

Against Jurisprudence's New Metaphysical Focus

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Brian Leiter, *Critical Remarks on Shapiro's Legality and the 'Grounding Turn' in Recent Jurisprudence* (October 15, 2020), available at [SSRN](#).

There are two overlapping complaints often offered about contemporary jurisprudence: the first is that it is too much aimed at an audience of (other) philosophers rather than an audience of legal practitioners;¹ the second is that it is too dependent on advanced theory to be accessible to the average lawyer and legal academic. Brian Leiter's recent SSRN post, *Critical Remarks on Shapiro's Legality and the 'Grounding Turn' in Recent Jurisprudence* (which he indicates may become part of a forthcoming monograph (P. 1)), offers a response relevant to the second concern, and perhaps the first as well.

Leiter's basic argument is that Scott Shapiro's influential work, *Legality*,² reflects an unfortunate turning away from H. L. A. Hart's basic insights about law and theorizing about law, and towards unnecessary metaphysics. In *Legality*, Shapiro put forward a "planning theory" of law. Leiter's critique of the book goes not only to that substantive result, but also to Shapiro's methodological approach. In part, Leiter's objection is a variation of one he has offered a number of times before:³ that Shapiro purports to be offering a *conceptual analysis* of law, and Leiter believes that this is a faulty methodology (for philosophy in general, and legal philosophy in particular). (Pp. 5-8.)

The other part of Leiter's concern⁴ – and the one on which the present discussion focuses – is Shapiro's turn towards metaphysical language and argument. As Leiter points out (P. 1), Shapiro early on in his work characterizes analytical legal philosophy as being about the "*metaphysical foundations*" of law,⁵ in particular, that one must (Shapiro says) "know which facts *ultimately* determine the existence and content of legal systems."⁶ Leiter questions whether this is the right direction for legal philosophy to take. He rightly focuses on a strange passage in *Legality*; Shapiro writes: "In order to prove conclusively that the law is thus-and-so in a particular jurisdiction, it is not enough to know who has authority within the jurisdiction, which texts they have approved, and how to interpret them."⁷ Leiter asks: *why* would that not be enough?; *why would* questions about "ultimate determination" be necessary, or even helpful, if one already knew which texts were authoritative and how to interpret them? (Pp. 9-10.)

While contemporary (English-language) legal positivists see themselves as working within a broad tradition created by H. L. A. Hart,⁸ much current work arguably takes a distinctively different tack from Hart's. In his major work, *The Concept of Law*, Hart makes a point of *avoiding* metaphysical, or metaphysical-sounding, questions. Regarding the traditional jurisprudential starting point, the question "what is law?," Hart makes the (Wittgensteinian) move of changing the focus, refusing to answer the question, but wondering instead what *motivates* the question (Hart argues that the motivations are determining the relationships between law, on one hand, and sanctions, rules, and morality, on the other).⁹

Leiter complains of the way that Shapiro's work not only does not *avoid* metaphysics, but seems to *emphasize* metaphysical analysis even when it is neither accurate nor beneficial. As he points out, Shapiro's attempts to characterize the legal positivism vs. natural law debate in terms of "grounding" comes out poorly. As Leiter shows, the views of actual legal positivists *do not fit* Shapiro's characterization as believing that "all legal facts are ultimately determined by social facts alone,"¹⁰ and

at least one important natural law theorist (Mark Murphy) is excluded by Shapiro's characterization of natural law theorists as believing that "legal facts are ultimately determined by moral *and* social facts."¹¹ A more accurate demarcation of the debate would require no references to "grounding" or "ultimate facts": "Some legal philosophers ... believe that no norm is legally valid except in virtue of its sources ... [or] in virtue of the conventional practices of officials." (P. 12, footnote omitted.) Those philosophers are legal positivists; those who reject that view are natural law theorists.

It may be that even if contemporary jurisprudential discussion rid itself of all references to grounding, supervenience, ontology, and metaphysics, jurisprudential works might still be too abstract or esoteric for the average lawyer. At the least, though, as Leiter shows, legal philosophers should remove metaphysical language which serves only to distort or distract from the true underlying issues.

1. See, e.g., Roger Cotterrell, [Sociological Jurisprudence](#) 15-72 (2018); William Twining, [Legal R/realism and Jurisprudence: Ten Theses](#), in Elizabeth Mertz, Stewart Macaulay and Thomas W. Mitchell (eds.), [The New Legal Realism, Volume I](#) 121-246 (2016).
2. Scott Shapiro, [Legality](#) (2011).
3. See, e.g., Brian Leiter, [Naturalizing Jurisprudence](#) 121-99 (2007).
4. Leiter additionally gives a persuasive rebuttal of Shapiro's portrayal of H. L. A. Hart's views about rules, practices, and the rule of recognition. (Pp. 16-20.)
5. Shapiro, *supra* note 2, at 2 (emphasis in original.).
6. Shapiro, *supra* note 2, at 25 (emphasis in original.).
7. (P. 9) (quoting Shapiro, *supra* note 2, at 25.).
8. See H. L. A. Hart, [The Concept of Law](#) (2012).
9. Hart, *supra* note 8, at 1-7; see also Brian Bix, *Questions in Legal Interpretation*, in Andrei Marmor (ed.), [Law and Interpretation](#) 137-54 (1995), available at [Academia](#).
10. (P. 11) (quoting Shapiro, *supra* note 2, at 27 (emphasis in original, footnote omitted.)).
11. (P. 12) (quoting Shapiro, *supra* note 2, at 27 (footnote omitted)); see *id* at 408-09, n. 28 (on Mark Murphy's not fitting the characterization.).

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