There are, of course, many other responses to the value of democracy that are also appropriate, but like -feeling proud of one's legal system- need not detain us here. Besides, democracy can be valued even by people who do not participate in institutional arrangements that are democratic. They may refrain from obstructing the normal working of democratic states or write pamphlets about its advantages, for example.

⁵³ J. Rawls, 'Two Concepts of Rules', op. cit. fn. 51, at 31.

Thus, the idea of second-order considerations goes a long way toward explaining how law makes a practical difference; it does because the duties of participants in legal practice are determined by first- and second-order considerations alike.

Note how the preceding remarks help us acquire a better sense of my earlier claim that the natural law approach does not presuppose any kind of parsimonious ‘weak description’. It may be recalled that according to this claim the natural lawyer offers a value-laden explanation of one’s duty to contribute to the joint activity of law that is alternative to and competitive with the positivist ‘weakest description’. Now we can see why. For the natural lawyer values are *constitutive* of the joint activity. In fact they are constitutive of it in a way that weaves together the two major themes in the conventionalist package, interaction and plurality of roles. Take the value of democracy as an illustration. In the account of judicial duty put forward in the foregoing paragraphs, democracy has been employed both to distinguish one type of participant from another (legislatures embody this value, while courts do not –not, that is, in the same way), and the type of interaction between the two (by furnishing a moral reason for one to give effect to the decisions of another). It is (at least in part)⁵⁴ because the judge has strong democracy-based reasons to heed democratically reached decisions that he has a duty to ‘mesh’ his official behavior with that of the other participants in the joint activity, notably the democratic legislature.

By contrast, I have so far said nothing about another prominent theme in the conventionalist package, namely the place of citizens in legal practice. To do this at all satisfactorily would take us far from our present concerns. Suffice it to say for the time being that second-order considerations as is the value of democracy must have a grip not only on officials like judges but on private citizens as well. Compliance of the latter with democratically reached decisions may plausibly be thought of as one appropriate response to the value of democracy. It is a different matter –and one heavily depending on the contingencies of specific legal systems- in what further ways this normative grip of second-order considerations is cashed out in terms of citizens’ participation in legal practice. But there is, it seems to me, nothing in the structure of the account proposed here that precludes such participation.

It may be objected to my project that the value of democracy, though clearly relevant to the legitimacy of legislatures in a legal system, is too *abstract* to account for the content of the duty of courts to apply statutes. Unless we already have the concept of law application, we cannot derive it from some lofty political ideal like democracy. The political ideal might boost our confidence to pursue the task of law application, when the law we are to apply has democratic pedigree, but it cannot *constitute* that task. In response, it must first be pointed out that reference to courts as *law-applying* institutions, though admittedly embedded in common usage, seems to me to load the dice in the positivists’ favor. It presupposes that there is a body of norms, which come into existence by virtue of their provenance from the right source and must then be brought to bear on individual cases by the courts. Apart from that, it

⁵⁴ Which part the value of democracy and other second-order considerations play in determining the nature and content of judicial duty crucially depends, among other things, on the conception of the proper combination between second- and first- order considerations one happens to espouse. It must be stressed that the purpose of the discussion so far has not been to suggest what that conception must look like more specifically, but rather how the availability of second-order considerations changes judicial duty in a way that helps us rebut the straight-to-morality assumption.

is not obvious why the value of democracy might not be thought up to the task. Quite the contrary, the link between valuing democracy and *giving effect to* democratically reached political decisions is both firm and straightforward. That is what I argued judges are called to do. And clearly judges are very well placed to give effect to such decisions. The duty of respect readily follows from these two premises.

But perhaps the objection can be put in a weaker and more plausible form. Now, the objection doesn't say that democracy cannot make sense of the courts' duty to give effect to democratic decisions, but that as a matter of fact courts often (perhaps typically) do not need to invoke democracy at all to justify their giving effect to democratic decisions. Imagine a constitutional provision that dictates: 'Courts ought to give effect to the decisions of the legislature'. In such a case, it seems, the value of democracy plays no role in the determination of judicial duty. However, I think that in its revised version the objection carries us off the track. For, it raises a different question from the one that has preoccupied us so far, namely the source of the normative force of legal rules. This is a question that I shall take up in the following chapter. For present purposes, it suffices to point out that the example just adds complexity to the situation. It highlights that the joint activity of law is a project that current participants share not only with their contemporaries but also with those having taken part in it in the past. And the latter, of course, include the constitutional assembly. A natural law account must be able to make sense of this cross-temporal aspect of the joint activity of law. Here I can only indicate how the argument might go. It would have to concede that, relative to the constitutional provision, the value of being governed by a democratic legislature is no longer a second-order consideration. To account for the duty of respect the judge owes the constitutional provision, it would probably have to appeal to other reasons having to do with the appropriate body to make this sort of momentous decision and the proper procedure to follow when making it.

Generalizing from the example just discussed, it is worth adding one remark for the sake of clarification. Throughout, I have been using democracy to illustrate how the idea of second-order considerations can help us account for the constraints in individual action that arise in the context of the joint activity of law in a manner consistent with the tenets of natural law. But of course democracy is not the only second-order consideration that constrains the exercise of institutional power, nor should we suppose that, unless we find democracy embedded in a system of governance, that system does not merit to be called law on the natural law account. From this a couple of conclusions may be inferred. First, in sufficiently complex legal systems democracy is bound to coexist and often compete with other second-order ideals. In fleshing out the judge's duty of respect in such legal systems we must bring all these ideals to bear. Second, where democracy is absent, there may be other second-order moral considerations sustaining the joint activity of law and the duty of respect that makes such activity possible. This is not to deny the possibility that a given system of governance is for a variety of reasons such that no scheme of second-order moral considerations may plausibly be said to support a duty of respect on the part of participants. A clear-headed natural lawyer should be prepared to claim that such a system of governance does not generate any type of legal obligation.⁵⁵

⁵⁵ I am not precluding that such a system of governance may still be legitimately called 'law' in some further sense. For a distinction of various 'concepts' of law, see R. Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) Introduction.

A different objection might be that the value of democracy, even if sufficiently concrete, is not strong enough. At best, democracy only gives us a *very weak* reason to give effect to democratically reached political decisions. But this is not at all how judges understand their duty to apply statutory law. They believe that application of statutory law actually lies in the core of their institutional role. The suggestion is that if the foundation of the duty of respect is shown to be weak, this would imply that judges may ignore democratic political decisions without much regret and that they may regularly do this in favour of stronger moral reasons like the reason to do justice in particular cases. This line of reasoning is backed by the familiar thought that in extensive enterprises occasional violations of one's duties arising from participation in the enterprise do not have serious detrimental effect to its success.

There are a number of counter-arguments to this objection. First, my interest is primarily with the foundation of the duty of respect, not its strength or its scope. Accordingly, it suffices to establish that in many cases the value of democracy can plausibly be said to ground a duty of respect on the part of the judge to assist in carrying out the democratic legislature's decisions. Moreover, it is not part of my argument that the duty of respect exclusively turns on the pernicious consequences of non-compliance –for instance a state of affairs where the authority of democratic institutions is diminished in the eyes of legal subjects- and thus disappears in the absence of such consequences. There are many reasons, it seems to me, to uphold democratically reached decisions apart from such consequence-driven considerations. If this is true, then maybe the duty of respect is not so weak after all.

Second, it must be insisted that however weak the value of democracy is understood to be in general, it carries more weight as a consideration applying to officials of democratic regimes. As has already been noted, the position of officials in the legal system makes them particularly apt to give effect to democracy. Still more importantly, on the account I have presented, their office is defined precisely by appeal to the kind of values they are supposed to serve, in the proportions that they must serve them. To be a judge means to act in ways sanctioned by the conception of the judicial role in the legal system. Of course, we can imagine a judge abusing his position, and there is nothing incoherent in this. But even abuses of judicial power make sense only against the backdrop of an understanding of what that power involves in the normal case. And this understanding, I have tried to show, may be thought of as determined by normative parameters like the value of democracy discussed in this section.

Third, even if we face the objection head on, we ought to acknowledge that it stings with equal force any conception of our obligations under extensive enterprises, whether these enterprises are defined in terms of moral considerations as in the natural law approach or in value-neutral terms as in the common legal conventionalist position. There is nothing in the argument to suggest that the natural lawyer fares worse in providing a sufficiently strong ground for legal obligation as compared to his legal conventionalist counterpart. In fact, it seems that the former can probably do better than the latter. For, whereas the promotion of justice is a cause that could imaginably enlist quite a few willing officials, the cause of 'establishing and maintaining a unified system of rules' is rather unlikely to spark an equal measure of enthusiasm.

Finally, there is a more sweeping objection that we need to consider. This objection does not question the details of the argument but its overall thrust. It states that the sort of argument I have advanced is not even apt to rebut the straight-to-morality assumption with its corollaries, the organizational and the Stachanov arguments. The invocation of second-order considerations does not change the fact that in the end it is moral theory that calls the shots. But I hope that by now this objection will have lost all its credibility. Let me recap how the argument has gone so far. We have seen that moral disagreement cannot be the problem with looking directly to moral theory. Nor can the problem be that looking directly to moral theory unduly taxes participants' level of agreement or commitment to the joint activity. Moreover, if the natural law understanding of our duties under the joint activity is plausible, the problem cannot be that the type of cooperation-related obligations that joint activity gives rise to cannot be given a value-laden reading. So, absent a set of independent premises having little to do with the conventionalist package itself, it cannot be an objection to natural law theory that it makes the determination of law subject to moral considerations.

5. *Oil and water*

So far, I have said nothing about the way first- and second-order considerations are supposed to interact in the context of a legal system or any other institutional system. This is an important question that I take up in the next chapter. Importantly, I have not said –nor do I intend to argue– that second-order considerations bracket out or neutralize first-order considerations or a subset thereof. In fact, in the next chapter I will claim –contrary to the standard account exemplified in Joseph Raz's theory of authority– that the full range of first-order considerations operate alongside and are balanced against the relevant second-order considerations.

It may be suggested, however, that this understanding of the relationship of second- and first-order considerations, however fleshed out, undermines my rebuttal of the straight-to-morality assumption. I have in mind the following argument: 'First- and second-order considerations are like oil and water. They cannot ever be balanced against each other. So, either second-order considerations neutralize first-order ones – and thus the need to balance them does not arise– or, if one leaves both types of consideration to play out in the determination of the judge's role, first-order considerations will typically win out'. I will call this the *substance-wins-out argument*. This argument draws on the intuition that procedural propriety and substantive outcome point to so different moral concerns that they cannot both be brought under a single calculus. And on the further intuition that in the face of injustice procedural niceties are likely to be swept aside. As already stated, much of my response to this argument ultimately depends on the theory of the combination between first- and second-order considerations that I will try to develop in the next chapter. For the time being, I will restrict myself to pointing to an example where it seems to me clear that a balance between the two types of considerations seems intuitively possible. But before I turn to the example, let me make a point of clarification: When the distinction between first- and second- order considerations was first introduced, I warned that it was not another name for the distinction between substantive and procedural values. This remark makes it necessary to narrow the scope of the *substance-wins-out argument*. It does not apply to all cases that involve a

balancing of first- and second-order considerations, but only those, where the first- and second-order considerations stand for substantive and procedural considerations respectively.

So, is there any reason to think that second- order considerations may be balanced against and occasionally place constraints on first-order moral considerations? Some theorists find this incredible. Richard Wollheim famously argued that democracy –which I have argued is an important second-order idea- involves a paradox.⁵⁶ It commits one to hold both that one ought to pursue policy A and that one ought to pursue its opposite, policy B, by virtue of the fact that policy B has been decided upon by a democratic majority. One thing to note is that Wollheim’s concern does not affect only those theories that propound the possibility of balancing between second-order and (the full range of) first-order reasons but all theories that maintain it makes sense to say that under suitable conditions we ought to do what someone tells us we ought to do. For all such theories make room for the possibility that what we ought to do according to the instructions we receive may conflict with what we on our own judge would be appropriate.

Wollheim, of course, rests content to point to what seemed to him a paradox, while the *substance-wins-out argument* goes further than this and invokes the paradox to draw very concrete conclusions. But although admittedly it has an air of common sense about it, it is actually premised on a strongly counter-intuitive idea, namely that even a minor increase in the promotion of first-order values is preferable over the most dramatic deterioration of second-order values. In this way, it overlooks that what is at stake on the second-order side of the equation is not always a procedural nicety. It may indeed be something that we value greatly and would therefore be reluctant to trade for a minor gain on the first-order side. To illustrate this, take the following example. Imagine that the municipal council of an Italian city contemplates building a statute to honor the greatest painter of the Italian Renaissance. Suppose further I think that Michelangelo best fits the bill, but after a plebiscite the municipal council decides otherwise. Is its decision binding on me? May it legitimately claim my allegiance and support? Let’s compare two situations. In the first, an overwhelming majority of my fellow-citizens decide for DaVinci and in the second for Gabriel Angelo, who we may suppose was a minor and unoriginal painter of the period (perhaps an ancestor of the mayor). Whereas in the latter situation we may –depending on our artistic sensibilities- be unwilling to concede that the second-order considerations relevant to the decision (e.g. self-government) suffice to curb our first-order qualms with the resolution, in the former the people’s choice is not, to use a familiar terminology, patently unreasonable (in fact it is quite reasonable) and thus does not raise the same obstacles to its being accepted as binding on Michelangelo-lovers like myself; I may still think that my fellow-citizens have made an error of judgment but the second-order considerations counting in favor of their decision seem to be able to tip the balance, in the sense that they make it unjustifiable for me to withhold my support from my city’s effort.

The example I just gave did not show that one ought to defer to someone else’s dictate, however strong the first-order reasons are that militate against it, but

⁵⁶ R. Wollheim, ‘A Paradox in the Theory of Democracy’ in Laslett & Runciman (eds.), *Philosophy, Politics, Society* (Oxford: Basil Blackwell, 1969), 71.

only that on occasion it is at least intelligible. Moreover, if the distinction I am trying to draw between the two situations is intuitively appealing, it doesn't matter for present purposes that I have so far given no indication of the underlying principles that are supposed to govern trade-offs between first- and second-order considerations. In fact, I readily concede that in many cases the outcome of the contest may prove to be indeterminate. But, as already noted, I am here interested solely in establishing the *prima facie* intelligibility of such trade-offs, not delineating their contours.

6. *United We Stand*

It is now time to bring the threads of the argument together. Do legal conventionalists really share as much with natural-law theorists as I have argued? Perhaps the distance between them is still considerable. However, if the argument of this paper is successful, there is no need to suppose that legal conventionalists have a special right to the ideas making up the conventionalist package. Nor is there in a strong natural-law theory anything inherently incompatible with these ideas. Contrary to the organizational and the Stachanov arguments, I have employed the idea of second-order considerations to show that on the natural-law understanding participants in legal practice have good moral reasons to heed and occasionally also defer to the decisions of their fellow-participants; this moderates the extent to which they may pursue their own moral agendas within the auspices of the practice.

The great wars between the major jurisprudential schools will most certainly rage on, and this paper is not likely to change the way of things. Still, I hope it has at least shown that, sometimes, it is surprising to see who is fighting on your side.