# BETWEEN SHAPIRO AND BERMAN: REFORMULATING PRINCIPLED POSITIVISM

*Liev Markovich*[1]

*This paper analyzes two particularly illuminating defenses of legal positivism: Scott Shapiro's "The Hart-Dworkin Debate: A Short Guide For The Perplexed" and Mitchell Berman's "How Practices Make Principles And How Principles Make Rules." First, a general overview of the debate between positivists and non-positivists establishes the context, followed by an examination of the three strongest objections posed by non-positivists to positivists. An analysis of how Shapiro and Berman answer these objections leads to the proposition that Shapiro's article acted as a philosophical precursor to Berman's "principled positivism." Finally, two original questions are posed regarding Berman's article and addressed utilizing concepts from Shapiro's paper. These supplemental concepts from Shapiro's paper yield a fuller picture of principled positivism—one that better explains judicial behavior and more effectively defends itself against challenges.*



## I. POSITIVISTS VS. NON-NON-POSITIVISTS

This debate between positivists and non-positivists centers on the grounds of law—that is, the source from which legal content is derived. Positivists, following the work of H.L.A. Hart in *The Concept of the Law,* argue that the content of the law is entirely grounded in social facts such as written constitutions, statutes, and judicial decisions, without relying on

[1] Liev Markovich is an editor and a writer for the YU Undergraduate Law Review. He is a senior at Yeshiva College majoring in Philosophy.

moral considerations. Near-consensus judicial acceptance of—called the "ultimate rule of recognition"—grounds fundamental legal norms, which combine with legally relevant phenomena to produce legal norms.[2] In contrast, non-positivists, following Ronald Dworkin in *Law's Empire,* believe that moral factors also play a role in grounding the law, and perhaps an even more authoritative role than social factors. As Shapiro puts it: "Should law be understood to consist in those standards socially designated as authoritative? Or is it constituted by those standards morally designated as authoritative?"[3] At the center of the debate between positivists and non-positivists lies the question of how to explain judicial decision-making: How do we make sense of judicial decision-makers' decisions and explanations? The primary critiques that non-positivists bring against positivists derive from judicial decisions that apparently cannot be explained without morality grounding the law, such as *Riggs v. Palmer*,[4] *Henningsen v. Bloomfield Motors, Inc.,*[5] and *TVA v. Hill*.[6] [7] Moreover, the debate bears on questions of legal interpretation: Should the law be interpreted in its best moral light (non-positivists), or should it be interpreted primarily according to social factors (positivists)?

In the next portion, this paper will summarize the three most compelling arguments that non-positivists have leveled against positivists: the problem from theoretical disagreements, the problem from "too little law," and the problem from "non-lexical determination." Shapiro only

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[2] *See* Mitchell N. Berman, *How Practices Make Principles and How Principles Make Rules*, 19 LEGAL THEORY 307, 307 fig. 1 (2013).

[3] Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 18 (Arthur Ripstein ed., 2007). My explanation of the debate between positivists and non-positivists is incredibly short for the purposes of this paper. For a more comprehensive explanation of the debate that deals more deeply with its nuances, see Shapiro, *id.* at 1-15.

[4] *Riggs v. Palmer,* 115 N.Y. 506 (1889).

[5] *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

[6] *TVA v. Hill*, 437 U.S. 153 (1978).

[7] These cases will be discussed below. *But see* LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 8–14 (2014) (attempting to separate adjudication questions from grounds-of-law questions).

addresses the first, while Berman both proposes and answers the latter two.

## II. CHALLENGES TO POSITIVISM

Since H.L.A. Hart's "The Concept of Law" was published, the default position in legal theory has been positivism. Positivists stand on a high ground, and non-positivists attack from below. Early critiques, such as those from Ronald Dworkin's "The Model of Rules I," were met with responses by defenders of legal positivism. For example, an early critique by Dworkin posits the fact that judges will sometimes invoke moral principles not grounded in past legal practice as if they were legally binding. For example, in *Henningsen*, the court ruled in favor of the plaintiff by introducing the novel legal principle that "in a society such as ours, the automobile manufacturer is under a special obligation in connection with the construction, promotion, and sale of its vehicles." Positivists answered this challenge in two ways:

1. Exclusive Legal Positivism: Where the law runs out, the rule of recognition leaves judges with the discretion to apply extralegal, moral standards in certain cases, and therefore "legislate."

2. Inclusive Legal Positivism: The rule of recognition can incorporate moral tests as a condition for legality. So morality can "internally" ground the law, but it can only do so via social acceptance, meaning that social facts still ultimately ground the law.

The problem of theoretical disagreements provides a tougher question to legal positivists. The non-positivist argument assumes that positivists adhere to the "plain-fact" view of law, where fundamental legal norms are established by consensus among legal officials through an ultimate rule of recognition. Thus, disputes about these norms would only involve questions of historical consensus. If an ultimate rule of recognition establishes fundamental legal norms, judges who agree upon historical facts cannot disagree about these norms. However, judges do indeed disagree about fundamental legal norms while agreeing upon empirical facts, as shown in cases like *TVA v Hill*.[8] If the law is socially grounded, it is incoherent for judges to claim they are accessing legal fundamentals while disagreeing about those very fundamentals. For example, if the "plain-fact" view is correct, for it to be a fundamental legal norm that the "original public meaning" of the US Constitution dictates the law in hard cases, then almost every relevant legal actor would have to agree upon that norm. However, it is clear that not every legal actor is an originalist, yet originalists still believe that "original public meaning" dictates the law in hard cases. Therefore, positivism cannot be true, and something besides official judicial consensus must ground fundamental legal norms; namely, moral factors, especially those related to political morality. For non-positivists, when judges have theoretical disagreements, these are disagreements about which moral factors are relevant in grounding fundamental legal principles.

Berman, in his article, deflects the problem from theoretical disagreements. He argues that positivism can be true even though judges do not realize that fundamental legal norms must be grounded in judicial near-consensus, as positivists argue. Judges simply do not appreciate that their disagreements over fundamental legal norms mean neither side has valid legal grounds for their decision. (Berman, 314-315). However, this is a weak argument, as theoretical disagreements are not limited to judges but also extend to legal scholars; they pervade the field of legal theory. Perhaps judges, for political reasons, are shielding their attempts to legislate from the bench under the banner of theoretical disagreements. But can it really

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[8] *See infra* Part IV (discussing principled positivism in detail).

be true that the whole profession of law is so confused about its own field that its main debates are all incoherent?

Shapiro answers that fundamental legal principles are determined by the "purpose" of a given legal system rather than the "plain facts." Positivists must construe this purpose not as grounded in moral reasoning, but in the legal system's historical objective. He argues that the job of judges and legal theorists in setting out methods of legal interpretation is to "impute to legal practice the political objectives that the current designers of the legal system sought to achieve.[9]"[10] Therefore, "theoretical disagreements would simply be a product of disputes over which purposes are in fact the objectives of the system or about which methodology best harmonizes with those objectives."[11] The problem of theoretical disagreements has been blunted: Instead of an ultimate rule of recognition shaping fundamental legal principles, the purpose of the legal system fulfills this role, with said purpose grounded in the system's social facts. Theoretical disagreements are hermeneutical disagreements about what those purposes are, and can thus exist even when everyone agrees on the historical record.

Berman proposes other arguments against legal positivism. First is the problem of "non-lexical determination." Positivists, even within Shapiro's framework, believe that legal principles determine legal rules "lexically," meaning that there is a clear hierarchy of principles and certain inputs of principles will always lead to the same result. For example, if there is a case where the legal principles of "freedom" and "equality" are at odds, then the social facts of the system must determine that either freedom always wins or equality always wins. However, Berman argues

[9] The "current designers" of a legal system are not limited to the original designers. Shapiro, *supra* note 3, at 44.
[10] *Id.* at 44
[11] *Id.* at 43

that legal principles work "non-lexically": different principles have certain weights, and those weights will sometimes combine in different ways to produce different outcomes.[12] Depending on the facts of the case, freedom will sometimes prevail over equality, and equality will sometimes prevail over freedom.

Another problem for positivists is the challenge from "too little law." If the law is grounded in social facts—and especially if it is grounded in an ultimate rule of recognition—disagreements about fundamental legal principles mean that in many hard cases, judges may have to legislate new rules because there is no precedential law on which to base a ruling. This would go against the common intuition that in most cases, even difficult ones, a "correct" answer exists "out there" that can be determined by the objective principles of the legal system.[13] Shapiro's rejection of the "plain-fact" view somewhat blunts this criticism, but it still remains in situations in which the social facts of a legal system do not clearly determine its purpose. For example, if we stipulate that the "purpose" of the American legal system, as determined by the political objectives of its designers, is to promote both freedom and equality, resorting to the system's "purpose" will not provide a helpful answer in a case in which freedom and equality conflict.

## III. PRINCIPLED POSITIVISM

Berman's answer to these challenges lies in a legal theory he calls "principled positivism." In principled positivism, "taking-up behaviors"—such as legal decisions and prevailing scholarly opinions—determine legal principles and their weights. These principles are activated by the specific conditions of a case, guiding the decision in a

[12] Berman, *supra* note 2, at 311–13.
[13] *Id.* at 316.

particular direction.[14] The introduction of activation solves the problem of non-lexical determination because even though one principle may be weightier than another, it is possible for the less weighty principle to be more activated in a given case and prevail over the weightier principle. For example, even if freedom is generally a weightier principle than equality, sometimes the facts of a case will "activate" equality to such an extent that the correct legal decision will be in favor of equality. It also solves the too-little law problem since the weights and activation of legal principles will always determine the proper legal decision. There is a mix of weights and activation "out there" that pushes the decision in one direction or another.

Berman applies his framework to the infamous "snail-darter" case, *TVA v. Hill*. The Tennessee Valley Authority had invested millions of dollars in a dam project that, nearing completion, was found to violate the Endangered Species Act (ESA) of 1973 because it threatened the snail darter, which had been placed on the federal endangered species list in 1975. The majority of the Supreme Court, in an opinion written by Chief Justice Warren Burger, ruled that construction must be halted on the dam, while Justice Lewis Powell dissented for the minority on the grounds that congressional statutes should not result in "absurd" implications. This seemed to be a theoretical disagreement about the authority of legislative enactments, but Berman understands it as a dispute over the weight and activation of three principles: "what the statutory text means matters; legal intentions of the enacting legislature have force; absurd results should be avoided."[15] While Burger and Powell agreed that the first two principles are weightier than the final principle, Powell perhaps gave greater weight to avoiding absurd results than Burger. However, they disagreed most strongly on the

[14] *See* Berman, *supra* note 2, at 320, 326 figs. 2–3.
[15] Berman, *supra* note 2, at 339.

activation of the first two principles. Burger viewed the meaning and intention of the ESA as clearly directing that the dam construction should cease, meaning that the first two principles were activated strongly enough to push the decision toward halting construction. In contrast, Powell did not think the statute's language clearly directed halting the dam's construction and maintained that it is unclear whether Congress intended to halt projects that are close to completion at the time a species is listed as endangered. Therefore, principle one was only mildly activated, principle two was neutral, and principle three was strongly activated, pushing the decision toward allowing construction.[16] Berman answered the "non-lexical determination" and "too-little law" problems, while demonstrating the ability of principled positivism to explain judicial behavior. The rest of this article will contribute more original ideas to the discussion.

## IV. BERMAN AND SHAPIRO

Shapiro's defense of positivism against the problem of theoretical disagreements serves as an important precursor to principled positivism. First, and perhaps most importantly, Shapiro denies the "plain-fact" view of positivism, as does Berman. Positivism without an ultimate rule of recognition is a novel insight and provides the crux of both Shapiro's and Berman's arguments, allowing them to integrate positivism with the fact that judges often disagree about fundamental legal principles. Both replace the rule of recognition with concepts rooted in historical legal practice, with Shapiro's "objectives of legal designers" paralleling Berman's "taking-up behaviors." Moreover, Berman's "legal principles" can be seen as a more developed form of Shapiro's "purpose of a legal system." Both concepts are grounded in historical practice and intended to guide legal practitioners in interpreting the law. However, Berman, with his

[16] *Id.* at 342.

introduction of weights and activation, does a better job of explaining how principles combine non-lexically to generate derivative legal norms.

Principled positivism also does a better job of hemming in potential excesses in interpretive methodologies. Since the "purpose" of a legal system is a broad and vague category, Shapiro's theory gives legal interpreters more room to fashion their preferred methodology into whatever "purpose" they may extract from historical practice. In contrast, in principled positivism, a principle has either been "taken-up" or not "taken-up," and is thereby either embedded or not embedded in the legal system. This is why Berman is comfortable criticizing Justice Clarence Thomas for his narrow originalism in *Obergefell v. Hodges*.[17] Thomas argued that the Constitution "contains no 'dignity' clause,"[18] but Berman retorts that "fundamental principles are extratextual, and the dignity principle that Justice Kennedy's majority opinion rested upon was well embedded in our constitutional law by the time *Obergefell* rolled around."[19] Principled positivism therefore gives a much clearer roadmap for adjudication than Shapiro's "purpose-oriented" positivism.

Nevertheless, Berman's picture of principled positivism has its flaws. In the remainder of this paper, it will propose and then answer two challenges to Berman: the first from "made-up principles," and the second from "conflicting weights." Both will be addressed by drawing on concepts from Shapiro's article.

## V. REFORMULATING PRINCIPLED POSITIVISM

As a legal system evolves, new principles will be introduced and embedded into the system. For example, as stated earlier in this paper, *Henningsen* introduced the principle that automobile manufacturers have

[17] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[18] *Id.*
[19] Berman, *supra* note 2, at 345.

special obligations in relation to the construction, sale, and operation of their vehicles. Since Bloomfield Motors produced a defective vehicle, this principle activated strongly enough that it outweighed the principle of freedom of contract, and the company was held liable even though the injured plaintiff signed a liability waiver. This would seem to fit into principled positivism, except that the presiding judge introduced such a principle not grounded in earlier taking-up behaviors. The crux of the issue is this: How does principled positivism account for evolution in a legal system if legal principles are meant to be grounded in historically recognized taking-up behaviors? Can principles be "made-up" by judges and legal theorists?

One answer would be that under principled positivism, judges do not have the authority to make up principles, but once created, the initially-illegitimate principles are embedded into the legal system and may be invoked in later cases. In the *Henningsen* case, the judge may have technically erred by deviating from previous legal practice, but the new principle introduced—if consistently adopted by legal actors—becomes embedded in the legal system over time. This would apply to any other novel legal principle, explaining legal evolution. However, this explanation comes with an unintuitive implication: Every time a judge invokes a new legal principle to decide a case, that case has technically been decided incorrectly. Is it so obvious that *Henningsen,* and any other case where a new principle is introduced, is wrong? Such an implication seems absurd, as then many cherished legal principles, such as "separate education facilities are *inherently* unequal" in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)*,* would have been introduced "wrongly," and therefore the case would have been decided "wrongly."

Nevertheless, a concept from exclusive legal positivism offers an alternative explanation. Shapiro describes exclusive legal positivism as providing judges with "strong discretion" to apply extralegal principles when the case calls for it, with such discretion being grounded in social agreement. A similar concept can be applied to principled positivism. The first time a judge introduces a novel legal principle, which is accepted and embedded in the system, a "meta-principle" that judges have the discretion to introduce novel principles also becomes embedded in the system. There are "taking-up behaviors" that recognize a judge's discretion to introduce novel principles. While this discretion is limited, certain important social or moral factors, such as the evils of segregation, may allow a judge to introduce a novel principle, such as "separate education facilities are *inherently* unequal," which carries less weight than previously established principles but could be activated to such an extent that it shifts the outcome of the case.

The second, and perhaps more difficult, challenge to Berman concerns judicial disagreement over weights. If the relative weights of legal principles are grounded in empirical facts about taking-up behaviors, then how is it possible that judges and legal theorists disagree so strongly about these weights? For example, a living-constitutionalist might admit that "original public meaning of the Constitution is important" is a legal principle, but will give it much less weight than an originalist would—so much so that their divergence cannot possibly be grounded in disagreement over historical taking-up behaviors. Therefore, when judges and legal theorists assign weights to legal principles, these judgments seem to stem not from empirical facts but from differing views on political morality.

Berman could perhaps dismiss this question the same way he dismissed the problem from theoretical disagreements: While judges and legal theorists are mistaken in their weighing of legal principles, the fact remains that legal principles' weights are grounded in historical taking-up behaviors. However, once again, such an answer would make the entire legal field look absurd and incoherent: How is it possible that the relevant legal actors are so wrong about how the law actually works?

Shapiro's solution to theoretical disagreements can also resolve the challenge of conflicting weights. When judges apply weights to certain principles, they do so not based on how often the principle is taken up, but rather how well it fits the "purpose" of the legal system, which, as Shapiro described, is grounded in the "political objectives that the current designers of the legal system sought to achieve."[20] For example, the weight of the principle "separate education facilities are *inherently* unequal" will depend on how much the purpose of a legal system is geared toward equality. Judicial disagreements about the weights of legal principles relate to the legal system's "purpose"—rooted in its historical facts rather than questions of political morality — which is more coherent than disagreements about taking-up behaviors: the former gives judges a broader range to interpret socio-historical facts, while the latter seems impossible to disagree over. Therefore, we must slightly alter principled positivism. Rather than the weight of a legal principle being determined by the prevalence of its being taken up, the principle's weight is determined by how well it fits a given legal system's purpose or purposes.

## CONCLUSION

Berman's principled positivism is analogous to Shapiro's "purpose" oriented positivism, as both scrap the ultimate rule of recognition in favor of social facts relating to historical legal practice, and both prefer an approach to positivism emphasizing broader goals or principles rather than determinate rules. However, Berman's approach is ultimately more

[20] Shapiro *supra* note 3, at 44addresses the challenges posed by "non-lexical determination" and "too-little law," whereas Shapiro's approach can- oriented positivism, as both scrap the ultimate rule of recognition in favor of social facts relating to historical legal practice, and both prefer an approach to positivism that emphasizes not.

developed, as it manages to answer the challenges from "non-lexical determination" and "too-little law," while Shapiro's approach cannot do so. Nevertheless, as Berman describes it, principled positivism is imperfect and faces challenges that must be addressed by applying concepts from Shapiro's paper. First, the proposed challenge from "made-up principles" is addressed by arguing that principled positivism must incorporate a "meta-principle" that judges, when absolutely necessary, may introduce novel legal principles not grounded in prior legal practice. Next, the proposed challenge from "conflicting weights" is answered by employing Shapiro's resolution to the problem of theoretical disagreements. Instead of the relative weights of legal principles being grounded in taking-up behaviors, they are grounded in a legal system's purpose, allowing for judicial disagreement about said weights. This refined principled positivism closely aligns with Berman's framework but introduces a different foundation for determining derivative legal norms non-lexically, thereby enhancing its coherence and applicability.