

THE TWO LIVES OF LAW'S MORAL AIM

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1. The institutional nature of law and the joint activity of officials

That law is an institutional system is taken by many legal theorists to be one of its essential features.¹ According to a strand of legal conventionalist literature exemplified in Scott Shapiro's planning theory,² law's institutional nature is best cashed out in terms of a joint activity of legal officials. Law, it is claimed, essentially involves legal officials acting together;³ The task of legal theory is to elucidate the characteristics of this joint activity.

It is commonly thought that this insight gives legal positivism a comparative edge over anti-positivism, because it puts a social fact -official practice- at the heart of the philosophical explanation of law. Indeed, Shapiro and most other legal conventionalists are positivists.⁴ In previous work I sought to soften the contrast between legal conventionalism and anti-positivism. I argued that the notion of a joint activity of officials can be accommodated within what I termed robust natural law theories. These are theories that accept that moral

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¹ See for instance J Raz, *The Authority of Law: Essays on Law and Morality* (2nd edition, OUP 2009) ch 6.

² S Shapiro, *Legality* (Harvard University Press 2011).

³ One of the abiding themes of modern legal positivism is that it draws a sharp distinction between legal officials and citizens in its account of the social practice that provides the ultimate basis of the legal system. Positivists argue that, for there to be law, such a practice must hold among legal officials but need not include citizens. See for instance J Coleman, 'Authority and Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 287, 298. For different criticisms of this distinction see D Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (Oxford, Hart Publishing 2015) ch 5; G Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 164; S Taekema, Does the Concept of Law Need Officials? (2008) *Problema: Anuario de Filosofía y Teoría de Derecho* 157-183. In what follows I restrict myself to the official world so as to facilitate the comparison between the positivist account of the joint activity of law and the moralised one that I espouse. But, unlike legal positivism, I do not place a strong metaphysical emphasis on the distinction.

⁴ See J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001); A Marmor, *Legal Conventionalism* (1998) 4 *Legal Theory* 509. But see G Letsas, 'The DNA of Conventions' (2014) 33:5 *Law and Philosophy* 535.

considerations are, first, essential for understanding the legal phenomenon and, second, necessarily among the truth conditions of propositions of law.⁵ More specifically, I contended that robust natural law can endorse a moralized understanding of institutional cooperation (MUIC). According to it, it is morally important that legal officials look over their shoulder and ‘mesh’ their acts with those of other officials. The moral considerations that structure their activity -the joint project of governing- and their roles in it, necessarily determine (in part) the content of the law.

But it might be objected that the synthesis I advocate is a sham because it takes the wrong lesson from law’s institutional nature. If law is the joint activity of officials, as legal conventionalists claim, then it is necessarily ‘morally risky’.⁶ Once it is set in motion, we cannot be certain that it will live up to whatever ideals we think befits it. It may take the morally appealing shape that robust natural law theorists speak of, but it need not. Hence, it cannot be true that the content of the law is necessarily determined by the considerations that should structure it. Rather, we must look for the considerations that actually do so in this or that jurisdiction, whatever their moral merit. Any overlaps between what happens and what should happen are contingent on how a particular joint activity is arranged.

In fact, so the objection goes, we can account for the moral importance of the joint project of governing without papering over the contingent character of its success. In other words, we can say that the joint activity necessarily has a moral aim, but that it does not always achieve it. This is an old strategy, and it has recently been revived by Shapiro. Shapiro claims that ascribing an essential moral aim to official practice does not entail that the content of the law is necessarily determined by morality. Hence, by relying on such an understanding of law’s aim

⁵ D Kyritsis, ‘What is Good about Legal Conventionalism’ (2008) 14:2 *Legal Theory* 135-166. Non-robust natural law theories assign only the first role to moral considerations.

⁶ I appropriate here Leslie Green’s phrase but mean something slightly different and more modest. Green has in mind that being governed by law carries with it inherent risks. He writes: ‘There are moral risks that law’s subjects are guaranteed to run, and they are risks against which law itself provides no prophylactic’. L Green, ‘Positivism and the Inseparability of Law and Morals’ (2008) 83 *New York University Law Review* 1035, 1054.

he thinks we can inject just the right amount of moralised theorising into a basically legal positivist framework.

In this chapter I want to challenge Shapiro's strategy. However, I shall not do this by arguing directly against his conception of law's moral aim. Instead, I want to sketch a different one vindicating robust natural law theory and defend it from a number of criticisms. My goal is primarily constructive rather than critical, to clarify the ambition and main thrust of the moralized understanding of institutional cooperation I espouse and to compare it more fully to its positivistic counterparts. I shall argue that the idea of a joint activity plays a very different role in moralized and positivist accounts. In the latter, this role is explanatory: It is meant to capture the main characteristics of a more or less stable practice that emerges from the intentions and actions of a multiplicity of institutional actors; thanks to (some of) those characteristics the law can achieve its moral aim, but they do not guarantee that it will. In the former, joint activity plays a justificatory role: It is meant to identify a dimension of moral worth that inheres in legal officials' being under a duty to be responsive to and rely on what other officials say and do. This dimension underpins a cluster of factors that bear on the legitimacy of state power.

What is the theoretical payoff of this analytical exercise? I shall suggest that it is not a defect of MUIC that it dismisses political systems which fail its moral test. Importantly, this dismissal does not signal a conflation of what is and what ought to be. Quite the opposite, it flows from MUIC's tenet that law is a set of genuinely binding standards, which may diverge from what those exercising institutional power think they are. Thus, it is evidence of its fundamentally different orientation compared to legal positivism. Conversely, this analytical exercise will, if successful, also bolster the anti-positivist credentials of MUIC. It can help address the -this time- intramural objection that MUIC betrays robust natural law theory. According to this objection, MUIC gives undue weight in the determination of the law to the social fact that a political decision has been made. But this, I shall suggest, is a misunderstanding. When it goes well, the joint project of governing serves a genuine value, so it makes *moral* sense to require judges and other legal officials to defer to the decisions of their fellow-participants. Such

deference is not a concession to legal positivism. Ultimately, it, too, is mediated by moral considerations. Although it is not possible in this chapter to fully spell out and argue for the value of institutional cooperation, I hope to do enough to establish the plausibility of the proposal.

The chapter will be divided into three sections. In section 2, I shall present Shapiro's attempt to reconcile legal positivism and the belief in the law's essential moral aim. Over the following two sections, I shall defend my alternative conception of law's moral aim. First, I shall define the justificatory ambition of robust natural law theory and contrast it to Shapiro's descriptive ambition by reference to Ronald Dworkin's theory of law. Finally, in section 4 I shall defend the claim that this ambition is served by MUIC against objections from both positivists and anti-positivists.

2. The moral aim of law

In *Legality* Scott Shapiro contends that the central insight of MUIC can be assimilated by positivists such as himself. Shapiro thinks that this insight boils down to the idea that the joint activity of officials necessarily has a moral aim. He means by this that we cannot adequately understand law and distinguish it from other social practices without appreciating that it is supposed to serve a morally valuable aim. This is an essential feature of law.⁷ There are many social planning organisations, and one of the things that distinguish law from them is precisely its moral aim.⁸ Just like the function of telling time makes a clock the thing that it is, something is not law unless it aims to 'remedy the moral deficiencies of the circumstances of legality', namely the inadequacy of other means of organisation for solving many serious social

⁷ Les Green distinguishes two understandings of this type of view. One takes law to have been intended to serve a particular function. The other attributes to law the function of producing a certain consequence 'if the disposition to produce the relevant consequence figures in the best explanation of the existence or persistence' of law. See L Green, 'The Functions of Law' (1998) 12 *Cogito* 117, 118. Shapiro maintains that law belongs to the former category. He writes: 'The law possesses the aim that it does because high-ranking officials represent the practice as having a moral aim or aims.' (*Legality* 217) I am not interested here to assess this position. For criticism see D Plunkett, 'Legal Positivism and the Moral Aim Thesis' (2013) 33 *OJLS* 563.

⁸ For instance, the moral aim distinguishes law from 'sophisticated crime syndicates like the Japanese Yakuza and the Sicilian Mafia'. (*Legality* 215)

problems under conditions of social complexity and disagreement.⁹ As is well known, Shapiro maintains that law's remedy of those deficiencies takes the form of a joint activity on a massive scale, which makes plans for the community and communicates them through general and publicly accessible standards.¹⁰ That activity is 'official, institutional, compulsory, self-certifying'.¹¹

Shapiro insists that the ascription of this aim to law is compatible with grave iniquity. The joint activity of law may simply stray off the mark. Arguably, there is nothing metaphysically problematic about this. As Shapiro writes, 'unjust regimes are like broken clocks... They do not do what objects of their type are supposed to do'.¹² What does the moral aim thesis tell us about the controversy between positivism and anti-positivism? Since the mere fact that law has a moral aim does not preclude the possibility that it may fall short of it, determining the content of the law in this or that jurisdiction ought not to focus on what it would look like if the joint activity achieved its aim, because that would result in air-brushing the law in those jurisdictions where it does not. This, arguably, is the mistake of robust natural law theory, and it blocks from view important lessons, for instance, about the risks that inhere in law's operation and the special evils that law's presence makes possible and, under certain circumstances, augments. Legal positivists are particularly alert to those risks and evils, which are commonly associated with some of the characteristics of legal systems that Shapiro also stresses. Thus, for instance, the fact that being subject to law is not voluntary and that legal

⁹ *Legality* 213. Several commentators have suggested that the law is different from clocks because the function of clocks is determined by the intentions of those who build them, whereas arguably the same cannot be said of law, since there is law that has not been intentionally created. See for instance L Green, 'The Functions of Law', above n 7 at 117. Jonathan Crowe has offered a modified functionalist account of law, according to which the function of functional kinds is fixed either by the intentions of a creator or by social acceptance. See for instance J Crowe, 'Law as an Artifact Kind' (2014) 40 *Monash ULRev* 737. It goes beyond the purpose of this chapter to adjudicate between these two views.

¹⁰ *Legality* 203.

¹¹ *Ibid* 225.

¹² *Ibid* 391. In other places Shapiro opts for a different explanation, whereby what distinguishes law is not its aim but rather its mode of operation. According to this explanation, law is essentially an instrument, which 'like all instruments,...can be used for good or bad purposes. When the law is used for bad purposes, it is imperative not to paper over this fact by denying the identity of the instrument doing the damage. And when the law is used for good purposes, it is important not to become complacent and assume that it is guaranteed to succeed.' (*Ibid* 399)

regulation is streamlined by formal procedures can make a tyrannical programme more oppressive.

This does not mean that the moral aim thesis is without philosophical consequences. Solving serious moral problems is not a beneficial side-effect of the operation of law. It is what you get when law works as it is supposed to. As Green has put it, '[l]aw is the kind of thing that is apt for inspection and appraisal in light of justice; we might say, then, that it is justice-apt'.¹³ Thus, we should expect that law's justice-aptness reveals itself in and helps us understand (at least some of) its essential characteristics. In addition, since telling the time is what clocks 'are supposed to do', it makes sense to fault them for not telling the right time. Likewise, it makes sense to criticize law when it fails to solve a serious moral problem.¹⁴ In these respects, then, the moral aim thesis appears to offer us the best of both worlds. It delivers a clear-eyed vision of law, warts and all, as is the self-proclaimed ambition of legal positivism, while at the same time preserving the moral aspiration on which anti-positivists insist.¹⁵ Nonetheless, it keeps the two separate. It is thus better able to account for the law's successes as well as its failures.

It could be objected at this point that we should not exaggerate the separateness of reality and aspiration in functional explanations of law. Inevitably, the aspiration bleeds into the way we perceive reality. For one thing, it pushes us to say more about how an object might fail to fulfil its function. Even a broken clock must possess certain features for it to count as a clock. Presumably, an object without a mechanism for measuring time would not be a clock, even if it looked like one. Doesn't the same apply to law? It is an unresolved question in Shapiro's analysis whether law's moral aim sets limits to the range of failures that a legal system can commit while still being a legal system or the range of deficiencies that a legal norm may suffer from while still counting as a legal norm. Arguably, though, if it is an essential feature of law

¹³ Green, *Inseparability*, above n 5 at 1050.

¹⁴ *Ibid* 233.

¹⁵ I do not address here the question whether it is possible to attribute a moral aim to law without engaging in moral reasoning. Theorists such as Kenneth Ehrenberg claim that it is. See K Ehrenberg, 'Defending the Possibility of a Neutral Functional Theory of Law' (2009) 29:1 OJLS 91-113.

that it has a moral aim, then we should be able to draw such a line.¹⁶ For instance, Jonathan Crowe has argued that, in order for something to qualify as a legal norm, it is necessary -though not sufficient- that it be constitutively capable of performing law's function, which he defines as that of serving as a deontic marker by creating a sense of social obligation.¹⁷ Crowe contends that '[a] law that is so unjust or unreasonable that it is incapable of engaging human motivations to the extent necessary to become generally accepted as binding will therefore be incapable of performing law's function as an artifact'.¹⁸

Even with Crowe's qualification, however, we are a far cry from robust natural law theory. To begin with, for Crowe the inability to perform law's function may be due to a norm's formal characteristics rather than its content. An incomprehensible norm or one that contradicts itself falls in this category. More importantly, as Crowe himself emphasizes, many unjust norms will pass the threshold of lawhood, because they are capable of fulfilling law's function, that is, they can generate a sense of social obligation despite their moral shortcomings.¹⁹ This, after all, is a key insight of legal positivism, which Shapiro shares. The joint activity of law may well have been set up to solve serious moral problems, but it can easily be transformed into a force of evil if the joint activity is captured by wicked groups. This is a result that robust natural law theory cannot accept without rendering itself completely toothless. For robust natural law theory it is not sufficient that a putative law is capable of satisfying the moral criterion that it designates as essential to law; it must actually satisfy it.²⁰ Thus, even if we allow that a

¹⁶ This thought does not only apply to functional kinds like clocks. According to some philosophers, for instance, it is true of the concept of belief. These philosophers claim that beliefs aim for truth in the sense that they are 'regulated for truth' both descriptively and normatively. See N Shah and JD Velleman, 'Doxastic Deliberation' (2005) 114 *Philosophical Review* 497, 498. In his critique of Shapiro, Plunkett speculates along similar lines that the moral aim thesis may be understood to specify success conditions of legal practice. Plunkett contends that this rendition is most congenial to Shapiro's project but expresses some doubts about its plausibility. See Plunkett, 'Legal Positivism and the Moral Aim Thesis', above n 7 at 568ff.

¹⁷ Crowe, 'Law as an Artifact Kind', above n 9 at 750ff. Crowe distinguishes putative laws that fail this condition -and thus are not real laws- from defective laws which are not minimally adapted to law's function.

¹⁸ Ibid 753.

¹⁹ See relatedly Green, 'The Functions of Law', above n 7 at 122.

²⁰ By zeroing in on the value-laden test for legal rights and duties, robust natural law theory, as I define it, also differs from other versions of anti-positivist legal theory. Specifically, it distances itself from the view that law admits of gradations, such that a political order or norm may be more or less 'legal' depending on how closely it approximates the moral ideals that are intrinsic to law. It falls outside the scope of this chapter to evaluate this view.

functional account excludes abysmal moral failures of the joint activity of law from the concept of law, it does not collapse Shapiro's theory into robust natural law.

3. Describing and justifying

In the previous section I tried to show how you can be a positivist and still embrace the view that law necessarily serves a morally valuable function. At first blush, then, the addition of the moral aim thesis helps Shapiro paint robust natural law into a corner. Proponents of robust natural law commonly argue that their accounts are competitive with and superior to positivistic accounts: They are able to explain law in a way that brings out rather than suppress its non-redundant moral dimension. But perhaps you do not need to embrace robust natural law to do that. If Shapiro is right, the moral aim thesis accommodates both the intuition that the law is there to do good and the fact that it does not always succeed in doing so. On this view, robust natural law theory is confined to the separate justificatory task that legal positivists have always assigned to it. It does not set out existence conditions for law but only the conditions under which law, identified in a non-moralised manner, is morally justified. It is thus 'redundant' in the sense that it relies on legal positivism to determine the object of justification.²¹

In this section I take issue with this diagnosis. I shall argue that it ignores that Shapiro's planning theory of law and robust natural law have starkly different theoretical orientations, which are also reflected in the way they conceive of the essential moral dimension they attribute to law. I shall then show that MUIC has the same orientation as robust natural law theory and is therefore also immune to the redundancy argument.

Let's begin by considering the distinction Dworkin introduces in *Justice in Robes* between the sociological and doctrinal concept of law. The former refers to 'a particular type of institutional

²¹ In previous work I have examined this argument at the level of the methodology of jurisprudence. See D Kyritsis, 'Is Moralised Jurisprudence Redundant?' in K E Himma, M Jovanovic and B Spaic (eds), *Unpacking Normativity: Conceptual, Normative and Descriptive Issues* (Hart Publishing 2018) 1-15.

social structure',²² whereas we use the latter to state 'what the law of some jurisdiction requires or forbids or permits'.²³ When we talk about law in the former sense, it is not incoherent to claim that it was created to remedy the moral deficiencies in the circumstances of legality or that it has evolved to serve this morally valuable function, and at the same time that on occasion it fails. The way we proceed is we first identify the structure the concept refers to, and then we ask questions about its emergence, history, operation and functions. Even when we investigate the moral importance of that structure, our goal is explanatory. We want to know by virtue of which features it has this moral importance.

Nonetheless, this mode of inquiry makes little sense if our interest is with the doctrinal concept of law. The doctrinal concept of law refers not to a social institution, but a set of standards. For Dworkin, these standards set a (necessary) benchmark for the legitimate use of state power. In a famous passage he writes:

Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.²⁴

When Dworkin says that guiding and constraining the power of government is the 'point' of legal practice, he does not merely mean that legal practice has been created with this goal in mind, which it sometimes falls short of, or that this is its accepted function, even though it sometimes malfunctions. Rather, he means that for the doctrinal legal philosopher law just is what guides and constrains the power of government by justifying the use of state coercion in the special way that law does, namely by demanding that it be in line with past political decisions.

²² R Dworkin, *Justice in Robes* (Harvard University Press, 2008) 3

²³ *Ibid* 223.

²⁴ R Dworkin, *Law's Empire* (Hart Publishing 1998) 93.

Here, morality, not social ontology, has priority. For Dworkin, we determine the meaning of the doctrinal concept of law by interpretively identifying the moral principles that best explain and justify our past political decisions. The standards that form the extension of the doctrinal concept are grounded in or justified by these principles. Sure enough, on Dworkin's view, the doctrinal concept of law is sensitive to facts about institutional action. We ask what standards 'flow from' such facts. If the facts are different, the standards may be different, too. But these facts have this role only because and to the extent that the relevant moral principles assign it to them.²⁵ An institution may be salient or powerful in a given society; its decisions may enjoy broad compliance and thus effectively order that society. But unless there is a genuine moral principle justifying that institution's enjoying such an influence, if, for instance, it acts in a morally repugnant way, then it does not contribute to the doctrinal concept of law.

It might be argued that my description of Dworkin's theory is grist to legal positivism's mill. Recall that for many positivists Dworkin's theory has the exclusively justificatory task of sifting through the body of legal norms and identifying those that are instances of the legal system living up to its moral aim.²⁶ But this is a mistake. Dworkin does not start from identifying the institutional structure that is law, subsequently taking what standards it has produced, good or bad, as the raw material to be purified with the use of morality. As already explained, he puts moral principles, interpretively specified, at the driver's seat. *They* determine what is legally binding. The difference can be brought out if we consider that Dworkinian principles may give rise to legal standards that have no anchoring in social facts such as the decisions of institutions. Presumably, the positivistic picture can make no room for such legal standards.²⁷

²⁵ See relatedly N Stavropoulos, 'Legal Interpretivism', in Stanford Encyclopedia of Philosophy available at: <http://plato.stanford.edu/entries/law-interpretivist/>

²⁶ See among others J Gardner, 'Law's Aims in Law's Empire' in S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 207, esp 219-222

²⁷ This, recall, is the thrust of Dworkin's original critique of legal positivism in 'The Model of Rules'. See R Dworkin, *Taking Rights Seriously* (Duckworth 1978) ch 2. According to his description the principle that no man may profit from his own wrongdoing was legally binding in New York even before the Court of Appeals decided *Riggs vs Palmer*. Dworkin used this case to illustrate his claim that what makes a standard legally binding is not its pedigree, as legal positivists would have it, but its justificatory force. Tellingly, legal positivists have responded to Dworkin's critique by seeking to expand the range of ways in which a standard can be anchored in social facts. For instance, John Gardner offers the following formulation: For legal positivism 'law is made up exclusively of norms that have been announced, practiced, invoked, enforced or otherwise engaged with by human beings acting on law's behalf'. See J Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 1, 199-227.

It could perhaps allow that a well-functioning legal system should include them. However, unless they are connected in the right way with the actual operation of an existing legal system, it cannot admit them into the set of valid legal norms. Again, Shapiro's theory provides a nice illustration of this point. Since law is for him a system of interlocking intentions to create a master plan for social organisation, a legal norm does not exist unless it figures in the content of those intentions or has been 'created in accordance with, and whose application is required by, such a master plan'.²⁸

The critic might insist at this point that Dworkin still gets the order of explanation wrong. Legal practice is not inert until it has been touched by interpretation. It would make no sense to interpret legal practice in light of moral principles, unless it was already in an important sense geared towards, say, justifying state coercion.²⁹ And if it so geared, it must be by virtue of more general features than those picked out by the moral principles; otherwise there would be no work left for interpretation to do. These are precisely the features that a less morally demanding account like Shapiro's planning theory can capture. For instance, such a theory can help explain why law and not some other social practice is charged with regulating state coercion.

Again, the critic conflates two very different theoretical projects. It may well be that talking about the doctrinal concept of law would not make sense in a society that lacked a certain kind of social organisation. It is perhaps true that, when we examine the features of that social organisation, we do not need to appeal to moral principles. For example, we analyse the beliefs, intentions, claims, and/or attitudes of those who act in its name or are subject to its

²⁸ *Legality* 225

²⁹ Mark Greenberg tries to account for this with the bindingness hypothesis: "[A] legal system is supposed to operate by arranging matters in such a way as to reliably ensure that, for every legal obligation, there is an all-things-considered moral obligation with the same content." See M Greenberg, 'The Standard Picture and its Discontents,' in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law* (OUP 2011) 84. Greenberg is careful to note that the bindingness hypothesis is not necessarily a claim about law's function, though it could be cashed out in functional terms too. The bindingness hypothesis conveys the broader idea that 'it can be part of the nature of something that does not have a function that it is supposed to have a certain property or is defective to the extent that it does not'. (Ibid ???) In subsequent work Greenberg has put the point in a weaker form. He writes: 'On the face of it, law-creating institutions try to create binding obligations'. See M Greenberg, 'The Moral Impact Theory of Law' 123 *Yale L.J.* (2014) 1288.

edicts, regardless of whether they are morally misguided. But according to Dworkin that examination will tell us nothing about the content of the law; at best, it will give us an insight into what people *take* the law to be, not what the law truly is.

4. Two ways of caring about institutions

It could be said that MUIC occupies an uneasy middle ground between Dworkin's justificatory jurisprudence and the explanatory jurisprudence that aims to explicate the sociological concept of law. Recall, for MUIC the law -at least in a subset of legal systems-³⁰ is also essentially determined by the interaction of institutions such as courts and the legislature. MUIC states that under certain circumstances this interaction enhances the legitimacy of a political order. In other words, the use of state force is *pro tanto* legitimate when it is produced by the right sort of institutional interaction. MUIC also maintains that this legitimacy-enhancing effect is distinctly 'legal'; it is part of what it means for the use of state force to be governed by law. To this extent, MUIC shares Dworkin's justificatory ambition. However, on the suggestion we are considering MUIC is simultaneously beholden to the sociological outlook on law that Dworkin thought unsuited for the doctrinal concept of law. The worry is not simply that MUIC allows that the content of the law may be morally sub-optimal. Any robust natural lawyer must countenance this possibility. For instance, Dworkin distinguishes between the grounds of law, 'circumstances in which particular propositions of law should be taken to be sound or true'³¹ and the force of law, 'the relative power of any true proposition of law to justify coercion in different sort of exceptional circumstances',³² as he thinks that, although normally the law on his conception comes with a moral warrant, there may be cases where, exceptionally, this warrant is defeated by overriding moral considerations. Even more pertinently, he contends that integrity, which he argues is the best articulation of the value of legality, demands that the state act in accordance with a 'plausible conception of equal concern',³³ not the optimal one. So, occasional deviation from the demands of ideal justice is in principle compatible with robust natural law. Why, then, should we think of MUIC as

³⁰ For this qualification see D Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (Hart Publishing 2015) ch 1.

³¹ Dworkin, *Law's Empire*, above n 24 at 110.

³² *Ibid.*

³³ *Ibid* 201.

‘turncoat natural law’? Here I shall examine two arguments to this effect. The first one is that MUIC makes a major concession to the sociological concept of law because it cannot but take as a value-free given which body is a court and which a legislature. The second is that MUIC is not really a form of robust natural law because it allows that certain facts, decisions issued by competent institutions, make a contribution to the content of the law without the proper mediation of moral considerations. Let me take each of these arguments in turn.

A. The social dimension of the joint project of governing

The first argument puts forward a variant of the criticism against Dworkin that we considered earlier, whereby interpretivism presupposes a positivist account of law. This criticism seems to have more bite against MUIC, which, after all, talks about courts and the legislature working together in the joint project of governing. Surely it must rely on a prior identification of those bodies. Remember, the planning theory of law has the resources to make that identification without reliance on political morality. What makes a body one whose decisions feed into the content of the law is that others have an intention to mesh their acts with those decisions, follow them, heed them etc and vice versa. That is simply a (complex) social fact. So, if MUIC is helping itself to such a criterion for identifying who counts as a partner in the joint project of governing, it tacitly puts social ontology before morality.

This argument is based on a misunderstanding. MUIC does not assume that membership in the joint project of governing is constituted by the intentions of legal officials (to carry on the project and mesh their acts with those of other officials).³⁴ That is not to say that MUIC looks at institutional cooperation through rose-tinted glasses whereas planning theorists take a more realistic approach. Rather, the difference reflects the underlying disagreement between the two views on what determines the content of the law. Planning theorists take the law to consist in whatever plan a group of officials intend to pursue collectively. For MUIC a set of interlocking intentions, even if they amount to a collective agent, do not by themselves give

³⁴ In this respect there is a crucial philosophical difference between MUIC and the understanding of institutional cooperation animating the planning theory, which follows more closely Michael Bratman’s theory of collective agency.

rise to legal rights and duties; coercion does not become any more legitimate simply by being carried out by this kind of collective agent. Only a joint project of governing that is internally organised in the right way *can* give rise to legal rights and duties. Hence, according to MUIC what matters for membership in the joint project of governing is, for instance, who has the requisite moral credentials to govern or stands in the requisite moral relationship with other participants in the project so as to demand their deference and support. This sort of criterion will likely pick out different institutions from the planning theory; for one thing, it will disqualify more than a few that would count as legal under that theory.

It is no accident that MUIC is far less austere than the planning theory. Inevitably the former depends on a whole host of controversial claims about the moral importance of various institutional arrangements and the contribution they make to the legitimacy of political regimes. This has repercussions on the issue of membership in the joint project of governing. For instance, MUIC assigns weight to the acts and decisions of courts and legislatures insofar as they instantiate values like impartiality and democracy, respectively. To be precise, it assigns weight to the decisions of the institutions that instantiate the relevant values, and in the legal systems with which we are familiar courts and legislatures typically fit the bill. Conversely, if an institution does not instantiate those values, it does not count as a ‘court’ or a ‘legislature’ for MUIC, regardless of what we call it or how effective it is in securing the cooperation or acquiescence of other institutions.³⁵ Elsewhere I have suggested that the overarching principle of political morality that should structure the joint project of governing is separation of powers: when the joint project of governing adheres to separation of powers, it enhances the legitimacy of the political regime.³⁶ On this picture, separation of powers allocates government

³⁵ It may be objected that this formulation ignores the gradated character of the concepts of a court and a legislature. These concepts capture an ideal, which actual institutions can achieve to a lesser or higher degree; consequently, it is misguided to focus on the question what ‘counts’ as a court or a legislature. Be that as it may, it does not undermine the claim I am making here. For MUIC what matters is whether the values of impartiality and democracy justify giving this or that actual institution a measure of influence over the content of the law. It is possible that the answer to this moral question is gradated: the lower a legislative institution scores, say, on democracy, the less influence it ought to have. Maybe a legislature that is not fully democratic is better than none at all, but its decisions must be taken with a pinch of salt. Or maybe, lacking sufficient democratic credentials, it must fall back on a residual justification, such as predictability, for its enduring, albeit limited, influence on the content of law. Nothing I say is incompatible with this possibility. I am grateful to Wibren van der Burg for urging me to address this objection.

³⁶ See D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017) ch 2. There I argue that the ideal of separation of powers should not be tethered to the traditional conception that

tasks to institutions that are by virtue of their composition and position in the joint project well-suited to carry them out. In other words, it is separation of powers -a moral principle on my rendering- and not social ontology that supplies the criterion for identifying participants in the joint project of governing. Legal interpretation will then specify the bearing on the content of the law of institutional facts regarding those participants.³⁷

As we have already seen in our discussion of Dworkin, upon hearing talk of moral criteria, some legal positivists immediately cry 'foul'. They lament that the line between what the law is and what it ought to be has been crossed. However, MUIC is not an exercise in ideal political theory. Legitimacy works on actual institutions that exercise more or less effective control over a territory. What MUIC asks is what it takes for an actual institution to acquire a moral warrant to direct how coercive force may be used. When it acts with such a warrant, it affects our legal rights and duties. It may be argued that this formulation gives the game away, in the sense that, for an institution to exist, we must have something like a Bratmanian collective agent in place who is constituted by the interlocking intentions of a group of people. Granted, a robust natural lawyer would deny that the social fact that such an agent has planned something is sufficient for the obtaining of legal rights and duties -the agent must possess moral credentials as well. Presumably, though, all that the positivist need demonstrate is that this kind of social fact is necessary.

envisages a rigid tripartite distinction of organs of government, each assigned a distinct government function. Rather, on the view I propose separation of powers should be understood, more broadly, to comprise a principle of division of labour and a principle of checks and balances, both of which can be specified in different permissible ways in different jurisdictions. Despite its flexibility, though, separation of powers sets a high bar for legal orders to clear. They must be institutionally arranged (by dividing government tasks and putting in place supervisory mechanisms) in such a way that they will reliably and systematically (though not necessarily unfailingly) act in a morally justified way. To ward off a possible misunderstanding, I should add that I am not claiming separation of powers is the master-value of law (in the way that integrity is for Dworkin), solely that it is a value that underwrites the joint project of governing in the legal systems with which we are familiar. But legal interpretation will need to invoke additional values, which cannot be subsumed under separation of powers.

³⁷ I have distinguished the question of membership from the question of determining the content of the law. But this was done for analytical purposes. In legal interpretation the two questions are intertwined. For one thing, considerations pertaining to the former question will adjust the moral significance of institutional facts. For example, a piece of primary legislation is likely to better promote legal certainty and therefore have pro tanto more weight, morally speaking, than a decision of an administrative agency.

My response to this line of argument mirrors the more general response that I offered in Dworkin's defence in the previous section: *Some* complex set of social facts comprising, among other things, intentions and beliefs of officials and private citizens, is undoubtedly necessary for the joint project of governing to gain a foothold in society. A sociologist may well find in the same set plenty of Bratmanian agents, too. However, it is a mistake to infer from this that the Bratmanian agents as such play a constitutive role in MUIC. According to MUIC the contribution courts and legislatures make to the content of the law depends on the moral considerations that structure the joint project of governing; these considerations will often identify as relevant to the content of the law aspects of institutional cooperation that diverge from what this or that agent, collective or otherwise, had intended. For instance, on some occasions they will give rise to legal rights and duties that overshoot or contradict actual intentions.

B. Turncoat natural law?

The argument we have just considered is one a positivist would more likely advance, seeking to cast doubt on the status of MUIC as an alternative to legal positivism. The second objection, which we shall examine in this section, would instead be pressed by an anti-positivist. Its thrust is that, rather than vindicate robust natural law, MUIC betrays key tenets of it.

What does the alleged betrayal consist in? MUIC insists that, by virtue of its participation in the joint project of governing, one institution, say a court, must be responsive to the acts and decisions of another such as the legislature. Sure enough, institutional responsiveness sometimes takes the form of deference. But the critic cannot mean that such deference *per se* is incompatible with the robust natural law commitment that all legal rights and duties must satisfy standards of moral legitimacy. To the extent that a duty of deference to the legislature exists, it is a moral one. Its existence depends on whether this or that aspect of the joint activity of governing, say, the assignment to the legislature of the power to shape legal rights and duties, is morally justified in the right way. Only if it is, can a legislative exercise of that power affect the content of the law including the responsibilities of other officials. In my earlier defence of MUIC I used democracy as an illustration. I suggested that this value can furnish a

general basis for the duty of judicial deference to the legislature.³⁸ When a state body instantiates the value of democracy, other state bodies like courts have at least a pro tanto moral reason to respect and give effect to its decisions. This example illustrates a wider point, namely that the moral merit of the joint project of governing is not judged solely at the substantive or retail level, by looking at the specific rights and duties its operation gives rise to, but also at the level of institutional design. At the latter level we focus on the institutional system that produces them. Legitimacy demands that the system, too, meet certain moral criteria.

It may be thought that deference is incompatible with robust natural law because it allows a social fact -the legislative decision- to trump an interpretive fact. For instance, so the claim goes, it sometimes instructs a judge to enforce a statute-based right or duty, even if this would be sub-optimal from the point of view of the principles that best explain and justify the rest of the law in her jurisdiction. This claim is question-begging. It assumes a premise that MUIC can plausibly deny, namely that there is a conflict between the best interpretation of legal practice and the judicial enforcement of the statutory right or duty. However, if deference is truly morally justified, then the principles that justify it will figure in the best interpretation of legal practice and will thus be balanced alongside other principles. The judge must defer only when this course of action is mandated by this more holistic exercise. But in that case deference would flow from the best interpretation of legal practice. Of course, someone might be sceptical that any principle can be found justifying deference. There is nothing particularly troubling about this. As noted earlier, robust natural lawyers cannot afford to be parsimonious; they must advance contested moral claims about the connection between law and legitimacy. Though deference might well fall at this hurdle, its failure would be a substantive issue; it would not signal the surreptitious influence of legal positivism.

Perhaps, then, the problem lies in that deference attributes the wrong kind of attitude to legal participants. In the standard interpretivist story, the judge assumes a Protestant attitude

³⁸ See Kyritsis, 'What is Good about Legal Conventionalism', above n 5 at 156ff.

towards legal practice.³⁹ She must, we are told, exercise her independent judgment in order to figure out which principles best explain and justify it; once she has identified those, legality requires that she enforce any rights and duties that flow from them; she should not refrain from doing so out of deference to the decision of another institution, even if it is the legislature.

Understood a certain way, this objection merely repeats the one examined in the previous paragraph and fails for the same reason: For the judge to show the right attitude, she would need to take into account principles counting in favour of deference just as much as any other principle that explains and justifies legal practice. But understood in a different way, the objection makes a mistake that highlights the relative strengths of MUIC vis-à-vis other variants of robust natural law. To wit, the objection could be construed to rest on the thought that the judge must take it upon herself to second-guess every other participant in the joint project of governing in the name of the law.⁴⁰ The theory of collective action shows why this is not the case. Whatever we take law's aim to be, it is one that is served by the joint project as a whole rather than by any one participant individually. Thus, the judgments, moral and otherwise, that are for courts to make depend on their -inevitably limited- role in that project. On this picture, holding a Protestant attitude means no more than honouring the responsibility of making just these judgments and no more.⁴¹

Alternatively, critics might concede that deference is in theory compatible with interpretivism but insist that it will systematically give rise to a serious tension further downstream. Here's a scenario that illustrates the tension:⁴² An institution that permissibly contributes to the joint project of governing decides to *disable* another institution that also has such a warrant under the moral principle of separation of powers. This seems to be a scenario where MUIC turns in on itself. Can it be avoided? The worry relies on a very static understanding of the moral principles that determine when the joint project of governing goes well. Morality does not lock

³⁹ Dworkin, *Law's Empire*, above n 22 at 413.

⁴⁰ I should emphasise that I do not think Dworkin makes this mistake in his account of the Protestant attitude.

⁴¹ In fact, deference can also have the function of allocating interpretive judgments among participants in the joint project of governing. See on this issue Kyritsis, *Shared Authority*, above n 29 at 120ff.

⁴² I am grateful to an anonymous referee for suggesting this scenario.

political orders into a specific institutional arrangement. Separation of powers also assigns the responsibility of changing the division of labour among participants in the joint project of governing, thus allowing for it to evolve over time. What if the institution charged with this responsibility strips another institution of its powers, when there are moral considerations that count against such a course of action? This situation is no different from any other situation when the joint project makes morally suboptimal decisions. Some of those decisions (say, assigning the judicial function to officials that completely lack judicial independence) will be morally beyond the pale, as far as separation of powers is concerned, and hence cannot be legally binding. By contrast, others will have legal effect despite their moral shortcomings, because those shortcomings are compensated by the value of having a joint project of governing in good (though not infallible) working order. Whether that is so will partly depend on the moral health of the rest of the joint project of governing as well. Perhaps a barely legitimate political order can ill afford a further moral deterioration, whereas more vigorous ones can get away with the occasional lapse without losing their overall legitimacy. Still, there is nothing in MUIC that counsels complacency. A legitimate political order can die of a thousand cuts.

5. Conclusion

Important philosophical ideas are likely to crop up in different places and enrich different viewpoints, even conflicting ones. The same goes for the idea of a joint activity as applied to the theory of law. This makes it even more pertinent to clearly distinguish the role it plays within positivist and robust natural law frameworks such as Shapiro's planning theory and MUIC respectively. In this chapter I have argued that the gap between these frameworks cannot be bridged by combining the moral aim thesis and the planning theory. That would be merely to add a layer of moral aspiration to a social structure identified in a non-moral way. For MUIC, by contrast, the idea of a joint activity is thoroughly moralized. It develops a crucial moral insight, namely that under certain conditions the fact that law is administered by institutions acting *jointly* makes an important moral difference; that fact bolsters the legitimacy of state power. The goal of a theory of law is to spell out these conditions and specify how, when these conditions are met, legal institutions contribute to the content of law.