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Norm Supercompliance and the Status of Soft Law

BRIAN SHEPPARD†

INTRODUCTION

At one time or another, each of us has desperately craved something. While we often indulge such cravings, every now and then we show self-restraint. The source of our self-control is not always the same. Sometimes it seems to come from within. Other times, however, it is clear that something in our environment has snapped us out of the haze of desire. Maybe it was the beauty of the sunset. Or the calorie count on the menu. Or the wedding ring on a finger. Or the sign stating, “public nudity is a punishable offense.”

There is no limit on the kinds of things that can serve this external constraining function, but some are likely better at it than others. Even in this short list, we might guess that the law is a better constraint than the sunset. The reason is obvious: to those subject to it, the nudity law states a clear obligatory command backed up with official sanctions. Indeed, the primary appeal of law might be its ability to modify our decisionmaking through these hard measures, thereby leading us to behave better.

Of course, we conceive of some utterances as laws despite the fact that they do not use hard measures. The statute in

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North Carolina that names the gray squirrel as the official state mammal¹ does not on a straightforward reading appear to create any new obligations; rather, it serves primarily to proclaim the legislature's love of squirrels. Yet we still think of that statute as a law. While the squirrel statute is an easy example to spot, it is not always obvious that legislation has such modest ambitions. It took the United States Supreme Court to establish that Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act² was designed merely "to encourage, rather than mandate, the provision of better services to the developmentally disabled[,]"³ even though the statute stated that "[t]he Federal Government and the States both have an obligation"⁴ to prevent spending on institutions that do not meet minimum standards for the care of the disabled. Yet, despite its interpretation of the Act, the Supreme Court nevertheless referred to the Act as a "law."⁵

Thus, norms can possess many of the trappings of law but fail to have the features that we believe are necessary to create constraining obligations on those who are subject to them.⁶ Such norms are popularly known as "soft law." A law can be soft because it is stated in such an indeterminate manner that it is impossible to identify a specific obligation within it.⁷ Even when a law states clear obligations, it can be soft because it appears merely to duplicate obligations that already exist.⁸ Still other times, it can be soft because it

1. N.C. GEN. STAT. § 145-5 (2013) ("The gray squirrel (*Sciurus carolinensis*) is hereby adopted as the official State mammal of the State of North Carolina.").

2. 42 U.S.C. § 6010 (1982) (current version at 42 U.S.C. §§ 15009 (2011)).

3. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981).

4. § 6010(3).

5. *Pennhurst*, 451 U.S. at 31 ("Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded. The [Act] is one such law.").

6. This is consistent with the broad, and somewhat unhelpful, first definition set forth in BLACK'S LAW DICTIONARY: "Collectively, rules that are neither strictly binding nor completely lacking in legal significance." BLACK'S LAW DICTIONARY 1519 (9th ed. 2009).

7. See *infra* Part I.B.2.b.

8. See *infra* Part I.B.2.b.

appears that the legislature wrote the law so as not to constrain anyone at all.⁹

The strangeness of soft law has led many to question whether it makes sense at all. Famously, Prosper Weil argued thirty years ago that such instruments “are neither ‘soft law’ nor ‘hard law’: they are simply not law at all.”¹⁰ Since then, a steady stream of scholars has reiterated the point. Anthony Clark Arend described soft law as “oxymoronic” and argued that “[i]f a rule meets the criteria for law, then it should be called ‘law.’ If, however, the rule is not binding—as soft law has been described to be—then it should not have law anywhere in its name.”¹¹ Others have described it as “a misnomer,”¹² “incoherent,”¹³ “illogical,”¹⁴ and

9. *See infra* Part I.B.1.

10. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 414-15 n.7 (1983).

11. ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 25 (1999).

12. Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 20 (2004) (“Similarly, resolutions of the United Nations General Assembly generally are not legally binding. Those resolutions are often referred to as ‘soft law,’ a misnomer, since they are really not law. Courts should therefore not impose them on States.”).

13. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 582 (2005) (“First, I argue that the notion of ‘soft law’ agreements is incoherent. Under the prevailing approach, pledges are being smuggled into the international lawyer’s repertoire by dubbing them soft law. Just as frequently, scholars declare that contracts containing vague or imprecise commitments are actually soft. In so doing, these commentators are conflating the legality of agreements with structure (in particular, enforcement features) or substance (e.g., rule precision), or effects with causes (i.e., looking to behavioral effects to demonstrate international law’s existence). Both sets of moves elaborate a conceptual category—soft law agreements—that has no compelling basis in state practice or legal theory.”).

14. BOLESŁAW A. BOCZEK, *INTERNATIONAL LAW: A DICTIONARY* 25 (2005) (“The concept of soft law has been criticized as illogical (something is the law or is not), confusing, misleading, and even dangerous. Critics have charged it with blurring the distinction between the law in force (*de lege lata*) and the law in the process of formation (*de lege ferenda*) and, more generally, between what is actually binding and what is not.”).

“incorrect”¹⁵ on similar grounds.

Despite the skepticism about whether it deserves legal status, soft law is an increasingly common mode of regulation for international bodies.¹⁶ We might wonder why something that is so easily dismissed as “inconsequential”¹⁷ is such a popular regulative tool. The attractiveness of soft law, at least from the perspective of those who have the power to enact hard law, has a simple explanation: it is generally cheaper to make and easier to pass than hard law.¹⁸ When

15. László Blutzman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L & COMP. L.Q. 605, 610 (2010) (“One part of the problem is thus of terminological character. Is this worth finding fault? For example, Sztucki is rather lenient towards the term. Even though he finds it quite incorrect, he considers that in indicating or denoting complex phenomena such all-embracing and indefinite ‘capsule formulas’ may be used. In addition, he says that in international law there are many imprecise and incorrect expressions, and soft law can only increase this number at the very best. The real problem, however, is that the expression is not only incorrect but it is also meaningless . . . [V]irtually every non-legal norm may be described [as soft law].”).

16. See, e.g., Guy Davidov, *Enforcement Problems in “Informal” Labor Markets: A View from Israel*, 27 COMP. LAB. L. & POL'Y J. 3, 14 n.26 (2005) (“Recently, ‘soft law’ solutions have become popular. Indeed, voluntary and semi-voluntary solutions could be useful alongside traditional, ‘hard law’ enforcement.”); Jonathan Graubart, *Giving Meaning to New Trade-Linked “Soft Law” Agreements on Social Values: A Law-in-Action Analysis of NAFTA’s Environmental Site Agreement*, 6 UCLA J. INT'L L. & FOREIGN AFF. 425, 427 (2001-02) (“Soft law agreements have become popular in recent years in the areas of human rights, labor rights, and environmental standards . . .”); Minsu Longiaru, *The Secondary Consequences of International Institutions: A Case Study of Mexican Civil Society Networks and Claims-Making*, 37 CAL. W. INT'L L.J. 63, 70 (2006) (“[S]oft law mechanisms are becoming an increasingly popular vehicle for facilitating public participation in international institutions, especially in the international environmental arena.”).

17. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 626 (2008) (“When lawmaking authorities create laws that by their own terms or common understanding have no effect, one immediately suspects a cynical public-relations ploy.”).

18. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000) [hereinafter Abbott & Snidal, *International Governance*] (“Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization.”); Louis Kaplow, *Rule Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621-22 (1992) (“Determining the appropriate content of the law for all such contingencies would be expensive, and

there is no pressure to state a clear obligation, the legislator's job becomes far easier. Why set forth specific speed limits when you can simply state, "drive at a reasonable speed?"

Obviously, the fact that one can do something cheaply does not mean that he or she ought to do it. One can get a dozen rotten eggs for a quarter, but this would hardly be considered an attractive deal. So a question remains: is soft law worth it?

In recent years, analysis of the benefits of soft law has become a hot topic.¹⁹ Several scholars endorse soft law, but when they do, they focus almost exclusively upon the beneficial functions that *distinguish* soft law from hard law. In particular, they praise the flexibility that it accords those who apply or are subject to it. Considering broad legal standards (such as that "reasonable" speed limit), some scholars have praised their ability to advance the systematic goals of government in a deliberate, measured, and context-sensitive way.²⁰ Even if laws start out soft—failing to state a clear enough obligation to guide conduct—they can evolve into finely tuned hard norms over time through precedential, case-by-case adjudication. Though the content of our speed limit started as the arguably indeterminate directive of "travel at a reasonable speed," each time that a court applied it to a particular set of facts and issued a precedential decision, it made the content of the law more specific by identifying conduct that satisfied or violated the norm.²¹ Thus, broadly written soft law can become hard law at a fraction of the price. It has the capacity to operate as a cost-

most of the expense would be wasted. It would be preferable to wait until particular circumstances arise.").

19. See, e.g., Brian Sheppard, *Calculating the Standard Error: Just How Much Should Empirical Studies Curb Our Enthusiasm for Legal Standards?*, 123 HARV. L. REV. F. 92, 92 (2011), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/volume124_forum_sheppard.pdf.

20. See John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 750-52 (2009).

21. See, e.g., Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805-07 (2005) [hereinafter Schauer, *Tyranny*].

efficient delegation of legislative labor to the courts.²² Better still, the delegation lowers the risk of error, so legislators might find it easier to garner the support necessary for the enactment of soft laws than for hard laws.

That is hardly the only reason to recommend soft law. Scholars also claim that soft law is uniquely able to spark discussion²³ or contemplation²⁴ among those who must apply such broad or vague language to concrete situations. Further, soft law can provide an early signal of the form that hard law will eventually take.²⁵ It can even serve as a useful low-stakes laboratory, providing a glimpse of how precise norms might operate in a hard law environment by exposing the same norms to smaller groups of actors or only to those actors that are interested in opting into the system. Lastly, soft law has the capacity to increase overall welfare by informing people of official preferences without forcing them to suffer any limitations on their conduct.²⁶ People might draw some happiness from the fact that their legislature has enshrined an official beverage or named a highway after a popular war hero, but that happiness would surely be threatened were those acts to come with the hard law price of obligation, such as having to pay a tax on that beverage or a toll on that bridge.

22. See Abbott & Snidal, *International Governance*, *supra* note 18, at 434 (“A major advantage of softer forms of legalization is their lower contracting costs.”); Kaplow, *supra* note 18, at 621-22.

23. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 607-10 (1988).

24. See Seana Valentine Shiffirin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1231 (2010).

25. See Gersen & Posner, *supra* note 17, at 586 (“Congress or another lawmaking body uses soft law to convey information about future intentions to enact hard law, allowing people to adjust their behavior in advance of binding statutes and in some cases avoiding constitutional requirements that apply to hard law.”).

26. See *id.* at 586-87.

Having discussed its many positive qualities,²⁷ we might now wonder why some are reluctant to bestow upon soft law legal status. It is important to remember that apologists for soft law embrace it, not because they believe it can mimic the constraining power of hard law, but because of the non-constraining qualities that only soft law possesses. In other words, even those who sing soft law's praises do not generally go so far as to say that it can constrain people's behavior through perceived obligation like hard law does. Thus, if we believe that the *sine qua non* of law is its ability to constrain people through perceived obligation, then the argument that soft law is not law remains viable.

For centuries, a group of leading philosophers known as positivists²⁸ has believed that, to be law, a norm *must* be obligatory.²⁹ On this view, soft law, insofar as it consists only of norms that fail to obligate, is undeserving of the "law" label. Soft law skeptics embrace a strict form of legal positivism, one that places firm limits on the kinds of content that laws can have and that connects to a bold functionalist concept of legality.

27. Of course, some dispute whether the benefits of soft law outweigh the costs. See, e.g., Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 ST. LOUIS U. L.J. 885, 891 (1995).

28. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 81-82 (2005) ("The literature usually labels nonlegal international agreements 'soft law.' We avoid this label because nonlegal agreements are not binding under international (or any other) law, so it is confusing to call them law, soft or otherwise. The dominant positivistic approach to international law views nonlegal agreements as aberrational or of secondary importance."); Weil, *supra* note 10, at 421.

29. H.L.A. HART, *THE CONCEPT OF LAW* 6 (2d ed. 1994) [hereinafter HART, CONCEPT] ("The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory."); Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 15 (2011) [hereinafter Coleman, *Architecture*] ("In the same way as one cannot *know* something untrue or *deceive* someone without getting her to believe a falsehood, a norm cannot be law in the full sense without succeeding in binding the conscience: primarily by obligating those to whom it is directed, and secondarily by motivating their compliance with the obligations thereby incurred. This is the concept of law suitable for jurisprudence."); see John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24-26 (1924).

To be clear, soft law skepticism does not commit one to the view that hard law must *always* succeed as a constraint. A lot of ink has been spilled to prove that people will work to find ways to escape the constraints of law so that they can do the things that they want to do. Simply put, some will treat hard laws as if they are soft if doing so serves their desires. When judges engage in this behavior, it is called “judicial activism.”³⁰ The question that I focus upon here concerns precisely the opposite phenomenon: do people ever treat soft law as if it is hard law, constraining themselves from the things they would want to do in law’s absence? My answer is yes.

This insight came unexpectedly. I discovered it, ironically, in the course of an empirical study of judicial activist behavior. Although I will discuss this study in more detail below,³¹ I was seeking to understand the conditions under which judges in a simulated case would be inclined to work around hard legal rules to reach outcomes that they personally preferred.³² I subjected one group of subjects to a broad, soft legal standard, expecting that it would fail to constrain the subjects in that group and, therefore, that the subjects would choose the outcome that they preferred.³³ Although it was not a focal point of the study, I was privately surprised that a small but significant number of subjects were constrained by the soft law, reaching outcomes to which they had objected in the absence of the law.³⁴ I call these constrained legal outliers “Norm Supercompliers.”

In the following Article, I show how soft law skeptics deny or severely undervalue the possibility of Supercompliance because they assume, often tacitly, the

30. See, e.g., Robert Alt, *What Exactly Is ‘Judicial Activism’?*, FOX NEWS, (June 27, 2012), <http://www.foxnews.com/opinion/2012/06/27/what-exactly-is-judicial-activism> (“[Judicial activism] occurs when judges write subjective policy preferences into their decisions rather than interpreting the constitutional or statutory provisions according to the law’s original meaning or plain text.”).

31. See *infra* Part IV.

32. Brian Sheppard & Andrew Moshirnia, *For the Sake of Argument: A Behavioral Analysis of Whether and How Legal Argument Matters in Decisionmaking*, 40 FLA. ST. U. L. REV. 537, 559 (2013).

33. *Id.* at 563.

34. *Id.* at 570 tbl. 3.

truth of a rigid functionalism derived from a philosophical school known as legal positivism. Thus, the ongoing debate about whether soft law deserves legal status is not merely one about labeling; it is also a disagreement about human conduct. I hope to establish that the controversy surrounding soft law's status turns on implicit hunches about the possibility of constraint under weak norms. It is time to take stock of what we have learned from the careful study of decisionmaking under the influence of norms. Doing so can change the terms of the debate and can educate legislatures about the best means to change the behavior of those subject to their laws.

In Part I, I describe the current state of the debate regarding soft law's legal status. In doing so, I survey the soft law literature and create a typology of norm softness, one that allows us to see the various kinds of norms and norm sources that have received the "soft law" label. With that groundwork laid, the way is clear in Part II to identify the most convincing theoretical justification for soft law skepticism, one that unites all of the forms of softness under a theory that explains how softness robs norms of legality. In Part III, I introduce the concept of Norm Supercompliance, describing its central characteristics. In Part IV, I identify examples of Supercompliance and related behavior from the empirical literature to establish its plausibility. Thereafter, in Part V, I describe how Supercompliance allows soft law to perform law's essential service, refuting the functionalist account that undergirds soft law skepticism. I conclude the Article with a discussion of the implications of and likely responses to my analysis.

I. SOFT LAW AS AN OBJECT OF FASCINATION AND CONTROVERSY

There are two implicit conceptual distinctions within the notion of soft law: one for softness (the distinction between hard and soft law), and one for legality (the distinction between law and non-law). It will be useful to use these distinctions as a way to differentiate soft law skeptics from believers.

A. *Contextualizing the Status Problem: The Hard/Soft and Law/Non-Law Distinctions*

The status problem for soft law arises out of the fact that scholars disagree about the independence of the hard/soft and law/non-law distinctions. On the one hand, soft law skeptics believe that falling on the soft side of the dividing line in the first distinction always means that a norm falls on the non-law side in the second. For them, the distinctions are intertwined. Soft law believers, on the other hand, assert that the two distinctions operate separately—falling on the soft side of the dividing line *might* mean that a norm is law, but further analysis is necessary.

These distinctions bring up two important points. Challenging soft law skepticism does not require one to articulate an alternative concept of legality; rather, one need only show that the skeptic's understanding of that concept fails on its own terms. Nor does it mean that a successful challenge inevitably leads to naïve formalism—the extreme opposite of skepticism—whereby all norms that fall on the soft side of the first distinction necessarily fall on the legal side of the second. One can refute the argument that all soft norms are non-legal without accepting that all soft norms are legal.

To lay the groundwork for a critique of soft law skepticism, it is necessary to describe in detail the skeptics' account of how softness robs norms of their ability to be laws. To do this, I will link norm softness to the concept of legality, itself. Unified under a single rigorous concept, soft law skepticism will be on solid theoretical footing, which will, I hope, provide some defense against the criticism that I have not put its best foot forward. Further, it will make it easier to understand how their functionalist understanding of legality rests on a series of behavioral assumptions, which can be subjected to empirical testing.

Trouble arises from the fact that the scholars who discuss soft law most profoundly—public international law scholars—do not typically spend much time on the concept of law, itself. Moreover, those who discuss the concept of law most thoroughly—analytic legal scholars—tend to be largely unconcerned with soft law. Thankfully, the state of affairs is

not so hopeless as it may at first seem; it turns out that the very same notions of obligation that undergird the concept of norm softness are elaborated and refined by a leading camp within analytic legal philosophy known as exclusive legal positivists. The first step is to list the qualities that render a norm soft.

B. *The Features of Soft Law*

Scholars have affixed the “soft law” label to a wide variety of normative phenomena.³⁵ Considering public international regulation, scholars have applied it to United Nations initiatives, such as the 1974 Charter on Economic Rights and Duties,³⁶ the Convention on the Law of the Sea,³⁷ the Universal Declaration of Human Rights,³⁸ the 2007 Declaration on the Rights of Indigenous Peoples,³⁹ the Helsinki Final Act,⁴⁰ the Basel Accords,⁴¹ the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights,⁴² and the 1992 Rio Declaration on Environment and Development,⁴³ among others. In the domestic arena, scholars have

35. Abbott & Snidal, *International Governance*, *supra* note 18, at 422.

36. RAJENDRA RAMLOGAN, *THE DEVELOPING WORLD AND THE ENVIRONMENT: MAKING THE CASE FOR EFFECTIVE PROTECTION OF THE GLOBAL ENVIRONMENT* 202 (2004).

37. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 429 (1991).

38. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 187-88 (2010).

39. Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT'L & COMP. L.Q. 957, 959 (2009).

40. Anthony D'Amato, *A Few Steps Toward an Explanatory Theory of International Law*, 7 SANTA CLARA J. INT'L L. 1, 9 (2010).

41. Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L.J. 888, 889 (2009).

42. Larissa van den Herik & Jernej Letnar Čer nič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT'L CRIM. JUST. 725, 734 (2010).

43. Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 312 (2004).

characterized a variety of official measures as soft law, such as when judges include dicta in their opinions, when the President of the United States issues a signing statement, or when executive agencies issue policy statements.⁴⁴ Scholars have even branded non-governmental legislation as soft law; norms issued by highly salient professional bodies like the American Psychiatric Association, or the World Medical Association have fallen under the soft law umbrella.⁴⁵ Even transactions between private parties often use soft law instruments, according to some scholars. Letters of intent—a fixture in business transactions—have been labeled soft law instruments on the ground that they “signal[] that two parties have an interest in further negotiations leading up to a binding contract but rarely ha[ve] legal force”⁴⁶

Though it is impossible to use the “soft law” label in a way that is entirely consistent with all prior uses of the term, there is an emerging consensus on the qualities that imbue norms with softness. At the most fundamental level, scholars call norms soft because of where they came from, because of the content that they have, or because of the way that they are enforced. Separately considering these roots of softness will make it easier to understand the philosophical principles that underlie softness.

1. Regulator-Based Softness

It is popular to label norms “soft” that were promulgated and enforced by bodies other than national or other domestic

44. Gersen & Posner, *supra* note 17, at 602-04, 622.

45. Angela Campbell & Kathleen Cranley Glass, *The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research*, 46 MCGILL L.J. 473, 477 (2001) (“It is therefore not surprising that most of these guidelines have traditionally been developed by associations of particular professional groups.”); Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 216 n.10 (1997) (describing World Medical Association codes of conduct as soft law); Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L. L. 101, 110-11 & n.52 (2008) (describing norms of the World Psychiatric Association, the American Hospital Association, the American Geriatrics Society, and the American Medical Association as soft law).

46. *See* Gersen & Posner, *supra* note 17, at 576.

governments.⁴⁷ Many scholars claim that softness arises when the promulgator is not a conventionally accepted authority.⁴⁸ Stable, domestic governments tend to meet this test rather easily because they often receive widespread recognition as the dominant authority in the area in which they mean for their norms to apply. It should come as no surprise that international organizations have a tougher time meeting this test. For example, soft law scholar and skeptic Anthony Clark Arend maintains that international bodies cannot meet this requirement,⁴⁹ claiming that the dividing line between hard and soft is that hard law is “the product of the political process and enforceable through the political process[.]” which leads to perceptions of legitimacy and “that actors regard the rules as binding.”⁵⁰

Even when a domestic government possesses authority as a general matter, the individual norms that it promulgates can be soft because they were not promulgated according to the conventions associated with authoritative promulgation. For instance, Jacob Gersen and Eric Posner label as “soft” those “rule[s] issued by a lawmaking authority that do[] not comply with constitutional and other formalities or

47. See, e.g., George K. Walker, *Occupation in Iraq: Issues on the Periphery and for the Future: A Rubik's Cube Problem?*, in 86 INTERNATIONAL LAW STUDIES, THE WAR IN IRAQ: A LEGAL ANALYSIS 219, 225-26 (Raul A. “Pete” Pedrozo ed., 2010); Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' “Protect, Respect and Remedy” and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69, 74-75 (2012); Benjamin J. Richardson, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, 8 ENVTL. L. REV. 83, 83-84 (2006) (book review).

48. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 543 (2009) (“The emerging Transnational New Governance system relies heavily on voluntary principles, codes, procedures, and (to the extent states and IGOs are involved) soft law. Private schemes lack authority to promulgate hard law; they also lack the capacity for coercive enforcement . . .”).

49. See AREND, *supra* note 11, at 20-26.

50. *Id.* at 20-21.

understandings that are necessary for the rule[s] to be legally binding.”⁵¹

Nearly as often as scholars locate one of the roots of softness in the lack of a source’s perceived authority, they find one in the closely related feature of a source’s inability or failure to impose official sanctions for violations of its norms.⁵² A satisfactory sanction must *increase* the cost of non-compliant behavior under law.⁵³ Thus, even if a norm has a punishment attached, there is not a satisfactory sanction if that punishment merely duplicates the punishment that exists in the absence of law. As with authority, individual norms for which no sanction has been announced are soft even if the promulgator is otherwise capable of imposing them.

Of course, there are ways to combine these two features; some might conceive of a lack of official sanctions as little more than a red flag that the source does not have recognized authority. But we should avoid that reductionist impulse, as we can conceive of an authoritative source that might opt not to impose sanctions for violations of one or more of its norms. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court’s ruling in which it declared President Truman’s seizure of steel mills unconstitutional was widely recognized as announcing an authoritative rule binding the

51. Gersen & Posner, *supra* note 17, at 579.

52. See, e.g., JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 36 (3d ed. 2010) (characterizing soft law as having no direct sanctions); Li-Wen Lin, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 720 (2009) (same); Avi Nov, *The “Bidding War” to Attract Foreign Direct Investment: The Need for a Global Solution*, 25 VA. TAX REV. 835, 871-72 (2006) (same); Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT’L L. 145, 151 (2003) (same); see also Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, J. INT’L ECON. L. 647, 650 (2002) (“This view poses serious problems for the area of international soft law, mainly because soft law entails no institutionalized enforcement by definition.”).

53. See, e.g., Patricia Funk, *Is There An Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 135-36 (2007) (“The classic ‘Law & Economics’ approach focuses on deterrence: a law enforced by a sanction increases the expected costs of the regulated activity and thereby induces compliance.”).

President, despite the fact that the Court lacked the power to prevent or reverse the seizure.⁵⁴ The more important point, however, is that norms that lack official sanctions, whether because the source cannot impose them or because they have chosen not to, are soft.

2. Norm-Based Softness

Having considered where norms come from, we are now ready to focus upon the norms, themselves. Norms (or, more accurately, norm statements) have two basic components: operator and norm content.⁵⁵

A norm's operator determines its deontic status, which in most cases means that the operator describes whether and in what capacity the content to which it applies is obligatory.⁵⁶ For example, an operator might indicate that the directive makes activity ϕ mandatory (makes ϕ obligatory), forbidden (makes not ϕ obligatory), or permissible (makes it not obligatory to not ϕ).⁵⁷ Under more complicated systems, there are operators that render a norm aspirational (ϕ is ideal but not obligatory) or permissibly suboptimal (ϕ is less than ideal, but it is not obligatory to not ϕ).⁵⁸ The norm content simply indicates the substance of the norm's directive. Thus, in the norm statement "you must drive to the right of the yellow line," the "must" serves as the deontic operator, and the "drive to the right of the yellow line" constitutes the norm content.

Soft law scholars converge in identifying three basic qualities that render norms soft: one arising from the operator, and two arising from the content.

a. *Operator-Based Softness.* When people conceive of law, they tend to envision mandatory norms, such as those that use the operators, "must," "may not," and "are required to."

54. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

55. See Paul McNamara, *Making Room for Going Beyond the Call*, 105 MIND 415, 417-18 (1996).

56. See *id.* at 416-17.

57. See *id.* at 415-16.

58. See *id.*

Of course, norms need not be mandatory. They may be permissive or aspirational, among other things. In addition to mandatory operators, there are permissive operators (e.g., “citizens may”) and aspirational operators (“citizens ought to, but need not” or “should”), among others. Scholars have characterized norms containing non-obligatory operators as soft.⁵⁹ For example, the World Health Organization’s Rio Declaration, which states in pertinent part, “[a]s collective goals, good health and well-being for all *should* be given high priority at local, national, regional and international levels[.]”⁶⁰ would be a soft norm.⁶¹

b. *Content-Based Softness.* Arguably, the most recognized source of softness is when the norm contains indeterminate or evaluative content.⁶² When the directive of a norm is vague or evaluative, soft law scholars reason, then the ability of the norm to constrain disappears, leaving those subject to the norm free to exercise their discretion when applying the norm to the circumstances before them.⁶³

59. See Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 *TRANSNAT’L LAW.* 121, 138-39 (2002); Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 *VA. J. INT’L L.* 725, 760 n.89 (2007) (“Soft law’ might also be comprised of provisions from an otherwise binding international document—such as a treaty—that are hortatory or aspirational.”); Roza Pati, *States’ Positive Obligations With Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia*, 29 *B.U. INT’L L.J.* 79, 92 n.46 (2011).

60. Rio Political Declaration on Social Determinants of Health, World Health Org., ¶ 7, Oct. 21, 2011, www.who.int/sdhconference/declaration/Rio_political_declaration.pdf?ua=1.

61. See Hans H. Hertell, Note, *Arctic Melt: The Tipping Point for an Arctic Treaty*, 21 *GEO. INT’L ENVTL. L. REV.* 565, 575-76 (2009).

62. See Leyla Davarnejad, *In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises*, 2011 *J. DISP. RESOL.* 351, 364 (2011) (“Among legal scholars the term ‘standards’—as opposed to strict/hard/tight rules—is used for these kinds of [soft] norms.”); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342, 391-92 (2004) (“The most common accounting of degrees of softness and hardness of law involves the content of the law and the degree of openness in its articulation.”).

63. See Roya Ghafele & Angus Mercer, *‘Not Starting in Sixth Gear’: An Assessment of the U.N. Global Compact’s Use of Soft Law as a Global Governance*

Scholars outside of the soft law literature have long been interested in the ways in which norm content will, as a general matter, fall short of being constraining as a result of vagueness or ambiguity.⁶⁴ So in this regard, soft law scholars make clear contact with the vast scholarship concerning the difference between clear, specific directives (rules) and broad, indeterminate ones (standards), a fact that some soft law scholars have acknowledged.⁶⁵

In the scholarly literature, a norm is a standard when it contains criteria that, on a straightforward reading,⁶⁶ force

Structure for Corporate Social Responsibility, 17 U.C. DAVIS J. INT'L L. & POL'Y 41, 44-45 (2010) ("In this respect, soft law is identifiable by the deliberately vague nature of the obligations imposed and the consequent discretion left to the parties being regulated. By contrast, hard law is precise, clear and unambiguous.").

64. See, e.g., Samuel Williston, *An Ambiguity in the Negotiable Instruments Law*, 23 HARV. L. REV. 603, 603 (1910) ("When it is considered how carefully the Negotiable Instruments Law has been examined by critics, and how long the practical working of the Act has been tested, it may seem odd to discover now an ambiguity in a section of the statute which involves a question arising every week in the business of every large bank.").

65. See Davarnejad, *supra* note 62, at 358-60. It bears noting that a small number of soft law scholars are reluctant to include indeterminate norms under the soft law umbrella. Compare Gersen & Posner, *supra* note 17, at 584 (excluding "ambiguous" norm content), with Lobel, *supra* note 62, at 391-92 ("The most common accounting of degrees of softness and hardness of law involves the content of the law and the degree of openness in its articulation."), and Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 505 (2006) ("Advocates of soft law claim that social integration is best effected through multilevel decentralized processes resulting in open-ended and flexible guidelines and standards. Conversely, defenders of hard law insist that social policies must be pursued through a centralized, vertical and formal decision-making process yielding uniform and binding rules creating justiciable rights."). One objection to their inclusion is that standards can be made more specific with canons of construction or repeated judicial application in a system of precedent. See Gersen & Posner, *supra* note 17, at 623. This is why we must be careful to limit softness to norms that at the time of analysis fall close to the standard end of the spectrum—"pure" standards. Other scholars are reluctant to group standards with soft law to avoid the implication that standards are a lesser norm because they have been labeled "soft." See, e.g., Steven A. Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 537, 554-55 (2011).

66. Of course, there are surely myriad ways in which an interpretation might be permissible within a normative system, but academics who write about the softness of a norm's content typically presume that those who monitor compliance with the norm will accept straightforward interpretations. See Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 764 (2013).

the interpreter to make evaluative judgment—for example, language such as “reasonable,” “moral,” “improper,” and “unfair.” Contrariwise, a norm is a rule when it contains criteria that, on a straightforward reading, provide clear guidance about what falls within the scope of the directive. Thus, bright-line criteria are characteristic of rules—for example, tests with numerical minima or maxima, such as “forty miles per hour.”

Scholars seeking to characterize norms as rules or standards run into the difficulty that there is a vast space between these two categories. Some norms use bright-line criteria but lack specificity in the contexts in which they are sometimes applied.⁶⁷ Other norms might incorporate evaluative terminology, but they have been supplemented with authoritative examples of concrete application,⁶⁸ such as when a court applies the norm to a distinct set of facts and renders a decision. Those judicial applications give the norm the power to provide adequately specific guidance when similar circumstances arise again.⁶⁹ Because specificity makes a continuum, it is clear that the dividing line between soft and hard norm content is a blurry one. It will suffice for the moment to say that softness due to indeterminacy is of the sort that must fall close to the standards end of the continuum so as to allay any concern that the norm might be better characterized as a rule. In other words, the standard must be pure.

Less commonly, scholars will call norms soft that simply duplicate pre-existing norms—even if those norms are clear, bright-line rules.⁷⁰ When we turn our attention to the

67. The most famous example might be Hart’s norm, “No vehicles in the park,” which is adequately specific when applied to a moving automobile but not so clear when applied to roller skates or an immobile tank set up in a war memorial. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) [hereinafter Hart, *Positivism*].

68. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1904 (2008).

69. See, e.g., Schauer, *Tyranny*, *supra* note 21, at 806-07.

70. See Curtis F.J. Doebbler, *A Complex Ambiguity: The Relationship Between the African Commission on Human and Peoples’ Rights and Other African Union Initiatives Affecting Respect for Human Rights*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 7, 19 (2003) (“The eight times human rights are mentioned, they are

positivist underpinnings of skepticism, this feature takes on greater significance.

3. Summing Up

We now have a fairly extensive list of the qualities that have been linked to norm softness. The regulator of the norm might lack authoritative pedigree, or it might not choose to impose sanctions. The norm, itself, might have a non-mandatory operator (such as an aspirational one), might not adequately specify what its directive is, or might merely duplicate obligations that already exist. The following Figure displays these characteristics.

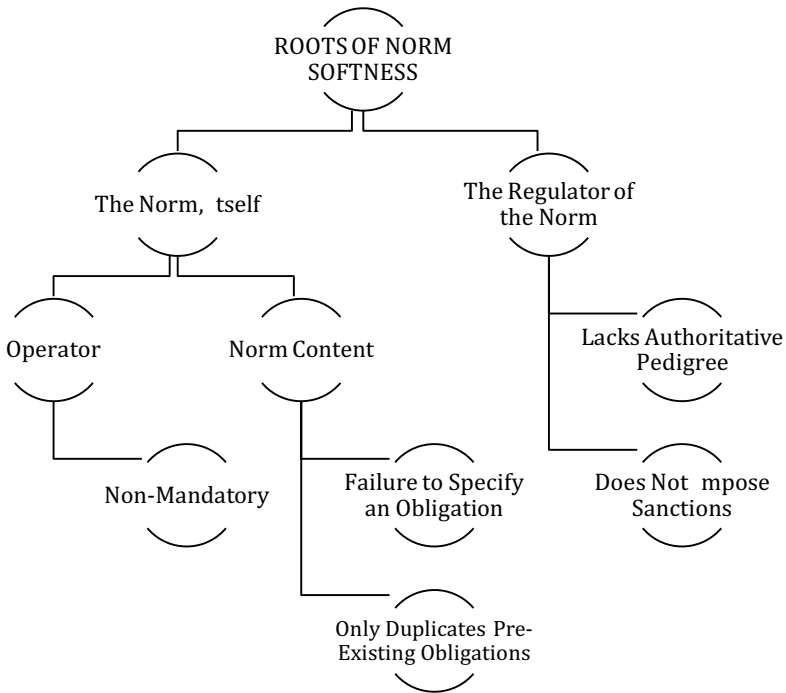


Figure 1: The Roots of Softness

implicated as soft law, i.e., a clear reference to the already existing legal obligations.”).

The question we now face is whether there is some way to unite these qualities into a single, coherent theory of law that can explain and justify soft law skepticism. In other words, is there a way to unite the hard/soft distinction and the law/non-law distinction under a single theory?

Fortunately, we are not starting with a blank slate. It has become nearly customary for soft law scholars to link skepticism to legal positivism.⁷¹ Unfortunately, scholars almost always refrain from describing the link in detail,⁷² or, if they do, they do not discuss all of the varieties of softness that are necessary to unite completely the two theories.⁷³ In the following Part, I will elaborate upon this relationship, showing how dimensions of positivism underlie each one of the characteristics of softness that we have described. In

71. See, e.g., CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* 3 (2012) (“Similarly, legal philosophers, especially of the positivist bent, have argued that international financial law does not qualify as ‘law,’ given the absence of a centralized, coercive authority”); José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 421 (2003) (“Others, especially positivists, have argued that the very term ‘soft law’ is an oxymoron that erroneously suggests that binding authority lies along a spectrum”); Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT’L L. 1075, 1083 (2008) (“It is the qualification of those acts with a soft *instrumentum* as soft law which has attracted most of the positivist attack.”); Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1164 n.94 (2011) (“Positivist legal scholars, for example, find that soft law is inferior to hard law because it lacks formally binding obligations that can be interpreted and enforced by courts.”); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 340 (2002) (“[M]ost public international lawyers, realists and positivists consider soft law to be inconsequential.”).

72. See, e.g., Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT’L L. REV. 87, 114-15 (2008); Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 159, 166-67 (2006).

73. See, e.g., Tai-Heng Cheng, *Making International Law Without Agreeing What It Is*, 10 WASH. U. GLOBAL STUD. L. REV. 1, 9-11 (2011) (discussing kinds of legal positivism in relation to soft law but not discussing all varieties of soft law); Kevin T. Jackson, *Rethinking Economic Governance: A Naturalistic Cosmopolitan Jurisprudence*, 36 B.C. INT’L & COMP. L. REV. 39, 54-58 (2013) (discussing positivism at length but concentrating on emerging soft law syndicates in business and human rights).

doing so, I illustrate that soft law skepticism is best understood as a claim about the function of norms possessing soft characteristics and, in particular, about their incapacity to perform the essential service that law claims to provide. I am not the first person to navigate these waters,⁷⁴ but I attempt to explore them more thoroughly than my predecessors have.

II. THE THEORETICAL BASIS FOR SOFT LAW SKEPTICISM

The most rigorous analysis of the requirements for legality comes from the tradition of analytic legal philosophy, where legal positivists occupy the dominant position. Generally speaking, positivists are united by a fairly uncontroversial idea—namely, that it is possible for the test of a norm’s legality to be based on a set of conditions that are social in nature rather than moral.⁷⁵ People *posit* what the law is; the law is a social fact. As a result of this Social Fact Thesis, the legality of a norm must be based upon whether that norm has come from a certain socially pedigreed source or convention—such as whether the norm has been posited by a sovereign—rather than whether it satisfies a moral or similarly evaluative test—such as whether the norm advances basic human goods.⁷⁶ Being a positivist means that you accept that law comes ultimately from some sort of social fact, but it does not necessarily mean that you believe that a society cannot make morality part of their legal tests. Those who believe that morality cannot be so incorporated are called exclusive legal positivists (hereinafter “exclusive positivists”), and those that believe it can are called inclusive legal positivists (hereinafter “inclusive positivists”).⁷⁷ The

74. See Oren Perez, *Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and New Ensemble Politics*, 12 THEORETICAL INQUIRIES L. 543, 550-60 (2011).

75. See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 730 (2006) (“The most fundamental of positivism’s core commitments is the Social Fact Thesis, which asserts that law is, in essence, a social creation or artefact.”).

76. Christopher P. Taggart, *How Can ‘Positivism’ Account for Legal Adjudicative Duty?*, 33 OXFORD J. LEGAL STUD. 169, 170-71 (2013).

77. John T. Valauri, *Dialectical Jurisprudence: Aristotle and the Concept of Law*, 3 DREXEL L. REV. 415, 427-28 (2011).

primary focus of my analysis (and criticism) in the remainder of this Article concerns a particular brand of exclusive positivism: one that relies on a functionalist test for legality. I do not challenge other forms of positivism or, more generally, the Social Fact Thesis. A subset of legal positivists takes a harder view, however. Exclusive positivists believe that a law's foundation can *only* be based upon a social test.

It will be useful to explain how these theories came about, as well as the problems that they sought to address. With that spadework completed, it will be much easier to show how only exclusive positivism unites the various roots of softness under a single account of legality.

A. *The Evolution of a Service-Based Concept of Law*

It has become a mainstream view for analytic legal theorists, the majority of whom are legal positivists, to demarcate the concept of law based, in part, on the distinctive⁷⁸ manner in which law claims to help those subject to it. Prominent exclusive positivist Scott Shapiro claims, “the primacy that positivism affords to social facts reflects a fundamental truth about law, namely, that the law guides conduct through the authoritative settlement of moral and political issues.”⁷⁹ This was not always the case, however. In this Part, I discuss how positivists, particularly exclusive positivists, arrived at this position in an effort to show how the various concessions and assumptions that positivists adopted along the way form critical components of their test for legality.

78. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 71 (2001) [hereinafter COLEMAN, PRACTICE] (“The prevalent view among legal positivists today is that law purports to govern conduct as a *practical authority*. The distinctive feature of law's governance on this view is that it purports to govern by *creating reasons for action*.”).

79. Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 24 (Arthur Ripstein ed., 2007).

1. The Turn Away From Coercion and Towards Accepted Obligation

In the beginning of modernity, legal positivists largely believed that the essence of law resided in its power to announce the commands of the sovereign and, most importantly, to communicate to those subject to the sovereign that the failure to obey the sovereign's commands would result in the imposition of a sanction.⁸⁰ The focus of this "Command Theory" of law was on law's power *over* its subjects through sanction, rather than on the internal mechanics of deliberation *under* law.⁸¹ That is, theorists were most concerned with explaining the source and power of legal systems rather than explaining what we do when we obey the law and how obedience to law can be rational. It was assumed that, without the presence of some sort of sovereign who has the power to impose sanctions, a system of norms could not qualify as a legal system.⁸²

Although the Command Theory reigned supreme among legal positivists for more than a century, its dominance came to an abrupt halt when H.L.A. Hart illustrated how the theory failed adequately to distinguish law from a distinctly non-legal situation—that of a gunman in a bank.⁸³ When law works, we perceive ourselves as being obligated to follow it and therefore perform or abstain from an action that we otherwise would have performed or abstained from, respectively. Our embrace of the law as an authoritative obligation distinguishes our experience of law-following from coercive experiences, such as being held up by a gunman. The gunman demands that we hand over our wallets on the ground that failure to do so will result in considerable harm,

80. See JEREMY BENTHAM, *A Fragment on Government*, in 1 WORKS 263, 293-94 (Russell & Russell, Inc. 1962) (1838).

81. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE, DETERMINED* 16 (Prometheus Books 2000) (1861) ("But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.").

82. See *id.* at 147.

83. See Hart, *Positivism*, *supra* note 67, at 603.

which we seek to avoid; whereas our obligation to law stems from legal officials' and even citizens' belief that the legally mandated conduct "may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action."⁸⁴ While this Hartian account seems better to describe the phenomenology of obedience to law than does the Command Theory, we might still wonder what it means to say that there is a legal obligation and that one has followed it.

2. What is Legal Obligation?

A useful way to understand how legal norms obligate us is to conceive of legal obligation as a relationship between a norm and a person who believes herself or himself to be subject to that norm. In that relation, the person is primarily concerned with two things: who issued the norm and its content. When we are obligated by a norm, we are obligated because of the source from which the norm came to apply to us; we have come to accept the norm-giver as having the power or authority to obligate us, at least so long as the norm-giver follows the procedure set up to make a norm authoritative. Once we recognize that a norm comes from an authoritative source, the content of the norm is able to change what we believe we must do.

Starting with the source of the norm, Hart claimed that for a legal system to exist, the norm-giver must be conventionally understood by a group subject to the norm to have the authority to create obligations within a jurisdiction.⁸⁵ By this, Hart meant that a suitable number of the members of that system, particularly its officials, have committed themselves to the position that a norm-giver has that authority.⁸⁶ Sources become authoritative through the development of a conventional, social rule to that effect. According to Hart's popular model, this social rule (a "rule of recognition") identifies which norms achieve legal status and

84. See H.L.A. Hart, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 125, 160 (1982).

85. See HART, *CONCEPT*, *supra* note 29, at 55-60.

86. See *id.* at 56-57.

therefore carry legal obligation.⁸⁷ The rule of recognition forms the foundation of the legal system, and it arises out of the conventional behavior among officials, such as judges.⁸⁸

Hart provided a couple of guideposts to determine whether such a social rule has been created, among them that the social rules must be taken as standards of legitimate criticism by officials within the group and that there must be widespread obedience to the directives that receive legal status from the rule of recognition.⁸⁹ If a source is authoritative by merit of a social rule, then the norms that the source legislates in compliance with that rule—if we follow Hart’s approach—are imbued with that authority. That means those who view the source as authoritative generally consider that the content of these norms make up obligatory directives.⁹⁰

How does obedience to legal authority manifest itself? We can tell that obedience has occurred by observing the manner in which those subject to the norm decide what to do with respect to the activities that the norm governs. In general, law commands us to follow it simply because it is the law, not because we like what it is commanding. This means that if a legal norm is supposed to change our deliberation, as is assumed, then our engagement with the norm has to be more than determining whether we favor doing what it says. Merely deciding in our own pure discretion whether a rule is worth following cannot count as an instance of obedience to that rule. This is the dynamic of obligation; we must perform under an obligation even if we would, on the balance of reasons, prefer not to.⁹¹ Hart called this principle “content-

87. *See id.* at 93-95.

88. *See id.* at 57-60.

89. *See id.* at 56-57.

90. *See id.* at 93-94. Hart refers to the directives under the rule of recognition as “primary rules,” but I will simply refer to them as directives for simplicity’s sake.

91. *See* Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 772 (2010).

independence.”⁹² It is the essence of obedience for post-Hart positivism.

Thus formed, a legal obligation is designed to alter our decisionmaking. When a legal norm says that a subject is “required to ϕ ,” that norm does not seek to make us choose whether we would prefer to ϕ ; rather it *purports* to obligate us to ϕ by changing how or even whether we deliberate about the merits of ϕ . Legal positivists disagree over whether our legal obligations trump all other considerations: some argue that, once it applies, law eliminates the need for further deliberation; whereas others argue that other considerations remain, leaving the need for further (albeit augmented) deliberation in at least some cases. They generally agree, however, that law must be the sort of thing that, to some extent, can change our deliberation through its obligations.⁹³ Thus, a legal norm, itself, must have the capacity to force us to change our understanding of the balance of the weight of the reasons in favor of performing the action proscribed in the law’s directive (or not performing the act prohibited therein) versus the weight of the reasons against doing so when we deliberate.

3. Why Be Legally Obligated?

Since following an obligation means that one does the action required even if he or she believes, on the balance of reasons, that it is not the best thing to do, the question remains as to how it can be rational for one willingly to

92. See H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 243-68 (1982).

93. See COLEMAN, *PRACTICE*, *supra* note 78, at 71 (“The prevalent view among legal positivists today is that law purports to govern conduct as a *practical authority*. The distinctive feature of law’s governance on this view is that it purports to govern by *creating reasons for action*.”); JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 7 (2009) [hereinafter RAZ, *AUTHORITY AND INTERPRETATION*] (“[T]he law sets things straight: telling people ‘this is what you should do and whether you agree that this is so or not, now that it is the law that you should you have the law as a new, special kind of reason to do so.’”).

assume a legal obligation.⁹⁴ The problem with the obligation-based account is that it is not clear how it justifies following the law in disregard of the reasons that one wholeheartedly believes militate against following it. Robert Paul Wolff argued that this form of obedience is incompatible with basic notions of human autonomy, which presuppose that we have a duty to act on our own assessment of what is right on the balance of reasons.⁹⁵ How can it be better to follow the directive of another when we wholeheartedly believe that directive to be wrong?

To respond to this challenge, legal positivists sought to devise ways that law could serve, not merely as a means for the sovereign to impose its will, but as a tool for the benefit of those who are subject to it. In particular, positivists became more interested in how law might improve deliberation, thus making obedience to law rational.⁹⁶ It is here that the functionalist wing of legal positivism begins to take center stage. Law must be the sort of thing that is capable of performing a deliberative service to those who are obedient to it.

We should start with the basic notion that law's service is tied to its power to improve our deliberation. It is clear that a background assumption of this notion is that we are imperfect deliberators without law's help. Otherwise, no norm could benefit us. This is a truism of human nature; we neglectfully omit reasons from consideration, suffer from bias, are forgetful, and sometimes lack adequate knowledge of the area of concern, to name just a few. Having established

94. See COLEMAN, *PRACTICE*, *supra* note 78, at 71 (discussing shift from Command Theory to focus on law's ability to create reasons for action as a practical authority).

95. See Heidi M. Hurd, *Challenging Authority*, 100 *YALE L.J.* 1611, 1620 (1991); see generally ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1970) (arguing that individual autonomy is incompatible with the notion of *de jure* state authority because of conflict of obligations).

96. See Scott J. Shapiro, *How Rules Affect Practical Reasoning*, in *REASONS AND INTENTIONS* 133, 151 (Bruno Verbeek ed., 2008) ("How would someone go about proving that the Constraint Model for rules is the correct conceptual analysis of rule-guidance? In short, one would try to show that for every, or nearly every, class of rules, if the Constraint Model were false, no plausible rationalization could be given for why agents routinely follow rules in these situations.").

that we have this infirmity, the question remains as to how law might help.

The most influential and well-respected answers to this question come from exclusive positivists Joseph Raz and Scott Shapiro. Raz offered a groundbreaking account of how legal obedience satisfies the demands of rationality called the Service Conception of Law.⁹⁷ Therein, he claims that law's essential service is to improve our ability to act on the right balance of all reasons, which, Raz believes, is an improvement to our ability to act in the moral way.⁹⁸ Law makes us better deciders.

To perform this service, law necessarily claims to be a legitimate authority for those to whom it applies.⁹⁹ Law serves as an authority to us when we allow law's directives to exclude our consideration of the balance of reasons that are within the scope of those directives ("background reasons") and to replace those reasons with one that weighs in favor of following the directive ("protected reason").¹⁰⁰ It should be the case that we are more likely to act on the balance of reasons—or to act morally—than we would have in the absence of the law.¹⁰¹ On this model, law is an "exclusionary reason."

Stacking the deck in favor of its directives is how authorities help us. If authorities are better at balancing reasons than we are, or at least are better at it within a certain scope, then it is possible for their exclusionary reasons to make us more likely to decide in accordance with the best balance of reasons. Such circumstances illustrate how obedience can be rational.

According to Raz:

97. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 55-56 (1986) [hereinafter RAZ, *MORALITY*].

98. See Joseph Raz, *Authority and Justification*, in *AUTHORITY* 115, 131-32 (Joseph Raz ed., 1990).

99. See *id.* at 132.

100. See RAZ, *MORALITY*, *supra* note 97, at 41-42, 57-59.

101. Legitimate laws, and the directives of legitimate authorities generally, preempt the background reasons that might militate against the authoritative directives and replace them with their own requirements.

The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.¹⁰²

By preventing us from considering reasons within the scope of the norm, law improves our decisionmaking; it helps us by constraining us to make choices that are better than the choices we would have made in its absence.

The approach of the other leading exclusive positivist, Scott Shapiro, shares Raz's view that law is distinctive due to the function that it provides for us, but his account of this function is based not on law's claim to be a legitimate authority, but on the notion that law is a type of planning institution that claims to solve moral problems.¹⁰³ Law arises when a community encounters moral disagreements whose solutions are so complex, contentious, or arbitrary that an elaborate planning system becomes the best option among alternatives.¹⁰⁴ To do this, it limits deliberation:

To serve as a plan, we might say, it is not necessary for a law to *eliminate* moral reasoning. Rather it need only displace the need for some such deliberation. As long as it takes certain issues "off the table" and channels deliberation in a particular direction, the rule will fulfill its function as a plan.¹⁰⁵

Thus, law is the sort of thing that can make this kind of practical difference to our deliberation. Having discussed law's essential service, it is now time to begin considering how to use this function as a means to test for legality.

102. RAZ, AUTHORITY AND INTERPRETATION, *supra* note 93, at 53 (emphasis omitted).

103. See SCOTT J. SHAPIRO, LEGALITY 213 (2011) [hereinafter SHAPIRO, LEGALITY] ("[T]he fundamental aim of the law is to rectify the moral deficiencies associated with the circumstances of legality.").

104. *See id.* at 225.

105. *Id.* at 276.

4. What Content Renders Norms Incapable of Performing Law's Service?

Raz and Shapiro believe that the way to test for legality is to determine a norm's fitness for providing the beneficial deliberative service that law claims to provide.

Several high-profile legal positivists—Jules Coleman,¹⁰⁶ Joseph Raz,¹⁰⁷ and Scott Shapiro,¹⁰⁸ among others—have said that, while law does not uniformly succeed in improving our decisionmaking through its obligations, it does uniformly *claim* that it will do so. And the only way that a system can make such a claim legitimately is if it is possible for it to perform that service. Thus, determining whether a norm is legal involves identifying whether that norm, by necessity, cannot perform the beneficial service. While passing this test does not guarantee that a norm is a law, passage is a necessary condition for legality.

It will be helpful to revisit the inclusive/exclusive distinction now that we have a better sense of the history of ideas leading up to its development. Exclusive positivists who subscribe to the service-based understanding of legality take a harder line than inclusive positivists regarding the kind of content that is fit for the service. Inclusive positivists follow Hart's lead in accepting that virtually any content might be capable of performing a beneficial service.¹⁰⁹ Thus, inclusive positivists receive their name because they are inclusive as to legal content. Exclusive positivists, on the other hand, adopt both restrictive conditions for what qualifies as a legal source, but they also assert that only certain content is

106. See Coleman, *Architecture*, *supra* note 29, at 16.

107. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* v-vi (1979) [hereinafter RAZ, *AUTHORITY OF LAW*].

108. SHAPIRO, *LEGALITY*, *supra* note 103, at 215 ("If we want to explain what makes the law *the law*, we must see it as necessarily having a moral aim, an end that criminal organizations do not necessarily possess. . . . [T]he difference between legal systems and these criminal syndicates is not that the former are *in fact* morally better than the latter; rather, the distinguishing factor is that it is in the nature of the former that they are *supposed to be so*.").

109. See Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 *LEGAL THEORY* 381, 382 (1998).

capable of allowing law to perform its service.¹¹⁰ All other content is excluded.

Raz and Shapiro agree that legal norms must, in principle, be capable of making a practical difference to the structure or content of deliberation or action through its non-optionalness.¹¹¹ Most visibly, the practical difference takes the form of behavioral constraint, during which a subject performs an action to comply with the norm's directive that is different from the action she would have performed in the absence of the norm. But it might happen internally, such as when one simply considers different reasons in favor of or against an action.

Of course, Raz and Shapiro offer their own accounts of the form that this practical difference takes in our reasoning.¹¹² Raz offers an elaborate account of exclusionary reasons that make consideration of the background reasons covered within the scope of a norm off-limits. The notion is that the content of the directive must indicate that some range of reasons that might have been considered during deliberation is no longer considerable. Raz maintains,

110. *See id.* at 383-84.

111. *See* Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEO. L.J. 393, 398-401 (2007). Most inclusive positivists, too, share this basic notion. H.L.A. Hart believed that legal norms are "peremptory" second-order reasons, meaning that they provide one with a reason to abstain from considering any of the first-order reasons that otherwise would have borne upon the decision of how to act, and they then replace those reasons with new first-order reasons to comply with the legal directive. *See* Lewis A. Kornhauser, *Economic Rationality in the Analysis of Legal Rules and Institutions*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 67, 71 (Martin P. Golding & William A. Edmundson eds., 2005). Thus, to comply with a legal norm means that its second-order reason has prevented the subject from considering the merits of φ , leaving her only to consider the fact that the law has directed her to φ when she is considering the first-order reasons regarding whether to φ , which of course tips the balance in favor of φ because there is now no other reason against which the law's first-order reason can compete. In a sense, there is no deliberation left to do after the second-order reason does its work—it has knocked all of the competing reasons off of the scale. We can thus categorize Hart among those positivists who link guidance by law with complete deliberation foreclosure.

112. *See generally* Edward F. McClennen, *Rethinking Rationality*, in *REASONS AND INTENTIONS*, 37 (Bruno Verbeek ed., 2008) (discussing differences between Raz and Shapiro).

however, that subjects are free to balance reasons that are outside the scope of the norm—meaning those reasons that were not meant to be under consideration when the norm was adopted—against the reason provided by the norm.¹¹³ This distinguishes him from Shapiro, who believes that law takes prior decisions about the manner in which to achieve a goal, as well as the goal, itself, as settled.¹¹⁴ These differences have been of philosophical interest to analytic legal philosophers,¹¹⁵ but they have little bearing when divining the line that separates law from non-law, as the same sorts of norm content fail regardless of whether one is in Raz or Shapiro's camp.

For Raz, the primary circumstance in which a system of directives is necessarily unable to make a practical difference is when the system leaves us to follow our own independent understanding of what is warranted on the balance of all reasons, as if the norm we are considering does not exist at all.¹¹⁶ In such cases, the system cannot qualify as a legal system; it fails to perform the service it is supposed to when we allow it to substitute its balancing of the reasons for ours. For an authoritative source, those subject to its norms "can benefit by its [norms] only if they can establish [the norm's] existence and content in ways which do to depend on raising the very same issues which the authority is there to settle."¹¹⁷

The most famous content that fails in this regard is moral content. According to Raz, when norms have moral criteria,

113. See RAZ, *AUTHORITY AND INTERPRETATION*, *supra* note 93, at 144.

114. SHAPIRO, *LEGALITY*, *supra* note 103, at 279.

115. COLEMAN, *PRACTICE*, *supra* note 78, at 121-23 (discussing the difference between peremptory and preemptive reasons).

116. See RAZ, *AUTHORITY AND INTERPRETATION*, *supra* note 93, at 141 ("The preemptive force of authority is part and parcel of its nature. It cannot succeed as an authority (ie, succeed in improving our conformity with reason) if it does not preempt the background reasons [that the norm is designed to exclude]. The function of authorities is to improve our conformity with those background reasons by making us try to follow their instructions rather than the background reasons. Authorities cannot do so without at least the possibility that their directives will sometimes lead us to act differently than we would have done without them.")

117. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 203 (1994) [hereinafter RAZ, *ETHICS*].

they simply tell us to balance the very background reasons that the norm giver was supposed to balance for us.¹¹⁸

Shapiro's limits are similar. One manner in which a system of plan-like norms necessarily fails is if the existence and content of those norms cannot be determined by facts whose existence the plans aim to settle.¹¹⁹ Because laws aim to settle moral problems, it cannot be the case that their existence and content are determined by moral facts.¹²⁰ No moral facts exist that can settle a moral problem, else that problem would not exist in the first place, supposes Shapiro. He writes:

If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation or bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts, not moral ones, can serve this function.¹²¹

Because of Shapiro's view that legal norms must operate to cut off deliberation, it should be obvious that aspirational norms suffer from the same infirmity as evaluative norms. In a recent article with Oona Hathaway, Shapiro admits, "To be

118. *See id.* at 220-21.

119. *See id.* at 275.

120. SHAPIRO, LEGALITY, *supra* note 103, at 279 ("The more deliberation obviated, the more complete the guidance. For example, the law might forbid 'unreasonable restraints of trade.' Or it might declare that 'pricefixing, bid rigging, and market allocation schemes' are prohibited. Both descriptions might apply to the same set of acts, but they represent very different plans. The former plan is highly incomplete because it picks out the actions in question under a morally loaded description. The guidance it provides does not obviate the need for deliberation on the moral merits of various business practices. The latter provides more complete guidance, not because it picks out more actions than the former, but because it picks out those actions in a way that settles more issues than the former. It is possible to identify the prohibited acts without deliberating on whether price-fixing is an unreasonable restraint of trade.")

121. *Id.* at 177.

sure, law would not be morally indispensable if it were purely aspirational in nature.”¹²²

The class of norms that are necessarily unable to perform the service that law claims to provide are the same regardless of whether one follows Raz or follows Shapiro. That is, the same kinds of norms are excluded whether one believes that legal norms cut off deliberation entirely, as Shapiro suggests, or only within a certain scope, as Raz suggests.

B. *Aligning the Service Conception and Soft Law Skepticism*

In this Part, I will provide a typology of norm characteristics that fail to pass muster under the Raz/Shapiro, service-based model of law, tying them to the features of softness described in Part I.B. Doing so will show how these features will, on these accounts, stall law’s essential deliberation-altering service. In other words, I will unite soft law skepticism and Raz/Shapiro exclusive positivism under the same functionalist banner. One useful byproduct of this exercise is that we will have a philosophically grounded means to distinguish soft from hard law. It will also provide the groundwork for showing that this soft law skepticism is unsustainable in the face of empirical evidence of Supercompliance. For those who are not persuaded by my critique, perhaps the following Part is nevertheless useful. As my relatively brief summary of the positivist literature shows, soft law skepticism might seem under-theorized when held to the standards set by the philosophers; whereas exclusive positivism might seem hermetic when held to the standards of the soft law literature, which often addresses topical issues and specific pieces of legislation. Drawing further connections between the two projects will benefit both, I hope.

1. Norm-Based Softness

In describing Raz and Shapiro’s positions, I briefly touched upon the sorts of norms—aspirational and moral

122. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 346 (2011).

norms—that necessarily fail to satisfy their functional, service-based test for legality. As the parallel between exclusive positivism and soft law skepticism is easy to draw with respect to these normative characteristics, it is a suitable starting point.

a. *Operator-Based Softness: Failing to Set Forth an Obligation.* Scholars include norms that use non-obligatory operators under the banner of soft law. Like soft law skeptics, exclusive positivists assert that such norms are not, themselves, capable of providing law's essential service.¹²³ The essence of obedience to law is accepting the law's obligations. On a straightforward reading, an aspirational norm, for example, does not set forth an obligation; rather, it endorses conduct but expressly leaves it up to the interpreter to decide whether to do it. Thus, it neither operates as an exclusionary reason nor as a deliberation forecloser and therefore does not perform the particular service that law claims to perform.¹²⁴ In short, it is obvious that soft law skeptics and Raz/Shapiro exclusive positivists are clearly on the same page in this regard.¹²⁵

b. *Content-Based Softness.* Likewise, there is an evident parallel between Raz/Shapiro exclusive positivists and soft

123. See SHAPIRO, LEGALITY, *supra* note 103, at 59 (calling aspirational legal norms peculiar, and that “[i]f we are not legally obligated[,] . . . then it is not true that we legally ought to [do it].”).

124. Insofar as we assume that posited aspirational norms mean to set a level for supererogation, which is not at all clear, then Raz does permit the possibility that the norm might serve as an exclusionary permission, meaning that the subject has the option of choosing whether to exclude the reasons that tip the balance in favor of doing the action that is supererogatory. Importantly, the exclusionary permission does not tip the deliberative scales towards morality in such cases; rather, it allows the decisionmaker the choice of deciding *not* to do the most moral thing—the supererogatory action. Thus, aspirational norms are as incapable as moral norms of performing law's essential service on the Razian view. See JOSEPH RAZ, PRACTICAL REASON AND NORMS 96 (1975).

125. It is not entirely clear whether both legal positivists and soft law skeptics apply their functionalist limitations to every individual norm within a legal system, to most laws within a legal system, or merely to the rule of recognition. Because my focus here is on behavioral impossibilities presumed by those groups for norms that meet these conditions regardless of whether they are primary or secondary rules, my reasoning here should be helpful regardless of how that question is resolved.

law skeptics with respect to norm content. Recall that soft law scholars identified two characteristics of directives that give rise to softness: (1) that they were indeterminate and (2) that they duplicated pre-existing obligations.¹²⁶ These same characteristics have the capacity to preclude norms from passing Raz and Shapiro's test for legality.

i. Specificity: Failing to Identify an Obligation. Soft law scholars have often characterized legal "standards" as soft, and now that we understand how law's service works, we can elucidate the philosophical basis for their characterization.

Legal philosophers generally make the same distinction between rules and standards that other scholars do, including soft law scholars. Hart famously claimed that we can imagine individual norms as having a core and a penumbra for the purposes of application.¹²⁷ When the application of a norm to a situation suitably identifies whether a particular activity falls within its purview, then that application has fallen within the core, and when it does not, then it has fallen into the penumbra.¹²⁸ If it is a penumbral application, then the interpreter must rely on discretion in determining whether the norm makes the activity in question legally obligatory.¹²⁹

Since it should be plain enough that both legal philosophers and soft law scholars understand the rules/standards distinction in much the same way, we are ready to see how the distinction matters when it comes to the Raz/Shapiro test for legality. When norms fall at the tail end of the spectrum on the standards side, then they are composed entirely of penumbra and therefore cannot perform law's deliberative service without supplementation. Of course, even rules admit of cases in which the interpreter

126. See *supra* Introduction.

127. Hart, *Positivism*, *supra* note 67, at 606-07.

128. See Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139, 146 (1982) ("Cases falling within the penumbra of a general rule, however, are uncertain. There is no uncontroversial answer as a matter of law to them, and judges must go beyond the law to exercise their discretion in order to resolve them. Controversy implies the absence of legal duty and, to the extent to which legal rules have controversial instances, positivism is committed to a theory of discretion in the resolution of disputes involving them.").

129. HART, CONCEPT, *supra* note 29, at 126-27.

finds herself in the penumbra, and in such instances, the norm operates as a soft norm. But in most instances, the rule will have the specificity necessary to perform the service. In other words, the specificity problem arises when we have either a pure standard applied in any case that it is understood to govern or another type of norm, even a rule, when the case falls into the penumbra. Because soft law scholars characterize norms (rather than classes of cases in which a norm is applied) as soft due to the kinds of terms contained within them, they likely have norms close to the pure standard end of the spectrum in mind when they assert that positivism underlies their reasoning.

Turning to the connection between pure standards and law's essential service, one must be able to identify what the particular directive within the norm is if one is to have his or her deliberation altered by the norm. With norms that fall at or near the very tip of the standards end of the spectrum, the norm content has been stated such that, in the cases to which the norm generally applies, the norm will fail to specify that a particular conduct is subject to the norm's deontic operator. The norm is so vague that, even when taking into account other norms in that system, the interpreter is unable to tell whether the conduct that he or she is considering at that moment falls within the norm's directive. As a result, the person subject to the obligation within the norm is left to decide whether the conduct ought to be performed on his or her own (and, thus, without the guidance of the norm). Consequently, the norm fails to deliver its service.

It is important to emphasize how rare pure standards are in a system of precedent. Legal norms are seldom promulgated into a vacuum, and ambiguous standards will likely be interpreted with other, clearer legal norms in mind. As mentioned, with each application, an ambiguous standard becomes more and more rule-ified, limiting the possible permissible interpretations.¹³⁰ We are most likely, then, to

130. See Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 491 (2000) ("As the Standard is applied over a series of cases, it almost always becomes increasingly rule-like. This occurs because cases, by nature, are disputes that involve particular facts. As the cases are decided they

encounter such ambiguity when legislatures use evaluative terms to regulate a theretofore unregulated activity, one with which other legal norms and precedential decisions make little contact, or when legislatures issue norms in systems that do not observe precedent.¹³¹ It is no coincidence that such qualities are more likely to be present in international regulation.¹³²

ii. Duplication: Failing to Impose a New Obligation. A small number of soft law scholars have characterized norms that merely duplicate preexisting obligations as soft.¹³³ This is a keen insight as it comports well with the service conception of law. Indeed, exclusive positivists have placed most of their attention on this particular aspect of norms, as it is more likely to cause problems for service than specificity in light of the rarity of pure standards.

Even when the interpreter of a norm is able to identify whether the conduct at issue is governed by the norm's directive, it is possible that the conduct was already being regulated in precisely the same way by earlier obligations. As a result, the obligation that was set forth in the norm cannot succeed in altering deliberation because it does not introduce a new obligation; any deliberation alteration that could have occurred would have been performed by the preexisting norms, or so the thinking goes.

Exclusive positivists, including Raz and Shapiro, assert that moral norm content creates duplication problems. It is popular for people, including philosophers, to believe that morality governs us at all times and everywhere.¹³⁴ Exclusive positivists extend this notion, reasoning that it is therefore necessary that positing a moral norm does nothing more than

become examples of what, as a concrete matter, the Standard means."); Schauer, *Tyranny*, *supra* note 21, at 808.

131. I leave open the possibility that a norm might be circumstantially soft, such as when the particular facts of a case fall squarely within a norm's penumbra, even if other cases would not.

132. See Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 EUR. J. INT'L. L. 967, 994-95 (2010).

133. See Doebbler, *supra* note 70, at 19.

134. See generally RAZ, AUTHORITY AND INTERPRETATION, *supra* note 93, at 183.

repeat the deontic status of what already existed. With this background in mind, consider a statute stating, “when doing business, you must do what morality requires.” In Razian terms, the moral content reduces to requiring subjects to do “that which is called for on the balance of all reasons,¹³⁵ as the natural state of being subject to morality asks us simply to balance all reasons. So this law really says, “when doing business, do what is dictated on the balance of all reasons.” Law is supposed to do that balancing for us, at least within some scope, but the moral content passes the buck to the interpreter. Thus, on the Razian view, the norm cannot perform law’s service, leaving us in precisely the situation we were in before the law intervened. For Shapiro, the argument is nearly the same. Law comes into being in the backdrop of moral problems. Such a norm is the equivalent of a plan that says, “let’s plan to rely on morality” to solve a moral problem.¹³⁶

Shapiro and Raz rely on the common sense argument that when a norm houses terminology that does nothing more than repeat the state of affairs that exists in the absence of the norm, it will not make a practical difference to deliberation. Put another way, when the content of a norm simply restates the deontic status of conduct as one already understood it to be, then the issuance of that norm should not cause one to believe that the status of that conduct has changed. Thus, the norm should not, on a straightforward reading, cause one to change his or her conduct.

Although some assume that moral norm content is vague by nature¹³⁷ and group moral content in with other standards on the ground that all of them create specificity problems, the duplication argument shows that a moral norm need not be vague for it to create softness. Indeed, even though duplication problems have received less attention among soft

135. *See id.*

136. *See* SHAPIRO, *LEGALITY*, *supra* note 103, at 201.

137. *See, e.g.,* Martin Stone, *Legal Positivism as an Idea About Morality*, 61 U. TORONTO L.J. 313, 330-31 (2011) (“That justice ‘is vague and needs further determination’ is no surprise to the natural lawyer; it is one of his commonplaces What is new to utilitarianism is not the discovery that everyday morality is vague and requires circumstantial judgments, but rather a certain interpretation of this commonplace . . .”).

law scholars than specificity problems, the latter is likely more commonplace, as the moral character of the norm does not depend on seldom-seen indeterminacy. Rather, the problem arises from the moral-evaluative nature of its content.

2. Regulator-Based Softness: Lacking the Power to Put the Process into Motion

Although the parallels between the philosophers and the soft law scholars with respect to regulator-based softness require a bit more legwork to identify, they are no less important. Recall that soft law scholars have articulated two different dimensions of regulator-based softness—that the promulgator was not conventionally understood to be an authority and that the enforcement of the norm was not backed up with sanctions.¹³⁸

a. *Conventional Authority*. One root of softness was that the promulgator was not understood by those regulated by the norm to be a conventional authority. Post-Hartian positivism simply adds flesh to that idea: authority comes from norm-creators who follow a conventional social rule that bestows upon them the power to make obligations. A promulgator can make legal obligations pursuant to a social rule when there exists a social convention or regularity of behavior among a group, there is some body within that group that identifies a norm fitting that convention, deviations from that convention get criticized within that body, and that criticism is viewed as legitimate (that is, the critics are not themselves criticized for being critics).¹³⁹ Moreover, there must be widespread obedience to these norms.¹⁴⁰ While positivists differ with respect to the particulars, those positivists that I discuss in this Article all believe in a social convention-based foundation for legal systems that bears a resemblance to Hart's account.¹⁴¹

138. See *supra* Part I.B.1.

139. See HART, CONCEPT, *supra* note 29, at 82-86.

140. *Id.* at 114.

141. See Kevin Toh, *An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps towards a New Conception of Legal Positivism)*, 27

The popular notion among soft law skeptics that laws must come from domestic governments or similarly powerful institutions receives support from Hart's writing. For his part, Hart had his doubts that international law was governed by a rule of recognition.¹⁴² It bears noting that Hart's position might be a byproduct of the immature state of public international law when he wrote *The Concept of Law* more than fifty years ago. At that time, Hart's view that international law was merely a network of contractual arrangements between nations rather than a centralized system with legislative protocols was a more defensible position. As a result, it was more difficult for him to imagine an international system in which legal officials like judges have internalized law's authority to the point where they accept content-independent obligation.¹⁴³ In this respect, we can align the service-based account with a feature of norm softness, thereby providing a theoretical foundation for this dimension of soft law skepticism.

It is important to be clear about what I am saying regarding this dimension of softness. One need not be a soft law skeptic or a Raz/Shapiro exclusive positivist to hold that promulgation pursuant to a social rule is a necessary condition for legality. Indeed, this understanding of legality might comport with our ordinary linguistic practices. The point is, however, that the positivistic service-based account of legality requires that the promulgator meet this characteristic as a precondition for its deliberative service, and this same notion underlies soft law skepticism. A convention of internalization of authority allows the subject to experience deliberation alteration without having first to decide whether the content of the norm is the sort of thing that they ought to believe is a fitting authoritative obligation. The obligation is content-independent. In other words, a

LAW & PHIL. 445, 445 (2008) ("According to this conception, the central thesis of legal positivism is that the existence of a law, or the legal validity of a norm, is ultimately a matter solely of some facts about the psychology and/or behavior of a group of people. Somewhat differently put: the central thesis of legal positivism, according to many philosophers, is that the ultimate *grounds* of any legal claim are only some facts about the psychology and/or behavior of a group of people.").

142. See HART, CONCEPT, *supra* note 29, at Ch. X.

143. See Payandeh, *supra* note 132, at 994-95.

convention of internalization is a necessary condition for the functional basis of soft law skepticism.

b. *Sanctions*. Turning now to sanctions, while there is no longer a consensus among positivists that sanctions are a necessary dimension of legality, this does not mean that soft law skepticism and positivism cannot be aligned. For one, the necessity of sanctions is entirely consistent with Command Theory positivism. Moreover, there is a consensus among contemporary positivists that, as a matter of practical behavioral necessity, sanctions are a necessary feature of legal systems.¹⁴⁴ And there is a recent movement afoot among legal theorists to resurrect the notion that sanctions are a conceptually necessary component of legality.¹⁴⁵ Lastly, Hart, himself, believed it appropriate to use sanctions as a factor in determining legality, at least in the domestic context.¹⁴⁶

For those who are nevertheless eager to have perfect conceptual harmony between the soft law and positivist literatures, there are two ways that we can embrace the notion that sanctions make norms soft with post-Command Theory positivism. First, one might argue that an absence of sanctions communicates something about the content of the norms that lack them. In light of the fact that sanctions are so pervasive in legal systems, we might take their absence as an indication that the source, itself, does not intend the sanction-less norms to be binding, and we might therefore

144. Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 607 (2010) (“For a social plan to be effective, the members of society, absent sanctions, will need to set aside not only their self-interested desires but also their own views of what the group ought now to do for the group’s benefits. But this subjugation of individual views, required by the notion of planning, is systematically unlikely to occur without the threat of force. Sanctions are therefore a predictable necessity whose importance emerges once we see the systematically frustrating dimension of social plans.”).

145. See MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 84-89 (1999); Danny Priel, *Sanction and Obligation in Hart’s Theory of Law*, 21 RATIO JURIS. 404, 404-08 (2008); see generally Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195 (2008) (claiming that a normative system cannot be differentiated or understood as the law without coercion).

146. HART, CONCEPT, *supra* note 29, at 214.

add the silent postscript to each norm that “this norm is non-binding.” Kenneth Himma has articulated a similar idea:

At the very least, this much seems reasonable: in cases where (1) formal coercive mechanisms are generally authorized for non-compliance and (2) officials lack authority to apply these mechanism in enforcing a particular judgment, norm, or order with coercive mechanisms, it is implausible to characterize the judgment, norm, or order as “obligatory.” Such norms are more fairly characterized as “advisory” because there is no sense in which the relevant behavior is made mandatory by mechanisms reasonably presumed to have normative relevance given human beings as we understand them.¹⁴⁷

Along those same lines, we might say that the absence of sanctions is a sign that there exists no social rule empowering that source to be authoritative. Given the sheer desirability of sanctions from the standpoint of any putative authority, it might be argued that their absence signals that a jurisdiction was unwilling to, or otherwise did not, adopt the convention that that source is an authority. Put differently, we might argue that the use of the social rule as a standard of criticism is shown *only* when sanctions are imposed.¹⁴⁸ This is a bolder claim than Hart would likely have made,¹⁴⁹ of course, but he and other positivists assert at a minimum that sanctions are a central but strictly unnecessary feature of legality.¹⁵⁰ In either case, the problem is the same: the source of the norm lacks a social rule imbuing their norms with the power to obligate.

147. Kenneth Einar Himma, *A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligations of Citizens* 25 (Sept. 4, 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141033.

148. In addition, there is a practical affinity between a type of norm-based softness and a lack of sanctions. When a norm does not impose an obligation because of its operator, such as with a norm that is aspirational, then there is an argument that it is logically entailed that the norm will not have a sanction. Regardless of the logic, it is certainly true that such norms do not generally have sanctions attached.

149. I owe Christopher Essert for the point that precisely the opposite inference could be drawn from the absence of sanctions—that the people of a jurisdiction so deeply accept the norm-giver as an authority that sanctions are completely unnecessary.

150. See, e.g., JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 3 (2d ed. 1980).

Thus, there is at least an affinity between legal positivism, including exclusive positivism, and soft law skepticism with respect to the necessity of sanctions.

C. *Summing Up and a Word on the Law/Non-Law Distinction*

My goal has been to establish that we can unite all aspects of norm softness that appear in the literature with an exclusive positivist concept of legality and that this union supports soft law skepticism by providing a rigorous theoretical foundation. The following Table illustrates how the soft/hard distinction—the aspects of which are listed in the left column—merge with the law/non-law distinction by preventing the norm at issue from achieving legal status due to its incapacity to perform law's essential service—examples of which are listed in the right column.

Characteristic of Softness	Typical Features	Basis for Causing Failure of Law's Essential Deliberative Service
Absence of Social Rule	Promulgating body does not resemble domestic government	Subjects do not perceive the norm as obligatory because no convention of obligatory obedience exists
Absence of Sanctions	Regulator lacks power to impose sanctions or does not link a norm to its sanctioning mechanism	Subjects do not perceive the norm as obligatory or otherwise worth following
Non-Obligatory Operator	Norm uses terms like "ought," or "should"	Subjects do not perceive the norm as obligatory and/or believe it merely sets forth a moral standard (see Duplicates Pre-Existing Obligations)
Indeterminacy	Norm uses obscure or evaluative content and there exist no interpretive supplements to clear up distinct meaning	Subjects cannot identify an obligation and are left to exercise their own unfettered discretion
Duplicates Pre-Existing Obligations	Norm content houses moral criteria or otherwise states a moral standard	Subjects can identify only an obligation to which they were already obligated and which did not solve the problem that they face

Table 1: Soft Law Skepticism and Raz/Shapiro Exclusive Legal Positivism United

For the remainder of this Article, I critique soft law skepticism. To do this, I will show how soft norms are capable of performing the very same service that those scholars believe distinguishes law from non-law. Although it is technically a distinct issue, I realize that a successful critique might leave some readers wondering where I draw the line between law and non-law. It will be best to take care of any lingering concerns before turning our attention to empirical findings.

As for my views regarding the conditions necessary to distinguish law from non-law, I should say at the outset that I see nothing particularly objectionable about the functionalist concept of law that I have described thus far; I object only to the assertion that soft norms cannot meet its test for legality, not to the test, itself.¹⁵¹

To dispel any notion that this Article opens the door for *anything* to be legal so long as it performs those functions, I am willing to concede that a norm possessing *all* of the roots of softness described here is not likely to satisfy the minimum requirements of a functionalist legality. Further analysis of the minimum requirements should be unnecessary for present purposes.

I can see the merit in taking a non-functionalist approach as well. We might consider a linguistic test, for example—one that relies upon ordinary uses of the word “law” to arrive at shared folk intuitions, which can then be formed into something like a concept for legality.¹⁵² I suspect that any

151. Scott J. Shapiro, *On Hart's Way Out*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO 'THE CONCEPT OF LAW' 149, 191 (Jules L. Coleman ed., 2001) [hereinafter Shapiro, *Hart's Way Out*] (“In this essay, I have tried to show why Raz's use of the word 'law' is neither arbitrary nor stipulative. Exclusive legal positivism represents the idea that legal institutions have certain functions and those functions all involve the guidance of conduct through rules. . . . Exclusive legal positivism, therefore, is forced on the legal positivist who is committed to a functionalist conception of law.”).

152. I have in mind something like a soft version of the Canberra Plan, stripped of any a priori pretense. See, e.g., Daniel Nolan, *Canberra Plan*, in A COMPANION TO PHILOSOPHY IN AUSTRALIA & NEW ZEALAND 98, 100 (Graham Oppy & N.N. Trakakis eds., 2010) (“So far I have been describing the Canberra Plan method as something that collects all the relevant platitudes, constructs a role that only a

such concept would be friendlier to some of the aspects of softness than others. The lack of a social convention is likely more critical to our usage of “law” or conceptually related terms¹⁵³ than the other aspects of softness, such as of lack sanctions or specificity. As a consequence, we might follow exclusive positivists and skeptics and characterize norms from un-authoritative sources as non-legal but (critically) not for the functional reasons that they assert.

III. NORM SUPERCOMPLIANCE

The basis for soft law skepticism is a set of bold assertions regarding the incapacity of soft norms to make practical differences to the deliberation of those subject to them. In this Part, I would like to describe a phenomenon, which, if it exists, proves that soft law has the capacity to create the very practical differences that skeptics deny. That phenomenon is Norm Supercompliance. Norm Supercompliance is not limited to legal contexts, and many of the examples that I cite do not concern settings that purport to be legal in nature.

It might be objected that soft law skepticism rests on purely conceptual claims about law, and therefore no amount of empirical evidence will show that it is unwarranted.¹⁵⁴ For example, exclusive positivists and skeptics might argue that their views are simply entailed by the one true concept of law.

I disagree. Positivism and soft law skepticism are best understood not as an analytic explication of our concept of

few things might meet, and locates a best deserver for an eventual identity claim.”).

153. Cf. Jules L. Coleman & Ori Simchen, “Law,” 9 LEGAL THEORY 1 (2003) (discussing semantics of “law”).

154. See SHAPIRO, LEGALITY, *supra* note 103, at 406-07 n.16 (“Social science cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance for the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system. These examples show that it is part of our concept of law that groups can have legal systems provided that they are more or less rational agents and have the ability to follow rules. Social scientific theories are limited in this respect, being able to study only human groups, and hence cannot provide an account about all possible instances of law.”).

law, but rather as both an articulation of the way we actually experience obedience to law and an explanation of how such obedience is rational. Others have made similar claims. For instance, Oren Perez characterizes the relationship between soft law and positivism thusly:

Taking the positivist conceptualization as a premise entails a reinterpretation of the soft law/hard law distinction in terms of a juxtaposition between law and non-law, making the reliance on soft law as a means of generating social change somewhat suspicious. This binary interpretation of legal normativity is, however, not more than a working hypothesis.¹⁵⁵

While I share Perez's belief that these theories make claims about behavior, I am more charitable to them. Understood in that way, it is clear that they are useful claims about the actual world, identifying *prima facie* functionalist limits on the conditions under which a norm can benefit a subject. In doing so, they make determinations of legality useful: they are predictive of conduct under norms and, therefore, of progress towards individual and social goals. While this might rob positivism of any legitimate claims to universality, there are fewer in its ranks that believe such claims are possible. Brian Leiter is a leader of this movement, stating "a satisfactory theory of adjudication must be continuous with empirical inquiry in the natural and social sciences"¹⁵⁶ and that we ought to be "skeptical about intuition-driven methods of philosophy and conceptual analysis . . . [because] the facts matter for philosophy."¹⁵⁷ Legal theorists have begun to embrace the approach,¹⁵⁸ one

155. See, e.g., Perez, *supra* note 74, at 559.

156. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 285 (1997).

157. Brian Leiter, *Against Convergent Moral Realism: The Respective Roles of Philosophical Argument and Empirical Evidence*, in 2 MORAL PSYCHOLOGY: THE COGNITIVE SCIENCE OF MORALITY: INTUITION AND DIVERSITY 133 (Walter Sinnott-Armstrong ed., 2008).

158. See Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1924-25 (2004); Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 OXFORD J. LEGAL STUD. 501, 508 (1995); William Twining, *General Jurisprudence*, 15 U. MIAMI INT'L & COMP. L. REV. 1, 31 (2007) ("Recently, there have been encouraging signs of a convergence between socio-legal and analytical approaches. For some time analytical jurisprudence

that Hart, himself, gestured towards when he described his work in *The Concept of Law* as “descriptive sociology.”¹⁵⁹ I will proceed to consider examples that conflict with the exclusive positivist and skeptical account.

Turning now to the phenomenon of Norm Supercompliance, itself, I will first provide a brief hypothetical example from a familiar setting to serve as a reference point.

A. *An Illustrative Example*

Imagine that Laura, a thirteen-year-old, loves to watch television. Her parents typically let her watch from 7:00 p.m. until about 9:30 p.m., at which time she is told that she must begin preparing to go to bed. This Friday is special—Laura’s parents have arranged to go out to dinner, and Laura will be left home alone for the first time. As Laura’s parents are gathering their things to leave, Laura sits down on the couch eager to watch television. She is about to reach for the remote when she hears her parents say on their way out the door, “Laura, you should be good while we’re gone.”

Laura freezes as her parents exit. She desperately wants to turn on the television, but she keeps thinking about her parents’ statement that she should be good. Perhaps it means that she can watch television; she usually does, after all. But her mind races to memories of those times in which she has overheard people criticize television, saying things like “too much television rots your brain!” or “good kids don’t watch a lot of television!” In light of those comments, Laura begins to think that her parental authorities believe that watching television has deleterious effects and therefore is not “good.” She then considers the fact that her parents said that she “should” be good. On the one hand, she thinks, this language could indicate that being good is merely a suggestion and is, therefore, optional. On the other hand, however, she considers the possibility that her parents thought it necessary to mention that she should be good to signal that

was treated with hostility by many who favored contextual or socio-legal perspectives. The disdain was mutual. Recently, however, the mood has changed.”).

159. HART, *CONCEPT*, *supra* note 29, at Preface.

they believe that she *must* be good, and they were using that language in order to test just how profoundly she understands that she must be good. As a result, she concludes that she is actually prohibited from watching television. She sits quiet and frustrated on the couch until her parents return at 10:30 p.m.

When her parents enter the room, they notice Laura's frown and ask, "What's wrong?" Laura responds, "I can't believe that you wouldn't let me watch television while you were gone!" Her parents, of course, are perplexed and explain that they never meant for her to forego television and that she could even have watched beyond her 9:30 p.m. limit because it was such an unusual and special night.

Laura's behavior might strike us as odd or unusual, even self-defeating. This is because we generally assume that norms constrain us from doing what we would have done in their absence only when their content directs us that we cannot do that behavior. Here, a straightforward interpretation of the parents' norm would indicate that it permits Laura to do the activity that she otherwise would have done, yet she concluded that the norm prohibited it. As a result she refrained from doing it. The norm changed her.

Generally speaking, Norm Supercompliance occurs when one is constrained by a norm despite the fact that it should have been obvious that the norm could easily and permissibly have been interpreted so that it would not constrain. Supercompliance is an example of superfluous constraint, at least from a particular interpretive point of view.

B. *The Mechanics of Norm Supercompliance*

Norm Supercompliance is a rather basic phenomenon. It involves a small number of preconditions and affirmative steps. In the central case,¹⁶⁰ Supercompliance occurs when (1)

160. By "central case," I mean to borrow the meaning used by John Finnis. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 277-78 (1980) ("Above all, the meaning has been constructed as a *focal* meaning, not as an appropriation of the term 'law' in a univocal sense that would exclude from the reference of the term anything that failed to have all the characteristics (and to their full extent) of the central case. And, equally important, it has been fully recognized that each of the terms used to express the elements in the conception . . . has itself a focal meaning

a person would freely choose to engage in ϕ ; (2) that person learns or is reminded of the existence of a soft norm that regulates ϕ and which, therefore, can be interpreted so as to permit ϕ ; (3) that person concludes that the norm governs his or her decision of whether to ϕ ; (4) yet, he or she interprets the norm as requiring to not ϕ ; and (5) that person decides to comply with the norm by refraining from ϕ . There may be other ways for Supercompliance to happen,¹⁶¹ but when these conditions are satisfied, it certainly has.

Returning to our initial example, it should be apparent that Laura has met the conditions for Supercompliance. Laura was about to watch television just before her parents announced the norm that she should be good while they are gone. A straightforward interpretation of that norm could lead one to believe that engaging in watching television, at least until 9:30 p.m., was permissible. For one, she is ordinarily able to do so. Additionally, the operator of the norm, “should,” appears on a straightforward reading to indicate that the norm was not mandatory but rather was aspirational, meaning that acting contrary to the content of the norm is permissible. Moreover, her parents would have accepted the permissible interpretation of the norm for this scenario, at least for television watching between 7:00 p.m. and 9:30 p.m. Despite the availability of this interpretation, Laura concluded that she was bound by that norm authoritatively and, furthermore, concluded that it prohibited television watching. Considering herself bound, Laura “complied” by refraining from watching television.

In the central case of Supercompliance, the actor is aware of a norm and concludes that it bears in some way upon his or her decisionmaking regarding an action. As a result, the actor believes that he or she must engage in an act of constraint—of self-sacrifice—despite the fact that a straightforward or otherwise obvious interpretation does not obligate such sacrifice. That is, the person that is being guided by the norm chooses an option that differs from that which that person would otherwise have chosen in the

and a primary reference, and therefore extends to analogous and secondary instances which lack something of the central instance.”) (emphasis in original).

161. Such as when steps (3)-(5) happen subconsciously, which I discuss below.

absence of the norm despite the fact that the norm does not obligate him or her to do so.

It might be wondered why I am excluding motivational overdetermination—cases in which extrinsic reasons are sufficient to motivate the person to perform an action, such as when a person acts in perceived compliance with the norm even though he or she would have performed the same action in the absence of the norm because of the pleasure that the action would bring. It is important to remember that capacity for constraint is a critical normative feature of legality under Raz/Shapiro exclusive positivism. Because I aim to show that soft law can produce constraint in instances of Supercompliance, and because I have chosen to describe the central case of Supercompliance rather than its outer limits, it makes sense to describe an example in which the soft norm provides difference-making constraint.

We can better understand Supercompliance by considering for a moment what it is not. It is not expected obedience to a straightforward obligatory directive. Thus, it is not deciding to stop swimming because a lifeguard has told you that everyone must leave a pool and you fear being barred from the pool for disregarding the order. Nor is it an interpretation done for the sake of pursuing one's own interest. Thus, it is not deciding that the norm, "treat your body like a temple," means being able to dine regularly at your favorite all-you-can-eat buffet on the reasoning that temples are sometimes places in which feasts are served. For that reason, it always presumes that one either would not be sanctioned for engaging in the conduct that they would otherwise have preferred to do or that the sanction for engaging in that conduct under the law is no worse than the sanction for doing so in the absence of the law.

Likewise, it is also to be distinguished from strategic decisionmaking in the shadow of uncertainty. There is a wealth of behavioral literature on how people bargain differently when the rewards from bargaining are uncertain. Scholars have recently tied this literature to the sort of uncertainty that occurs under legal standards.¹⁶² It is

162. See Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty*, LAW & CONTEMP. PROBS., Spring 2011, at 133, 144-45 ("In this paper,

important to distinguish Supercompliance from self-interested conduct in the face of unknown probabilities regarding rewards or punishments. To that end, I have included among the elements of Supercompliance that it involve an act that one would not have performed in the absence of the norm and that the act be sacrificial in nature.

Putting this all together, the central case of Supercompliance has three basic elements: (1) a soft norm; (2) the conscious following of that norm; and (3) a sacrificial act done for the sake of following that norm that differs from the act one would have performed in the absence of that norm. I will consider each component in turn.

1. The Norm is Soft

One of the conditions of Norm Supercompliance is that the norm upon which the person relies possesses at least one of the traits of softness described above. Thus, so long as the conditions for norm softness that concern the norm, itself, as opposed to the softness that results from impotent enforcement bodies are satisfied, then this aspect of Norm Supercompliance is satisfied.

2. The Subject Engages in Conscious Norm Following

At risk of stating the obvious, one engaging in Norm Supercompliance must, at the very least, be aware of the norm and perceive that his or her conduct complies with it. Without doing so, the phenomenon could not fairly be said to be *Norm Supercompliance*.

To be clear, Supercompliers need not be conscious that there is a permissible interpretation that would permit them to do the act that they would otherwise prefer to do in the

we suggest a more dramatic change in the way people react to legal uncertainty than has been argued for in the disjunction effect suggested by Tversky and Shafir or the uncertainty effect suggested by Gneezy and his colleagues. More specifically, we argue that legal ambiguity might cause people to undermine their consideration for the law altogether and resort to alternative motivational causes—their true preferences. Thus, our focus is not on how people make decisions under conditions of uncertainty, but rather how people might avoid taking legality of their actions into account and choose alternative paths of behavior when the law cannot give them certainty.”).

absence of the norm. In some cases, the Supercomplier is conscious of the norm's permissive interpretation and nevertheless sincerely concludes that the norm obligates him or her to engage in the sacrificial conduct. In other cases, the interpreter is not conscious of those qualities, perhaps as a result of self-deception that functions to rationalize the behavior. The person has interpreted the norm and is making a conscious effort to follow its dictates.

In central cases of Supercompliance, one is motivationally guided by the norm. According to Shapiro, this happens "when his or her conformity [with a norm] is motivated by the fact that the [norm] regulates the conduct in question."¹⁶³ While I would not use the word "fact" as Shapiro does, I would say that the Norm Supercomplier is motivated by his or her perception that the norm regulates the conduct in question.

Shapiro has argued that Hart's rule of recognition requires officials to be motivationally guided by norms; whereas it requires that ordinary citizens only be epistemically guided by them. Epistemic guidance occurs "when the person learns of his legal obligations from the [norm] provided by those in authority and conforms to the [norm]."¹⁶⁴ Perhaps, epistemic guidance can support an instance of Norm Supercompliance when it is performed by non-officials, but it falls short of being a central case.

Shapiro's point brings to mind Meir Dan-Cohen's distinction between decision and conduct norms. In a landmark article, Dan-Cohen explained that, when an official is applying a norm, the norm serves as a "decision" norm, and when layperson is following a norm, it serves as a "conduct" norm.¹⁶⁵ On Shapiro's view, motivational guidance is needed when a norm is a decision norm, but only epistemic guidance is needed when a norm is a conduct norm. I will use these categories to frame my discussion of the empirical literature in later parts.

163. Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 490 (1998).

164. See Shapiro, *Hart's Way Out*, *supra* note 151, at 173.

165. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626-30 (1984).

3. The Subject Performs An Act Which He or She Would Not Have Performed in the Absence of the Norm

When Supercompliance occurs, the effort to follow the norm in the previous condition manifests itself in an act that materially or practically differs from that which one would have performed in the norm's absence. To discuss practicality or materiality at length would belabor the point. We must exclude the differences that are necessitated by the hypothetical comparison, such as the fact that the act under the norm takes place after awareness of the norm whereas the act in its absence does not. Likewise, if the only difference between the act performed in the absence of the norm and following the norm is that one took place, say, minutes earlier than the other, then that difference does not likely satisfy the requirements of materiality.

4. The Act Undertaken is Sacrificial

Lastly, in the central case of Supercompliance, the act undertaken to satisfy the perceived requirements of the norm is sacrificial compared to the act that would have been performed in the absence of the norm.

Many economists will find this condition to be redundant after the satisfaction of the third condition. Under the principle of revealed preference (widely accepted in consumer economics) one's choice among available alternatives is assumed to reveal one's preference for the thing chosen over those alternatives.¹⁶⁶ Using this reasoning, one way to determine whether an act is sacrificial is simply to compare the act under the norm to the alternative acts that the person could have chosen under the norm and ask whether the person would have chosen the alternative in the absence of the norm. If the answer is yes, then, generally speaking, the act performed in the absence of the norm is preferred, and

166. Ariel Rubinstein & Yuval Salant, *Some Thoughts on the Principle of Revealed Preference*, in *THE FOUNDATIONS OF POSITIVE AND NORMATIVE ECONOMICS: A HANDBOOK* 116, 117 (Andrew Caplin & Andrew Schotter eds., 2008) ("The Principle of Revealed Preference, as we understand it, is a methodological paradigm which follows the standard economic approach, whereby observed choices are used only to reveal the mental preferences of the individual over the set of objects as perceived by the modeler.").

the decision to perform an alternative act must be sacrificial. So the choice under the norm, if different from the choice in the absence of the norm, sacrifices the act that they otherwise would have preferred to make.

Even if it risks superfluosity, I favor including sacrifice as a separate condition for the central case of Supercompliance because it emphasizes the experience of constraint and because there are certainly those who agree neither with the principle of revealed preference nor with the notion that engaging in a non-preferred act is always sacrificial.¹⁶⁷ For the reasons relied upon by economists, however, I suspect that, in most cases, when one foregoes an action that she would otherwise have chosen to perform for the sake of complying with a norm, the norm-following act is likely to involve greater sacrifice, using the typical meanings of that word.¹⁶⁸

One final point: just as a Norm Supercomplier need not be conscious of the permissive interpretation, he or she need not be conscious of the fact that the act is sacrificial. Indeed, he or she might be convinced that the sacrificial act is the most self-interested course of conduct despite the fact that

167. For those unsatisfied with the logic of revealed preference, there might be some concern that if a norm is soft solely as a result of a specification problem and that norm is backed up by a sanction or a reward—a somewhat narrow class of soft norms—then a risk-averse person might be inclined to conclude that the best way to approach the norm is to interpret it conservatively, leading them to constrain themselves from engaging in a wide range of behavior that they otherwise would have engaged in. Those individuals have not internalized the law as imposing an obligation upon them and are seeking to avoid sanction. So if a sanction and norm content operate together to change the utility of an action by altering the probability of something good or bad happening to that person, and the person to that norm acts self-interestedly in light of his or her perception of that changed probability, it is arguably not a case of Supercompliance. Similar phenomena have been the focal point of behavioral research. See Feldman & Lifshitz, *supra* note 162, at 145 (“The goal was to compare between the influence of certain, probabilistic, and ambiguous legal benefits relative to a situation *where no legal benefit was offered.*”) (emphasis added). Of course, this is a rather narrow concern because it is a concern under conduct rules rather than decision rules, which have lower standards for guidance, as I describe in Part III.A.

168. Because it is likely a rare instance in which the sacrifice condition does much work in excluding cases of Norm Supercompliance, we need not spill much ink on articulating a set of conditions to determine whether an act is sacrificial. I am happy to adopt the popular meaning of the term.

the choice would have been different absent the norm. Again, this might be a result of self-deception.

IV. THE PLAUSIBILITY OF NORM SUPERCOMPLIANCE

Having now described the elements of Norm Supercompliance in some detail, we are ready to turn to the hard question of whether it is plausible. Though the story of Laura might seem entirely believable to some, others might continue to believe that it is an outlandish tale, describing something that could not really happen under soft norms. Another objection is that the Laura example is plausible in that non-legal context, but it would be implausible in a legal context. Answering these objections and establishing the plausibility of Supercompliance goes a long way towards resolving the status problem for soft law in favor of legality, as it casts doubt on its particular exclusive positivist foundation. It does not eliminate skepticism, of course. There might remain some who concede its plausibility but maintain that the frequency or impact of Supercompliance is so low compared to constraint under hard norms that there is still reason to believe that only hard law deserves legal status. While this latter concern is not my focus, I will address it where the empirical evidence is germane.

To make the case for plausibility, I will rely on the results from experimental scientific studies, including my own. It might be wondered why we ought to resort to such studies, many of which involve simulations, when there are plenty of real-world soft laws to use as examples. The problem with existing soft laws is that it is difficult to determine what would have occurred in the absence of an existing soft law. It is almost impossible to find examples in which soft and hard norms have separately regulated identical circumstances (such as the same parties, the same underlying facts, all during the same time period) or to determine with confidence what a subject's behavior would have been in the absence of any dispositive norm at all. Experimental simulation can provide control of the circumstances of norm application, making legal norms, case facts, incentives, legal precedent, and party argumentation uniform or different depending on the goals of the study. This level of control is elusive in real-world settings.

Importantly, my goal here is not to defend the generalizability of the results in these experiments; to the contrary, I rely on these studies primarily to illustrate the plausibility of the phenomenon in any instance. It is an attempt to provide recalcitrant empirical evidence to unseat a conceptual assumption about legal norms that has been accepted by a community of international legal scholars and, to a lesser extent, legal philosophers.¹⁶⁹

A. *Supercompliance under Decision Norms: An Example of Adjudication*

In a recent study, Andrew Moshirnia and I used behavioral experimentation to shed light on whether a hard norm (a rule¹⁷⁰) or a kind of soft norm (a standard¹⁷¹) was more likely to keep judges from choosing the same outcome that they would have chosen in an identical case but under the absence of those norms.¹⁷² Each subject—either a recent law graduate or a law student—was asked to act as a judge in a simulated, ideologically divisive asylum case.¹⁷³ In a nutshell, the case forced judges to decide whether to grant asylum to a politically persecuted immigrant who had overstayed his visa.¹⁷⁴ Among the reasons in favor of asylum were that the applicant had a meritorious case that he would face political persecution upon return to his home country, that he does not appear to pose a threat to the safety of Americans, and that he is engaged in gainful employment.¹⁷⁵ Among the reasons in favor of denial were that he stayed a long time after his visa expired, that he did not pay taxes on his income,

169. See, e.g., Douglas J. Mook, *In Defense of External Invalidity*, 38 AM. PSYCHOL. 379, 381-82 (1983) (discussing four reasons why not to do an experiment: “First, we may be asking whether something *can* happen, rather than whether it typically *does* happen.”).

170. See *supra* Part I.B.2.b.

171. See *supra* Part I.B.2.b.

172. Sheppard & Moshirnia, *supra* note 32, at 545.

173. *Id.* at 559.

174. *Id.* at 559-60.

175. *Id.*

and that asylum might not be the best policy for the United States.¹⁷⁶

The experiment had two phases. In one phase, subjects were able to decide whether to grant asylum without the assistance of any law on the issue (the baseline phase).¹⁷⁷ We designed this phase to indicate the subjects' understanding of the best direction in which to resolve the case on the balance of reasons as they saw them. In the other phase, subjects received the same fact pattern but with the addition of either a rule or a standard that purported to govern whether asylum ought to be granted (the law phase).¹⁷⁸ The rule quite clearly forbade the immigrant from applying for asylum because he had waited beyond a six-month grace period, stating, "Aliens seeking asylum must file their petitions within 6 months after the day upon which their work visas expire."¹⁷⁹ The standard stated, "Aliens seeking asylum must file their petitions within a reasonable time after the day upon which their work visas expire."¹⁸⁰ Subjects were to assume that the rule or standard came from the recognized legal authority of their jurisdiction.¹⁸¹ The order in which subjects received the phases was randomized; that is, some had the baseline first (normal order), and some had the law condition first (reverse order).¹⁸²

In each phase, subjects were told to write an opinion justifying their decisions.¹⁸³ They were further told that, if they were to be eligible for a large cash prize, their opinions would have to satisfy two reviewers that their decisions were adequately justified. In order to illustrate to the subjects that their decisions had real-world consequences, winning the

176. *Id.*

177. *Id.* at 561-62.

178. *Id.*

179. *Id.* at 597.

180. *Id.* at 598.

181. *Id.* at 595. The study additionally varied whether subjects were exposed to legal argument during the law phase, but that variable is not particularly important for present purposes.

182. *Id.* at 561.

183. *Id.* at 559-60.

prize also resulted in a large donation to a pro-asylum organization or anti-immigration organization, depending on whether they decided to grant or deny asylum in each phase.¹⁸⁴

Because the study was most interested in constraint under norms, we analyzed only those subjects that granted asylum in the baseline, meaning that we analyzed only those subjects that had the potential to be constrained by the norms in the law phase. Incidentally, the vast majority of subjects chose to grant asylum in the baseline phase.

The most interesting results for our purposes here are those concerning constraints under the soft norm. Taking all subjects together, ten percent of subjects under the soft norm were constrained by it, meaning that they decided not to grant asylum, even though they had done so in the absence of the norm.¹⁸⁵ In other words, even though the soft norm appeared to leave the way clear for subjects to decide the case in the same way that they decided the case in the absence of the norm, they chose to reach a different result under the soft norm. This result was surprising, but it did not reach statistical significance. Considering only the subjects who had experienced the baseline phase before experiencing the law phase weeks later, however, the percentage constrained jumped to nineteen percent, which was statistically significant.¹⁸⁶ Considering that we expected these numbers to be zero, the results were quite striking. We might further want to know how the standard compared with the rule. Taking all subjects together, the rule constrained twenty-one percent of subjects, and this number jumped to forty-two percent when considering only normal order subjects.¹⁸⁷

184. *Id.* at 560-61.

185. *Id.* at 570.

186. *See id.* at 584; Brian Sheppard, Rules vs. Standards, Naturalized: Using Philosophy and Behavioral Experimentation to Identify the Determinants of Constraint in a Legal Context, 270 (May 2012) (unpublished S.J.D. dissertation, Harvard Law School) (on file with Harvard Law School Law Library, Harvard Law School) (discussing significance).

187. Lending support to this empirical finding is the fact that there appeared to be similar, although not statistically significant, levels of constraint under the soft norm in an earlier experiment that utilized nearly the same framework but

1. Was Denying Asylum Supercompliance?

The question remains whether the constraint under the standard constitutes Supercompliance. It does. At the outset, the claim that the legal standard is soft must be defended. The criterion for legal validity here was a reasonableness test. Such standards are popularly understood to be vague,¹⁸⁸ particularly when interpreted without the assistance of clarifying precedent, as was the case here. Moreover, many have characterized that criterion of “reasonableness” as a moral standard,¹⁸⁹ including Shapiro.¹⁹⁰ As a result, both

varied the amount of time to adjudicate rather than exposure to legal argument. See Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U.L. REV. 931, 955-56 (2012). About seven percent of subjects were constrained under the soft law; whereas about twenty-seven percent of the subjects were constrained under the hard law. *Id.* at 980. Breaking this down into each subject group, none of the subjects under the standard who had unlimited time to decide their case were constrained, although eleven percent of the subjects under the standard with limited time were. For the rule, the levels of constraint were twenty-five percent and thirty-two percent, respectively. *Id.* The amount of constraint under the standard did not reach significance compared to the baseline for either of the subject groups, although that was also true for the rule subjects that were not subject to time limitation. The rule subjects under time limitation, however, did show statistically significant levels of constraint. *Id.* at 983.

188. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 145 (2002); Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1479 (2008); Timothy A.O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1, 4 (1999).

189. See, e.g., James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1907); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 724 (1992); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 444 (2004); Charles Weijer, *I Need a Placebo Like I Need a Hole in the Head*, 30 J.L. MED. & ETHICS 69, 70 (2002); Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1676 (2002) (reviewing COLEMAN, PRACTICE, *supra* note 78); David Howarth, “*O Madness of Discourse, That Cause Sets Up with and Against Itself!*,” 96 YALE L.J. 1389, 1415 (1987) (reviewing H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (1985)); Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 895 (2011) (reviewing SCOTT SHAPIRO, LEGALITY (2010)).

190. See SHAPIRO, LEGALITY, *supra* note 103, at 279.

specificity and duplication problems are implicated.¹⁹¹

In addition, the subjects engaged in a sacrificial act that was materially different from the act they would have performed in the absence of the law. Even though they would have preferred to grant asylum, as indicated by their baseline decisions, they nevertheless chose during the law phase to deny asylum, resulting in a donation to an organization that is hostile to the position they preferred to take in the absence of the law.

Lastly, it appears that subjects were consciously following those norms and motivationally guided by them. Beyond the fact that the introduction of the soft norm was one of the only salient changes in the scenario between the baseline and law phases, subjects often cited the soft law in their opinions as part of the justification for their decisions.

B. *Supercompliance Under Conduct Norms*

In recent years, a group of psychologists has focused its attention on the systematic study of cheating and other similarly self-serving conduct that is often in violation of social or legal norms. A handful of studies in this literature have analyzed the impact that norms have on cheating, with some comparing the effect of a soft norm to the absence of a posited norm and others comparing the effects of soft norms to the effects of hard norms.

191. At least arguably, there is a regulator-based softness issue as well—in particular, the weakness of the sanction imposed. The only official sanction that existed was the inability to be considered for a lottery. Making this sanction even weaker was the fact that it would occur only if a neutral reviewer found a subject's analysis unconvincing in either phase. Admittedly, this mirrors real-world adjudication somewhat, where the only personal penalty for unconvincing adjudication is reversal and, potentially, a slight reduction in the likelihood for career advancement. One difference, however, is that the sanction for these subjects was no greater under the standard than when there was no law at all, meaning that the sanction here did not increase the risk of suffering an evil, as it ordinarily does. Since subjects defended granting asylum in the baseline phase, it is apparent that their change of position in the law phase was not a result of the prize's influence.

1. Soft Norms Versus No Norms

Psychologists Nina Mazar, On Amir, and Dan Ariely recently published a landmark study that provides great insight into an underappreciated feature of soft norms.¹⁹² One of their objectives was to determine the degree to which references to moral norms, they call them “moral reminders,”¹⁹³ influence the likelihood that one will cheat. In particular, they hypothesized that people are generally willing to cheat to the extent that they can enrich themselves without threatening their own positive self-view.

a. *The Ten Commandments Experiment.* In one study, they sought to learn whether the salience of moral norms to a subject impacts the likelihood that the subject will cheat, figuring that salient moral norms will make it more difficult for a subject to believe that he or she can cheat (or cheat a lot) and continue to hold the belief that they have integrity. They reasoned that the more salient the moral norm, the more a subject will be forced to re-evaluate her or his self-image through the lens of morality.¹⁹⁴

The study had 229 subjects (students at two elite universities) in two groups.¹⁹⁵ Subjects in one group were asked to write down the names of ten books that they had read in high school (the “no moral reminder” group), and subjects in the other group were asked to list any of the Ten Commandments that they could remember (the “moral reminder” group).¹⁹⁶ The experimenters asked the individuals in the moral reminder group to make the list regardless of whether they believed in God or were part of a religion in which the Ten Commandments were given special significance.¹⁹⁷ Thereafter, both groups were asked to perform

192. See Nina Mazar, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633, 633 (2008) (discussing the study generally).

193. *Id.* at 635.

194. *See id.* at 633-34.

195. *Id.* at 635.

196. *Id.*

197. *Id.*

a task seemingly unrelated to the first: they were given a series of moderately difficult problems involving addition that left the possibility for error, and they were asked to write on a separate sheet the total number of correctly solved problems.¹⁹⁸ As part of the instructions, the experimenters promised that two randomly selected participants would earn ten dollars for every correct solution.¹⁹⁹

In addition to varying exposure to a moral reminder, the experimenters also varied whether the subjects could cheat.²⁰⁰ In the control condition, the subjects were asked to provide the worksheet upon which they wrote their answers so that the reported number of solutions could be verified.²⁰¹ In the experimental condition (or “cheat condition”) the subjects were able to keep their worksheet, giving them the opportunity to misreport the number of correct answers with impunity.²⁰²

For the control condition, the type of reminder had no effect on whether the subjects cheated.²⁰³ But in the cheat condition, cheating occurred under the no reminder task but not under the moral reminder task.²⁰⁴ The experimenters determined this from looking at the mean reported scores under each condition.²⁰⁵ They found a significant interaction between the presence of moral reminder and the presence of moral reminder and the opportunity to cheat.²⁰⁶ That is, the combination of a lack of moral reminder mattered when given the opportunity to cheat but not when there was no such

198. *Id.* at 635-36.

199. *Id.* at 636.

200. *Id.*

201. *Id.*

202. *Id.*

203. The mean scores for moral reminder/control and no reminder/control groups was 3.1. ($F(1, 225) = .012, p = .91$). *Id.* at 636.

204. The mean score for the no reminder/cheat group was 4.2, and the mean score for the moral reminder/cheat group was 2.8. *Id.*

205. *Id.*

206. *Id.*

opportunity.²⁰⁷ The mean score in the no reminder/cheat group was significantly higher than the scores in the moral reminder/cheat condition.²⁰⁸

Interestingly, the participants remembered on average only 4.3 of the Ten Commandments, and there was no significant correlation between the number of Commandments recalled and the number of problems the participants reported to have solved.²⁰⁹ The experimenters noted:

If we use the number of commandments remembered as a proxy for religiosity, the lack of relationship between religiosity and magnitude of dishonesty suggest that the efficacy of the Ten Commandments is based on increased attention to one's internal honesty standards, leading to a lower tolerance for dishonesty (i.e., decreased self-concept maintenance threshold).²¹⁰

b. The Honor Code Experiment. In another experiment that formed part of the same study, the experimenters asked their subjects—207 students attending either MIT or Yale—to sign a statement about honesty.²¹¹ Specifically, the statement asked them to print and sign their names below the statement, “I understand that this short survey falls under MIT’s [Yale’s] honor system.”²¹² Neither MIT nor Yale has an honor code system.²¹³ In addition, this second experiment added independent variables manipulating the amount earned per correctly solved problem: \$.50 (“low money”) and \$2 (“high money”), paid to each participant.²¹⁴ In

207. The mean scores were indistinguishable between the control conditions, providing a reliable measure of the score that was likely without cheating (both groups scored 3.1). Importantly, the mean score for subjects in the moral reminder/cheat group (2.8) was indistinguishable from the scores in the control condition, indicating a lack of cheating. *Id.* (F(1, 225) = .49, p = .48).

208. “(M_{Books/recycle} = 4.2), but they did not cheat after the Ten Commandments recall task (M_{Ten Commandments/recycle} = 2.8; F(1, 225) = 5.24, p = .023.) . . .” *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 636-37.

212. *Id.* at 637.

213. *Id.*

214. *Id.*

this experiment, however, there was no control condition in which the subjects were given no opportunity to cheat while being exposed to the moral reminder; rather, the two control conditions varied the money levels without presenting subjects with an Honor Code or an opportunity to cheat.²¹⁵

The results mirrored those of the first experiment. The Honor Code condition, which under the circumstances served as little more than a reminder of morality in general, was enough to eliminate cheating just as the Ten Commandments task had done.²¹⁶ In particular, the mean scores were indistinguishable between the control conditions in which there was no opportunity to cheat and the moral reminder conditions in which cheating opportunities were available.²¹⁷ Moreover, the mean scores were significantly higher under the no reminder/cheat conditions than under the moral reminder conditions in which cheating opportunities were available.²¹⁸ Lastly, the presence or absence of the Honor Code condition was highly significant with the variance in the mean scores, whereas the presence or absence of the low or high money condition was not.²¹⁹ That is, the moral reminder appears to have had a more powerful impact on whether there was cheating than the amount of gain from cheating did.

c. Are the Non-Cheaters Supercompliers? As a threshold matter, we must determine whether the norms to which the participants in these studies were subject were soft. Beginning with the Ten Commandments experiment, the norms that the experimenters directed the subjects to think about have regulator-based softness. There did not exist a

215. *Id.*

216. *Id.*

217. *Id.* (Control Conditions: low money = 3.4 & high money = 3.2, averaged to 3.3; Moral Reminder Conditions: low money = 3.1 & high money = 3.0, averaged to 3.0 (F(1, 201) = .19, p = .66)).

218. *Id.* (No Reminder/Cheat: low money=6.1 & high money=5.0, averaged to 5.5; F(1, 201) = 19.69, p < .001).

219. *Id.* ("An overall analysis of variance (ANOVA) revealed a highly significant effect of the attention-to-standards manipulation (F(2, 201) = 11.94, p < .001), no significant effect of the level of incentive manipulation (F(1, 201) = .99, p = .32), and no significant interaction (F(2, 201) = .58, p = .56).").

social rule whereby the Ten Commandments, themselves, are taken as a social system that creates true obligations under a social rule. Furthermore, there is no earthly sanction for violation of the Ten Commandments, themselves. While some might object that God could be monitoring compliance with the Ten Commandments, the results suggest that the subjects were not devout and therefore did not expect that this would be the case.²²⁰ Moreover, devoutness was not conventional in the region in which the experiment took place. Despite being elite students, they could only recall about four of the Ten Commandments. In addition, the experimenters conducted a survey of laypeople who had not taken part in the experiment but were told about the experiment's structures, and those surveyed predicted on average that the Ten Commandments would not significantly decrease cheating.

As to norm-based softness, the Commandments are a mixed bag. We cannot be sure which of the Commandments the subjects were able to recall in each instance, but it is entirely possible that the subjects were not able to write down any that would later be relevant to the task. Indeed, the mandates to keep holy the Sabbath and honor fathers and mothers, as well as the prohibitions of coveting, adultery, making graven images, putting other gods before God, taking God's name in vain, and killing are not straightforwardly applicable to the task that they were asked to do.²²¹ To be sure, there are two Commandments that are possibly relevant on a straightforward reading—specifically, the prohibitions against stealing and bearing false witness against neighbors.²²² It ought to be conceded that the content in these two norms is well-drawn enough to avoid general specificity problems. Moreover, they arguably do not duplicate a moral mandate that they were, by necessity, already subject to.

Turning now to the Honor Code experiment, the basis for softness is reversed: the case for content-based softness is

220. *See id.* at 636.

221. *Exodus* 20:3-20:17 (King James).

222. *Id.* at 20:15-20:16.

strong and the case for regulator-based softness is relatively weak. Though the statement was not phrased as a norm, it ought to be understood as such; “I understand that this short survey falls under MIT’s [Yale’s] honor system.”²²³ Because there is not actually an honor system at these universities, the norm’s directive does not lead to another obligation, let alone a specific one. In a sense, it is a broken normative system, leading to a dead end—the most severe kind of specificity problem one can encounter. The students were not rudderless, however, as they still had a norm directing them to follow an “honor” code, which they could reasonably assume required them to behave honorably when they performed an experiment. This too lacks specificity, however, making it fair to characterize it as a standard. Moreover, insofar as we are willing to say that a norm requiring “honor” is a generic moral test (such as if we required “morality”), then we have a duplication problem according to positivist reasoning.

As to regulator-based considerations, it is at least arguable that a norm is enforced by a hard source. University-student relations are governed by contract law.²²⁴ And Honor Codes ordinarily form a part of the university-student contract.²²⁵ Since the American court system enforces contract law, the enforcement of the Honor Code rests on the same social convention that undergirds the enforcement of American law. Furthermore, university honor codes are ordinarily backed up with sanctions such as expulsion.²²⁶ While all of this supports a finding of hardness, we should

223. Mazar et al., *supra* note 192, at 637.

224. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410, 416, (7th Cir. 1992) (“It is held generally in the United States that the ‘basic legal relation between a student and a private university or college is contractual in nature.’”) (quoting *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1 (1972)); *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 577 (6th Cir. 1988); *Univ. of Miss. Med. Ctr. v. Hughes*, 765 So. 2d 528, 535 (Miss. 2000).

225. See, e.g., *Valente v. Univ. of Dayton*, 438 Fed. App’x 381, 384 (6th Cir. 2011) (“Because this action involves an Honor Code dispute between a university and its student, contractual theories underlie our analysis.”) (citing *Behrend v. State*, 379 N.E.2d 617, 620 (Ohio 1977)).

226. See Eric Roberts, *Honor Codes Across the Country*, <http://www-cs-faculty.stanford.edu/~eroberts/cs181/projects/honor-code/honorcodes.html> (last visited May 23, 2014).

not overlook that neither of the schools that the subjects attended had honor codes. There is a distinct possibility that the subjects were aware of their absence and, therefore, did not accept that the norm set forth a new contractual obligation that they needed to observe. The experiment did not make it clear whether this had occurred, however.

Having presented the case for softness, we can now turn to other dimensions of Supercompliance. For both experiments, we can infer that some proportion of non-cheating subjects engaged in an act that they otherwise would not have in the absence of the norm—namely, not cheating. The increase in the number of “correct” answers in the non-norm cheat conditions lends strong empirical support to the notion that some subjects would have decided to cheat (or cheat to a greater extent) in the cheat condition had they not been exposed to the moral reminder. Furthermore, foregoing the opportunity to win more money in the lottery is sacrificial.

The difficult question to answer is whether the subjects were engaged in conscious norm following. One reason to suspect that such consciousness did not occur is the fact that the direct relevance of the Ten Commandments and non-existent Honor Codes to the conduct at hand was not obvious, particularly among non-believers. We cannot rule out the possibility that the subjects were conscious and motivated to be bound by the posited soft norms, believing that they stated obligations, even if it seems unlikely. Of course, Shapiro and his exclusive positivist followers do not require that conduct norms such as these motivationally guide; rather, they must epistemically guide.²²⁷ The level of consciousness that a subject must have to be epistemically guided is clear. Shapiro indicates that “[c]entral to epistemic guidance is the fact that the rule was the source of information regarding what counts as conformity, not necessarily the source of motivation for conformity,”²²⁸ and there is no reason to suspect that this process cannot occur subconsciously. If so, then, on some cognitive level, the norm caused subjects to engage in a sacrificial act that was consistent with the directives to which

227. Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 LEGAL THEORY 127, 146 (2000).

228. *Id.* (emphasis omitted).

they were exposed, then they should satisfy the requirement of epistemic guidance. While these experiments cannot prove causality, they provide evidence that the soft norm caused the difference in behavior described and, in turn, provide support for epistemic guidance.

Considering these factors together, it is fair to say that the cheating resistance among the subjects that would otherwise have cheated falls somewhere within the orbit of Norm Supercompliance, falling just short, perhaps, of being a central case. It is close enough, I believe, to justify concluding that epistemic guidance under these circumstances is plausible and, therefore, that Supercompliance can occur.

2. Soft Norms Versus Hard Norms

We can also learn about the power of soft norms by comparing them to hard norms under identical circumstances. Unsurprisingly, the hard law was more constraining than the soft law in my aforementioned judging experiment.²²⁹ And other empirical studies have observed a similar differential in constraining power. For instance, Professors Yuval Feldman and Alon Harel used behavioral experimentation to analyze whether rules or standards were more effective at preventing people from following self-interested (and arguably immoral) social norms that conflicted with law.²³⁰ As soft law skeptics would expect:

Standards g[a]ve people the opportunity to interpret reality in a way that supports their self-interest and hence both noncompliance [social] norms (most people would convince the client) and high [incentives] (if you convince the client you will earn a lot) exert a greater effect when people are faced with [standards].²³¹

Some might look at this evidence and conclude that, even if it must be conceded that soft norms *can* constrain, they never

229. Subjects in the rule groups showed significantly higher rates of constraint: 10% for those under standards versus a 21.5% increase for those under rules, looking at all subjects. See Sheppard & Moshirnia, *supra* note 32, at 571.

230. Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma*, 4 REV. L. & ECON. 81, 81 (2008).

231. *Id.* at 105.

constrain as powerfully as hard norms. As a result, they might argue, soft law does not deserve legal status. While any such distinction risks arbitrariness—there is no obvious place to set a minimum level of constraint—another problem with making that distinction is that it rests on assumptions that are not yet established. More important for the purposes of this Article is whether the standards do anything, not that they outperform rules as constraints. Interestingly, however, when standards *do* outperform rules, then drawing the line of demarcation for legality between hard and soft norms becomes untenable, insofar as it is based on the notion the soft norms are incapable of performing law's beneficial service. The following study provides an example.

a. *The Tabloid Study*. In a very recent study, a group of researchers sought to see how various normative interventions affect the likelihood that people will engage in sacrificial, honest behavior.²³² The researchers tested whether subjects would forego the financial benefits of taking a tabloid newspaper without paying for it.²³³ The researchers placed hundreds of sale booths on various streets.²³⁴ Each booth had a large plastic board sign, a bag with the tabloids, and a box in which one could leave payment.²³⁵ The price of the paper was indicated on the payment box. The experimenters designed the booth so that people could take tabloids quite easily without payment or with underpayment—as well as allowing them to pay the full amount or more.²³⁶ In the control, only the cost of the newspaper was shown (“The paper costs €0.60.”).²³⁷ There were two treatment conditions: a “legal” treatment, in which they added, “Stealing a paper is illegal;” and a “moral” treatment, in which they added, “Thank you for being

232. Gerald J. Pruckner & Rupert Sausgruber, *Honesty on the Streets: A Field Study on Newspaper Purchasing*, 11 J. EURO. ECON. ASS'N 661, 661-62 (2013).

233. *Id.* at 662.

234. *Id.* at 663.

235. *Id.* at 664.

236. *Id.* at 666.

237. *Id.*

honest.”²³⁸ Theft of a newspaper is illegal in Austria, and it is governed by a mandatory legal rule.²³⁹ The researchers randomized the locations of each condition over the course of several days.²⁴⁰

Many people were honest and paid the stated amount of €0.60, but most did not.²⁴¹ The experimenters observed 120 instances in which the paper was removed from the bag, and in forty-one cases, a positive payment was recorded.²⁴² There was no significant difference between any of the conditions as to the percentage of non-payers between any of the conditions—legal, moral, and control—as to the percentage of payers.²⁴³ More importantly for our purposes, however, was that the total amount of payment among those who paid any amount was highest under the moral condition, a soft social norm. The control (€0.16) and legal (€0.15) conditions produced similar levels of giving, but the giving under the moral condition (€0.38) was statistically significant.²⁴⁴ Thus, the presence of moral treatment did not correlate with an increase in the likelihood of payment, but it did correlate with an increase in the amount that people were willing to pay when they paid at all.²⁴⁵ This difference was driven primarily from the fact that nearly half of the subjects under the moral condition were compliant, honest payers—that is, they paid at least the €0.60 cost of the newspaper—whereas no subjects under the legal condition did, and less than ten percent did under the control.

b. *Are The Honest Payers Supercompliers?* At the outset, we must consider whether the experiment used soft norms. The moral treatment, “[t]hank you for being honest” can reasonably be recast in the format of a facially soft norm statement, the most appropriate being the aspirational norm

238. *Id.*

239. STRAFGESETZBUCH [StGB] [Penal Code] § 242(1) (Austria), available at <http://www.iuscomp.org/gla/statutes/StGB.htm#242>.

240. Pruckner & Sausgruber, *supra* note 232, at 666.

241. *Id.* at 669.

242. *Id.* at 663, 668.

243. *Id.*

244. *Id.* at 669-71.

245. *Id.*

“you ought to be honest.” That is, honesty is supererogatory rather than mandatory. Just as easily, the legal treatment can reasonably be recast as a hard norm. “Stealing a paper is illegal,” is tantamount to saying that “you may not take this paper without paying the posted price else you will be subject to the penalties set forth in the law.” The laws of Austria are authoritative pursuant to a social rule and are backed up by sanctions. Moreover, the norm is mandatory and stated with specificity to identify a clear obligation. The legal treatment is, therefore, classifiable as a hard norm. Put differently, it is reasonable to assume that, had the treatments been phrased as these norm statements, the results of the experiment would not have been different.

The subjects who complied also engaged in sacrificial acts under the soft norm that they would not have in the absence of that norm. Because the percentage of compliers under the moral treatment was so much higher than under the control, we can assume that some proportion of compliers would not have paid the cost of the paper in the absence of the soft norm. Moreover, the act of parting with money was sacrificial. While the experimenters did not test whether the people were conscious of the soft norm, its salience in the environment, the short time between exposure and payment, and the differences in amounts paid suggest that they were both aware of them and were motivated to pay the amounts that they did because of them.

Some might object that the study took place in an environment that was already being regulated by a hard norm prohibiting theft—Austrian criminal law—so the results ought to be dismissed on the ground that we are simply comparing hard norm (in the control condition and law treatment) against hard law plus soft law (in the moral treatment). But that would be a mistake. While the law operated in the background, so too did a soft norm—the moral rule prohibiting theft. Moreover, these background norms were present for all phases, making the positing of either the hard or soft norm the critical change in their environment. Thus, it is fair to say that the soft norm was more effective in promoting compliance than either the hard norm or the absence of any newly posited norm at all.

While the phrasing of the norms and the applicability of real-world background norms complicate our characterization somewhat, the conduct of the honest payers bears at least a family resemblance to Norm Supercompliance. Close enough, I would argue, that it lends support to the plausibility of purer examples of the phenomenon, which are denied under the positivist soft law account.

V. EXPLAINING AND DEFENDING NORM SUPERCOMPLIANCE

Having established the plausibility of Supercompliance under both decision and conduct norms, we can now turn to an analysis of what is happening when it occurs. I will describe how Supercompliance satisfies the demands of law's essential service along phenomenological and functional lines.²⁴⁶ Thus, I will employ psychological, conceptual, and logical techniques with the aim of showing how there may be multiple deliberative processes at play during Supercompliance, any one of which can serve the functions that are required to make obedience to the norm rational.²⁴⁷

A. *Soft Norms Can Force Adjustment in the Scope of Considerable Reasons and Change Deliberation*

Considering first my judging experiment, it is important to offer an explanation as to how the subject, when first

246. CRISTINA REDONDO, REASONS FOR ACTION AND THE LAW 116-17 n.52 (1999) ("Raz invokes two kinds of arguments, one phenomenological, the other one functional. Phenomenological arguments point towards the particular features of a concept (in this case, that of an exclusionary reason), based on how it functions in an individual's speaking and thinking. . . . Through the functional argument, Raz shows how exclusionary reasons play an important role in practical reasoning when a decision must be made.").

247. See David Woodruff Smith, *Phenomenology*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (20), <http://plato.stanford.edu/entries/phenomenology> (last updated Winter 2013) ("It develops a descriptive or analytic psychology in that it describes and analyzes types of subjective mental activity or experience, in short, acts of consciousness. Yet it develops a kind of logic—a theory of meaning (today we say logical semantics)—in that it describes and analyzes objective contents of consciousness: ideas, concepts, images, propositions, in short, ideal meanings of various types that serve as intentional contents, or noematic meanings, of various types of experience.").

exposed to the fact pattern, decided that asylum was appropriate but when faced with the same fact pattern at a later date and with the addition of a norm asserting a soft filing deadline decided to deny asylum.

In the first adjudication, the subject, acting as a judge, considered all of the facts and issued an unfettered moral determination—a determination on the balance of reasons regarding the best outcome.²⁴⁸ The subject believed that both sides of the scale were accorded some weight, but the balance of reasons tilted in favor of granting asylum.

In the second adjudication, the subject considered for the first time the soft norm that “Aliens must file for asylum within a reasonable amount of time after the day upon which their work visas expire.”²⁴⁹ The subject had already internalized that the law states authoritative obligations, so he or she was willing to do whatever the law told him or her to do. He or she read this norm, and while it was unclear what reasonable might mean, it was clear that the norm placed great importance on the timing of the asylum application. Even if it is true that what is reasonable is that which is right on the balance of all reasons, the subject might have concluded that she is to look only at what is reasonable with respect to the timing of the asylum application. Thus, to put this in Razian terms, the norm excluded reasons that were unrelated to timing during the first adjudication, but it left the balance of reasons related to the timing untouched. This narrowed class of reasons favored denial, and therefore the subject concluded that denial was mandated on the balance of the remaining reasons despite the fact that the subject did not agree that denying asylum was the right thing to do on the balance of *all* reasons.

The norm accomplished its deliberative work by narrowing the scope of reasons that escape exclusion from the subject’s deliberation, which is slightly different from the account that Raz offers. Raz’s model says law excludes within

248. *See supra* Part IV.A.

249. *See supra* Part IV.A.

the scope of the norm just as this one did,²⁵⁰ but it also adds that the person must consider the weight of a protected reason consisting of the content of the law's directive. Because the law's directive is not obvious to the subject, she must come up with the balance on her own. As a consequence, the protected reason, if it exists at all, is vacuous, so it is the exclusion that makes the practical difference. Still, the soft law succeeded in stacking the deck in favor of denying asylum through deliberative manipulation, just like a hard law aims to do.

Because my account dispenses with a role for the protected reason to play (although it does not necessarily dispense of protected reasons), Raz might object that this account of Supercompliance does not meet the very particular requirements of rational norm guidance under legal authority that he requires. There are both reasons to doubt whether he would object on these grounds and whether the objection is warranted. As to the former, Raz has recently clarified that "there is no need to saddle the account of authority with a commitment to [the protected reason model] of explaining the preemptiveness of authoritative directives."²⁵¹ As to the latter, there is a new wave of analytic legal philosophers claiming that Raz's account of protected reasons fails as a necessary condition for the occurrence legal obligation. In separate articles, Christopher Essert and David Enoch assert that protected reasons are inessential or wrong. Essert argues that Raz's various accounts of protected reasons are unacceptable as an account of deliberation under authoritative norms because they either force us not to consider reasons in favor of the action that we are directed to perform or force us to double count those reasons.²⁵² As a result, they do not make sense as a means of deliberating to the right decision and do not comport with our experience of

250. We might say that this also differs in that the legislator leaves some background reasons for the subject to balance—those concerning the evaluative standard (in this case, the reasonableness of timing). But this seems like an unnecessary distinction; we can simply say that the reasons left to consider are not among the background reasons.

251. Joseph Raz, *On Respect, Authority, and Neutrality: A Response*, 120 *ETHICS* 279, 298 (2010).

252. See Christopher Essert, *A Dilemma for Protected Reasons*, 31 *LAW & PHIL.* 49, 49 (2012).

deliberation. More important for our present purposes is Enoch's criticism. Enoch describes a phenomenon—the case of an authority issuing “Quasi-Protected Reasons”—that parallels in important respects the account of Supercompliance that I just described. Enoch points out that Raz's account of deliberation under an authority is unduly narrow. There are multiple ways for deliberation under an authoritative directive to operate, all of which benefit the deliberator who agrees to be subject to the authority and are satisfactory phenomenological accounts:

Quasi-protected reasons come in different kinds: They include (except for the relevant first-order reasons) reasons not to consider other reasons, reasons not to deliberate in some ways on some reasons, and perhaps also Razian exclusionary reasons (on this terminology, then, protected reasons are a particular instance of quasi-protected reasons). And there may be other kinds of quasi-protected reasons as well.²⁵³

Both my and Enoch's accounts share the feature that a norm changes a subject's deliberation by merit of its authoritative exclusionary power but without necessarily adding a clearly stated (protected) reason into the pile of unexcluded reasons.²⁵⁴

Raz has a second potential objection, one that applies only to duplication problems. He might argue that the only way that the norms I have described here can perform this service is if they have limited scope, but that leaves the challenge that moral norms of unlimited scope will fail to provide the service. I concede that none of the norms that I have discussed thus far meet this condition, and were we to eliminate this aspect, it would be a great challenge to explain how the norm might exclude any reasons at all. Importantly, however, soft law scholars have affixed the soft law label to

253. David Enoch, *Authority and Reason-Giving*, 86 PHIL. & PHENOMENOLOGICAL RES. 1, 26 (2012) [hereinafter Enoch, *Authority*].

254. There might be other reasons-based accounts that can arrive at the same outcome and have greater explanatory power but depart from Raz's account. Indeed, there might be other such accounts of constraint under hard norms. One promising candidate is a weight-shifting model. See Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 SANTA CLARA L. REV. 995, 1053 (1989); Donald H. Regan, *Reasons, Authority and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3, 20 (1990).

moral norms of limited scope. But even if we wish to face the Razian challenge directly, it is somewhat difficult to identify a plausible law that would fit this description, one that encompasses the entirety of existence at all times and in all contexts. Perhaps a law stating simply, “be moral,” might fit. And such a law might be as unlikely to as exclude reasons as it is unlikely to be enacted by a legislature. Of course, if Raz’s brand of exclusive legal positivism is to be limited to such bizarre legal norms, its relevance has been cut down significantly, and it can hardly be said to apply to the class of “moral standards” as Raz purports.²⁵⁵ But we ought not to accept this objection so easily. Wil Waluchow and others argue that “[t]he set of all moral reasons is not identical with the set of dependent [i.e., underlying] reasons under dispute,”²⁵⁶ providing support for the notion that adjudication invariably limits scope through application.²⁵⁷

Turning to Shapiro, some of his writings indicate that law must be the sort of thing that forecloses deliberation regarding the action regulated. The function I describe leaves further deliberation, so Shapiro might conclude that it does not threaten his approach. Like plans, he argues, law takes prior decisions about the manner in which to achieve a goal,

255. RAZ, AUTHORITY AND INTERPRETATION, *supra* note 93, at 202.

256. See G.J. Postema, *A Treatise of Legal Philosophy and General Jurisprudence*, in LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD 373 (2011).

257. Moreover, for Raz’s objection to be damning to soft law, alone, it must be the case that a hard legal norm of similarly unlimited scope would be capable of satisfying the demands of law’s essential service. This, too, is no easy task. I suppose that we could imagine, for example, a law stating, “all those subject to law must exist.” This norm is arguably of unlimited scope, as it applies in all contexts in which we could possibly follow it. The problem, of course, is that it is hard to imagine how this law could possibly make one more likely to act how they ought to on the balance of all reasons under the Razian model. We might be tempted to interpret such a law to be a prohibition on suicide. But even then the law would have a scope limitation, applying only to situations in which we have the capacity to commit suicide, just as the moral speed law applied only in situations in which we had the capacity to drive at an unreasonable rate. The point here is that expanding the scope of a law in this way diminishes its capacity to perform law’s essential service regardless of whether it has moral or social fact-based content.

as well as the goal, itself, as settled.²⁵⁸ In the same way that “our plans must be fairly stable, which is to say that they must be reasonably resistant to reconsideration,”²⁵⁹ thus “[l]aws guide conduct in the same way . . . namely, by cutting off deliberation and directing the subject to act in accordance with the plan.”²⁶⁰ One caveat to deliberation foreclosure in Shapiro’s account is the fact that law may be defeasible.²⁶¹ Shapiro states:

That the law is supposed to settle, and purports to settle, normative questions should not be taken to mean that the law demands that its dictates be followed *come what may*. . . . When compelling reasons exist, the law will normally permit its subjects to reconsider its direction and engage in deliberation in the merits. The catch here is that the law claims the right to determine the conditions of its own defeasibility. It attempts to settle when the quandaries it has resolved become unsettled.²⁶²

It would seem, then, that legal norms “settle” normative matters by improving or sparing deliberation even if they permit remaining deliberation, so long as the terms of that remaining deliberation are set by the laws. My example satisfies this standard, as it performs the deliberation alteration that plans and laws are supposed to, and any remaining deliberation is framed by the soft law’s own narrowing of the parameters for that deliberation to problems regarding timing.²⁶³

258. Although Shapiro agrees that law is defeasible for compelling reasons, this does not mean that he does not believe in the foreclosure model because he explains that law “claims the right to determine the conditions of its own defeasibility.” SHAPIRO, *LEGALITY*, *supra* note 103, at 202.

259. *Id.* at 124.

260. *Id.* at 274.

261. *Id.* at 202.

262. *Id.*

263. Jeremy Waldron raises a similar point. *See* Waldron, *supra* note 189, at 896 (“[A reasonableness speed limit] settles that dispute: in effect, it directs the use of moral judgment in circumstances where it might not otherwise be engaged. If it is a plan, it is a plan for moral thinking—because that, as much as behavior of various kinds, is one of the things we need to plan for. Left to themselves some people will reflect on what a reasonable speed is given the condition and width of the road, and others will not. This is too risky; so the plan is that everyone must drive at a reasonable speed taking into account width, condition, etc.; and to

As such, I offer that obligatory scope adjustment is one function that soft norms might perform in cases of Supercompliance. While it would be sufficient to provide one psychological mechanism that performs law's service, I would like to discuss two other mechanisms that, while more difficult to defend, might perform the service as well. To do so, I will need to refer to the other behavioral experiments discussed.

B. *Soft Norms Can Serve As Authoritative Reminders of Previous Obligations*

In the Ten Commandments and Honor Code studies, the experimenters were primarily interested in whether one's favorable self-image operates as a defeasible limit on their desire to cheat. Though they did not set out to the connection between the formal features of norms or norm creators and behavior, they did test norms that have different characteristics as a means to increase the salience of moral commitments.²⁶⁴ For this reason, they called their treatments "moral reminders." Despite our different focus here, we can follow the experimenters' lead and highlight an unsung function that norms might perform: they can alleviate or remedy the deliberative infirmity of forgetfulness.

Assume that a person reaches the conclusion that a certain action is the right action to perform on the balance of all reasons when certain circumstances obtain. Further assume that this person has the unfortunate trait of forgetting these insights regarding proper behavior unless he or she is exposed to particular kinds of normative prompts. Without these prompts, this person must engage in deliberation to determine the action mandated on the balance of reasons. Unfortunately, this work is unwelcome and usually flawed, often leading the person to an improper

comply with or play their part in this plan, drivers are going to have to address themselves to this issue of reasonableness. The example shows that even when moral predicates are used, their use does not always beg the moral question that the law is supposed to settle. And so we are back with the general response to Shapiro's first argument: a moral criterion for identifying law or for identifying what a given law requires does not necessarily defeat the purpose of having a law in the first place.").

264. See *supra* Parts IV.B.1.a, IV.B.1.b.

balance and a poor decision. When exposed to these prompts, however, the person snaps right back into their prior commitments, sparing themselves laborious and fallible deliberation.

To put this in a reasons-based framework, the norm serves as a resurrecting reason—it resurrects the deliberative service that prior internalized obligations were supposed to have provided. Thus, the process operates in the exact same way that exclusionary and protected reasons were supposed to have worked the first time around, but it relies upon a soft norm to import that prior deliberative work into the current situation, which results in constraint.

There are a few exclusive positivist objections to the notion that the reminder function can perform the service necessary to earn legal status. First, there is the “you’re doing it wrong” objection. They will argue that the norm serves to do nothing more than duplicate the obligations to which the person already was subject and, therefore, the only instance in which such a norm can perform a deliberative service is when the person made the error of forgetting about a previous obligation. Since this rests on a background of erroneous obedience, it should not count, they might claim. This argument is unavailable, however. Recall that both Shapiro and Raz rely upon some sort of deliberative infirmity when they justify obedience to law.²⁶⁵ Importantly, they do not place limits on the kinds of infirmities that count and do not count, and were they to try, it would be difficult to draw that line without engaging in evaluation that would rob positivism of its claim to being a descriptive exercise.

Another objection is that legality requires that the norm must, itself, be obligatory and not simply something that refers to prior obligations.

The impact on deliberation that I describe is largely to inform the subject of a normative commitment that already existed and of which the subject would not otherwise have been aware. Even if we assume that such a norm has been given by a source imbued with conventionally understood Hartian legal authority, there remains the question of whether the reminding function is enough to satisfy the

265. See *supra* Part I.B.3.

demands of Razian legality. Here I depart from Enoch, who would doubt that it succeeds because the function that I describe resembles the one that his “purely epistemic reasons” provide.²⁶⁶

When a norm provides “purely epistemic reasons” to the deliberator, the existence of the norm serves not to create a new reason to act but merely to provide information that will allow him or her to make a better decision.²⁶⁷ For example, suppose that a jilted lover wants to key his former lover’s car, and he asks a friend to give him a reason not to do it. The friend might identify that there is a security camera pointing at the car. Since the security camera was in that position the whole time, it was always a reason not to key the car even though the jilted lover was not always aware of it. When the friend made the jilted lover aware of the camera, she performed an epistemic service, providing information but not a new reason to act. Compare this to a situation in which someone promises to return a borrowed sweater. The act of promising creates a new, independent reason to return the sweater for the borrower. Before the promise was made, that particular reason did not exist (even if other reasons favored returning the sweater).

According to Enoch, purely epistemic reasons do not satisfy the requirements of authority under the Razian account of legality, which he believes requires protected, as described in the previous Part, or quasi-protected reasons. Importantly, however, Enoch concedes that “there can be an epistemic phenomenon that is close enough to that of authority, and that includes preemption (perhaps some special cases of expertise are of this kind).”²⁶⁸

Before continuing, it is appropriate to take a momentary step back and remind the reader that it is doubtful that soft law skepticism would turn on such a technical philosophical point. But insofar as we have the goal of asking whether this phenomenon satisfies the very detailed reasons framework

266. David Enoch, *Reason-Giving and the Law*, in 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW 4 (2011) [hereinafter Enoch, *Reason-Giving*].

267. David Enoch, *Giving Practical Reasons*, 11 PHILOSOPHERS’ IMPRINT 1, 4 (2011).

268. Enoch, *Authority*, *supra* note 253, at 27 n.39.

that Raz has used to justify exclusive legal positivism, then it is important to address the point.

As mentioned in the previous Part, Raz is not beholden to a reason-giving model of authority. Further, despite Enoch's doubts that a purely epistemic function can be *authoritative* in the Razian sense, he does not deny that it can meet the test for *legality*.²⁶⁹ Moreover, Enoch famously argued that there is no reason, even among officials, to accept that the law provides a robust new reason to do the act prescribed by the law in every instance that a law is made;²⁷⁰ in many cases a law's primary function is merely to trigger a conditional legal reason that was there all along, and that is not a problem for a generally positivistic theory at all.²⁷¹ For example, a law that introduces a punishment of incarceration for fraud might trigger the application of the preexisting norm that one should not perform acts that could lead to imprisonment even if it does not provide a new robust reason not to commit fraud due to the fact that the punishment has legal status.

The question remains, however, whether there is some material difference between the experience of authoritative reminding and the experience of legality that Raz and Shapiro describe. Perhaps there is. When a subject is given an authoritative reminder through a norm, the subject does

269. Enoch, *Reason-Giving*, *supra* note 266, at 27 n.43 ("And it seems to me clear that the law sometimes gives reasons in this epistemic sense—indicating that I have a reason, the existence of which does not depend on the law so indicating. But I don't think that the law's power to give reason in this epistemic way is either central or problematic, and so in the text I ignore it.").

270. *Id.* at 20 ("I am spending some time on the motivations for the claim that law necessarily gives reasons for actions, because the most striking thing about this thesis, it seems to me, is that it is so clearly false. Obviously, sometimes when the law requires that you Φ , it thereby succeeds in giving you a reason to Φ (and in the next section I discuss the implications of this obvious fact). But just as obviously, sometimes this is not the case—think about exceptionally stupid or corrupt laws, perhaps in exceptionally stupid or corrupt legal systems. Remember, we are now dealing with a thesis about what is *necessarily* true of law, presumably as a matter of conceptual necessity. But then all that has to be shown to establish the falsehood of the suggested reading of the claim about the normativity of law is one conceptually possible case where the law—*any* law—requires that you Φ and yet you do not thereby acquire a reason to Φ .").

271. *Id.*

not necessarily perceive that that the reminding norm demands compliance with its own content. From a functional standpoint, any failure to comply with the reminding norm is ultimately a failure to comply with the preexisting norm. As a consequence, it is at least possible that the subject will not perceive the reminding norm as something that, itself, needs to be complied with. An example will help. When I ignore my alarm clock, I do not perceive myself as transgressing the command to wake up that has been announced by my clock. Rather, I perceive myself as transgressing the command to teach my 9:00 a.m. class, for which I set my alarm in the first place.

As this example shows, at least part of the problem is that there is no limit to what can serve the epistemic function that I describe.²⁷² Anything can serve as a reminder, even an inanimate object. Thus, this account, without some further limit, does not comport with our phenomenology of legality.

One limitation is the manner in which an authoritative reminder is given. An important difference between the reminding function during an act of Supercompliance and the provision of a purely epistemic reason is that the former always comes in the form of a norm. While the primary function of the norm is effectively to piggyback upon the function of a preexisting hard norm, it is not necessarily the case that the soft norm is entirely normatively inert. The fact that comes from a norm-giver—a human being or group—makes it phenomenologically dissimilar to an experience with an inanimate object. I can think of no reason that a soft norm issued by a person or group that serves this reminding function cannot be treated in an obligatory fashion. The forgetful subject may treat consultation of that norm as an obligation even if the norm's primary function is recollection rather than to provide a first-order reason to do that which is stated in the norm. He or she may do so by internalizing the belief that he or she is obligated to consult the reminder and consider its content, just as people typically do under hard norms.

Let us consider the ostensibly empty directive, "take one day at a time." It commonly serves as a useful authoritative

272. *Id.* at 17.

reminder to members of Alcoholics Anonymous (“A.A.”) that they are not to drink alcohol on that day. This is despite the fact that they have already committed themselves to a life of sobriety by merit of their membership to the organization and that the norm might be, on a literal reading, impossible to violate (how can one take two days at a time?). Were that slogan to be uttered by a person or group other than A.A., one that is not perceived to be authoritative, the A.A. member might disregard it and end up drinking as a result. Further, it is entirely possible that when an A.A. member drinks, he or she believes that not only has he or she violated the original norm to stay sober but also the norm to “take one day at a time.”

Thus, the fact that the source of the reminding norm is taken as an authority can be a necessary component of its making a practical difference to deliberation. And as with any Razian authority, the norm-giver can earn that authority by serving as a consistently helpful reminder of the right balance of reasons over time.²⁷³ From the perspective of the actor, there is little difference between the triggering function that law often provides and the authoritative reminder function that I just described. In both, the trigger or the reminder cause the actor to consider a preexisting norm that applies to the situation at hand, causing a practical difference to deliberation that is content-dependent. It does not appear that the difference in this function necessarily results in a different experience for the actor. Whether there is an important metaphysical difference can be debated, but Raz and Shapiro’s account of legality is primarily functional and phenomenological rather than metaphysical.

Once reminding occurs under an authoritative norm, whether that norm is hard or soft, there is always a risk that the subject will nevertheless choose to disregard a prior commitment, stalling the service that law might have provided. There is empirical support of the notion that soft norms might actually outperform hard norms in this regard. Not only did we observe this in the tabloid experiment, but my own research reached a similar result, providing support

273. RAZ, MORALITY, *supra* note 97, at 53.

for the notion that soft aspirational norms were more likely to keep intrinsic charitable motivations intact than were mandatory norms.²⁷⁴ This phenomenon has been observed in numerous psychological experiments concerning whether incentives “crowd out” intrinsic charitable motives,²⁷⁵ but my research identified a parallel phenomenon in which mandatory (hard) operators initiated the crowding out effect but aspirational (soft) operators did not.²⁷⁶

C. *Soft Norms Can Set Into Motion a Process of Useful Self-Deception When Consciously Perceived as Obligations*

Recalling the Laura example, she interpreted her parents’ soft directive as if it were a hard directive that prohibited her from watching television, something that she believed that she wanted to do.²⁷⁷ Though Laura was faced with a norm that provided ample opportunities for non-obligatory interpretation, she concluded that the correct interpretation was one that obligated her to forego television. Were this norm absent, Laura would have watched television as she ordinarily did. It is, of course, possible that foregoing television was the right conduct in which to engage on the balance of all reasons. If so, then the presence of the norm performed a valuable service for her.

Given that the norm to which she was subject was so open-ended, it appears that she was free to choose an interpretation that allowed her to indulge in a conscious desire to watch television. Yet, she reasoned that she could not do that, perhaps subconsciously choosing to indulge a temptation to be bound by a norm. Rather than acknowledging that she had this choice, Laura felt as though the choice was inevitable on an honest appraisal of the circumstances and the content of the norm.

274. See Brian Sheppard & Fiery Cushman, *Evaluating Norms: An Empirical Analysis of the Relationship between Norm-Content, Operator, and Charitable Behavior*, 63 VAND. L. REV. 55, 80 (2010).

275. See, e.g., RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 245-46 (1971).

276. See Sheppard & Cushman, *supra* note 274, at 80.

277. See *supra* Part III.A.

Those who feel that, as an objective matter, Laura could permissibly have chosen to pursue her conscious desire to watch television might say that Laura has engaged in an act of self-deception so that she may avoid acknowledging that she has engaged in masochistic behavior. Critically, however, she would not have succeeded in the act of self-deception were it not for the presence of the soft norm to initiate and support the process.

Similar traits have been the object of study in clinical psychology for some time. The popular usage of the term “masochism” refers to a distinct and strong sexual desire characterized by the preference for self-suffering or sacrifice.²⁷⁸ Masochism need not be based on sexual pleasure seeking, however. Indeed, the American Psychological Association included Masochistic²⁷⁹ Personality Disorder (“MPD”) in the DSM-III-R Appendix as a proposed diagnostic category, in part, because it believed that psychologists had discovered a psychopathology that shared the basic principles of sexual masochism but that occurred in non-sexual contexts.²⁸⁰ Since sexual masochism already had its own entry in the DSM at that time, some psychologists believed that MPD ought to as well.²⁸¹

MPD, also known as “Self-Defeating Personality,” is marked, in part, by engagement in a pattern of avoiding or undermining pleasurable experiences and being drawn to situations or relationships in which the actor will suffer.²⁸² For instance, the very first criterion listed in the DSM for MPD was that a person “[c]hooses . . . situations that lead to his or her disappointment, failure or mistreatment even

278. MOSBY'S MEDICAL DICTIONARY 1093 (9th ed. 2013).

279. In the DSM-III-R it was given an alternate name, “Self-Defeating Personality Disorder,” but the index refers to the phenomenon as “Masochistic Personality Disorder” as well, and many psychologists continue to refer to it with that label. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS Appendix A (3d ed. Revised 1987).

280. See *id.* (“The behaviors . . . do not occur only in response to, or in anticipation of, being physically, sexually or psychologically abused.”).

281. Daniel Goleman, *New Psychiatric Syndromes Spur Protest*, N.Y. TIMES, Nov. 19, 1985, at C1.

282. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 279.

when better options are clearly available to him or her,”²⁸³ often insisting that this is the best or an inevitable course of action. The parallel to Laura is obvious. The same can be said for another listed criterion—that those with MPD “[e]ngage[] in excessive self-sacrifice that is unsolicited by the intended recipients of the sacrifice.”²⁸⁴ Laura’s parents never expected Laura to sacrifice television entirely, and, more importantly, there were straightforward interpretations of the norm that would have permitted television watching. The fact that the behaviors underlying sexual masochism and Masochistic Personality Disorder actually exist goes some way towards supporting the notion that Norm Supercompliance is plausible.

The important point is that there is no categorical reason to assume that engaging in this sort of behavior will always cause one to make decisions that are worse than if he or she had not been exposed to the norm at all. Thus, the influence of masochistic thinking on this deliberation leaves open the door for the possibility that soft norms are the sort of thing that are capable of benefitting people, consistent with law’s claims.

Still, some might say that Laura’s approach and others like it ascribe an intrinsic power to a norm that is not really there. The constraining power really comes from an exogenous source—the subject’s subconscious *misinterpretation* of that norm. The problem with this reasoning is the baggage that comes from accusations of misinterpretation. It is premised on the notion that a straightforward interpretation of the norm is always the correct interpretation of the norm, so an interpretation that leads one to constrain him or herself under the norm is either mistaken or self-deceptive. Positivists risk inconsistency when they raise such arguments, however, because they otherwise assert that there is no single, valid way to adjudicate laws. Himma explains, “[p]roperly understood, positivism does not entail any particular theory of adjudication. If law is, as positivism maintains, grounded in

283. *Id.*

284. *Id.*

a purely conventional rules about how officials should behave, then it will be up to any given society to decide what duties judges have in deciding hard cases.”²⁸⁵ Indeed, the only limitation on adjudication advanced by Shapiro is purposive, as he states, “[a]n interpretive methodology is proper for an interpreter in a given legal system just in case it best furthers the objectives actors are entrusted with advancing. . . .”²⁸⁶ Thus, a legal system may conclude that non-straightforward interpretations, even ones that are “self-defeating,” are proper if they are suitably useful under the objectives set by the legal system.²⁸⁷ Positivists are famously agnostic about the particular goals that any particular legal system ought to advance, and Raz and Shapiro set only the requirement that law claims to make those who follow it morally better off than they were without it. There is no reason to assume that a masochistic interpretation of a soft norm is incapable of satisfying this modest criterion.

Another objection might be that this function makes the authority of the law superfluous. This is a valid point: there is no reason that someone cannot engage in useful masochism under norms that are not meant to be authoritative by the norm-giver—this is a rather one-sided account of obedience.²⁸⁸ Even so, it is not necessary for these

285. Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1207 n.235 (2002) (reviewing COLEMAN, PRACTICE, *supra* note 78).

286. SHAPIRO, LEGALITY, *supra* note 103, at 359.

287. Raz might be tempted to raise a different argument. He would describe this scenario as a “directed power”—an instance in which the legislators have used open-ended standards to delegate power to the law-applying organ in order to exact a change in the law through further legislation. See RAZ, ETHICS, *supra* note 117, at 242. The judges are “directed” to make these changes by engaging in moral deliberation about how best to serve the goals the law seeks to serve. Raz might argue that these self-defeating judges are not satisfying their duty to adjudicate on their best balancing of all reasons. But, if that argument were raised, it would ignore that these judges do not realize that they are not engaging in a true subjective balancing of all reasons, as well as the fact that they might end up reaching the true objective balancing of all reasons despite their self-defeating subconscious impulses.

288. To return to Enoch’s typology of reasons, it is possible that the norm in this instance performs a triggering role, changing the circumstances such that a preexisting norm now applies to the situation at hand. Thus, the defenses of the

functions to require harmony between norm-giver and norm-follower; it is enough that they perform a function that satisfies the Raz/Shapiro service conception of legality. Here, the subject perceives the norm to be obligatory, and this perception sets into motion a process that makes a practical and potentially beneficial difference to his or her deliberation.

Any such debate about the proper purpose of adjudication or interpretation in this context would end up perilously close to the one that doomed MPD as a diagnostic label. When MPD was provisionally included in the DSM, many psychologists complained that its inclusion risked psychologizing the experience of abused women, in effect blaming them for traits that are the result of oppressive cultural norms and violent male behavior.²⁸⁹

Moreover, some critics believed that MPD's diagnostic criteria imposed an unduly narrow view of normality:

They constitute an ad hoc collection of behaviors that do not conform with late-20th-century notions of how to relate to others to maximize one's self interest. Apparently, to the proponents of the MPD diagnosis, it appeared self-evidently pathological for people to underachieve, to not use others for their own benefit, to feel or be defeated, or to put the interests of others above their own: in a culture that places high value on pleasure, short-term gain, and using other people, the behavior of many women seemed inexplicable.²⁹⁰

In short, they argued that characterizing the collective traits described as a disorder imposed a negative gloss on behavior that might be normal, perhaps even salutary. Take the notion that the sacrifice involved in constraint under a

process described in the preceding Part apply here as well. One distinction here, however, is that this function does not require the existence of a preexisting norm, so it might provide a reason-giving function as well. It does not always provide robust reasons as Enoch understands them because it does not necessarily involve a situation in which A intends to give B a reason to do a particular action and A communicates this intention to B. See Enoch, *Reason-Giving*, *supra* note 266, at 13.

289. See HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 126-43 (1997).

290. *Id.* at 138.

soft norm is “excessive.” One person’s excessive self-sacrifice is another person’s altruism, charity, or pro-social behavior.²⁹¹ For this reason, it is important to be clear that my use of the term “masochistic” to describe the behavior is meant to be value neutral.

This MPD debate is important to this project because it makes vivid an important pitfall that must be avoided in the analysis of Norm Supercompliance. The major problems associated with the inclusion of Masochistic Personality in the DSM were the result of the desire to label it a *disorder* or otherwise incorrect. We should not make the same mistake in this context by taking too narrow a view of the sorts of functions that count and do not count. The most important thing from a functional point of view is that the norms have the capacity to set into motion a potentially helpful change in a deliberation when they are perceived to be obligatory.

CONCLUSION

I hope that I have established that Norm Supercompliance is a vehicle through which soft law can manifest its power to provide the very sorts of benefits that scholars expect hard law to provide. If so, then the dominant, functionalist justification for stripping soft law of legal status ought to be revised or abandoned.²⁹²

Though theorists have relied on folk wisdom regarding the kinds of norms that make sense for solving the problems that law seeks to solve, empirical study has shown that the relationship between norm and interpreter is more complex

291. See DAVID HEYD, SUPEREROGATION: ITS STATUS IN ETHICAL THEORY 142 (1982).

292. My empirical examination was meant to show that the functionalist foundation for soft law skepticism and exclusive positivism is based on false claims about behavior. The argument does not, of course, rescue soft law from all attacks. If it is true, for example, that a social rule is not a necessary condition for law’s service to be performed, then that does not mean that we cannot continue to hold that a social rule is a necessary condition for legality, thereby pushing a class of soft norms out. Indeed, if we are willing to use some other foundation for legality, such as how we ordinarily use the term “law” in our linguistic practices, then it might make sense to make a Hartian social rule a necessary element of our concept of law.

than they have anticipated. Tony Honoré once said, "Decade after decade, [p]ositivists and [n]atural [l]awyers face one another in the final of the World Cup (the [s]ociologists have never learned the rules)."²⁹³ The onus is not merely on sociologists to study legal theory; it is also on legal theorists to study sociology and psychology. It should come as no surprise that the vast majority of the discussions regarding legal constraint are conceptual in nature and seldom rely on scientific methodologies or the results therefrom. There are good reasons for this: conceptual theories tend to be byproducts of deductive reasoning, and armchair logical techniques are ordinarily adequate to show that a theory is invalid without being costly. And even when the soundness of a theory is questioned, theorists are skilled at conjuring plausible counterexamples without availing themselves to the methods of science. Once we consult the scientific literature, however, we are unable to ignore that those who believe they are subject to law's authority can bind themselves in surprising ways. Subjects have unanticipated weaknesses that soft norms can remedy, perhaps even more effectively than hard norms.

It will surely be tempting for skeptics and exclusive positivists to deny the empirical character of their positions and, thereby, try to negate any notion that the evidence I have presented will unseat them. They might concede that Supercompliance occurs but dismiss it on the ground that Supercompliers are, as a conceptual matter, failing to obey in the right way. They might argue that soft laws provide assistance only when Supercompliers suffer from some sort of serious infirmity such as habitual forgetfulness. Or they might say that Supercompliers misinterpret the norms before them, bypassing their proper, straightforward readings. I do not find these arguments persuasive because the functionalist view of law cannot and should not be sealed off from empirical evidence of function, because their functionalism assumes, rather than denies, that people suffer from infirmities that laws can remedy, and because positivists cannot endorse so narrow an interpretive view

293. A.M. Honoré, *Groups, Laws and Obedience*, in OXFORD ESSAYS IN JURISPRUDENCE 1 (A.W.B. Simpson ed., 1973).

without violating the underlying principles of descriptive neutrality that they hold so dear.

This leaves a milder justification for denying soft law's legal status—namely, the relatively low *probability* that soft law will provide law's service. I concede that I did not explore probabilities in this Article. Even if we were inclined to probe that issue, however, the jury is still out as to the more basic question of whether and in what context hard law outperforms soft law as a constraint. Likewise, there needs to be more research into the possibility that certain features of softness are more or less likely to satisfy the demands of a service-based conception of legality. Nevertheless, drawing the line between law and non-law at some level of probability that beneficial constraint will occur comes with too great a risk of arbitrariness. How likely does constraint need to be for something to be legal?

For those convinced by Norm Supercompliance that soft law passes the functionalist test for legality, a different question might arise: should we dispense with the hard/soft distinction altogether? I think not. Soft and hard law are not functional equivalents. Scholars have already recognized that the two kinds of law differ as to legislative cost, delegation of authority, and executive involvement. And with regard to constraining power, we ought to consider the possibility that soft norms could be better constraints than hard norms when the goal is to insulate subjects from crowding out effects and leave their intrinsic altruistic motivations intact.²⁹⁴ This is yet another question that empirical research ought to investigate further.

I focused here on an unduly ignored category of constraint under norms. In doing so, I tried to unmask the narrowness with which we have approached the relationship between norm and subject. We can do much more to inform legislators about how to build better norms. If such a project is to succeed, however, all of the parties involved must keep an open mind about the kinds of behaviors that can result from exposure to norms and the various shapes that our norm sources, sanctions, operators, and content can take.

294. See Sheppard & Cushman, *supra* note 274, at 68-71.

