

C5 **5** Legal Metanormativity
 LESSONS FOR AND FROM CONSTITUTIVIST ACCOUNTS IN THE
 PHILOSOPHY OF LAW
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C5.S1 I. The Metanormative Ambitions of Metaethics

C5.P1 Philosophers working in metaethics are gripped by questions about how we think, talk, and come to know facts about ethics and morality and what the nature of its domain could be, given answers to these questions. It is increasingly clear to many that the features of the ethical domain that make these questions so gripping extend beyond it to other domains that might also be properly thought of as normative, dealing with questions not merely of how things are, but of how they ought to be.

C5.P2 This recognition of normativity outside of ethics puts pressure on metaethicists to attend to other normative domains to ensure that their answers to metaethical questions can be extended to provide a natural unified explanation of normative phenomena wherever they occur. Many metaethicists are, then, in the process of turning their sights to see whether their accounts of the metaethical could be extended to metanormative accounts more generally.¹

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C5.P2n1 ¹ Though what distinguishes normative domains is a matter of controversy, many agree that a domain is normative when it can be understood in terms of reasons. The question “is domain D normative” often is thought to be settled by the answer to the question “are the dictates of domain D reason-giving?” So, Foot’s example of sexist club rules would not be normative on this account, because they do not give us reason to accord with them, while the rules of prudence might, though they would not themselves be dictates of ethics. (Foot

Dimensions of Normativity. David Plunkett, Scott J. Shapiro, and Kevin Toh.
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C5.P3 It is unsurprising, then, that the domain of legality has increasingly come to the attention of metaethicists. Though metaethicists interested in expanding their account beyond the ethical domain typically focus on the theoretical or epistemic domain, the legal domain has characteristic prescriptive reason-giving normativity that the epistemic domain is often thought to lack.² Unlike the epistemic domain, it is inherently practical, and so has features that make it plausibly reason-giving. Because of its reason-giving and evaluative features, the legal domain is a clear candidate for explanation from metanormative extensions of metaethical accounts. It seems important, then, that any metaethical account must be extendable to include an account of the legal domain.³ However, it complicates matters to include the legal domain among those domains that a metanormative theory is beholden to explain. The greater the number of normative domains and the more diverse their subject matter and normative features, the more sophisticated the metanormative account of them must be. However, one promising metaethical account that seems poised to extend to account for diverse normative domains is constitutivism.

C5.P4 Metaethical constitutivism is a reductive account that takes the constitutive features of some ethical kind to explain or ground the normative ethical facts. So, for example, Korsgaard seeks to explain the reasons agents have (a normative ethical fact) by appeal to the claimed fact that agents are by nature self-constituting, and agents have reasons to do things that would further the success of this constitutive activity.⁴ The heavy lifting for constitutive theories is in explaining the constitutive features that all kind-members in a domain share and how that constitutive feature grounds the normative features of the domain. I think of these tasks as the Extension Task and the Norm Explanation Task, respectively.

C5.P5 These two tasks also constrain the metanormative constitutivist's account of normativity generally. The constitutivist's account of normativity must explain the extension of normative domains generally, a correlate of the Extension Task. In addition, the metanormative constitutivist must have the resources to explain the distinctive normative features of each normative domain. So, depending on the set of domains to be explained by the generalized constitutivist account, which I will call the Metanormative Constitutivist account, the constitutivists' task will vary in difficulty. It seems that the more diversity there is in the normative features across domains, the greater the problems for the constitutivist in providing a unified account. So, the metaethical constitutivist with unifying aspirations has an

1972) Considerations of parsimony might lead us to reject this understanding, because many domains that might strike us as having important commonalities with ethics that metanormativity seeks to understand are ruled out on this account. Epistemology, for example, if you are to follow Kolodny, is not normative on this conception because it is not reason-giving in the right way. *Pace* Kolodny, in "Why Be Rational?" *Mind* (2005), I think this result should lead us to reject this reasons-basic understanding of normativity, rather than reject epistemology as normative. For readers who are primarily interested in the reason-givingness of the legal domain, I direct them to Enoch's (2011) "Reason Giving and the Law" that argues that the reasons given by laws are triggering reasons, which bring about conditional reasons.

C5.P312 ² See, for example, (Wedgwood 2002, 267–297). and (Velleman 2000, 244–81) Kate Nolfi, who calls this view, in epistemology, at least "Normativism" see her: (2015) "How to Be a Normativist About the Nature of Belief."

C5.P313 ³ Alternately, the metaethicist could provide an Error Theory of the normativity of the legal domain consistent with her general metanormative account.

C5.P414 ⁴ See (Korsgaard 2009). For other prominent examples of constitutivists, see (Velleman 2000), (Smith 2013), and (Katsafanas 2013).

additional burden: to show that her metaethical story generalizes in some principled way to a metanormative constitutivist account according to which we can understand specific constitutivist accounts in other normative domains.

C5.P6 In this chapter, I look to the legal domain which is both plausibly normative and practical, and in which there are currently accounts that take the general shape of constitutivist explanations I sketched above. I'll look at one such account, Scott Shapiro's, and see how far understanding its strengths and working to avoid its weaknesses can get us toward completing these tasks for the metaethical constitutivist.

C5.S2 II. The Planning Theory of Legal Normativity

C5.P7 In many plausibly normative domains, there are already existing constitutivist-esque accounts that take the nature of individuals in that domain to explain the plausibly normative features of that domain. Perhaps unsurprisingly, there are current positions in the philosophy of law literature that take the general shape of a constitutivist account, grounding the normative features of the legal domain in the nature of laws themselves.⁵ This sets the metaethical constitutivist up to incorporate an existing constitutivist account of legal normativity into her metanormative account.⁶ Here I'll focus on one account with a constitutivist form recently developed by Scott Shapiro to identify a type of problem faced by constitutivist accounts of the legal domain and what lessons metanormative constitutivists can glean from its struggles.

C5.P8 Shapiro's account is one of the more interesting recent attempts to ground law's normative features in an account of its function.⁷ Shapiro's Planning Theory of Law explains normative facts in the law by appealing to the necessary features of the law itself. His account has two general constitutive requirements on being a legal institution. First, developing a position found in the philosophy of action in the work of Michael Bratman, Shapiro understands a

C5.P7n5 ⁵ This is, of course, not the only position in current and historical philosophy of law. It is, of course, possible to deny that there *are* normative features of the legal domain. It is also possible to explain the normative features by appeal to those of other normative domains, (e.g., the domain of morality), or from the activities of other normatively authoritative beings (e.g., the commands of deities). Regardless, each of these forms could produce a unified metanormative account, provided the same sort of explanation held of other normative domains. What is at issue, then, seems to be whether the legal domain is *itself* the source of its own normative features, or whether the existence of legal normativity is dependent on the existence of ethical normativity or divine normativity, or perhaps pragmatic normativity, if such a thing exists. There are many interesting questions that turn on this that are beyond the scope of the chapter here.

C5.P7n6 ⁶ I'm understanding, "metanormative accounts" to be those that explain, in general, how domains have their normative features, and particular accounts then specify how that metanormative account applies in specific cases. So, e.g., metaethical accounts explain how the ethical domain has the normative features it has, and accounts of how the legal domain explain how legal domains have their normative features. A particular metaethical and legal account can have the same form, e.g., can both be constitutivist accounts, and thus both fall under the same metanormative account.

C5.P8n7 ⁷ Shapiro's account is certainly not alone here. See, for example, (Ehrenberg 2015, 247–266). I focus on Shapiro because his book-length treatment lays out the constitutive features of the legal domain and accounts for both how those constitutive features are had and how those features generate norms. It is, to my knowledge, the most explicit and recent development of a full constitutivist legal account.

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legal institution as characterized by the Planning Thesis: as social organizations that create, carry out, and enforce social plans. Legal activity, for Shapiro, is thus activity of a sort of social planning. Shapiro writes that “legal institutions plan for the communities over whom they claim authority, both by telling their members what they may or may not do and by authorizing some of these members to plan for others.”⁸ Certain complex social arrangements lead to what Shapiro calls the “circumstances of legality,” situations in which the management of predictability, compensation for ignorance and bad character, and accountability are needed.⁹ According to Shapiro, in these circumstances of legality, social planning is needed to set communal standards for behavior via publicly accessible standards. This is the sort of planning that legal institutions are constitutively engaged in as a matter of actual practice. Any institution, in order to be a legal institution, must be engaged in such planning activity.

C5.P9 However, engagement in planning activity is not sufficient to constitute a legal system on Shapiro’s account. To fully account for the constitutive requirements of legal systems, Shapiro supplements the Planning Thesis with what he calls the Moral Aim Thesis. The Moral Aim Thesis states that “the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.”¹⁰ There are institutions that engage in planning activity of the sort the Planning Thesis constitutively attributes to legal institutions and yet are not legal institutions (e.g., the Mafia). On Shapiro’s account, these institutions are not legal institutions because they do not have the constitutive moral aim that all legal institutions have. Though many planning institutions coordinate social activity, “only a legal system *is supposed to* address those problems that less sophisticated methods of coordinating social activity and guiding action are unable to resolve.”¹¹

C5.P10 So, the two constitutive requirements on a legal institution are characterized by the Planning Thesis and the Moral Aim Thesis. Legal institutions must be engaged in a characteristic type of planning activity and they must have a moral aim. The Planning Thesis only requires that legal institutions *actually* engage in planning activity, and so accounting for this requirement only requires that we can determine what an institution does. Determining whether an institution has a moral aim is more difficult. Shapiro recognizes that many legal institutions fail to achieve their moral aims, and some might even fail to attempt to achieve their moral aims. So he doesn’t require that legal institution *actually* achieve moral ends. Instead, he holds that “what makes the law the law is that it *has* a moral aim, not that it *satisfies* that aim.”¹² Together, on Shapiro’s view, these two constitutive features are shared by all legal institutions and can be used to explain the normative features of the legal domain.

C5.P11 Shapiro develops this view to account for Extension (ruling in all and only pre-theoretical legal institutions) and Norm Explanation (accounting for the normative features of the domain). The Moral Aim Thesis serves both tasks for Shapiro. It helps explain why the Mafia and Yakuza aren’t legal institutions, despite being planning institutions, and it helps explain

C5.P8n8 ⁸ (Shapiro 2015, 195).

C5.P8n9 ⁹ (Shapiro 2015, 200).

C5.P9n10 ¹⁰ (Shapiro 2015, 213).

C5.P9n11 ¹¹ (Shapiro 2015, 214).

C5.P10n12 ¹² (Shapiro 2015, 212). The explanation for how an institution counts as having this constitutive aim is, as yet, unexplained. We’ll return to this shortly.

the normative features that govern legal officials. The Planning Thesis, with its behavioral constraint, and the Moral Aim Thesis with its teleological constraint, together generate an account of not only what the law *is*, but also what it *should be*, and importantly for Shapiro, *how it should be used*. He writes “the law is, in the end, an instrument [. . .] and as with all instruments, there are correct and incorrect ways to use the law; if we use it incorrectly, it will not do what it is supposed to do and authorities will not do what they are entitled to do.”¹³

C5.S3 III. The Moral Aim Thesis and the Extension Task

C5.P12 Shapiro takes legal officials to be accountable for the accomplishments of the law as well as its uses. The demand to explain these normative features makes Shapiro’s Moral Aim Thesis an obviously appealing constitutive requirement for legal institutions. By appealing to the moral aim of law, Shapiro takes himself to be able to explain how those who make and apply laws are also under moral and other practical constraints because of the nature of law.

C5.P13 However, explaining a domain’s normative features by appeal to a constitutive feature requires a successful account of how that feature is constitutive of the domain. So, a suitable metaphysical account must be given to explain both *how* the members of a normative domain have this feature and to show that all members of the normative domain in question have that feature. So, how can we tell whether a system has a moral aim, and how can we be sure that all legal systems are going to have such an aim?

C5.P14 On Shapiro’s view, we can determine whether an institution is a planning institution by looking to what the institution *does*, but this same strategy can’t be used to determine whether an institution has a moral aim. The constitutive requirement is *having* a moral aim, not engaging in any activity that would satisfy or accomplish this aim. Additionally, having the moral aim cannot require satisfaction of the aim, and similarly cannot require minimal satisfaction.¹⁴

C5.P15 Without a satisfactory account of how legal institutions have their constitutive features, an account cannot succeed in grounding the normative features of the legal domain. One might hope that the Moral Aim Thesis could be accounted for by appeal to the intentions of its designers as is often thought to work for artifacts. Artifacts occupy a plausibly normative domain where the activities of designers seem to determine the domain’s normative facts. Because there is a long tradition of understanding legal institutions as particularly complex social artifacts, this route might seem particularly appealing.

C5.P16 However, the turn to artifacts for this work is already concerning to some. Leiter, for example, has worried that legal creators cannot seem to do the metaphysical work that artifactual creators do.

C5.P17 Often, for artifacts that have identifiable human creators, we appeal to the intentions of the creator, and that works well as long as we have other theoretical reasons for treating the creator’s intention as metaphysically decisive. [. . .] Such considerations

C5.P1113 ¹³ (Shapiro 2015, 399).

C5.P1414 ¹⁴ For an argument for this general position, see (Lindeman 2017).

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will not help, in any case, with law, at least for positivists, since law need not have a creator who intended to create it (think of custom as a source of law, among many other examples). But when we untether artifacts from creators, functions seem hostage to rather variable interests in that artifact. [. . .] I am not aware of a single, widely accepted analysis of the essential properties of any artifact that does not rely on appeal to intentions of the creator in a context where it seems we should defer to those. If there is one, I would like to hear it.¹⁵

C5.P18 Leiter takes this to be a decisive reason to reject all functional accounts of legal normativity, but here we need to focus on the more fundamental worry: that legal institutions are more varied than an appeal to any shared creator intention could account for. If we searched for one intention that all legal officials shared that could account for the legal nature of their creation, we would come up empty-handed. Shapiro recognizes this, and so instead appeals not to legal officials' *actual* intentions or aims, but to their *avowed* intentions and aims.

C5.P19 Shapiro thinks we can account for legal institutions having constitutive moral aims without falling into the trouble Leiter raises. Instead of appealing to the actual *intentions or aims* of legal officials, he appeals to their *activities* to account for the constitutive moral aim of legal institutions. Specifically, he states that in order for an organization to have a moral aim (and thus to be a legal institution), the high-ranking officials of that organization must *avow* that the organization has a moral aim.¹⁶ This can be done explicitly and implicitly in speeches, preambles to formative documents, such as constitutions, prologues to legal codes, and judicial dicta. It is thus a necessary condition on an institution having a moral aim, on Shapiro's account, that its officials use moral discourse to frame their activities.¹⁷

C5.P20 Shapiro thus writes "[t]he law possesses the aim that it does because high-ranking officials represent the practice as having a moral aim or aims. Their avowals need not be sincere, but they must be made."¹⁸ So, it is a condition on something's being a legal institution that its high-ranking officials represent it as having a moral aim. This, it seems, is supposed to account for the law having that represented aim, which could then serve to ground the normative facts in the legal domain. Importantly, however, the transition from the claim that high-ranking legal officials avow particular aims to the position that the relevant legal institutions have those aims presupposes some principle such as Aim Transfer.

C5.P21 **Aim Transfer:** When an individual or set of individuals with creative control over some system or item profess to have aim x, the system or item thereby has aim x in virtue of that profession.

C5.P17n15 ¹⁵ (Leiter ms, 5–6).

C5.P19n16 ¹⁶ (Shapiro 2011, 217).

C5.P19n17 ¹⁷ Recently, David Plunkett has challenged Shapiro to account for how the Moral Aim Thesis is fully compatible with the positivist commitment, as Shapiro claims. On this objection the account of the law that Shapiro gives seems to import moral material to account for normative evaluations of law in ways Shapiro seems committed to avoiding. It isn't clear to me that Shapiro has made this mistake, but in any event, my own objection to Shapiro differs from and is prior to Plunkett's. See his "Legal Positivism and the Moral Aim Thesis" (2013, 1–43).

C5.P20n18 ¹⁸ (Plunkett 2013, 216–217).

- C5.P22 Aim Transfer avoids the under-accounting problems that resulted from making aims turn on either sincerely held or fully or partially satisfied aims. Unfortunately, because Aim Transfer is highly implausible as a general principle, it will do no better at accounting for how legal systems have constitutive moral aims.
- C5.P23 To see how odd Aim Transfer is, consider what commitments we must take on to endorse it in other cases. Suppose propaganda is information disseminated with the function of shaping the views of consumers in ways not sensitive to the truth.¹⁹ A good propagandist is often someone who successfully represents their propaganda as having the aim of disseminating clearly presented truths, and this might involve insincere avowals that the information is being conveyed with the aim of informing consumers about the truth. But, representing propaganda as legitimate unbiased information does not thereby give it that function. Its actual function remains to mislead or otherwise lead the consumers to believe what the propagandist wants, independently of whether it is accurate or best supported by all the evidence.
- C5.P24 If by making insincere avowals, I deceive others into thinking I run a legitimate news organization with the aim of disseminating unbiased information, it does not thereby become a legitimate news organization with this aim.²⁰ However, according to Aim Transfer, my organization would have the aim of disseminating unbiased information. But this is implausible; propaganda cannot become news so easily.
- C5.P25 This inability of propaganda to become news via mere avowals should help us see why a possible supplement to Aim Transfer will not help. Even if we were to supplement it with an uptake requirement, according to which the avowed aim only transfers when others believe the avowal. In the case of propaganda, however, we can see that the propaganda does not become news when it succeeds in convincing others that it is news. Even with this strengthening, Aim Transfer cannot account for how things with authors or creators have aims.
- C5.P26 We shouldn't be surprised that avowals of legal officials would be unable to account for the aims of legal systems. Even in the case of artifact designers, we don't think their *claims* are of metaphysical significance. Of course, the claims of both artifact designers and legal officials could be defeasible *evidence* that they are engaged in an activity that might be involved in the transfer of an aim. Shapiro relies on the avowals of legal officials to account for the moral aim of legal systems. However, even though it is perhaps plausible that all legal systems will have officials who avow moral aims, accounting for the Moral Aim Thesis via Aim Transfer does not work.²¹
- C5.P27 If all legal institutions have a constitutive moral aim, something other than the claims of high-ranking legal officials must be at work to account for it. What seemed to be a promising
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- C5.P23n19 ¹⁹ I'm not here attempting to develop a sophisticated account of propaganda; the analysis given here is only meant to be a plausible one. Any analysis that similarly takes propaganda to be the sort of thing that a) is not news, and b) can be falsely presented as news, will serve my purposes just as well.
- C5.P24n20 ²⁰ Plunkett presents an alternate to the Moral Aim Thesis he calls the Represented as Moral Thesis: "It is that legal activity involves at least the different forms of surface-level moral presentation identified by that organization meeting the moral-representation criteria (or some slightly revised version of them)." (Plunkett, 2013, 33) This criticism, I think, holds against Plunkett's revision, offered to be more palatable to positivists.
- C5.P26n21 ²¹ I grant that it is plausible because no matter how plausible, it does not do the needed metaphysical work. Despite this, I am convinced by (Plunkett 2013) that it is not, actually, particularly plausible.

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answer to Leiter's worry about what might account for constitutive features of law as an artifact seems to not appropriately account for the functions the Planning Theory attributes to it. So, Shapiro seems not to have provided the metaphysical account needed to support the Moral Aim Thesis.

C5.S4 | IV. The Moral Aim Thesis and Norm Explanation

C5.P28 Given the difficulty faced in accounting for the Moral Aim Thesis, it is worth revisiting why Shapiro is interested in this thesis. Shapiro takes it to be important for meeting the two primary tasks facing constitutivist accounts: the Extension and Norm Explanation tasks. First, as we noted above, the Moral Aim Thesis is directly involved in ensuring the Planning Account gives an accurate extension of legal systems. Without the Moral Aim Thesis, according to Shapiro, the Japanese Yakuza or Sicilian Mafia and similarly advanced criminal organizations that perform planning functions laid out in the Planning Thesis would count as legal institutions.²² Second, in order to satisfy Norm Explanation, the legal constitutivist must account for all the normative features in the legal domain by appeal to its constitutive features. These normative features should include the types of criticism Shapiro takes to be appropriate in the legal domain. He thinks that we believe that legal systems that are unable to solve serious moral problems are criticizable, while we do not make similar judgments about all systems. Moreover, he believes we make moral appraisals of legal officials and make prescriptive judgments about how law-users ought to behave and what lawmakers are entitled to do. If the legal institution has a moral aim, then via some transfer principle, Shapiro thinks that there will be constraints on how we ought to use, bring about, and act in the light of the moral aim of legal institutions.

C5.P29 The two motivations for endorsing the Moral Aim Thesis thus align with the Extension and the Norm Explanation tasks that we saw all constitutivist accounts were tasked with. Shapiro takes these tasks to require something like the Moral Aim Thesis, and yet we saw that Aim Transfer was not a suitable foundation for the Moral Aim Thesis. If Shapiro is right, legal constitutivists need another way to account for the constitutive moral aim of legal institutions. However, given the difficulty Shapiro has accounting for the Moral Aim Thesis, it might be useful to consider whether the Moral Aim Thesis would successfully account for these additional normative features.

C5.P30 It seems that the normative features of the legal domain Shapiro is considering include those concerning what ends the law should be put to, what counts as a correct or incorrect use, and what legal authorities are entitled to do. Moreover, Shapiro seems to think that this is a general account that can be appealed to in artifactual cases more generally, such that when one knows what an instrument is *for*, one is in a position to know how one ought to use it and what one is entitled to do with it.

C5.P31 We've already seen reason to be suspicious that aims, moral or otherwise, can be transferred from avowed aims of creators or authorities. The principle Shapiro needs here is different. In this case, the aim or function of some artifact or system is supposed to transfer to its user

C5.P28n22 ²² (Plunkett 2013, 215).

or designer, to account for their normative constraints. Shapiro's explanation of normative evaluations seems to rely on something like Norm Transfer:

C5.P32 **Norm Transfer:** When someone is using, creating, or otherwise interacting with some functionally understood individual thing, they are thereby assessible, according practical norms determined by the function of that thing.

C5.P33 There are some attempts in the metaethics literature to argue that the normative features of constitutive kinds constrain the reasons or norms that designers or users of those kinds are bound by. Korsgaard, for instance, argues that the constitutive function of a house constrains the reasons that housebuilders have.²³ On her view, housebuilders have reasons to build houses that are good at sheltering because houses are for sheltering. In explaining this connection, Korsgaard appeals to a further commitment that Shapiro has denied himself in his explanation of the Moral Aim Thesis: that if housebuilders were not *actually* aiming to make something good at sheltering, then they would not be building a house at all. Korsgaard believes that individuals undertaking to create something with a constitutive function must be guided by the kind's norms in order to count as making something with that function. If you build something sufficiently bad at the norms of houses, you are not building a house, and if you are not aiming at building a house, you are not performing the characteristic activity of housebuilding, and so you are not a housebuilder. So, the conclusion is supposed to be that if you are a housebuilder, you are already engaged in an enterprise governed by the aims of housebuilding, because you are already aiming at building a shelter when you undertake to build a house. So, as a housebuilder, you have reason to build houses that are good at serving the function of houses. There is a sort of existential risk in not so aiming: you could cease being a housebuilder.²⁴

C5.P34 However, this explanation of the norms governing tool-users or designers seems to require they *actually* have the relevant aim. Because Shapiro does not think legal officials necessarily have a moral aim, this sort of account is not open to him. Shapiro takes high-ranking legal officials to have their status as legal officials in virtue of institutional features, rather than in virtue of their legal activities (as Korsgaard thinks housebuilders have their status as housebuilders). No legal official is a legal official in virtue of their good performance of legal activities, or in virtue of having a moral aim. So there is no existential risk in being a very bad legal official on Shapiro's planning account.

C5.P35 In accepting Norm Transfer, it seems we would need to think (implausibly) that the natures of tools bind their users and creators with norms to further their functions.²⁵ We can accept that there are correct and incorrect ways to use a tool and facts about what the tool is supposed to do without thinking that has anything to do with what a tool-user is entitled to use it for or what others can rightfully demand of tool designers or users. For example, I have done nothing essentially criticizable when I use a teacup as a potter for a plant, despite it not being the function of the teacup to hold a plant. I have done the right thing when I dismantle

C5.P33n23 ²³ For this argument, see (Korsgaard 2009) Chapter 2.

C5.P33n24 ²⁴ I think there are good reasons that one should reject this sort of story, independent of the considerations addressed here. For an argument against the identification of the real and the (minimally) good at the heart of this view, see (Lindeman 2017).

C5.P35n25 ²⁵ We would, that is, need to think that in creating artifacts we normatively enslave ourselves to them.

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the bomb, rather than permit it to fulfill its function of exploding when on a crowded public street. If I am designing a pocketknife, I am not criticizable for sacrificing optimal functionality for cost-effectiveness. I need not even be criticizable for sacrificing optimal functionality for my lunch break, though you might disagree if you are my boss. In general, that something has an aim or a function does not imply that it is criticizable to use it for another (even contrary) purpose. That something has an aim or a function does not require that any particular person be co-opted into the furtherance of that function or aim. That something has a function or an aim doesn't even seem to demand of designers that they try to make an excellent instance of that kind of thing.

C5.P36 Even if we could establish the Moral Aim Thesis, it doesn't seem that it could do most of what Shapiro wants it for anyway, because Norm Transfer is false. Absent an explanation like the one provided by Norm Transfer, it's hard to see what could account for the Moral Aim Thesis explaining the practical norms governing legal officials and other individuals under the legal institution. Moral aims, even if we could account for them as a constitutive feature of legal institutions, don't seem to account for the practical constraints on those who are engaged in designing or being governed by them as simply as an artifactual account might have led us to think.

C5.S5 V. Planning Functions Without Moral Aims

C5.P37 Without Norm Transfer, it's thus unlikely that the Moral Aim Thesis will allow us to account for the practical norms governing legal officials as we might want. Even if we could find a way, other than Aim Transfer, to account for the Moral Aim Thesis, it doesn't seem to provide the constitutivists with everything they wanted. We could then, following Leiter, reject appeal to a constitutive function or aim of legal institutions to understand the normativity of the legal domain. First, however, the metanormative constitutivist would do well to take a step further back and consider whether there is another way to understand what artifactual normativity could look like.

C5.P38 So far, we saw Shapiro's Planning Theory involved two constitutive components characterized in the Planning Thesis and the Moral Aim Thesis. The first required actual planning behavior in order to be a legal system. This constitutive feature involved actual performance or properties (e.g., actually performing planning functions). The second required having a moral aim in order to be a legal system. This constitutive feature involved the claims of a creator (e.g., the avowed aims of legal officials). However, these two accounts do not exhaust the ways that functions and aims can be had by individuals or kinds.

C5.P39 This is where the metanormative constitutivist might turn her sights to other domains in which functional accounts are used to explain plausibly normative features. An ecumenical account of normativity might involve not only explicitly practical domains such as morality and legality, or the reason-involving, which would presumably include the epistemic, but also include all domains in which deontic judgments are apt: not just the artifactual, but also the biological, and plausibly the aesthetic.

C5.P40 If we recognize domains in which metanormative constitutivists must account for normative features without recourse to designers at all, we are emboldened to look beyond Aim Transfer and the activities of legal officials to account for the normativity of the legal domain.

The biological domain, for instance, involves no designers who transfer their aims. There are many facts in the biological domain that involve normative assessment, despite their failure to be grounded in the intentions of any designer. Despite lacking a designer, we think livers ought to filter toxins from the blood, that plants are harmed by acid rain, that hearts too weak to adequately circulate blood are bad hearts. These are all claims that are true *because of* the nature of the biological kinds in the subject. There are function claims that underpin each of these assessments, and we need not abandon them for lack of a designer.

C5.P41 We no longer think that explanations of biological organisms must appeal to a creator whose intentional designs gave organs their functions, yet we understand eyes functionally. Eyes have the function of seeing, and my eyes have this function independently of my own use or interest in their having this function. They also have this function independently of how well or badly suited they are to perform this function or whether they are currently being used to see. They have this function because, independently of any intentionally directed intervention, they were created in a process selected to give a form that was suited to serve the function of seeing.²⁶ Similarly, we can understand the norms of eyes as coming from this function. Eyes ought to be sensitive to light, to present accurate images of visually perceivable phenomena, etc.

C5.P42 In in the philosophy of biology neither actual behavior nor creator intentions or claims are needed to explain etiological proper function.

C5.P43 For some activity or effect, *Z*, to be the *etiological proper function* of some *x*,

C5.P44 i) *x* must be created in a process selected to produce individuals with a form *F*,

C5.P45 ii) *F* itself must have been selected over alternatives *because* it was selected to have effect *Z*.

C5.P46 The etiological proper function of my eyes is to see because they were created in a process selected to produce individuals with the rough physiology of my eyes and that physiology was selected to have the effect of providing sight.²⁷ Having an etiological proper function, then, is a matter of having been created in a way that relates your form to an end.

C5.P47 This provides the beginnings of a sketch of how we can generate constitutive functions or aims without accounting for them through a transfer from something else that shares the function or aim, as the artifactual story under consideration required. If having a constitutive function is a matter of having a form with the right sort of creation story to account for a proper function, we could do away with the need for appeals to intentions or aims of any particular individual or to any minimal success criteria to account for what it is to have a constitutive function or aim. This account then would hold that being a member of a functional kind requires a history that accounts for the relevant proper function.²⁸ Nothing has to be

C5.P41n26 ²⁶ There are many individuals who have eyes that are incapable of serving their function and have no interest in those organs performing their function. Many blind people would not choose to become sighted and yet this does not change the function of their eyes. These people believe they are benefitted in important and meaningful ways because of this difference, and this is almost certainly true. Yet, this also does not change the function of the eyes.

C5.P46n27 ²⁷ See (Millikan 1989).

C5.P47n28 ²⁸ Note, not every legal institution must share the same history or same form. It is the sameness of function that groups legal institutions on this account, and different histories or forms can account for this function.

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particularly good at performing a function to have it as a proper function. This is particularly useful to the constitutivist who wants proper functions to serve the Extension task, because it would permit, e.g., extremely flawed legal institutions, so long as they had the correct etiological proper function.

C5.P.48 To incorporate this approach in the legal domain, we would need to explain the constitutive feature of legal institutions and show that it can satisfy the Extension and Norm Explanation tasks. That is, we would need to find one function or aim that all legal institutions share as a proper function, ensure that all legal institutions are likely to have some historical account that explains their having this as a proper function, and then explain the normative features of legal domains by appeal to this function.

C5.P.49 Without a substantial account of the constitutive function of legal institutions, we can't get far in this project, and it is well beyond the scope of the current chapter to fully defend a particular function for this purpose. Instead, in the remaining space, I want to accomplish two tasks. First, using the resources remaining from Shapiro's Planning Theory, we will see how far we can get in understanding what such an account would look like. Second, we will assess whether such an account makes any progress where the Planning Theory seemed to flounder. I aim to show that it does, and that the aspiring metanormative constitutivist should take this success into consideration in her development of a unified metanormative account.

C5.S6 VI. Planning Functions as Proper Functions

C5.P.50 The metanormative constitutivist has the hard task of accounting for how specific legal institutions have their forms selected for whatever function legal institutions all share. Of course, she can't just rest here because she doesn't yet have a story for what, specifically, that function is or how, in general, legal institutions could have histories that make them selected to have it.²⁹ But understanding legal institutions as evolving systems whose large-scale features can be understood as selected for the performance of certain functions could, in principle, adequately account for the extension of legal institutions.

C5.P.51 For now, let's assume with Shapiro that it is a constitutive function of legal institutions to be a particular sort of planning institution, of roughly the sort that he claims. The Moral Aim Thesis won't help account for what Shapiro wants, but the constitutivist might fruitfully understand this planning function etiological to address the Extension and Norm Explanation tasks discussed above.

C5.P.52 First, understanding the planning function as an etiological proper function does seem to provide some resources that might help with the Extension task. If the aim or function is had as the result of having a form selected for suitedness to that function or aim, this directs our attention away from the actual behavior of an institution and toward its history to determine what sort of institution it is. Shapiro, of course, thought that actual planning behavior

C5.P.50n29 ²⁹ One account could be to appeal to Hart's transition from pre-legal to legal stages of a community's evolution when the community adopts secondary rules, which establish the legal conditions under which primary rules can be recognized. For this account, see Hart, *The Concept of Law* (1994), especially ch. 5.

was insufficient to count as a legal institution because it ruled in, e.g., the Japanese Yakuza or Sicilian Mafia, which engaged in planning but are not taken to be legal institutions.

C5.P53 But on the etiological account, planning institutions are those institutions that have forms selected to perform planning tasks, not necessarily those institutions that actually do perform those tasks. Legal institutions are, on the Planning Account, social planning organizations with a particular character. Shapiro writes that this social character “creates and administers norms that represent *communal standards of behavior*,” via *general policies*, via *publicly accessible standards*.³⁰ So, on the proper function account, in order for some organization to have this function of social planning it must have been selected to create and regulate communal standards that are general and publicly accessible.

C5.P54 Shapiro describes sophisticated crime syndicates as a form of non-legal planning organization:

C5.P55 These firms are compulsory planning organizations: their members engage in collective planning designed to further shared criminal ends, they occupy offices (for example, the don, consiglieres, capos, lieutenants, bodyguards, hitmen, and so forth), their normativity is institutional in nature (for example, the Yamaguchi-gumi of Japan has tens of thousands of members and as a result has an extremely complex hierarchal structure), and they do not require consent before imposing their demands on their victims.³¹

C5.P56 Is it at all plausible that the Japanese Yakuza or Sicilian Mafia have this organizational form selected for the planning function? It might be possible that these groups have a social planning function selected to serve a larger purpose of facilitating the criminal ends of financial success and dominance of one family or social group over the rest.³²

C5.P57 But looking at whether they have offices, engage in compulsory planning, etc., involves looking at their current features, rather than *why* they have those current features. Though it isn't obvious that all institutions that we wish to pre-theoretically rule out as potential legal institutions are actually ruled out by this proper function account, it certainly provides additional resources over creator and performance functional accounts. Looking to the historical selection process seems to provide extra resources to the constitutivist to sort the legal from the extralegal, i.e., to serve the Extension task.

C5.P53n30 ³⁰ (Shapiro, 2011, 203).

C5.P55n31 ³¹ (Shapiro 2011, 215).

C5.P56n32 ³² I am not as convinced as Shapiro that this would be an unwelcome outcome. If it turns out that the Yakuza and Mafia share proper functions with legal institutions, we will likely have the resources to account for their serious defects qua legal institutions. Whether having the planning function for some further purpose was a disqualifying trait in a legal institution would then determine whether the Yakuza or Mafia were legal institutions. One could hold that the final proper function of legal institutions must be the social planning function, such that if the social planning function is instituted for some other function, the institution with those functions is not a legal one. I have no real objection to this sort of view, either.

C5.S7 VII. Explanatory Resources of Proper Functions

C5.P58 The extra resources in the etiological proper function account also aid the constitutivist in addressing the Norm Extension task where the Moral Aim Thesis failed. The etiological account of the planning function explains legal institutions as having the function of social planning because their form was selected to engage in the creating, carrying out, and enforcing of social plans for guiding and coordinating the activity of agents.

C5.P59 Legal institutions aren't selected to merely issue prohibitions; they also, as we learn from Hart, characteristically confer powers and establish the apparatus that enables social agents to undertake certain statuses and obligations with respect to each other.³³ Grant, for the moment, that these are part of how legal institutions are selected to fulfill their proper function; it's not something they do accidentally, but something they do because they were selected to do it, and individual legal institutions have the shape and structure they do because that shape and structure was chosen to perform these functions. With this, we have additional resources, though we have not yet explained how we get moral or practical judgments about legal institutions from these facts.

C5.P60 Leslie Green has distinguished what he calls the *internal problem* of how legal institutions perform their given function from the *external problem* of the moral (or social) value of that function.³⁴ This is an important distinction, because we can certainly see this having been an issue earlier in explaining why artifactual function does not determine the practical norms governing artifact users. In addition to these two problems, we might also see a third problem that we might call the *normative internal problem* of the value of how legal institutions perform their given function. Not only can we ask *how* some institution performs its function, and what the value of *that function* is, we can also ask after the value of *how that institution achieves that function*. Proper functions are uniquely set up to provide space for this last question. The same proper function can be multiply realized by different systems that achieve it in varying ways.

C5.P61 Artifacts provide nice examples of how the same function can be realized by different forms. Of the many ways corkscrews can be designed to perform their proper function, here are two: they can use a lever-system to remove the impaled cork, and they can be set up to allow the force from direct pulling to remove the impaled cork. Both are ways of achieving the same aim of removing corks. The answer to the external question requires us to ask: What's the value of removing corks? Answering this question does not require us to consider the answer to the internal question. However, the answer to the internal question differs between the two cases, and so there could be different answers to the normative internal question. There might be a difference in the value of the *way in which* the two corkscrews remove corks.

C5.P62 Once the function of legal institutions is understood to have social agents as its object, the significance of this normative internal problem is clear. Given that there are numerous ways of engaging in social planning, the normative internal problem can lead us to ask which

C5.P59n33 ³³ (Hart 1994, 26–78).

C5.P60n34 ³⁴ (Green, 1998, 121–122).

is best, and the kind of activity that social planning is—the planning for social agents—can help us understand those constraints. Loading the contents of a moving van is a function that a person might perform, but how it's best to load differs dramatically on whether you're loading feather pillows—toss 'em in—or boxes of priceless porcelain plates—set them down gingerly and carefully secure them ensuring they don't jostle. If the thing you're planning is the social arrangements of people, there are constraints on what makes that arrangement a good one in addition to the external success of whether you end up with a social arrangement.

C5.P63

Unlike corks, the object of the function of corkscrews, agents, and especially social agents, have normative significance. This normative significance is independent of the function of legal institutions to engage in social planning for them. Because the social planning function is planning for these social agents, the normative significance of these social agents is relevant for addressing the normative internal problem for legal institutions. It is not a mere consequence of legal activity that it affects agents that have normative standing; it is part of the function of legal activity that it affects these agents. So, the standards that govern how these agents ought to be treated is internal to the function of legal institutions, because they are essentially engaged in an activity that engages with these agents. Because of this, we should see that it's a mistake to think that moral aims are required to help us satisfactorily answer the normative internal problem for legal institutions. On any plausible constitutive aim or function of legal institution, e.g., bringing individuals into political society or being a social planning organization, any form selected to perform this function will have internal normative standards that involve moral evaluations, because the constitutive activity of that institution is an instance of a more general activity that has normative standards.

C5.P64

Additionally, this move to a proper function account of the planning theory allows us to admit of legal institutions with distinctly immoral aims, more easily accounting for the Extension task. That is, it more easily allows for extensions that not only exclude the Yakuza, but that include distinctly immoral legal systems. For example, a social planning system that structures and coordinates social beings through the oppression of some subset of those beings would be a legal system without a plausible moral aim. Antebellum America had such a legal system. It was structured to commodify and exploit a set of those social beings who were governed by the system. Those of African ancestry, both free and enslaved, were governed by the legal system and had their obligations and rights (such as they were) structured by a system whose aim involved their oppression. It had no moral aim, yet it has a social planning function that could account for it being a legal system.

C5.P65

This also allows a useful resource to answer to the Norm Explanation task by accounting for how legal officials are evaluable because of the proper function of legal institutions. Norm Transfer cannot account for the standards legal officials are held to, but once we reject the Aim Transfer, we can see the activities of legal officials as standing in a special role in legal institutions. Legal officials, qua social agents, have the same general moral obligations to treat other social agents with respect, but criticism of their actions qua social agents is criticism external to the normative features of the legal system. By understanding the function of legal institutions to be accomplished independently of it being accomplished *well*, we have recourse to an internal understanding of the moral criticism of legal officials. The activities of legal officials, qua agents of the legal system, constitute the performance of the institution's planning function, and their actions are thereby evaluable by the internal standards of the legal institution. The actions of legal officials done in their official capacities

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are not normatively assessable simply because those officials are generally morally assessable according to moral standards external to the legal system, as they are when they go to the store or interact with neighbors. When legal officials are engaged in legal activities, they are engaged in an activity with a function that has moral standards because of the kind of activity it is. Looking at *how* the function is performed opens up the space for internal moral assessment of legal institutions and legal agents, independently of any explicit or implicit moral aim the legal institution might have.

C5.P66 It seems we should then be less concerned about Shapiro's inability to account for a distinctive constitutive moral aim of legal institutions. He adds the Moral Aim Thesis because he thinks it is the only way to account for the extension of legal institutions and to explain the prescriptive and evaluative judgments governing legal officials. But he is unable to satisfactorily account for how legal institutions have moral aims, and it seems to cause rather than solve problems for the Extension and Norm Explanation tasks. We've seen, however, that for constitutivists willing to understand constitutive functions as etiologically understood proper functions, there are more satisfying ways to address these constitutivist tasks for the legal domain. So, given that Shapiro has been unable to account for how the Moral Aim Thesis could be a constitutive aim of legal institutions, and there are alternate ways of accounting for at least some of the normative facts governing how legal systems function and legal officials operate, metanormative constitutivists have reason to turn to developing an account of legal institutions without constitutive moral aims.

C5.S8 VIII. Conclusions for Metanormative Constitutivists

C5.P67 This is relevant not only to the philosopher of law, of course, but also to the interested metaethicist. Metaethical constitutivists interested in expanding their views to other normative domains will be interested in determining whether some feature constitutive of the legal domain can explain its normative features, i.e., explain the evaluative, prescriptive, and deontic facts in the legal domain. Shapiro provided a candidate account, but a central part of his planning theory, the Moral Aim Thesis, seemed both difficult to account for (because of the failure of Aim Transfer) and unable to do what was asked of it (because of the failure of Norm Transfer). In looking more closely at how we should understand constitutive functions, we saw that it is possible for the planning thesis alone to account for the Norm Explanation and Extension tasks that the Moral Aim Thesis was introduced to address.

C5.P68 By turning to etiological proper functions, we have seen that there is hope that this work can be accomplished without a Moral Aim Thesis. Though we were led to think constitutivists needed it because of a particular view of artifactual functions, according to which all normative features are explained by appeal to an explicit aim, this isn't true. We have seen, rather, that things can have functions independently of having any intentionally understood aims, so long as they have a particular history that accounts for a characteristic function. Additionally, we saw that institutions and institutional-members can be morally criticized even if they do not have moral aims themselves, if those institutions have etiologically understood proper functions that constitutively involve moral subjects.

C5.P69 We also have dismissed the concern that because legal institutions were artifacts, their aims must come from the aims of their designers. Shapiro avoided the implausible commitment

that all legal institutions had designers who shared aims by retreating to an account based on an aim transfer principle. We've seen that the need for such an account is avoided if we can explain the moral normative facts in the legal domain independently of any specific moral aim. The aspiring metanormative theorist has examples of other normative domains that lack designers all together. These provide models for constitutive features that do not stipulate designers, but rather rely on historical accounts of form. Combined with the need to account for a constitutive moral aim, this should increase the metanormative theorist's confidence that a constitutivist account in the legal domain is possible.

C5.P70 Moreover, this can help the metaethicist who was interested in the two questions that we began with. What is the scope of the set of normative domains, and can metaethical constitutivism generalize to account for every normative domain? One tentative answer to the first question is that there are normative domains wherever there are etiological proper functions, because wherever there are etiological proper functions, there are deontic facts. In this case, the constitutivist is well-poised to give a general account for metanormative constitutivism of the following form: for any domain in which there is an etiological proper function determining the membership in that domain, this constitutive function can be used to explain the normative facts governing that domain.

C5.S9 References

- C5.P71 Ehrenberg, Kenneth. 2015. "Law's Artifactual Nature. How Legal Institutions Generate Normativity," In *Reasons and Intentions in Law and Practical Agency*, edited by George Pavlakos and Veronica Rodriguez-Blanco. Cambridge: Cambridge University Press, pp. 247–266.
- C5.P72 Enoch, David. 2011. "Reason Giving and the Law," In *Oxford Studies in Philosophy of Law*, Vol. 1, edited by Leslie Green and Brian Leiter. Oxford: Oxford University Press, pp. 1–38.
- C5.P73 Foot, Phillipa. 1972. "Morality as a System of Hypothetical Imperatives," *The Philosophical Review*. 81(3):305–316.
- C5.P74 Green, L. J. M. 1998. "The Functions of Law," *Cogito*. 117(12):121–122.
- C5.P75 Hart, H. L. A. 1994. *The Concept of Law*, 2nd ed. Oxford: Clarendon Press.
- C5.P76 Katsafanas, Paul. 2013. *Agency and the Foundations of Ethics: Nietzschean Constitutivism*. Oxford: Oxford University Press.
- C5.P77 Kolodny, Nico. 2005. "Why Be Rational?" *Mind*. 114:509–563.
- C5.P78 Korsgaard, Christine. 2009. *Self-Constitution: Agency, Identity, and Integrity*. Oxford: Oxford University Press.
- C5.P79 Lindeman, Kathryn. 2017. "Constitutivism without Normative Thresholds," *The Journal of Ethics and Social Philosophy*. 12(3):231–258.
- C5.P80 Leiter, Brian. ms. "Why Legal Positivism (Again)?" University of Chicago, Public Working Paper No. 442. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.2323013>.
- C5.P81 Millikan, Ruth Garrett. 1993. "In Defense of Proper Functions," In *White Queen Psychology and Other Essays for Alice*. Cambridge, MA: MIT University Press, pp. 13–29.
- C5.P82 Nolfi, Kate. 2015. "How to Be a Normativist about the Nature of Belief," *Pacific Philosophical Quarterly*. 96 (2):181–204.

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- C5.P83 Plunkett, David. 2013. "Legal Positivism and the Moral Aim Thesis," *Oxford Journal of Legal Studies*. 33(3):563–605.
- C5.P84 Shapiro, Scott. 2011. *Legality*. Cambridge, MA: Harvard University Press.
- C5.P85 Smith, Michael. 2013. "A Constitutivist Theory of Reasons: Its Promise and Parts," *Law, Ethics, and Philosophy*. 1:1–30.
- C5.P86 Velleman, David. 2000. "On the Aim of Belief," In *The Possibility of Practical Reason*. Oxford: Oxford University Press. 244–281.
- C5.P87 _____. 2000. *The Possibility of Practical Reason*. Oxford: Oxford University Press.
- C5.P88 Wedgwood, Ralph. 2002. "The Aim of Belief," *Philosophical Perspectives*. 16(s16):267–297.