Real Definition, General Jurisprudence, and The Planning Theory of Law:
A Reply to Hershovitz on the "Model of Plans"[1]

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§1. Introduction.

Scott Shapiro develops a view in *Legality* that he calls "The Planning Theory of Law".[2] In rough terms, The Planning Theory is based on two central claims about the nature of law. First, it claims that *legal institutions* are a kind of institution for creating, applying, and enforcing shared plans for a group of agents in a given community. Second, it claims that *the law* (in a given jurisdiction, at a given time) consists of those plans that are applied by those institutions, regardless of anything to do with the normative merit of those institutions or plans.[3]

Shapiro develops The Planning Theory in a way that is meant to vindicate *legal positivism*. For our purposes here, we can think of legal positivism as the following thesis: necessarily, the content of the law in a given jurisdiction (at a given time) – i.e., *what the law is* in a given jurisdiction (at a given time) – is ultimately determined by social facts alone, and not robustly normative facts. This is in contrast to legal antipositivism, which claims that, necessarily, the content of the law is ultimately determined by both social facts (roughly, the kinds of descriptive facts that are the purview of the natural and social sciences) *and* robustly normative ones (roughly, the kinds of normative and evaluative facts involving "ought" or "good" that are the focus of much work in moral

[1] [Add thank you list].
[2] (Shapiro 2011).
[3] (Shapiro 2011). It should be noted that Shapiro also thinks that certain other "plan-like norms"– e.g., norms of custom – can be part of the law, if they are taken up by those plans in the right sort of way. (Shapiro 2011, 140). This detail won't be important in what follows. So I will mostly drop it for ease of exposition.

and political philosophy).[4] Importantly, according to one form of legal positivism ("inclusive legal positivism"), robustly normative facts *can* be amongst the grounds of law: namely, when certain contingent social facts obtain that *make* those robustly normative facts part of the grounds. (This is in contrast to "exclusive legal positivism", according to which robustly normative facts *never* ground the content of the law). The locution of "ultimate" determination (or "ultimate" grounds) is meant to capture what makes inclusive legal positivism still a form of positivism: namely, that the contingent social facts have a relative explanatory priority here.[5]

It is not hard to see why Shapiro thinks that the Planning Theory of Law can be used to support legal positivism. In general, the content of a plan (e.g., a plan that an individual is, or a group of agents have) is necessarily, ultimately determined by descriptive facts, and not robustly normative facts. One might, following Shapiro, call this idea a form of *plan positivism*.[6] To support this idea, consider what sorts of facts determine the fact that two people *have* a plan to go see a movie this weekend, or the plan to travel together to Idaho next fall, as well as those facts that determine the facts about the *content* of those plans they have. No facts about what is *really and truly valuable*, or what our *real moral obligations are* figure into the grounding of either such facts here. Rather, all we need are prosaic descriptive facts, such as facts about the mental states of individuals.[7] According to the Planning Theory, individual laws are, necessarily, a subset of plans (and, remember, a subset determined without reference to normative merit of those plans, or the institutions that created them). It therefore follows that the content of those laws is,

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[4] These formulations of legal positivism and antipositivism draw from (Greenberg 2006), (Shapiro 2011), (Rosen 2010), (Plunkett 2012), and (Plunkett Forthcoming).

[5] For further discussion of this basic way of formulating legal positivism using "ultimately" talk, see (Shapiro 2011, Ch. 9). Given this use of "ultimately", this means that the claim that social or robustly normative facts are "ultimate" grounds is compatible with the idea that such facts are further grounded in other, more fundamental facts. It might well be that "ultimately" isn't the best language to capture the relevant idea here of explanatory priority. And, in fact, I think its not. But I am not going to press on that here.

[6] (Shapiro 2011, 178).

[7] It should be noted that if certain views about the so-called "normativity of content" or "normativity of meaning" are right, then facts about the contents of mental states might be normative in ones sense of "normative". But that sense isn't plausibly the sense of *robust* normativity that is at issue here. I take it for granted in this paper that facts about the contents of mental states are *not* robustly normative facts.

necessarily, ultimately determined by descriptive facts alone (of the kind that get counted as "social facts" in the context of the debate over legal positivism), and not robustly normative facts. Further, there is good reason to think – as, indeed, Shapiro argues – that *the law* as a whole (that is, what *the law* is, in a given jurisdiction, at a given time) *just is* the totality of those plans. In turn, the *content* of the law just is the content of the entire set of relevant plans here, described in a certain way. Or at least so the basic thought goes.

Many legal philosophers, including Shapiro, think that there are strong reasons to favor a form of legal positivism, independent of anything having to do with the truth or falsity of the Planning Theory as such. For example: many (including Shapiro) think that positivism has an easier time than antipositivism at explaining the possibility of ethically abhorrent laws. Part of Shapiro's goal in developing the Planning Theory is to develop a viable positivist account of law – an account that overcomes problems he thinks afflict other well-known positivist views (including, most importantly, Hartian forms of positivism, which are the most prominent contemporary positivist views on offer).[8] At the same time, however, Shapiro aims for the Planning Theory to *help secure* the truth of positivism. That is, he thinks that he can use independent lines of argument in support of the core theses of the Planning Theory to help secure the truth of legal positivism.

In "The Model of Plans and the Prospects of Positivism", Scott Hershovitz argues against the idea of using the core theses of the Planning Theory to defend legal positivism.[9] He claims that the main argument that Shapiro gives on this front is invalid. Moreover, he claims that so too is another argument that Shapiro gives, which might seem to help bolster this main argument. Moreover, Hershovitz sees no good way to resurrect either of these arguments. He concludes that the prospects of using the Planning Theory to argue for legal positivism are dim. In addition, he argues that we can glean general lessons from his discussion of the Planning Theory that spell bad news for legal positivism – and especially for *exclusive* legal positivism, which is the variety of positivism that Shapiro argues for.

[8] See (Hart 1961/2012).
[9] (Hershovitz 2014).

In this paper, I respond to Hershovitz's main line of attack, with the aim of showing how a promising overall argument for the Planning Theory can be used to support the truth of legal positivism. The argument that I will give rests on certain ideas about how to best develop the core metaphysical claims of the Planning Theory; namely as claims about the *real definition* of law. I propose that these claims about real definition are best defended on the basis of inference to best explanation as part of an overall *metalegal* theory. By "metalegal theory", I mean a theory that aims to explain how our legal thought and talk – and what (if anything) it is distinctively about – fits into reality overall. (I say more about this idea of "metalegal theory" in what follows).[10] Drawing on a plausible principle about the relationship between real definition and *grounding* (recently defended by Gideon Rosen), the claims about real definition that I put forward here can be used as the basis for a good argument in favor of legal positivism, which, for the purposes of this paper, I take (in line with Shapiro and Hershovitz) to be a thesis about grounding. As I explain, the strategy I develop here might well also be used as the basis for a defense of exclusive legal positivism in particular.

Many of the issues I discuss here matter for reasons having anything to do with the Planning Theory as such. The issues concern, among other things, the prospects of legal positivism, epistemological issues about how to assess views in general jurisprudence, and the relationship between different kinds of theses in general jurisprudence. Thus, I urge readers who don't have much sympathy for the core ideas of the Planning Theory to bear with me. Even if you think the Planning Theory is implausible as a view in general jurisprudence, much of the core argument might well still be on interest to you.

Before I begin, I should emphasize the following up front. My aim in this paper is *not* to take on all of the criticisms that Hershovitz makes of the Planning Theory, or of his criticisms of Shapiro's arguments involving it (either ones for the theory, or ones in favor of positivism based on it). Rather, my aim is to focus on one of the main lines of argument that Hershovitz develops in his paper – a line that focuses on whether or not

[10] Shapiro and I develop and defend this view of metalegal theory in (Plunkett and Shapiro 2017).

the Planning Theory can be developed in such a way as to yield a valid, as well as promising, argument on behalf of legal positivism (and, eventually, perhaps for exclusive legal positivism in particular). I flag this because there are many important points that Hershovitz makes that deserve serious engagement, but which are beyond the scope of this paper.

§ 1. The Planning Theory of Law: an Overview.

As I said in the introduction, The Planning Theory can be understood as involving two main claims about the nature of law. The first is a claim about the nature of legal institutions: namely, that they are a kind of institution for creating, adopting, and enforcing shared plans for a group of agents in a given community. The second is a claim about the nature of the law (in a given jurisdiction, at a given time); namely, that *the law* (in a given jurisdiction, at a given time) consists of those plans that are applied by those institutions, regardless of anything to do with the normative merit of those institutions or plans. In this section, I say a bit more about what these claims consist in, and how they are situated within Shapiro's overall explanatory project in *Legality*. This sets up the basis for my eventual response to Hershovitz.

Shapiro's view about the nature of legal institutions rests on the following line of thought. Humans are agents capable of planning what to do. One can (for example) plan where to eat dinner tonight, or how to get to work tomorrow. Some of our plans are simple. But others are quite complex, involving a number of nested subplans: e.g., planning to do X in order to do Y in order to do Z. In addition to planning by ourselves, we can plan together as a group – not only for ourselves that are members of that group, but also for others as well. Shapiro's basic idea about legal institutions is that they are involved in this sort of shared planning, and are doing it on what is often a large scale for large numbers of people, in cases (centrally) where their shared activity is complex, and involves issues that are contentious (e.g., the regulation of commerce) and/or involve an element of arbitrariness (e.g., whether we should drive on the left or right side of the road, prior to any settled convention one way or another). By creating,

adopting, and enforcing plans, legal institutions can help coordinate the activity of massive numbers of people, helping them to do things like raise taxes, fund building projects, regulate the sale of goods, etc.

According to Shapiro, legal institutions (including, for example, legislatures and courts) aren't just *any* institutions that are engaged in the activity of shared planning. They have specific characteristics, which help make them distinct from other, related entities such as the governing bodies of schools, social clubs, or sports leagues. I won't go into the full details here of Shapiro's theory, but here are some of the key claims he makes: legal institutions involve *officials* (roughly, people who are granted certain powers and responsibilities by a plan, independent of the specific identity of the person occupying the office at a given time)[11]; "legal relations may obtain between people independent of the particular intentions of those people"[12]; legal institutions create plans that are often *compulsory* in nature (in that one can't get out of a legal requirement simply because one doesn't want it to apply to oneself);[13] the activity of legal institutions aims to accomplish a certain kind of moral aim (roughly, remedying the problems that would obtain in large-scale communities if there was no planning)[14]; and legal institutions are "self-certifying", in the sense that a legal institutions is "free to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid."[15]

Let's now turn to the second major component of the Planning Theory; the claim not about the nature of legal institutions, but about *the law* as such. The basic idea here is a straightforward one. Legal institutions can (and often do) produce many things. For example: they often produce documents, as well as jobs for legal officials. But the core things they produce – the things that are at the heart of the fact that they are institutions of *shared planning* – are *plans*. As Shapiro understands it, a plan is a kind of *norm* in the following, thin sense of "norm" – a standard that something (e.g., activity) can conform

11 (Shapiro 2011, 209).
12 (Shapiro 2011, 210).
13 (Shapiro 2011, 211).
14 (Shapiro 2011, 213).
15 (Shapiro 2011, 220).

to, or fail to do so.[16] Now consider the totality of the plans that legal institutions create, adopt, and enforce. Or, somewhat more carefully, consider the totality of the plans (as well as relevant "planlike norms" (e.g., norms of custom)) that have been adopted in a way that conforms to the relevant overall plan *for* shared planning (a so-called "master plan") that has been adopted by the relevant legal institutions. These plans (and planlike norms) are *the law* according to the Planning Theory.

In turn, the further idea I will develop (which I think is already at the heart of Shapiro's way of developing the Planning Theory) is this: the "content of the law" can be understood as the *overall content* of those plans, described in a certain way (e.g., by talking about which possible actions conform to those plans, or which possible actions are permitted by those plans, etc). But getting to *that* basic claim will be further work – and something we don't want to assume at the start, since it is precisely the thesis that Hershovitz wants to put pressure on. So let's leave that aside for now.

Having introduced the outlines of the core claims the Planning Theory makes about the nature of law, I now want to introduce a point that will be crucial for my argument that follows. Consider the two claims that I introduced above, which I claimed form the core of The Planning Theory: the first is a claim about the nature of legal institutions, the other is about the nature of the norms created by those institutions (norms which comprise "the law" of a jurisdiction). These are both claims about the metaphysics of law – or, if one doesn't like the term "metaphysics" here, they are claims about *object-level* issues, rather than *representational-level* ones. By this, I mean that they are claims about a part of reality (namely, legal institutions and legal norms), rather than our thought and talk about those parts of reality. According to Shapiro, the heart of the Planning Theory consists of an account of the metaphysis of law, which is anchored in these two claims.

These claims, however, also form the basis for a more ambitious kind of theory, which Shapiro develops throughout *Legality*. In the course of developing The Planning Theory, Shapiro not only makes metaphysical claims about legal institutions and the law. He also makes claims in the philosophy of mind (e.g., how to make sense of central legal

[16] (Shapiro 2011, 41).

concepts we employ in legal thinking), the philosophy of language (e.g., what we mean by terms such as "legal obligation"), and epistemology (e.g., how we learn about the content of the law). These other kinds claims are not just incidental observations, tagged on to a project that is fundamentally about metaphysics. Shapiro's discussion in *Legality* can be misleading in this regard, given that, at the start of *Legality,* he explicitly states the fundamental debate in general jurisprudence to which the Planning Theory is meant to contribute is about the "metaphysical foundations of law"[17]. I don't doubt that a large part of the Planning theory is about metaphysics, as is are many theories in general jurisprudence. However, the right way to understand Shapiro's overall ambition in *Legality*, I think, is to understand it as an attempt to make progress on a *more general* explanatory project, where theses of the kind I glossed above (e.g., from philosophy of mind, language, and epistemology) often also play a central role, in addition to claims about metaphysics. And, in recent work, Shapiro agrees.[18] This explanatory project – which Shapiro and I call the core explanatory project of *metalegal inquiry* – can be glossed as follows.[19]

First, take the totality of *legal* thought and talk, including, for example, thought and talk about the content of the law, legal obligations, rights, etc. We might wonder what we are doing when engage in such thought and talk, and how to best make sense of it (for example: how to develop the best overall semantic account of legal talk, or how to best analyze our central legal concepts). Now consider that legal thought and talk seems to be *about* certain (distinctive) things – including, for example, legal norms and legal institutions, as well as legal rights, duties, permissions, and so on. We might wonder how to understand the things that such thought and talk (at least seems) to be distinctively about, given our best overall account of what reality as a whole is like. For example, we might want to know: what kinds of things are *laws*, and how are they are related to other things in reality (including, for example, social conventions, or the

[17] (Shapiro 2011, 12).
[18] See (Plunkett and Shapiro 2017).
[19] What follows in the next paragraph draws on (Plunkett and Shapiro 2017). For connected discussion about metanormative inquiry in general, see (McPherson and Plunkett 2017). For a related take on the idea of "metalegal" inquiry, closely related to mine and Shapiro's (though distinct in a number of crucial ways), see (Toh 2013).

demands of morality). These questions give rise to a general explanatory project: to explain how legal thought and talk – and what (if anything) such thought and talk is distinctively about – fit into reality overall. This is the core explanatory project of metalegal inquiry. For ease of exposition, if we take "legal reality" to refer to that part of reality that legal thought and talk is distinctively about, we can usefully gloss this project as follows: to explain how legal thought, talk, and reality fit into reality overall.[20] General jurisprudence, we argue, is a subset of metalegal theory. It is that subset that deals with *universal* legal thought, talk, and reality – that is, legal thought and talk that is universal across all social/historical contexts in which there is such thought and talk. In short, that is what it makes it *general* in the relevant sense here, as opposed to just focused on (for example) legal thought, talk, and reality of contemporary Israel.

In developing The Planning Theory, I take Shapiro to be developing a theory that can give a systematic, comprehensive way of carrying out the core explanatory project of general jurisprudence – or which at least can be reconstructed as making a serious contribution to doing so. In this regard, I take Shapiro's theory to be on all fours with other major "general" theories in general jurisprudence, such as H.L.A. Hart's theory of law in *The Concept of Law* and Mark Greenberg's "Moral Impact" theory of law.[21] The term "Planning Theory" can then be used either as name for narrower metaphysical core of the theory Shapiro develops, or the more general metalegal theory that is based on that metaphysical view (or which might be based on it). For my purposes it won't matter much which one goes here with the label. The focus in what follows will be the metaphysical core of the broader theory – a core that might then be developed in different ways, and also embedded in different overall metalegal theories. But it is crucial that the metaphysical views under discussion are embedded in an overall account that seeks to offer the basis for a comprehensive view in metalegal theory, which, in this case (as in many instances of theories in metalegal theory), includes claims in philosophy of mind, philosophy of language, and epistemology.

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[20] Strictly speaking, as Shapiro and I note in our paper, this is a somewhat misleading gloss. This is because legal thought and talk might not be *about* anything (in even the minimal, intensional sense of 'aboutness' we are using here), and because it might not be about things that are part of reality. But I leave these complications aside here.

[21] (Hart 1961/2012) and (Greenberg 2014).

§2. Legal Positivism: What's At Issue.

Herhsovitz's argument concerns the relationship between the Planning Theory and legal positivism. Now that we have a better grip of the core of the Planning Theory in hand, as well as how to understand what *kind* of theory it is, the next thing to do is make sure we are clear on what's at issue with the discussion of "legal positivism" in this context.

In *Legality*, Shapiro claims that legal positivism is the thesis that facts about the content of the law (and facts about the existence of legal institutions) are ultimately determined by social facts alone, and not moral facts. Antipositivism (which Shapiro calls "natural law theory") is the denial of this thesis. It is the thesis that both social facts and moral facts are among the ultimate determinants of facts about the content of law and facts about the existence of legal institutions.[22] For my purposes in this paper (and following one key strand of usage of the term "legal positivism"), I am focusing on the claim about legal content, and not the claim about the existence-conditions of legal institutions.[23]

In what follows, I will stick with Shapiro's basic understanding of what it takes for a view to be a positivist one. This understanding is also common ground with Hershovitz, at least in the context of developing his argument in "The Model of Plans". However, I will modify the way I discuss the view slightly, both for purposes of philosophical clarity, and because some of the details will matter for the overall assessment of the argument I develop below.

First, I want to note that I will explicitly understand legal positivism (and antipositivism) as theses about *grounds*. I take "ground" to refer to a constitutive kind of explanatory relation (rather than a causal one); of the kind that we invoke when we make claims such as a "glass is fragile in virtue of its disposition to break in certain circumstances" or "an action is morally right in virtue of its promoting the best overall consequences". I

[22] (Shapiro 2011, 27).
[23] For this kind of focus, see (Gardner 2001) and (Greenberg 2006).

take ground to be a form of asymmetric metaphysical dependence. Shapiro and Hershovitz have the same basic issue in mind here, even though they don't always use the language of "ground".[24]

Second, I will move away from the language of "moral" facts in formulating the core of what's at issue in the debate over legal positivism. Instead, I will focus on what I call "robustly normative facts".[25] What do I mean by this? Consider the contrast between two different ways we might use the term 'norm'. First, consider the rules of board games, or the standards of fashion. These are "norms" in the same thin "formal" or "generic" sense that plans are: they are standards to which something (e.g., our actions) can conform to or not. Now consider the standards of morality. Many think that morality *normatively matters* in a way that rules of board games or standards of fashion do not. There are different ways we might want to capture what is involved in that idea. But the basic thought might be glossed as follows. Many people think that when there is a conflict between what morality demands of you, and what the standards of fashion prescribe, you should generally (or perhaps always) give more weight to the demands of morality. Moreover, the norms according to which you should give it more weight are not just *any* old further norms that we just happen to pick. Rather, the relevant norms we have in mind here are ones that are *authoritative* with respect to conflicts between different normative systems (or schemas). This suggest the idea of a kind of "authoritative" or "robust" normativity.[26]

Many people (philosophers and non-philosophers alike) think that morality has a more important tie to robust normativity than other normative systems. Indeed, some just *use* the term "morality" to pick out the idea of robust normativity as such, insofar as it bears on practical issues, such as what we should do, or how we should live. For my purposes here, we don't need to wade into debates about whether we should agree with such proposals or not. Nor do we need to wade into debates about what exactly robust normativity is, or even whether there is actually even any such thing at all. Rather, all we

[24] For some helpful overviews of grounding, see (Rosen 2010) and (Trogdon 2013).
[25] For further discussion of this change of focus, see (Plunkett Forthcoming).
[26] I here draw on (McPherson Forthcoming). See also (McPherson and Plunkett 2017).

need is the rough *idea* of robust normativity. Once we have it hand, I claim that the debate over legal positivism is often (though not always) best formulated as one involving whether robustly normative facts (or perhaps facts bearing some important, necessary connection to such facts) are, necessarily, amongst the ultimate grounds of facts about legal content, in addition to social facts. I will use the term "antipositivism" to refer to the view that the answer here is "yes", and positivism to refer to the answer as "no". In other words: positivism is the view that, necessarily, social facts alone are the ultimate grounds of facts about legal content (henceforth, the "legal facts"), and not robustly normative facts.[27]

§3. Plans and Content.

Let's now turn to Hershovitz's argument.

Hershovitz claims that Shapiro's main argument for legal positivism (or at least the one that uses the Planning Theory as a key premise) is best reconstructed as follows:

> Argument 1:
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> Premise 1 (L1) Laws are plans.
>
> Premise 2 (L2) The content of a plan is determined by social facts.
>
> Conclusion (LC) The content of the law is determined by social facts.[28]

Hershovitz claims this is an invalid argument.

Why? One potential worry is this: perhaps there is a restriction on *which* plans are laws, such that only some of them determine the content of the law. If that restriction has to do with normative merit – e.g., a bar for how morally good the plans need to be – then

[27] I discuss (and defend) this way of formulating legal positivism and antipositivism at greater length in (Plunkett Forthcoming).
[28] (Hershovitz 2014, 158). (Note that my numbering of the premises here is different, although the content of them are exact quotes. The same is true in my discussion of Argument 2 below).

we are going to get a form of antipositivism. This is why, in presenting the Planning Theory above I have (following Shapiro) put things as follows: *the law* (in a given jurisdiction, at a given time) consists of those plans that are applied by those institutions, regardless of anything to do with the normative merit of those institutions or plans. Hershovitz isn't worried about this here, and I take it he is just granting this way of thinking about things in his reconstruction of the argument above.

This brings out a more general, related worry. One might be concerned about the move from "laws" in L1 to "the law" in LC. (And, indeed, I think that is not something crazy to be worried about). But that is not Hershovitz's worry here either. As I understand it, he is okay with granting (at least for the purposes of argument) something along the following lines (which would link L1 and LC): the law (in the relevant sense of "the law" here) *just is* the totality of the relevant laws. There is more to say on that relationship. But let's leave it at that for now, since this isn't Hershovitz's worry.

Instead, his basic charge is that Shapiro's argument rests on an equivocation between different ways we can use the term 'content'. Here is the purported issue. On the one hand, we can talk about the content of a plan in a normal, everyday sense – for example, when we ask what plan you have adopted for how to get to work tomorrow, and what it involves. This is the kind of "content" that is at issue in L1. On the other hand, however, is the sense of 'content' relevant to the debate over legal positivism. This kind of content is, roughly, about what *the law* is – in the sense that is closely tied to our talk of legal obligations, rights, duties etc. It might well be, claims Hershovitz, that the law *consists in* plans in some sense, but that the content of the law isn't the same as the content of those plans (in the normal, more mundane sense of "content"). Thus, Hershovitz argues, even if L1 and L2 are both true, they don't guarantee the truth of LC.

In order to illustrate the kind of mistake he thinks Shapiro is making here, Hershovitz constructs another argument which wears the mistake more clearly on its sleeve. Here is the argument:

Argument 2:

Premise (S1) Statutes are texts.

Premise (S2) The linguistic content of a text is determined by social facts.

Conclusion (SC) The legal content of a statute is determined by social facts.[29]

Argument 2 is clearly an invalid argument. The reason is that we switched from one notion of content ("linguistic content") in the second premise to a different kind of content ("legal content") in the conclusion. Hershovitz claims that, in this respect, this argument (argument 2) is on all fours with the previous argument (argument 1).

In order to evaluate Hershovitz's charge here, I first want to step back and note another claim that Hershovitz makes about Argument 2. Hershovitz says we should grant S1. I am *not* at all sure about that – and, indeed, this is because of reasons that I think are in fact closely related to Hershovitz's concerns about different notions of content. This is because we can (and often do) use the term "statutes" to refer to particular laws (of a certain kind, perhaps which are created in a certain kind of way), which contribute to the overall content of the law (in a given jurisdiction, at a given time). Those things are norms (in, at minimum, the thin, formal sense of "norm" I introduced earlier). They are not texts. The texts might spell out (at least roughly) the content of those norms, or help determine the content of those norms in some way. But that's a different issue. Of course, another way of using the term "statute" is just to use it to refer to a kind of text (which is intimately related in some way to a law). I take it that this is the notion of "statute" that Hershovitz has in mind. But it is crucial we keep these kinds of issues distinct here, given the sorts of metaphysical issues at stake in this discussion.[30]

This is tied to the following issue. Hershovitz writes that "one object can bear multiple

[29] (Hershovitz 2014, 159).

[30] One might want to insist that statutes themselves, even if not texts, are not strictly speaking *laws*, but rather another kind of legal entity created by legal actors that, in turn, contributes to the content of the law (perhaps by helping shift or create many different laws). If one has that view of what statutes are, that's fine for my purposes. One could then simply rephrase my distinction in the main text as one between statutes considered as a) a kind of legal object (perhaps a law, or a legal norm) vs. b) a kind of text (which bears some important connection to the relevant legal object).

kinds of content. Statutes are texts, and as such they are bearers of linguistic content. But they are also bearers of legal content, and the legal content need not be the same as the linguistic content."[31] Hershovitz is onto something important here with the basic point he wants to make; a point that, ultimately, is about the need to keep our eyes on the relevant *kind* of content for the purposes at hand.[32] But I don't think he is putting the key point here in the right way. A given object being closely *associated* with multiple kinds of content doesn't mean it itself *has* both kinds of content. A text with linguistic content, when created in the right sort of circumstances, can contribute to making legal content. But that doesn't the text *itself* has legal content. It might instead, as I suggested above, play a role in creating another kind of object (e.g., a *law*) which then contributes to legal content. Indeed, given many ways of understanding what legal content is – for example, what *the law* is, in a given jurisdiction, at a given time – it is far from obvious what it would mean for a text to *have* legal content. The broader point is this: we want to be careful about how we individuate objects here, given the context of this debate.

One key reason we want to be careful is this. Different objects might well have certain kinds of content that are privileged, given the kinds of objects they are. This might well be true even if those objects are not just closely associated with different kinds of content (e.g., perhaps because of how those objects are connected to other objects) but in fact themselves *have* different kinds of content. The kinds of content here might not only be epistemically privileged for us as inquirers, given the epistemic context at hand, but perhaps even more fundamentally metaphysically privileged. For example, suppose we are thinking about the content of a linguistic utterance in a given context. It's natural to think that certain kinds of content are most crucial to that utterance *qua* linguistic utterance: e.g., perhaps *semantic* content and *full communicative content*, as opposed to say the contribution that utterance makes to the content of an artwork (e.g., when embedded as lyrics in a song). With this in mind, then consider the following: suppose there is a kind of content that is tightly associated with plans *qua* plans. If that is right, and laws are plans, then it might well be that Shapiro (or a proponent of the planning

[31] (Hershovitz 2014, 160).
[32] Mark Greenberg has recently done much to underscore the import of this kind of issue for general jurisprudence, as Hershovitz notes. See (Greenberg 2011).

theory) has strong reason to privilege *that* kind of content by default in the context at hand. To foreshadow part of my argument in what follows, it might be particularly warranted if laws *essentially* are plans, in a way that *defines* what laws as such are.

With that in mind, let's return to the main thread. In both argument 1 and argument 2, Hershovitz thinks there is a missing premise that is needed. In argument 1 (about the law) he claims that what is needed is this:

> Missing Premise 1 (LMP): "The content of the law just is the content of the plans that constitute it."[33]

And what is needed in argument 2, he claims, is an argument linking linguistic content of a statue to its legal content. That is, what is needed is something like the following:

> Missing premise 2 (SMP): The legal content of a statute just is its linguistic content.

Is Hershovitz correct that argument 1 is invalid, for the same basic reason that argument 2 is? That is: does it involve the same kind of equivocation involving different senses of "content" as argument 2?

I think the answer is No. Argument 1 doesn't explicitly mention different types of content at all. And, as we saw above, there might well be good reason to privilege certain kinds of content by default in the context at hand, given the kinds of objects under consideration. So why then think Shapiro's argument involves equivocation? The equivocation reading seems forced, or else begs the question in favor of an opponent of The Planning Theory (e.g., someone who just rejects L1 or L2). It is more charitable, I think, to read Shapiro's argument as an instance of something along the lines of the following form of argument:

> Argument 3:

[33] (Hershovitz 2014, 159).

Premise 1 (F1): All As are Bs.

Premise 2 (F2): The content of anything that is B (and which has content) is determined by facts of type T.

Conclusion 1 (FC1): The content of an A is determined by facts of type T.

If the notion of "content" is the same in F2 and FC, then this *is* a valid argument. And unless we have reason to think that 'content' is being used in different ways in F2 and FC, then the charitable thing to do is to assume that it is the *same* notion in each. The key point of Shapiro's argument is a move about the content of what (at least prima facie) are different things: plans and laws. The key move is an argument that law *are* plans, so that whatever type of facts in general determines the content of plans will also determine the content of these particular kind of plans. This is the better way of reconstructing the core of Shapiro's argument that Hershovitz reconstructs as Argument 1. Argument 1 might well be unsound. But it isn't invalid.[34]

A small worry remains about connecting Argument 1 with this generic form of argument I just formulated above. As I noted earlier, strictly speaking, what we need here isn't just about the content of *a* single law, bur rather of *the law* (in a given jurisdiction, at a given time). So we would need to add in something about how the content of X (e.g., "the law") is a function of the content of all the relevant Bs when combined in the right way ("the laws"). There are some potentially delicate issues here. But, again, we can put this aside for now, given that the relevant issue here is one about the equivocation about "content".

With this in mind, we can see that argument 1 is more like another argument one might give:

Argument 4

[34] After starting work for this paper, I discovered that Nate Gladd makes the same basic point in an unpublished, short response piece to Hershovitz. (Gadd Manuscript). My thinking in this paragraph closely parallels Gadd's. To again foreshadow my argument in what follows, it should be noted that the premises here might be most plausible they are taken to involve claims about *real definition*. That is: F1 is a claim about real definition, and thus not just about *something* that As are, but about what they are *essentially*, and what *makes* them As. In turn, we can then read F2 as making reference to that claim about real definition.

Premise 1 (L1): All statutes are texts.

Premise 2 (L2) : The linguistic content of anything that is a text (and which has linguistic content) is determined by social facts.

Premise 3 (L3): The linguistic content of a statute is determined by social facts.

This argument might be unsound. But it isn't invalid.[35]

The lesson is this: Hershovitz moves too quickly in dismissing argument 1 as invalid. His argument that it is invalid rests on an uncharitable reading of Shapiro's argument in question, or else begs the question against the Planning Theorist (e.g., by just denying the claim that Shapiro is putting forward in P1 of the argument, in which he claims that laws are plans).

So are proponents of the Planning Theory who want to use it as the basis for a form of legal positivism off the hook? I think not. Even though Hershovitz isn't putting his concern in the best way, I think that, at the end of the day, the core issue that Hershovitz is driving at remains. The issue is this: why *should* we think that the notion of "content" that we have in mind when asking about the "content of the law" in the context of general jurisprudence lines up with the notion of "content" that we have in mind when talking about the "content of a plan"? There might not be a missing premise here, which is needed to fix an otherwise invalid argument. But there is a question of what kind of argument one should give for making this link. And this is the link that one needs in the context of using the Planning Theory to defend the truth of legal positivism. In other words: one needs to defend LMP (or some closely related thesis), or else establish that link in some other way.

§4. The Planning Theory and Legal Positivism.

So how should a proponent of the Planning Theory establish this kind of link? In thinking about this issue, Hershovitz considers another argument that Shapiro gives,

[35] My thinking here closely parallels (Gadd Manuscript).

which (at least prima facie) might seem to support LMP. Hershovitz thinks that – unfortunately for Shapiro – this argument is also invalid. Let's now turn to that argument.

The argument that Hershovitz focuses on goes as follows. Shapiro argues that legal institutions "are supposed to enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone."[36] They aim to do so, he claims, by creating plans – plans that constitute *the law*. If those plans are to be successful at fulfilling this function, he argues, it must be possible to identify the content of those plans without engaging in moral deliberation – or, more generally, ethical deliberation about what one should do. Plans are meant to help *guide* and *constrain* that deliberation. If one needed to engage in normative reasoning about what one should do in order to figure out their content, Shapiro argues, then it is hard to see how they could play this role successfully. This is meant to be part of why the content of plans is, necessarily, ultimately grounded in social facts alone, and not robustly normative facts. In other words: it is meant to be part of why *plan positivism* is true. This then suggests the following: if laws are plans, then, given the functional role that plans should play, it follows that the content of those laws (and the content of *the law* overall) is, necessarily, ultimately determined by social facts alone, and not robustly normative facts. As Hershovitz helpfully puts it, the argument here can be summed up as follows: "legal positivism follows from plan positivism, coupled with the fact that the law aims to solve problems in the way that plans do."[37]

Hershovitz thinks that there are multiple problems with this basic line of argument. The most important one is that it is invalid, at least as stated. Here is how Hershovitz sums up the issue:

> Suppose that Shapiro is right to say that the fundamental aim of a legal system is to solve problems in the way that plans do. And suppose that he is right to think that law can only help do that if the content of the law is

[36] (Hershovitz 2014, 171).
[37] (Hershovitz 2014, 162).

> same as the content of the plans that constitute it. When you put these claims together, what you learn is that if the content of the law differs from the content of the plans that constitute it, law will not achieve its fundamental aim. But that does not entail that the content of the law must be the same as the content of those plans. To reach that conclusion, we would need to add the further premise that the law must be capable of achieving its fundamental aim. But Shapiro does not offer us an argument to that effect, and I doubt that he could.[38]

I think that Hershovitz is right that Shapiro needs a premise of that sort for the above argument (as stated) to work. Moreover, I think he is right about something else as well, which he goes on to argue for after making this point. This is that a premise about what would count as a *successful* or *valuable* instance of X is a clear basis for a *normative* argument about what Xs should be, or (in a closely connected vein) an *evaluative* argument about how it be good for Xs to be. But what Shapiro is after is an argument about what, necessarily, Xs are. That is a descriptive issue. Not a normative or evaluative one. So there is a serious worry here that Shapiro is appealing to the *wrong kind* of premise here in trying to get his conclusion. In short, he seems to be trying to argue for an "ought" to an "is". Maybe such arguments can work – e.g., perhaps understanding something's proper function can help us understand, or perhaps even help determine, what the function of something *in fact* is. But these are obviously going to be contentious issues. As I said, on the face of it, it seems that perhaps Shapiro is just appealing to the *wrong kind* of premise given the kind of conclusion he aims to draw.[39]

I think there are multiple different ways to go here at this juncture, in light of Hershovitz's worries about this line of argument in support of LMP. One is to push back on whether Shapiro has in fact put together an invalid argument, or whether (in fact) Hershovitz has done a poor job of charitably reconstructing his argument here. I have some sympathy with this way of going. But I think the issues here are much less clear than with the argument I discussed in the previous section. Moreover, at this juncture, the more important philosophical issue at stake here is this: a) can a sound version of this argument be developed here to help Shapiro secure LMP (whether it is

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[38] (Hershovitz 2014, 162).

[39] Herhsovitz raises similar worries about the argument in (Raz 1994). I do so as well briefly in (Plunkett 2012), and in more detail in (Plunkett Forthcoming).

Shapiro's original argument or not) or else b) provide an argument that secures the link between the different kinds of content at issue in some other way?

I have sympathies with both options. But I want to focus on the second. This is because it will allow me to illustrate the broader philosophical points I want to make, not only about how to best develop and argue for the Planning Theory, but also about the overall prospects of legal positivism and the methodology of general jurisprudence.

There are two main points I want to make here. The first is as follows. Consider the claim that the content of the law ultimately *just is* the content of the plans (laws) that constitute it. (This is a slightly modified version of LMP, which I will call LMP*). This claim is embedded in an overall general jurisprudential theory that Shapiro develops. As such, I take it that they are theses that are meant to get evidential support by the way in which they figure into an overall theory which does a good job of explaining how universal legal thought, talk, and reality fit into reality overall. We have reason to believe that overall theory (if we do so have such reason) because it is not only *a* good theory, but because it does a better job than its rivals at explaining the relevant phenomena at hand (namely, at explaining how universal thought, talk, and reality fit into reality overall). We then have the basis for an inference to best explanation argument for the overall theory. And, at the end of the day, such an IBE argument is exactly how I think we should make the case for the Planning Theory – or, indeed, any comprehensive theory in general jurisprudence.[40]

A relevant question then is this: would the Planning Theory be *as good* if it dropped LMP*? My aim is not to answer that here. Rather, it is to underscore that *this* is one of the crucial questions that needs to be asked in evaluating LMP*. We want to know, in other words, about the overall explanatory power of the Planning Theory (considered as an overall metalegal theory) and the role that LMP* plays in that theory.

[40] In thinking about the overall argument for the Planning Theory in this way, I take myself to be following one core strand of Shapiro's own argumentative strategy in (Shapiro 2011). This is also how I state the core argumentative strategy for the Planning Theory in (Plunkett 2013a), (Plunkett 2013b), and (Plunkett Forthcoming).

In thinking about these issues, consider some of the things that Shapiro (I think rightly) takes to be features of legal thought, talk, and reality.

1) Legal institutions are involved in the production and application of norms (in at least the formal sense of "norm") which either *are* or bear some deep relationship with *the law*.

2) Legal institutions involve many people, who can create norms even without knowing what norms they are creating, or how they are creating them.

3) Judges, lawyers, and other legal actors can have profound disagreements about the content of the law, even when they agree on the meaning of relevant legal texts, and even when they agree on many (though perhaps not all) descriptive facts that are seemingly relevant. Such deep disagreements are possible even amongst judges at the highest levels of judicial power, such that they fail to converge on a single interpretative method for determining what the law is.

4) Legal institutions involve officials.

5) We can morally criticize the law, as well as individual laws.

6) There can be morally abhorrent legal systems, and morally abhorrent laws.

7) Ordinary citizens can use the law (or at least large parts of it) to guide their actions.

8) Some laws are duty-imposing, whereas others are power-conferring.

9) The law of a given jurisdiction is created over time, such that the law of that jurisdiction changes.

10) There are facts about what the content of the law is, in a given jurisdiction at a given time. People can learn about that content, and form disagreements about it with others (including people outside of the legal system in question).

11) The content of the law (in a given jurisdiction, at a given time) isn't always consistent. Nor need it cover all possible cases that might arise.

12) People can follow (or obey) the law for many different reasons.

13) Legal officials can be alienated from the law but still participate in the making and application of law.

14) The law of a given jurisdiction might reference the law of another jurisdiction, and reference it in a way that helps determine what legal officials plan to do, without thereby incorporating that law as part of its own law.

15) Many legal actors (judges, lawyers, etc.) seem to freely cite moral facts in making claims that, at least prima facie, seem to be about "what law is" and not just about what it should be.

Part of what makes general jurisprudence philosophically interesting is that it turns out to be difficult to give a unified theory that provides a good explanation of these things, or which provides a good explanation for why some of these things aren't actually true, despite prima facie reason to think so. A reason to accept LMP* is because it figures in a crucial way to such an overall explanation. That would suggest the following: we get LMP* by analyzing how legal thought and talk in fact function, in thinking about how those things (such as law) that such thought and talk is distinctively about, and in then trying to explain how all of this (legal thought, talk, and reality) fits into reality overall.

It should be emphasized that, by itself, this is obviously only the sketch of how an argument might go. It is one that is based on the idea that we should keep in mind the overall explanatory ambitions of the Planning Theory as a theory in general

jurisprudence (understood as the kind of metalegal theory that I introduced earlier), some of the particular features of legal thought, talk, and reality that such a theory is meant to explain, and the holistic way in which components of a metalegal theory might well get evidential support. So it is far from anything like a decisive response to the key challenge from Hershovitz: namely, the challenge of why we should accept something along the lines of LMP*, or something else that make the link between legal content and the content of plans (in the more ordinary sense of "content"). But it does help orient us in how we should proceed – and, moreover, it shows that the proponent of the Planning Theory (as a form of legal positivism) is not without significant hope here. Or, more carefully, we can at the very least, say the following. It shows us that Hershovitz's worry in particular isn't a fundamentally *new* insurmountable challenge, which is fundamentally distinct from what proponents of the Planning Theory (as a form of positivism) know we needed to do *already*: namely, make a convincing IBE argument on behalf of the Planning Theory as a form of positivism, as part of developing it as a general metalegal theory.

We can sum up the basic dialectic here as follows. Hershovitz writes as if Shapiro – or other proponents of the Planning Theory – are forced into a very specific kind of strategy for defending LMP* (or something else that provides the relevant link between the kinds of "content" at issue). He then has doubts about whether such a strategy can succeed. I share some of his worries about this strategy (even though I think there is more to say on its behalf). But I disagree that the proponent of the Planning Theory (who wants to defend legal positivism) is forced into such a strategy. Instead, once one understands the Planning Theory as an overall metalegal theory, and thinks about how individual theses that are part of such an overall theory are often defended, one sees there is another general strategy that the Planning Theorist can take. In short, this is to defend LMP* (or something closely related to it) by an overall IBE argument on behalf of a general metalegal theory (which we can call "the Planning Theory") that involves LMP* as a key component part – a part that, if it wasn't there, would weaken the overall IBE case for the metalegal theory.

§5. Real Definition and Positivism.

So how exactly does positivism fit into the overall metalegal theory I have in mind here? There is a lot to say here, and it is beyond the scope of this paper to give anything like an exhaustive account. Instead, I want to introduce a way of thinking about how to best understand a core claim of the Planning Theory. This will allow me to say something in what follows about another issue that Hershovitz raises. It also brings out an important point about an important way in which legal positivism might be defended.

As I have emphasized, at the core of the overall metalegal theory proposed by the Planning Theorist are two metaphysical claims: one about legal institutions and the other about the law itself (in the sense of the "the law" that has to do with legal norms, and not legal institutions"). I earlier glossed these as "nature of" claims. We can now be more precise. We can ask: are these claims about composition? Identity? Or what? There are different ways to go here, and different philosophers aiming to develop the core ideas of the Planning Theory might well want to go in different ways. What I want to propose is this: we think of these as claims about *real definition*.[41] By this, I mean roughly the following: these are claims telling us about what something really is. Not about the words or the concepts used to pick out those things. But the things themselves. This involves (centrally) telling us something about the *essence* of those things under consideration. Not just there necessary features. But the features that make that thing *what it is*. In proposing a real definition, what we are doing is defining one thing (A) in terms of another (B). Following Gideon Rosen, I take it that the following is true: "real definitions are not identities (though they entail identities). Rather they pair one (possibly simple) thing — the definiendum — with another (invariably complex) thing: its definiens."[42]

The idea that the central metaphysical claims of the Planning Theory should be thought of in terms of real definition is not a highly revisionary way of developing the Planning Theory. In fact, it closely aligns with Shapiro's own understanding of the view. In the

[41] This idea is also in (Gadd Manuscript), who anticipates the same basic way of developing the core metaphysical claims of the Planning Theory.
[42] (Rosen 2015, 190).

first chapter of *Legality*, Shapiro distinguishes between what he calls an "Identity Question" about X vs. the "Implication Question" about X. He puts the Identity Question as follows: "In general, to ask about the identity of X is to ask what it is about X that makes it X and not Y or Z or any other such thing. … A correct answer to the Identity Question must supply the set of properties that make (possible or actual) instances of X the things that they are."[43] In turn, when asking the Implication Question, Shapiro claims that "we are not so much interested in what makes the object the thing that it is but rather in what necessarily follows from the fact that it is what it is and not something else."[44] Shapiro aims to answer both questions about law in *Legality* – both in the sense of "law" that has to do with legal institutions (e.g., "the law often uses force to insure compliance") and the sense of "law" that has to do with legal norms (e.g., "the law of this state is that taxes are due every April"). What Shapiro calls an "Identity Question" about X might best be interpreted in a few different ways. But a straightforward way of reading him is to read this as a question about real definition. Among other things, doing so aligns with his emphasis on discovering what a thing *is*, rather than our thought and talk about it, his explicit invocation of Aristotle (who introduces the idea of real definition) in initially presenting the Identity Question, and his emphasis that *essential* properties matter a great deal here (and not just necessary and sufficient properties), in the sense emphasized by Kit Fine.[45] This emphasis on essential facts matters for the following reason: facts about essence are arguably key to giving a real definition, as Rosen argues. According to Rosen, one should give a real definition of what real definitions themselves are in terms of a combination of grounding and essence.[46] All of this suggests the following: it is hardly a forced reading to think of Shapiro's core metaphysical claims of the Planning Theory in terms of real definition.

The idea then is that Shapiro is giving a real definition of law. Of what? In claiming that the law is such-and-such, what Shapiro is saying something about one of the *distinctive things* picked out by actual legal thought and talk (as it occurs across all social/historical contexts in which there is such thought and talk). The distinctive thing in particular

[43] (Shapiro 2011, 9).
[44] (Shapiro 2011, 9).
[45] (Shapiro 2011, 10, fn. 7) citing (Fine 1994).
[46] (Rosen 2015).

under consideration is the thing we can call *the law* (in the sense of 'law' that, roughly, tracks the idea of the totality of legal norms in a given jurisdiction (at a given time), rather than legal institutions).

Contemporary philosophy abounds with claims about real definition (and related claims about essence). We see them everywhere from metaphysics to ethics to philosophy of mind. Perhaps this is a deep mistake. Perhaps, for example, the whole idea of "real definition" is just a deep confusion. Perhaps there really is nothing here for us to investigate. I take those kinds of issues seriously. But my aim here isn't to defend the general idea of real definition. Nor is it to give a theory of real definition. Rather, I want to make a point about what might well follow from the core metaphysical claims of the Planning Theory *if* we understand those claims about real definition, assuming that there is a substantive topic for us to meaningfully discuss here (of the sort that contemporary metaphysicians working on real definition are interested in).

The idea I want to introduce here concerns a link between real definition and grounding, recently defended by Gideon Rosen. The link is as follows:

> GDL: If Def (F, Φ) then necessarily, if a thing is F it is F in virtue of being Φ.[47]

By "Def (F, Φ)", Rosen means that the real definition of F in terms of Φ. And the "in virtue of" talk here in the second part of the sentence is another way of talking about ground.

The core idea behind this link is straightforward. Real definitions are meant to be explanatory. Not in an epistemic sense of "explanation" of helping us understand a subject matter, nor in a causal sense. But rather in terms of "constitutive" explanation. If real definitions are explanatory in this sense, it seems that they must tell us something about the metaphysical priority of one thing relative to another (or of some set of facts

[47] (Rosen 2015, 198).

relative to others). Here is how Rosen motivates the thought: "If to be prime is to be a number *n* whose only factors are 1 and *n*, it follows immediately that whenever *n* is prime, *n* is prime *because* — i.e., in virtue of the fact that — it's only proper factors are 1 and n."[48] That doesn't mean that to give a real definition is *just* to state something about grounding. Indeed, Rosen thinks it is not. (His own account of what real definitions are understands them in terms of both grounding and essence). The point is, rather, that real definitions entail (in addition to perhaps consisting partly in) facts about what grounds what.

Suppose that Rosen's thesis about the entailment here is correct. This then gives us the basis for a good argument from the truth of the core metaphysical claims of the Planning Theory to the truth of legal positivism.[49] The argument would go (roughly) as follows:

P1) The fact that the law (in a given community, at a given time) is X consists in the fact that legal institutions have adopted and apply certain plans, regardless of having anything to do the normative merit of those institutions or plans. (This is meant as a real definition of what *the law* is).

P2) If Def (F, Φ) then necessarily, if a thing is F it is F in virtue of being Φ. (This is The Grounding-Real Definition Link.)

P3) The fact that the law (in a given community, at a given time) is X is, necessarily, grounded in the fact that legal institutions apply certain plans, regardless of having anything to do the normative merit of those institutions or plans. (This follows from P1 and P2).

P4) The fact that a group of people have a given plan P, as well as facts about the content of those plans, are, necessarily, ultimately grounded in social facts alone, and

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[48] (Rosen 2015, 198).

[49] (Gadd Manuscript) also recognizes the same possibility here, and develops it much the same way as I do here.

not robustly normative facts. (This is, in essence, the thesis that Shapiro calls *plan positivism*. The use of "ultimately" here is akin to the same use of "ultimately" in the debate over legal positivism).

P5) If X grounds Y, and Y grounds Z, then X grounds Z. (In other words: grounding is transitive). More specifically, if X ultimately grounds Y (in the relevant sense of "ultimately" that we are working with here, in the context of the debate over legal positivism), and Y ultimately grounds Z, then X ultimately grounds Z. (This is the more specific version of the transitivity of ground that we need in the context of our debate).

C) The legal facts (facts about the content of the law) are, necessarily, ultimately grounded in social facts alone, and not robustly normative facts. (This is the thesis we have been calling *legal positivism*. It follows from P3, P4, and P5).

This is, roughly, how I want to here propose one argues for why the core metaphysical commitments of the Planning Theory lead to the conclusion of legal positivism.

Obviously, a lot more needs to be said to get us anything like a convincing case that this argument works. For example: as the earlier discussion of Hershovitz's worries makes clear, many might well want to resist some of the premises here (e.g., P1 or P4). These premises might well be mistaken. So too might the link between grounding and real definition that I have relied on, or the idea that there are substantive truths about the *real definitions* that we can discover as philosophers. And it might well be that the exact formulations of the grounding-real definition link, or the formulations of the transitivity of ground, might well need to be slightly tinkered with, given the relevant kinds of grounding relations at issue here (e.g., because of the issue of "ultimate grounds"). But all of these are further issues. What matters here is this: there is a basic argument form that is a promising one for the Planning Theorist to take *if* the view is developed in a certain way (a way that I think is in fact basically Shapiro's own way of developing it), and *if* certain (widespread) ideas in contemporary metaphysics turn out to be right.

It is particularly promising when it is recalled, as a I argued earlier, that the overall best argument for the Planning Theory is an IBE argument, where there are many evidential connections between different claims made in developing the theory. So too will be there multiple strands of support for the truth of legal positivism as such. Recall that some of the reasons we should think that legal positivism is true won't have anything at all to do with the Planning Theory in particular. Rather, they will be general arguments and motivations for legal positivism as such. In assessing whether positivism is true, or whether antipositivism is instead, we shouldn't expect there to be knock-down arguments one way or the other that *obviously* settle the debate one way or another in a way. Rather, to put in the terminology of David Enoch, we should be thinking about overall "plausibility points"; about how many considerations favor positivism over antipositivism (or vice versa).[50] The Planning Theory both gains support from the fact that there are many plausibility points in favor of positivism (independently of anything have to do with the Planning Theory as such) as well as helps deliver more plausibility points in favor of positivism (insofar as we think the Planning Theory is on the right track).

§6. Real Definition and Exclusive Legal Positivism.

I now want to turn to another argument that Hershovitz makes later in his paper. The issue centers on the prospects of exclusive legal positivism. But, as we will see, the issues here are more general. What I want to propose is this: the same basic sort of argumentative strategy that I outlined above can be used to respond to this other argument from Hershovitz.

Hershovitz asks us to imagine a group of people who read Dworkin's *Law's Empire*, who then decide that they want "what Dworkin describes – a legal system whose content

[50] This talk of "plausibility points" is from (Enoch 2011b). It is worth noting that Enoch himself takes there to an *overwhelming* amount of evidence in favor of positivism, such that (in this particular case of the debate over legal positivism) positivism has *way more* plausibility points. See (Enoch 2011a). So it's not clear how methodologically *useful* he would think talking in terms of "plausibility points" here is (even if it is still *true* that this is the correct methodology), given how conclusive he thinks the case is for positivism vs. antipositivism.

flows in a principled fashion from the political decisions that they make."[51] Based on this, they decide to try and create a legal system where the law is grounded on the kinds of facts that Dworkin claims the law is grounded in – roughly, normative facts about what best morally justifies the overall legal practices in that community. Those grounds involve a combination of robustly normative facts (or at least facts that bear a deep necessary connection to such facts, such as necessarily entailing them) as well as social facts. The former are the facts about moral justification, and the latter are the descriptive facts about the actual legal practices in that community.

Is it metaphysically possible for this group of people to create such a legal system? According to the Dworkinian antipositivist, the answer is obviously Yes. Indeed, from that point of view, we might say that what they are doing is just deciding to have *law*. Consider here what is (at least) *a* compelling way of reading Dworkin's view in *Law's Empire*: *necessarily*, the law is ultimately grounded normative facts about what best morally justifies the overall legal practices in that community.[52] According to the inclusive legal positivist, the answer might also be Yes. This is because, according to inclusive legal positivism as such, robustly normative facts (e.g., perhaps the ones Dworkin has in mind) can be amongst the grounds of the legal facts if certain contingent social facts obtain. So perhaps, in this case, the relevant social facts *do* obtain, following the decision of this community to try to create a legal system based on their admiration of the system that Dworkin describes in *Law's Empire*. However, exclusive legal positivists must answer No here. This is because, according to exclusive legal positivism, necessarily, robustly normative facts can never be amongst the grounds of legal facts, and not just in an ultimate sense. As Hershovitz puts it: "exclusive legal positivists, like Raz and Shapiro, are committed to the view that this project must fail. Try as they might, these people cannot create the law they intend to create."[53]

Hershovitz finds this answer puzzling. What is it about such normative systems that makes them ineligible to be law? In other words, according to exclusive legal positivists,

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[51] (Hershovitz 2014, 169).
[52] This reading of Dworkin's account of the grounds of law in (Dworkin 1986) draws on Greenberg's reading of it in (Greenberg 2006).
[53] (Hershovitz 2014, 169).

why *can't* we create legal systems where the content of the law is grounded partly in the kinds of normative facts that Dworkin has in mind in *Law's Empire*? Hershovitz writes the following:

> Raz and Shapiro give what strikes me as the only answer one could give to this question. These normative systems are ineligible because they cannot play the role in these people's lives that a legal system is supposed to play. For Raz, the law must be capable of making the difference that authority makes. For Shapiro, it must be capable of making the difference that plans make. The details are different, but the arguments take the same form because only an argument of that form seems apt to explain why these normative systems are ineligible to be law.[54]

But this form of argument, Hershovitz claims, is problematic. First, as we saw before, it seems to move from a normative premise about how something *should* function to a descriptive claim about what it *is*, in a way that is unwarranted. Furthermore, Hershovitz argues (following Hart) that there is *no* "task, so central to what it is to be law, that nothing could be law if it could not do it."[55]

There is a lot to say at this stage, both about the arguments from Shapiro and Raz that Hershovitz outlines, as well as Hershovitz's worries about how those arguments go (including the two I just stated above). However, for my purposes here, I want to focus on a single key point about Hershovitz's discussion. This concerns his idea that Shapiro and Raz "give what strikes me as the only answer one could give to this question"[56] – that is, to the question of why, according to the exclusive legal positivist, the community of people in our thought experiment must fail in setting up a legal system in which legal facts are partly grounded in the sort of normative facts that Dworkin discusses. Hershovitz doesn't give an argument for why this is the only answer that can be given. He simply says that it "strikes" him that it is the only answer one could give. Especially given this, we should ask: is this really the only answer the exclusive legal positivist could give here? I think the answer is No. Moreover, I am not at all convinced that it is even the *best* answer one could give.

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[54] (Hershovitz 2014, 170).
[55] (Hershovitz 2014, 170).
[56] (Hershovitz 2014, 170).

Here is how an alternative answer can go, based on the way of thinking about the Planning Theory that I have been developing in this paper. First, when asked "why can't these people set up a legal system in which legal facts are partly grounded in the sort of normative facts that Dworkin discusses?", we can respond as follows. It follows from the real definition of law that this is impossible. It might well be that these people have successfully created an institutionalized normative system of *some* kind. And it might be one that is law-like in *many* ways, e.g., that it involves norms for the regulation of the activity of agents that obtain (at least partly) because of the activity of officials in that system. But, given the facts about what law as such is, the possibility of this sort of Dworkin-inspired institutionalized normative system being a *legal system* is simply ruled out. Perhaps, for example, this is tied to the fact that laws are plans, and it follows from the real definition of *plans* that facts about the contents of plans must be grounded exclusively in social facts, and not robustly normative facts. Appealing to such an idea is akin to appealing to the following: it follows from what the game of chess is that one can't have a version of chess where pawns can move 5 spaces diagonally and the Queen can only move one space at a time. When we properly understand what chess *is*, we understand that this is impossible. Such a game might be chess-like in *many* ways. But it isn't chess.

Of course, however, Hershovitz or other opponents of exclusive legal positivism will be unsatisfied here. An appeal to *that's just what X is* here will hardly be convincing to them. It might indeed just seem like mere table-thumping. They will want to know *why* this is the correct view of what X is. In one (metaphysical) sense of "why", perhaps the answer is that there is no further explanation to be given. Perhaps facts about the real definitions of things are metaphysical bedrock.[57] But the relevant sense of "why" here that Hershovitz and other critics will be after here won't be a demand for further metaphysical explanation. Instead, the relevant thing Hershovitz and others will want to know is a good *argument* for why they should believe that this is the correct real definition of law (or of legal facts, etc.).

[57] See (Dasgupta 2014).

The question then is this: is the exclusive legal positivist forced into an argument about proper function here, in making this argument? I don't see why that would be so. Consider that, in the case at hand, the proposed real definition of law (or real definitions of other phenomena) is part of an overall metalegal theory that the Planning Theorist is developing. What gives us reason to think that the thing – law – that we are referring to with our legal thought and talk is something that can only be grounded in X facts, and not Y facts? There is unlikely to be just be *one* argument here. As part of the arguments delivered, there is going to an argument for an overall package – a package deal involving (among other things) claims in metaphysics, philosophy of language, philosophy of mind, and epistemology – that is a general view in metalegal theory (and in general jurisprudence in particular). That view will be supported by an IBE argument for why we should accept this view. This will be an argument that makes the case that we should accept this view (the Planning Theory, understood here as including the commitment to exclusive legal positivism) because it does a sufficiently good job, and a better job than all the alternatives, in explaining how legal thought, talk, and reality fit into reality overall.

This brings out that exclusive legal positivism might be established in any number of ways. For example: perhaps it turns out that, given the correct analysis of the concept we express by the term 'law', it just follows that it only picks out things that where exclusive legal positivism is true of them. Thus, when we ask about the real definition of the relevant thing – the things picked out by that concept – it might well be that exclusive legal positivism flows from the real definition of that thing. Not because our use of concepts *made* it so. But because we happen to pick out that thing using the concept we happen to employ. Maybe we could have used the term 'law' to express some *other* concept – for example, to express the concept we now express by the term 'horse' or 'shoe'. But we didn't. So when we engage in the descriptive project of explaining the relevant portion of our thought and talk here (namely, the *legal* thought and talk), it is the current concept that is the relevant one. The project of analyzing the relevant concepts here need not appeal to any robustly normative facts. Nor must there be an appeal to the proper function of the things picked out by that concept.

There are obviously key challenges that such a defense of exclusive legal positivism faces. Among other things, there is the question of how exactly to demarcate *legal* thought and talk from other kinds of thought and talk. There is also clearly the issue of whether the correct analysis of the relevant concepts here turns out in the way I sketched. But, again, I am not here claiming that this argumentative route for defending exclusive legal positivism is correct. My point is just that it is the basis for a promising route for defending it, which avoids the key charges that Hershovitz makes against the arguments from Shapiro and Raz he considers. Perhaps most importantly, the form of argument doesn't rely on an appeal to the function of law of the kind that Hershovitz worries about. Thus, if it is a bad argument for exclusive legal positivism, it's bad for reasons other than the ones Hershovitz has given us. For my purposes here, that is enough. For my concerns here aren't whether exclusive legal positivism is correct (or whether positivism in general is). Rather, it is about the theoretical status of those claims, including whether or not those claims are doomed because of Hershovitz's arguments. My argument has been that there are philosophical resources here that Hershovitz underappreciates, and which blunt the force of his criticisms. Positivism might be false. So too might be exclusive legal positivism in particular. But those wishing to defend such claims have promising ways of defending those claims that don't fall prey to Hershovitz's main lines of attack here.

In closing this section, I want to briefly note a separate issue that Hershovitz's thought experiment raises. This is the possibility that the community in his thought experiment creates a system for regulating human behavior that works roughly along the lines of the Dworkinian system (e.g., in that the content of its norms are grounded partly in normative facts of the kind Dworkin has in mind). The exclusive legal positivist is *not* committed to the idea that such a normative system wouldn't be possible. They are only committed to the idea that it wouldn't be law. We might then ask the following. Suppose the community in question recognizes that, given the current meaning of our legal terms, it can't be that the thing they build counts as a legal system. But what if this community decides to *reform* current usage of relevant terminology here (e.g., the term 'law' or 'legal system')? Nothing in the story I have sketched rules that out. Metalegal theory is a descriptive project, rather than a normative one. As such, it doesn't tell us

that we should or should not reform our words (or concepts) one way or another. If this community proposes a reform in our thought and talk, the question then is: should we accept that reform or not? Perhaps the answer is yes.

Once this possibility is firming in view, we can ask if people in the actual world are in fact already advocating for such a reforming usage of 'law'. One way they might do so is explicitly. But they also might do so implicitly, by using (rather than mentioning) the relevant terms in a way that advocates for their preferred usage. This latter idea is tied to what, in other work, Tim Sundell and I have called *metalinguistic negotiation*.[58] Roughly, metalinguistic negotiations are disputes in which speakers use a relevant term (e.g., 'law') in divergent ways, such that they have a disagreement (expressed in the pragmatics *via* such divergent usage, rather than the literal content of what they say) about how that term should be used. In recent work, I have argued I have argued that an important part of the dispute over legal positivism involves a metalinguistic negotiation over how we should use the word 'law'.[59] If this is right, it creates some challenges for the proponent of the strategy in defense of exclusive legal positivism I sketched above. Most importantly, it suggests that there might not be sufficient *unity* in terms of which concepts actual people express by the relevant terminology (e.g., 'law') to get a constraint of the kind I sketched by descriptive conceptual analysis alone. For it might be that one concept that some people express by the term 'law' (at least in certain contexts) picks out something of which antipositivism is true (or inclusive legal positivism), even if there is another concept that some people express by the term 'law' (at least in certain contexts) that picks out something of which exclusive legal positivism is true. If that is right, the exclusive legal positivist would need to give a normative argument for why we should privilege one of multiple rival concepts that we currently express by the term 'law', in the context at hand.[60]

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[58] See (Plunkett and Sundell 2013).
[59] (Plunkett 2016).
[60] I develop this line or thought in more detail in (Plunkett 2016). For connected discussions in general jurisprudence, which also emphasize (something roughly close to) the import of normative questions about which concepts to express by the term 'law', see (Murphy 2008) and (Stoljar 2013).

It is beyond the scope of this paper to address what such a case might look like. Rather, what I want to emphasize here is that this choice need not be arbitrary. Nor need we think the answer to which concept we should use depends just on which one we happen to want to use. Instead, it is at least plausible that which concept should be privileged here will be tied to what we aim to do with that concept.[61] And, here, we might zoom in on more specific projects – for example, either explanatory ones about trying to understand a particular subset of legal thought and talk, or perhaps projects of moral or political advocacy, or perhaps theoretical inquiry in moral and political philosophy. Different concepts might be relevant for different purposes. One compelling option for the Planning Theorist here, I think, is the following. To argue, first, that they have latched onto a concept that is central to what is at least *one* important strand of existing legal thought and talk, and then argue that, by regimenting our usage of the term 'law' around this meaning, we get some further payout: e.g., perhaps in explanatory projects in the social sciences, perhaps for our normative discussions in moral and political philosophy, or perhaps both.[62] Making that case will obviously be a complicated task. And perhaps it will fail miserably. But it isn't one that is obviously sunk by the considerations that Hershovitz raises in his arguments that I have been considering in this paper.

§7. Conclusion.

In this paper, I considered one line of argument that Hershovitz develops against The Planning Theory of Law, insofar as that theory is meant to help secure the truth of legal positivism. I have argued that the Planning Theorist has promising routes open to her to defend against Hershovitz's main lines of criticism. It might well be that the Planning Theory is deeply mistaken – and, indeed, perhaps for reasons that Hershovitz puts forward in other parts of his article, or in other work. But, if the Planning Theory is deeply mistaken, it isn't because it rests on the invalid argument that Herhshovitz

[61] For further discussion of this idea, see (Burgess and Plunkett 2013a), (Burgess and Plunkett 2013b), (Thomasson 2016), and (Haslanger 2000).
[62] For further discussion of this, see (Plunkett 2016).

focuses on (or two invalid arguments, one of which was meant to support the purportedly missing premise in the first).

In responding to Hershovitz, I have put forward a way of thinking about what the Planning Theory is a fundamentally a theory *of*. Namely, I have claimed that it is a theory in general jurisprudence, where this is conceived of as a branch of metalegal inquiry. It is a theory that, in short, aims to explain how universal legal thought, talk, and reality fits into reality overall. As part of this, I have also put forward a view about how some of the core claims in this metalegal theory are best understood – namely, as claims about the real definition of things that are part of legal reality (that is, the part of reality that legal thought and talk is distinctively about). Put together, these ideas formed the basis of my explanation of how one might defend legal positivism (and, perhaps, *exclusive* legal positivism as well) using the Planning Theory. Hershovitz argues that a version of his attack on the Planning Theory (as a form of positivism) might well generalize to other theories that aim to secure positivism – perhaps not all of them, but many of them. I think he is right that many of the core issues involved here aren't specific to the Planning Theory as such. It is thus worth emphasizing that someone who thinks that the Planning Theory is wrong, but who still wants to secure positivism, might well make use of the same central moves I have put forward in this paper, but based around a different theory (e.g., a Hartian one). Moreover, so too might an antipositivist who wanted to explain why antipositivism is true.

Such arguments – either for defending positivism or antipositivism – might well *not* be the best ways of establishing these theses. Perhaps, for example, it will turn out that the best overall metalegal theory will be neutral on the debate over positivism. This would be so, for example, if (at least one kind of) expressivism turned out to be true of legal thought and talk.[63] If that is right, then seeking to defend positivism (or antipositivism) via appeal to the true metalegal theory would just be a mistake. My aim here, however, has not been to defend the strategy I have put forward as the *only* way to defend legal positivism. Not I have claimed it is even the *best* way. Rather, my aim has been much more modest. It has been to defend it as *a* way that avoids Hershovitz's line of

[63] For discussion of this idea, see (Plunkett and Shapiro 2017) and (Toh 2013).

challenge: a way that is plausible, if one already has reason to believe the core metaphysical claims of the Planning Theory, as well as reason to believe certain (widely held) views about metaphysics in general. Having this way of thinking about the Planning Theory squarely on the table, as well as the schema it suggests for thinking about other views in general jurisprudence, should help us in evaluating further arguments in legal philosophy.

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