Inclusive Legal Positivism is contrary to Raz’s theory of authority

* All law claims authority (may not actually have it)
* To claim authority it must be possible to have authority
* and not possible to have authority if those subject to the authority can find out the existence and content of the authoritative utterance is only by considering the very reasons for action that authority is meant to preempt
* that’s why “do the right thing” cannot be a law
* Or why a doctor is not acting as an authority if he says “do what is medically necessary”

So if a rule of recognition includes a moral standard, that moral standard cannot itself be law, because the identification of the moral standard requires one to engage in the very sort of reasoning that the law was meant to displace

* One way of thinking about it is that what was already subject to morality before the law, so when the law tells one that one is subject to morality it has not made a difference

Montana does not have speed limit on freeways – it is the reasonableness standard

Assume that that reasonable the standard is a moral standard

Does that mean that there is no law in Montana about how fast to drive?

* In fact one is probably subject to judicial determinations about what reasonableness is
* And lower courts in Montana are subject to what higher courts say
* But the Montana supreme court, when deciding such matters, would look to the moral standard and for them that moral standard would not be law, under this argument against inclusive legal positivism
* Notice that the law that says one should ride at a reasonable rate of speed does settle some matters even for the Mont SCt
  + It does tell them that other considerations besides reasonableness are not permissible to consider in determining how fast to drive
  + So it is law in that respect
  + But for the Montana supreme court the standard of reasonableness is not itself law

For the exclusive legal positivist, it follows that the law must be identifiable only through factual reasoning

If it is identified through morality, it requires one to consider the very reasons for action the law is meant to displace

That means when a court considers morality in deciding a case it cannot be discovering preexisting law

Only when it has made its decision, which can be identified without considering moral questions, is there law

That means that courts make law in hard cases rather than finding it, contrary to what Dworkin and what the inclusive legal positivist say

We have been speaking about cases where a moral standard is claimed to be identified as a legal standard

* In that case the exclusive legal positivist would say that the moral standard is not itself law

But also the law often says that the validity of a law is dependent upon a moral consideration

Think of the 14th amendment or the 8th amendment

The validity of law is dependent upon a moral question

First of all, for private citizens the validity of the law probably does not depend upon morality

* If a law violates the 14th amendment moral standard, it is still valid until struck down by a court
* And whether it is struck down by a court is a question of social fact
* One does not have to determine that through moral reasoning

But the court that does the striking down looks to a moral standard, and again the exclusive legal positivist would say that the moral standard cannot be law

EG Drive 30 unless this law violates due process or equal protection

If due process are equal protection are themselves moral standards, they were already binding the court even before there was law

being told that they are binding on a court does not add anything for them

so, for the exclusive legal positivist the 14th amendment does not incorporate equal protection or due process into the law, rather equal protection and due process are areas where the law retreats, allowing morality to do the work that it always does

Here is an analogy :

Imagine that a Dr. said “ Take the Blue Pill”

That can be a medical directive because you can determine whether something is a blue pill without considering the medical reasons for action that the medical directive was meant to displace

Now imagine that a Dr. said “ Take the Blue Pill - but this directive is imvalid if it is contrary to fairness considerations”

You have to consider non-medical reasons for action to determine the validity of directive, reasons that the directive does not displace

Although the doctor appeared to have conditioned the validity of his directive upon its not violating non-medical reasons for action, what he really did was issue a valid medical directive that preempted only medical and not non-medical reasons for action.

There is really no difference between the first scenario and the second

Green: Is it also possible that facts cannot be part of the law?

* + - 1. Sometimes what is preempted by law are factual questions
         1. Law cannot refer to the factual reasons for action that it claims to displace
         2. An example would be a court’s judgment for the plaintiff that says that the judgment is not binding if the defendant did not in fact do it

Thus, certain facts cannot be included in the law either

Shapiro’s argument

like Raz’s except he appeals to the idea of a plan

The essence of the law is its settling function

Therefore the part that is the law is the part that is settled

When morality is pointed to as in a standard, it cannot be law because it is not a matter that is settled

Sum up: the inclusive & exclusive legal positivist agree on whether judges look to morality to decide legal questions, but they disagree as to which part of the law is LAW and which part is only morality