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The Planning Theory of Law

A Critical Reading

100th Volume

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100th Edition Announcement

The editors of the Springer *Law and Philosophy* series – Francisco Laporta, Frederick Schauer, and Torben Spaak – are pleased and honored to recognize this book as the 100th volume in the *Law and Philosophy* series.

The *Law and Philosophy* series was started in 1985, with the late Michael Bayles and Alan Rabe as the initial editors. Shortly thereafter Aulius Aarnio joined them, thus creating the three-person team that entrenched the series as an important, thoroughly academic, and always peer-reviewed publication outlet within the world of legal philosophy.

Although the series has, over its 27 years and 100 volumes, published work by some of the major figures in Anglo-American legal theory – Neil MacCormick and Robert Summers are noteworthy in this regard – its primary mission can be understood in terms of two other concentrations. One is to make available the best English-language legal philosophy emanating from non-English-speaking countries. Increasingly, and for better or for worse, English is becoming the major language of worldwide academic discourse, and legal philosophy is no exception. This phenomenon, however, has produced a publication gap, since most of the major academic publishers in English-language countries focus predominantly on work coming from those countries. This focus threatens to make legal philosophy increasingly provincial, and the editors are proud of the fact that the series has become the pre-eminent publication outlet for some of the best scholarship in the philosophy of law coming from countries whose primary language is not English. The series has been and will always be in English, and it is a publication requirement that the books be fluent and idiomatic in that language, but the more that the English language tends to predominate as the international language of legal philosophy, the more important becomes this aspect of the mission of the series.

In addition, the series has always been the principal outlet for the best legal philosophy produced in a more formal idiom. More particularly, scholarship that makes important contributions to our understanding of legal reasoning and legal argument has often taken advantage of the precision that formal logic can offer, or has frequently engaged with advances in artificial intelligence, or has connected with work in the theory of argumentation. Because of its more formal nature and

sometimes heavy reliance on symbolic logic, academic work of this variety may be less widely accessible, but that does not make it any less important. The series has always recognized that part of its mission is to provide a publication outlet for the best research in this genre, and again it is an aspect of the mission that is expected to continue for some time to come.

In some respects, therefore, the volumes published in the series are within the same tradition as books published by other academic publishers, but in other respects the series makes available important work that might otherwise remain unpublished. The mission of the series is thus a multifaceted one, and the editors and the publisher are committed to ensuring that this continues for the next 100 volumes.

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Introduction

Damiano Canale and Giovanni Tuzet

Scott Shapiro's book *Legality* has definitely been one of the most relevant editorial events since a few years now in the field of legal philosophy. Elaborated through the course of a decade, partially discussed in conferences and seminars before its publication, and repeatedly announced to the public, the book has given rise to a lively discussion in the field.

Some commentators see it as a groundbreaking work that will disclose new horizons for the contemporary inquiry into the nature of law. Contrarily, others criticize the book as providing a view on the subject that is affected by theoretical misunderstandings and lack of originality. Despite these conflicting assessments, Shapiro's work constitutes a powerful and challenging attempt to reframe the theoretical basis of analytical jurisprudence and the set of issues it is traditionally concerned with.

Two are the fundamental moves made by Shapiro in his book: First, he points out that the main issue a theoretical account of law is called upon to address is to explain how and why the law is apt to oblige, i.e., to guide human conduct in a specific normative way. Where does this capability come from, and how is it articulated in massive social groups and organizations? According to Shapiro, the traditional responses to this question are unsatisfying, and the issue has to be reassessed on a new theoretical basis. Second, Shapiro explains why and how the law is apt to guide human conduct by means of the concept of *plan*. In his view, human beings are planning creatures, who organize their behavior over time and across persons in order to achieve highly complex ends. Legal activity is in turn a form of institutionalized social planning, whose function is to compensate for deficiencies of other forms of planning in order to resolve doubts and disagreements about the moral matters that affect our communal life.

Shapiro not only bases his proposal on legal theory conceptual tools, but he also makes use of conceptual tools coming from collective action theory. In particular, he tries to extend to the explanation of legal practice the progresses that the concepts of intention and plan seem to have produced in other theoretical fields. In Shapiro's words, "The main idea behind the Planning Theory of Law is that the exercise of legal authority, which I will refer to as 'legal activity,' is the activity of social planning. Legal institutions plan for the communities over whom they claim authority,

both by telling their members what they may or may not do and by authorizing some of these members to plan for others. […] Central to the Planning Thesis is the claim that legal activity is more than simply the activity of formulating, adopting, repudiating, affecting, and applying norms for members of the community. It is the activity of *planning*" (*Legality*, 195).

So, in the light of those two assumptions, Shapiro reassesses and revises in *Legality* the tradition of analytical jurisprudence, pointing out its blind spots in considering the nature of law and of legal obligation. Furthermore, Shapiro's planning theory of law is used to present in a new light several jurisprudential debates that still occupy the agenda of contemporary legal philosophers, such as the controversies on legal interpretation, hard cases, the normativity of law, and theoretical disagreements in legal theory and philosophy. This critical assessment is developed in continuity with the tradition of legal positivism that Shapiro maintains to belong to; at the same time, this tradition assumes, in Shapiro's work, a new shape, since many fundamental theses and distinctions legal positivism is traditionally based upon are designed in a way that actually changes the landscape of jurisprudence.

The chapters collected in this book aim to contribute to the debate over Shapiro's *Legality*. In comparison with other critical discussions on the subject, this book has at least two particular features:

1. The chapters collected in this volume were first presented in a workshop held in Milan, at Bocconi University, in December 2009, 2 years before the publication of *Legality*. In the beginning, each author was asked to discuss one chapter of Shapiro's text with the other participants in the course of several seminar sessions organized in 2008 and 2009 at Bocconi. This discussion was focused on an earlier version of *Legality*, which Shapiro kindly made available to the authors. As a result, the structure of this book reflects the line of argument presented by Shapiro: the order of the chapters corresponds to the articulation in chapters of *Legality*. The result of this collective work was then discussed with Shapiro during a stimulating and animate 2-day workshop in Milan. After the discussion, each chapter has been revised by the authors also in the light of the final version of Shapiro's work. In this sense, the chapters collected here can be seen both as a middle stage in the making of *Legality* and a challenge to Shapiro's project: they do not seek to celebrate any theoretical finding; they rather aim to highlight the weaknesses of the presented argument, if any, in order to help the author to improve or emend it. According to the editors' project, this book should have included a response by Shapiro to the critical observations made in this volume. Unfortunately, Shapiro was not able to send his response in time for publishing the book.
2. The authors of this book are scholars who work in Italy, Spain, and South America. Although they have strict contacts with the English-speaking jurisprudential world, their theoretical background is rooted in the continental tradition of legal philosophy, more precisely, in the jurisprudential methodology characterizing continental legal positivism. As a consequence, the chapters collected in this volume implicitly set up a confrontation between two different traditions in legal

philosophy that, strictly speaking, do not share the same conceptual tools nor address the same theoretical and practical issues. Shapiro's *Legality* and the jurisprudential debate it takes part in are hence looked at from an "external point of view" in this book. The main theses subscribed by Shapiro are not simply analyzed from a different perspective: they are considered by starting from a different way of setting the task and the agenda of legal philosophy. Nevertheless, the aim of the editors of this volume is not that of confronting one jurisprudential tradition to the other. We aim to provide a contribution to bridge the gap between the two, as far as this is possible and worthwhile. This is actually a difficult task, which is not likely to be achieved for several reasons. These reasons are strictly related to the differences between the Anglo-American and the continental legal worlds as to the structure of legal systems, their historical and political background, the features of academic research, the role of the philosophy of law in legal education, etc. We think, however, that providing the conditions for a fruitful dialogue between Anglo-American and continental jurisprudence should be a strong commitment for the scholars working in the field.

That is the overall purpose of this book. More in particular, every contributing author wishes to point our attention at some features of *Legality* and provide an assessment of Shapiro's theses. Let us try to summarize in the following the main topics and claims of the chapters.

Canale's chapter (Chap. 1) critically focuses on the methodological aspects of *Legality*. Indeed, Shapiro's book sets out several original theses concerning not only the nature of law and the main problems of jurisprudence but also how the nature of law can be discovered by jurisprudence. In this sense, the method of inquiry adopted by Shapiro can be considered as one of the most interesting and challenging outcomes of his research.

So the chapter is divided into two parts. The first one provides an analysis of Shapiro's jurisprudential approach; in particular, it focuses on Shapiro's resort to metaphysical vocabulary, conceptual analysis, constructive reasoning, and institutional explanation of law. The second part highlights some of the problems that this approach gives rise to. In particular, the chapter argues that (1) the planning theory of law is not able to explain legal obligation, (2) Shapiro's constructive strategy has a recursive character which tends to obscure the functional variety of legal entities, (3) the version of conceptual analysis proposed in *Legality* is semantically blind and runs the risk of reading back into the world the features of language, and (4) legal entities are supposed by Shapiro to amount to a single universe of legal facts, whereas actual norms, contracts, parliaments, etc., do not seem to have the same basic set of properties and to exist in the same way. To account for this, the chapter outlines an alternative view on the nature of law based upon a pluralistic approach to social ontology.

The aim of Poggi's chapter (Chap. 2) is to discuss a paradox concerning the law, which Shapiro singles out and extensively examines in his book. According to Shapiro, it is puzzling how the law could have been invented: attempts to explain the origins of law face a paradox, which Shapiro labels the Possibility Puzzle (PP).

The PP is a classic chicken-egg problem, and it can be summarized as follows: (egg) somebody has power to create legal norms only if an existing norm confers that power; (chicken) a norm conferring power to create legal norms exists only if somebody with power to do so created it. Briefly, the problem is that in order to *get* legal power, one must already *have* legal power. According to Shapiro, the legal positivist solutions to the PP are not homogeneous. Shapiro examines two of these solutions, Austin's solution and Hart's one, and he argues that they are both unsatisfactory. In fact, Shapiro stresses that whatever solution to the PP must be compatible with a theory dealing with problematic issues such as the methodology of legal theory, the logical status of normative statements, the judicial duty to apply the law, and the relation between moral and legal duties. But, according to Shapiro, neither Hart's solution nor Austin's one solves satisfactorily these underlying problems. So Poggi claims, firstly, that once we adopt a legal positivist point of view, the PP vanishes or, better, it turns into a nonparadoxical question; secondly, that all legal positivists (including Hart and Austin) give the same answer to that question, and this is the case because that answer stems from (is implicit in) the very concept of legal positivism; and, finally, that the underlying issue had already been solved by legal positivist theory. With regard to the last point, Poggi tries to vindicate Hart's theory against Shapiro's criticisms, although she acknowledges that some corrections must be made to the former.

According to Tuzet (Chap. 3), *Legality* engages in a difficult and exiting philosophical task: giving an account of what law is and of why it is worth having. Shapiro's theory addresses the first issue in terms of the so-called Social Facts thesis and the second in terms of the "Moral Aim" thesis: law is determined by social facts alone, but it has a moral point, for the aim of legal activity is to remedy some moral deficiencies. As it is well-known, twentieth-century jurisprudential schools divided on such topics: natural law theory was mainly concerned with the value of law and its moral dimension, whereas legal positivism and legal realism were mainly interested in its factual features. Shapiro tries to give a unified picture of it and rejects the realist account because it leaves out of the picture the *internal point of view*. On this issue, Shapiro follows Hart's critique of the realists, but the chapter tries to show that the Hartian picture of legal realism was very simplified, not very charitable, and misleading in some respects. One of the misunderstandings is the following: many realist claims were claims about *legal knowledge*, but they were taken by Hart, and are taken by Shapiro, as claims about legal normativity. In particular, the bad man character does not help us understand whether we ought to comply with legal obligations; it helps us to get knowledge about the law.

For Schiavello (Chap. 4), Shapiro works out a version of legal positivism, taking as its starting point Hart's practice theory of law. Some serious limits of Hart's practice theory of norms concern the conception of legal obligation and the normativity of law. The chapter analyzes the limits of Hart's conception of legal normativity and wonders whether the planning theory of law indicates the correct direction for overcoming them. Schiavello's aim is to show that Shapiro replicates Hart's mistakes on these subject matters. The chapter is divided into three main sections. First, it starts with a brief and critical reconstruction of Hart's conception of normativity, a

reconstruction which is partially different from that given by Shapiro in *Legality*. Schiavello analyzes not only the original conception of normativity sketched out by Hart in *The Concept of Law* but also the (partially) different conception that can be drawn from the *Postscript*. Then the chapter addresses the conceptions of legal obligation and legal authority associated with the planning theory of law and finally criticizes Shapiro's assumptions on legal positivism.

Papayannis's chapter (Chap. 5) tries to show that the planning theory of law contains in fact two theories, one internal and the other external. The internal one is based on conceptual analysis. In this regard, Shapiro claims that law can be best understood as a social plan to solve the moral problems of a community in certain circumstances. The logic of social planning makes law intelligible from the participant's perspective. The external one is a kind of functional explanation, and the internal point of view plays no role under this approach. The idea is to identify what social needs law satisfies for the community that holds a legal system. The chapter's conclusion is that even if one is not persuaded by Shapiro's arguments against some positivist theories like Hart's, there are good theoretical reasons to consider the planning theory of law: it provides a mixed understanding of legal practices, and it captures at the same time two aspects of social reality. On the one hand, it presents a view of law that accommodates most of the fundamental characteristics of legal systems. On the other hand, it offers a functional analysis of law that illuminates the valuable services law provides for us.

According to Celano (Chap. 6), Shapiro puts forward what he claims to be "a new and hopefully better" (better, namely, than the ones given so far) answer to "the overarching question of 'What is law?'": the central claim of this new account (the "Planning Thesis") is that "legal activity is a form of social planning." The relevant notion of a plan is the notion molded, in his work in the philosophy of action, by Michael Bratman. It is the resort to this concept of a plan, and to Bratman's way of understanding human agency as planning agency, that, according to Shapiro, makes substantial progress in legal theory possible. What, then, can (Bratmanian) plans do for legal theory? Does resort to Bratman's concept of a plan – along the lines followed by Shapiro – in fact provide new and special insights into the nature of law? Celano argues that the answer is negative.

Chiassoni's chapter (Chap. 7) argues that *Legality* suffers from some major problems: (*a*) it overlooks the point of classical legal positivism (to wit, the positivism of Bentham, Austin, Kelsen, Hart, Bobbio); (*b*) it endorses a spurious form of positivism; (*c*) it takes an indulgent attitude toward exclusive legal positivism; and (*d*) it sets forth a surprising solution to the Possibility Puzzle concerning legal authority. Because of this, Chiassoni is highly skeptical about the alleged improvement of contemporary jurisprudence fostered by *Legality*.

Ferrer and Ratti (Chap. 8) analyze the portions of *Legality* which deal with the problem of legal disagreements and the related theory of interpretation (and meta-interpretation) deployed by Shapiro in order to overcome that difficulty. The question of legal disagreements, together with the main assumptions of legal positivism, according to the authors makes it necessary to pay some attention to the current accounts of such a jurisprudential conception. As a consequence, the structure of

their chapter is this: in the first section, it deals with legal positivism in the way it is commonly accounted for in Anglo-American jurisprudence; in the second section, the authors present their own account of methodological legal positivism, much indebted to Bobbio's and Ross's works; in the third section, the argument from disagreements is summed up and the difficulties it allegedly poses to legal positivism are carefully analyzed; this leads to the fourth section, where Shapiro's conception of legal interpretation and consequent response to such a challenge is examined; in a fifth and final section, some conclusions are drawn, the main of which is that Shapiro's sophisticated theory of interpretation is, on the one hand, supererogatory, and, on the other hand, unfaithful to the genuine spirit of traditional methodological positivism, since it conflates descriptive and prescriptive aspects of legal interpretation.

Finally, Pino (Chap. 9) provides a reconstruction of Shapiro's theory of legal interpretation and tries to assess this theory on its own terms, checking its internal coherence and overall persuasiveness. Then Pino carries out an evaluation of the compatibility of Shapiro's picture of legal interpretation with the general project of the planning theory of law and claims that this picture obscures some important parts of judicial legal reasoning, such as value judgments.

Of course this is only a sketch of the arguments contained in the book and of the topics it is about. We hope that the reading of it will provide a detailed understating of these arguments and stimulate further discussion about them.

Last but not least, we wish to thank Scott Shapiro for the opportunity to discuss with him the manuscript of *Legality*, the authors for their effort in achieving this volume, and the editors of the "Law and Philosophy Library" for their willingness to publish this book as the 100th issue of the series.

Damiano Canale
and Giovanni Tuzet

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Chapter 1
Looking for the Nature of Law: On Shapiro's Challenge*

Damiano Canale

1.1 Put the Sticker in the Right Place

Imagine a child's puzzle book designed with the following layout[1]: On the right-hand side of each page, there is a complex scene: animals in a wild jungle, Tom riding a yellow bicycle, Mom at the china shop, and so on. On the left-hand side, there is a set of peel-off stickers. For each sticker – the elephant, Tom's hut, the teapot, etc. – the child needs to find the corresponding object in the picture. Now, imagine another children's book with a similar layout but where the scenes on the right have a broad outline such as a green grass court, a skyline of mountains, or an empty kitchen. The design is different because the task of the child is quite different here: She has to compose her own scene by using the stickers, so that the scene fits the background. The first kind of game is successfully completed when every sticker has been put in the right place. The second one is successful when the scene created by the child upon a given background is as meaningful as possible: If the child succeeds in the game, the stickers are still in the right place, but in a different sense.

Now, think of the right-hand side of these books as the world of law, composed of statutes, precedents, contracts, testaments, judges, parliaments, and so forth, and think of the peel-off stickers as the set of statements which we take to be true of that world. For each statement, one is to ask what "makes it true." What the expression in inverted commas means depends on the game, obviously. If the scope of the game

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[1] The following picture is based on Price (2007).

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is to account for the world of law without altering it, we need to know what fact in the legal world has the right shape to do the job. If the game aims to give a new shape to this world, then we need to decide what meaningful form the legal world ought to take according to the given background.

Legal philosophers looking for the nature of law seem much like children putting stickers in a puzzle book. Some of them like playing the first kind of game; they practice descriptive jurisprudence and try to account for law as it is. Others prefer the second kind of endeavor; in this case, they practice prescriptive jurisprudence and tell us how law ought to be. As every child well knows, however, putting stickers in the right place can be a very difficult task in both cases. The trickiness of the game depends on the constraints put upon it: the complexity of the scene, the shape of the stickers, and, obviously, the ability of the player. Jurisprudential methodology focuses on the ways to do this job. It seeks to clarify under what conditions jurisprudential games succeed, what their rules are, and how best to comply with them.

In his book *Legality*, Scott Shapiro puts forward an original strategy for putting stickers in the right place within jurisprudence. This strategy amounts to descriptive jurisprudence and is the methodological device that Shapiro uses to give an answer to all the main problems of the philosophy of law. Indeed, as an introduction to Shapiro's book *Legality*, one might appropriately recall the words that Lon Fuller used in his famous commentary of Hart's *The Concept of Law*:

> [This book] is certainly a contribution to the literature of jurisprudence such as we have not had in long time. It is not a collection of essays disguised as a book. It is not a textbook in the usual sense. Instead, it represents an attempt to present in short compass the author's own solutions for the major problem in jurisprudence.[2]

Just like Hart's groundbreaking work, *Legality* does not seek to clarify the content of an old story, nor is it conceived as a further chapter of a novel written by others. Its purpose is to tell us a story that nobody has told before, a story which aims to change our jurisprudential insight into the nature of law. Starting from the problem of the origin of law and legal authority – the so-called Possibility Puzzle – Shapiro critically considers the solutions to this problem yielded by the tradition of legal positivism, claiming that they are flawed.[3] Bentham, Austin, Kelsen, and Hart have not been able to explain how law can generate legal obligation simply on the basis of social facts. In continuity with the positivistic tradition, but also reframing the problems that this tradition has been focusing on until present days, Shapiro

[2] Fuller (1969), 133.

[3] The way in which the Possibility Puzzle is designed by Shapiro – Why and how can law provide oughts merely on the basis of social facts? – seems strongly influenced by Mark Greenberg's analysis of the same problem, according to which nonnormative facts cannot themselves constitutively determine the content of the laws; see Greenberg (2006). The theoretical design of the Possibility Puzzle affects the rest of the book, in particular Shapiro's reading of the tradition of legal positivism, the way in which moral disagreement is conceived and the idea of social planning as an institutional activity that pursues a moral aim. In this chapter, however, I will not concentrate on these issues.

then proposes his own solution to the Possibility Puzzle: Law is a planning activity that coordinates our behavior in order to resolve doubts and disagreements about the moral matters that affect our communal life. The promotion of many moral goals, such as the maintenance of social order, prevention of wrongful behavior, protection of rights, fair settling of dispute, etc., is often forestalled by the complexity and contentiousness of social life, Shapiro claims. According to the planning theory of law, "the primary mission of law is to resolve these very issues."[4] Legal institutions settle moral doubts and disagreements through social planning: Legal norms are social plans that distribute rights and responsibilities in such a way that "the exercise of the allocated powers and observance of the assigned duties achieves the selected goals and realizes the designed values."[5] This is possible because plans, seen as social facts, intrinsically dispose those who embrace them to comply: When adopting a plan, human beings are rationally obliged to carry it out without being affected by its content or being influenced by conflicting courses of action.[6]

On the basis of this theoretical framework, in the second part of the book, Shapiro critically outlines some jurisprudential debates concerning the tenets of legal positivism in an admirably straightforward way. In particular, he provides interesting insights into the features of legal interpretation and gives an account of how trust and distrust have an impact on the institutional design of a legal system.

Of course, a bold, large-scale philosophical endeavor of this sort is risky. Firstly, it is likely to give rise to criticism from those who do not see any immediate advantage in considering laws as plans or find this view misleading. Secondly, Shapiro puts all his eggs in one basket: If, after a closer scrutiny, the core theses presented in the book turn out to be wrong or of little interest to lawyers and jurisprudents, Shapiro's whole philosophical endeavor would fail. If, however, the solutions for the main problems in jurisprudence proposed in *Legality* prove to be sound and illuminating as to our general comprehension of law, then the advantages that Shapiro's contribution will bring about are extremely relevant.

In this chapter, I will not provide a critical reading of *Legality*.[7] I will rather concentrate on the methodological aspects of this work, as they are outlined mainly in the first chapter of the book. Indeed, *Legality* presents several challenging theses as to both the nature of law and how the nature of law can be discovered by "putting the sticker in the right place." In this sense, the jurisprudential method adopted by Shapiro can be considered as one of the most interesting outcomes of his research in jurisprudence. The analysis of Shapiro's approach to jurisprudence will show, in particular, that the planning theory of law is characterized by a sort of "overcommitment" that tends to overstretch its explanatory potential. Shapiro seeks not only to discover the essence of law but also to explain, through this, every possible legal fact and institution, assuming that all aspects of legal reality have the same identity

[4] Shapiro (2011), 309.

[5] *Ibid.*

[6] See Sect. 1.6.

[7] An insightful reading of the book is provided by Schauer (2011).

conditions and necessary properties. I will try to show that such a commitment is neither necessary nor useful to explain the nature of law. *Legality* could be a valuable contribution for jurisprudence even if Shapiro had not taken this commitment on, and a pluralistic view of the nature of law had been considered and admitted.

This chapter is divided into two parts. In the first two sections, I shall describe Shapiro's jurisprudential approach by focusing on its resort to metaphysical vocabulary, conceptual analysis, constructive reasoning, and institutional explanation of law. In the following sections, I will consider some of the problems that this approach gives rise to and suggest a possible way out.

1.2 The Nature of Law Reconsidered

In Shapiro's view, analytical jurisprudence is concerned with the metaphysical foundations of law:

> Normative jurisprudence deals with the *moral* foundation of law, while analytical jurisprudence examines its *metaphysical* foundations (…). [It] analyzes the nature of law and legal entities, and its objects of study include legal systems, laws, rules, rights, authority, validity, obligation, interpretation, sovereignty, courts, proximate causation, property, crime, tort, negligence and so on.[8]

But what exactly are we seeking when looking for the metaphysical foundations of law? Typically, a metaphysical inquiry does not focus on the contingent characteristics of reality but seeks to reveal the necessary features of the world, those features that do not depend on what we contingently know, want, or aim at. According to Shapiro, in particular, two metaphysical questions are at stake here: what it is for a legal entity to be what it is (the Identity Question) and what consequences necessarily follow from the fact that this entity is what it is (the Implication Question). A correct answer to the Identity Question "must supply the set of properties that make (possible or actual) instances of [law] the things that they are."[9] In order to answer the Implication Question, moreover, one needs to discover those properties that the law cannot fail to have whatever its contents are.[10]

This picture of analytical jurisprudence is very close to Joseph Raz's conception of legal philosophy and characterizes most contemporary inquiries into the nature of law.[11] In spite of this, Shapiro's explicit resort to metaphysical vocabulary might be surprising. It is definitely so for those philosophers of law, particularly in the civil law world, who still conceive the tradition of analytical jurisprudence as characterized, among other things, by a battle against metaphysics to be carried out by means of conceptual analysis. Indeed, this battle was often considered in the past as a way

[8] Shapiro (2011), 2–3.

[9] *Ibid.*, p. 8.

[10] Shapiro (2011), 9.

[11] Cf. Raz (2009), 17–46, and Raz (1994), 195–209. See also Dickson (2001), 17.

of settling the fundamental distinction between legal positivism and natural law theory as to both their substantial and methodological tenets. Why was this so?

According to the old tradition of legal positivism, the word "metaphysics" denotes those legal discourses which are obscure, deceptive, or even meaningless. This is typically the case of those claims about the nature of law whose truth conditions are neither empirical nor conceptual. If I say, as a natural lawyer might do, that morality is the very source of legality, it is not easy to specify under what conditions this metaphysical claim is true or false, for such conditions seem to depend neither on empirical facts nor on the meaning of the terms I have used. This being the case, my claim connects with nothing in reality and metaphysics turns out to be a sophisticated trick which makes the law "a brooding omnipotence in the sky."[12] Consequently, an explanation of law having resorted to metaphysical vocabulary is to be demystified by jurisprudence by means of conceptual analysis.

It has to be noticed that this picture is flawed. Firstly, contemporary natural lawyers such as Lon Fuller and John Finnis have aimed to detach the inquiry into the nature of law from metaphysical considerations. They have focused their jurisprudential research on the features of practical reason, asking whether these features are continuous with those of law.[13] Moreover, the alleged anti-metaphysical commitment of analytical jurisprudence breaks down if one assumes – as Quine suggests we do – that there is no real distinction between analytical truths and empirical truths.[14] If this is the case, then there is no basis for the contrast between metaphysical statements and empirical statements of existence: The former can be made intelligible by expressing them through observation sentences.[15] For instance, the metaphysical claim "morality is the very source of legality" can be clarified as follows: "Everything is such that if it is legal then it is moral and something is sourcing it as being moral." This metaphysical sentence is perfectly intelligible, in the sense that it is apt to be true, as natural law theory holds, or to be false, as legal positivism takes it to be. Quine's general assumption, therefore, seems to vindicate metaphysical inquiry *against* conceptual analysis in jurisprudence – although, as we will notice in the next section, this is not Shapiro's view.

As a matter of fact, the philosophical function of metaphysical vocabulary results thereby radically changed in a way that cannot be considered good news for jurisprudents looking for a metaphysical foundation of law. According to Quine's view,

[12] Justice Holmes dissenting in *Southern P. Co. v. Jensen*, 244 U.S. 205, 222 (1917). See also Kelsen (1945), 433. One might notice that Jeremy Bentham frequently used the word "metaphysics" in a positive sense, but Bentham denoted thereby a discourse which is "to explain or to inquire what it is a man means" (Bentham 1827, 386), i.e., an inquiry into the meaning of metaphysical statements. As to traditional metaphysics, he was much more cautious: "'I hate metaphysics,' exclaims Eduard Burke, somewhere: it was not without cause" (*ibidem*).

[13] See Finnis (2011), Fuller (1969).

[14] Cf. on this Canale (2009), Himma (2007), Leiter (2007), Oberdiek and Patterson (2007), Coleman (2001).

[15] "If there is no proper distinction between analytic and synthetic distinction…, ontological questions end up on a par with the questions of natural science" (Quine 1966, 134).

metaphysics loses its foundational role. On the one hand, metaphysical statements are purely extensional: Existence can be exclusively ascribed to physical objects and abstract classes. Given certain conditions, on the other hand, different ontologies can serve a theory of law equally well. A commitment to a metaphysical framework, in jurisprudence as well as in every other kind of theoretical discourse, is never absolute: It depends on a pragmatic concern with the explicative power of the theory that includes such a framework and on its criteria of revision.[16]

This being the case, what is left for a jurisprudential inquiry into the nature of law? From a methodological point of view, such an inquiry can be seen as governed by a sort of inference to the best explanation.[17] Legal philosophers do not seek to explain contingent facts about one region of space-time. They are not interested in whether X is a norm belonging to the law of the State of Connecticut or whether Y is a valid contract according to Italian contract law. Jurisprudence seeks to give an explanation of some *necessary* facts (those facts without which law does not occur), with other more fundamental *necessary* facts, which instantiate the identity conditions and the necessary properties of legal entities. These more fundamental necessary facts can be seen as facts concerning the nature of law.

Obviously, the term "nature" is ambiguous in this context. It can be used to convey the idea that jurisprudential statements describe natural states of affairs. From this point of view, for instance, the metaphysical statement "morality is the very source of legality" could be disambiguated as follows: "For every legal fact Y, there is a moral fact X such as X determines Y." But the term "nature" could also be seen as committing legal philosophers to a different kind of explanation, as Shapiro implicitly holds. The facts at the foundation of law concern what *ought* to be the case, and the normative nature of these facts cannot be part of a purely causal explanatory framework. These evaluative facts concern human dispositions that supervene on physical facts: the disposition to have certain attitudes and to make judgments, to use these attitudes to form intentions and behave accordingly, and to use judgments for evaluating what we do as appropriate or inappropriate behavior. Moreover, evaluative facts have not only dispositional properties but also a social

[16] Quine (1960), 271. Obviously, Quine's criticisms against the analytic-synthetic distinction can be challenged and the autonomy of conceptual analysis vindicated; see on this Himma (2007). As an alternative, Quine's criticism can be incorporated into an updated vision of conceptual analysis, such as that proposed by Frank Jackson, who is the most important source of inspiration for Shapiro in this respect. See Jackson (1998), 44–55.

[17] The "inference to the best explanation" corresponds approximately to what is normally called "abduction" or "hypothetic inference": "In making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis. In general, there will be several hypotheses which might explain the evidence, so one must be able to reject all such alternative hypotheses before one is warranted in making the inference. Thus one infers, from the premise that a given hypothesis would provide a 'better' explanation for the evidence than would any other hypothesis, to the conclusion that the given hypothesis is true" (Harman 1965, 89). This kind of inference perfectly describes the "detective work" in which the kind of conceptual analysis adopted by Shapiro consists; see Shapiro (2011), 13.

nature: They concern the way in which our intentions affect social life, condition our relationships with others, structure social agency, and give shape to social institutions.[18] According to Shapiro, these are the social facts that do matter for an inquiry into the nature of law. From a methodological point of view, however, such a thesis seems to leave jurisprudence on the horns of a dilemma: either the facts outlined above are to be accounted for empirically or their "explanation" resorts to normative vocabulary. In the first case, jurisprudence turns out to be paired with social science, and jurisprudents have nothing to say about their subject matter that could not be better said by a sociologist, a psychologist, or an anthropologist. In the second case, an account of the nature of law would set out what law ought to be, and thus it would move away from legal positivism and descriptive jurisprudence.

Shapiro takes a third route, which leads him to partially reframe the traditional idea of conceptual analysis in jurisprudence.

1.3 From Conceptual Analysis to the Philosophy of Action

In Shapiro's view, the answer to the Identity Question and the Implication Question must be provided by conceptual analysis. This claim may appear even more puzzling than the metaphysical commitment considered so far. Indeed, contemporary analytical jurisprudence has recourse to metaphysical vocabulary because its traditional method of inquiry (conceptual analysis) seems to be flawed. And this method of analysis is flawed, especially as a result of Quine's arguments against the analytic-synthetic distinction, which justifies, as we saw in the previous section, the resort to metaphysical vocabulary by analytical jurisprudence. Therefore, how can conceptual analysis help in discovering the nature of legal entities? Having recourse to the former either averts the knowledge of the latter or makes its explanation meaningless. The solution to this puzzle is provided by the kind of conceptual analysis that Shapiro practices in *Legality*. How is it conceived?

According to Shapiro, the object of conceptual analysis is not a concept but those entities "that fall under the concept."[19] In other words, the analysis of concepts law, authority, obligation, etc., is not concerned with the content of the words "law," "authority," "obligation," etc., but with those entities which instantiate such content in reality and are therefore identified as laws, authorities, obligations, etc. To do this, conceptual analysis takes on the work of a detective:

> In conceptual analysis, the philosopher also collects clues and uses the process of elimination for a specific purpose, namely, to elucidate the identity of the entity that falls under the

[18] The idea that evaluative or normative facts exist and are necessary to determine the content of law is highly controversial; cf. Leiter (2007), 121 ff. and Greenberg (2011). This issue is a part of the jurisprudential discussion about the so-called normativity of law: How is it the case that laws give members of a community reasons for acting? For a critical reconstruction of this debate, see Enoch (2011).

[19] Shapiro (2011), 405.

> concept in question. The major difference between the philosopher and the police detective is that the evidence that the latter collects and analyzes concerns true states of affairs whereas the former is primarily interested in truistic ones. The philosophical clues, in other words, are not merely true, but self-evidently so.[20]

In other words, whoever is committed to conceptual analysis in jurisprudence has first to gather as many truisms about law as possible. Then she has to theorize about what the law must be if it is to have the properties specified in the above list. To recall the picture presented at the beginning of this chapter, she has "to put the stickers in the right place" by working out the theory that best accounts for the set of obvious truths about the law.

It is apparent that this picture of conceptual analysis is far from the traditional Oxford-style search for analytically necessary and sufficient conditions. It is rather much closer to the Canberra-style approach to metaphysics provided by Frank Jackson.[21] According to this approach, conceptual analysis starts from our intuitions about a thing or event, which are typically expressed by means of truistic claims. Then it strives to elucidate the circumstances covered by these claims by showing that they are entailed by a more fundamental description or explanation. In this way, conceptual analysis displays the implicit conception associated with a conceptual term, and this, in turn, determines the identity condition of what the conceptual term is about. Obviously, intuitions simply play a "provisional role" in determining what the world is like.[22] In fact, we can be mistaken about what is self-evidently true, although it is strongly implausible that the entire set of our intuitions about the world are wrong. Moreover, it is possible that we disagree about whether some statement is a truistic claim or not. In most cases, however, conceptual disagreement can be settled by comparing the explicative power of the theories in which the obvious truths are embedded.[23] Finally, it may happen that we overlook some obvious truth about law and the necessary properties connected to it. In order to elucidate the hidden essential properties of law, conceptual analysis needs to be supported by "compensatory strategies." Shapiro mentions four of such strategies: (1) comparing legal institutions with similar social practices (*Comparative Strategy*), (2) solving paradoxes and conceptual puzzles (*Puzzle-solving*), (3) examination of anthropological and historical evidence about law (*Anecdotal Strategy*), and finally (4) constructing a hypothetical legal system starting from a nonlegal situation in order to figure out what is needed to transform this situation into law (*constructivist strategy*). All this shows that conceptual analysis is an imperfect and fallible method of inquiry.[24]

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[20] *Ibid.*, 13.

[21] Jackson (1998).

[22] Shapiro (2011), 17.

[23] "To adjudicate between intuitions, one would need to examine the theories of which they are a part in order to see which better accommodates the *entire* set of considered judgments about the law" (*Ibid.*, 17).

[24] One might ask if this intellectual process can be still labeled "conceptual analysis." I argue it cannot. Actually, when Jackson and Shapiro use the word "concept," they refer to language uses. Indeed, Jackson admits that "our subject is really the elucidation of the possible situations covered

But this does not invalidate it as jurisprudential method when integrated with other forms of reasoning.[25]

As a result, Shapiro's picture of jurisprudential methodology can be recapitulated as follows: Firstly, an inquiry into the nature of law has to accrue as many legal truisms as possible. For instance, suppose that *F(T)* is the set of truths about law that most competent speakers consider to be obvious: Following Moore, we could label the elements of this set "common sense assumptions about law." *T* may include, as Shapiro claims, "All legal systems have judges," "Every legal system has institutions for changing the law," "Legal authority is conferred by legal rules," "It is possible to obey the law even though one does not think that one is morally obliged to do so," etc.[26] Secondly, *F(T)* has to be made coherent by eliminating errors and solving conceptual disagreements; it also has to be integrated by those hidden truisms *hT* that can be discovered using compensatory strategies. Thirdly, the resulting set of claims *F(T + hT)* is elucidated by means of an existence sentence *R* corresponding to *F(T + hT)* such as: "There is some unique kind that characteristically have institutions for changing it, imposes obligations, whose authority is conferred by legal rules, is obeyed even though one does not think that one is morally obliged to do so, etc."[27] This being done, conceptual analysis explains under what conditions the description of law in R is true. As far as our example is concerned, the outcome of the analysis would be the following:

1. If things are so-and-so according to the explanation *E* of *R*, then *R* is true.

In this way, the story about the nature of law told in the common sense vocabulary of competent speakers is "made true" by a story being told with a more fundamental vocabulary.[28] This conceptual outcome is fallible and revisable; still, on Shapiro's

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by the *words* we use to ask our questions… I use the word 'concept' partly in deference to the traditional terminology which talks of *conceptual* analysis, and partly to emphasize that though our subject is the elucidation of the various situations covered by bits of language according to one or another language user, or by the folk in general, it is divorced from considerations local to any particular language" (Jackson 1998, 33). As far as the word "analysis" is concerned, then, it seems to me that this intellectual process could be better described as a sort of *explanation*. In fact, Shapiro's focus is not so much on the question "What *is* law?" as on the question "Why do ordinary speakers have such a notion as law?" Only an answer to the second question gives access to the first issue, indeed. This being true, Shapiro could have better labeled his method "explanation of ordinary language uses" rather than "conceptual analysis," although the former label is much less appealing to philosophers than the latter.

[25] On Shapiro's view, we should not to be "overly confident" in the assertions that a given property is part of the nature of law and be open to change our mind; Shapiro (2011), 19.

[26] Shapiro (2011), 15.

[27] In this picture, the existence sentence *R* that is used to explain our commonsense assumption about law should have the form of a Ramsey sentence, i.e., an existentially quantified formula in which all secondary, theoretical terms of a theory of law should be replaced by bound variables (see Ramsey 1990). Actually Shapiro seems to make reference in this respect to the modified version of Ramsey sentences that Jackson applies in identifying ethical properties; cf. Jackson (1998), 140–141.

[28] See Jackson (1998), 28.

view, the method just outlined represents the best strategy available to jurisprudents to discover the identity criteria and necessary properties of law.

The intellectual process just described has two crucial and strictly related aspects that merit attention. Firstly, as in all "detective work," one is required to put forward the hypothesis which could give the best explanation *E* of the common sense assumptions about law. Secondly, one is to identify what vocabulary best fits such an explanation. As to the first issue, Shapiro's basic hypothesis in *Legality* is that "we are planning creatures."[29] What does this mean? The words "plan" and "planning" refer here to a b asic feature of human agency which has been first analyzed by the philosophical work of Michael Bratman. According to Bratman, one of the distinctive aspects of human psychology is that human beings desire many ends but have serious resource limitations and need for coordination.[30] Plans structure practical reasoning and deliberation by guiding our courses of action: In particular, they reduce deliberation costs and impose coherence between our beliefs and desires. Once a plan of action is adopted, indeed, it imposes a rational requirement to carry it out without further deliberation, according to the principle of instrumental rationality. This permits individuals to make rational decisions in situations that leave no time for deliberation; to engage in complex, temporally extended projects; to coordinate their activities; and to work together toward the same goal. Thereby individuals achieve "goods and realize values that would otherwise be unattainable."[31] Although the idea that we are planning creatures rests upon a set of psychological assumptions concerning the basic features of human beings, it is not itself a psychological claim in Shapiro's analysis. It is, rather, a conceptual claim (in the metaphysical-oriented sense previously considered) on which a suitable explanation of the nature of law can be built up. It is so because the notion of plan gives us the key to solve the Possibility Puzzle: On Shapiro's view, indeed, this notion explains why some sort of social facts generate genuine obligations.

As to the second issue, Shapiro assumes that the vocabulary of the philosophy of action best fits an explanation of the nature of law. Shapiro observes in this respect that the questions "What is law?" and "What are legal systems" are ambiguous: They may refer to an inquiry into the nature of legal norms or an inquiry into the nature of legal organizations. Now, analytical jurisprudence traditionally studies legal phenomena "by analyzing the norms that legal organizations produce rather than the organizations that produce them."[32] Nevertheless, organizational analysis has become a prominent feature of social sciences that has proved to be extraordinary

[29] Shapiro (2011), 119. It is to be noticed that the claim "we are planning creatures" is hypothetical not in the sense that it could turn out to be wrong on the basis of conceptual analysis. According to Shapiro, this claim refers to a psychological fact that does not need to be questioned by analysis: It is the hypothesis from which an explanation of our commonsense assumptions about law is inferred.

[30] Bratman (1987), 2 ff.

[31] Shapiro (2011), 119. See also Shapiro (2002), 401 ff.

[32] Shapiro (2011), 6.

fruitful for the explanation of social phenomena. Given that legal systems "have institutional structures that are designed to achieve certain political objectives," this lack of interest for organizational analysis is surprising. On Shapiro's view, indeed, asking "why moral agents form legal systems that produce rules rather than deliberate about or negotiate over the terms of social interaction"[33] is a prerequisite for an inquiry into the nature of legal norms. An answer to this question can be given by philosophers of action, who have provided in recent years the vocabulary for the analysis of the nature of groups and collective action. Therefore, this branch of philosophy is likely to have the explanatory resources for underpinning our common sense assumptions about law.

However, the more original aspect of Shapiro's application of Jackson's framework in *Legality* is the way in which the best explanation of the nature of law is yielded. As we have seen, Shapiro claims that there are several "compensatory strategies" that can help with conceptual analysis. The most important among them is "constructivist strategy": When using it, the legal philosopher "starts from a very simple, nonlegal situation, then [she] launches a comparison with the law and tries what it would be necessary to transform it into a legal system."[34] By means of this strategy, in particular, Shapiro *deduces* from the fact that human beings are planning creatures how this fact affects individual action, the behavior of a small group, the organization of a large shared activity, up to the structure of hierarchically, massive institutionalized activities such as law. This intellectual construction is meant to justify the metaphysical claim that "legal activity is a form of social planning… Legal rules are themselves generalizing plan, or plan-like norms, issued by those who are authorized to plan for others."[35] Based on a comparison with other kinds of explanation, the planning theory is, in fact, considered to give the best explanation of the common sense assumptions about law. The final outcome of conceptual analysis is therefore the following:

2. If law is a planning activity having the properties *a*, *b*, *c,* and *d*, then *R* is true, and law necessarily has the properties *a*, *b*, *c,* and *d*.

Indeed, this claim clarifies Shapiro's response to the Identity Question: "The existence of law (…) reflects the fact that human beings are planning creatures, endowed with the cognitive and volitional capacities and dispositions to organize their behavior over time and across persons in order to achieve highly complex ends."[36] In other words, what make the laws *the law* is that they are plans, or plan-like norms, and nothing else.[37]

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[33] *Ibid.*

[34] *Ibid.*, 20–21.

[35] *Ibid.*, 155.

[36] *Ibid.*, 156.

[37] *Ibid.*, 195 ff., 208, 225.

On the basis of this foregoing reconstruction, Shapiro's methodological commitments in jurisprudence may be summed up as follows:

(a) *The metaphysical commitment*: Jurisprudence is a metaphysical inquiry into the nature of law aiming to discover the identity criteria and necessary properties of legal entities.
(b) *The commitment to conceptual analysis*: The metaphysical inquiry of jurisprudence rests upon conceptual analysis, i.e., on the explanation of necessary legal facts by means of more fundamental necessary facts.
(c) *The commitment to constructivism*: The fundamental necessary facts about the nature of law can be discovered by constructing the theory which gives the best explanation of the common sense assumptions about law.
(d) *The commitment to the institutional explanation of law*: The theory which best accounts for the nature of law is the theory of social planning within institutionalized shared activities.

Shapiro's methodological commitments are particularly attractive and engaging. They assume that the metaphysical question concerning the nature of law can be incorporated into conceptual analysis, thereby providing a new perspective for legal philosophy, a perspective that is an alternative to both naturalized jurisprudence and the Oxford-style approach to the study of legal concepts. At the same time, this jurisprudential method gives rise to some theoretical concerns, which I will highlight and discuss in the following sections. I will begin by focusing on the commitment to institutional explanation of law and then work back through the others.

1.4 Plans and Legal Obligation

The planning theory of law is the most important theoretical outcome of *Legality*. According to it, legal norms *are* plans, or plan-like norms. To put it more precisely, the properties that legal norms have in the picture outlined by the common sense vocabulary are identical to the properties that plans have according to the second-order, explicative vocabulary of the theory of social planning.

It is worth noticing, however, that the notion of plan was originally introduced by Michael Bratman in response to a particular theoretical problem which is not related to social institutions and massive shared activities such as law. The notion of plan concerns the problem of those courses of action, the explanation of which is not covered by the standard belief-desire model of intentionality. These are typically situations in which our conduct, in order to comply with our aims, needs guidance and coordination over time in ways that our ordinary desires and beliefs do not.[38]

[38] Cf. Bratman (1984) and (1987).

What plans actually do, therefore, is to account for a kind of intentionality that entails a distinctive commitment to future actions: a stability-intentionality whose contents derive from and subsequently constrain over time human attitudes toward oneself and others.

As a consequence, the notion of plan is particularly thick and turns out to be even more demanding in the metaphysical realm, i.e., if it is used to identify the necessary properties of social entities. In fact, a legal entity is a plan if, and only if, (1) it is produced by a purposive process, (2) its structure is partial and nested, (3) it purports to settle questions about how to act, and (4) it disposes her addressees to comply.[39] Now, the question is: Do *all* legal norms have these distinctive properties? Shapiro is well aware of the implication of this question and designs the notion of plan in order to avoid categorical problems. In keeping with the methodological purpose of this chapter, however, the point I want to make is not categorical but conditional. My question is: If legal norms were plans, would they do the job that legal norms actually do in everyday life?

To respond to this, it is worth focusing on the alleged dispositional property of plans. According to Shapiro, plans dispose to comply in the sense that those who adopt a plan are rationally *obliged* to carry it out.[40] If I adopt the plan to write this chapter, for instance, all things being equal, it would be self-defeating not to use an available means, say my laptop, to carry out the plan, my laptop being one of the best means to that end. Therefore, my plan to write this chapter rationally obliges me to use my laptop.[41] To put it differently, if instrumental rationality requires me to use my laptop, then I ought to use it to achieve my planned end.

Well, one might argue that this conclusion lacks justification because there is no straightforward reason for claiming that plans *entail an obligation* to adopt a certain means to a planned end. According to John Broome, for instance, if I do not believe that I ought to use my laptop to write this chapter, although this actually is what I ought to do in order to achieve my planned end, I am not rationally obliged to use my laptop to write this chapter. In fact, the desires and intention that instrumental rationality requires me to have are not the ones I ought to have, unless further conditions are satisfied. At the same time, satisfying a particular requirement of instrumental rationality will often not contribute to my achieving what I plan to achieve. Indeed, it will sometimes prevent me from achieving my planned end. Suppose, for instance, that I believe I ought not to write my paper with my laptop because it does not work well, but my belief is false: my laptop works perfectly and is the only effective means to my planned end. If I satisfy the requirement of instrumental

[39] Shapiro (2011), 225.

[40] According to Shapiro, plans "are not only positive entities that form nested structures, but they are formed by a process that disposes their subject to comply. As a result, unless the members of the community are disposed to follow the norms created to guide their conduct, the norm created will not be plans" (*Ibid.*, 179).

[41] According to instrumental rationality, Shapiro claims, agents are required "to adopt the means to their ends" without further deliberation; see *ibid.*, 123.

rationality, I will intend not to use my laptop, and probably I will not use it. This being the case, satisfying what instrumental rationality requires me to do prevents me from doing what I actually ought to do. In general, on this account, when rationality requires me to do *M*, being *M* an effective means to a planned end, it might not be the case that I ought to do *M* and it might be the case that I ought not to do *M*.[42] So, if instrumental rationality requires me to do *M*, that is for sure not a *sufficient* or *necessary* reason for me to do *M*. It is so because instrumental rationality is normative not in the sense that it obliges agents to adopt a means to their ends: It merely requires a particular coherence relationship to hold among agents' propositional attitudes (beliefs, desires, intentions, etc.).

The lack of motivational force that characterizes instrumental rationality becomes even more apparent in the case of institutionalized social activities, namely, when individual plans are determined by an anonymous planner such as, for instance, a parliament or an administrative authority. Even if we admit, for the sake of discussion, that plans instantiate genuine obligations when they work as "internal norms" and guide agent's deliberation,[43] it is mysterious how plans can dispose individuals to comply when they operate as "external norms" that are not involved in the practical reasoning and deliberation of their addresses. In this situation, plans are not *sufficient* for motivating individual conduct because they do not entail any addressee's commitment to adopt a means to the planned end.[44]

To sum up my concern here, instrumental rationality seems not to be normative in the same way that law is. In fact, plans do not instantiate obligations of any sort; they rather instantiate commitments to means-end coherence which are of help in the evaluation of human agency. As a consequence, if legal norms were plans, they would not do the job that they actually do in everyday life: They would neither instantiate genuine obligations nor be authoritative.[45] To account for the normativity

[42] Cf. Broome (2005), 323–327. According to Broome, some conditional ought sentences do not allow for detachment. Even if I ought (to do *M* if *P*) and *P* is the case, it does not follow that I ought to do *M*. This conclusion necessarily follows only if detachment is warranted and I believe that *P* is the case. As a consequence, from the premise "I ought (to do *M* if I intend to do *P* and *M* is a means to *P*)," and the premise "I intend to do *P* and *M* is a means to *P*," it does not follow the conclusion "I ought to do *M*." See Broome (2000). In tune with Broome's analysis, R.J. Wallace has claimed that "[instrumental rationality] imposes rational constraints on the attitudes of agents without entailing either that they have reason to take the means necessary relative to their ends, or that they are rationally required to believe that they should adopt the necessary means" (Wallace 2001, 16). Cf. also Smith (2004), 97 ff.

[43] Bratman (1987), 109.

[44] Christine Korsgaard and Joseph Raz have put forward different lines of reasoning that reach an analogous conclusion. On their view, there is no reason to pursue an end as such. Raz opportunely notices that "a situation in which we do not pursue the means to our ends may be better than a situation in which we do" (Raz 2005, 17). Similarly, according to Korsgaard, the judgment about whether we ought to do *M*, being *M* an effective means to *P*, depends on the *content* of *P*; see Korsgaard (1997). In particular, a goal acquires normative relevance only if (a) it is worthwhile, and (b) it is actually an agent's contingent goal. It follows from this that having a planned end is not *sufficient* to pursue a means to that end.

[45] *Contra*, however, Bratman (2007), 195 ff.

of law and to solve the Possibility Puzzle, Shapiro should *add* something to plans or admit that plans supervene upon other, more fundamental normative entities.

In fact, even Michael Bratman seems not to exclude this sort of explanation. According to Bratman, instrumental reason might have a "deeper ground": "the structures of cross-temporal and interpersonal planning are partially constitutive of … forms of cross-temporal *integrity*, cross-temporal *self-government* and *sociality* that we highly value."[46] But if plans would rest upon values such as cross-temporal integrity, self-government, and sociality, then some central theses of *Legality* should be emended. According to Shapiro's version of the social fact thesis, the existence of a shared plan does not depend on the existence of any moral fact.[47] For instance, the fundamental plans of a legal system can be unjust, obnoxious, and have no support from the population; nevertheless, "if most officials accept a publicly accessible plan designed for them, then the shared plan will exist."[48] But if Bratman's deeper ground thesis is sound, this claim should be emended as follows: It is not sufficient that most officials accept the master plan of a legal system for such a plan to exist. It is necessary that the accepted plan complies with the values of cross-temporal integrity, self-government, and sociality. This does not mean that a legal system cannot be unjust or obnoxious. The existence of legal plans would simply depend on their capability to realize at least those human values that make plans to oblige and ensure their coordination function, even though the content of social planning is mostly unjust or dreadful.

This further existence condition of legal planning would significantly modify Shapiro's picture of the relationship between law and morality. In Shapiro's view, law is necessarily connected to morality in the sense that legal plans are a social technology that helps human beings to solve moral problems that could not be fixed otherwise, although officials are not requested to appeal to moral considerations in order to determine the content of law. If one assumes that Bratman's deeper ground thesis is correct, however, it follows that immoral legal plans exist if, and only if, they fulfill at least the moral functions expressed by the values of integrity, self-government, and sociality. In the case of immoral legal plans, officials are still not requested to appeal to moral considerations to determine the content of plans, but when not fulfilling their basic moral functions, plans are not apt to oblige and thus cease to be plans. This being true, Shapiro's picture of the relation between law and morality comes surprisingly close to Fuller's idea of the "inner morality of law" with the difference that in *Legality* the purposive character of the legal system is warranted by the principle of instrumental rationality. On the basis of this analysis, therefore, the planning theory of law cannot be simply seen as an updated version of legal positivism, as Shapiro presents it in his book. Shapiro does actually seek to

[46] Bratman (2009), 56, emphasis added.

[47] Shapiro (2011), 177.

[48] *Ibid.*

overcome the traditional distinction between legal positivism and natural law theory[49]: He sets out a picture of the nature of law in which legality and morality are necessarily related, immoral law is possible, and the content of law cannot be conceived independently from some moral ends.

To sum up my point here, a first challenge for Shapiro's project is to account for the deeper ground of plans and their alleged aptitude to generate obligations, a challenge that might lead Shapiro to specify (or even to emend) some of the core theses presented in *Legality*. According to the purpose of this chapter, however, we do not need to figure out how this could be done in more detail. We must rather question the reasons which drive Shapiro's picture of the nature of law toward this problem. What is the methodological path underlying the idea that legal norms are plans or plan-like norms? A partial answer to this question is given by the second commitment of Shapiro's jurisprudential method: the commitment to a constructivist explanation of law.

1.5 Constructivism

As we have seen, Shapiro claims that one of the most useful techniques in conceptual analysis is the "constructivist strategy." To discover the nature of law, one can build a hypothetical legal system starting from a nonlegal situation and look at what would be necessary to make it a legal system. The advantage of this strategy is threefold, states Shapiro. Firstly, "it enables philosophers to rule out those properties that are merely contingent features of legality." Thereby, this strategy helps philosophers to uncover the necessary properties of law and to develop noncircular analyses of it.[50] Shapiro observes that this is Hart's own strategy in *The Concept of Law*. The gunman situation is the nonlegal starting point of an account of the nature of law which goes on by drawing the distinction between being obliged and having an obligation and ends up by considering the structure of the legal system and the nature of the rule of recognition. Shapiro seems to embrace the same strategy in *Legality*. His starting point is the nonlegal situation of planning to cook together with a friend, and then he goes on to consider what organizational devices have to be added in order to enable planning within increasingly larger groups, up to massive, highly institutionalized shared activities such as law.

Although Hart's and Shapiro's constructive strategies are similar, they are not identical. There is an important difference between them. In Hart's story, the gunman

[49] On the basis of the traditional distinction between legal positivism and natural law theory, the latter claims that the content of laws necessarily depends on what morality requires, whereas the former does not. It follows from this that immoral law is not possible for natural law theory, whereas legal positivism holds that it is. See on this Coleman (2011). Shapiro actually overcomes this picture by claiming that immoral law is possible and that the content of laws necessarily depends on what morality requires.

[50] Shapiro (2011), 21.

situation is what law cannot be. In Shapiro's story, planning to cook together is what law is not yet. The latter form of social activity is considered to display the functional genotype of every form of shared activity (legal activities included), whereas Hart's gunman picture is not. At the same time, the conditions added by Hart to the starting situation serve to highlight, in a critical fashion, why law cannot be reduced to a gunman's threat. On the contrary, the conditions added by Shapiro are rather to point out that law can be better seen as incrementally reflecting the activity of cooking together with a friend.

From a methodological point of view, this is made possible by the fact that plans are used to single out a functional regularity in the guidance of human conduct which is recursive in character. This enables conceptual analysis to explain the nature of a massive social phenomenon by reconstructing it as a cluster of functional regularities which are more and more complex but have identical functional properties.[51] To do this, conceptual analysis proceeds in the following way: Every relevant legal concept – such as OBLIGATION, CONTRACT, PROPERTY, LEGISLATURE, LEGAL SYSTEM, AUTHORITY, etc. – is explained by setting out under what conditions social planning yields the situations ordinarily covered by the concept to be explained. For instance, to explain the concept LEGAL SYSTEM, one must figure out what problems social planning faces in situations ordinarily covered by this concept and then to specify under what conditions social planning solves those problems and makes the ordinary picture true. In this way, the notion of plan works as a recursive mechanism that calculates, like a Turing machine, what is needed for that function to be satisfied on a different, incremental domain size.

The advantages of this kind of explanation are manifest. It avoids circularity and regress, two traditional threats for conceptual analysis. Moreover, the problem of the foundation of law, which an inquiry into the nature of law is traditionally called upon to address, is withdrawn from the philosophical agenda, for the essence of law can be explained merely in functional terms. This kind of explanation has some drawbacks, however. In fact, jurisprudential analysis is committed thereby to focus only on those aspects of a legal phenomenon, or those properties of a certain legal entity, which satisfy the functional relation at the basis of law. Does this strategy ensure the best explanation of the nature of law? It might not be the case for two reasons at least.

Firstly, Shapiro's theory construction projects the properties of a micro-phenomenon, such as individual planning, on a massive macro-phenomenon, such as law, thereby risking faulty generalization: Macro social phenomena do not necessarily have the same constitutive properties of a micro social phenomenon. Take, for instance, our standard conception of legislature. According to the planning theory of law, the legislature is a legal institution in which a group of planning creatures plans for others, thereby permitting social coordination and control. Now, does legislative planning have the same constitutive functional properties of individual planning?

[51] According to the technology of planning, "even the highly complex [social activities] that are mobilized by the law, *can be constructed through planning alone*" (*Ibid*., 156).

As we have seen, individual planning involves attitudes of intention that are characterized by consistency and means-end coherence: A human being is a planning agent only if she is committed to comply with these rules of rationality. On the contrary, legislation does not necessary involve these attitudes: Laws are often the irrational results of shifting coalitions and arbitrary political agendas. Moreover, the content of a law cannot be traced back to the intentions of the people who enacted it: It is so only in the weak sense that the legislators intended the law to be enacted, not in the strong sense that the legislators intended to enact the same law.[52] In this respect, what we commonly call "legislative intent" does not have the same constitutive properties of individual intent.

Secondly, Shapiro's strategy in theory building tends to project the necessary and relevant properties of the macro-phenomenon just mentioned on *all* the sub-phenomena that amount to it. Therefore, the planning theory of law may not capture the relevant properties of a certain legal entity or phenomenon, i.e., what makes it what it is by distinguishing it from other entities or phenomena. If all this is true, legal concepts turn out to be designed in a way that rules out claims about the conceptualized entity which are rooted in our common sense assumptions about law. Take for instance the concepts PROPERTY and CONTRACT. In Shapiro's view, the rules of property and contract are institutionalized plans which enable private planning: "The rules of property and contract…can be understood as general plans whose function is to create the condition favorable for optimal order to emerge spontaneously."[53] But this description does not capture some relevant properties of these legal entities. The owner of a piece of land is not obliged to comply with any functional purposes: The standard conception of property ownership includes, among others, the *jus abutendi*, i.e., "the right of destroying or injuring [one's property] if one likes."[54] Equally, the contractor is permitted to place herself under an obligation which does not maximize her interests according to instrumental rationality. In this sense, real estate and contracts seem to isolate normative models of action that cannot be reduced to planning or that are not plans in the same functional sense in which, for instance, antitrust law is.

In short, it seems to me that Shapiro's constructive strategy has a recursive character which tends to conflate heterogeneous legal entities with one another, i.e., to reduce them to the same functional genotype, thereby obscuring their differences. Hart's constructive strategy, on the contrary, is mainly disjunctive: It focuses on what distinguishes phenomena such as being obliged and having an obligation, social regularity and social rule, legal obligation and moral obligation, primary and secondary rule, etc. In this way, Hart implicitly yields a richer and more articulated ontological picture, which we shall come back to in the last section of this chapter.

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[52] Cf. Raz (2009), 265 ff.

[53] Shapiro (2011), 134.

[54] Pound (1939), 997. For a critical discussion of the "right to waste" in Anglo-American law, see McCaffery (2001), Penner (1996).

Obviously, one might counter this by saying that such an objection is off target. Jurisprudence is an inquiry into the necessary properties of legal entities which are to be discovered by means of conceptual analysis. It is not concerned with the contingent properties of legislatures, contracts, or property rights. This response is flawed, however. If conceptual analysis is conceived as a sort of inference to the best explanation, the properties at stake need to be not only necessary but also *interesting*. To give an example of this, one might explain the explosion of a car bomb in downtown Kabul in terms of the physical necessary properties of the individual molecules determining that explosion, but this would not be an interesting explanation of that event in *all* domains of discourse. Shapiro actually admits that the relevance of a property is context-dependent.[55] But, in his view, the context-dependence of these criteria does not entail that the nature of law depends on the context. According to the metaphysical framework of *Legality*, there is one, and only one, set of relevant properties indentifying legal entities in all possible worlds. Jurisprudence may fail to discover it, but this does not affect the way that our world actually is.

A number of questions can be raised about this critical reconstruction of Shapiro's theory-building strategy. As to our purposes here, it is worth focusing once again on the source of the methodological problems previously outlined. In fact, at a closer look, it is manifest that the inconsistencies between micro- and macro-explanation which may occur in theory building depend upon the way in which social phenomena are analyzed. This drives our attention to conceptual analysis and the original way in which it is conceived in *Legality*.

1.6 What Semantics for Conceptual Analysis?

Shapiro holds that conceptual analysis amounts to a metaphysical endeavor. It enables jurisprudence to single out the identity conditions and necessary properties of legal entities. How is this the case?

We have seen that conceptual analysis follows two stages. Firstly, it reconstructs our ordinary conception of the central facts about law, which isolates the possible cases in which law occurs. Secondly, these possible cases are divided into those in which the target facts about law occur and those in which they do not. This is done by theory construction. Indeed, according to Shapiro, the planning theory of law elucidates the necessary conditions for the possible cases to be achieved and provides the best explanation of this basic fact.

Jurisprudents acquainted with conceptual analysis will have a preliminary concern about this assumption. According to the standard model of analysis,

[55] "Whether philosophers will find a certain necessary property interesting is to some extent context-specific: It depends on which issues and phenomena seem most perplexing at a given time. As a result, we should not expect any theory of law to be complete. Each generation identifies new questions and these newly salient challengers affect which properties legal philosophers will seek to catalogue and study" (Shapiro 2011, 10).

conceptual necessity outruns metaphysical necessity because a certain claim might be conceptually true and, at the same time and under the same description, metaphysically false. It is conceptually true that witches are possessed by evil, but this is not metaphysically true: This does not happen in all possible worlds, and we should be thankful for this. But under what conditions, then, does conceptual necessity correspond to metaphysical necessity?

There are two strategies that can be used to work out this issue, and they correspond to two different approaches in social ontology. According to the first strategy, the structure of reality reflects, in some way, the structure of our concepts. This is the case, for instance, in John Searle's picture of social institutions and legal entities, based upon constitutive rules and collective intentionality.[56] In this view, a claim about the nature of law is true or false, but it is not metaphysically objective. The kind of necessity that this approach brings about is epistemic; moreover, it assumes an ontological discontinuity between empirical or brute facts and institutional facts which is at odds with Shapiro's project.

According to the second strategy, on the contrary, our concepts mirror, in some way, the structure of reality. In other words, a conceptual truth about contracts identifies a necessary property of contracts only if the concept CONTRACT and those contracts we come across in everyday life have the same deep structure. The general idea underlying this strategy is that both legal concepts and legal facts are complex entities and that the ultimate constituents of concepts *correspond* to the ultimate constituents of facts, in the sense that the latter make the former true. If, indeed, this were not the case, how we manage to get by in our everyday life would be a mystery, i.e., respond appropriately to external stimuli, convey true information to others, satisfy our needs by getting married or buying a house, etc. Human interaction, linguistic communication, social practices, and legal institutions would operate as if by magic. Therefore, unless there are some specific reasons to the contrary, we can assume that the structure of our thought and language reflects genuine ontological categories: that such a structure is, to a significant degree, the way it is *because* of the structure of the world.

If all this holds true, then there is good news for legal philosophers who still hold conceptual analysis in high regard. Indeed, from this point of view, the conditions of reference of our concepts are analytic. Thus, jurisprudence can still discover the nature of law almost entirely by careful reflection rather than by observation, and it can do so because the common sense assumptions that are expressed by legal truisms uncover the deep structure of what is out there.

To work out this kind of explanation, however, it is not enough to put all our intuitions about law together and to yield a theoretical account of the conditions determining which concept corresponds to which fact. One is also to address the problem of how legal concepts can be about things, properties, and relations. That is to say, conceptual analysis is to address the semantic problem: It is committed to make intelligible how correspondence relations are obtained. Now, the semantic

[56] Cf. Searle (1995).

account assumed by Shapiro's methodology seems to me unsatisfactory, in this respect, for the following reasons:

1. *Superficial Semantics and Indeterminacy*. Our common sense assumptions about possible cases of law are not necessarily truthful.[57] Shapiro correctly observes that we can be mistaken, at least somewhat, about what is self-evidently true of a legal entity. Moreover, people can engage in fallacious reasoning, overlook relevant evidence, lack imagination, and indulge in wishful thinking, and all this gives rise to disagreements among them as to the necessary properties of law.[58] But a more serious problem has to be considered in this respect, a problem that might lead jurisprudents to incur a form of systemic error. Legal truisms might simply express superficial similarities in language games. Words such as "judge," "parliament," "rule," "right," etc., are ambiguous and vague: They are used in quite different senses in different space-time domains and admit borderline cases that sometimes are not easy to solve. Therefore, it is not straightforward how the analysis of sentences containing these ambiguous and vague concept terms, whose sense and reference radically change in space and time, can be of help to sort out the essential properties of legal entities.
2. *Relevance*. Shapiro's constructive method seeks to isolate the *necessary* and *relevant* (or interesting) properties of legal entities through conceptual analysis. It is not very clear, however, how the relevance condition is met. If the relevant properties of a legal entity are singled out holistically, i.e., looking at the social and cultural aspects of a legal phenomenon without recourse to analytical hypothesis, Shapiro moves toward ontological relativism,[59] which is at odds with his conception of the Identity Question (see more on this in the last section of this chapter). If the relevance condition is met on the basis of how the world is, Shapiro's method of jurisprudential inquiring seems to rest on a form of knowledge which does not depend on experience. According to this picture, the necessary and relevant truths about the nature of law can be derived *a priori*, via conceptual analysis, from truths that are *a posteriori* and contingent, such as legal truisms. It is far from obvious, however, how that can be done.
3. *Redundancy of Analysis*. Shapiro's approach in jurisprudence risks committing "the error of reading back into the world the features of language."[60] Assuming that a claim about the nature of law is correlated to a legal entity by linguistic conventions, this claim does not necessarily reflect the inner structure of social reality. Therefore, it is possible that a picture of the nature of law corresponding to common sense jurisprudence is not reliable and gives an image of law which reflects our prejudices, desires, purposes, and values, rather than the law as it is. Now, in our discussion, the fact that we have no language-independent ontological viewpoint available to metaphysics is relevant for methodological reasons.

[57] Cf. Jackson (1998), 38 ff.

[58] Shapiro (2011), 17 and 19.

[59] Cf. Quine (1960), 58 and 77.

[60] Austin (1950), 129.

Once a linguistic framework in ontology is conventionally accepted and it is also accepted that there is no necessary correlation between the structure of language and the structure of reality, then ontological questions can be answered simply by means of empirical investigation. If the premises just mentioned are true, conceptual analysis has nothing at all to say to metaphysics and philosophy in general.

4. *Semantic Blindness*. The correspondence between common sense jurisprudence and social reality assumed by Shapiro is not ascertainable, and this is not a good thing for philosophy. It is worth noticing, in this respect, that Shapiro's metaphysical account of the nature of law is conditional, not categorical: It tells us what the nature of law is *if* the correspondence just outlined holds. But *Legality* does not provide any evidence that this condition is satisfied because this is not a task for conceptual analysis. From a semantic point of view, this seems to me a theoretical position quite similar to the point that Ludwig Wittgenstein reaches at the end of the *Tractatus*, where he proposes a view of the relation between language and the world which is inaccessible to us. As well as the early Wittgenstein, Shapiro seems to support the idea that linguistic structures mirror ontological structures by means of conceptual-semantic mapping, but how they do this cannot be explained and has to be taken for granted. As suggested by Wittgenstein in the *Tractatus*, Shapiro does not worry about this issues and "throw[s] away the ladder, after he has climbed up on it."[61] The planning theory of law seems to work pretty well: This is all we need to know. From a philosophical point of view, however, the ladder solution is unsatisfying, as Wittgenstein himself famously argued. Moreover, sidestepping this problem leads to a completely different methodology in metaphysics, conceptual analysis, and jurisprudence.

1.7 Identity Question and Ontological Pluralism

The thesis I shall argue in this chapter is that the methodological problems considered so far depend on the way Scott Shapiro has designed the Identity Question. Overstretching of the planning theory, reductionism in theory building, and semantic blindness have the same source, namely, they rely on how the question "what is law?" is conceived. In this last section, I will try to show why it is so and to envisage a possible way out.[62]

As we have seen in the previous sections, in Shapiro's view, the Identity Question is the key issue of an inquiry into the nature of law. This is perfectly consistent with

[61] Wittgenstein (1961), 6.54.

[62] In doing this, I will not provide an alternative view on the Identity Question; I shall simply outline a different line of reasoning in this respect that is stimulated by Shapiro's design of the Identity Question. As a result, what follows is a part of the philosophical discussion of Shapiro's work proposed in this chapter and does not aim to put forward an autonomous philosophical perspective.

contemporary metaphysics, in which existence predicates are typically considered to express identity relations, along the lines of Quine's view on the matter. For instance, when a lawyer says "the contract exists," she is actually claiming that "it is the case of a thing and this thing is identical to a contract."[63] The problem is that the conditions under which identity relations hold are not straightforward. There are various philosophical routes for addressing this issue. Locke identities typically depend on the time-space location of things: If x and y are in the same place at the same time, then $x=y$. Mereological identities depend on how parts are related to the whole: If x and y are composed of the same parts, then $x=y$. In turn, Leibniz identities depend on the qualitative characteristics of things: If x and y have the same properties, then $x=y$. Shapiro embraces the latter, rationalistic conception of identity relations: As we have seen, a satisfying answer to the Identity Question is needed to specify what "properties make (possible or actual) instances of x the things that they are" (cf. Sect. 1.2).

What are the implications of conceiving the Identity Question in this way? In short, legal entities are supposed to amount to a single universe of facts. These facts have the same basic set of properties and exist in the same way, so that the same existence quantifier ranges over them. This set of properties unifies legal norms, practices, institutions, as well as our attitudes and discourses about law. These basic assumptions justify, in turn, the idea of a correspondence between common sense assumptions about law and legal reality, the explanation of legal facts by means of a recursive function which is satisfied in all legal domains, and the thesis according to which law is a planning activity generating genuine obligations.

Now, is this the best way to frame the problem concerning the identity of legal entities? For sure, it is not the only one. Let us explore an alternative line of reasoning, the clues to which might be seen in Geach's famous treatment of the identity problem.[64] In Geach's view, identity sentences of the form "$x=y$" are incomplete. If I say that x is better than y, this does not make sense until I add that x is better than y in terms of strength, color, speed, taste, etc. Equally, when I say "x is identical with y," this is an incomplete expression that is short for "x is the same as y": One needs to add to the former expression that x and y are the same law, contract, minister, state, etc. More precisely, identity relations depend on a dominion of values over which the existential quantifier ranges. This claim has often been interpreted as a kind of ontological relativism. In jurisprudential discourse, it would imply that *the* law does not exist as such; what *counts as* law depends on the metaphysical domain selected by a detached observer and thus on the nonlegal facts and interests involved in jurisprudential inquiry. But Geach's thesis could be reconstructed another way: A legal entity is made up of different sets of properties from

[63] Quine argued that "[we] have an acceptable notion of class, or physical object, or attribute, or any other sort of object, only insofar as we have an acceptable principle of individuation for that sort of object. There is no entity without identity" (Quine 1981, 102).

[64] Geach (1967).

different domains of discourse.[65] If this is the case, the terms "law," "contract," "property," etc., are multiply ambiguous: They refer to *different sets of properties* when applied to discourses from different domains. It follows from this, for instance, that norms have a certain set of distinctive properties in the domain of morality, but a different set in the domain of religion, in the domain of law, as well as, to some extent, in the domain of contract law, property law, torts law, criminal law, etc., according to the uses of the word "norm" in that domain. In this view, therefore, the identity criteria of a legal entity reflect the irreducible plurality of *kinds* of discourses, i.e., the multiple language games in which that entity is taken to have a certain set of properties.

According to this type of "ontological pluralism," therefore, a social entity such as a legal norm exists in more than one way, and an overarching principle unifying the different ways of being of legal entities is (probably) not available. Furthermore, ontological pluralism considers the Identity Question as a question concerning the uses of language which instantiate a certain linguistic framework, not as a metaphysical doctrine. Shapiro's monism maintains that the autonomous domains of social facts are all part of a single universe or *metaphysical* totality, which can be uncovered by analyzing ordinary language. On the contrary, ontological pluralism denies first of all the unity of *language*: It maintains that the various uses of language share only superficial characteristics – which may be captured, for instance, by looking at obvious truths about law – but are fundamentally diverse. At the same time, every ordinary existence assertion referred to a legal entity is bounded by a domain of discourse, over which the existential quantifier ranges.[66]

Of course, ontological pluralism has its own methodological problem to address. It is required, among other things, to establish the limits of "pluralistic tolerance" in order to avoid legal entities increasing in number without necessity, according to the "economy principle."[67] Moreover, criteria for identifying the relevant domains of discourse are needed, along with an explanation of how they overlap and interlock. Discourse pluralism does have its own methodological advantages, however. Unlike the metaphysical monism implicitly subscribed by Shapiro, it is not semantically blind: The basis of every ontological account of reality is provided by a linguistic framework which fixes the necessary and relevant properties of a legal entity. Moreover, a pluralistic version of the Identity Question does not incur reductionism in theory building: A set of necessary properties is described as a function of multiple domains of discourse which account for the context in which a legal entity is taken to exist. Statutes, wills, contracts, courts, and parliaments have different necessary properties under different descriptions in different domains of discourse. Finally, ontological pluralism does not need to resort to a unifying recursive

[65] A domain of discourse (or linguistic framework) is constituted by the set of terms in a language and the rules that govern their uses. The deflationist view of ontology subscribed to here found its seminal formulation in Carnap (1950).

[66] Cf. McDaniel (2009), Hirsch (2002), Price (1992).

[67] For a solution to this problem, see Turner (2010), 28 ff.

mechanism, such as plans, in order to account for all the aspects of legal reality. On the basis of this approach, the explanatory overcommitment that affects the planning theory of law can be avoided: Social planning identifies the necessary properties of legal norms in certain domains of discourse. In particular, these are the domains in which instrumental rationality governs the linguistic practices involving legal norms, according to certain social needs and purposes. But social planning does not account for the necessary properties of legal norms in *all* domains. It accounts for some relevant aspects of social and institutional reality from an unprivileged point of view. On the basis of this, ontological pluralism might yield a promising framework for an inquiry into the nature of law. Accepting this framework would lead jurisprudence to abandon some of its universalistic claims, but this would be an advantage insofar as it would allow jurisprudents to gain a sharper insight into the nature of legal entities.

To conclude, I agree with Scott Shapiro that the social world is "highly pluralistic."[68] But this basic circumstance admits different explanations. The social world might be highly pluralistic because there is a *single* universe of social facts which is highly differentiated and articulated, as Shapiro holds. Still, it might be so because there are *multiple* universes of social facts, properties, and discourses, which are ontologically determined and consistent and on which the nature of law depends.

References

Austin, J. 1950. Truth. *Aristotelian Society Supplementary* 24: 111–128.
Bentham, J. 1827. *Rationale of judicial evidence*, vol. III. London: Hunt & Clarke.
Bratman, M.E. 1984. Two faces of intention. *The Philosophical Review* 93(3): 375–405.
Bratman, M.E. 1987. *Intention, plan, and practical reason*. Cambridge, MA: Harvard University Press.
Bratman, M.E. 2007. *Structures of agency. Essays*. Oxford: Oxford University Press.
Bratman, M.E. 2009. Intention, belief, practical, theoretical. In *Spheres of reason. New essays in the philosophy of normativity*, ed. S. Robertson, 29–61. Oxford: Oxford University Press.
Broome, J. 2000. Normative requirements. In *Normativity*, ed. J. Dancy, 78–99. Oxford: Blackwell.
Broome, J. 2005. Does rationality give us reasons? *Philosophical Issues* 15: 321–337.
Canale, D. 2009. Consequences of pragmatic conceptualism. On the methodology problem in jurisprudence. *Ratio Juris* 22(2): 171–186.
Carnap, R. 1950. Empiricism, semantics and ontology. *Revue Internationale de Philosophie* 4: 20–40.
Coleman, J.L. 2001. Naturalized jurisprudence and naturalized epistemology. *Philosophical Topics* 29: 113–128.
Coleman, J.L. 2011. The architecture of jurisprudence. *Yale Law Journal* 121: 2–80.
Dickson, J. 2001. *Evaluation and legal theory*. Oxford/Portland: Hart Publishing.
Enoch, D. 2011. Reasons-giving and the law. In *Oxford studies in philosophy of law*, vol. 1, ed. L. Green and B. Leiter. Oxford: Oxford University Press.
Finnis, J. 2011. *Natural law and natural rights*, 2nd ed. New York/Oxford: Oxford University Press.

[68] Shapiro (2011), 11.

Fuller, L.L. 1969. *The morality of law*. New Haven/London: Yale University Press.
Geach, P.T. 1967. Identity. *Journal of Metaphysics* 21(1): 3–12.
Greenberg, M. 2006. How facts make law. In *Exploring law's empire: The jurisprudence of Ronald Dworkin*, ed. S. Hershovitz. Oxford: Oxford University Press.
Greenberg, M. 2011. Naturalism in epistemology and the philosophy of law. *Law & Philosophy* 30: 419–451.
Harman, G.H. 1965. The inference to the best explanation. *The Philosophical Review* 74(1): 88–95.
Himma, K.E. 2007. Reconsidering a dogma: Conceptual analysis, the naturalistic turn, and legal philosophy. In *Law and philosophy: Current legal issues*, ed. M. Freeman and R. Harrison. Oxford: Oxford University Press.
Hirsch, E. 2002. Quantifier variance and realism. *Philosophical Issues* 12: 51–73.
Jackson, F. 1998. *From metaphysics to ethics. A defense of conceptual analysis*. Oxford: Clarendon.
Kelsen, H. 1945. *General theory of law and state*. Cambridge, MA: Harvard University Press.
Korsgaard, C.M. 1997. The normativity of instrumental reason. In *Ethics and practical reason*, ed. G. Cullity and B. Gaut, 215–254. Oxford: Oxford University Press.
Leiter, B. 2007. *Naturalizing jurisprudence. Essays on American legal realism and naturalism in legal philosophy*. Oxford: Oxford University Press.
McCaffery, E.J. 2001. Must we have the right to waste? In *New essays in the legal and political theory of property*, ed. S.R. Munzer. Cambridge: Cambridge University Press.
McDaniel, K. 2009. Ways of being. In *Metametaphysics: New essays of the foundation of ontology*, ed. D. Chalmers, D. Manley, and R. Wasserman. Oxford: Clarendon.
Oberdiek, J., and D. Patterson. 2007. Moral evaluation and conceptual analysis in jurisprudential methodology. In *Law and philosophy: Current legal issues*, ed. M. Freeman and R. Harrison. Oxford: Oxford University Press.
Penner, J.E. 1996. 'The bundle of rights' picture of property. *UCLA Law Review* 43: 711–820.
Pound, R. 1939. The law of property and recent justice. *American Bar Association Journal* 25: 993–998.
Price, H. 1992. Metaphysical pluralism. *The Journal of Philosophy* 89(8): 387–409.
Price, H. 2007. *Expressivism, Pluralism and Representationalism: A New Bifurcation Thesis*. Unpublished paper presented at the conference "Expressivism, Pluralism & Representationalism". University of Sydney, 22–24 July 2007.
Quine, W.V.O. 1960. *Word and object*. Cambridge, MA: MIT Press.
Quine, W.V.O. 1966. *The ways of paradox and other essays*. New York: Random House.
Quine, W.V.O. 1981. *Theories and things*. Cambridge: Harvard University Press.
Ramsey, F. 1990. In *Philosophical papers*, ed. D.H. Miller. Cambridge: Cambridge University Press.
Raz, J. 1994. *Ethics in the public domain: Essays on the morality of law and politics*. Oxford: Clarendon.
Raz, J. 2005. The myth of instrumental rationality. *Journal of Ethics and Social Philosophy* 1: 1–28.
Raz, J. 2009. *Between authority and interpretation: On the theory of law and practical reason*. Oxford: Oxford University Press.
Schauer, F. 2011. The best laid plan. *Yale Law Journal* 120: 586–621.
Searle, J. 1995. *The construction of social reality*. New York: Free Press.
Shapiro, S.J. 2002. Law, plans, and practical reason. *Legal Theory* 8: 387–441.
Shapiro, S.J. 2011. *Legality*. Cambridge, MA: Harvard University Press.
Smith, M. 2004. Instrumental desires, instrumental rationality. *The Aristotelian Society Supplementary Volume* 78(1): 93–109.
Turner, J. 2010. Ontological pluralism. *The Journal of Philosophy* 107(1): 5–34.
Wallace, R.J. 2001. Normativity, commitment and instrumental reason. *Philosopher's Inprint* 1(3): 1–26.
Wittgenstein, L. 1961. *Tractatus logico-philosophicus*. London/New York: Routledge/Kegan Paul.

Chapter 2
The Possibility Puzzle and Legal Positivism

Francesca Poggi

2.1 Shapiro's Challenge

The aim of this chapter is to discuss a puzzle concerning the law, which Shapiro singles out and extensively examines in his book. My task is not a simple one since Shapiro's puzzle is intimately related with several complex problems that, in legal philosophy, are both central and very controversial. Whatever solution to the puzzle we come up with, it must be compatible with a theory dealing with problematic issues such as the methodology of legal theory, the logical status of normative statements, the judicial duty to apply the law and the relation between moral and legal duties. Shapiro's book has the merit of pointing out the importance of that puzzle as a key test for every legal theory. However, my work represents an attempt to show, firstly, that once we adopt a legal positivist point of view, that puzzle vanishes or, better, it turns out to be not puzzling at all and, secondly, that the underlying questions had already been solved by a legal positivist theory: a theory which satisfactorily addresses all the issues I have mentioned. With regard to the last point, I will try to vindicate Hart's theory against Shapiro's criticisms, although I will acknowledge that some corrections must be made.

2.2 Shapiro's Possibility Puzzle

Shapiro (in chapter II) claims that it is puzzling how the law could have been invented: attempts to explain the origins of law face a paradox, which Shapiro labels the possibility puzzle (henceforth PP). The PP is a classic chicken-egg problem and it can be summarized as follows:

Egg: Somebody has power to create legal norms only if an existing norm confers that power

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Chicken: A norm conferring power to create legal norms exists only if somebody with power to do so created it

Briefly, the problem is that "in order to *get* legal power, one must already *have* legal power" (Shapiro 2011, 37).

Shapiro notes that natural lawyers and legal positivists adopt different solutions to the PP. The (modern) natural lawyers believe that the law is not ultimately determined by social facts alone but that moral facts play a crucial role as well. In particular, as far as the PP is concerned, the (modern) natural law theorists think that the legal authority must ultimately derive from some moral norms, viz., that the existence of legal authority ultimately rests on moral facts. Thus, the (modern) natural lawyers reject the chicken principle and think that there are norms which confer the power to create legal norms and which are not created by somebody empowered by other norms or, better, which are not created at all: these are the moral norms, the norms belonging to the natural law.

On the contrary, legal positivists claim that the law is ultimately determined by social facts alone.[1] According to Shapiro, the legal positivist solutions to the PP are not homogeneous. Shapiro examines two of these solutions[2]: Austin's solution and Hart's one.

I think that even though Shapiro's reconstruction of the solutions proposed by Hart and Austin is correct and, as Shapiro notes, they are quite different from each other, nevertheless all the positivist solutions to the PP share a common core. More exactly, I claim that once we adopt a legal positivist point of view, the PP vanishes or, better, it turns into a not paradoxical question, and all the legal positivist theories, even being different, answer that question in the same way. But, before engaging in this issue, it is necessary to say something about the concept of legal positivism, about what a positivist point of view consists in.

2.3 Shapiro on Legal Positivism

Shapiro conceives legal positivism as a thesis about:

(a) The foundation of legal authority, that is, as an answer to the question: "On what does legal authority ultimately rest?" (Shapiro 2011, 43ff.)

[1] Actually, Shapiro explains that legal positivists do not seriously mean that the law is ultimately determined by social facts alone, for the simple reason that almost no one believes that social facts are among the ultimate constituents of the universe (Shapiro 2011, 44). Shapiro states that, for reasons of simplicity, he will count as legal positivists also those authors who think that social facts are further reducible to moral facts and, similarly, he will also regard as natural theorists those authors who think that moral facts are further reducible to social facts. This seems to me an oversimplification (although I understand Shapiro's need to ignore the deepest metaphysical questions).

[2] In fact, three: the third is the theory which Shapiro calls the Coordination Convention Interpretation of legal practice (CCI) but I will not examine it because I have nothing to add to Shapiro's criticisms (see Shapiro 2011, 105ff.).

(b) The individuation of the fundamental rules of a particular legal system, that is, as an answer to the question: "Which are the fundamental rules of the legal system LS?" (Shapiro 2011, 45)
(c) The determination of the content of law, that is, as an answer to the question: "What does the law of LS prescribe in case C?" (Shapiro 2011, 28ff.)

In this section, I will develop two critical observations on Shapiro's thesis about legal positivism and its tasks.

Although it is widely accepted in the English post-Hartian philosophy of law, it seems to me that Shapiro's definition of legal positivism, according to which "legal positivism is the thesis which claims that the law is ultimately determined by social facts alone", is not clear because neither the meaning of "determined" (or, as Shapiro sometimes writes, "founded") nor the meaning of "social facts" is clear.[3] For similar reasons, Shapiro's definition of natural law theory, as the theory according to which the law is also determined by moral facts, is quite blurry. In continental philosophy of law, and in Italy especially, we can find more perspicuous definitions.

I am thinking, for example, of Bobbio's famous distinction between three meanings of "legal positivism": methodological legal positivism, which consists in a non-evaluative approach to the law, that is, in the study of the law as a fact and not as a value; ideological legal positivism (or ethical legalism), which maintains that the law is right just because it is law (that a legal norm is morally right just because it is legally valid); and, finally, theoretical legal positivism, which is a sum of ideologies such as the sanction theory of law, the imperative theory of law, the theory according to which every legal system is consistent and complete and the thesis which maintains that legal interpretation is a mechanical, logical activity which consists in knowing and declaring a preexisting meaning (Bobbio 1965, 1996).

According to Bobbio, and to many other authors, the core of legal positivism is represented by methodological legal positivism, the other conceptions being normative, ideologically compromised or simply false. Methodological legal positivism is not a thesis about the (concept of) law: it is a thesis about the theory of law. Notwithstanding methodological legal positivism supposes a (certain) concept of law: it supposes that it is possible to distinguish the law as it is in fact from the law as it ought to be. A corollary of methodological legal positivism is precisely the idea according to which legal rules are legally existent, legally valid, just because they are posed by human beings (Bobbio 1996, 35; Barberis 1990, 176).

Recently, Villa has proposed a reformulation of methodological legal positivism and of its corollary, which seems to be very persuasive (Villa 2000, 260–1, 2004, 29ff.). Villa argues that the concept (and not the conceptions)[4] of legal positivism refers to both an ontological thesis about the law and a methodological thesis about the knowledge of the law. The methodological thesis claims that it is possible to report what the positive law prescribes without taking a stand on it (without accepting or refusing it). The ontological thesis claims that the law is a conventional product of

[3] I thank Giulio Itzcovich for pointing this matter out to me.

[4] According to Villa, a concept is the core of, what is common to, all conceptions of the same phenomenon: viz., the assumptions and beliefs presupposed and shared by all conceptions.

human historically contingent decisions and/or behaviours. It seems to me that either Shapiro's definition of legal positivism amounts to (but it is less perspicuous than) the ontological thesis or it remains obscure what a social fact is.

Similarly, also the concept of natural law theory refers to a methodological thesis and to an ontological thesis. The methodological thesis claims that it is not possible to report what the positive law prescribes without taking a stand on it (without accepting or refusing it). The ontological thesis claims that an objective natural law, viz., an objective morality, exists, and the positive law must or ought to comply with it.

The positivist methodological thesis is clearly inconsistent with the natural lawyers' methodological thesis. Is the positivist ontological thesis also inconsistent with the natural lawyers' one? I think that the answer depends on how we specify the natural lawyers' ontological thesis. What happens, according to the natural lawyers, when the positive law is inconsistent with the natural law? Often, the natural law theorists answer that the positive law ceases to be binding. The point is, "binding" in which sense? If by "binding" we mean only "morally binding", then the positivist ontological thesis is not necessarily inconsistent with the natural lawyers' ontological thesis: the positivist ontological thesis claims that the positive law is a contingent human product, and the natural lawyers' ontological thesis claims that the positive law (that contingent human product) is not morally binding if it breaks the natural law. An inconsistency arises only if we think that when the positive law violates the natural one, the former also ceases to be legally binding – viz., it arises only if we opine that the moral binding force ever prevails over the legal one and/or founds it.

In both versions, the natural lawyers' ontological thesis is always a thesis about the justification of law and the legitimacy of authority: from the natural lawyer's point of view, the question "On what does legal authority rest?" means "What justifies the legal authority? What makes it legitimate?" The former version claims that the consistency (or, better, the not inconsistency) with the natural law is what justifies the legal authority. The second version adds that when this justification ceases, the legal binding force also ceases: the existence of the positive law depends on its moral justification. The positivist ontological thesis is opposed to this last version, claiming that the existence of law is independent from its (moral) justification: but the positivist ontological thesis does not answer the question about what justifies the legal authority.[5] From a legal positivist point of view, the question "What does legal authority rest upon?" means rather "What does the law derive from? What determines the existence of legal rules?" The positivist answer is that the law depends on human-contingent, historically determined, behaviours and/or decisions.

The second criticism concerns Shapiro's thesis on the tasks of legal positivism: I cannot understand how the positivist concept of law can resolve all the questions raised by Shapiro. Clearly enough, the ontological thesis cannot.

First, as we have seen, the ontological thesis does not answer the question "On what does legal authority rest?" if it is intended as a question about the justification of law.

Second, it seems to me that no concept of law can answer the question about the individuation of the fundamental rules of a particular legal system for a very trivial

[5] This point is stressed also by Chiassoni (2012), Schiavello (2012), Ferrer Beltrán and Ratti (2012).

reason: the concept of law has to be distinguished from the concept of law in force. The concept of law must also embrace the ancient Roman law, the imaginary law, in sum, all the legal systems that are no longer in force or never were in force. The concept of law may help us to identify the fundamental rules, but it will not establish whether those are the fundamental rules actually in force in a given legal system. Only the concept of law in force can play a role in this task – in fact, as we will see, many positivist theories give a lot of importance to this latter concept, viz., to the effectiveness of law. However, I also think that the role of the concept of law in force should not be overestimated, especially as far as the adjudication theory is concerned. I have never seen a judge who, before applying the Italian civil code, engages in a sociological inquiry on the effectiveness of the Italian Constitution. The judge simply assumes its effectiveness – and it is easy for her to do so because where she lives, the Italian Constitution is in fact effective. It is the only effective set of fundamental rules – viz., the judge employs a very blunt, not theoretically sophisticated, concept of effectiveness, exactly the same that every common person employs.[6]

Finally, I think that no concept of law can offer a solution to the problem about the determination of the content of law (in a single case). Let us examine an example given by Shapiro in chapter one. Shapiro considers the Eighth Amendment to the US Constitution, which establishes that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". The problem is: does this constitutional provision prohibit the death penalty? Shapiro notes that the interpretation of this provision "has given rise to endless discussions about whether it should be read as prohibiting punishments that are actually cruel or only those that were thought to be cruel by those that were thought to be cruel by those who drafted and ratified the provision" (Shapiro 2011, 28). According to Shapiro,

> the crucial question here is: how are we to resolve this disagreement? What determines the content of the Eighth Amendment: plain meaning or original meaning (or perhaps something else)? And it is here that the debate between the legal positivists and natural lawyers becomes relevant. For the only way to figure out whether plain meaning or original intent determines United States constitutional law is to know which facts *ultimately* determine the content of *all* law. So, for example, if positivists are right, the only way to demonstrate that one interpretative methodology or another is correct is to point to the social fact or facts that make it so, perhaps by showing that courts routinely follow one methodology and not the other. On the other hand, if the natural lawyer is right, then the only way to establish one's position is by engaging in moral and political philosophy. Thus, for example, one might argue for one methodology over another by showing that considerations of democratic theory support reading the Constitution in a certain way. (Shapiro 2011, 29)

As seems evident from this quotation from Shapiro, neither legal positivism nor the natural law theory can determine which interpretative argument is correct; they can only justify the argument selected. In other words, the adherence to legal positivism or to natural law does not impose one argument: it only requires one to justify the argument adopted in a certain way. Thus, on one hand, there is no reason why a legal positivist should prefer the original meaning; on the other hand, the only reason why a natural

[6] I owe this idea, as well as the distinction between the concept of law and the concept of law in force, to Jori (2010, 28ff.).

lawyer should prefer the plain meaning is that she thinks that the authors of the constitution were not morally legitimated or were wrong in declaring the natural law. Moreover, the adoption of the plain meaning does not determine a solution to the question whether the death penalty is prohibited by the US Constitution. The question still stands: Is the death penalty actually cruel? In this case, the interpretative argument underdetermines the individuation of the content of law. It is not an unusual case: I claim that this often happens.[7] Thus, even if the concept of law could drive us in choosing between different interpretative criteria, it would not determine the content of law in every single case.

2.4 Solving the Puzzle: From a Legal Positivist Point of View

It is now time to examine the PP in detail. Let us recall its formulation:

Egg: Somebody has power to create legal norms only if an existing norm confers that power.
Chicken: A norm conferring power to create legal norms exists only if somebody with power to do so created it.

Which came first?

As the saying goes, when you see a paradox, look for an ambiguity. In fact, I think that if we apply some analytical distinctions, the paradox vanishes, but a problem remains, there is still something to explain.

We can distinguish at least two meanings of "existing rule", two meanings of "legal rule" and two main meanings of "power to create norms".

A rule exists [1] in a legal system LS if it is created in accordance with all the legal norms of competence of LS. I label this meaning of "existence", validity. The norms of competence are the norms of LS which govern the creation of further norms. This class also includes the power-conferring rules, but it is not exhausted by them.[8]

[7] We can agree that a certain provision has to be interpreted according to its literal meaning and still disagree about what its literal meaning is, or we can agree on the use of the teleological argument and still disagree about what is the purpose of the law, or, again, we can agree in using also moral arguments, but we can disagree on what is moral.

[8] Guastini (1993, 1994a, b, 2001) distinguishes five subclasses of norms of competence: (1) Power-conferring rules *stricto sensu*, i.e., those rules which ascribe to a given subject a rule-creating power, viz., the power of creating a specified source of law, provided with a given *nomen juris* (in such a way that no other subject is entitled to create the same legal source); (2) procedural rules, i.e., those rules which regulate the modes of exercising the conferred power, viz., creating the specified source; (3) rules which circumscribe the scope of the conferred power by determining what subject matters such a power (viz., the specified source of law) is entitled to regulate; (4) rules which reserve a certain subject matter to some specified legal source, in such a way that (a) no other legal source is entitled to regulate that matter and, furthermore, (b) the legal source concerned is not entitled to delegate the regulation of that matter to any other source; and (5) rules about the contents of future lawmaking, viz., rules which command or prohibit (sometimes in a disguised mode) the legislature to enact statutes with specified contents.

A rule exists [2] in a legal system LS if it belongs to LS, if it is generally considered a legal norm, in spite of it not being created in accordance with all the legal norms of competence of LS. I label this meaning of "existence", membership (Guastini 1994a).

Consequently, in a first meaning, a rule is a legal rule [1], that is, a rule of a legal system LS, if it is valid in LS, if it is posed in accordance with *all* the second-order rules which govern both its production and its normative content.

In a second meaning, a rule is a legal rule [2], that is, a rule of a legal system LS, if it belongs to LS, viz., if it exists [2] in LS, if it is member of LS.[9]

The distinction between membership and validity is important because all legal systems contain norms that are not valid (Guastini 1994a, 1996, 2001).

First, in most European continental legal orders governed by rigid constitutions, statutes contrary to the constitution are deemed to be existent, notwithstanding their invalidity, until their inconsistency with the constitution is "declared" by the constitutional court. In fact, in most legal systems, a rule is held to be "existent" – although possibly invalid – provided that the rule-enacting organ complied with some second-order rules, not necessarily all of them.[10] The (mere) membership is not devoid of any legal effects since existent (although invalid) statutes ought to be applied by the courts until their existence is repealed by the constitutional court (in such a way that the repealed rules lose their "membership", i.e. they no longer belong to the legal order).

Second, the fundamental rules of any legal system, such as the Italian Constitution or the US Constitution, are not valid, viz., they are not created according to all the legal norms of competence of LS, or, more exactly, they are created according to no one legal norm of competence of LS, but they belong to the legal systems that they found.

A reformulation of the PP may consist in answering how it is possible that the fundamental norms of every legal system belong to (exist [2] in) that legal system, in spite of them possibly not being valid. This question is the same as "How is it possible that the constitutional assembly could create norms which belong to the legal system LS, without being authorized by other norms belonging to (or being valid in) LS?", viz., "How is it possible that the authors of the fundamental norms had the power to create norms which belong to the legal system LS, without being authorized by other norms belonging to (or being valid in) LS?".

With regard to this problem, it is useful to distinguish between two fundamental meanings of "power to create norms" or, which is the same, "normative power".

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[9] In a third meaning, a rule exists when it is formulated. So in legal-philosophical literature, the creation or production of legal rules is often identified with a speech act, viz., the uttering of a normative (prescriptive) sentence (see, e.g., von Wright 1963). Such an act, in its turn, is often called "promulgation" (see, e.g., Bulygin 1982). However, the mere factual existence, as Guastini labels it (see Guastini 1994a, 1996), is not a sufficient condition for the existence of a legal rule. So, for example, we can now write the Constitution of Banana State, establishing that it will be binding in the territory with spatial borders from Bocconi University to via Festa del Perdono. But our Constitution of Banana State will not be a legal constitution; it will not be a set of legal norms.

[10] As Guastini often remarks, the necessary and sufficient conditions of existence are not easy to state. In principle, compliance with power-conferring rules seems to be a necessary condition of existence, but, as far as procedural rules are concerned, existence is an open-textured concept (see Guastini 1994a, 2001).

In a first sense, someone has the power to create norms when, as a matter of fact, she creates norms or legal norms. I label this meaning of "power to create norms", normative power *de facto*. Normative power *de facto* is "normative" in the sense that it produces norms, but it is not "normative" in the sense that it is conferred by norms. It is a power *de facto* because its existence is a matter of facts: we can ascertain the existence of a normative power *de facto* only *a posteriori*, by examining if, as a matter of fact, some norms have been created.

In a second sense, someone has the power to create norms if she is authorized by other norms to create norms. I label this meaning of "power to create norms", authorized normative power. Obviously, we can establish whether somebody has an authorized normative power through an *a priori* analysis. However, further distinctions are required.

Someone has an authorized normative power [1] in a legal system LS if that power is conferred by a norm which belongs to (exists [2] in) LS. So, the legislator has an authorized normative power [1] to create legal norms because the constitutional rules confer that power to her.

Someone has an authorized normative power [2] in a legal system LS if that power is conferred by a norm which is valid in LS. Thus, in the Italian legal system, people have an authorized normative power [2] to create contractual norms because some (valid) statutes confer that power to them.

On the other hand, someone has a normative power *de facto* [1] in a legal system LS if she creates norms which belong to (exist [2] in) LS.

Finally, someone has a normative power *de facto* [2] in a legal system LS if she creates norms which are valid in LS. Since a norm is valid in LS if it is created in accordance with all the legal norms of competence of LS, someone has a factual normative power [2] only if she has an authorized normative power [1] or [2].

We can now specify the PP according to our previous distinctions. We may see, for example, that the following specifications of the PP are correct but not paradoxical:

Egg: Somebody has an authorized normative power [1] to create legal norms (viz., norms which belong to LS or which are valid in LS) only if an existing norm confers that power.
Chicken: A norm conferring an authorized normative power [1] to create legal norms exists only if somebody with the factual normative power [1] to do so created it.
Egg: Somebody has an authorized normative power [2] to create legal norms (viz., norms which belong to LS or which are valid in LS) only if a valid norm confers that power.
Chicken: A (valid) norm conferring an authorized normative power [2] to create legal norms exists only if somebody with either the authorized normative power [1] or the authorized normative power [2] to do so created it.

Instead, the following versions of PP are paradoxical but not correct:

Egg: Somebody has a normative power *de facto* [1] to create norms only if an existing norm confers that power.
Chicken: A norm conferring a normative power *de facto* [1] to create legal norms exists only if somebody with the normative power *de facto* [1] to do so created it.
Viz. Somebody has a normative power *de facto* [1] only if she has an authorized normative power [1].

Egg: Somebody has a normative power *de facto* [2] to create norms only if an existing norm confers that power.
Chicken: A norm conferring a normative power *de facto* [2] to create legal norms exists only if somebody with the normative power *de facto* [2] to do so created it.
Viz. Somebody has a normative power *de facto* [2] only if he has an authorized normative power [2].[11]

The above distinctions solve the puzzle, but a problem still remains. We still have to answer the question "How is it possible that the authors of the fundamental norms had the power to create norms which belong to the legal system LS, without being authorized by other norms belonging to (or being valid in) LS?"

The positivist answer is simply that the authors of the fundamental norms (e.g. the constituent assembly) had a normative power *de facto* [1], and having a normative power *de facto* [1] is a matter of fact. Somebody has a normative power *de facto* [1] if, as a matter of fact, she creates norms which are generally considered law (in a given spatial area) and, therefore, generally followed, viz., if, as a matter of fact, her norms are effective because they are considered to be the law in force (in a given territory).[12] That is, the law is the contingent product of human decisions and behaviours.[13] This is the solution of Austin, Hart and even Kelsen.

2.5 Austin's Solution, Hart's Solution and Shapiro's Criticisms

In the previous section, I have argued that the core of every legal positivist solution to the PP consists in claiming that the authors of the fundamental norms of the legal system have not been authorized by other legal norms, viz., they did not have an authorized normative power. They were able to create norms which belong to the legal system and which found the legal system because, as a matter of fact, the norms they enacted were considered to be law and, therefore, were followed. In this section, I will try to show that this is also the core of Hart's solution and, moreover, that Hart reaches that solution within the framework of a theory which, with the appropriate adjustments, satisfactorily answers all Shapiro's

[11] Version (vi) claims that somebody has the power to create norms which are valid in a given legal system if, and only if, this power is conferred by somebody who has the power to create norms which are valid in that legal system, viz., if, and only if, that power is conferred by a valid norm. This version is false, if we admit that the constitution confers on the legislator the power to create valid norms, albeit the constitution itself is not a set of valid norms.

[12] Note that, from a legal positivist point of view, the constitutional assembly has not the *right* to enact constitutional norms, if we are referring to a (legal) right conferred by other legal norms. The constitutional assembly could have the *right* to enact constitutional norms, if we mean that it could be morally legitimate, that its norms could be (considered) morally right. But, as we have seen, legal positivism does not engage in questions about the legitimacy of law.

[13] At this point, we could take a further step and ask ourselves why these facts were obtained. This is a very interesting problem; however, as Kelsen claims, solving it is the task of sociology and psychology, not of philosophy of law.

questions. Before engaging in this analysis (Sect. 2.5.2), I will also examine Shapiro's criticisms to Austin's solution to the PP (Sect. 2.5.1).

2.5.1 Austin's Theory

According to Shapiro, Austin rejects the egg principle and maintains that the power to create legal norms need not always be conferred by a norm. Because sovereignty rests on habits of obedience, there is no need to postulate a further authority that created a rule conferring sovereignty. In fact, according to Austin, the sovereign is a person (or a determinate aggregate) who is habitually obeyed and does not obey anyone else. Thus, Austin's solution to the PP is a legal positivist one. Austin's answer to the question "How is possible that the authors of the fundamental norms had the power to create norms which belong to the legal system LS, without being authorized by other norms belonging to (or being valid in) LS?" is that it is a matter of fact. The sovereign was able to create norms that belong to (and found) the legal system because, as a matter of fact, the citizens have been obeying his norms. The habits of obedience are facts.

Following Hart, Shapiro claims that Austin's solution cannot explain three essential features of every legal system, that is, continuity, persistence and limitability (Hart 1961, 50ff.). Moreover, Shapiro thinks that Austin's attempt to comply with Hume's law is not successful. Austin tried to avoid deriving an "ought" from an "is" by treating legal concepts, and the statements and judgements in which they are embedded, as descriptive. Because claims of obligation and right are descriptive, not normative, they may be derived from premises about habits and likelihoods of obedience that are purely descriptive. In other words, Shapiro argues that, according to Austin, the following reasoning is merely descriptive (in Shapiro's terms, it is a DIDO pattern):

(i) If the sovereign has enacted the primary norm "Everybody must do *p*" and the secondary norm "Who doesn't do *p* must be punished with the sanction *S*", then
(ii) Everybody must (has the obligation to) do *p*

Both the premise (i) and the conclusion (ii) are descriptive and, according to Austin, are identical to:

(i) If the one who is habitually obeyed and who does not obey anyone else expresses his will that everybody must do *p* and also expresses his will that who does not do *p* must be punished with the sanction *S*, then
(ii) It is probable that, if someone will not do *p*, then she will be punished with the sanction *S*

However, according to Shapiro, it is

> hard to see how statements that deploy purely descriptive concepts could be used in their normal way, namely in the service of justification and evaluation. When we tell people that they are obligated to perform some action, we are trying to state a *reason* for them to do it. Similarly, when we criticize people for violating their obligation, we are presupposing that

> they *ought* to have acted differently. We say that they have enacted "wrongly" and are "guilty" of an "offense". If any concepts are normative, these are (Shapiro 2011, 77–8)

Actually, it seems to me that Austin's theory can perfectly explain how the "obligation statements" (the statements that refer to an obligation or to an ought), albeit being purely descriptive, can be used in the service of justification and evaluation. If the sovereign has enacted the primary norm "Everybody must do *p*" and the secondary norm "Who doesn't do *p* must be punished with the sanction *S*", this is a good reason for doing *p*. In other words, the descriptive proposition "If you will not do *p*, you will probably be punished" founds the technical rule (the directive, in von Wright's terms) "If you don't want to be probably punished, you must do *p*". The reason for not doing *p* is that one does not want to be probably punished. The desire not to be punished is a very good reason for doing several things. In the same way, Austin's descriptive statements can be employed for evaluation: we can criticize someone because he did something, for which he will be punished. However, it is clear that, according to Shapiro, these statements and these concepts sometimes have a different meaning: sometimes, in stating that somebody ought to do *p*, or that not doing *p* is wrong, we want to express norms, prescriptive judgements.

Finally, I think that Austin's theory has another problem, which Shapiro overlooks. Austin seems to think that only the fear of sanctions motivates obedience to the law and this thesis faces the risk of an infinite regress of the sanction norms.[14] According to Austin, citizens comply with the primary norms because they think it is probable that otherwise the judges will apply the secondary norms and will punish them – but why do the judges comply with the secondary norms? It would be necessary to have other norms (third-grade norms) that prescribe a sanction for the violation of secondary norms and other norms again (fourth-grade norms) which prescribe a sanction for the violation of third-grade norms, and so on, *ad infinitum*.

2.5.2 Hart's Theory (Revisited)

According to Shapiro, Hart's strategy to solve the PP consists, instead, in rejecting the chicken principle: Hart claims that, while authority must be conferred by norms, norms can be created by those lacking the authority to do so. In fact, according to Hart,

> [t]he assertion that [the rule of recognition] exists can only be an external statement of fact. For whereas a subordinate rule of the system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practices of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact. (Hart 1961, 110)

Note that in Hart's theory too, the existence of a power to create fundamental norms is a matter of fact, viz., it is a normative power *de facto* [1]. The rule of recognition

[14] See Olivecrona (1975), who, however, moves the same criticism not against Austin, but against Bentham.

does not confer the power to create fundamental norms: the existence of the rule of recognition presupposes that the fundamental norms are still effective and still accepted. In fact, the rule of recognition is a customary rule,[15] which, like every customary rule, requires a general, repeated behaviour along with the so-called *opinio juris ac necessitatis*. So, for example, in modern constitutional states, the rule of recognition is the one which commands judges to apply the criteria of validity established by the constitution, but the rule of recognition itself does not confer to the constitutional assembly, an authorized power to create constitutional norms. The existence of the rule of recognition presupposes that the constitutional norms are effective (that a regular, general behaviour complying with them still exists) and are believed to be obligatory (still accepted). The effectiveness of the legal system, for example, the fact that in Italy the judges follow the Italian Constitution enacted on 1948, is, according to Hart's theory, both a fact and the object of a legal duty. The fact that a general, regular behaviour exists along with the belief that this behaviour is legal generates the legal obligation to act so, to behave in that way. This device may appear obscure, but it is the same that founds every customary norm: a general, regular conduct along with the general belief that it is obligatory, or, as Hart writes, a "regular conduct with a distinctive attitude to that conduct as a standard" (Hart 1961, 85) generates the rule according to which that conduct must be the case.

Hart's solution is clearly more complex than the one which founds the fundamental rules on the blunt effectiveness alone (such as Austin's solution), but it has two main advantages.

First, imagine we were to write the Constitution of Banana State and imagine that our constitution is identical to the Italian Constitution: in that case, the Banana State Constitution would be effective. But, in spite of its effectiveness, we would not say that the Constitution of Banana State is a law in force, a set of fundamental norms belonging to (and founding) a legal system. The reason is that the Banana State constitutional norms would be effective but not followed: nobody would do what they command just because it is commanded by them. In Hart's terms, they would not be accepted. *Pace* Kelsen, effectiveness as mere correspondence between the behaviour prescribed by a norm and the citizens' effective behaviour is not a sufficient condition for the existence of a legal system, viz., for defining the concept of law in force.

A second, correlated, advantage of Hart's theory is that it can explain (without violating Hume's law) the fact that judges must apply the fundamental norms. As we said, in Austin's theory, the duty of judges to apply norms cannot be explained unless there are other norms which punish the judges for not applying the secondary norms, other norms again which punish the misapplication of these latter norms and so on. In Hart's theory, instead, judges must apply the criteria of validity established by the rule of recognition, because it is exactly a rule – a rule that derives from judges' behaviour and acceptance (there is a circle but not a vicious one).

[15] Cf. Hart (1961), *Postscript*, 256: "the rule of recognition […] is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of courts".

Shapiro's criticism of Hart's solution consists in arguing that social rules can neither be reduced to social practices nor are they necessarily generated by social practices. In fact, Shapiro maintains that, according to Hart,

> groups are capable of creating social rules simply by engaging in a social practice. The reason that groups can accomplish such a feat is that, for Hart, social rules *are* social practices. Thus, the rule of recognition is generated through the convergent and critical behaviour of official identification of certain rules because the rule of recognition is nothing but this practice among officials. (Shapiro 2011, 80)

But Shapiro objects that social rules cannot be reduced to social practices because rules and practices belong to different metaphysical categories. Moreover, Shapiro claims that even the weaker thesis, according to which social rules are generated by social practices, does not work: many of our social practices fail to generate social rules. Shapiro shows this point through the smoking example:

> Among the professional class in the United States […] it is now generally accepted that people ought not to smoke even when no one else is affected. Smokers are routinely criticized by non-smokers. Smoking, they say, is "stupid", a "dirty habit", and sets a "bad example". Moreover, these non-smokers are not criticized by other non-smokers for engaging in such criticism. Yet there is no social rule against smoking alone or with other smokers. (Shapiro 2011, 104)

It seems to me that these criticisms to Hart are not convincing.

First of all, I am not sure that Hart identifies social rules and social practices. As Shapiro writes, "social rules are brought to existence simply by virtue of being accepted and practiced by members of a group" (Shapiro 2011, 95). The acceptance is important as well as the practice, and, if a fundamental metaphysical difference exists between practices and rules, I am not so sure that such a fundamental one also exists between rules and acceptance attitudes.

However, the fundamental point is that, as we can infer also from Shapiro's quotation, the regular conduct and the attitude consisting in accepting it as standard are not social rules but conditions of existence of social rules. To quote Hart, "If a social rule is to *exist* some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole" (Hart 1961, 56, emphasis added), and "[t]here is involved in the *existence* of any social rules a combination of regular conduct with a distinctive attitude to that conduct as a standard" (Hart 1961, 56, emphasis added). Thus, it seems to me that Hart adopts the weak thesis: the one which claims that social rules are generated by social practices. As we have seen, Shapiro objects that not every social practice, accepted as a general standard, produces a social rule. Is it correct? Doesn't a social rule against smoking really exist among the professional class in United States? Of course, a legal rule against smoking (in a private home or in the open air) does not exist, but what about other types of social rules? Certainly, we do not say that among the professional class in United States, there is an obligation to not smoke, but according to Hart,

> [i]t is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation […] Rules are conceived and spoken of as imposing obligation when the general demand of conformity is insistent and the social pressure brought to bear upon those who deviate is great. (Hart 1961, 86)

In sum, we can think that, among the professional class in the United States, a social rule against smoking (a rule belonging to the morality of that social group) exists but that the social pressure and the demand of conformity are not (even) so general and great for that rule to be conceived of in terms of obligation. It is a matter of degree: a clear-cut answer is not possible. In other words, here we are wondering whether a customary norm against smoking exists. The existence of customary norms is a very complex question – so complex that, in order to solve it, in the primitive community imagined by Hart, the rule of recognition had to be introduced.

Finally, it seems to me that, in order to refute Hart's solution, proving that some social practices do not produce social rules is neither necessary nor sufficient: rather one has to prove that the concordant practice of the courts, officials and private persons in identifying the law by reference to certain criteria cannot produce a social rule. That is, one has to prove that the rule of recognition is not brought to existence simply by virtue of being accepted and practised by members of a group.

Shapiro moves another objection to Hart: he thinks that Hart's solution to Hume's challenge is seriously undetermined. Let us see why.

Prima facie, Hart's concept of internal point of view allows us to derive a normative judgement from a mere fact, viz., the existence of the rule of recognition. As Shapiro points out,

> One can take an internal point of view toward the practice and treat the pattern of conduct as a standard for the guidance and evaluation of conducts. And once one forms a normative judgement concerning the propriety of following the rule of recognition, one can derive further normative judgement about legal validity, rights and obligations. (Shapiro 2011, 100).

It is these judgements that Hart calls "internal statements". Let us consider the two following syllogisms, HS1 (Hart's syllogism 1) and HS2 (Hart's syllogism 2):

HS1

(i) If the rule of recognition establishes that judges must apply the rules which satisfy the criteria of validity C_1, C_2, C_3, etc.
(ii) If the rule "Everybody must do *p*" satisfies the criteria of validity C_1, C_2, C_3, etc.
(iii) If judges accept the rule of recognition (viz., if they engage with the existence of the rule of recognition "practically" by committing themselves to treating it as a general standard of conduct),[16] then
(iv) Judges must apply the rule "Everybody must do *p*"

HS2

(i) If the rule "Everybody must do *p*'" exists
(ii) If I accept the rule "Everybody must do *p*", then
(iii) Everybody (including me) must do *p*

[16] Acceptance plays a dual role in Hart's theory: on the one hand, it is a condition for the existence of the rule of recognition, and, on the other hand, it is a condition to infer normative judgements from the existence of the rule of recognition, without violating Hume's law.

HS1 is a judicial syllogism: its conclusion, which derives from accepting the rule of recognition, is not that "Everybody must do *p*" but that judges (included me, if I am a judge) must apply the rule "Everybody must do *p*". HS2, instead, is a common-man syllogism: its conclusion derives from accepting not the rule of recognition but the primary rule "Everybody must do *p*". These two syllogisms are valid: thus, it seems that, albeit the existence of a rule is a mere fact, Hart does not break Hume's law. However, according to Shapiro, legal judgements can be made without taking the internal point of view: even when people do not accept the law from the internal point of view, it is always possible for them to figure out the content of the law and to describe legal rules using the familiar normative terminology:

> The bad man does not accept these norms [the secondary rules of the system] but can nonetheless truthfully redescribe the law in terms of obligation, rights and legal validity. (Shapiro 2011, 112)

To be honest, this objection is problematic: I am not yet sure whether I have understood why the redescribability of law (as Shapiro labels it) – viz., the fact that a bad man can redescribe the law using normative terminology, even though he takes the external point of view – seriously undermines Hart's response to Hume's challenge.

First, according to Hart, the internal point of view has typical linguistic expressions:

> [the] critical reflective attitude to certain patterns of behaviour as a common standard […] should display itself in criticism (including self-criticisms), demands for conformity and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must", and "should", "right" and "wrong". (Hart 1961, 57)

If one accepts a norm as a general standard of conduct, then one may state normative judgements, using the typical normative terminology of "ought", "must", etc. However, this does not imply (from a logical point of view) that if one states normative judgements, viz., if one uses the typical normative terminology, then one accepts the norms. This last inference is an instance of the so-called *modus ponens* fallacy. One can publicly say that everyone ought to pay taxes, even if one doesn't pay taxes and even if one thinks that nobody ought to pay taxes. Hypocrisy is always possible.

Second, we can doubt that the bad man is really using normative sentences in a normative way. Sentences like "Everybody ought to do *p*", "I have the obligation to do so-and-so", "I have the right to S", etc. are ambiguous in that they could express both (a) norms and (b) propositions which describe the fact that, in a given legal system, there exist or are valid norms according to which "Everybody ought to do *p*", "I have the obligation to do so-and-so", "I have the right to S", etc. So, Shapiro thinks that a bad man's judgements express propositions about a given legal system, but nothing in Hart's theory prevents him from adopting the same solution.

Third, even if a bad man can also use normative sentences in a normative way, this will not show that Hart's solution is incorrect, viz., that syllogisms HS1 and HS2 are invalid. It only shows that the same conclusions can derive from different premises, viz., that the connection between the premises and the conclusion is not a material biconditional.

Actually, *contra* Shapiro, I think that a bad man can also state normative sentences in a normative way and that this fact points out a serious problem in Hart's theory – although not a problem which undermines Hart's response to Hume's challenge. The problem concerns the correlated concepts of internal point of view and external point of view.

On one hand, Hart characterizes the concept of external point of view both as the point of view of bad men, who "reject its rules [i.e., the rules of the legal system] and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation" (Hart 1961, 90) and as the point of view of an external observer who notes regularities of behaviour or describes a given legal system. But, it is clear that the bad man does not take an external point of view in the latter sense. The bad man is a player, although one who cheats (or tries to cheat) – but if he is caught, he will go to gaol, and going to gaol is a move in the game.

On the other hand, according to Hart, the reasons for accepting a rule may be very different: the participants may accept legal rules "simply out of deference to tradition, or the wish to identify with others or in the belief that society knows best what is to the advantage of individuals" (Hart 1961, 257) or the belief in their moral justification, or, finally, any other prudential reason. But if one may accept a rule for that particular prudential reason which is the fear of sanction, then the distinction between acceptance and obedience vanishes, and we have to recognize that even the bad man may adopt an internal point of view.[17] However, this conclusion could seem untenable because it could seem that assuming an internal point of view towards a legal norm, like "Everybody must do *p*", entails the norm "I (you, everybody) must do *p all things considered*". If that were correct, two unpleasant consequences would follow.

First, as Shapiro points out, it would become unexplainable how the bad man can redescribe the law using normative terminology (in a normative way, viz., to express norms and not propositions about norms).

Second, as Schiavello notes, it would become difficult (if not impossible) to distinguish the legal duty from the moral duty and to found the autonomy of the legal ought (Schiavello 2012). In fact, our concept of moral is such that we cannot say "I (you, everybody) must do *p all things considered*, even if doing *p* is morally wrong".

It seems to me that, in order to solve these problems, we have to rethink the correlated concepts of internal point of view and external point of view. More precisely, we have to admit that even the bad man can assume an internal point of view because assuming an internal point of view means nothing more than using a norm as a standard of conduct, evaluation and justification (for whatever reason, even for the fear of sanction). Assuming an internal point of view towards a legal norm, like "Everybody must do *p*", does not entail, and cannot justify, the norm "I (you, everybody) must do *p all things considered*". It only entails, and it can only justify, the norm "I (you, everybody) *legally* must do *p*". For example, as a

[17] For an analysis of the different concepts covered by the terms "acceptance" and "internal point of view", see, e.g., Martin (1987), 20ff.

lawyer, I may say to my client that she must stay in prison waiting for due legal process and my judgement can be really normative – even if I think that morally she ought not to, that the preventive imprisonment is morally wrong. In other words, assuming an internal point of view (or, which is the same, accepting a norm) just means using it as a major premise of a normative syllogism (no matter why). Similarly, also, the external point of view has to be redefined. On this point, Chiassoni's comment seems to me very useful (Chiassoni 2012). According to Chiassoni, before the law, two basic games are available: the player's and the observer's. The external point of view is just the observer's point of view: to take an external point of view means to describe the existence of norms, legal systems, obligations, etc. I would like to note that the bad man, just like anybody else, takes necessarily neither an external point of view nor an internal point of view: he may take both on different occasions (just like we all may do). When we are subject to a legal order, we may also observe it from an external point of view, but we are always compelled to play it.

However, some authors think that at least some officials have to accept the rule of recognition for moral reasons. I cannot see why this is so: it seems to me that, to avoid the infinite regress before mentioned, it is necessary that the judges (or some of them) apply the law not because they are afraid of sanctions, but it is not necessary for them to apply the law for moral reasons.

First, some authors think that if nobody accepts for moral reasons, then there will be no difference between the law and a gunman's order. However, it seems to me that the gunman's mental experiment is vicious by a tacit presupposition: we always think of the gunman's order as a morally wrong order, and we think that our (democratic, constitutional) law is something different. Why do we not try to think of the gunman's order as a morally right order, or wonder what is the difference, for example, between the commands of Jesus Christ and the law of the Third Reich?

Second, some observations made in this chapter could also seem to justify the necessity of a moral acceptance. We said that, from a legal positivist point of view, legal norms exist only if we believe in their existence, or, better, legal norms cease to be when we, all together, stop believing in them – instead, when a sufficient part of us stops believing in legal norms, a civil war happens. Thus, if no official accepts the rule of recognition for moral reasons, then it is unexplainable why the officials all together do not stop believing in the law (viz., stop applying it),[18] thus breaking up the law. The problem is how can the judges all together stop, at the same time, applying the law? It would require an authority to coordinate all the judges. In a sense, there is no way of escape from law.

Finally, other authors, like Shapiro himself, argue that

> [i]n legal contexts, we require people to pay their taxes, join the army, pass difficult licensing exams before practicing a profession, and testify in a criminal trial under the threat of jail or heavy fines. Only moral concepts have the heft to make such serious claims. (Shapiro 2011, 114)

[18] Actually, I think that if the officials only stop applying the law, it will not cease to be, but a civil war will begin.

This observation is correct in the sense that the law is so important that it ought to be morally justified: we (morally) ought to obey the law, only if we think that it is morally justified, but this doesn't imply either that it is necessarily so or that it is so.

As a final remark, I think that the considerations above also show why Dworkin's objection, based on the vegetarian example, is not correct. Dworkin rightly claims that the existence of a (moral) duty is independent from the existence of a social rule: thus, if I am the only vegetarian in the world, I may think that eating meat is wrong, that there is a duty to not eat meat, even if nobody else thinks so, even if there does not exist a social rule which prohibits eating meat. However, we may admit that there can be obligations without social rules, but not that there can be the obligation to apply some criteria of validity without a social rule of recognition. More exactly, I, Francesca Poggi, lecturer in philosophy of law, might think that I must recognize as valid legal rules only those which satisfy my Marxist morality: the problem is that, in doing so, I will probably be imprisoned or, at best, I will be considered a madwoman who thinks herself the judge of an imaginary legal system.

2.6 Shapiro's Solution to the Puzzle

Shapiro's planning theory

> claims that a body has legal authority in a particular legal system when two conditions are met: (1) the system's master plan authorizes that body to plan for others, and (2) the members of the community normally heed all those are so authorized. Legal authority will be possible, therefore, just in case it is possible for both of these conditions to obtain. (Shapiro 2011, 180)

Regarding the first condition, Shapiro maintains that legal officials

> have the power to adopt the shared plan that sets out these fundamental rules [viz. the master plan of a particular legal system] by virtue of the norms of instrumental rationality. Since these norms that confer the rational power to plan are not themselves plans, they have not been created by any other authority. They exist simply in virtue of being rationally valid principles. (Shapiro 2011, 181)

With regard to the second condition, Shapiro affirms that

> [m]embers of the group might all accept a general policy to obey the law or deem those in authority to be morally legitimate. In such case, the adoption of plans by legal officials will induce a rational requirement for those individuals to comply. Even when members of the group are not predisposed to conform to the law, the commitment of officials to carry out parts of the shared plan that direct punishment in case of disobedience may be sufficient to motivate ordinary citizens to obey. (Shapiro 2011, 181)

I will spend only few words on Shapiro's solution to PP because it has already been examined by other discussants, especially by Pierluigi Chiassoni.

Contra Chiassoni, I think that Shapiro's solution is a legal positivist one: also according to the planning theory, the law is the contingent product of human behaviours and decisions. As we have seen before, the problem posed by the PP is "How is it possible that the fundamental norms of every legal system belong to that legal system, in spite of them not being valid?" or, which is the same, "How is it possible that the

authors of the fundamental norms could create norms which belong to the legal system LS, without being authorized by other norms belonging to (or being valid in) LS?". In Shapiro's terms, these questions are equivalent to "What authorized the authors of the master plan to adopt it?" or, better, "How is it possible that the master plan could create norms which belong to the legal system LS, without being authorized by other norms belonging to (or being valid in) LS?". Shapiro's answer is: it is a matter of facts. "Legal system are possible […] because certain states of affairs are achievable" (Shapiro 2011, 181).[19]

Actually, one could object that, according to Shapiro, the master plan is authorized by the norms of instrumental rationality – which, however, do not authorize the master plan authors but the officials, who do not write the master plan but simply adopt it. But, it seems to me that the norms of instrumental rationality are not *stricto sensu* norms: they are not guides for actions, they do not motivate behaviours. The norms of instrumental rationality are likely technical norms, or, better, they are definitions of what counts as rational. The fact that doing something is rational does not imply that I must do it, unless I want to be rational.

I think that a problem of Shapiro's theory is that it cannot explain the judicial legal duty to apply the master plan. The officials may adopt the master plan, but they have not the duty to adopt it. Actually, the officials have not the *legal* duty to apply the master plan, even if they have adopted it. As Shapiro writes,

> an official who accepts her position within an authority structure will be *rationally* criticizable if she disobeys her superior, fails to flesh it out orders so that she may take the means necessary to satisfy their demands, adopts plans which are inconsistent with these orders, or reconsiders them without a compelling reason to do so. (Shapiro 2011, 183, emphasis added)

But to be rationally criticizable does not mean to be legally criticizable: one is rationally criticizable if she violates the rules of rationality which, on one hand, are not legal rules and, on the other hand, are not *stricto sensu* norms.

Note that in Hart's theory (as reconstructed in Sect. 2.5.2), the single judge's acceptance is not a necessary condition for the proposition stating that the judge in question has the legal duty to do p – for example, to apply a criterion of validity – to be held true. If the rule of recognition exists, if the other judges accept it, then it is true that the duty to do what it requires exists. Instead, it seems to me that in Shapiro's account, the single judge's adoption of the master plan, say, judge John's adoption, is a necessary condition both for the proposition stating that the judge John has the rational duty to do p and for being justified the normative conclusion according to which "I, the judge John, rationally must do p"', to be held true. But, since rational duties are not normative legal duties, this does not explain the judicial legal duty to apply the master plan.

Moreover, Shapiro's thesis does not explain the normative legal judgements, that is, it does not explain the meaning of statements like "every judge must respect the Italian Constitution", "I legally ought to do p" and "Doing q is legally wrong"

[19] Moreover, Shapiro does not inquire into the moral legitimacy of law, specifying that "there is no reason to think that the master plans of every possible legal system will be morally legitimate" (Shapiro 2011, 184).

intended as genuine normative judgements. According to Shapiro, all the previous judgements are descriptive and mean "According to the legal system LS's point of view every judge *morally* must respect the Italian Constitution, I morally ought to do *p*, doing *q* is morally wrong". Those judgements are normative only if the speaker shares the moral theory of the legal system: only if they are moral judgements. It seems to me that Shapiro is liable to the same criticisms that he addresses to Austin: Shapiro's thesis is not able to render legal thought intelligible. Shapiro rejects the autonomy of legal reasoning and denies the existence of a plurality of normative systems. Normativity appears to be a moral matter only.

References

Barberis, M. 1990. *Il diritto come discorso e come comportamento*. Torino: Giappichelli.
Bobbio, N. 1965. *Giusnaturalismo e giuspositivismo giuridico*. Milano: edizioni di Comunità.
Bobbio, N. 1996. *Il positivismo giuridico*. Torino: Giappichelli.
Bulygin, E. 1982. Time and validity. In *Deontic logic, computational linguistics, and legal information systems*, ed. A.A. Martino, 65–81. Amsterdam: North-Holland Publishing Co.
Chiassoni, P. 2012. Ruling platitudes, old metaphysics, and a few misunderstandings about legal positivism. On Scott Shapiro's *Legality*. In *The planning theory of law*, ed. D. Canale and G. Tuzet, 153–168. Dordrecht: Springer.
Ferrer Beltrán, J., and G.B. Ratti. 2012. Theoretical disagreements. A restatement of legal positivism. In *The planning theory of law*, ed. D. Canale and G. Tuzet, 169–186. Dordrecht: Springer.
Guastini, R. 1993. *Le fonti del diritto e l'interpretazione*. Milano: Giuffré.
Guastini, R. 1994a. Analysing legislation (and some related concepts). *Annali Giurisprudenza Genova* 25: 205–229.
Guastini, R. 1994b. Invalidity. *Ratio Juris* 7: 212–226.
Guastini, R. 1996. *Distinguendo*. Torino: Giappichelli.
Guastini, R. 2001. *Il diritto come linguaggio*. Torino: Giappichelli.
Hart, H.L.A. 1961. *The concept of law*. Oxford: Claredon Press.
Jori, M. 2010. *Del diritto inesistente*. Pisa: ETS.
Martin, M. 1987. *The legal philosophy of H.L.A. Hart*. Philadelphia: Temple University Press.
Olivecrona, K. 1975. The will of the sovereign: Some reflections on Bentham's concept of 'a law'. *American Journal of Jurisprudence* 20: 95–110; reprinted in: Parekh, B., ed. 1993. *Jeremy Bentham: Critical assessments*, vol. III, 9–27. London/New York: Routledge.
Schiavello, A. 2012. Rule of recognition, convention and obligation. What Shapiro can still learn from Hart's mistakes. In *The planning theory of law*, ed. D. Canale and G. Tuzet, 65–87. Dordrecht: Springer.
Shapiro, S. 2011. *Legality*. Cambridge: The Belknap Press of Harvard University Press.
Villa, V. 2000. Alcune chiarificazioni concettuali sulla nozione di *inclusive positivism*. *Analisi e diritto* 2000: 255–288.
Villa, V. 2004. *Il positivismo giuridico: metodi, teorie e giudizi di valore*. Torino: Giappichelli.
von Wright, G.H. 1963. *Norm and action. A logical enquiry*. London: Routledge & Kegan Paul.

Chapter 3
What Is Wrong with Legal Realism?

Giovanni Tuzet

3.1 Realism Again

Scott Shapiro's book *Legality* engages in a difficult and exciting philosophical task: giving an account of what law is and of why it is worth having. His "planning theory of law" addresses the first issue in terms of the so-called social facts thesis and the second in terms of the "moral aim" thesis: law is determined by social facts alone, but it has a moral point, for the aim of legal activity is to remedy some moral deficiencies. Twentieth-century jurisprudential schools divided on such topics: natural law theory was mainly concerned with the value of law and its moral dimension, whereas legal positivism and legal realism were mainly interested in its factual features. Shapiro tries to give a unified picture of it, even if the realm of jurisprudence remains (and will probably remain) a battlefield where different philosophical armies fight for definite portions of territory.

I will make reference to realism in particular. Recent writings in legal and political philosophy recover the methods and ideas of twentieth-century legal realism.[1] After Richard Posner's revival of realism in the framework of the economic analysis of law[2] and the critical legal studies' postmodern reading of the realists in the 1980s and 1990s,[3] today Brian Leiter's work, in particular, calls our attention again to the realists' methodology and insights.[4]

[1] Some significant examples of this trend are Leiter (2007), Posner (2008), Miles and Sunstein (2008), Nourse and Shaffer (2009).

[2] See Posner (1981) and (1990). Cf. Chiassoni (1999).

[3] See, e.g., Minda (1995).

[4] See Leiter (2007). On Leiter's approach, see, e.g., Priel (2008), Spaak (2008), and Green (2009).

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Shapiro does not follow this strand. While Leiter, taking inspiration from the realists, engages in the project of naturalizing jurisprudence, Shapiro sticks to the method of conceptual analysis. Legal realism is not even mentioned by Shapiro in the first part of the book, dealing with jurisprudence, the concept of law, legal facts, Austin's sanction theory, and Hart's rule of recognition.[5] But realism played an important role in the twentieth-century discussion of such jurisprudential issues. What is wrong with it? I think the answer agreed on by Shapiro is this: it leaves out of the picture the *internal point of view*. This is the main reason for which it has been considered a cracked theory of law. Apparently, it deals with the law only from the external point of view, without taking into consideration the reasons why citizens and officials take the law as a guide, accept its norms, follow them, criticize those who do not comply with them, etc. One may add that realism leaves out the internal point of view because it is committed to the insane project of reducing norms to facts, explaining normativity away. The law's normativity and the internal point of view are of no interest once they are taken to be mere epiphenomena of social and psychological facts, but this could not be a correct analysis of our concept of law. Hart developed such a critique of realism and Shapiro totally agrees with it, if I am right.[6]

I think that Hart's critique was basically sound. I also think that one of Shapiro's attempts in this book is precisely to give an account of what the realists apparently missed: why we use the law as a guide, why we care and should care about it, and why it is so important for our lives as individuals and social groups. However, I think that the Hartian picture of legal realism was very simplified, not very charitable and misleading in some respects, for it neglected many features of the realists' agenda. If this is correct, it is worth having a closer look at these issues, not only for historical but also for theoretical reasons, in order to better understand Shapiro's project and to assess his views.

3.2 Sanction Theories and the Bad Man

In fact, realism is not explicitly mentioned in the first part of Shapiro's book but implicitly referred to. Discussing the legal philosopher's task of assembling a preliminary list of truisms about law, Shapiro takes into consideration what is usually taken to be the realists' account: the law is whatever courts say it is.

> Suppose … that someone proposes the following account of the nature of law: The law is whatever courts say it is. Although this is a popular theory among many politicians and law

[5] Realism deserves consideration in chap. 9 of Shapiro (2011), for its critique of formalism in adjudication.

[6] Cf. Hart (1961, chaps. 1 and 7). "Hart famously ridiculed the legal realists by pointing out the absurdity of their theory of rules: if legal rules are merely predictions of judicial behavior, then how is a court to decide any legal question – is a court supposed to use the rules to predict its own behavior? Legal rules enable people to predict judicial behavior because legal rules guide judicial behavior, not vice versa" (Shapiro 1998, 503).

> professors, it is clear that this account fails as an instance of conceptual analysis insofar as it flouts many legal truisms. (Shapiro 2011, 15)

Shapiro's method of conceptual analysis delivers some truisms about law, and the realist account cannot be accepted, for it flouts too many of them. What are the truisms flouted by the realists? Mainly, it is the *objectivity truism*, "which maintains that courts can make mistakes when interpreting the law."[7] Shapiro mentions other platitudes violated by the realist account, but to my sense they are just variations on the objectivity theme

> that some courts have better legal judgment than others, that appellate courts exist in part to correct legal errors, and that the reason why it is often possible to predict what courts will do is we think that courts often correctly follow preexisting law. (Shapiro 2011, 16)

If my impression is correct, we can doubt that this account "flouts so many truisms that it cannot be seen as revealing the identity of the entity referenced by our concept of law."[8] Moreover, Shapiro leaves room for the possibility that an answer on the identity of a given entity violates one or even more truisms.

> *Although it is not necessary that our answer satisfy every single truism*, we must try to come up with a theory that accounts for as many of them as possible. For if our account flouts too many of them, we will have changed the subject and will no longer be giving an account of the intended entity but of something else entirely. (Shapiro 2011, 14; emphasis mine)

Since a conjunction of sentences with a false member is false, I guess that a theory that violates one or even more truisms about the entity in question is false. But Shapiro seems to claim that, on certain conditions (i.e., absence of a better theory?), it can be accepted nevertheless. I find this puzzling, but even if we grant this theory-acceptance claim, one would like to know something more about the number and kind of truisms that a theory could legitimately flout.

Apart from these preliminary questions, I would like to focus on Shapiro's (implicit) treatment of the realist account and, in particular, on his (explicit) discussion of the *bad man* perspective. As I said at the outset, the main flaw in the realist account is the fact that it misses the internal point of view. (Perhaps, this is an important legal truism flouted by the realists: legal norms, as Hart puts it, have an internal aspect). Now, the bad man perspective is quite challenging in this respect, for it seems to be a radical attack on the law's normativity and on the idea that the internal point of view is essential in defining what law is.

The bad man perspective is introduced in a chapter on Austin's sanction theory and subsequently discussed in a chapter on Hart's rule of recognition.[9] Shapiro basically reiterates Hart's critique to Austin, and I basically agree on the soundness of the critique. What I find puzzling is the way the bad man perspective is presented and discussed.

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[7] Shapiro (2011, 15–16). Cf. Leiter (2007, 70).

[8] Shapiro (2011, 16). Following Hart, however, one may say that realism cannot give an account of secondary rules like the "rule of recognition" or the "rule of adjudication". Cf. Hart (1961, chaps. 5–7).

[9] Shapiro (2011, chaps. 3–4). Cf. Shapiro (2000a) and (2002, 437–439).

I think – and I will try to show in the following – that Holmes' point was quite different from what Shapiro and others attribute him: it was on *legal knowledge*, not on legal normativity. Strictly speaking, the bad man character does not help us understand whether we ought to comply with legal obligations, whether the law is a reason to act, etc. It helps us getting knowledge about the law.

If we take it as an account of the normativity of law (of law as a reason to act and a guide to action), of course it is hardly satisfying. As Austin's sanction theory, it "effaces the existence of the good citizen," for it only focuses on the bad man who is motivated by the simple desire to avoid sanctions.[10]

> The good citizen, on the other hand, takes the obligations imposed by the law as providing a new moral reason to comply. The rules are taken as reasons quite apart from the sanctions that would attend their violation or the moral considerations that independently apply to the actions required. (Shapiro 2011, 70)
>
> For the bad man, the only normative contribution that the law makes is its threat of sanctions. While the law certainly cares to control the bad man, and for this reason normally threatens sanctions, it also wishes to guide the behavior of the good citizen. Not only are sanctions not needed to control those who respect the power-conferring rules of the system and impute legitimacy to those who act pursuant to them, but they are terribly expensive. Motivating good citizens by imposing legal duties on them is far more efficient than credibly threatening them. Indeed, a regime whose only means of persuasion was force would quickly bankrupt itself. (Shapiro 2011, 71)

Following Shapiro, this allows a complementary understanding of Holmes' bad man (wishing to avoid sanctions) and of Austin's gunman (threatening sanctions), and it is bad news for Hart's practice theory of rules because the bad man can express legal judgments without taking the internal point of view towards the system's rule of recognition.

> Consider the bad man. For him, the law provides the same basic reason to act that the gunman generates, namely, the avoidance of sanctions. He follows the law out of rational self-interest, because he is "obliged" to do so. Note, however, that the bad man is able to recharacterize the law using an alternative vocabulary. While the bad man may describe the law in the same terms that he would use vis-à-vis a mugging – "I was obliged to hand over the money" – he can also accurately *re*describe the former using the language of obligation. He might say not only that the law obliges him to pay his taxes, but also that he is *legally obligated* to do so. That is, he can describe the tax laws not only as the expression of wishes backed by threats of sanctions, but also as rules that impose legal duties. (Shapiro 2011, 112)

I do not know if it is really bad news for Hart,[11] but I suspect it is good news for legal realism taken not as a theory of law but as a theory of legal knowledge. The bad man can redescribe the law using a normative vocabulary and terminology, even though he takes the external point of view. This is exactly the point. The good man is in danger of confusing moral and legal obligations while, if we want to know the law, we want to know what is distinctively legal. The bad man helps us doing this.[12] (I will try to explain it in more detail in the next section.)

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[10] Shapiro (2011, 70). See also Shapiro (2006, 1159), but cf. Schauer (2010).

[11] On this issue cf. Poggi's and Papayannis' contributions to this book.

[12] Shapiro (2011, 113). Cf. Shapiro (2011, 191–192), on the alleged planning theory's advantages in explaining how the bad man can discover the contents of law without taking the internal point of view.

For this reason, the charge (Shapiro 2011, 113) of violating Hume's law performing a DINO pattern of reasoning (deriving the normative from the descriptive) is in my opinion misplaced. If we take the bad man perspective at face value (what Holmes was *not* interested in), it is a *practical* perspective and follows a NINO pattern of reasoning (where of course the normativity is not legal but merely prudential). It derives a normative conclusion from a normative premise and a descriptive one, in the following way (where "!" designates the normative force of a statement, "/" separates premises from one another, and "//" separates the premises from the conclusion):

(1) I want to avoid sanctions! /
If I do not do A, I will be (probably) sanctioned by a court. //
I have to do A![13]

Or, if we take the bad man perspective as an *epistemic* one (what Holmes was interested in), there is no DINO pattern of reasoning, but a DIDO one, drawing a descriptive conclusion from equally descriptive premises:

(2) If A is a legal duty, it will be (probably) enforced by courts /
X did not do A //
X will be (probably) sanctioned by a court.

Neither (1) nor (2) amounts to a theory of law. But (2) contributes to legal knowledge making predictions on what officials will do and so could be a part of a certain theory of law, namely, a "prediction theory" about the way in which our *external* statements about the law can receive significant empirical confirmation or disconfirmation.

Coming back to Holmes' original statement of the bad man perspective will probably throw some light on these topics – or so I hope.

3.3 What Is Wrong with the Bad Man?

Austin's focus is on *sanctions*, for these are a key element of his "imperative" theory of law according to which legal rules are commands of the sovereign, that is, wishes of the sovereign backed by threats. Holmes' and Ross' focus is instead on *prediction*. I will refer to Ross' position in the next section; in the present, I want to concentrate on Holmes' reasons for doing that.

Holmes' *bad man* shows up in the address delivered by Oliver Wendell Holmes at the dedication of the new hall of the Boston University School of Law on January 8, 1897. The address was subsequently published in the *Harvard Law Review* under the title "The path of the law." It is not unimportant to note that the original addressees were, presumably, law students and teachers.

[13] This can be also seen as a DIDO pattern if we redescribe it in terms of statements about desires and "technical norms" (von Wright 1963, chaps. 1 and 6) susceptible of being true or false: "I want to avoid sanctions / If I want to avoid sanctions, I have to do A // I have to do A."

Holmes' topic is the "study of the law." In order to know what the law is, we have to make predictions about official action and, in particular, judicial decisions.

> A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; – and so of a legal right.[14]

The pattern of reasoning I presented above as (2) is nothing but an application of this. Why engage in predictions of judicial decisions? To distinguish law from morality and actual law (what the law is) from law in the abstract (what law is). It is here that the *bad man* comes into play. The bad man in Holmes' definition does not care about morality, ethical rules, or principles shared by his fellows; he is only moved by self-interest considerations. In particular, he wants to avoid being sanctioned by courts. So he performs the pattern of reasoning I presented above as (1), and this is of great importance, in Holmes' view, because it gives us a method that does not conflate law with morality.

> I think it desirable … to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory …. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.[15]

The bad man reasoning is practical, but the reasoning of the legal scholar who adopts the bad man perspective in order to distinguish law from morality is not. Holmes highlights the *epistemic* significance of this character's perspective, which is perfectly compatible with the recognition of the fact that the law "is the witness and external deposit of our moral life."

> I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of *learning and understanding the law*. (Holmes 1897, 459; emphasis mine)

If we want to know the law as it is, and not as it ought to be according to some moral standard, we must look at it as the bad man does, for his reasoning does not conflate law with morality. We do not need to endorse his prudential reasons supported by predictions; we just need to use his reasoning as epistemic guidance, to

[14] Holmes (1897, 458). On "The path of the law" cf. Fisch (1942), Twining (1973), Miller (1975), Grey (1989) and Burton (2000).

[15] Holmes (1897, 459). Shapiro (2006, 1161) qualifies the bad man point of view as an external and practical one, consisting in a nonacceptance attitude. (But "external and practical" sounds like an oxymoron, if external means not practical, i.e., theoretical). Perry (2000) qualifies it as "hermeneutic," in the sense of "engaged in an exercise of practical reasoning."

make accurate predictions.[16] On the contrary, the reasoning of the good man who is willing to perform an action or to avoid it for moral reasons, which may be different from legal reasons, is no epistemic guidance. Here is the key passage:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. (Holmes 1897, 459)

Holmes gives various examples of this. A significant one concerns the so-called rights of man. Even if morality has always had an influence on the law, says Holmes (1897, 460), "nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."

So, in the first place, the bad man perspective helps us distinguish law from morality; in the second, thanks to predictions, it helps us distinguish actual law (or law in force) from law in the abstract. Here is the conclusion of Holmes' argument, ending in the famous phrase on the "prophecies of what the courts will do in fact":

> The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to *know* what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. (Holmes 1897, 460–461; emphasis mine)

There are some unfortunate passages in Holmes' argument, however. The passage just quoted conveys the impression that the nature of the law is at stake ("What constitutes the law?"); the same do other statements of that writing:

> The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. (Holmes 1897, 458)
>
> The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else. (Holmes 1897, 462)[17]

These passages give the impression that Holmes is providing a conceptual account of law. This impression is reinforced if you read the passage where Holmes (1897, 458)

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[16] Shapiro is right when he observes that "Holmes' bad man does not motivationally guide his conduct according to the law, but he does epistemically guide his conduct, at least when legal regulations are correlated with the imposition of significant sanctions, or the risk thereof" (Shapiro 2000b, 146–147). On epistemic and motivational guidance, cf. Shapiro (1998, 490ff.) and Coleman (2001, 135ff.). Also Leiter (2007, 104–106) claims that Holmes' point was epistemic and stresses that "Hart misread the Realists as answering philosophical questions of conceptual analysis" (Leiter 2007, 18).

[17] Cf. the critique of these and similar passages in Kelsen (1945, 166–169).

criticizes the theories according to which a legal right or a legal duty is "something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward." Here, Holmes' is a sanction theory of law. And as such, it is exposed to the well-grounded objections that Hart and Shapiro display against sanction theories.

Some authors have tried to defend Holmes' account from such and similar objections, claiming for instance (White 2004) that Holmes did not want to provide a semantic theory of the meaning of "law," but an empirical theory of the connection between legal oughts and judicial decisions. Others say (Haack 2005, 86–87) that the bad man perspective is a "heuristic device," adopted in order to distinguish law from morality and actual law from law in the abstract.

In any case, apart from philological inquiries and scruples, it is reasonable to say that "The path of the law" allows two different readings, *conceptual* and *empirical*: according to the first, the law is nothing but prophecies; according to the second, the knowledge of the law requires predictions about judicial decisions.

(An epistemic important point: I said that prediction theories are to be interpreted as theories of legal knowledge, but we should not take prediction for knowledge. A prediction has a propositional content capable of being true or false, and if it turns out to be false, it is not knowledge of course. But predictions are, in any case, "heuristic devices" perhaps indispensable if we want to get a full knowledge of the law in force. They need to be tested in order to see if the hypotheses on which they are based are true or false.)

Hart and Shapiro show that the conceptual reading of Holmes' writing is wrong. But this does not imply the empirical one is wrong too. Indeed, Ross defended a similar position in a very persuasive way to my sense. Let us get a closer look to Ross' realist position.

3.4 On Prediction Theory as a Theory of Legal Knowledge

3.4.1 Hart's Critique

In "Scandinavian realism," which is a review of Alf Ross' book *On Law and Justice* published 1 year before, Herbert Hart provided a severe critique of Ross' thought.[18] Prediction theories are wrong from a conceptual point of view and inadequate from an explanatory point of view. First, it is conceptually wrong to reduce legal validity to factual predictions. Secondly, translating internal statements into external ones misses a central point of legal discourse and practice as well as the difference between being "obligated" and being "obliged," or being obligated and having an obligation.[19]

[18] Hart (1959). See Ross (1958). Cf. Shapiro (2006, 1168–1170).

[19] Cf. Hart (1961, chap. 2) and Kelsen (1945, 165ff.).

Hart's reconstruction of Ross' view singles out the prediction aspect of it and the fact that it takes into consideration the emotional attitudes of the courts; both things are needed to determine when a legal rule is "valid" in Ross' picture.

> To say that a legal rule is valid is to say (1) that courts will under specifiable conditions apply it or at least regard it as especially important in reaching their decisions and (2) they will do so because they have an emotional experience of "being bound" by the rules. A valid law is a verifiable hypothesis about future judicial behaviour and its special motivating feeling. (Hart 1959, 165)

The second point is important to distinguish Ross' realism from a crude form of realism for which only judicial behavior counts. Behavior is not enough to spell out an account of valid law and of law application: judicial attitudes and the conviction of "being bound" by the rules must be taken into account as well. Nevertheless, Hart thinks that Ross' account cannot make sense of judicial decision-making.

> First, even if in the mouth of the ordinary citizen or lawyer "this is a valid rule of English law" is a prediction of what a judge will do, say or feel, this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others' behaviour or feelings. "This is a valid rule of law" said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so as a legal standard of behaviour. (Hart 1959, 165)[20]
>
> Secondly, even if (thought this may well be doubted) non-judicial statements of the form "X is a valid rule" are always predictions of future judicial behaviour and feelings, the basis for such predictions is the knowledge that the judges use and understand the statement "this is a valid rule" in a non-predictive sense. (Hart 1959, 165)

Hart stresses in this respect the difference between internal and external statements: the latter are factual statements "*about* the group and the efficacy of its rules" (1959, 166); the former are normative statements that "manifest acceptance of the standards and use and appeal to them in various ways" (1959, 167).[21] Ross, according to Hart, treats statements of legal validity as external statements predicting judicial behavior and feelings. "Yet the normal central use of 'legally valid' is in an internal normative statement" (Hart 1959, 167).[22]

Similarly, about the interpretation of what Hart terms "statements of obligation," "the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions" (Hart 1961, 84).

So, *internal statements cannot be reduced to external ones, but also external statements cannot be reduced to internal ones*, for these do not report about the "efficacy" or "effectiveness" of the rules (i.e., they do not say nor imply that rules are enforced). Reading his work, one may have the impression that Shapiro is more interested in internal rather than in external statements; certainly, he agrees with

[20] As you may notice here, Hart is thinking at what he will call "rule of recognition". Cf. Shapiro (1998) and (2011, chap. 4).

[21] Cf. Muffato (2007).

[22] Cf. Ross (1958, chap. 2).

their distinction, but the planning theory of law seems to fit the internal and neglect the external ones, insofar as it is almost exclusively built on the planners' perspective, namely, the perspective of those who create our legal institutions, adopt the law, and care about it.[23]

3.4.2 Ross' Defense

A few years after Hart's review, Ross publishes a review of Hart's book *The Concept of Law*. He seems to be less critical towards Hart than Hart had been towards him. Ross does not want to neglect the internal/external distinction about legal statements: on the contrary, the scientific ambitions of a realist legal theory depend on such a distinction.

> For my part I want to add that the internal language is not of a descriptive nature. Its function is not to state or describe facts, not to confer information of any kind, but to present claims, to admonish, to exhort. When I say "You borrowed my car. It is your duty to take good care of it," my intention is to claim a certain behaviour from the borrower and to justify this claim by a reference to the (legal or moral) rules concerning borrowing. I don't inform him of the rules, I apply them. The external language, on the other hand, is descriptive in nature. It is concerned with facts, the description and prediction of facts. (Ross 1962, 1189)

Judges and other officials who apply the law use an "internal language" that is normatively loaded. The same is true, we can add, of citizens who accept the law and abide by it. They show what Hart (1961, 56ff.) called a "reflective critical attitude."[24] But legal science does not use the same language: it uses an "external language" which makes abstraction from acceptance.

> To me it is astonishing that Hart does not see, or at any rate does not mention, the most obvious use of the external language in the mouth of an observer who as such neither accepts nor rejects the rules but solely makes a report about them: the legal writer in so far as his job is to give a true statement of the law actually in force. (Ross 1962, 1189)

The legal writer whose business is to describe the law as an observer interested in legal knowledge must avoid the participants' internal language. "I am concerned with the *external* statement concerning the *existence* of a rule or system of rules" (Ross 1962, 1190).[25] Therefore, there is virtually no disagreement between Hart and

[23] Cf. Shapiro (2000a), (2006) and (2011, 99–101). I say "almost exclusively" because Shapiro sometimes provides external considerations like "Unintentional lawmaking is possible" (2011, 72) or "planlike norms must be analyzed differently from plans, given that they can, and often do, arise unintentionally" (2011, 386).

[24] Cf. Ross (1958, 34ff.).

[25] Cf. Kelsen (1945, 164): "Normative jurisprudence describes law from an external point of view although its statements are ought-statements." Some scholars claim that Scandinavian legal realism was the most interesting and consequent attempt to naturalize (and "externalize" in a sense) jurisprudence; see Spaak (2008). On legal knowledge cf. Tuzet (2005).

Ross, according to the Danish philosopher, because for both of them the existence of legal rules is an empirical question depending on judicial practice:

> Hart concurs in the opinion that the question of the existence of a rule or a system of rules is an empirical question of fact depending on the way in which the courts in actual practice identify what is to count as law. (Ross 1962, 1190)[26]

One source of misunderstanding between them, Ross contends, was the term "validity": Ross says (1962, 1190) that "valid" in the English translation of his book was a bad choice since his original Danish word meant something like "in force" or "effective." Prediction theories are theories of legal knowledge, i.e., knowledge of the law "actually in force." In this sense, there is no incompatibility between these theories and the Hartian positivist concept of law.

Omitting here probability complications, an extremely crude form of realism would produce statements of this sort (where "x" is a variable for individuals, "C" means "performs conduct C," "S" means "is sanctioned by a court," "$\forall$" is the universal quantifier, and "$\rightarrow$" is the symbol for material implication):

$$(\mathrm{A}) \quad \forall x (\mathrm{C}x \rightarrow \mathrm{S}x).$$

The problem with statements of sort (A) is that they miss the normative dimension of law, legal conduct, and decision-making.[27] Ross' external statements, on the contrary, have in my opinion the following logical form (where "O" is the deontic obligation operator):

$$(\mathrm{B}) \quad \mathrm{O}\,(\forall x(\mathrm{C}x \rightarrow \mathrm{S}x)).$$

What they say is this: it is the case that it is obligatory (according to the courts' normative attitudes) that such conduct be sanctioned by courts. Statements of sort (B) do not miss the law's normativity. Still, being descriptive, they are different from the participants' internal statements that can be expressed in the following form:

$$(\mathrm{C}) \quad \mathrm{O}\,(\forall x(\mathrm{C}x \rightarrow \mathrm{S}x))!$$

The distinguishing mark of the latter statements is their normative force: they do not report the courts' attitudes but express themselves a normative attitude. Ross' realist and scientific perspective is intended to deliver statements of sort (B), for statements of sort (A) are clearly inadequate and statements of sort (C) are the

[26] This is not strictly speaking correct: Hart says that for the whole system, not for any single rule.

[27] "An *order* or command is not just any signal that is appropriately responded to in one way rather than another. It is something that determines *what is* an appropriate response by *saying* what one is to do, by *describing* it, specifying what *concepts* are to apply to a doing in order for it to count as *obeying* the order" (Brandom 2009, 175).

participants' statements, delivered from the internal point of view. Or, better, a realist picture combines statements of sort (A) and (B), namely, predictive statements about judicial behavior and statements about judicial attitudes, given that judicial behavior is evidence of judicial attitudes.[28] Not to mention the fact that knowing the law also involves the knowledge of a complex set of social facts.[29] This *presupposes* of course a certain theory of what law is. For instance, it may presuppose a positivist theory of law. I think that this realist stance is also compatible with Shapiro's planning theory of law, but, to assess this point, one should understand whether a pure description of the law in force is possible in Shapiro's picture, whose viewpoint is the planners', that is, a viewpoint from which law has a moral aim and is designed to solve moral problems.[30] For one thing is the fact that plans are binding on the courts, quite another that they are effective.

3.5 How Many Realisms?

Leiter says that American legal realists had a theory of adjudication, not a theory of law strictly speaking.[31] The rationale for claiming this is Leiter's attempt to resist some of Hart's objections and to conciliate legal realism and legal positivism. He claims that the former, but not the latter, had a (correct) descriptive theory of adjudication, while the latter, but not the former, provided a (correct) conceptual account of what law is. Leiter thinks that the realists' conception of law was simply the positivists' (according to which legal validity is a matter of pedigree).[32]

I think that legal realism, as any other legal theory, had a more or less implicit theory and ontology of law.[33] So, despite some cries against metaphysics, realism

[28] See Ross (1958, 70–74). Then, what about the *normativity of law*, namely, "the idea that legally valid norms supply special *reasons for action* in virtue of their legality" (Leiter 2007, 188)? "To the extent that legal reasons circumscribe the range of permissible outcomes, the normativity of law figures in the best explanation of the decision – even if the *final* outcome (chosen from among those that can be rationalized legally) is a product of ideological attitude rather than legal reasoning" (Leiter 2007, 190). This involves a deflated version of the notion at stake. "To be sure, admitting 'normativity of law talk' within our social-scientific theory of adjudication involves a further deflation of the claims of legal obligation beyond the deflation in Hart's original theory: we move from '*judges take themselves to have obligations*' to '*judges talk as if they take themselves to have obligations*'" (Leiter 2007, 191).

[29] See, e.g., Hierro (1996) and (2009).

[30] Of course Shapiro claims it is possible (2011, 191): "Legal statements are descriptive … because they describe the moral perspective of the law." But this seems to be a description of the planners' attitudes, which can be different from the law "actually in force."

[31] Leiter (2007, chap. 2). However, Green (2009, 4) points out that we still lack a good predictive theory of adjudication.

[32] "Thus, at the *philosophical* or *conceptual* level, realism and positivism are quite compatible, and, in fact, the former actually needs the latter. At the *empirical* level, it will turn out that, while there is a genuine disagreement between the two theories, neither Hart nor any other legal philosopher has actually provided a real argument against the Realist view" (Leiter 2007, 60).

[33] Cf. Tuzet (2007).

too had a theory of the nature of law. I am not sure if it was simply the positivist one. Such distinctions as Gray's between *law* and *sources of law*, or Pound's between *law in action* and *law in books* – to mention some realist cornerstones – are not squarely positivist, even if it is not impossible to accommodate them in a positivist framework.[34] According to the legal ontology of the realists, the law is (mainly) made of judicial decisions, and predictions on them are a way to get knowledge about it. If the "prediction theory" were a theory of the nature of law, it would be flawed for the reasons we mentioned.[35] This does not imply that it is wrong as a theory of legal knowledge or as a descriptive theory of adjudication.

Leiter claims that the realists were "empirical rule-skeptics," in that they contended that legal rules do not play the role they were supposed to play in legal adjudication and decision-making. Empirical rule-skepticism is different from conceptual rule-skepticism, for this is a much stronger position which claims that rules are what courts say they are and which "makes it impossible to articulate the simple idea that the law is one thing, and a particular court's decision another" (Leiter 2007, 70). It flouts the "objectivity truism," to use Shapiro's vocabulary. The supporter of empirical rule-skepticism claims instead that legal rules are not effective: they have no causal efficacy on the courts' rulings (at least in some contexts as appellate litigation).[36] The courts' rulings are not determined – or at least are underdetermined – by the rules. Now, substitute "rules" with "plans" and the same worry can be addressed to Shapiro's theory. Do plans have causal efficacy on judicial decision-making?

Assume with Shapiro that legal activity is a form of social planning ("Planning Thesis"), that legal rules are plans, and that they are binding on courts.[37] A different set of questions would be: When is a plan effective? How to determine it empirically? Are all plans effective by definition? Is the notion of "failing plan" a contradictory notion?[38] I am not clear whether the planning theory has conceptual room for a description of failing plans.[39] If yes, however, it should say (how to determine)

[34] See Gray (1909) and Pound (1910). Such theories can be accommodated in a positivist framework defined by a source thesis. "The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties. The difference in this matter between contending schools of Jurisprudence arises largely from not distinguishing between Law and the Sources of Law" (Gray 1909, 82). "The first Sources from which the courts of any human society draw the Law are the formal utterances of the legislative organs of the society" (Gray 1909, 145).

[35] It misses the internal point of view and cannot give an account of the Hartian secondary rules.

[36] Leiter (2007, 73–79). So Leiter claims that "Hart has good arguments against conceptual rule-skepticism, but this form of skepticism is not, in fact, at stake in legal realism; and second, that Hart never offers any argument against empirical rule-skepticism" (2007, 69).

[37] Cf. Shapiro (2011, chaps. 6–7).

[38] According to Shapiro plans "are not only positive entities that form nested structures, but they are formed by a process that disposes their subject to comply. As a result, unless the members of the community are disposed to follow the norms created to guide their conduct, the norms created will not be plans" (2011, 179).

[39] Shapiro is aware of the problem, for plans can fail to achieve their various aims and their moral aim in particular. "What makes the law *the law* is that it has a moral aim, not that it satisfies that aim" (2011, 214).

whether plans are effective or not in a given context and, in particular, whether the realists were right or not on the indeterminacy of the law. So, to put it as Leiter, does the planning theory provide an adequate descriptive theory of adjudication? And, does it provide a descriptive theory of the law in force?

If we focus on adjudication, in any case, we can realize that the realists were not simply content with a descriptive theory of it; they claimed that certain methods for deciding cases were *good* methods indeed. Insofar as they praised certain methods and criteria of judicial decision-making, they had a prescriptive theory of adjudication. The details of it were different according to authors and specific legal contexts (solving a certain commercial dispute is not the same as deciding a criminal case, to be sure), but the realists shared an interest in specific concepts, methods, and criteria, disliking generalities and abstractions. When cases were decided considering the social consequences of the decision, or the economic consequences of the dispute, or the specific facts of the matter, instead of the abstract concepts of legal doctrine, they were decided in a good way. According to the realists, to take a well-known example, *MacPherson* was a well-decided case by Cardozo in 1916.[40] So the realists had a prescriptive and evaluative theory of adjudication, not a merely descriptive one. One might wonder whether such an approach is more desirable than the planning theory approach when applied to legal interpretation and decision-making,[41] especially when the plans we should employ to solve certain problems were designed in different social or moral conditions.

If all of this is true, summing up what we said so far, legal realism can be taken and assessed in at least four ways:

1. As a theory of the nature of law
2. As a theory of legal knowledge
3. As a descriptive theory of adjudication
4. As a prescriptive theory of adjudication

In the first sense, it was showed to be false. In the second and third sense, there are good reasons to take it as true (recall what we said about Holmes and Ross). In the fourth sense, there are good reasons to take it as good (consider *MacPherson* and similar cases). This is not the place to settle these questions, however. But to conclude, they suggest a couple of worries about Shapiro's own theory. The first is the following. What exactly are the external statements available to the legal scholar who accepts the planning theory? Is there conceptual room in this theory for such statements that simply describe the law in force in a given context, making abstraction from its moral correctness and notwithstanding the "moral aim" thesis? To put it differently, I am not clear where the dividing line between internal and external statements is in Shapiro's theory. Furthermore, "What is law?" and "What is the law?" are different questions, and the realists were more interested in the latter than

[40] See Leiter (2012). Cf. Posner (1996) and Shapiro (2011, 343ff.) on Posner's "pragmatic adjudication."

[41] Cf. Shapiro (2011, chap. 13).

in the former[42]; one can have the impression that the planning theory is more interested in the former and lacks a clear account of the latter and of the way in which legal knowledge can be gained. In this sense, it would be helpful to understand whether there are failing plans and how to detect them empirically. To my experience, one of the most recurring features of social life is that things do not go the way they are supposed to. In this sense, it would be odd to say that plans are effective by definition.

The second worry, which is quite different from the first,[43] is this: Is Shapiro more realist than Leiter? This might be a surprising conclusion but not so surprising if you consider Shapiro's basis for his central claim that legal norms are plans: we are planning creatures and the conditions of our social life (in particular, the so-called circumstances of legality[44]), together with the norms of instrumental rationality, bring us to that kind of social planning which is the establishment of a legal system.

> The existence of law … reflects the fact that human beings are planning creatures, endowed with the cognitive and volitional capacities and dispositions to organize their behavior over time and across persons in order to achieve highly complex ends. (Shapiro 2011, 156)

The planning theory's background is a functionalist one, if I am right; also its vocabulary is at least in part the vocabulary of functions.[45] In some sense, this theory is a naturalistic explanation of why we have such things as legal rules and institutions. You might think that the law's "moral aim" too can be explained in this framework: it is something we need, given our instrumental rationality, the conditions of social life, and the "circumstances of legality."[46] The genuinely naturalized jurisprudence, one might think, is Shapiro's, not Leiter's! It is true that Shapiro introduces his book with the eulogy of conceptual analysis, but it might be a celebrative introduction with no real effect on the book's argument and results. I must confess that this reading of Shapiro is quite hazardous, but I wonder whether it might be a more empirically robust way to construct and defend a planning theory of law.

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[42] Cf. Ross (1958, 31).

[43] Papayannis' contribution to this volume rightly observes in my opinion that Shapiro's book allows a double reading: internal and external, providing an explanation of law in terms of purposes on the one hand and an explanation in terms of functions on the other.

[44] "The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary. In such instances, the benefits of planning will be great, but so will the costs and risks associated with nonlegal forms of ordering behavior, such as improvisation, spontaneous ordering, private agreements, communal consensus, or personalized hierarchies" (Shapiro 2011, 170).

[45] See, e.g., Shapiro (2011, 170–175). However, he suggests at various places that his claims are conceptual and based on thought experiments (2011, 156); moreover, some explicit references to the functions of law have been canceled from the penultimate version of the text (a fact that testifies about the author's intentions but does not change the nature of his arguments): the ultimate version contains more than 80 occurrences of "function" and cognate words, whereas in the penultimate the occurrences were almost 100.

[46] "The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality" (Shapiro 2011, 213).

References

Brandom, R.B. 2009. *Reason in philosophy. Animating ideas*. Cambridge/London: Harvard University Press.

Burton, S.J. (ed.). 2000. *The path of the law and its influence*. Cambridge: Cambridge University Press.

Chiassoni, P. 1999. Richard Posner: pragmatismo e analisi economica del diritto. In *Filosofi del diritto contemporanei*, ed. G. Zanetti, 183–220. Milan: Raffaello Cortina.

Coleman, J. 2001. *The practice of principle. In defence of a pragmatist approach to legal theory*. Oxford: Oxford University Press.

Fisch, M.H. 1942. Justice Holmes, the prediction theory of law, and pragmatism. *The Journal of Philosophy* 39: 85–97.

Gray, J.C. 1909. *The nature and sources of the law*. New York: The Columbia University Press.

Green, L. 2009. Law and the causes of judicial decisions. *University of Oxford Legal Research Paper Series* 14(2009): 1–36.

Grey, T.C. 1989. Holmes and legal pragmatism. *Stanford Law Review* 41: 787–870.

Haack, S. 2005. On legal pragmatism: Where does "The path of the law" lead us? *The American Journal of Jurisprudence* 50: 71–105.

Hart, H.L.A. 1959. Scandinavian realism, reprinted in: *Essays in jurisprudence and philosophy* (1983), 161–169. Oxford: Clarendon Press.

Hart, H.L.A. 1961. *The concept of law*, 2nd ed. 1994, with a postscript, ed. by P.A. Bulloch and J. Raz. Oxford: Oxford University Press (citations from the 2nd ed.).

Hierro, L. 1996. Realismo jurídico. In *Enciclopedia iberoamericana de filosofía*, vol. 11, ed. E. Garzón and F.J. Laporta, 77–86. Madrid: Editorial Trotta-Consejo Superior de Investigaciones Científicas.

Hierro, L. 2009. *El realismo jurídico escandinavo. Una teoría empirista del derecho*, 2nd ed. Madrid: Iustel.

Holmes, O.W. 1897. The path of the law. *Harvard Law Review* 10: 457–478.

Kelsen, H. 1945. *General theory of law and state*. New York: Russell & Russell, 1961.

Leiter, B. 2007. *Naturalizing jurisprudence. Essays on American legal realism and naturalism in legal philosophy*. Oxford: Oxford University Press.

Leiter, B. 2012. In praise of realism (and against "nonsense" jurisprudence). *The Georgetown Law Journal* 100: 865–893.

Miles, T.J., and C.R. Sunstein. 2008. The new legal realism. *University of Chicago Law Review* 75: 831–851.

Miller, J.D. 1975. Holmes, Peirce and legal pragmatism. *The Yale Law Journal* 84: 1123–1140.

Minda, G. 1995. *Postmodern legal movements. Law and jurisprudence at century's end*. New York: New York University Press.

Muffato, N. 2007. Asserti interni: prescrizioni o asserzioni? In *Analisi e diritto 2007*, ed. P. Comanducci and R. Guastini, 11–37. Turin: Giappichelli.

Nourse, V., and G. Shaffer. 2009. Varieties of new legal realism: Can a new world order prompt a new legal theory? *Cornell Law Review* 95: 61–137.

Perry, S.R. 2000. Holmes versus Hart: The bad man in legal theory. In *The path of the law and its influence*, ed. S.J. Burton, 158–196. Cambridge: Cambridge University Press.

Posner, R.A. 1981. *The economics of justice*. Cambridge/London: Harvard University Press.

Posner, R.A. 1990. *The problems of jurisprudence*. Cambridge/London: Harvard University Press.

Posner, R.A. 1996. Pragmatic adjudication. *Cardozo Law Review* 18: 1–20.

Posner, R.A. 2008. *How judges think*. Cambridge/London: Harvard University Press.

Pound, R. 1910. Law in books and law in action. *American Law Review* 44: 12–36.

Priel, D. 2008. Were the legal realists legal positivists? *Law and Philosophy* 27: 309–350.

Ross, A. 1958. *On law and justice*. London: Stevens & Sons.

Ross, A. 1962. Review of "The concept of law" by H.L.A. Hart. *The Yale Law Journal* 71: 1185–1190.
Schauer, F. 2010. Was Austin right after all? On the role of sanctions in a theory of law. *Ratio Juris* 23: 1–21.
Shapiro, S.J. 1998. On Hart's way out. *Legal Theory* 4: 469–507.
Shapiro, S.J. 2000a. The bad man and the internal point of view. In *The path of the law and its influence*, ed. S.J. Burton, 197–210. Cambridge Cambridge University Press.
Shapiro, S.J. 2000b. Law, morality, and the guidance of conduct. *Legal Theory* 6: 127–170.
Shapiro, S.J. 2002. Law, plans, and practical reason. *Legal Theory* 8: 387–441.
Shapiro, S.J. 2006. What is the internal point of view? *Fordham Law Review* 75: 1157–1170.
Shapiro, S.J. 2011. *Legality*. Cambridge/London: Harvard University Press.
Spaak, T. 2008. Review of "Naturalizing jurisprudence" by B. Leiter. *Theoria* 74: 352–362.
Tuzet, G. 2005. La conoscenza giuridica. *Notizie di Politeia* 80: 42–62.
Tuzet, G. 2007. The social reality of law. In *Analisi e diritto 2007*, ed. P. Comanducci and R. Guastini, 179–198. Turin: Giappichelli.
Twining, W. 1973. The bad man revisited. *Cornell Law Review* 58: 275–303.
von Wright, G.H. 1963. *Norm and action*. London: Routledge & Kegan Paul.
White, M. 2004. Holmes and Hart on prediction and legal obligation. *Transactions of the Charles S. Peirce Society* 40: 569–573.

Chapter 4
Rule of Recognition, Convention and Obligation: What Shapiro Can Still Learn from Hart's Mistakes

Aldo Schiavello

4.1 On Hart's Tracks

In the initial lines of the preface to *The Concept of Law*, Herbert Hart writes: "my aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena" (Hart 1994, vi).

The same words could be used for Scott Shapiro's *Legality*. Indeed, he works out a version of legal positivism taking as its starting point Hart's practice theory of law. On one side, it can be stated that *Legality* is in the line of post-Hartian jurisprudence, characterized by the opposition between inclusive and exclusive legal positivists. On the other side, Shapiro, though clearly taking a stand in favour of exclusive legal positivism (Shapiro 2011, 267–281), avoids the technicalities and self-reference of a debate that appears to have burnt itself out. For this reason too, I believe it is legitimate to set *Legality* alongside *The Concept of Law:* like Hart, Shapiro seems to oppose "the belief that a book on legal theory is primarily a book from which one learns what other books contain" (Hart 1994, vii).

The first chapter of *Legality* is entitled "What is law (and why should we care)?" and the choice of this title harks back once again to Hart, who begins *The Concept of Law* by observing that "few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many different, strange, and even paradoxical ways as the question 'What is Law?'" (Hart 1994, 1).

Nevertheless, we have to notice that the central problem that according to Shapiro must be faced by legal philosophy is not summed up by the question "What is law?" but by the question "How is law possible?" The latter question has broader scope than the previous one in that it contains aspects that concern the identification of law and its definition and aspects that concern the justification of law and its legitimacy.

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The broadness of this question sometimes causes an overlap of issues that it would instead be better to keep separate.

Shapiro's planning theory of law sets out to answer the question "How is law possible?" in a more convincing way than other conceptions of law. In general, answering this question forces us to solve the classic "chicken-egg" problem, which Shapiro calls "the possibility puzzle" (see also Shapiro 1998, 469–507). On one side, the existence of law seems to imply the existence of norms that confer on some individuals the power to create legal norms (in Shapiro's lexicon, this would be "The Egg Principle"); on the other side, nevertheless, the existence of a norm that confers the power to create legal norms implies the existence of individuals that have the power to create this norm ("The Chicken Principle"). Stopping the infinite regress that characterizes this dilemma forces us, so to speak, to opt for the chicken (identifying an ultimate authority) or for the egg (identifying an ultimate norm).

Classical natural law theories identify in God the ultimate authority that makes the existence of law possible: "God created the natural law, which confers the legal right on rulers to rule" (Shapiro 2011, 42–43). Modern natural law doctrine considers the people the ultimate authority, which however is legitimized by "the rules or principles of political morality" (Shapiro 2011, 43); these rules and principles are therefore the ultimate norms on which law is founded. What the different natural law theories have in common is the idea that "it is the *moral fact* that God or the people (or possibly a benevolent dictator) has the moral authority to empower others to act that invests these bodies with legal authority" (Shapiro 2011, 43, italics added).

Legal positivism too has proposed different solutions to the "possibility puzzle". Imperativism believes that the existence of law depends on the existence of an ultimate authority, the sovereign, with the ability to force individuals, through the threat of the use of force, to obey his commands. According to this version of legal positivism, the existence of law, and its authority, rests on brute power. Instead, Hart's practice theory of norms arrests the infinite regress with a social rule, whose existence does not depend on the exercise of a normative power, but on the mere existence of a practice of deference. What the different versions of legal positivism have in common, marking the opposition to natural law theory, is the thesis that in the last analysis the existence of law depends on social facts and not on moral facts.

The answers given to the possibility puzzle by natural law doctrine and legal positivism respectively have to face difficulties of a different nature. Natural law theories are embarrassed by what Shapiro calls "the problem of evil": if the existence of law depends on moral facts, how is it possible to explain the existence of evil or wicked legal systems? Legal positivism has instead to face what can be referred to as "Hume's challenge"; it has to explain how it is possible to ground the existence of law exclusively upon social facts without violating Hume's Law prohibiting us "to derive normative judgments about legal rights and duties from descriptive judgments about social facts" (Shapiro 2011, 48).

Shapiro believes that Hart points to a promising way to face the possibility puzzle and Hume's challenge, though, in the end, he fails to win the challenge. Some serious limits of the practice theory of norms concern the conception of legal obligation and normativity of law deriving from it. In this chapter, I will analyze these

limits of Hart's legal positivism and I will appraise whether the planning theory of law effectively indicates the correct direction for overcoming them.

The next section contains a detour on the way in which Shapiro reconstructs the opposition between legal positivism and natural law theories.

The subsequent sections present a critical reconstruction of Hart's conception of normativity which is partially different from that given by Shapiro in *Legality*.

The final section is devoted to a critical analysis of the conceptions of legal obligation and authority of law associated with the planning theory of law.

4.2 Legal Positivism and Natural Law Theories

According to Shapiro, the opposition between legal positivism and natural law doctrine lies in the fact that the former conception of law believes that law is founded upon social facts and the latter on moral facts. In other words, legal positivism defends the thesis of separation or, at least, of separability between law and morals, and natural law doctrine the thesis of the necessary connection between law and morals. This reconstruction of the opposition between these two important legal philosophical traditions is marred by a certain vagueness that can induce major misunderstandings.

The issue of the connection between law and morals presents at least two facets: the problem of "justificatory connection" and that of "identificational connection".[1]

The first problem concerns the possibility of justifying a legal decision or also a behaviour because it is prescribed by the law without necessarily having recourse to moral arguments.

The problem of the identificational connection instead concerns the possibility of identifying the law without necessarily having recourse to a moral point of view.

Shapiro underestimates the importance of the distinction between the thesis of the justificatory connection and the thesis of the identificational connection. Indeed, he presents the positive law perspective as follows:

> … all legal facts are ultimately determined by social facts alone …. Claims about the existence or content of a legal system must ultimately be established by referring to what people think, intend, claim, say or do. Positivists disagree with one another about the nature of these ultimate social facts, but one plausible version goes as follows: *the fact that legal officials treat the state conventions as having had the power to ratify the Constitution makes it the case that the Constitution is legally binding on them*. (Shapiro 2011, 27, italics added)

In the light of this quotation, it would therefore seem either that it is not possible to separate the conceptual level from the justificatory and normative one or that legal positivism necessarily accepts the thesis of social facts both in relation to the question of identification of the law and in relation to the issue of the justification of the law and its normativity.

[1] See Comanducci (1998, 3–15) and also Id. (1999, 125–134). Regarding the relations between law and morality, Paolo Comanducci also identifies an axiological aspect that we can disregard here. See also Nino (1994), Barberis (2008, 1–46).

In my opinion, this way of presenting legal positivism is questionable and a source of confusion. Some legal positivists, in fact, believe that legal positivism only puts forward a conceptual thesis, and precisely the thesis that in order to answer the question "What is law?" it is necessary to look exclusively at social facts. This version of legal positivism is well reconstructed, for instance, by Michael Hartney:

> Legal positivism is *simply a theory about what counts as law and nothing else*: Only rules with social sources count as legal rules. It is not a linguistic theory, a moral theory or a theory about judges' moral duties. Some theorists may be legal positivists because they are moral skeptics or utilitarians or political authoritarians or because they believe all laws are commands, but none of these theories are part of legal positivism. (Hartney 1994, 48, italics added).

Yet other legal positivists believe that the *social thesis* does not imply a rejection of the thesis of the necessary connection between law and morals at the level of justification and legal obligation. A clear example is the exclusive legal positivism of Joseph Raz. For Raz, the issue of legal obligation implies a reflection on the notion of legitimate authority. He calls his conception of legitimate authority the "service conception of authority" (Raz 1979, Id. 1990a, 115–141, Id. 1995, 210–237).

According to Raz, there are three conditions making it possible to affirm that an authority holding power over a determined territory is not only a de facto authority but also a legitimate authority.

In the first place, the "dependence thesis": the decisions or the directives issued by the authority have to depend on the reasons that would have guided the behaviour of individuals in the absence of an intervention by the authority.

In the second place, the "pre-emption thesis": the decisions or the directives issued by the authority are not added to, but replace, the reasons that would have guided the behaviour of individuals in the absence of an intervention by the authority. In other words, the authoritative decisions are "*exclusionary reasons*".

Lastly, the "normal justification thesis", which is central to understanding Raz's conception of the obligation to obey the law. In order to affirm that an individual or an institution exerts a legitimate authority, it is necessary to show that its directives offer a more correct balancing of the first-level reasons in comparison to what each individual could achieve alone.

This schematic reconstruction of Raz's conception of legitimate authority makes it possible to understand the main reason that induces even Raz to deny the existence of a prima facie obligation to obey the law. A directive is mandatory if it issues from a legitimate authority. On the basis of the condition of normal justification, an authority is legitimate if it can be supposed that it can answer the question "What needs to be done in this circumstance?" in a better or more correct way than the person called on to act directly. Is law a legitimate authority in this sense? For Raz, not necessarily. The answer to this question is to be given case by case and depends not only on the topic that constitutes the object of a specific legal discipline but also on the profile of the subjects who are the addressees of that discipline. Summing up, there is an obligation to obey an authority if the latter is legitimate. The law is an authority that is characterized by the fact of making a limitless claim to legitimacy (Raz 1988, 70–105). According to Raz, nevertheless, the legitimacy of the law is

more circumscribed than that which the law claims to have and in some cases it can also be null. Accordingly, there is no obligation (not even a prima facie one) to obey the law. For our purposes, it is important to stress that for Raz on the plane of justification of legal authority and the obligation to obey the law a necessary bond exists between law and morals. In other words, legal obligation is nothing but a particular instance of moral obligation.

Obviously prominent versions of legal positivism defend the thesis of the separability between law and morals at the level of justification too. Hart, for instance, distinguishes legal obligation from moral obligation and tries to found the former on what Shapiro appropriately defines practice of deference. The planning theory of law also makes a distinction both between moral authority and legal authority and between legal obligation and moral obligation.

I believe that versions of legal positivism that go in this direction have to face insurmountable obstacles. In this section, however, my purpose was to highlight the fact that conceptions of legal positivism that go in a different direction without succumbing when faced with Hume's challenge exist.

4.3 The Practice Theory and the Normativity of Law

One of the main merits of Hart's theory of law is having tried to reconcile two intuitions on legal practice that are set on different levels (Postema 1987, 81–104). The first intuition is that the notion of law has a practical dimension: the law tells us how we are to behave. The second intuition is that law is a social phenomenon, a set of practices, texts and institutions that can be studied by external and detached observers. In short, the problem arises from the fact that the two intuitions are set on different levels, the former on the level of "ought", the latter on the level of "is". Hart, tracing out a theory of the normativity of law based on the existence of a practice, points to a promising pathway for reconciling these two intuitions.

In this section, only a partial reconstruction of the practice theory is offered; indeed, we will only dwell on those aspects of the theory that make it possible to delineate Hart's conception of the normativity of law.

A necessary preliminary observation is that with the expression "normativity of law" reference is made to the capacity of the law to represent a reason justifying action.[2] Anyone who maintains that law is a reason for action intends to highlight the legitimacy, and perhaps also the compulsoriness, of the actions and behaviours performed in order to comply with what is required by the law.[3] The issue of the

[2] See Raz (1990b). On the distinction between justificatory and explanatory reasons, see Nino (1984, 489–490), Raz (2009, 186–189).

[3] Some authors deny that there exists a one-to-one correspondence between, on one side, reasons for actions and, on the other, duties and obligations. Here we will not dwell on this issue. See Coleman (2001, 90).

normativity of law forces us to examine the relationship between law and coercion on one side and law and morals on the other. In this connection, there are three possible options: (a) the normativity of law depends on coercion (Austin), (b) the normativity of law depends on moral reasons (natural law doctrine, but also some legal positivists like Raz and Carlos Nino) and (c) the normativity of law is independent of both coercion and moral reasons and must be linked to "legal reasons". As we will see, Hart moves in the latter direction.

Hart works out a theory of social rules whose aim is to distinguish social rules from mere habits and regulated behaviours from those that are merely regular. One of the principal criticisms that Hart makes of John Austin's imperativism is precisely not having perceived the importance of this distinction and, as a result, having overlooked the concept of norm. "The root cause of [Austin's] failure", Hart observes, "is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law" (Hart 1994, 97).

Social rules, unlike habits, in addition to regularity of convergent behaviours, also present an internal aspect: "What is necessary is a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'" (Hart 1994, 57).

For Hart, the rule of recognition, the rule of rules identifying the validity criterion of other legal norms, is a social rule. A rule of recognition exists when it is possible to identify a group of people that accepts this rule from the "internal point of view". The latter does not necessarily imply moral acceptance of a legal system and its fundamental principles but only a reflective critical attitude that is empirically verifiable. This empirical verification consists both in analysis of the linguistic expressions that go with legal obligations and in observation of the fact that officials, in particular judges, act in accordance with the secondary norms.

In this way, Hart seems to succeed in reconciling the two intuitions on law indicated at the start of this section. For Hart, indeed, the rule of recognition is, at one and the same time, the norm closing the system and the basis of legal obligation. Hence, the definitive answer to the question "Why do we have to do what the law prescribes?" will be "because a social rule exists that obliges us to do what the law prescribes".[4]

A further issue is specifying the group of people whose acceptance is relevant in relation to the existence of a rule of recognition and, consequently, of a legal system as a whole. On this point, Hart's answer is clear: "the assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical

[4] Shapiro (2011, 84–85) too believes that the rule of recognition is a *duty-imposing* rule.

common standards of official behaviour" (Hart 1994, 117; see also Shapiro 2011, 91–93).

The practice theory of norms tells us that a rule of recognition exists when it is accepted (at least) by judges. This ontological thesis on law – that is to say, the thesis that the rule of recognition and, more in general, the law of a community coincides with the attitudes and convergent behaviours of the participants and of judges in particular[5] – has some implications at a methodological or meta-theoretical level: the law is a fact that can be described in a non-evaluative way looking at the attitudes and convergent behaviours of the participants (neutrality thesis).

Starting from the theory of social rules, Hart also works out his general theory of legal obligation, which is what interests us here. According to Hart, the existence of a social rule is a necessary but not sufficient condition for a determined behaviour to be configured in terms of obligation: if a person has an obligation to do something, then it will always be possible to trace a social rule at the basis of this obligation; nevertheless, not every social rule is an index of the existence of an obligation. Hart highlights three conditions that, together with the identification of a rule, make it possible to reconstruct a determined behaviour in terms of obligation.

The first is that there should be an "insistent general demand for conformity" to the model of conduct prescribed by the rules and a "great social pressure" on those people whose behaviour configures a deviation from this model.

The second condition is that "the rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it" (Hart 1994, 87). As Neil MacCormick puts it, "obligations depend, at least in part, on degrees of importance of rules" (MacCormick 1986, 133).

The third and last condition is that the behaviour that shapes the fulfilment of an obligation should imply a sacrifice or a renouncement and, accordingly, there is a "standing possibility of conflict" between the obligation on one side and personal interest on the other (Mackie 1977, 105–107).

Peter Hacker, in a famous essay devoted to Hart's philosophy of law, breaks Hart's theory of obligation down into eight conditions.[6]

The first condition is that the social rule requires of those people that are subject to it that they behave (or abstain from behaving) in a certain way in given circumstances.

The second condition is that the majority of the members of the group believe that the social rule at issue is important for the maintenance of social life or some highly appreciated characteristic of the latter.

[5] Shapiro (2011, 102–105) believes that the assimilation of social rules to social practices is a category mistake. His arguments in favour of this thesis are convincing. Here, however, I will not go into this point.

[6] Hacker (1977, 12–18). A partially modified version of Hacker's reconstruction of Hart's theory of obligation can be found in Lagerspetz (1995, 141–146). For a critical analysis of Hart's theory of obligation, see also Gilbert (2006, 185–197).

The third condition is the existence of a potential conflict between the behaviour required by the social rule and the desires of those people that are subject to the rule.

The fourth condition is the existence of generalized conformity on the part of the members of the group to what is prescribed by the rule. In other words, the rule has to be potentially effective.

The fifth condition is that deviations from the rule be followed by serious critical reactions such as to make the deviant behaviour less advantageous.

The sixth condition contemplates possible deviations from the rule being considered as a good reason for a critical reaction.

The seventh condition contemplates this critical reaction being generally considered legitimate; in other words, criticism for the deviation from the rule is not usually followed by counter-criticism.

The eighth and last condition is that in criticizing the deviant behaviours major use is made of normative language.

Much more should be added on Hart's conception of legal obligation. Here, nevertheless, I am only concerned to emphasize as clearly as possible the central point of this conception. According to Hart, the ultimate foundation of legal obligation is the rule of recognition, which is a social rule. The existence of a social rule depends on its acceptance by a group of individuals as a criterion of behaviour. Acceptance of a social rule as a criterion of behaviour implies (a) that this rule is generally obeyed, (b) that its application is prescribed and (c) that behaviours different from what is prescribed are criticized.

According to Hart, legal obligation is founded on the social rule that arrests the infinite regress of the chain of validity of law. The definitive answer to the question "Why do we have to do what law prescribes?" will therefore be "because a social rule exists forcing us to do what the law prescribes". As María Cristina Redondo puts it:

> the fact that the majority of the norms of a system must be applied because this is imposed by other norms presupposes the fact that the latter norms, which prescribe the application of other norms, must be applied in virtue of a practice. *In other words, from this positivist perspective, a distinctive trait of every existing legal system is constituted by the fact that the norms that form it must only be applied because, in the last resort, they are founded on social rules.*[7]

The idea underlying this formulation is that the acceptance of a norm is a mental or interior act and, as such, is not relevant to the justification of a given behaviour. As Hart puts it, "…feelings are neither necessary nor sufficient for the existence of 'binding' rules".[8] A legal norm can be accepted for prudential or moral reasons, just

[7] Redondo (1999, 209, italics added); see also Hart (1982a, 153–161). For a general presentation of this perspective, see also Bayón (2000, 326–327) and Bulygin (2007, 173–186).

[8] Hart (1994, 57). Elsewhere, Hart (1994, 203, italics added) is even clearer: "Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. *In fact, their allegiance to the system may be based on many different considerations: calculation of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere whish to do as others do*".

as a moral norm can be accepted for moral reasons, for prudential reasons or for reasons of simple conformism. What counts, in order to justify an action, is the nature of the norm that is adopted as a model of conduct: if it is a legal norm, then we find ourselves facing a legal obligation; if instead it is a moral norm, then we find ourselves facing a moral obligation. This implies that in the justification of an action it is not possible to go beyond the norm that is adopted as a model of conduct. It is appropriate to specify that setting a social rule, and hence a social practice, at the basis of the legal obligation does not involve a violation of Hume's Law. As Shapiro observes, in relation to a social fact like the existence of a social rule, two different attitudes can be imagined. One is the theoretical and descriptive attitude of the observer. The other is instead the normative attitude of the person who takes the internal point of view and derives normative judgments not from a social fact but from his or her own "practical engagement with descriptive facts" (Shapiro 2011, 99–101).[9] Hence, Hart follows what Shapiro calls the NINO (normative in/normative out) pattern of inference and avoids violating Hume's Law.

To conclude, I would like to emphasize a difference between my reconstruction of Hart's theory of legal obligation and Shapiro's. According to my reconstruction, Hart defends the autonomy of legal obligation with respect to moral obligation and does not set up any hierarchical relationship between the two types of obligations. They are obligations that have different spheres of application and are founded on different social rules (legal obligation on the rule of recognition, moral obligation on a social rule founding a certain positive moral practice).

By contrast, Shapiro attributes to Hart the thesis that: "…to judge that people have a legal obligation to pay taxes is not to judge that they have a moral obligation to do so. Indeed, one can think that people have a legal obligation to pay their taxes, but coherently deny that they have a reason to comply. Thus, by distinguishing legal from moral concepts, Hart thought he could explain the coherence of affirming the existence of a legal obligation but denying the corresponding moral obligation to comply" (Shapiro 2011, 101). If, however, the existence of a legal obligation is not a reason for action, then it seems to me that we veer away from the plane of normative discourse to the plane of descriptive discourse, depriving the idea of an internal point of view of all meaning. As we will see, this problem also arises in the conception of the normativity associated with the planning theory.

[9] Shapiro also believes that the way in which Hart overcomes Hume's challenge presupposes adoption of an expressivist meta-ethical perspective. Though I cannot go into this, I believe that this conclusion is questionable. In fact, Hart does not seem to consider acceptance of a non-cognitivist meta-ethic an integral part of a positivist theory of law. On at least one occasion, Hart (1958, 626) expressed this thesis clearly: "Let us now suppose that we accept this rejection of 'non-cognitive' theories of morality and this denial of the drastic distinction in type between statements of what is and what ought to be, and that moral judgments are as rationally defensible as any other kind of judgments. What would follow from this as to the nature of the connection between law as it is and law as it ought to be? Surely, from this alone, nothing". However, in a later essay, he defended the opposite thesis. See Hart (1982b, 243–268). The observation on the minimum content of natural law likewise does not seem to be fully compatible with an expressivist perspective. See Ricciardi (2008, 221–263).

4.4 The Practice Theory and Its Limits

For Hart, the existence of a legal obligation implies the possibility of identifying a social rule founding this obligation. Starting from this intuition, Hart on one side criticizes Austin in that, reducing the law to orders backed up by threats, he fails to distinguish situations in which there is an obligation to do something from situations in which one is forced or compelled to do something. On the other side, he believes that it is possible to distinguish legal obligation from moral obligation in that the source of an obligation of the first type is a legal rule, while the source of a moral obligation is a moral rule.

The main criticisms of this formulation challenge precisely the possibility of distinguishing legal obligation from moral obligation starting from the idea of social rule.[10]

Hart's fundamental mistake would be believing that the existence of an obligation necessarily presupposes the existence of a social rule. A vegetarian could affirm that a duty exists not to kill any living being even in the absence of a social rule that effectively prescribes a model of conduct of this type.

What this example is meant to show is that the sources of obligations are not social rules but moral rules, rules of critical morality of individuals, rules that are not necessarily *also* social rules. If this is true, it follows that the only genuine obligations are moral obligations and therefore, in spite of what Hart affirms, that it is not possible to distinguish legal obligations from moral obligations. This conclusion is also shared by Shapiro who, criticizing Hart, observes: "In legal contexts, we require people to pay their taxes, join the army, pass difficult licensing exams before practicing a profession, and testify in a criminal trial, under the threat of jail or heavy fines. *Only moral concepts have the heft to make such serious claims*" (Shapiro 2011, 114, italics added).

Against this objection, one could concede that in some cases, like that of the vegetarian, the practice theory of norms, which sets up an inseparable relationship between the existence of an obligation and the existence of a social rule, is not appropriate and nevertheless continue to maintain it in relation to those cases in which there is generalized concordance on the existence of a determined obligation inside a community.

However, this possible response is unsatisfactory in that it does not take into account the importance of distinguishing between two different situations.

The first situation includes those cases in which it is only an accidental fact that there is generalized agreement inside a community on the existence of a certain obligation. In relation to these cases, Ronald Dworkin speaks of "concurrent morality": the agreement is not one of the essential reasons for the existence of the obligation in question. Let us imagine, for instance, that all the members of a community are vegetarians and therefore that in that community it is possible to

[10] The main opponent of Hart's model of obligation is Ronald Dworkin. By the latter, see at least Dworkin (1978, 46–80).

observe the existence of a social rule that forbids killing living beings for alimentary purposes. The existence of this social rule cannot found the obligation, which every member of the community believes he or she has, not to kill living beings. The fact is that probably a vegetarian is convinced he or she must not kill living beings even if nobody shares this moral belief. Then, in cases of this type, the connection between the obligation on one side and the existence of a social rule on the other is somewhat loose: the fact that all the members of the group accept a given rule is not the reason, nor even one of the reasons, for the acceptance of that rule. In conclusion, in cases in which the existence of a social rule is accidental, the source of the obligation is not the social rule, which might also not exist, but the critical morality of each individual.

The second situation includes those cases in which the generalized agreement on the existence of a certain obligation is somehow connected to the existence of a problem of coordination. In relation to these cases, Dworkin speaks of "conventional morality": to solve a problem of coordination presupposes an agreement, in a broad sense, between those people that find themselves implicated in this problem and, consequently, the agreement (which can consist in acceptance of a social rule) becomes at least a necessary condition for the existence of an obligation.

In relation to these cases, it seems reasonable to believe that a social rule can justify certain behaviours. For instance, a social rule that prescribes driving on the right (or, indifferently, on the left) is what is needed for coordinating the traffic. In relation to cases of this type, the practice theory seems to maintain a certain plausibility: after all, what is it that "obliges us" to drive on the right side except the existence of a social rule that gives the necessary salience to this practice?

At this point, Hart's problem is to show that the rule of recognition is a conventional rule. He attempts to do this in the "Postscript" to the second edition of *The Concept of Law*.

Before dealing with Hart's "conventionalist turn",[11] it is useful to notice another serious limit of the practice theory in its original version.

I have maintained that Hart's aim is to distinguish legal obligation from moral obligation. This is also the reason why he rejects the assimilation of internal point of view and moral point of view: the acceptance of law can come about for different reasons that are all on the same level. However, this thesis of Hart's is questionable. For instance, the "conformist" – who is law abiding because others are – though being, Hart says, perfectly referable to the perspective of the participant, in effect shows many analogies with the perspective of the *bad man*. The only difference between these two situations is that the *bad man* "goes straight" out of fear of punishment, and the conformist out of fear of social reproof. Social reproof, however, is nothing but a sanction that is not institutionalized. Characterization of the internal point of view in a weak sense thus reduces the distance between Hart's conception of legal obligation and Austin's one. If the reasons for accepting the law are on the same level, the case can be hypothesized in which all the participants accept the law

[11] This expression is used by Green (1999, 35–52).

out of conformism, and where this happens, the difference between "having an obligation" and "being obliged" ceases to be substantial.

In order to break away from Austin's model of law, it is necessary to characterize acceptance of law in a strong sense, that is to say as moral acceptance. The need to characterize acceptance of law in a strong sense is also recognized by some disciples of Hart. MacCormick in particular identifies the weak point in Hart's analysis of social rules precisely in the over-weak characterization of acceptance of law. The existence of some legal norms rather than others is due to the fact that from a moral point of view at least some members of the community prefer (or, at least, say they prefer) the behaviour pattern identified by such norms rather than alternative behaviour patterns.[12]

To maintain that the existence of a social rule implies that there is someone who deems the behaviour prescribed by this rule preferable to the alternative behaviours does not mean denying the possibility that some follow the rule out of idleness or hypocrisy or that others rebel against it. The latter situations, nevertheless, can only be understood by presupposing the existence of a significant group that accepts the norms from a moral point of view. All the attitudes that can be imagined in relation to norms are therefore "parasitical" compared to that of people who deem the norms adequate from a moral point of view. While it is possible to imagine the case in which a given norm is approved in a strong sense by everybody, it is instead unthinkable that the behaviour prescribed by a rule is effectively not approved by anyone.

Analogous conclusions are also reached by Raz, who is convinced that it is impossible to account for law and legal interpretation putting in brackets the reasons that induce the participants to consider law morally correct or just:

> …while the law may be morally indefensible, it must be understood as a system which many people believe to be morally defensible. While rejecting any explanation of the nature of law or legal interpretation which is true only if the law is morally good, we must also reject any explanation which fails to make it intelligible. This means that to be acceptable an explanation of the law and of legal interpretation must explain how people can believe that their law, the law of their country, is morally good. (Raz 1996, 260)

In brief, Hart finds himself in a rather invidious position: if he characterizes the acceptance of law in bland terms, then his conception of law and his theory of legal obligation are sucked in by an imperativist model *à la* Austin, while if he recognizes that acceptance of law implies a sort of moral sharing of the values and goals incorporated in law, then he has to forego the autonomy of legal obligation with respect to moral obligation.

Summing up, the practice theory advances a conception of legal obligation claiming to defend the autonomy of the latter with respect to coercion and moral obligation. In its original version, this project fails for two reasons. In the first place, the existence of an obligation is not always founded on a social rule, and it is

[12] MacCormick (1994, 287–288) observes: "That there can be common patterns of criticism of conduct or states of affairs depends upon our conceiving that some patterns are willed as common patterns for all people in given circumstances. We can conceive of that independently of our own will in the matter, but not independently of our beliefs about the will of other members of our social group…".

debatable whether, in the specific case of legal obligation, it is correct to believe that this is indeed the case. In the second place, the over-weak characterization that Hart gives of the internal point of view produces in his version of legal positivism some defects that he had attributed to Austin. As also observed by some influential disciples of Hart, the only way out consists in reducing the distance between internal point of view and moral point of view. This, however, means sacrificing the autonomy of legal obligation with respect to moral obligation. A possible pathway, suggested to Hart, perhaps captiously, by Dworkin himself, consists in treating the rule of recognition as a conventional rule able to solve problems of coordination. As previously mentioned, Hart goes in this direction. The next section is devoted to a critical analysis of the conventionalist turn.

4.5 The Conventionalist Turn and Its Limits

In the "Postscript", though conceding to Dworkin that the practice theory is not acceptable as a general theory of obligation, Hart maintains that it continues to be a plausible theory in relation to conventional rules. The fact that Hart there expressly affirms that the rule of recognition is a conventional rule induces some scholars to speak of a conventionalist turn.

Among scholars that have emphasized Hart's conventionalist turn, Julie Dickson (2007, 373–389) is the one that notices the biggest distance between the original version of *The Concept of Law* and the "Postscript". According to Dickson (2007, 375), in the first edition of *The Concept of Law* "…the rule of recognition plays a vitally important role in the union of primary and secondary rules which forms the explanatory core of his account of a legal system". The fact that the rule of recognition is a social rule tells us nothing, according to Dickson (2007, 382), about the reasons that individuals have for obeying the law: "… nothing in Hart's original account of the rule of recognition should lead us to conclude that he regards this rule as a conventional rule wherein common official practice constitutes part of the reasons which judge has for treating it as binding".

Dickson's reconstruction emphasizes the passages in *The Concept of Law* of 1961 in which Hart maintains that the acceptance of the rule of recognition can be due to different reasons, none of them hierarchically placed above others. These reasons can also include the desire to respect a consolidated practice of acceptance of the rule of recognition; this reason, nevertheless, like all the others, is not a necessary reason and therefore does not allow us to affirm that Hart proposes a conception of obligation in a conventionalist key.

In the 1994 "Postscript", Hart, influenced by the argumentative line dictated by Dworkin, affirms that the rule of recognition is a conventional rule, in the sense that its compulsoriness for each judge is also necessarily linked to the fact that it is considered mandatory by the judicial class as a whole. According to Dickson, this concession of Hart's, besides not being in any way necessary, would misrepresent the practice theory of norms, which would be transformed from a theory of identification of law into a conception (wrong, according to Dickson) of legal obligation.

All things considered, I believe that the conventionalist turn should not be emphasized; a marked conventionalist "vocation" already characterized the original version of Hart's conception of obligation (as is also evident from Hacker's reconstruction of it, referred to in Sect. 4.3).

In the "Postscript", Hart limits himself to better clarifying what, following Bruno Celano, I call "dependence condition" (Celano 1995, 35–87, Id. 2003, 347–360). The dependence condition can be seen in a strong sense or a weak sense. If it is maintained that the only reason that an individual has for considering a social rule as a model of conduct is that the other members of the group also consider it as such, then the dependence condition is seen in a strong sense; if instead it is maintained that general conformity of the members of the group is only one reason for the acceptance of a rule, then the dependence condition is seen in a weak sense. Hart accepts the weak version of the dependence condition.

It is worth stressing that more than 30 years after the publication of *The Concept of Law* Hart continues to feel the need to distinguish legal obligation both from moral obligation and from coercion. This is also confirmed by Nicola Lacey (2004, 335): "[Hart] worried… that any revisions he might make [on his theory of legal obligation] would either render it impossible to differentiate his own position from the earlier positivist account of obligation as equivalent to the demands of a gunman, or else from the fully moral account of obligation espoused by natural lawyers".

The passages in the "Postscript" that are important for characterizing Hart's conception of legal obligation as conventionalist are in the third section, entitled "The Nature of Rules", and in the fourth section, entitled "Principles and the Rule of Recognition".

In the third section, after conceding to Dworkin that the scope of his theory of obligation must be restricted, Hart nevertheless maintains that it applies to conventional rules and adds that the rule of recognition is a conventional rule. He offers the following definition of conventional rule:

> Rules are conventional social practices if the general conformity of a group to them is *part* of the reasons which its individual members have for acceptance. (Hart 1994, 255, italics added)

The fact that Hart considers "general conformity" to a conventional rule only "part of the" reasons for accepting it shows that he accepts the dependence condition in a weak sense; this means that his theory of obligation cannot be considered an alternative to the model of the gunman and the model of morality. At this point it is already possible to understand Hart's worry, documented by Lacey, that any change he made to the original version of the theory of the obligation would force him to forego the autonomy of legal obligation.

This worry induces Hart to reemphasize the formulation originally defended. In brief, according to Hart, it is not correct to attribute hierarchical superiority to any of the reasons for accepting a conventional rule with respect to acceptance by the other participants:

> Plainly a society may have rules accepted by its members which are morally iniquitous, such as rules prohibiting persons of certain colour from using public facilities such as parks or bathing beaches. Indeed, even the weaker condition that for the existence of a

> social rule it must only be the case that participants must *believe* that there are good moral grounds for conforming to it is far too strong as a general condition for the existence of social rules. […] Of course a conventional rule may both be and be believed to be morally sound and justified. But when the question arises as to why those who have accepted conventional rules as a guide to their behaviour or as standards of criticism have done so I see no reason for selecting from the many answers to be given […] a belief in the moral justification of rules as the sole possible or adequate answer. (Hart 1994, 257, italics in the original)

Hence, for Hart, the reasons that can induce acceptance of a social rule are manifold, in many respects are unfathomable and are all on the same plane. In this respect, the only significant difference between the original edition and the "Postscript" is that in this posthumous writing Hart further clarifies the idea that, in the case of social rules, acceptance by the other members of the group is a necessary reason for the existence of an obligation.

In what sense is the rule of recognition a conventional rule? Hart gives the following answer to this question:

> Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus. That it does so rest seems quite clear in English and American law for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over sources *includes* the fact that his judicial colleagues concur in this as they predecessors have done. (Hart 1994, 266–267, italics added)

To conclude, the conventional nature of the rule of recognition is not sufficiently strong to ensure the autonomy of legal obligation with respect to moral obligation. The only way conventionalism can preserve the autonomy of legal obligation is to treat the rule of recognition as a convention in the manner of Lewis, making it possible to solve coordination problems seen in a narrow sense. In relation to a typical coordination problem (for instance, if a telephone call is interrupted, who has to call back the other person?), it is indifferent what solution is selected; the important thing is that all converge towards the same solution. In other words, in order to be effective, the conventionalist turn should adopt the dependence condition in the strongest version. In this way, it would effectively be possible to distinguish legal obligation from moral obligation: the normativity of law would not depend on its capacity to ensure a morally appreciable social order but on its capacity to solve coordination problems.

However, this version of conventionalism does not appear very plausible. The fact is that it is not enough for us that the law should coordinate social action in one way or another, since we desire that it should do so in the correct way. As Shapiro notices, a constitution is not generally considered an arbitrary solution that can be replaced by another text at any moment; on the contrary, many believe that "the text of the Constitution is sacred and that they had a moral obligation to heed it, regardless of what everyone else did" (Shapiro 2011, 109). Strong conventionalism could guarantee the autonomy of legal obligation but at the price of a serious distortion of reality.

4.6 The Planning Theory and the Normativity of Law

Shapiro proposes a theory of law founded on the notion of "plan" worked out by Michael Bratman within a general theory of collective intention. The final part of this chapter is devoted to a critical analysis of the conception of normativity of law associated with the planning theory. As we shall see, Shapiro follows in Hart's footsteps in his concern to distinguish legal obligation from moral obligation and this weakens the conception of normativity of planning positivism.

Preliminarily it is necessary schematically to present the planning theory of law.

To use Shapiro's words, "the main idea behind the Planning Theory of Law is that the exercise of legal authority, which I will refer to as 'legal activity', is an activity of social planning. Legal institutions plan for the communities over whom they claim authority, both by telling their members what they may or may not do and by authorizing some of these members to plan for others" (Shapiro 2011, 195).

Before going into this thesis in depth, it is necessary to dwell on the notion of plan in general. Human beings are animals that plan. There are at least two reasons that make planning an essential feature of human beings. The first is that human beings, unlike most other animals, have complex objectives and desires that, to be achieved, involve demanding activity of organization of the future. Plans, in this sense, satisfy the need for coordination. The second reason is that human beings are endowed with limited rationality. Planning makes it possible to save energies that we would waste if we spent the whole time deciding what to do and continually revising our decisions. Moreover, this way of behaving would mostly lead to paralysis of action. In the last analysis, planning is an efficient method for facing the limits of our cognitive abilities and reducing the costs of deliberation. A satisfactory answer to the question "What shall I do for dinner?" can be the working out of the plan to dine at home.[13] This very general plan allows me to exclude a whole series of possible actions like dining at a restaurant, getting a friend to invite me to dinner, fasting and so forth. Further, applying this plan[14] raises other issues that allow us to proceed in the realization of our complex desires. Once I have planned to dine at home, the question "What shall I do for dinner?" ceases to be topical and is replaced by the question "Where shall I go to buy the food to cook tonight?" The answer to this question, for instance "I'll go and buy the food at the supermarket", in turn is a sub-plan of the plan to dine at home. Then the plan to go to buy the food at the supermarket represents the starting point of an even more specific sub-plan and so forth down to the attainment of the goal. An important aspect to be stressed is that the application of a plan imposes a high degree of stability. A plan, in other words, fulfils the same function as what Raz calls exclusionary reasons: it is a reason for not considering further reasons. Once I have planned to dine at home, the hypothesis of dining at a restaurant is swept away. This does not mean that plans are unchangeable,

[13] The example is Shapiro's.

[14] "…To 'apply' a plan means to use it to guide or evaluate conduct" (Shapiro 2011, 126).

but that their "reconsideration is rational when, but only when, there is good enough reason for it" (Shapiro 2011, 124).

The need to plan obviously increases when we pass from individual activity to shared activities. Then among these a fundamental difference is between small-scale and massively shared agencies (MSA). The former activities include organizing a dinner together with some friends; the latter include, for instance, the creation of a catering company.[15] MSA deserve a few words more because law carries out its planning activity precisely in relation to activities of this kind. In the case of small-scale activities, it can be useful to introduce a certain hierarchy among participants. For instance, a group of friends that applies the plan to cook a dinner together can decide to attribute the qualification of head chef to one of them. This decision is rational because it avoids having to submit every choice to discussion, from establishing what to prepare for dinner to deciding who cooks what. The hierarchy is even essential in the case of MSA. If among a group of friends it is already difficult to adopt plans unanimously, in a big group this is impossible. The difference between the two types of shared activity does not only concern the number of participants but also the fact that in the MSA the degree of interest that the different participants show in the shared activity is very variable. It is above all the latter aspect that makes it essential that the power to plan should be concentrated in the hands of a few people. More precisely, "those who are committed to the success of the activity must have some way of directing and monitoring those who fail to share their enthusiasm" (Shapiro 2011, 143–144). Then setting aside the interest that each participant has in the shared activity, it is evident that not all the participants can have a broad vision of the activity in question. This implies that anyone who is at the top of the hierarchy has to contemplate a rigid division of the horizontal work so that all participants know what their roles are in the application of the general plan. The division of work requires that whoever is "above" produces policies for those who are "below". Among these policies some – those that have the function of allocating different roles – are very general, while others are more specific. In Shapiro's example of the catering company, among the more general policies there may be the one that forces the bartender to be always behind the bar and to serve customers the drinks they require. Among the most specific policies, Shapiro distinguishes stipulations, factorizations and permissions. Stipulations are instructions that the recipients have to follow in the application of the plan without wondering if they are correct or wrong. If the cocktail book given to barkeepers says that among the ingredients of Bloody Mary there is mango juice, then barkeepers have to use this ingredient when a customer asks for this cocktail. Factorizations identify the factors that are to be taken into consideration in the application of the plan. A factorization can for instance prescribe that employees be cost-conscious. Lastly, permissions are "anti-directives"; they simply inform addressees that given actions are permissible. Allowing waiters to take home leftover food is a permission. All these policies are sub-plans of the shared plan to engage in the catering business together.

[15] These examples are Shapiro's too.

In the case of MSA, the horizontal division of work also implies a vertical division. It is necessary that some individuals selected both for their abilities and for their devotion to the shared activities should be entrusted with watching over the application of the policies traced out by the inventors of the plan for staff members. This requires that whoever is at the top of the MSA should contemplate further sub-plans conferring on supervisors "… the power to apply those company plans that are directed to staff members" and that they should specify "… how supervisors are to exercise their authorized powers" (Shapiro 2011, 147). Shapiro calls these sub-plans, respectively, authorizations and instructions.

Summing up, what distinguishes MSA from other types of shared activity is the presence of alienated participants. Returning to the example of the catering company, it is plausible to imagine that anyone taken on by the management as a barkeeper may not be particularly interested in the good outcome of the shared activity but only in earning what he needs to live; hence, the problem is to make sure that these individuals who are not highly motivated also apply the plan correctly. The alienation that connotes MSA imposes on those that have determined the content of the general plan to contemplate (a) detailed guidance, (b) hierarchical structures and (c) the possibility of sanctions being imposed by those who are in supervisory positions.

As previously mentioned, for Shapiro, the law is a planning activity that has to face the difficulties typical of MSA planning. Risking some imprecision, we can say that a social community is an MSA to the nth power. A legal system is therefore a highly sophisticated planning organization and is composed by a master plan shared by a group of planners and by the norms (sub-plans, mainly) that this group adopts and applies.

As the law is not the only shared activity of social planning, it is necessary to identify the further characteristics making it possible to determine its identity. In other words, it is necessary to ask ourselves what differences there are between law and other shared non-legal activities. Shapiro lists five further characteristics making it possible to render more determinate the answer to the question "What is law?" In this section I will simply present them briefly.

First of all, law is configured as an official activity. Legal activity is carried out by offices that are not ad hoc positions of authority. Offices are for instance the Presidency of the Republic, the Presidency of the Council and so forth. An important characteristic of offices is that the physical person that occupies them is fungible. This characteristic allows us to distinguish law from the planning activity of parents over their children. Generally, the power of parents over their children is not constant but decreases until it disappears. Moreover, parents are not fungible: "parents normally stay the parents of their children – for better or worse" (Shapiro 2011, 210).

Secondly, the law is an institutional activity. This means that the production of the law comes about through procedures making it possible to disregard the intentions of individuals. A legal norm is valid if it has been produced respecting the criteria contemplated by the master plan, even if anyone who voted for it was not aware of its contents. As Hans Kelsen puts it, a norm is a command (but also a permission) that has been depsychologized. The institutional dimension of law marks once more a difference from the planning activity of parents.

Thirdly, the law imposes compulsory governance. We are not free to pay or not pay taxes, respect or not respect speed limits and so forth. From this point of view, the law is similar to the planning activity of parents and is distinguished from the previously seen activity of the catering company. In the latter case, in fact, a staff member who no longer wishes to obey the rules imposed by the management and the supervisors can resign.

Fourthly, the law is a planning activity that has the very precise purpose of solving in the most efficient way possible the moral problems that arise inside society. As we have seen previously, we do not only ask the law to coordinate actions in one way or another but to choose the morally correct solution. This characteristic of law is for instance adequately expressed by Robert Alexy's argument of correctness (Alexy 1989, 167–183). The moral aim thesis is central for Shapiro's conception of the normativity of law, and so I will come back to it shortly. Here I will limit myself to noticing that this characteristic makes it possible to distinguish law from phenomena that are in many respects similar like organized crime. The point is not that legal activity is connoted by being morally correct while that of an organization like the mafia is not; the difference consists, rather, in the fact that the law has the necessary purpose of morally organizing a society correctly, while this is not the purpose of a criminal association.

Fifthly, the law is a self-certifying planning organization. In Shapiro's terms, an organization is self-certifying if it is supreme or if it enjoys a general presumption of validity on the part of all superior planning organizations. The latter characteristic makes it possible to distinguish law from restricted communities – for instance, groups of elderly people that are gathered together in residential communities devoted to them – which are organized in an independent way.

Summing up, "…a group of individuals are engaged in legal activity whenever their activity of social planning is shared, official, institutional, compulsory, self-certifying, and has a moral aim" (Shapiro 2011, 225).

According to Shapiro, the planning theory allows us to distinguish legal authority from moral authority and legal obligation from moral obligation. In brief, the existence of a legal authority presupposes the satisfaction of two conditions: the first is that the master plan of the system authorize a group of individuals to plan for others; the second is that the members of the community generally listen to those people that have been authorized by the master plan. The solution to the possibility puzzle proposed by the planning theory is the following: legal authority derives from the master plan and the power of the officials to adopt the shared plan derives from the norms of instrumental rationality. In this connection, as we have seen, planning is a rational way to pursue complex desires and objectives. The norms of instrumental rationality that legitimate adoption of a master plan are not plans in turn, and this means that we do not have to go in search of an authority that has produced them: "they exist simply in virtue of being rationally valid principles" (Shapiro 2011, 181).

The possibility puzzle having been solved, the issue of the normativity of law has to be faced: is it permissible to criticize those who intentionally violate the law? According to Shapiro, the planning theory allows us to answer this question

affirmatively. First of all, acceptance of the fundamental rules of a legal system implies the adoption of a plan and this brings into play the norms of instrumental rationality. Accordingly, an official that accepts his/her position inside an authoritative structure is rationally criticisable in the case of disobedience to a superior and, in general, if she/he does not apply the plan. Indeed, as we have seen, the function of planning is annulled if the plans adopted are reconsidered in the absence of compelling reasons to do so. This type of criticism is a consequence of what Bratman and Shapiro call "inner rationality of law". Obviously, the constraints that derive from the inner rationality of law are only valid for those people who accept the master plan. From the point of view of inner rationality of law the defence of Adolf Eichmann at the 1961 Jerusalem trial was correct.

As the latter example clearly shows, to affirm that it would be irrational for anyone accepting the law not to apply the legal plans does not mean that anyone who violates the law is also criticisable from a moral point of view. In fact, moral criticism goes beyond the moral legitimacy of the master plan. Hence, "unless the master plan sets out a morally legitimate scheme of governance, those authorized will merely enjoy legal authority but will lack the ability to impose moral obligation to obey" (Shapiro 2011, 184).

This statement seems to connect legal authority to moral authority and also, accordingly, legal obligation to moral obligation. After all, why does Eichmann's defence, consisting in saying he simply carried out orders, not satisfy us? The answer is precisely that we believe that the orders in question were immoral and originated from an authority that was illegitimate from a moral point of view. This conclusion – which Shapiro, in my opinion wrongly, necessarily links to acceptance of a natural law perspective – seems to imply the impossibility of discussing the normativity of law if not in moral terms. Anyone who accepts the law has to be ready to defend his/her acceptance from a moral point of view.

Shapiro, though sharing the distinction between constraints imposed by rationality and constraints imposed by morality, believes it is possible – and necessary for an exponent of legal positivism – to distinguish legal authority from moral authority and legal obligation from moral obligation.

He distinguishes two possible ways of interpreting legal authority: the adjectival interpretation and the modal interpretation.

On the basis of the former interpretation, "legal authority entails moral authority, and since morally illegitimate shared plans do not confer moral authority they cannot confer legal authority" (Shapiro 2011, 185). Shapiro rejects this interpretation in that it fails to solve the problem of evil: if legal authority is linked to moral, it is not possible to justify the existence of immoral regimes. This conclusion is not convincing in that it presupposes confusion between two types of connection between law and morality, i.e. identificational and justificatory. Raz, for instance, says that a fundamental characteristic of law is laying a claim to be a legitimate authority. This claim does not imply that the authority of the law is legitimate. In conclusion, the existence of the law depends exclusively on social facts (the existence of a certain practice among whose necessary characteristics there is also that of laying a claim to legitimacy), while its legitimacy or otherwise depends on moral evaluations. John

Finnis's distinction between central and peripheral cases of law, partly criticized by Shapiro in the last chapter of his book, also makes it possible to distinguish between the existence and legitimacy of a legal system and therefore is a possible way to overcome the problem of evil.

On the basis of the second interpretation, the term "legal" in the expression "legal authority" works as a modal operator. This means that attributing legal authority to someone does not also imply attribution of a moral authority but the observation that, from the point of view of law, that subject morally exerts legitimate power. Shapiro observes that the modal interpretation performs a distancing function, in the sense that it allows us to speak of the moral conception of a legal system without personally accepting it. It can be said that a legal system that forbids divorce attributes a high moral value to the traditional family order without for this reason having directly to share this perspective. On the basis of this interpretation, it is hence possible to distinguish between legal and moral authority.

On one side, the modal interpretation of legal authority does not seem very different from Raz's thesis that every legal system lays claim to legitimacy. On the other side, however, the fact that Shapiro is concerned to maintain a clear-cut distinction between legal and moral authority produces some ambiguities in relation to the theme of the normativity of law. As I have said, discussing the normativity of law requires us to ask ourselves whether and to what extent law is a reason for action. As Hart clearly showed, this question forces us to take the perspective of the participant seriously. As I have tried to show, the participant, to justify his/her behaviour conforming to the law, must be prepared to defend, wholly or partly, the moral perspective accepted by law. This means that it is not possible to distinguish legal obligation from moral obligation. I believe that Shapiro shares this conclusion, although the distinction between legal and moral authority goes in the opposite direction. To this, it must be added that (a) the rational constraints that force us not to break away from a plan once it has been adopted do not authorize us to put in brackets the reasons (moral, first of all) that have led to that plan being adopted and (b) doing one's part in a shared activity in order not to betray the expectations of the other planners implies a positive evaluation, from a moral point of view, of the protection of the entrustment and therefore is a moral reason that must be balanced with other moral reasons.

One last point, Shapiro says that "the normative theory that represents a system's point of view … *may be false from a moral perspective*" (Shapiro 2011, 186, italics added). This claim seems to imply acceptance of a cognitivist and objectivist meta-ethics. Ethical objectivism maintains (a) that it is possible to predicate the truth or falsehood of utterances that contain evaluations or moral appreciations, (b) that such utterances are true or false independently of our opinions and (c) that the canons of moral reasoning constitute a reliable method for attaining and increasing moral knowledge (Boyd 1988, 181–183). The planning theory maintains that a characteristic of legal activity is the moral aim. Nevertheless, if one defends a strong objectivist position in the meta-ethical sphere, one has to be prepared to maintain that it is possible to show whether a legal system conforms to correct morality or not. The possibility of showing the immorality of a legal system creates some problems

for legal positivism and, all the more, for planning positivism that includes the moral aim among the necessary characteristics of law. Positivists in the first half of the last century were well aware of these problems and perhaps Shapiro should have paid greater attention to them.

In conclusion, the distinction between moral authority and legal authority is a legacy of the practice theory which Shapiro could renounce without any consequences for his planning positivism.

References

Alexy, R. 1989. On necessary relations between law and morality. *Ratio Juris* 2(2): 167–183.

Barberis, M. 2008. *Filosofia del diritto. Un'introduzione teorica. Terza edizione*. Torino: Giappichelli.

Bayón, J.C. 2000. Deber jurídico. In *El derecho y la justicia*, ed. E. Garzón Valdés and F.J. Laporta, 313–331. Madrid: Editorial Trotta.

Boyd, R.N. 1988. How to be a moral realist. In *Essays on moral realism*, ed. G. Sayre-McCord, 181–228. Ithaca/London: Cornell University Press.

Bulygin, E. 2007. *Il positivismo giuridico*, Italian edition: P. Chiassoni, R. Guastini, and G.B. Ratti. Milano: Giuffrè.

Celano, B. 1995. Consuetudini, convenzioni. In *Analisi e diritto 1995. Ricerche di giurisprudenza analitica*, ed. P. Comanducci and R. Guastini, 35–87. Torino: Giappichelli.

Celano, B. 2003. La regola di riconoscimento è una convenzione? *Ragion Pratica* 21(2003): 347–360.

Coleman, J. 2001. *The practice of principle. In defense of a pragmatist approach to legal theory*. Oxford: University Press.

Comanducci, P. 1998. *Assaggi di metaetica due*. Torino: Giappichelli.

Comanducci, P. 1999. Il positivismo giuridico: un tentativo di bilancio. In *Studi in onore di Franca De Marini Avonzo*, ed. M. Bianchini and G. Viarengo, 125–134. Torino: Giappichelli.

Dickson, J. 2007. Is the rule of recognition really a conventional rule? *Oxford Journal of Legal Studies* 27(3): 373–402.

Dworkin, R. 1978. *Taking rights seriously*. Cambridge, MA: Harvard University Press.

Gilbert, M. 2006. *A theory of political obligation*. Oxford: Clarendon.

Green, L. 1999. Positivism and conventionalism. *Canadian Journal of Law and Jurisprudence* XII/1: 35–52.

Hacker, P.M.S. 1977. Hart's philosophy of law. In *Law, morality, and society. Essays in honour of H. L. A. Hart*, ed. P.M.S. Hacker and J. Raz, 1–25. Oxford: Clarendon.

Hart, H.L.A. 1958. Positivism and the separation of law and morals. *Harvard Law Review* 71: 593–629.

Hart, H.L.A. 1982a. Legal duty and obligation. In *Essays on Bentham. Studies in jurisprudence and political theory*, ed. H.L.A. Hart, 127–161. Oxford: Clarendon Press.

Hart, H.L.A. 1982b. Commands and authoritative legal reasons. In *Essays on Bentham*, ed. H.L.A. Hart, 243–268. Oxford: Clarendon Press.

Hart, H.L.A. 1994. *The concept of law*, 2nd ed. with Postscript, ed. P.A. Bulloch and J. Raz. Oxford: Clarendon (1st ed. 1961).

Hartney, M. 1994. Dyzenhaus on positivism and judicial obligation. *Ratio Juris* 7: 44–55.

Lacey, N. 2004. *A life of H. L. A. Hart. The nightmare and the noble dream*. Oxford: Oxford University Press.

Lagerspetz, E. 1995. *The opposite mirrors. An essay on the conventionalist theory of institutions*. Dordrecht/Boston/London: Kluwer.

MacCormick, N. 1986. Law, morality and positivism. In *An institutional theory of law. New approaches to legal positivism*, ed. N. MacCormick and O. Weinberger, 127–144. Dordrecht/Boston/Lancaster/Tokyo: Reidel.
MacCormick, N. 1994. *Legal reasoning and legal theory*, 2nd ed. Oxford: Clarendon (1st ed. 1978).
Mackie, J.L. 1977. *Ethics. Inventing rights and wrong*. Harmondsworth: Penguin.
Nino, C.S. 1984. Legal norms and reasons for action. *Rechtstheorie* 15: 489–502.
Nino, C.S. 1994. *Derecho, Moral y Política. Una revisión de la teoria general del Derecho*. Barcelona: Ariel.
Postema, G.J. 1987. The normativity of law. In *Issues in contemporary legal philosophy. The influence of H. L. A. Hart*, ed. R. Gavison, 81–104. Oxford: Clarendon.
Raz, J. 1979. *The authority of law. Essays on law and morality*. Oxford: Clarendon.
Raz, J. 1988. *The morality of freedom*, 2nd ed. Oxford: Clarendon.
Raz, J. 1990a. Authority and justification. In *Authority*, ed. J. Raz, 115–141. Oxford: Basil Blackwell.
Raz, J. 1990b. *Practical reason and norms (with a new postscript)*. Oxford: Oxford University Press (1st ed. 1975).
Raz, J. 1995. *Ethics in the public domain. Essays in the morality of law and politics (Revised edition)*. Oxford: Clarendon.
Raz, J. 1996. Intention in interpretation. In *The autonomy of law. Essays on legal positivism*, ed. R.P. George, 249–286. Oxford: Clarendon.
Raz, J. 2009. Reasons: Explanatory and normative. In *New essays in the explanation of action*, ed. C. Sandis, 184–202. Basingstoke: Palgrave Macmillan.
Redondo, M.C. 1999. Sulla rilevanza pratica del diritto. *Ragion Pratica* 13: 203–218.
Ricciardi, M. 2008. *Diritto e natura. H. L. A. Hart e la filosofia di*. Oxford/Pisa: ETS.
Shapiro, S.J. 1998. On Hart's way out. *Legal Theory* 4: 469–507.
Shapiro, S.J. 2011. *Legality*. Cambridge, MA/London: The Belknap Press of Harvard University Press.

Chapter 5
Legality: Between Purposes and Functions

Diego M. Papayannis

5.1 Introduction

In his book *Legality*, Scott Shapiro offers an extremely novel theory of law. His most important claim is that law can be best understood as an activity of social planning. It is a very hard challenge in its own right to present a compelling argument around this idea. Legal theorists' first reaction probably would be to ask themselves whether it is necessary to incorporate in their discourse the notion of plan, a completely alien concept to traditional jurisprudence. I am almost convinced that Shapiro succeeds in showing that the analysis of law in terms of plans is a plausible enterprise. At the end, the reader finds out that in Shapiro's explanation, all the pieces of law fit together. However, showing that plans can provide an interesting insight of law is just part of the task. Additionally, in order to convince legal theorists that this project is worth the effort of learning about plans, their logic, their rationality, and their structure, Shapiro has to show that the reference to social plans is *a necessary step* to fully understand legal practices. So, can a legal theorist make it without the notion of plans? This is an important question too. Contrary to Shapiro, I think she can. In Sect. 5.3, I try to show that an orthodox interpretation of Hart's theory is ultimately immune to Shapiro's sharp criticisms, so there is no real need to abandon social rules as an explanatory device. Shapiro would probably consider that my defense of the Hartian theory makes Hart succeed in a less interesting project, while Shapiro's own reconstruction makes Hart fail in a more interesting one. I will not discuss whether the orthodox interpretation of Hart is interesting or not; that,

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I think, is a matter of choice, and theoretical arguments are likely to fail in showing that some projects are more (or less) interesting than others.

Despite all this, I think that *the planning theory of law* is a very powerful theory. In fact, it is two theories. I would like to suggest that Shapiro's approach to the legal phenomenon admits two different readings. According to the first reading – the most obvious one – it is an explanation of legal practices that takes into account the internal point of view. In this sense, Shapiro provides an understanding of legal practices that passes the intelligibility test. His explanation is understandable from the participants' perspective. On the other hand, I think Shapiro can be seen as offering an external explanation, a functional explanation to be more precise. As I will show, these two approaches are of a very different kind, but not incompatible. Indeed, they are complementary. I think one of the most attractive features of Shapiro's theory is that, maybe without intending to do so, it illuminates different aspects of legal systems, some of them often neglected by legal theorists. What is shown by each kind of explanation is inaccessible to the other. That is why I defend a mixed understanding of legal practices. In this respect, *the planning theory of law* stands out from other alternatives. Like no theory before, *the planning theory of law* offers a broader explanation of legal systems, their nature, and, especially, their functions. In my opinion, its merit is not being a superior alternative to Hart's approach; instead, its value lies in the highly developed mixed explanation it provides.

I present my argument in the following order: In Sect. 5.2, I explain the Hartian methodology and its background. Section 5.3 is devoted to show how *the planning theory of law* fits within the Hartian tradition. It also argues that, according to the orthodox interpretation of Hart, there is no real need to abandon the Hartian theory in order to understand legal practices taking into account the internal point of view. However, there might still be compelling reasons to advance in our understanding of law in terms of social plans. Thus, Sect. 5.4 reconstructs the main theses of *the planning theory of law*. The reader familiarized with them can skip the entire section. In Sect. 5.5, I argue that Shapiro's theory is susceptible of an internal reading as well as an external one. Finally, in Sect. 5.6, I argue for a mixed understanding of legal practices. In this sense, I place the theoretical value of *the planning theory of law* on the fact that it provides a very detailed mixed explanation of law.

5.2 Hart's Legal Methodology and Its Background

In the last 50 years, legal theory has addressed the study of the legal phenomenon taking into account the participant's perspective. Since the publication of *The Concept of Law*, the idea that an explanation that fails to present an image of law recognizable to those who accept the norms of the system as a legitimate standard of conduct is fatally flawed has become increasingly popular. Hart's criticisms to Austin were grounded on this idea.[1] The imperative theory provides an inadequate account of law because it makes unintelligible the participants' discourse, the way

[1] For these criticisms, see Hart (1994, especially chapters II, III, and IV).

they speak about rules, and the way they use them in their practical reasoning. In other words, to conceive law as a set of general commands issued by the sovereign, backed by threats of sanction, and habitually obeyed by the majority of the population distorts every feature we consider to be salient of law. This theory cannot account for the existence of different kinds of rules – for example, duty-imposing rules and power-conferring rules – in every legal system; for related reasons, it also fails to account for certain features of the sovereign like persistence, continuity, and limitability. Finally, legal systems usually include rules that are not intentionally created by a sovereign but by the practice itself, like customary rules. These three problems should convince us that Austin's account is terribly defective. Law is not grounded on general commands; it is grounded on social rules.[2]

In order to analyze the concept of a social rule, one has to consider its two different constitutive aspects. The first is the regularity of conduct. This aspect is external. Thus, the proposition "in Xanadu every employee remains silent when Kane takes his nap" is descriptive of a behavioral regularity. We still have no grounds for asserting the existence of a social rule, because this could just be a social habit. For there to be a rule according to which in Xanadu every employee *ought* to remain silent when Kane takes his nap, a second aspect is required to obtain, that is, the fact that they take this behavioral pattern to be a justified or legitimate standard of conduct to be followed by the group as a whole. Social habits differ from social rules because the internal aspect is missing in the former. The existence of social rules entails that the majority of the members of the group *use* the standard of conduct to guide their own behavior and to criticize the deviations of others. The standard of conduct is considered a good reason for action and for criticizing those who do not conform their conduct to it; that is why those who criticize are not in turn criticized for doing so. Individuals that accept the pattern of conduct as a legitimate standard, Hart explains, take up the internal point of view; they develop a reflective critical attitude toward the pattern. This is usually shown by the use of a normative language, necessary to utter the criticisms. So, expressions like "right," "wrong," "you ought," and "you must not" are typical of those who take up this point of view.[3] Without the internal point of view, the regularities of conduct are, at most, social habits with no legal significance.

Notice that the study of legal practices requires taking into account the attitudes of the participants. The theorist must be able to reconstruct the perspective of those who accept the legal rules. Before Hart, Alf Ross tried to show the limitations of a purely behavioral model, based on the external observation of patterns of conduct. He insisted on the need of incorporating a psychologist element. Otherwise, the legal reality would turn out to be inaccessible for the theorist. Ross illustrates this idea by showing the fragility of the conclusions reached by a theorist that studies the game of chess from the external point of view. He said: "Even after watching a 1,000 games it would still be possible to believe that it is against the rules to open with a rook's pawn. (…) The problem is to discover which rules are actually felt by the players to be socially binding (…). But in order to decide whether rules that are

[2] Hart (1994: 75).

[3] Hart (1994: 57).

observed are more than just customary usage or motivated by technical reasons, it is necessary to ask the players by what rules they feel themselves bound."[4]

The behavioral model went along with the prevailing scientific standards of the nineteenth century. At that time, the philosophy of science defended a methodological monism, and for that reason social sciences also took the exact natural sciences' premises to be unquestionable.[5] Later, a different model that stressed an obvious truth was developed: human beings can be understood in a way natural phenomena cannot.[6] Within this framework, the relevant knowledge is not to be obtained from the external observation of behavioral regularities but from its interpretation. Social life has a meaning for the individuals that share it. The interpretation or the understanding of those meanings, through the analysis of the participants' conceptual scheme, became an important aspect of social sciences.

This new approach finally got established with Max Weber's *comprehensive sociology*. This framework, among other things, strongly emphasizes the inquiry of the subjective meaning that actions have for those who perform them. According to Weber, to explain is to grasp the complex of meanings in which a directly intelligible action fits in virtue of its intentional subjective meaning.[7] I will call this last kind of explanation *internal*, and I will refer to the former as *external*.[8]

Taking part in this methodological tradition, Hart is primarily concerned with providing an internal explanation that renders the phenomenon intelligible for the participants.[9] For that reason, the explanation of the legal practice requires taking

[4] Ross (1959: 15).

[5] See Von Wright (1971: 3–4).

[6] On the roots of this tradition, see Macdonald and Pettit (1981: 55).

[7] Weber (1922: 18).

[8] It is very important to stress that the internal explanation I am mentioning does not *take up* the internal point of view. The statements are expressed from the point of view of an external observer, even though they are descriptive of the internal point of view. This is the position known as moderate external point of view. Certainly, some theorists had taken the internal methodology to an extreme claiming that it is impossible for an external observer to understand the phenomenon. Understanding law does not merely require taking into account the internal point of view; it requires taking it up. This would blur the theorist-participant distinction. As a consequence, the statements made by the theorist are equal in nature to those uttered by the participants; they are internal statements, committed, purely normative ones. See Dworkin (1986: 62–65). I will not address these questions in this chapter. I will just assume that the Hartian project intends to be normatively neutral and that it succeeds.

[9] Actually, Hart follows Peter Winch's philosophy, and it has always been pointed out that there is a big difference between Winch's approach and Weber's comprehensive sociology. In Winch's opinion, Weber was wrong in assuming that in order to provide an interpretation in meaningful terms, the theorist must support her conclusions with statistics. These work in Weber's approach as an objective criterion for the validation of one among different possible interpretations of social facts. In contrast, in Winch's account statistics are irrelevant because nothing else besides interpretation is needed. However, leaving aside Weber's reference to statistics, it is possible to understand that their positions are not really divergent, given that Winch's project is committed to better interpretations in terms of social rules, but he surely didn't mean to exclude the validation of plausible interpretations through some objective procedure. See Martin (2000: 95–97).

into account the internal point of view, from where certain obvious truths about law can be grasped, those truths that an educated man would identify as central features of every legal system.[10] Nonetheless, the theory must in some way transcend this common knowledge; it is supposed to provide something different of what everybody knows about the law. How can an explanation illuminate some aspects of law usually unnoticed by the participants, and at the same time be a reconstruction of their own perspective? In other words, how can the theorist bring out an explanatory element that the practice does not expressly contain, and at the same time be engaged with an internal methodology? Hart solves this problem offering a conceptual analysis aimed to elucidate the general framework that organizes legal thought.[11] The immediate object of analysis is the *concept* of law, or *our concept* of law. Why is this kind of study of any value? Hart believed that the elucidation of these concepts sharpened our perception of the legal phenomenon. The basic idea is that by identifying the central organizing concepts of a practice, determining their contents, and clarifying the internal relations that hold them together, we deepen our understanding of the kind of practice that constitutes the object of our inquiry. When the analysis is carried out properly, the explanation obtained should be recognizable to the participants, maybe after reflecting about it, as the practice they are engaged in. In this sense, the criticism to the imperative theory is based on the fact that the participants do not regard the habitual obedience to a sovereign whose commands are backed by threats as an adequate description of the practice they call "law."

As it is well known, Hart substitutes the notion of social rule for the notion of command backed by threats. In particular, the foundation of legal systems is to be found in a rule (*the rule of recognition*) accepted by officials as a criteria for identifying the rest of the valid rules of the system, that is, the duty-imposing rules and the power-conferring ones. These notions allow him to solve all the problems he previously pointed out in Austin's theory. For now, we do not need to discuss Hart's position in detail. Up to this point, I just wanted to show the main assumptions of his project and the epistemological tradition in which he engages.

In the next section, I will analyze the methodology followed by Shapiro and the reasons he has for rejecting Hart's substantive theory of law.

5.3 The Need for a New Theory of Law

The most fundamental question of jurisprudence, Shapiro claims, is the question, "*what is law*?" When someone asks this question, she wants to know about the nature of law. How is this nature elucidated? There are two ways. Sometimes we are after an answer to the *identity question*: what makes something to be the kind of

[10] Hart (1994: 3).

[11] Hart (1994: vi, 81).

thing it is? What makes law to be *law* and not something else? Still, other times, we are interested in giving an answer to the *implication question*: what necessarily follows from the fact that something is what it is and not something else? What necessarily follows from the fact that something is law? Shapiro addresses these two questions by means of conceptual analysis.[12]

To that effect, from the beginning, he presents a list of truisms about the law.[13] Theories are to be evaluated in light of their ability to account for them. The process can be quite complex because there would probably be disagreements among theorists sometimes–profound–disagreements about the list of truisms that a good theory of law must explain. When this occurs, we are left without any criteria for evaluating rival conceptions of law. However, we should bear in mind that the intuitions of the participants might fail, so the list of truisms is always subject to revision until a kind of reflective equilibrium is reached. A theory that cannot account for most of the central intuitions will be unsatisfactory, but not necessarily mistaken. The analysis takes as a starting point the intuitions of those familiarized with the phenomenon, but it does not end there. Conceptual analysis can help us to identify the sources of confusion, and in that way to reach an agreement about which features are essential to the phenomenon. Looking at the truisms, we can elaborate theories, and with these theories we can revise our beliefs about what is true and false regarding law; this in the end will sharpen our perception of the phenomenon.[14]

Shapiro builds his *planning theory of law* with what he considers to be the most commonly known features of law in mind. However, first, he has to justify the need to substitute this novel idea for the theoretical instruments provided by traditional jurisprudence. For that reason, Shapiro analyzes Austin's and Hart's theories "paying attention not only to their logical coherence but also to the extent to which their representations of legal practice are faithful to the shared understanding of legal participants."[15]

[12] See Shapiro (2011: 8–10 and 13).

[13] Shapiro's preliminary list of truisms about the law includes, among others: (a) every legal system has judges that interpret the law and whose function is to solve conflicts; (b) every legal system has institutions to modify the law; (c) there are different kinds of norms; some of them are duty imposing; (d) norms can be applied to those who created them; (e) legal authority is always conferred by legal norms; (f) legal authorities can impose obligations even if their decisions are wrong; (g) in every legal system, some person or institution has supreme authority to create the law; (h) knowing what the law requires is not sufficient to motivate obedience; (i) it is possible to obey the law even if it is thought that there is no moral obligation to do it; (j) officials can be alienated; and (k) legal questions have right answers. Sometimes, courts interpret the law incorrectly. Some individuals know the law better than others. See Shapiro (2011: 15).

[14] See Shapiro (2011: 16–18).

[15] Shapiro (2011: 34).

5.3.1 Intelligibility

Austin's imperative theory fails for the same reasons Hart points out in *The Concept of Law*. Nevertheless, sometimes, Shapiro's criticisms are slightly different. For example, while some of Hart's criticisms are based on the fact that power-conferring rules are not commands backed by threats, Shapiro adds that the imperative theory is flawed because it cannot account for the different *functions* that duty-imposing and power-conferring rules fulfill. The function of *duty-imposing rules* is to limit our negative freedom, while the function of *power-conferring rules* is to increase our positive freedom.[16] Notice that these functions need not be part of, nor be derived from, the common knowledge about the law. Functions can occupy a central place in the concept of law, but Shapiro does not include them in his list of truisms. In this sense, this criticism is different than the Hartian one. It holds that rules fulfill different functions, and the imperative theory just cannot give an account of them.

Later on, Shapiro's criticisms return to the Hartian track pointing out that the imperative theory leaves no space for the *good citizens*. They not only consider they have moral reasons to do what the law requires, but they also regard law as providing a *new* moral reason for action. The good citizens do not see the law as composed merely of sanctions; therefore, this cannot constitute the essence of the duty-imposing rules. Sanctions do not make duty-imposing rules duty imposing.[17] Finally, Shapiro holds that a theory like Austin's renders incomprehensible the way these people think about their actions: "For any theory that privileges habits and sanctions over norms not only gives a poor explanation of the actions of some citizens but, more importantly, fails to account for the coherence of their thoughts. It cannot explain the fact that they think that the sovereign has the legal *right* to rule, that the exercise of that power generates legal *obligations*, that it would be legally *wrong* to disobey, and that those *guilty* of breaking the law *should* be *punished* for their *offense*."[18] To sum up, the greatest objection against Austin is that he does not account for the internal point of view.

5.3.2 Puzzling Hart

Undoubtedly, Hart cannot be accused of the same crime. The objections raised against him are of a different kind. From the beginning of his book, Shapiro says that part of his analysis will be presented in the form of puzzles. This is a good approach because puzzles show us the paradoxical aspects of our practices that have to be explained if our conceptual scheme is to be consistent. The most important of

[16] Shapiro (2011: 61–66).

[17] Shapiro (2011: 68–71).

[18] Shapiro (2011: 77).

these puzzles is the *possibility puzzle*. Briefly stated, the problem is how can legal authority be possible if the following two very reasonable propositions are accepted: (a) someone has authority to create new legal norms if an existing legal norm confers that power; (b) a norm conferring power to create legal norms exists only if a body with power to do so created it.[19] This puzzle recreates the classic "chicken-egg" problem.

Austin solves the possibility puzzle rejecting proposition (a). The sovereign has authority because he can coerce the population. The authority does not derive from norms; instead, norms derive from the authority. The problem with this answer is the one discussed in the last section. Most of the aspects of law that result familiar to us turn out to be unintelligible.

Hart undertakes a different strategy. He rejects proposition (b). While authority has to be conferred by legal rules, legal rules can be created by those who lack legal authority. The idea is that groups can create social rules with their practices. According to Hart, every legal system has a rule of recognition. This is a secondary rule (a rule about other rules) used to identify the rest of the rules of the system. The duty-imposing rules are part of the legal system if they satisfy the criteria of validity specified in the rule of recognition. The validity of primary rules does not depend on them being applied by the courts, but the rule of recognition exists just in case it is actually practiced. Its existence is a matter of fact. This means that it exists insofar as the relevant officials in the community use it to identify the norms of the system. Like every other social rule, it requires the concurrence of the external aspect, given by the effective use of the rule, and the internal aspect: officials must accept the rule of recognition as a legitimate pattern of conduct.[20]

Thus, the mere acceptance of a pattern of behavior as a legitimate standard of conduct and the effective use of this pattern to guide conduct and criticize deviations from it generate a social rule sufficient to ground a legal system (provided that the conduct in question is the identification of what are taken to be valid norms of that system). Hart's theory, remarks Shapiro, is clearly positivistic. The existence of the rule of recognition is a purely empirical fact; it is a matter of social facts because rules are practices.[21]

As Shapiro points out, defining rules as practices is simply a category mistake. Rules are abstract entities whereas practices are concrete events that occur in a spatiotemporal dimension. So rules cannot be reduced to practices. This is certainly true. At this point, Hart might want to weaken his thesis, Shapiro suggests, acknowledging that even if these two categories are mutually irreducible, practices necessarily generate rules. Then, the weakened version of the practice theory of rules would say that the instantiation of a practice is a sufficient condition for the creation of social rules. Unfortunately, this position would not hold either.

[19] Shapiro (2011: 40).

[20] See Hart (1994: chapters V and VI).

[21] Shapiro (2011: 95–96).

This aspect of Hart's theory had already been criticized by Raz. The idea is that the existence conditions of social rules specified by Hart are overinclusive. According to Raz, this makes it impossible to distinguish two different kinds of practices: the practice of acting for general reasons and the practice of acting following rules. Not always that someone acts for general reasons she acts guided by a rule.[22] Think of a soccer match. Any member of the audience would be able to notice that when a player other than the goalkeeper touches the ball with his hands, the referee calls a fault and gives a free kick to the other team. Deviations from this pattern of conduct give rise to strong criticisms against him. Likewise, the member of the audience would be able to observe that when a defender is pushed near the penalty box, he always kicks the ball outside or tries to play across the sideline, but he never kicks the ball inside the penalty box. In this case, deviations from the pattern also give rise to criticisms. However, although there is a *rule* that imposes the referee the duty to call a fault when some player other than the goalkeeper touches the ball with his hands, there is *no rule* that imposes defenders the duty to kick the ball outside.[23] In both cases, there is a pattern of behavior (external aspect) and a critical attitude (internal aspect), but only in the first case are the participants being guided by a rule. In the second case, individuals act following what Shapiro calls *generalized normative judgments*. They are nothing more than good reasons for carrying out certain courses of action in general. The most important difference between rules and generalized normative judgments is that rules are content-independent reasons, whereas generalized normative judgments are not.[24]

Shapiro thinks that there is another way of amending Hart's theory. With the Razian objection in mind, he considers the claim that not all practices generate social rules but some of them do. Of course, unless we specify what conditions must obtain for a practice to generate social rules, the Hartian theory would be incapable of solving the possibility puzzle. The most promising way to amend the practice theory of rules, he suggests afterward, is given by the thesis according to which the rule of recognition is a coordination convention that solves the recurring coordination problem of settling on an authority structure. Eventually, he ends up rejecting this interpretation of the rule of recognition because it "unduly restricts the types of motivation that officials may have for accepting [it]."[25] Since a coordination convention only exists when the participants take the existence of the pattern of behavior as a *reason* for doing what everybody else do, the possibility of widespread official alienation is precluded. Such a theory cannot account for a system in which officials do not care about what other officials do, and just want to do their job in order to get a big paycheck at the end of each month.[26]

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[22] Raz (1990: 55).

[23] The original example, referred to cricket, is taken from Warnock (1971: 45–46).

[24] Shapiro (1998: 493).

[25] Shapiro (2011: 110).

[26] Shapiro (2011: 108–110).

There is another alternative that Shapiro, strangely, does not discuss. I think it is plausible to solve this problem resorting to the idea of exclusionary reasons (or peremptory reasons, in Hart's own terms[27]). Thus, the practices that necessarily generate social rules are those in which the participants develop a very particular reflective attitude toward the pattern of conduct: they take it to be a first-order reason to behave as the pattern establishes and as an exclusionary reason, that is, as a reason to abstain from acting for other first-order reasons that might apply. In this sense, to take the internal point of view toward a pattern of behavior would mean to regard the pattern as an exclusionary reason. Being faithful to Hart's ideas, it can be noticed that the participants *experience* very different feelings when they recognize that a norm they consider to be valid applies to them, and when they recognize that under the circumstances there are in general very good reasons to undertake a specific course of action. In the first case, reasoning avoids deliberation about the merits of the conduct required by the norm; in the second, the possibility of deliberation is always open.

I think this Razian interpretation of Hart can solve the possibility puzzle.[28] If this is so, one of the reasons for leaving behind Hart's substantive theory and for advancing in the understanding of law in terms of the idea of social plans is unsupported.

The second reason for which Shapiro thinks it necessary to introduce the notion of social plans is related to what he calls Hume's challenge. The problem for Hart is that, according to the practice theory of rules, once certain facts obtain, it is possible to assert the existence of a rule of recognition. At the same time, that would allow us to assert the validity of the primary norms identified by it. Primary norms impose duties and confer rights, and their validity justifies judgments like the following: in Xanadu all employees ought to remain silent when Kane takes his nap. Given the logical impossibility of inferring an *ought* from a fact, we would expect that Hart's theory avoided deriving normative judgments from descriptive ones. But this is precisely what happens when from (1) asserting the existence of a fact (e.g., the relevant individuals of the community accept that whatever Kane says must be obeyed), we get (2) the assertion of the validity of a norm ("in Xanadu all employees ought to remain silent when Kane takes his nap," assuming that Kane commanded this). An orthodox Hartian positivist would respond that the analysis does not violate Hume's law because, as it will be shown later, propositions about the validity of norms, or about the rights and duties

[27] Hart (1982). The differences between the concepts of peremptory and exclusionary reasons are not relevant for the argument presented here. For some notes on this matter, see Himma (2002: 152–153).

[28] It should be noticed that the Razian interpretation can only account for the duty-imposing rules but not for the constitutive ones, for example. However, this should not be a problem for Shapiro, given that he thinks that the rule of recognition is a duty-imposing rule: it imposes on the officials the duty to enforce the norms that satisfy the criteria of validity. See Shapiro 2011: 85. Moreover, in a previous article, Shapiro thought that this interpretation solves the problems of overinclusion in Hart's theory. See Shapiro (1998: 493–494).

individuals have, are descriptive of certain acts and attitudes of the participants. Hart's purpose was to point out that law is a normative practice, in the sense that the participants treat rules as a reason for action, but it might be the case that these rules do not actually provide reasons of any kind.

However, this is not Shapiro's interpretation. He suggests that Hart must be understood in an expressivist fashion. It is unquestionable that the existence of the rule of recognition is dependent of certain facts. But one can engage with facts in two different ways. One can have a theoretical attitude, so our propositions would be descriptive, they will purport to represent a state of the world, or one can have a practical attitude toward them. In this last case, the individual expresses his commitment to treat these facts in a certain way. The statements are normative; therefore, they do not intend to describe norms but to express a practical commitment to descriptive (not normative) facts. Based on this distinction, Shapiro holds that statements of validity, or about individual rights and duties, are internal, that is, purely normative. They express the practical commitment of the person that utters them to the rule that identifies these rights and duties. In other words, they express the acceptance of a rule as a legitimate standard of conduct. The existence conditions of the rule do not include anything but facts, but the judgments about rights and duties, or about the validity of primary norms, express a practical orientation toward them. In this way, the pattern of inferences followed by the Hartian scheme is always normative. Therefore, normative judgments are derived from a normative commitment. Hume's law is respected. This brings as a consequence that a theorist who refuses to take up the internal point of view can never find out what the law requires because his reasoning would always be descriptive.[29]

Thus, the expressivist interpretation prevents someone from making judgments about rights and duties, or about the validity of norms, without accepting the rule of recognition. This way of dealing with Hume's challenge is really problematic. That is so because the fact that Holmes' bad man can engage in legal reasoning threatens the idea that these judgments require taking up the internal point of view.[30] The bad man, who obeys the law for prudential reasons alone, is able to *re*describe his judgments in legal terminology. Instead of saying that he is obliged to pay taxes, for example, he can assert that *legally* he has the obligation to pay taxes. Shapiro thinks that it is always possible to redescribe the content of the law using normative terminology without accepting at the same time the rule of recognition. In fact, it would be very odd if the only people who can have access to the content of the law were those who accept it. Law professors very often describe the content of other legal systems, in order to carry out a comparative study, without taking up the internal point of view toward every one of them. But in the expressivist view of Hart's theory, only those who accept the rule of recognition can do that. Therefore, the theory cannot account for the bad man, who actually engages in legal reasoning and describes the system accurately. In short, Shapiro argues that the bad man, to the extent he is *bad*,

[29] Shapiro (2011: 98–101).

[30] Shapiro (2011: 111–113).

does not take up a practical attitude toward the rule of recognition, but he is nevertheless able to derive normative judgments from descriptive ones; and this constitutes a violation of Hume's law.[31]

The most interesting aspect of this argument is that Shapiro takes the existence of an individual that performs *logically impossible* mental operations to be a fatal objection to Hartian positivism. By this, I mean that something does not work in the description of the bad man. If I understand the problem correctly, neither the bad man nor anyone else can derive a normative judgment from a descriptive one. As this is logically impossible, there are three alternatives. The first is that the outcome of the reasoning is not truly normative; it must be descriptive. The statement in which the bad man acknowledges that he has the duty to pay taxes, if he is a genuine bad man that has not developed a practical attitude toward the rule of recognition, is nothing more than a description of the unhappy consequences of disobeying the commands of the sovereign or a description of the fact that *others believe* that he has the duty to pay taxes. The second possibility is that in fact the bad man is not so bad after all, and having accepted the rule of recognition, maybe for prudential or self-interested reasons, he is able to derive his duty to pay taxes. This second alternative does not concern us here, because this is not a truly bad man. The third alternative is that the judgments about the validity of the norms are descriptive, even if they are expressed in a normative language. Obviously, these statements can be uttered without accepting the rule of recognition. Unlike the first alternative, these judgments do not describe the beliefs and attitudes of the participants, but the *legal point of view*.

Explained in another way, at first sight, it would seem to be the case that Shapiro's argument against Hart depends on these two propositions being true:

(a) The bad man does not accept the rule of recognition.
(b) The bad man can utter genuine normative judgments about what the law requires.

However, in the Hartian approach, the truth of (a) makes it the case that (b) is false for logical reasons; so, Hart cannot account for the legal abilities of the bad man. All Shapiro means, I think, is that Hart lacks the necessary theoretical resources to explain how it is possible for the bad man to make legal judgments without accepting the rule of recognition. Surely, an orthodox Hartian would reply that the judgments of the bad man, like those of the theorist, are made from the moderate external point of view. In order to determine what the law of a particular community requires, it is necessary to inquire what norms officials *believe* to provide them reasons for action. Then, it could be discovered what rights and duties they *believe* citizens have. The pattern of inferences is always descriptive-in-descriptive-out. The statements of validity are never genuinely normative. The Hartian response, then, would consist in denying premise (b) of the counterargument.

[31] Shapiro (2011: 113).

But in Shapiro's account, premises (a) and (b) can be simultaneously asserted if one rejects that the truth of (a) entails the falsehood of (b). That is, the acceptance of the rule of recognition is a *sufficient condition* for someone to be able to utter normative judgments, but not a *necessary condition*. Another way of uttering normative judgments about what the law requires, without accepting the rule of recognition, is qualifying the statement with the word "legal." Every assertion about the validity of the primary norms, about the existence of rights and duties, would be uttered from the *legal point of view*. The ascription of authority, for example, does not mean to recognize any kind of moral authority; the only thing that is asserted is that *from the legal point of view*, the person in question has legitimate authority. In the same way, the claims about duties make reference to what the individuals have the moral obligation to do according to the legal point of view. These statements do not commit us with the existence of a true moral obligation to discharge these duties or to respect the rights conferred by the norms of the system.[32] According to this, Shapiro continues, "statements of legal authority, legal rights, and legal obligations are *descriptive*, not normative. They describe the law's normative point of view. Statements such as 'X has legal authority over Y in S' are true just in case it is true that *according to S's point of view* X has moral authority over Y."[33]

I am not sure that this third alternative is really different from Hart's. In effect, to assert that "from the system's point of view citizens have the moral duty to pay taxes," given that Shapiro admits that the legal point of view might not coincide with the true moral point of view,[34] seems really close to assert that officials believe that citizens have the moral duty to pay taxes. This, except for the "moral" qualifier, is the orthodox interpretation of Hart's theory, and it does not violate Hume's law either. Anyway, let's suppose that Shapiro is right, and the legal point of view is different than the description of the participants' beliefs and attitudes. Even in this case, the orthodox interpretation would still be invulnerable to Shapiro's objections, so maybe his expressivist interpretation of Hart should be rejected.

Perhaps Shapiro is able to provide an elegant explanation of how it is possible for officials to understand that a fact, that is, the acceptance of the rule of recognition by other officials, provides them a reason for action.[35] Now, to say that they take a practical attitude toward that fact still does not justify acceptance, but it explains its rationality. Another quite different thing is to extend this argument to the theorists. They never take up a practical attitude, like the bad man, and if that is so, their statements about the validity of the primary norms must be understood as describing the beliefs and attitudes of officials. To reject this would imply that the theorists and the bad man are irrational. If they are asked whether they accept the rule of

[32] Shapiro (2011: 185–186).

[33] Shapiro (2011: 188).

[34] Shapiro (2011: 186–187).

[35] Dworkin, criticizing Hart, asked how the fact that the majority of the members of the group accept certain rules as a standard of conduct can create *duties* or *reasons for action*. See Dworkin (1978: 48–58).

recognition and they answer negatively, but at the same time they express that they believe to have (or that the citizens have) a genuine legal duty to pay taxes, either they do not understand what to accept a rule of recognition is nor what to have a duty means.

To sum up, Shapiro offers two reasons for advancing in his *planning theory of law*. The first is related to the fact that the imperative theories, still today very influential,[36] are incapable of accounting for the internal point of view. They do not present an intelligible view neither of the legal discourse nor of the participants' reasoning.[37] The second reason is that the most sophisticated positivist theory that succeeds in providing an account of the internal point of view – Hart's theory – is incapable of solving the possibility puzzle, and the way it deals with Hume's challenge is problematic. I tried to show that even if one accepts that the reasons for leaving the imperative theory behind are sound,[38] the reasons to abandon Hart's theory are not completely compelling for a traditional positivist. Regarding Hume's challenge, I think it is clear that Hart does not have a problem. Regarding the possibility puzzle, Hart's theory should be improved. Now, this improvement can be achieved resorting to the old idea of exclusionary reasons suggested by Raz. So, is it really necessary to conceive law in terms of social plans? Even if is it thought that the answer is negative, I will argue that Shapiro's theory provides a broader understanding of the legal phenomenon than the traditional view, and it highlights a great bunch of aspects very often neglected by most legal philosophers.

5.4 The Planning Theory of Law

Shapiro's main thesis is that law is a form of social planning. Legal institutions plan for the community over which they claim authority. For this reason, they prescribe what individuals may or may not do, that is, they set up standards of behavior to guide the conduct of the citizens, and they identify those who have the power to set up new standards or change the existing ones. According to this view, legal rules are general plans,[39] or plan-like norms,[40] created by those authorized to plan for the community, and legal activity is nothing more than the interpretation and the

[36] Shapiro takes the law and economics proponents to be the direct descendants of the imperative theorists.

[37] Shapiro (2006: 1166).

[38] Later on, I will call into question this idea also.

[39] Shapiro defines plans as "abstract propositional entities that require, permit or authorize agents to act, or not act, in certain ways under certain conditions." In this way, plans are norms, but not every norm is a plan. Moral norms, for example, exist because of their validity, not because someone has adopted them. See Shapiro (2011: 127).

[40] Plan-like norms refer to consuetudinary rules. They are not plans; they are plan-like norms because they do what plans normally do. See Shapiro (2011: 140).

application of those plans. Legal planning has a specific aim: to solve the moral problems that are impossible to solve, or that would be unsatisfactorily solved, by means of alternative forms of social organization.[41]

How does Shapiro arrive at these novel conclusions? We individuals, he notices following Michael Bratman, are planning creatures: we design, adopt, and execute plans to achieve our aims. We plan because our goals and desires are complex. Unlike animals, assuming that they have a certain degree of intentional abilities (at least in the most basic sense), we are in need of plans in order to achieve our goals; these are usually very sophisticated and require coordination. Further, we have limited rationality, and deliberation case by case can be really expensive. Under these circumstances, the adoption and execution of plans is a way to realize our ends.[42]

In the case of shared activities, the success of the group depends on every individual doing their part. This requires a substantial coordination that is difficult to accomplish by means of improvisation. In some contexts, in which the parties know each other well and are strongly bound together by trust, improvisation might work just fine. When these conditions do not obtain, the need to have a guide of conduct emerges. In many occasions, even if the aim of the group is clear, there will be several ways to achieve it. This makes what each individual *must do*, that is, the conduct that each person must perform as part of the shared activity, dependent on what the others will do. Thus, planning seems to be the only way to carry out a shared activity in contexts of pervasive uncertainty about the conduct of others. Therefore, Shapiro argues, plans have a *control* function over the individuals' behavior.[43]

The coordination and predictability problems regarding the individuals' behavior are particularly important under three circumstances: when shared activities are complex, contentious, or require arbitrary solutions. Then, planning might be considered a rational response (almost a natural one) of the groups that carry out their shared activities in these scenarios. All this is part of a general theory of planning, also applicable to law. Notice that in order to have a social life, every community will be required to solve a number of problems, which Shapiro calls *moral problems*, making a generous use of the word "moral." They include the regulation of "ownership, contractual obligations, duties of care to one another, proper levels of taxation, limitations of public power, legitimacy of state coercion and so on." Clearly, modern societies are incapable of solving these problems efficiently by means of other forms of social organization or spontaneous coordination. So, when it comes to the resolution of moral problems, the three scenarios mentioned above conform to what Shapiro calls "the circumstances of legality."[44] In general, complex or contentious shared activities require the adoption of a plan; when the activity in question is the resolution of moral problems, legal institutions are required. In this respect, Shapiro's

[41] Shapiro (2011: 155 y 194).

[42] Shapiro (2011: 122–123).

[43] Shapiro (2011: 131–133).

[44] Shapiro (2011: 170).

argument is really insightful because he debunks the myth, widespread among positivists, that a society of angels would have no use for law, except maybe for solving pure coordination problems. The point is that even good faith individuals would need a guide of conduct to know how to behave when confronted with the moral problems described under the circumstances of legality.[45]

It is important to make it clear that the function of law is not to solve any particular moral quandary; the law is concerned with moral problems in general, whatever they happen to be in different societies. The idea is that law is necessary in a community – in this way, the function is defined – when their moral problems are so numerous and serious and their solutions so complex, contentious, or arbitrary that it is impossible to address them with less sophisticated forms of social organization. Now, the specific moral problems in every particular society can cover a wide range. Law is just an efficient technology to solve them. Of course, the legal response might be morally unsatisfactory. In order to understand the moral aim thesis, it has to be taken into account that under the circumstances of legality, certain morally objectionable states of affairs *might arise*. Before having law, social groups might live in a constant moral chaos whose rectification requires legal planning. In these circumstances, law presents itself as a good way of solving conflicts. It is a useful instrument to regulate *any kind* of moral conflict. Then, it should be stressed that law is necessarily concerned with a second-order problem: the problem of how to solve moral problems in general. What makes something to be *law* is that it has the purpose of establishing a mechanism to solve the moral problems that cannot be solved efficiently by customs, traditions, consensus, persuasions, or promises.[46] Legal activity, like any plan, achieves its aim by guiding, organizing, and controlling individual and collective behavior and, at the same time, allows agents to reduce the costs of deliberation, negotiation, and agreement; it increases predictability and solves the problems generated by the informational deficiencies, the inability to make perfectly rational decisions, or bad character.[47]

The moral aim thesis might seem controversial. On what grounds does Shapiro ascribe this purpose to the legal practice? It must not be thought that the purpose of law is the one intentionally pursued by legal officials. Legal systems would still have a moral aim even if officials had the intention of simply maximizing their welfare, perpetuating themselves in power. Remember that officials might be alienated from their jobs. What is important is that they continue employing the typical rituals and language of moral practices. In their legal discourse, participants represent the practice in this way: they offer arguments based on individual rights and duties, etc.[48]; in sum,

[45] Shapiro (2011: 170–175).

[46] Shapiro (2011: 213–214). This is only a part of Shapiro's response to the *identity question*. Law, besides having a moral aim, is a self-certifying compulsory organization; this means that it is not voluntary for the community and that it enforces its claims without having to demonstrate their validity to any superior (if one exists). See Shapiro (2011: 221–222).

[47] Shapiro (2011: 200).

[48] Shapiro (2011: 216–217).

they offer an image of their own activity in which the moral purpose is transparent to all. Officials, nonetheless, might disapprove altogether the rules of the system. As long as they keep using certain language and evaluating conduct from the legal point of view, they will be doing their jobs. If I understand Shapiro correctly, this means that the moral aim of law *is part of the concept of law*. Officials, even those who are less committed to the system, use moral language and notions because that is supposed to be the point of law: using a moral reasoning to solve moral problems. If they suddenly stop doing this, their activity would no longer be recognizable as *legal* for the participants. In Sect. 5.1.2, I will say something more about this.

Now let's suppose that law is a social plan to solve the moral problems of the community. Small communities might solve almost every problem deliberating, but as they grow in population, their need for plans will be more urgent. However, the facts that make plans more necessary also make them more difficult to adopt and apply. How can a large society agree to a common plan? Under these circumstances, the ideas of delegation and hierarchy become stronger. Communities delegate the activity of planning to certain individuals whose identification is functional, not nominal. These individuals, the officials of the system, are in charge of adopting a plan *for the community*. On the other hand, other individuals are in charge of applying those plans. The plan that sets this division of labor among officials is a *common plan for social planning*. Its purpose is to solve the problem of how to plan for the community when plans are more needed, but the circumstances make them more difficult to adopt and apply. This plan, which Shapiro calls *master plan*, is the foundation of a legal system given that, as I understand the idea, it fulfills in the *planning theory of law* the same function that the rule of recognition fulfills in Hart's theory.[49] Hence, the legal system is composed of the master plan and every plan, or plan-like norm, adopted and applied by the social group.[50]

The master plan is a shared plan, but it is not the plan of the community as a whole. It is the social planners who share a plan to plan for the community; it is them who accept the plan. In other words, officials *accept* the master plan that guides, organizes, and controls its shared activity of planning for others. Officials share a plan because they work together, and, for that reason, they are members of the same legal system.[51] Nevertheless, the claim that officials have legal authority entails something more than the assertion of the fact that they are authorized by the master plan to plan for others. In order to have authority, officials are further required to be able to dispose the members of the community to act in accordance with their directives. This disposition can be achieved by any means, including threats of sanctions. Only when these two elements are obtained, authorization and the ability to motivate, can it be claimed that officials have legal authority, that they have the ability to plan for others.[52]

[49] Shapiro (2011: 163–166).

[50] Shapiro (2011: 208).

[51] Shapiro (2011: 165–166).

[52] Shapiro (2011: 179–180).

Let's have a closer look to what Shapiro has in mind. If it is asked why Rex has legal authority in the community C, we would say that Rex is authorized by the master plan to plan for the citizens of C and that he also has the ability to dispose them to act according to the plans he makes, by threatening them with the imposition of sanctions or by any other means of motivation. In turn, the master plan exists because officials, including Rex, *accept* it. But, how did they get the authority to adopt the plan whose content is that Rex is to plan for the rest? Here the word "authority" should not be understood as legal authority; instead, it refers to the authority that every individual has to adopt a plan, merely for being a planning creature. All individuals have the power to adopt plans by virtue of the norms of instrumental rationality. By the same token, officials have the rational power to adopt the master plan. The norms of rationality are not plans; they have not been created by any authority. The ultimate ground for the master plan is to be found in instrumental rationality, which provides the normative foundations of every legal system. In short, legal authority is possible because certain agents are capable of creating and sharing a plan for planning and motivating others to act along with their plans.[53] This is Shapiro's response to the possibility puzzle.

The planning theory of law is a positivist theory as long as the existence of the law can be asserted by social observation alone. The theorist just has to verify the fact that a master plan to solve the moral deficiencies in the circumstances of legality has been adopted by the officials of the system. The legal authority of a body does not rely on moral considerations but on the fact that officials had accepted a plan that authorizes that body to plan for the community and requires deference to it. From this, it follows that in order to create a legal system, it is not necessary that officials have moral legitimacy for imposing obligations and conferring rights. It is required that they have the ability to plan.[54] Notice that Shapiro's theory conforms to the *social sources thesis*, because there is no plan without social facts and no law without plans, and the thesis of the *separation between law and morality*, because the substantive merit of plans has nothing to do with their existence conditions.

This is, in very general terms, Shapiro's conception of law. His response to the identity question can meet, as we saw in the last section, Hume's challenge, given that statements about the validity of primary norms describe the moral conception of the legal system – what one has the moral duty to do from the legal point of view. This point of view holds that the norms of the system are legitimate and morally obligatory. When the theorist formulates statements of validity, or about the individuals' rights and duties, she simply describes this normative perspective. *The planning theory of law* can also solve the possibility puzzle: legal authority is created by norms (plans), but not every norm is created by individuals with legal authority. The foundation of the legal system is the master plan, whose existence does not depend on it being created by a group of individuals with legal authority for doing so, but on it being adopted and applied by some members of the group.

[53] Shapiro (2011: 119–120, 180–181).

[54] Shapiro (2011: 119–120, 156, 176–178).

5.5 Purposes and Functions

Here I want to suggest that Shapiro's theory can be understood in two different ways. It can be seen as an internal explanation or as an external one. As an internal theory, it fits within the Hartian tradition by taking the intelligibility of legal discourse to be a criterion for evaluating a theory of law, probably the most important criterion. As an external theory, it offers a kind of functional explanation, whose roots can be traced back to the methodology of Emile Durkheim.

5.5.1 The Purpose of Law

5.5.1.1 Are Purposes Necessary to Understand the Legal Practice?

The internal explanation model, sometimes called hermeneutic or humanist, commits us to a conception of persons according to which, at least most of them, do not accept rules mechanically; they have a reason for doing it. This follows from noticing that persons, unlike animals or insects, are moved by purposes, they reflect upon their acts, and they have a self-understanding of their own conduct. It is impossible to work within this approach and deny this fact about human beings. That is why the adoption of rules will always have a purpose in light of which the understanding of social practices can be deepened.

This can be noticed in the vast literature on the purposes of specific legal practices. Theorists interested in these questions claim, for example, that the purpose of tort law is to implement corrective justice, while the purpose of criminal law can be explained by retributive justice, and antitrust law by the principle of efficiency. These principles are supposed to make sense of legal discourse better than any other theory; they account for the central concepts that organize each practice and the way these concepts are related. The most profound understanding is achieved taking into account the specific purposes of each practice. I assume that there are different degrees of intelligibility. Let's think of tort law. The observation of external regularities offers a superficial knowledge of the law. For example, we observe that every time a motorist skips a red light and an accident occurs, the state makes him pay damages to the victim. Then, we can formulate a predictive statement based on a generalization from our observation. If, further, we add the internal point of view to the picture, it can be discovered that *negligent* agents have a *duty* to *repair* their victims' losses and that the victims have a claim to *compensation* against the injurer. This normative language expressed in terms of rights, duties, and wrongful conducts takes into account that the participants developed a reflective critical attitude toward the pattern of behavior externally observed. But we still have no clue of why this attitude is developed. What explains that the group accepts *these* rules, and not others, to deal with wrongful losses? Why impose on the injurer the duty to make good the victims' losses instead of having a general social insurance system? In other words, why implement a bilateral system (restricted to the victim and the injurer) to address the compensation of wrongful

losses? This second kind of question also requires taking into account the internal point of view, but in a different level than the previous one. The theorist can only answer to this question if she analyzes the purpose or point of the practice.

The question about the purpose is not an inquiry about the reasons (real reasons) individuals have to implement a tort law system with these features. It is not a justificatory question. Instead, the idea is to inquire what reasons can be ascribed to individuals in order for the institution to make sense. If they wanted to achieve an efficient allocation of resources, they would not have a bilateral tort law, because it is often an obstacle in the reduction of the costs of accidents.[55] Ultimately, this inquiry is about instrumental rationality. To say that efficiency is the purpose of a practice that at the same time implements improper means to achieve the supposedly purported end is as much as to impute irrationality to the members of the group. This is forbidden by the *principle of charity* in interpretation,[56] except when there is undisputable evidence in that sense.[57] In turn, the thesis that the purpose of tort law is corrective justice does not have these problems. That is why it seems to be the best explanation of the practice from the internal point of view.

Then, the theorist must look at the purposes of the practice in order to understand why the members of the group developed a reflective critical attitude toward a particular set of rules. To verify that the majority of them do take up the internal point of view is not enough to understand the practice at its deepest level. Individuals act for reasons, and this fact leads us to ask ourselves for what *reason* they take up the internal point of view toward *this* concrete pattern of behavior and not toward some other pattern. This question is fundamentally related to the participants' rational beliefs and not with the moral reasons they objectively have to adopt a particular normative system. Only at this stage would we have achieved a full understanding that captures the participant's perspective.

Now one might ask whether it is possible to apply this approach to the understanding of law in general. One might concede that the different statutes or areas of law have specific purposes, but deny their relevance to a general theory of law. In fact, it makes no sense to ask why individuals adopt *a particular set of rules*. At the most, it could be interesting to ask why social groups adopt *some set of rules*. However, the answer seems obvious: to guide conduct in order to achieve any goal they want to pursue as a community. This seems to be Hart's position in *The Concept of Law*. In opposition to Dworkin's point of view, for whom the purpose of law is to justify state coercion,[58] Hart refuses to make any statement about the aim of legal practices. In effect, he considers quite useless to search for a specific purpose that law is to serve, beyond the guidance of human conduct.[59]

A position like Hart's relies in two premises: (1) a *general theory* cannot take into account the specific purposes of the different areas of law, and (2) it is not

[55] See Landes and Posner (1983: 113), Weinrib (1989: 506–509).

[56] Davidson (1974: 19).

[57] Thagard and Nisbett (1983: 252).

[58] Dworkin (1986: 96, 110, 190–192).

[59] Hart (1994: 248–249).

possible to identify in the different areas of law a basic purpose that unifies them as a legal practice.

Notice that the first premise admits that the different areas of law have different purposes. In fact, it would be absurd to deny that individuals pursue some end when they accept certain patterns of behavior as exclusionary reasons. But, what else can be said about legal practices in general, conformed by private law, criminal law, antitrust law, etc., if not what Hart says? For Hart, these areas of law establish standards of conduct for the group. Beyond that, whatever can be known about the specific purposes of the different areas of law will not necessarily be helpful to understand the general phenomenon. Of course, if one wants to understand why losses in tort law have different treatment than losses in contract law, specific purposes became relevant to the intelligibility of the distinction. Hart acknowledges this when he discusses the problem of judicial discretion. He admits that certain purposes are identifiable in an area of the law.[60] That is, even when he thought that such inquiries made no sense in a *general theory*, he did not deny the existence of a purpose accessible to the external observer that intends to deepen his understanding of a particular area of law. Law is an instrument to achieve multiple ends; therefore, a general theory cannot be concerned with every one of them. The only reason a theorist might have to elucidate the general purpose of law is his belief on the falsity of premise (2). To show this, it is necessary to identify a fundamental purpose unifying all areas of law.

Then, apparently, whoever wants to ascribe a general purpose to legal practices must prove false premise (2), that is, she must show that different areas of law share in common something more than being a guide of conduct. The difficulty lies in that the possibility of finding a unifying principle for all legal areas depends on them being coherent, and this does not only seem unlikely, it is also contingent. To keep on with our previous example, if the purpose of tort law is corrective justice, as I think is plausible to hold, and wealth maximization is the purpose of antitrust law, the falsity of premise (2) will commit the theorist to the possibility of connecting these two principles at a foundational level. As a matter of theoretical understanding, the connection of these two principles depends on them being normatively or conceptually connected in the participants' scheme of thought; and, of course, this is a contingent matter.

Maybe we can modify premise (2) and say something weaker, like the following: (2') it is not always possible to identify in the different areas of law a basic purpose that unifies them as a legal practice. This formulation reflects in a better way the fact that Hart's thesis is concerned with conceptual necessities. Thus, premise (2') asserts that the existence of a unifying principle is a contingent matter, and for this reason, it is left aside in Hart's theory. What is conceptually necessary? That the different areas of law intend to guide the conduct of the group to achieve *some purpose*. There is nothing more in common in all areas of law. This is a general description based in the fact that individuals are purposive agents; they act for reasons. The search for more specific purposes would mean to engage in an analysis of a different level, the level of substantive reasons, which are contingent.

[60] Hart (1994: 274).

Obviously, Shapiro thinks that premise (2') is false and, therefore, that it is possible to identify the purpose of law. But he tries to do it without looking at contingent reasons. I think this leads him to complete Hart's idea specifying what the different areas of law have in common, without analyzing the different substantive purposes of every one of them. According to the *planning theory of law*, the aim of legal practices is to solve moral problems that arise in every community, whatever they might be. Regardless of whether tort law is actually explained by corrective justice, criminal law by retributive justice, and antitrust law by wealth maximization, every one of these areas of law has the purpose to solve moral problems. Whatever the particular purposes, they constitute a response to a moral problem identified by the community,[61] and they are implemented by means of social planning.[62] If we accept Shapiro's broad conception of moral problems, his position results extremely interesting; even if it is not capable of explaining every aspect of social practices, it explains the most important ones.[63]

Shapiro does not commit himself to the thesis that all areas of law are related in a substantive level. His commitment is that different areas of law intend to solve what the participants consider to be moral problems. The purpose of the master plan is to solve a second-order problem, namely, the problem of how to solve the moral deficiencies of the circumstances of legality. Different areas of law can be interpreted as specific solutions to the moral problems identified by the officials in a community. It must not be thought that each area of law is defined by a particular moral problem or a set of moral problems. The same moral problem can be addressed from different perspectives, through different plans. Establishing and protecting private property, for example, might be the concern of private law and criminal law as well. So, Shapiro's conception can be understood as a specification of Hart's position. Law, through its different areas, has the purpose of guiding the conduct of the members of the group (Hart's thesis) *in order to solve the moral problems they face as a community* (Shapiro's thesis).

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[61] Undoubtedly, every principle I mentioned solves different moral problems in a very particular way. Market efficiency is a way of solving the problem of how to allocate resources; corrective justice solves the moral problem of enforcing fair terms of interaction between private parties; and retributive justice… only god knows what moral problems it solves (and which new problems are created by it).

[62] Shapiro does not say exactly this, but when he discusses the expressive function of law he holds that if it is reasonable to understand that law fulfills this kind of function, it does so through social planning. Extending this idea, I think that my analysis is coherent with his theory. See Shapiro (2011: 203).

[63] Only few people would deny that criminal law and tort law solve moral problems, but many might object that pure coordination problems, given that their solutions are arbitrary, also involve moral problems. Think of the norm that prescribes to drive on the right side of the road. Deciding which side of the road we should drive on is a pure coordination problem; however, there is a *prima facie* moral imperative to reduce the number of accidents between motorists, and motorists and pedestrians (to be sure, not at all economic and moral costs). If this is so, there is a moral imperative to adopt one of the possible rules. On the other hand, once the rule is established, whichever it is, it fulfills a fundamental function in the moral evaluation of conduct. Some morally neutral actions, after the rule is established, become moral wrongs. This means that even coordination rules are in some way related to the resolution of moral problems.

Nonetheless, there is an important difference between Hart's and Shapiro's conception. A theorist based on Hart's theory can offer an explanation of the law in terms of rules that guide the conduct of the members of the group. By contrast, Shapiro's explanation describes law as a social plan. A legal system consists of the master plan and the plans created according to the master plan. Unlike the notion of rule, which can be understood without considering any purpose beyond the guidance of conduct, the notion of plan requires that a final aim is specified. In some way, rules are self-sufficient in respect to purposes. If the dean of the law school gathers all his employees, gives them a piece of paper, and says, "these are my rules," probably everybody would try to study and follow them. But if the dean while giving the pieces of paper says instead, "this is my plan," the employees would read the paper; they would find a number of rules written on it, some of them very simple instructions like "under no circumstances the dean shall be disturbed while taking his nap"; and then they would naturally ask: "your plan for what?"

In the same way, if we could ask Hart what is the foundation of any legal system, he would explain to us that in every legal system, there is a rule of recognition. If, taking advantage of his kindness, we further ask him what a rule of recognition is, he would answer that it is a rule that identifies the rest of the rules of the system. Finally, we could ask him why anyone would want to have a rule that identifies the rest of the rules of the system. Well, Hart would say, in order to have certainty about which rules are rules of the system. By contrast, if we asked Shapiro about the foundation of any legal system, he would mention the master plan, and at the same time he would be forced to mention what the plan is for, which is its purpose. The idea is that purposes are related to the notion of plan in a way that they are not to the notion of rule. Plans and rules have content: at the very least, a deontically qualified action. But plans, unlike rules, are meaningless without a general purpose. Let's think of an individual who adopts certain rules for himself for no particular reason, that is, he acts without a purpose. To be sure, we would say he is being irrational. However, if the same person tells us that he has adopted *a plan* that requires him to obey certain rules, but when asked, he cannot tell us what his aim is, what he intends to achieve with the plan, which is his purpose, we would not only say that he is being irrational, we would also say that he has no plan at all. That is why theoretical understanding in terms of rules is possible without making reference to purposes (an incomplete understanding perhaps); but a plan without a purpose is a conceptual monstrosity.[64] Could Shapiro have held by any chance what he holds in his book without including the moral aim thesis? Wouldn't we feel in every chapter the need to know what the plan is for?

[64] I am not suggesting that determining the content of a plan necessarily requires considering its purpose. My claim is that a plan that commands or prohibits certain conducts is unintelligible *as a plan* if the purpose is not taken into account. We could say that the plan requires performing certain conduct, but we could not say what the plan is for. In fact, most individuals for whom officials plan – that is, the citizens – can identify and comply with what is required of them without knowing the purpose of the master plan, or knowing that the prescribed conduct is part of the solution to a moral problem. Maybe Shapiro is right, and law is a social plan; that would explain the theorists' eternal interest in rationalizing legal systems in discovering the point or purpose of the law.

I think these considerations explain why Shapiro has to ascribe a general purpose to law because if he does not, his conception of law as a social plan would be very unsatisfactory. Hart did not need to ascribe a general purpose to law because his explanation is based on rules, and rules are understandable in their own terms.

5.5.1.2 Purposes and Intentions

One last aspect of the moral aim thesis deserves special attention. As I have already explained, Shapiro thinks the practice has the purpose of setting out a mechanism to solve the moral problems of the community because officials *represent* it in this way. Concrete intentions of legislators, judges, and members of the executive power might be terribly despicable; they might occupy their office just because they intend to enrich themselves at the citizens' expense, but if they perform their activities meticulously observing the usual legal discourse – they argue and express their decisions in terms of rights, duties, authority, validity, etc. – the practice would have the purpose of solving moral problems. Why does Shapiro take this odd position? Probably because he wants to preserve the idea that the officials of the system can be alienated; and taking their intentional mental states as determinant would force him to admit that many instances of law are not really *law*, given their lack of a moral aim.

Remember that, according to Shapiro, the law is supposed to pursue a moral aim, although actual legal systems might fail to fulfill this function. If mental states were relevant, corrupt officials *could never* bring to life a legal system, and that would deprive *the planning theory of law* of much of its explicative potential. That is why Shapiro establishes as a minimal condition that officials represent their activity as intending to solve moral problems.

I think the better way to analyze this problem is to start with this question: what determines the content of the concept of law? This question can be answered in a traditional conventionalist fashion. The concept of law, *our concept* of law, has the content it has because of the beliefs of the participants. Then, law has a moral aim if, and only if, the participants believe that it has a moral aim or treat law as having it. All of us, including corrupt officials, would say that an official that enriches himself at the expense of the citizens contributes to the legal system working improperly. This shows that actual intentions of officials are not relevant to define legal activity. Perhaps this is so because we are thinking of a few corrupt officials. But, what would we think of a system in which 100% of the officials, let's say Rex and its descendents, are corrupt? If, even in this case, we are still willing to accept that the practice held by Rex and his thugs is a legal system, it is because we either reject the moral aim thesis or we think that the intentions of officials do not determine the purpose of law. In this second case, we would agree with Shapiro and say that even in a fully corrupt legal system, law still aims to solve moral problems, although officials do not intend to perform this function. Then, what makes the system to have this aim? The answer we are discussing is that officials represent their activity as having it.

A second alternative is to accept the moral aim thesis but to deny that the intentions of officials are irrelevant. According to this position, beliefs and intentions are

constitutive of the legal practice. Unlike the previous position, now it is said that our concept of law includes as a requisite for there to be law that officials have the intention to solve moral problems. The weakness of this idea becomes clear when one tries to distinguish corrupt legal systems from writ large criminal organizations. It might be thought that there are no real differences between them, that is, that a fully corrupt system is not law. Obviously, Shapiro wants to avoid this conclusion, and for that reason he excludes the intentions of officials from his conception of law.

Finally, the moral aim thesis can be rejected, as well as the thesis according to which the intentions of officials are relevant. This would be a classical positivist position: law does *not necessarily* have a moral aim, and the intentions for which officials fulfill their functions are irrelevant. They could be motivated by the desire to solve moral problems, but they also could be motivated by the perspectives of personal enrichment or the social status associated with their office. In this view, it is never possible to distinguish a legal system, corrupt or not, from a writ large criminal organization on the bases of the intentions of officials. In fact, the cases in which it is possible to distinguish are those of criminal organizations who have not achieved a sufficient degree of efficacy to dominate a territory entirely. When a criminal organization is sufficiently effective, the phenomenon becomes indistinguishable for us. There are many historical examples of states whose activities are similar to those carried out by writ large criminal organizations. Consider piracy, for instance; pirates are usually thought to be criminals, but during the sixteenth century in England, piracy was turned into a legitimate business and even encouraged by the state, by conferring honorific titles to successful pirates (or business men; after all, how can we tell which is the most appropriate description?).

It looks like the difference between Shapiro's theory and the one I called "classic positivist position" is the way they distinguish corrupt legal systems from criminal organizations. For Shapiro, what is distinctive of legal systems is the fact that officials express themselves in a particular language. For the traditional positivist, it is the efficacy of the organizations. Criminal organizations that have control over a community within a territory are considered to be states. The traditional approach does not assume any commitment regarding the aim of legal systems. Remember that Hart ends his analysis when he notices that law is supposed to guide conduct. Being that so, in order to justify the moral aim thesis, Shapiro has the burden to show that the fact that legal officials express themselves in a particular language, although their intentions are despicable, constitutes a theoretically relevant difference. Given that also piracy during the sixteenth century was expressed in *moral* terms, the word "moral" in Shapiro's scheme cannot have the same meaning as that in ordinary discourse. To be sure, when Shapiro claims that law has a moral aim, he is just saying that officials represent their activity *as if* it is aimed to solve moral problems. But taking this as a distinctive feature of legal systems is tantamount to taking as a criterion for distinguishing a police officer from a crook the fact that the former is dressed in blue. So, how can we make sense of the moral aim thesis?

Actually, properly understood, I think that Shapiro's thesis consists in pointing out that every known legal system presents its activity in a terminology akin to the moral discourse, and officials show in this discourse a concern for solving moral problems.

On the other hand, criminal organizations do not represent themselves as having the same purpose. In essence, both activities might be indistinguishable from each other, and, maybe, the only relevant criterion is efficacy. However, the form of the legal discourse, the fact that the practice presents itself as moral, is a conceptual feature of law. This would explain why when evaluating a corrupt legal system, we refer to officials in a critical negative way; we disapprove their conduct; we say that they are "exceeding their function." On the contrary, when we asses criminal activity, we do not say that criminals are exceeding their functions. We say that they are complying with their function as *good criminals* when they are more efficient in performing the reprehensible conduct.

In order to show the potential of this position, I will adapt an example used by Coleman to contrast conceptual explanations with functional ones.[65] Let's suppose that a group of university professors decide to organize a tribute to a retired colleague that they actually despise. Imagine that they organize the tribute because it is a good way of raising money for the legal theory department. *Everybody knows* that the point of a tribute is to honor someone. Without any doubt, this purpose is part of *our concept* of a tribute. If the act takes place, although we know that the organizers hate the honoree, we would still say that the old professor is being honored, that a tribute is taking place. Perhaps we would think that the tribute is not sincere, but we would *never* say that is not a tribute. The same is true about law.[66] Once we notice that officials do not have the intentions they are supposed to have, maybe we morally criticize them. The reason for criticizing them is not that they are depriving us of a legal system. The reason is that when we realize that an official does not have the intentions we expect him to have, we think that he will profit the discretionary power he might have for his own benefit instead of the community's. This shows that the concept of law includes similar features than those pointed out by Shapiro.

5.5.2 The Functions of Law

5.5.2.1 The Planning Theory of Law and External Explanations

I will argue that Shapiro's ideas admit a second reading according to which the *planning theory of law* is an external explanation. In particular, it is a functional explanation.

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[65] Coleman (2001: 14–15).

[66] It looks like the idea is not that odd after all. There are many cases in which what people claim is constitutive of the activity they are carrying out. This will not hold for any activity. A group of individuals may claim the existence of god, and have a lot of rituals associated with this claim, but if none of them actually believe in god and their single intention is to evade taxes, they are not carrying out a religious practice; Shapiro's point is that law is the kind of shared activity in which the claims that are made by its participants are relevant in order to define it as *legal*.

External explanations take for granted that the meanings individuals ascribe to social institutions like family, religion, or law, among others, do not show but a superficial aspect of the social reality. Durkheim thought that it is natural for men to form certain concepts to organize their life, but it is a mistake to ground our explanations on them just because they are closer to us than the realities they cover. The suppression of the underlying social reality by the theorist is a tendency that must be resisted. Individuals usually turn these superficial notions into speculation that lacks scientific value.[67] In this sense, Austin's theory can also be interpreted as external. In general, Hartian criticism – to which Shapiro adheres – assumes that external explanations make unintelligible the participants' discourse, the way they think and argue in terms of rules, and the way they use rules to guide their conduct. But if Austin is interpreted as providing an external explanation, these criticisms are out of place, because the theory would purport to show that law, despite all the conceptual ornamentation of the participants, is nothing more than an organized use of force. It is irrelevant that the participants feel like having rights and duties; the essence of law is a sovereign that generates incentives for the citizens threatening them with the imposition of sanctions in case of deviation from the established pattern of behavior. There is nothing magical behind law that makes it different from the mere use of force. For this reason, the theorist that focuses on the internal point of view is actually getting farther from the true nature of law.

However, for an external explanation, the concepts through which individuals interpret reality are not completely useless; they are a good indicator.[68] Still, exhausting the inquiry in the analysis of these superficial categories is a kind of scientifically reprehensible theoretical conformism. For Durkheim, reality becomes intelligible when the theorist elucidates what *social needs* are met by the institutions that organize the life of the community.[69] On this approach, the best way to describe the social reality is with a functional explanation.

Functional explanations conform to the pattern of the explanations usually offered in biology. In this field of knowledge, research aims to discover why a *process* takes place (why does photosynthesis occur?) and what explains the presence of certain *organs* in certain species (why do fish have gills?) or of some *trait* or *feature* (why do leopards have spots?). In every case, the answer has to do with the function met by the item (the process, the organ or the trait) in an ecosystem or organism. Thus, "the function of the heart is to make the blood flow," "the function of big toes is to help men to keep balance," and "the function of the liver is to segregate bile" are all propositions with the form of a functional explanation. In social sciences, the idea of organism is replaced with the notion of social system, and that of which the function is predicated instead of being an organ or a trait can be a practice or institution. The functional explanations of religion or family are very well known examples. "The function of religion is to strengthen social cohesion

[67] Durkheim (1895: 53).

[68] Durkheim (1895: 79).

[69] Durkheim (1895: 140).

among the members of the community" and "the function of the family is to protect and train the children in order to maximize their fitness for survival" are propositions that intend to explain certain institutions by the function they meet in a social system.

In a standard functional explanation, the functions of the institution in a given social system are opaque to the participants, but they do not have to. The theoretical knowledge is part of the life of the society; therefore, after some time, the functions discovered by the theorist are likely to be known by the community. In spite of this, the explanation continues to be functional because it does not depend on the self-understanding of the members of the social group; instead, it points at the benefits produced by the institution or practice. In this sense, I do not propose a version of functional explanations as stringent as Elster's, for whom it is an essential feature of this kind of theories that the benefits of the institution or practice are (a) *nonintentional* for the members of the community and (b) *unknown* for the actors of the social group or, at least, if the benefits of the institution are known, that they do not know how their actions produce those beneficial effects.[70] Elster includes these conditions, among others, as a requisite of any functional explanation because he thinks that if individuals were conscious of the beneficial effects of their actions or if obtaining these effects were part of an intentional action, the explanation would become internal. However, I think those who criticize this model are right.[71] The explanation would remain functional even if the actions that produce the beneficial effect were *intentional* but their consequences *unforeseen* for the individuals. Likewise, if the awareness of the benefits produced by the institutions is causally inert, it is not clear why the explanation would cease to be functional; the mere fact that after a while, the participants of the practice become conscious of the beneficial effects of their institutions or patterns of behavior does not prevent an explanation from being functional. For example, the functional explanation of religion as a means for social cohesion might continue to be a good functional explanation even after the participants of the religious practices find out the unanticipated beneficial effects of religion. The structure of this explanation would hold provided this knowledge is causally irrelevant for the maintenance of the religious practice, that is, provided that the fact of knowing the function does not affect the reasons participants invoke to have a religion.[72]

At this point, my argument can be anticipated. I think Shapiro, being someone trying to provide an internal explanation, is unusually concerned with the beneficial

[70] Elster (1984: 28).

[71] Schwartz (1993: 281–282).

[72] This idea can be summarized by saying that functional explanations, unlike intentional or purposive ones, do not presuppose human agency. See Brown (1963: 109). Nevertheless, it is possible for a practice to evolve and take as its purpose what previously was just a *function*. For example, a highly developed society might realize that religion is nonsense but still preserve its religious practices because, like any other tradition, it keeps them together as a group. In this case, the external-functional explanation of religion would have to be replaced with an internal-intentional explanation.

effects of legal systems. Plans have multiple advantages as compared to other forms of organizing social behavior. In fact, the first remarks Shapiro makes about planning aim at highlighting that it is a way of overcoming all the problems derived from limited rationality and the costs of deliberation. Of course, after an adequate reflection, individuals might acknowledge that these are excellent reasons to adopt plans, but as planning is independent of our recognition of these circumstances, the explanation can be understood as external. Expressed in a different way, individuals plan even when they are not conscious of the circumstances that would make it rational to plan. So, the fact that they plan, and the benefits they get from doing it, can be constitutive parts of an external explanation. The idea is that planning allows us to solve the problems of limited rationality and, at the same time, to minimize the costs of deliberation. This is true even if we are neither aware of these problems nor of the solutions we instinctively adopt. Our characterization as planning creatures does not depend on our self-understanding.

In the same way, when discussing shared activities, Shapiro notices that groups face additional difficulties: some of the problems of living together require complex, contentious, or arbitrary solutions (see Sect. 5.4). In these circumstances, shared plans allow us to control and coordinate the conduct of the members of the group and provide us with a higher degree of predictability regarding their actions. Shapiro explicitly asserts that the function of legal systems is to surmount the deficiencies of the alternative forms of social ordering in the circumstances of legality. Legal institutions should make it possible to overcome the difficulties of social life that cannot be solved by other nonlegal mechanisms such as spontaneous interaction, improvisation, private agreements, etc. In the same sense, he interprets hierarchy as a fundamental *technological development* for modern societies because they make it possible to plan for the group when collective deliberation is impossible, or to plan more efficiently when it is factually possible but its costs are prohibitive.

Shapiro also believes that all these functions explain why we consider law to be valuable. But in fact they do not explain this. The reasons why law is in fact considered to be valuable might change in every community. It is a contingent matter. Some communities might consider it to be valuable for mythological reasons, others for religious reasons, while still others for nationalist reasons (because it is *their law*). But considered as part of a functional explanation, Shapiro's claim is that the benefits produced by law *should count as good reasons* for every community to value it. These are objective reasons, provided an underlying theory of what is objectively valuable for every community is accepted. Coordination and control of the members of the group and the efficiency of legal planning as compared to other forms of social organization are *benefits* for the group from certain point of view: the point of the view of the system it is being studied. The theory of natural evolution assumes that the survival of the species is something beneficial for them. It should be conceded, this is not a controversial assumption, but without it functional explanations of the spots of the leopards, the chromatophores of cephalopods, etc., are unsupported. That is why for *the planning theory of law* to be a plausible functional explanation, it is necessary to make explicit its assumptions. Fortunately, the functional interpretation of Shapiro's theory is not based on very controversial

assumptions either. The only necessary assumption is that *the possibility of designing and implementing an efficient response to the social problems the individuals identify* is beneficial for the community.

The ascription of function is the most questionable aspect of this kind of explanation when applied to social sciences, given its normative implications. In natural sciences, the problem is also there, but it does not seem to be as serious as it is in social sciences. Ascribing to the heart the function of pumping blood requires assuming that (1) hearts usually pump blood (most of them, but not the defective ones) and (2) this is something *good* for the body in which hearts are located. In contrast, ascriptions of functions as the one made by the law and economics proponents might provoke the most vigorous reactions. For example, the assertion that the function of tort law is to allocate resources efficiently assumes that tort law allocates resources efficiently (at least in general; there might be defective systems), and that efficiency is beneficial for the community. Many authors reject that efficiency has any value when considered in isolation. Its value, if it has any, can only be assessed once its place is located within a defensible theory of justice.[73]

Despite everything, I think it is less controversial to assert that efficiency in decision making, or in planning, is valuable for the community. I am aware that any argument in this line assumes a normative theory about what is beneficial for the group. Even the advantages of efficient planning might be controversial. Someone might ask why a system in which a dictator makes all the important decisions regarding social life is beneficial; although this system minimizes the costs of planning and of collective deliberation, we might still think that, all things considered, it is not beneficial because it eliminates the group's autonomy. There are several answers to this objection, but I do not intend to offer definitive arguments. I would just answer that it is plausible to hold that a dictatorial system is necessarily better than a Hobbesian state of nature and that plans are beneficial because they are the only available technology that makes possible to overcome these circumstances in which life is solitary, poor, nasty, brutish, and short. Now, once the state of nature is abandoned, communities can live under better or worse schemes of social planning. That is why history shows us instances of good and bad legal systems (assessed from the point of view of autonomy, which was the concern of our hypothetical critic). In short, to assert that law is beneficial for the community does not mean that there cannot be better or worse legal systems or that there are not better plans than others for the community that adopts them, according to the own theory of the system that one is assuming.

This account of functional explanation is not the only one available. Indeed, there are several alternatives that the theorist can consider. For example, Wright and Millikan, each in its own way, avoid including in the explanation the beneficial effects by linking the function of the item to a certain etiology or causal history.[74] But it seems to me that in social sciences in general, and in the understanding of

[73] See Rawls (1999: 257–258).

[74] See Wright (1973), Millikan (1984).

legal institutions in particular, causal history is irrelevant. How legal institutions came into existence might have interest to the history of law, but not to the analysis I intend to pursue here. The project I am engaged with can be taken to be focused on how law operates, or what its contribution is, in a broader scheme given by the development of social groups.[75] As Boorse points out, "function statements do often provide an answer to the question 'Why is *X* here?'" (…). There is, however, another sort of explanation using function statements that has an equal claim to the name. This sort answers the question 'How does *S* work?',[76] where *X* is the item we are trying to explain and *S* the containing system of which *X* is part.

Close to this idea, Cummins had previously characterized functional explanations as concerned with an account of a system's capacity to achieve a complex end, or to produce a certain result, that appeals to the specific capacities of its constitutive parts. Thus, of the many things an item does, its function is doing whatever we appeal to in explaining the capacity of the containing system as a whole.[77] The problem with this conception is that it seems to be overinclusive. The human body, for instance, "has capacities to die of various diseases, and each of these complex capacities can be analyzed in the ways Cummins suggests."[78] Most people would be reluctant to assert that cancer has a function given by its contribution to the overall capacity of the body to die.

The model I presented above, although I cannot offer a full defense of it here, avoids this problem by defining the function of the item as its contribution to a general capacity that happens to be beneficial for the containing system. In this way, I also tried to preserve Durkheim's insight according to which a deep explanation of the phenomenon should aim at elucidating how social institutions might be useful for the communities that hold them. Then, if organizing behavior is an essential need for every society, law can be seen as the kind of technology that makes this possible in the circumstances of legality.

5.5.2.2 The Internal Point of View and the Practical Relevance of Jurisprudence

Shapiro might find the functional interpretation of *the planning theory of law* interesting, but most probably he will find it surprising and terrifying at the same time, for two related reasons.

The first reason I think Shapiro might have for rejecting my external interpretation of his theory is that it goes against the very roots of this project. As I already

[75] Besides that, etiological accounts depend on an evolutionary theory for the traits or items that are to be explained. I prefer to avoid such strong commitments when it comes to the explanation of social institutions.

[76] Boorse (1976: 75).

[77] Cummins (1975: 760–762).

[78] See Griffiths (1993: 411).

mentioned, criticisms to Austin are exclusively grounded on the fact that it is an external theory, and, it seems, Shapiro's general objection to external theories is that they make law unintelligible. The analysis to determine the nature of law starts from certain concepts whose contents and mutual relations provide the key to elucidate the central features of legal practices and institutions. Hart thought that these were the central concepts of his analysis: duty-imposing rules, power-conferring rules, rules of recognition, rules of change, acceptance of rules, internal and external points of view, and legal validity.[79] Besides some of these, the most important concepts Shapiro adds in his own analysis are the following: plans, master plan, legal point of view, and shared activity. All these concepts illuminate the way law functions, offering an image of legal activity that results familiar to the participants. Notice, also, that the notion of efficiency or the benefits of planning, even though Shapiro mentions them all the time, are not casted as central concepts. This means that they do not take any part in his explanation of law. Therefore, an external interpretation of his theory is misleading.

The second reason Shapiro might have for rejecting this external interpretation is intimately related to the first and in some way is more important. The problem with functional explanations is that they are incapable of answering the identity question. Nothing Shapiro says about the benefits of having legal systems allows him to answer what makes law to be law and not something else. It only informs us about some advantages that can be profited by communities if they abandon nonlegal forms of social organization. The impossibility of answering the identity question is a fatal flaw of any theory of law, not only because this is the main concern of jurisprudence, but also because this question has practical implications.

The possibility of answering the question about what law requires in a particular case, Shapiro says, depends on our ability to answer firstly what law is. Very often, there is no way of solving a disagreement about the content of the law without taking a position about the nature of law in general. Surely, those who hold that law is exclusively determined by social sources will have, more than once, different opinions to those who believe that the content of the law depends on moral considerations as well. Thus, the identity question has fundamental practical implications.

Summing up, according to Shapiro, to "understand the nature of law is to figure out the principles that structure our social world and, as we have seen, these principles have profound implications for how we ought to engage in legal practice."[80] This reference to *the principles that structure our social world* makes it clear that the nature of law cannot be understood with an extreme external methodology, because *our world* depends mostly on how we interpret it. Likewise, without taking into account the internal point of view it is not possible to determine the content of the law, which in turn is absolutely necessary to determine what must be done in a particular case. The rejection of external explanations in general is related to the

[79] Hart (1994: 240).

[80] Shapiro (2011: 32); see also the discussion on pages 24–25.

role the internal point of view plays in Shapiro's theory: it makes it possible to elucidate the nature of law and, therefore, to determine its content. External explanations, then, are defective because they do not provide an answer to the identity question or, at least, a useful answer to determine what the law requires.

Nothing Shapiro says entails that external explanations lack practical relevance. The fact they are based on a methodology that makes it impossible to determine the content of the law does not deny the possibility that they provide equally valuable information for other practical matters. Remember that external explanations still conform to the pattern of natural sciences. So, among other things, they stress the need of empirical verification, the observation of regularities, the elucidation of causal relations linking the phenomena covered by the object of inquiry, the formulation of general laws, predictive capacity, and quantification. Obviously, Shapiro would not downplay the importance of comparative institutional studies that intend to establish the *effects* of alternative schemes regarding different variables. For example, we can compare bilateral tort law with general plans of compulsory social insurance for automobile accidents in order to see which system produces fewer accidents, which of them compensate the victims better, and what the effects of each system are on the costs of public and private transportation, among other things. All this information, inaccessible from the internal point of view,[81] would be of great practical relevance at the time of designing the optimal plan for our community. What reasons might a community have to prefer a bilateral tort system to a compulsory social insurance? It could be answered that bilateral tort law implements corrective justice, so it is morally mandatory to compensate the victims with such a scheme. But if we find out that bilateral tort law leaves victims without compensation most of the times, would we still say that this scheme is morally mandatory? And if then we discover also that given motorists escape liability most of the times, the number of accidents rise, and as compared to a general insurance scheme much more people dies every year, would we still insist that we have moral reasons to implement a bilateral tort law? I think that the practical relevance of external explanations is out of question, whatever the conception of morality held.

It is important to make clear that even if Shapiro speaks of *practical implications*, this must be understood as *practical relevance*. External theories have practical relevance because they provide information of the state of world in which we make our decisions. In the same sense, internal theories do not have, strictly speaking, practical implications. Nothing follows from internal explanations about what ought to be done in a particular case. Neither the participants nor the theorists derive duties to identify law with the methodology suggested by the theory. Duties will always derive from the norms of rationality: once a plan is adopted, it is rational to follow it. However, internal explanations have practical relevance because they improve the understanding the participants have of their own activity. Like the English grammar has practical relevance even for those who already speak English

[81] This information is empirical, not conceptual, so the internal point of view cannot tell us much about these questions.

because if they want to speak it properly, it will help them to minimize their mistakes, a general theory of law can be helpful for the participants who would carry out their legal reasoning with a deeper understanding of what they are doing.

In conclusion, I think that the functional interpretation of *the planning theory of law* is a defensible theoretical project, even if it is not what Shapiro had in mind. This version of the theory cannot answer the identity question, or cannot answer it in a way that helps us to determine what the law requires; but slightly reformulating Shapiro's ideas, it could be said, nonetheless, that *law is an instrument used by the communities to solve their social (or moral) problems, whatever they happen to be, when they are so numerous and serious and their solutions so complex, contentious, or arbitrary that nonlegal organization (spontaneous interaction, improvisation, private agreements, etc.) is an inferior way of guiding, coordinating, and monitoring conduct.*

Therefore, the functional statement could be this: the function of law is to allow social groups to overcome the circumstances of legality. This means that (1) law *usually* makes it feasible for social groups to overcome the circumstances of legality[82] and (2) if, *ceteris paribus*, legal institutions were absent, then, the social groups' probability of overcoming the circumstances of legality would be lower than if legal institutions were in place.

It is possible to argue that this makes law a functional kind, but I do not think it is necessary to assume any commitment in this respect. External theories are not really concerned with the nature of things; they do not care about definitions.[83] The theorist's program does not include anything like grasping essences; she is just interested in determining the benefits produced by those institutions that everyone recognizes to be of a certain kind.

So, Shapiro should not have many objections against the external formulation of his theory. In fact, his intuitions aim at that direction. This can be observed in his discussion of property rules, contracts, and tort law. In his view, all these rules "can be understood as general plans whose function is to create the conditions favorable for order to emerge spontaneously. Rather than acting as visible hands directly guiding economic decisions, they provide market actors the facilities to carry out their own profit-maximizing plans so that overall economic efficiency will be maximized in the process."[84] Clearly, this interpretation of the central institutions of private law

[82] When I say that law *usually* makes it feasible for social groups to overcome the circumstances of legality, I am leaving open the possibility of there to be *defective law*. Just as there can be a defective heart, whose function is to pump blood even when it cannot achieve this result, there might be law unable to organize behavior or to guide conduct. This might be an interesting way of supporting the idea that rules validated by an inclusive rule of recognition are law even if they are not capable of making a practical difference, that is, to guide conduct. According to this functional explanation, inclusive rules of recognition would be defective foundations for legal systems. However, this idea is not compatible with Shapiro's exclusive legal positivism.

[83] There are, of course, different opinions about this. See Millikan (1989: 295–297) and Neander (1991: 180).

[84] Shapiro (2011: 134).

would be rejected for any theorist that intends to study them taking into account the internal point of view. This shows that, even if Shapiro did not want it to be this way, his theory offers sometimes internal explanations, and other times purely external ones. This, I will argue, should not be considered a methodological incoherence, but a virtue.

In the next section, I will try to show why internal and external explanations are complementary. Further, I will defend a mixed understanding of legal practices. I think each perspective illuminates a different aspect of social reality. Therefore, we can learn about the law both from the internal or the external points of view. Both perspectives have great theoretical interest and also practical relevance for different matters. In this line of argument, I will try to show that the best interpretation of Shapiro's theory conceives it as a mixed explanation that deepens the tradition initiated by Hart.

5.6 Toward a Mixed Understanding of Legal Practices

The last argument I want to offer is aimed at showing that most legal theorists since the publication of *The Concept of Law* had been dazzled by the internal point of view.[85] Hart's criticisms against Austin's ideas, which were supposed to illuminate the shortcomings of purely external explanations, have blinded theorists to a point where almost everyone has devoted himself to provide internal interpretations. The primal concern is the analysis of the concepts that figures in legal practices. For example, many of the criticisms received by the law and economics scholars are related to the image they present of legal institutions: it is unrecognizable for the participants. Even some prominent proponents of this movement try to show that economic analysis can provide a good internal explanation.[86] Instead of vindicating the value of external explanations, theorists try to meet the internal intelligibility test. We should remember that the way participants interpret their own reality might be vitiated by the myths and superstitions with which common men organize their social lives. The analysis of these aspects is undoubtedly of great value, but of the same value is the analysis of those parts of reality that cannot be found in the participants' conceptual scheme. This is true even if the analysis focuses only on a select subgroup (the officials) that is supposed to be composed by the educated men of the larger social group.

[85] Within legal positivism, legal realists that follow the tradition of authors like Alf Ross constitute the most important exception.

[86] See, among many others, the attempts of Jody Kraus, in Kraus (2007). The clearest exception is Richard Posner. According to him, instead of thinking of private law and criminal law in terms of their *concepts*, they should be conceived as *instruments*. Once this is done, it can be noticed that the functions of private law and criminal law are the same: both areas of law fix a price for certain conducts in order to discourage them or, at least, to control them. See Posner (1996: 54).

As I already mentioned, for Hart the main object of analytical jurisprudence was the elucidation of the conceptual framework that organizes legal thought. For this reason, he often pays attention to the ordinary language. This is theoretically justified because our perception of the phenomenon is sharpened when we examine the way in which the relevant expressions are habitually employed in a given context. The idea is that analyzing the way individuals talk about something makes it possible for us to grasp how they think about that object, and that deepens our understanding of social phenomena.

With this in mind, for my argument to be successful, it should be necessarily the case that the Hartian methodology illuminates *only part* of the phenomenon. In other words, a defense of a mixed understanding only makes sense if there is another part of social reality that escapes to the participants' conceptual scheme. Otherwise, internal explanations would exhaust everything we have to learn about legal practices. Let's think again about tort law. Suppose those who see the practice as a matter of corrective justice are right. Let's say that the best explanation from the internal point of view, what better explains the inferences leading to a responsibility judgment, is the principle of corrective justice. Yet, an external explanation regarding the effects produced by the different rules of the system on the incentives of the victims and injurers, provided they are rational agents, utility maximizers, could help us to understand why certain tort law systems are most expensive than others and why in some countries the accident rate is much higher (or lower) than in others. All these seem to be part of the social reality of each community, although the internal point of view is irrelevant to grasp it.

It is a mistake to think that the knowledge provided by external explanations, even if valuable, is contingent. The theory I am describing would explain *why* it can be predicted that any community that adopts certain tort law system would have a much higher (or lower) accident rate that any other community with a different system. The theory is general. As well as the notion of rule of recognition is useful to study any particular legal system, predictive studies are useful to illuminate the social realities of each social group.[87]

This is true even of those phenomena usually thought to be socially constructed. I am referring to the phenomena whose existence is not independent of the beliefs and attitudes of the community. The most known example is money. Something is money when individuals in a certain community collectively ascribe to the object the function money normally has (i.e., being an instrument of change and deposit of value). The existence of money is not a brute fact; instead, it requires the existence of human institutions. Then, something would be money in a given context when it is deemed to be a useful instrument of change and deposit of value. However, this is not to deny that money can fulfill *nonintentional* functions, such as preserving relations of power between those who have money and those who do not.[88] Further,

[87] Now I hope it is clear that the empirical data I mentioned in note 81 are analyzed with the support of an external general theory. The truth conditions of this theory, by definition, are independent of the conceptual scheme of the participants.

[88] See Searle (1995: 20–23, 123).

it does not deny that an external theory that highlights the positive effects of having money as compared to barter helps us to *understand* more deeply *our own social reality.*

In the end, what I am suggesting is that even that part of reality that depends exclusively on the beliefs and attitudes of the community *produces effects* that are frequently opaque to the participants' conceptual scheme. If internal explanations improve our understanding of social phenomena, they surely improve only part of them. To fully understand social reality, there is no other way than resorting to mixed explanations. I think that Shapiro's theory is an excellent example of this. That is why at the beginning of this chapter, I said that there are good reasons to value his approach even if one rejects the idea that incorporating the concept of social planning is necessary for overcoming the theoretical flaws of Hart's theory.

Shapiro's merits aside, it must be noticed that he is not the first author that has these intuitions. Hart himself, who in *The Concept of Law* proposes a radical methodological change, offers a mixed explanation of legal systems. Everybody is familiarized with it, but not many people have noticed that the internal point of view plays a limited role in his theory.[89] The internal point of view is used to define the concept of social rule, which is essential to explain the foundation of a legal system. But in order to explain the elements of law, that is, the relation between primary and secondary rules, Hart offers a typical functional explanation. His reasoning can be reconstructed as follows.

First, Hart compares the way a primitive society would organize behavior with the way a modern legal system does. Primitive societies obviously have rules, in particular, primary or duty-imposing rules. Those rules are just a set of separate standards, so they do not constitute a system. Any primitive society is likely to suffer all the weaknesses of a social structure made of primary rules alone. They probably would suffer an important degree of *uncertainty* regarding which rules are part of the community's legitimate standards; a second defect is given by the difficulties associated with the introduction and the elimination of rules from the existing set. A social ordering conformed by primary rules alone is essentially *static*. If a society is to have an adequate set of rules for all the particular circumstances they experience throughout their history, they must have a way of *modifying* the rules of the community; finally, the third defect of a primary rules social order is the *inefficiency* of the diffuse social pressure by which the rules are preserved. Disputes as to whether a rule has been violated are prone to arise, and disagreements about the application of rules are likely to be pervasive. In short, the first part of Hart's argument is to identify the defects of a primitive social order.

Then, the second part of Hart's argument is to show how these three *defects* can be solved by three different kinds of rules. The rule of recognition solves the uncertainty problems; the rules of change solve the deficiencies of static sets of primary

[89] Interestingly, Shapiro suggested in a few occasions that Hart was committed to a functionalist conception of law, but in his latest work, he seems to have abandoned this line of argument. See Shapiro (1998: 186–189, 2000: 167).

rules; and the rules of adjudication empower individuals to make authoritative determination on the matter of whether, on a particular occasion, a primary rule has been violated. When a social order includes these kinds of rules, it is undoubtedly a modern legal system.[90]

Notice that in this explanation, the functions of the secondary rules are opaque to the participants, and pointing out the positive effects they produce for the community is irrelevant to define them. No definition includes the function as an essential property. That is, in order to understand what a rule of recognition or a rule of change is, the interpreter of the social reality does not need to inquire into their functions. However, Hart offers an additional explanation. He does not limit his account to the internal point of view. Why not? Probably, because he had the intuition that his explanation enlightened the legal phenomenon, even though it did not fit with the canonical conceptual interpretation. Hart could have disregarded this external explanation. It would have been enough to point out that law, unlike other normative practices, is the union of primary and secondary rules. That is, it would have been enough to point out that law is an institutionalized normative practice. Then, if he advanced in the external functions of the secondary rules, it is probably because this aspect of his theory captures something relevant, something that the internal point of view leaves aside: the positive effects of having certain kinds of rules.

This aspect of Hart's theory is, as I said, often overlooked, and this is shown in criticisms like the one formulated by Stephen Perry. According to him, Hart makes an evaluative judgment of the practice itself when he holds that a normative social order composed exclusively by primary rules is *defective*.[91] From the perspective of an external explanation, this criticism misses the target. Hart is providing a functional explanation, and the identification of certain needs or defects to be solved is a necessary step for the ascription of function. Perry might reply that this is exactly why functional explanations require normative commitments. However, I think this evaluation is epistemic. Unlike explanations in natural sciences, in which it seems odd to say that leopards, for instance, have a point of view about what is valuable to them,[92] in social sciences what is valuable for human beings can be identified without much controversy. Not only methods for measuring the preferences of a community are available, but we are also part of *some* community. If, as it is also reasonable to assume, every community has similar organizational needs, for the mere fact of being members of a social group, we can know what they are. So, it is true that it can

[90] Hart (1994: 91–97).

[91] Perry (1998: 438).

[92] In these cases, when the theorist explains that the spots of the leopards have the function of camouflaging them in order to make them more efficient hunters, he transposes his own conceptual scheme in the explanation. Probably, leopards do not have a conception of *camouflage*, but it does not seem ridiculous to ascribe this function to the spots if it is assumed that (1) extending their lives is beneficial for leopards, (2) leopards need to hunt in order to extend their lives, (3) camouflage makes them more efficient hunters, and (4) spots usually camouflage leopards. Given these premises, it is reasonable to conclude that spots produce the positive effect of camouflaging them and that this effect is beneficial for leopards.

be contested that every society values certainty, the possibility of modifying their normative systems with celerity, and to have authoritative bodies to decide when a rule has been broken; but if it is sound to hold that these are benefits for the society, it is also sound to ascribe to secondary rules the functions Hart points out. Whoever intends to deny that these are benefits would also have to deny that the efficient guide of conduct is valuable for the community. But if someone dared to deny this, we would doubt of this capacity to understand social life.

Obviously, the external part of Hart's theory must have caused a great impression on Shapiro because in his book, when in Chap. IV he discusses Hart, his analysis begins with the description of the problems of the prelegal world. I could continue speculating about the impact Hart had on Shapiro's approach, pointing out that the *circumstances of legality* could also be opaque to the participants, and that makes it possible to provide an external explanation within his theory, but this comparative study would exceed the aim of this chapter. I think it is enough to show that there is an intellectual connection between these two authors that is not obvious. *The planning theory of law* does not only attempt to deepen and improve Hart's internal theory, but maybe without meaning to do so, advances on the external theory as well. Besides the problems of the prelegal world, Shapiro provides an explanation of the benefits of modern legal systems vis-à-vis other forms of social organization much more sophisticated than Hart's. At least for this reason, even those legal theorists that find the idea of social plans unappealing should receive this book with great enthusiasm.

References

Boorse, C. 1976. Wright on functions. *Philosophical Review* 85(1): 70–86.
Brown, R. 1963. *Explanation in social science*. Chicago: Aldine Publishing Company.
Coleman, J.L. 2001. *The practice of principle*. Oxford: Oxford University Press.
Cummins, R. 1975. Functional analysis. *The Journal of Philosophy* LXXII(20): 741–765.
Davidson, D. 1974. On the very idea of a conceptual scheme. *Proceedings and Addresses of the American Philosophical Association* 47: 5–20.
Durkheim, E. 1895. *Las reglas del método sociológico*, 1986. México: Fondo de Cultura Económica.
Dworkin, R. 1978. *Taking rights seriously*. Cambridge, MA: Harvard University Press.
Dworkin, R. 1986. *Law's empire*. Cambridge, MA: Harvard University Press.
Elster, J. 1984. *Ulysses and the Sirens. Studies in rationality and irrationality*, Revised edition. Cambridge: Cambridge University Press.
Griffiths, P.E. 1993. Functional analysis and proper functions. *The British Journal for the Philosophy of Science* 44: 409–422.
Hart, H.L.A. 1982. Commands and authoritative reasons. In *Essays on Bentham*, 243–268. Oxford: Clarendon Press.
Hart, H.L.A. 1994. *The concept of law*, 2nd ed. Oxford: Oxford University Press.
Himma, K.E. 2002. Inclusive legal positivism. In *Oxford handbook of jurisprudence and philosophy*, ed. J.L. Coleman, S. Shapiro, and K.E. Himma. Oxford: Oxford University Press.
Kraus, J.S. 2007. Transparency and determinacy in common law adjudication: A philosophical defense of explanatory economic analysis. *Virginia Law Review* 93(2): 287–359.

Landes, W., and R.A. Posner. 1983. Causation in tort law: An economic approach. *The Journal of Legal Studies* 12(1): 109–134.
Macdonald, G., and P. y Pettit. 1981. *Semantics and social science*. London/Boston/Henley: Routledge & Kegal Paul.
Martin, M. 2000. *Verstehen: The uses of understanding in the social sciences*. Brunswick: Transaction Publishers.
Millikan, R.G. 1984. *Language, thought, and other biological categories. New foundations for realism*. Cambridge, MA/London: The MIT Press.
Millikan, R.G. 1989. In defense of proper functions. *Philosophy of Science* 56(2): 288–302.
Neander, K. 1991. Functions as selected effects: The conceptual analyst's defense. *Philosophy of Science* 58(2): 168–184.
Perry, S. 1998. Hart's methodological positivism. *Legal Theory* 4: 427–467.
Posner, R. 1996. *Law and legal theory in England and America*. Oxford: Clarendon.
Rawls, J. 1999. *A theory of justice*, Revised edition. Cambridge, MA: Harvard University Press.
Raz, J. 1990. *Practical reasons and norms*. Oxford: Oxford University Press.
Ross, A. 1959. *On law and justice*. Berkeley/Los Angeles: University of California Press.
Schwartz, J. 1993. Functional explanation and metaphysical individualism. *Philosophy of Science* 60(2): 278–301.
Searle, J. 1995. *The construction of social reality*. New York: The Free Press.
Shapiro, S. 1998. On Hart's way out. *Legal Theory* 4(4): 469–507.
Shapiro, S. 2000. Law, morality, and the guidance of conduct. *Legal Theory* 6(2): 127–170.
Shapiro, S. 2006. What is the internal point of view. *Fordham Law Review* 75(3): 1157–1170.
Shapiro, S. 2011. *Legality*. Cambridge, MA/London: Belknap Press of Harvard University Press.
Thagard, P., and R.E. y Nisbett. 1983. Rationality and charity. *Philosophy of Science* 50(2): 250–267.
von Wright, G.H. 1971. *Explanation and understanding*. London: Routledge & Kegan Paul.
Warnock, G.J. 1971. *The object of morality*. London: Methuen.
Weber, M. 1922. *Wirtschaft und Gesellschaft*. Tubinga: J. C. B. Mohr. Cited by the Spanish translation of Giner, S. 1984. La acción social: Ensayos metodológicos. Barcelona: Ediciones Península.
Weinrib, E. 1989. Understanding Tort Law. *Valparaiso University Law Review* 23(3): 485–526.
Wright, L. 1973. Functions. *Philosophical Review* 82(2): 139–168.

Chapter 6
What Can Plans Do for Legal Theory?*

Bruno Celano

6.1 Introduction

In his book, *Legality,*[1] Scott Shapiro puts forward what he claims to be "a new, and hopefully better" (better, namely, than the ones given so far) answer to "the overarching question of 'What is law?'" (3), that is, an account of the "the fundamental nature of law" (4).

The central claim of this new account is that "the fundamental rules of legal systems are plans. Their function is to structure legal activity so that participants can work together and thereby achieve goods and realize values that would otherwise be unattainable" (119, emphasis omitted).

Thus, Shapiro goes on, the "central claim of the book"—the "Planning Thesis"—is that "legal activity is a form of social planning" (155; "legal activity" is defined as "the exercise of legal authority," 195). "Legal institutions plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are entitled to affect what others may or may not do. Following this claim, legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply. In this way, the law organizes individual and collective behavior so that members of the community can bring about moral goods that could not have been achieved, or achieved as well, otherwise" (155).

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[1] Shapiro (2011). References by page number in the text and footnotes are to this work.

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The planning theory of law, Shapiro claims, affords the resolution of some puzzles that have long vexed legal theory. Specifically, it affords a solution to the possibility puzzle (how is legal authority possible?) and it allows us to rebut Hume's challenge (you cannot derive an "ought" from an "is"). It does so by vindicating the positivist conception of law against the main objections so far raised against its most influential (i.e., Austin's and Hart's) versions. Moreover, according to Shapiro, answers to the question about the nature of law (and, thus, the planning theory) contribute to providing answers about what is the law on particular issues, by grounding claims about legal authority and by contributing to establishing what the proper interpretive method is in a given jurisdiction (18–25). (Answers to the question about the nature of law make a practical difference, by contributing to determining which legal facts obtain and, thus, the truth or falsity of legal propositions).

All this is afforded, basically, by resort, in legal theory, to the concept of a *plan*, and to the leading idea that human agents are planning agents. To be sure, the word "plan," by itself, does not say much (and the same holds of the phrase "planning agents"). The relevant notion of a plan is the notion molded, in his work on the philosophy of action, by M. E. Bratman. When claiming that human agents are planning agents, Shapiro should be understood as referring to Bratman's planning theory of agency. It is resort to this concept of a plan, and to Bratman's way of understanding human agency as planning agency, that, according to Shapiro, makes substantial progress in legal theory, along the lines indicated above, possible.

Let us ask, then, what can (Bratmanian) plans do for legal theory. Does resort to Bratman's concept of a plan in fact provide new and special insight into the nature of law? Does the Planning Thesis—understood (as it should be) along Bratmanian lines—tell us anything especially informative about what law and laws are? The issue is, in fact, twofold. First, does the conceptual apparatus, theoretical syntax, and terminology of Bratman's planning theory of agency allow us to discover and express important truths about the nature of law, truths that could not be expressed in the usual idiom of norms, rules, principles, or even, maybe, orders, threats, and obedience or acquiescence? Second, can Bratman's notion of a plan be legitimately put to the use to which Shapiro puts it? In other words, can laws (or perhaps only "fundamental" laws) legitimately be characterized as (Bratmanian) plans? I have doubts on both counts.[2]

6.2 Planning in the Third Person

Plans (Bratmanian plans, of course; henceforth, this qualification will be omitted) are created and adopted by an agent for *her own* future action and deliberation. They are a device intended for the *self*-governance of agents. And, according to Shapiro,

[2] Bratman himself is quite sympathetic to a marriage between his own views and legal theory, and, in his more recent works, he repeatedly credits Shapiro with suggestions and insights on these and related matters. What I am asking is how solid this marriage can be.

law should be understood as a set of plans concerning also, and mainly, the actions and deliberation of people other than the planner. Laws are, typically, plans created and adopted (also, and mainly) for others.

Is it helpful to think of law on the model of self-governance? And, are we dealing with the same notion, or are we equivocating on the word "plan"?

It is certainly possible, in some sense of the word "plan," to make plans for others. In Bratman's theory of agency, however, planning is envisaged as an aspect of first-person agency (be it singular or plural; see Sect. 6.5). It is to first-person planning that the set of regularities and associated norms (means-end coherence, plan and plan-cum-beliefs consistency, agglomeration, reasonable stability) set out by Bratman (1987, 1999, 2009a) apply. It is this set of regularities, and associated normative requirements, that defines the relevant notion of planning, and it is the discovery, and analysis, of these regularities and associated norms that makes Bratman's planning theory an illuminating conception of human agency. When "planning" for others is concerned, however, this set of phenomena is not involved (which is not to deny that similar phenomena may be involved). "Planning" for other people involves, rather, the old, familiar panoply of issues: authority, binding force, power, coercion, etc. Nothing is gained—on the contrary, distinctions are blurred—by recasting this whole net of interrelated issues in terms of planning. In the third-person case, talking of "plans"—plans adopted by somebody for somebody else—provides, *re* these issues, no new or illuminating insight. Thus, it cannot yield any special, new insight where our understanding of the law is concerned.

These are the broad outlines of my argument. And this, I think, is the conclusion we are forced to draw as the upshot of an examination of some of Shapiro's arguments, to which I now turn.

6.3 The Authority of Planners

I shall argue that, in some crucial passages of his book, Shapiro illegitimately trades on the normativity (to be defined soon) that a plan has for the agent, or agents, who have adopted it for themselves, in order to suggest that law, too, is in the same way normative (i.e., it is "binding," as Shapiro often puts it)[3]—that, namely, it is normative in such a way that its normativity does not consist in, nor derive from, its moral legitimacy.

The reason why, according to Shapiro, "understanding fundamental laws as plans […] provides a compelling solution to [the] puzzle about how legal authority is possible" is that "the creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans" (119). There is, then, a

[3] It has to be stressed that what is at stake in the planning theory of law is the possibility of conceiving of the law as "binding" (165–166, 201, 218) or (as Shapiro once says: 168) as endowed with "binding force." What is at stake is "how legal authority is possible" (119). (I take these—"How is legal authority possible?" and "How can the law be binding?"—to be, in the planning theory, alternative formulations of the same question).

peculiar "capacity" which is at issue in the coming into existence of plans. "This power," notes Shapiro, "is not conferred on us by morality." True. But then, what kind of capacity, or power, is it?

The answer—Bratman's answer—is as follows: forming an intention, or adopting a plan, is a distinctive kind of "commitment"—setting oneself one or more "framework reasons" (see Sect. 6.6.5), thereby subjecting oneself to a distinctive set of normative requirements (Bratman 1987, ch. 7). Thanks to the exercise of this capacity—thus, by virtue of the creation and adoption of a plan—individuals give rise to, and find themselves subject to, normative requirements. From now on, I shall call this capacity "the authority of planners."[4] It has to be understood, as we have just seen, as a distinctive power of giving rise to commitments, thereby bringing into existence normative requirements.

How can the authority of planners be supposed to provide "a compelling solution to [the] puzzle about how legal authority is possible"? Shapiro's leading idea is this (or at least I can gather no alternative argument from what he writes): just as, by virtue of their authority, planners can give rise to normative requirements, so, likewise, by virtue of the creation and adoption of plans legal officials bring into existence normative requirements, thereby subjecting the relevant individuals to these requirements—their doing so is, plainly, what their authority ("legal authority") consists in. The latter, the authority of legal officials, is, then, but a special case of the authority of planners.

This argument, however, is flawed. The "capacity that all individuals possess to adopt plans"—to be understood, as explained, as the capacity to engage in a distinctive kind of commitment, and thus as a source of normative requirements—is the capacity each individual has to adopt plans *for himself*.[5] What is at stake in legal authority is, on the other hand, mainly the creation and adoption of plans *for others*. And, when adopting plans for others—that is, telling them what they ought to do ("legal institutions plan for the communities over which they claim authority […] *by telling members what they may or may not do*," 155, my emphasis)—comes into play, the whole array of issues concerning social, political, and legal authority is back. Nothing has been said to solve the old familiar puzzles.

So, let us grant that the capacity each one of us possesses to adopt plans "is not conferred on us by morality," that it rather "is a manifestation of the fact that we are planning creatures" (i.e., it is a core component of the "special kind of psychology" which is distinctive of adult human beings in our modern world, as Bratman claims; 119). This, by itself, does nothing to show that any one of us has the capacity—this very same capacity (to be understood, along Bratmanian lines, as the capacity to engage in a distinctive kind of commitment, and as a source of normative

[4] The authority in question is not, *eo ipso*, autonomy. Bratman's views about (what he calls) "agential authority"—the authority an attitude may have to speak for the agent—are quite complex (see Bratman 2007, 2009a) and need not detain us here. Intentions, and intention-like attitudes (e.g., plans), do not have, as such, this kind of authority, nor may their creation or adoption, as such, be said to be an exercise thereof.

[5] The important exception of shared intention will be dealt with in Sects. 6.5 and 6.6.1.

requirements)—to adopt plans for others, nor that the latter capacity, whenever it exists, is not "conferred on us by morality." The authority each one of us has for creating and adopting plans for himself is conferred on us by the principles of instrumental rationality: there are rational (instrumentally rational) pressures in favor of planning, supporting the normative requirements (means-end coherence, etc). it is subject to (Bratman 1987, 2009a, c). Why should all this be supposed to apply when "planning" for others is concerned?

One key passage is found on p. 127. I shall quote it at length and comment on it. "When a person adopts a personal plan," writes Shapiro (and note that the case envisaged here is, specifically, the case of the adoption of *personal* plans), "she thus [since 'plans […] are norms,' 127] places herself under the governance of a norm. This power of self-governance is conferred on her by the principles of instrumental rationality." The capacity at issue is, then, a "power of self-governance," and it is conferred on *X*, not by morality (see also the passage from p. 119 quoted above), but by "the principles of instrumental rationality." This should be understood as following from the fact that planning has, as Shapiro (following Bratman 1987) claims, a "pragmatic rationale" (123): there are good pragmatic, or instrumental, reasons (such as complex ends, limited resources, "a lack of trust in our future selves," 122) why humans engage in planning.

This we know already. Let us read further on p. 127. "When a person adopts a personal plan, she thus [since 'plans […] are norms'] places herself under the governance of a norm. This power of self-governance is conferred on her by the principles of instrumental rationality. Planning creatures [Shapiro goes on], in other words, have the rational capacity to subject themselves to norms." Here, it is understood that planning, in the relevant sense, has to do with *self*-governance. It does not follow that planning creatures have the rational capacity (to be understood, in the same way, as a "power of governance": the power to place somebody "under the governance of a norm") to subject *others* to norms. This claim is, as yet, neither here nor there, and it would have to be explained what this capacity might consist in and stem from. True, we may happen to lay down instrumentally rational norms of conduct for others. But whether or not attempts of this kind will succeed depends on much more, or something else, than the power we have, by hypothesis, *qua* planning creatures. (The first question that comes to mind is, obviously, "instrumentally rational" from whose standpoint? See below, in this section). The power *X* may have to subject *others* to norms, if and when it exists, surely is not something she has simply *as a planning creature*.

But—it will be objected—Shapiro is talking, here, about *personal* plans. So, it is not surprising that the point he is making does not apply where "planning" for others is concerned.

Things are not so simple, however. "Indeed [Shapiro continues], *this* capacity [my emphasis] explains the efficacy of planning. Planning psychology is unique not only because it enables planners to form mental states that control future conduct but insofar as it enables them to recognize that the formation of these states generates rational pressure to act accordingly." Does this apply to personal plans only or to *the law* as well (remember that the law instantiates "planning for others")? If the latter,

there is, I take it, something wrong here. Why on earth should our shared "planning psychology," by itself, lead me to recognize that the plan *you* made and adopted for me puts *me* under "rational pressure to act accordingly"? Surely something more—be it morality, or prudential reasoning—is required for this conclusion. "Thus [the passage continues (127–128)], when an individual adopts a self-governing plan, the disposition to follow through is not akin to a brute reflex; it is instead mediated by the recognition that the plan is a justified standard of conduct and imposes a rational requirement to carry it out."

It must be stressed, I think, that all this does not apply to "planning" for others—and, thus, to the law. Shapiro does not say it does. And—as we shall see below—he elsewhere argues to the contrary. But, and this is my point, he is not at all clear about this: he doesn't always speak with the same voice on this issue. The gist of the planning theory of law is, precisely, that what accounts for the fundamental nature of law is our planning psychology—that "understanding the law entails understanding our special psychology [as planning agents] and the norms of rationality that regulate its proper functioning" (119–120); and, further, "the creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans" (119). The "inner rationality" of law (183), grounded in the rational requirements our planning is subject to, is supposed to flow from this capacity. So, it seems to me, there is an unwarranted analogy, or an assimilation, between the first- (be it "I" or "we"; see Sect. 6.5) and the third-person case at work, here.

Shapiro writes (156): "my aim in what follows is […] to build on the discussion in the previous chapter by demonstrating that *technologies of planning*, even the highly complex ones that are mobilized by the law, *can be constructed through planning alone. In other words, to build or operate a legal system one need not possess moral legitimacy to impose lrgal obligations and confer legal rights: one need only have the ability to plan* [my emphasis]." Now, this—the latter, italicized claim—is, I think, surprising: it suggests that legal systems, though not necessarily the product of the exercise of moral authority, are *obviously* something different from complex structures of orders and incentives; that they are something endowed with a kind of authority ("legal authority," 119), *because* they are the product of the exercise of our ability to plan, that is, because they enjoy the authority we have as planners. "The existence of law, *therefore*, [my emphasis] reflects the fact that human beings are planning creatures, endowed with the cognitive and volitional capacities and dispositions to organize their behavior over time and across persons in order to achieve highly complex ends" (156).

The conclusion that there is an unwarranted analogy, or assimilation, between the first- and the third-person case at work in Shapiro's argument is corroborated by a further passage at pp. 128–129: "while all plans are positive purposive norms, not all positive purposive norms are plans. Threats are created by human action, and are created to guide action, but they are not typically structured norms: unlike plans, they are not characteristically partial, composite or nested." This suggests that the *differentia* of plans be their structure. The suggestion is, however, misleading, in the light of what follows. **"**More importantly, these norms do not aim to guide conduct by settling questions about how to act, nor do they purport to settle such questions. [What is meant here by 'settling' will be discussed later, see Sect. 6.6.5]. Threats are

merely supposed to be, and merely purport to be, one factor among many to be considered. It shows no irrationality or disrespect to deliberate about whether to capitulate to a threat—the gunman, after all, gives you a choice: 'your money or your life'. By contrast, when one has adopted a plan, for oneself *or for another person* [my emphasis], the plan is supposed to preempt deliberations about its merits, as well as purporting to provide a reason to preempt deliberations about its merits." So, the *differentia* of plans is (what we may call) their "preemptive force." But note that plans merely *purport* to have preemptive force (i.e., they *claim* authority)—and, thus, to "preempt," or "provide a reason to preempt," deliberation. Does Shapiro mean that, in contrast to what happens in the case of threats, in the case of a plan adopted by *X* for *Y* "it shows some sort of irrationality or disrespect on the part of *Y* to deliberate about whether to let his actions be guided by the plan"? Shapiro doesn't say so. Rather, he writes that, while it shows no irrationality etc. in the case of threats, plans, be they for the planner or for others, *are supposed to* preempt (and they *purport* to provide a reason to preempt) deliberation. Fine. By arguing this way, however, Shapiro misses an important difference between personal, first-person plans, intended for self-governance, and "plans" created for others: while (as is entailed by any defensible theory of the reasonable stability of plans) it does show some kind of irrationality always to reconsider personal plans once adopted, and while it does indeed show some kind of irrationality to consider a personal plan, once adopted, as one reason for action to be balanced against all the other relevant reasons applying to the case (this might lead to paradoxical bootstrapping—see Bratman 1987: plans, according to Bratman, work as "framework reasons," posing problems concerning means and preliminary steps, selecting relevant options, and filtering out options that are inconsistent with them—see, again, Bratman 1987), considering whether to follow through in the case of a "plan" somebody else has adopted for you, or balancing the fact that somebody else has adopted it for you against all other relevant first-order reasons, does not, by itself, show any irrationality. On the contrary. And this is a deep difference. Under this respect, "plans" adopted for others are on a par with orders backed by threats and other incentive-based prescriptions. So, where is the difference?[6] For all Shapiro has shown us, when "planning" for others, what we are doing is, trivially, issuing commands or, generally, incentive-based prescriptions ("threats" says, here, Shapiro).[7]

[6] Remember that one obvious answer—legal plans are no mere orders backed by threats: they are the dictates of morally legitimate authority—is not available to Shapiro, given the basic premises and aims of the planning theory of law.

[7] In the section titled *Introducing hierarchy* (140 ff.), what the head chef does is, trivially, issuing *orders* ("that is, I can *order* them to do so," 141). It is only because we, the sous chefs, accept the plans he made for us, or because we accept his authority, that his orders are binding on us (on the role of acceptance and consent in Shapiro's argument, see Sect. 6.6.2). Shapiro writes (141): "when the head chef orders a sous chef to perform some action, we might say that she 'adopts a plan' for the sous chef." So, can anybody, at will, adopt a plan for me? No, but, unsurprisingly, acceptance of plans adopted for me by someone else (i.e., *adoption*, in the first person, of the plan) and *commitment* to carrying it out make me subject to the normative requirements planning is governed by.

In other words. Let us grant that, as Bratman claims, plans owe their authority to instrumental rationality, and are governed by its norms. Instrumental rationality is rationality in the pursuit of goals, or ends. Whose ends, whose goals? In the case of first-person plans, the answer is straightforward: *my* goals (or perhaps *our* goals; see Sect. 6.5), whatever the way in which it may be determined what these goals are. But, in the case of "plans" adopted for others, an alternative appears: are we talking about norms that are instrumentally rational *for the planner*, or for those for whom the "plan" is adopted? Unless we presuppose—an unwarranted assumption—that these coincide, we have to grant that what is instrumentally rational for the one may not be instrumentally rational for the others, or vice versa.[8] The idea of laws as plans supported by a pragmatic rationale, and subject to the requirements instrumental rationality imposes on plans, rests, it seems, on the assumption that we—officials, all of them, and ordinary people—share the same relevant goals or ends: that all individuals involved in the operations of a legal system necessarily, as a matter of conceptual necessity, or of law's "fundamental nature," share the same relevant goals, or ends. And this seems too irenic, and a purely contingent matter anyway (see Sect. 6.5).

Thus, it does not seem to be true that "understanding fundamental laws as plans […] provides a compelling solution to [the] puzzle about how legal authority is possible" (119). Laws, it seems, are not, as such (i.e., simply *qua* laws) plans. The norms of rationality they are subject to are not, it seems, the norms of rationality that govern the proper functioning of our special psychology as planning agents.[9]

Thus, "by issuing the order, the head chef places the sous chef under a norm designed to guide his conduct and to be used as a standard for evaluation. Moreover, the head chef does not intend her order to be treated as one more consideration to be taken into account when the sous chef plans what to do. Rather, she means it to settle the matter in her favor. And *because the sous chef accepts the hierarchical relationship, he will adopt the content of the order as his plan* [my emphasis] and revise his other plans so that they are consistent with the order. He will treat the order as though he formulated and adopted it himself" (ibid.). Again: "parts of the shared plan authorize certain members of the group to flesh out or apply the other parts of the shared plan. These 'authorizations' are accepted when members of the group *agree to surrender their exclusive power to plan and commit to follow the plans formulated and applied by the authorized members* [my emphasis]. Thus, when someone authorized by the shared plan issues an order, she thereby extends the plan and gives members of the group new sub-plans to follow" (142). When somebody else adopts a plan for me, and I myself adopt it—or commit myself to it (maybe, because I have somehow transferred to him my power to adopt plans for myself)—then I have a plan. Is this all Shapiro means? Or does the planning theory of law claim that, as a matter of conceptual necessity, or of the "fundamental nature" of law, individuals affected by the law adopt legal plans? (See Sect. 6.6.2).

[8] The trouble is apparent, it seems to me, where Shapiro puts forward his solution to the possibility puzzle (181): "legal officials have the power to adopt the shared plan which sets out these fundamental rules by virtue of the norms of instrumental rationality. Since these norms that confer the rational power to plan are not themselves plans, they have not been created by any other authority. They exist simply in virtue of being rationally valid principles." *Whose* ends are served by the fundamental rules of a legal system, and *who* is subject to the relevant rational pressures?

[9] Corresponding, in the case of intentions and plans, to the issue of the violation of (i.e., deliberate noncompliance with) a norm is the issue of giving in to temptation. Bratman sees the key to the rationality of resisting to temptation in the anticipation, by the agent, of future regret (1999, ch. 4, 2007, ch. 12). This makes good sense because, in the case of intentions and plans, the agent is one and the same: the planner. I can see no parallel in the case of legal norms.

(It might be that "understanding the law entails understanding our special psychology [as planning agents] and the norms of rationality that regulate its proper functioning" (119–120), but, as yet, nothing has been done to show that it is so).

It seems to be false, in sum, that "the creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans" (119). For all Shapiro has shown, it is, rather, grounded in our capacity to issue "threats" and other incentive-based prescriptions.[10]

6.4 A Tentative Diagnosis

So, to repeat, at some crucial junctures of his argument Shapiro trades on the normativity of first-person planning (i.e., on the authority of planners; above, see Sect. 6.3)[11] in order to suggest that law, too, is normative—in a sense which does not involve moral legitimacy (in order, i.e., to explain "how legal authority is possible," 119). Plans are, indeed, normative, and their normativity is grounded in norms of instrumental rationality. This does not hold, however, when, as it happens in the case of the law, we are "planning" for others, that is, telling them what they ought to do, whether they want to do it or not, and, maybe, offering them incentives for doing so. Shapiro acknowledges that the law claims to have moral binding force and that it may fail in this. I agree. But we should not rule by definition, or as a conceptual point, or as a matter of its "fundamental nature," that, when it does, it nevertheless is binding, because of norms of instrumental rationality.[12]

[10] Which is not to rule out that there can be norms of rationality laws, *qua* prescriptions, can be subject to, and rational pressures for means-end coherence, consistency and agglomeration deriving from them. Norms defining the "inner rationality of prescribing" may be identified, building on defeasible assumptions concerning the psychology of prescribers (Celano 1990, 127–150, 187–191, 269–282).

[11] Talk of the "normativity of plans" is shorthand for saying that, as explained in the preceding section, adopting a plan involves a distinctive form of commitment and thereby subjects the agent to distinctive normative requirements.

[12] My point, then, is that the relevant analogy between individual planning, on the one hand, and legal "planning" does not hold. Shapiro explicitly claims that he wants to flip Plato's soul-State analogy (193): rather than moving from an inquiry into the nature of (justice in) the State to an inquiry about the individual, he moves from an inquiry about the individual as a planning agent to consideration of the law as a set of plans. Laws, he claims, "play the same role in social life that intentions play in individual and shared agency: they are universal means that enable us to coordinate our behavior intra- and interpersonally" (194). The first part of this statement, however, is misleading, for the reasons I have explained. The second part may well be true. In fact, many aspects of the individual-State analogy, in Shapiro's version, are, I think, perfectly to the point. See, for example, at p. 200: "by characterizing legal activity as planning activity, my aim thus far has been to highlight the incremental nature of the law's regulatory behavior. But the parallel does not end there. As I would now like to show, legal activity also seeks to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize and monitor the behavior of individuals and groups.

Assuming, then, that there is this unwarranted analogy, or assimilation, at work in Shapiro's argument, where does it originate? My tentative diagnosis is as follows.

Shapiro severs the link between plans and intentions, and this leads him into trouble. Bratman's planning theory is, first and foremost, a planning theory *of intention*. It is one of the building blocks of Bratman's theory that plans are "intentions writ large", and that, correspondingly, intentions are to be understood as the component parts of plans—intentions, we might say, are, according to Bratman, the stuff plans are made of.[13] Laws, however, are not intentions, not even intentions "writ large" (and Shapiro acknowledges and emphasizes this). What Shapiro is interested in, as a conceptual framework affording an adequate understanding of the law, are "plans" in a much weaker—and less informative—non-Bratmanian sense. In legal "planning," the forms of commitment, and the rationality requirements (means-end coherence, consistency, agglomeration, reasonable stability), characteristic of Bratmanian plans,[14] either do not apply or apply in very different ways—in ways that we may deem to be, for all Shapiro has shown us, characteristic of orders, threats, and, generally, incentive-based prescriptions.[15]

Appeal to plans appears, at first sight, promising for legal theory for two reasons: plans are a kind of norms which are (1) positive and (2) endowed with authority (an authority stemming from the principles of instrumental rationality). So, it seems, by resorting to the concept of a plan—by claiming that laws are plans and that the key to understanding the nature of law is our special psychology as planning agents—it will be possible to solve, in a positivistic vein, familiar puzzles about the law, stemming from its Janus-faced nature (law is a social fact, and it is also, at least *prima facie*, normative). Appearances are deceptive, however. It turns out that only personal (first-person) plans, intended for self-governance, have, as such, both properties (being positive and endowed with authority). "Plans" adopted for others are, indeed, positive, but they have, as such, no authority. If and when they—or their

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It does this by helping agents lower their deliberation, negotiation and bargaining costs, increase predictability of behavior, compensate for ignorance and bad character, and provide methods of accountability." I have no quarrel with this. Similarly with the following (p. 203, in ch. 7): "[…] not every way of guiding conduct counts as 'planning.' Indeed, planning is a very distinctive way of guiding conduct. For this reason, the Planning Thesis makes a strong jurisprudential claim. According to it, legal activity is not simply the creation and application of rules. It is an incremental process whose function is to guide, organize and monitor behavior through the settling of normative questions and which disposes its addressees to comply under normal conditions." In these passages, the relevant notion of a plan is a rather weak one, far less demanding than the one Bratman has developed (see also below, nn. 16, 38).

[13] Accordingly, what Bratman is interested in, as far as forms of sociality are concerned (see Sect. 6.5), are shared *intentions* (these are common both to SCA and to less stringent forms of JIA). (Bratman's treatment of the "Mafia case" of shared activity—(1999), 100, 117–118, (2009b), 158—remains quite obscure to me. But it does not seem relevant to the present point anyway).

[14] Or of Bratmanian shared intentions (see Sect. 6.5).

[15] In such a way, that is, as to define what might be called the "inner rationality of prescribing" (above, fn. 10).

authors—have authority, this can only be so on further grounds, wholly different from the authority conferred on the author of a first-person plan, intended for self-governance, by the principles of instrumental rationality. Legal norms, however, are mainly norms adopted for others. So, if the point of treating legal norms as plans was the apparent possibility of explaining, in a simple and economic way, their being, at once, positive and authoritative, the analogy—or the identity claim (laws are plans)—breaks down. So, why treat legal norms as plans? Of course, we may still say that they are "plans" created and adopted for others.[16] But this, by itself, does not say much more than saying that they are positive norms. And this is something we knew from the beginning.[17]

We may perhaps go deeper than that in seeking an explanation for Shapiro's unwarranted analogy, or assimilation. Shapiro adopts a disquotational account of validity as binding force:[18] a norm is valid just in case one should act as the norm prescribes ("as I will be using the term, norms need not be valid. Norms always *purport* to tell you what you ought to do or what is desirable, good or acceptable, but whether they actually succeed at this task is another matter entirely. A norm that tells you to do something that you shouldn't do is an invalid norm. It is a bad norm, not a non-norm"; 41–42). It remains unclear, however, whether Shapiro thinks that *legal* norms (laws) are, as such, valid. At times, talk of laws as plans leads Shapiro to conflate, in the case of legal norms, existence and validity. And this seems to be a central, though hidden, move in the groundings of the planning theory of law.

[16] One important qualification. If Shapiro is to be understood as claiming that what is distinctive of "plans" is their structure (partiality, nestedness, etc.) only, then I have no quarrel with him. But this is no slight departure from Bratman's concept of a plan. See, for example, the concluding paragraph of the section titled *Individual Planning* in ch. 5 (129), where a summarizing definition of the relevant notion of a plan—or so it seems—is provided: "to conclude, a plan is a special kind of norm. First, it has a typical structure, namely, it is partial, composite and nested. Second, it is created by a certain kind of process, namely, one that is incremental, is purposive and disposes subjects to comply with the norms created." I have no quarrel with seeing legal norms in this light. So understood, the claim that laws are plans turns out to be rather weak, when compared to what plans are in Bratman's theory. (Both the idea of the partiality of legal norms and of their incremental specification in application are to be found, I think, in Kelsen's jurisprudence. The same holds, of course, as far as reflexivity—"plans for planning"—is concerned: the law regulates its own production).

[17] Perhaps, at least some of the deep differences that, appearances notwithstanding, drive a wedge (or so I have claimed) between Bratman's planning theory of agency and Shapiro's understanding of the fundamental nature of law may be traced to a further difference concerning the ontology of plans—a difference that should strike us for its sharpness, although it is not easy to understand its implications, and the connection (if there is one) between it and the difficulties for Shapiro I have been indicating in the text. In short, Bratmanian plans have to be understood as attitudes, while Shapiro's "plans" are abstract contents, the objects, or contents, or possible attitudes. See, respectively, Bratman (1999), 37, 248; and Shapiro (2011), 127 ("by a 'plan,' I am not referring to the mental state of 'having a plan.' Intentions are not plans, but rather take plans as their objects. For my purposes, plans are abstract propositional entities that require, permit or authorize agents to act, or not act, in certain ways under certain conditions").

[18] On validity as disquotation, see Celano (2000).

This, I shall now argue, may be seen, crucially, where Shapiro introduces his own solution of the problem about law and morality (176–177): "why might one claim – as legal positivists do – that law and morality do not share the same basic ground rules? Why is *the determination of legal validity* [my emphasis] a matter of a sociological, rather than moral, inquiry?" In his answer to the latter question, Shapiro short-circuits existence and validity: "I hope that my answer to these questions is now apparent: namely, that the fundamental rules of a legal system constitute a shared plan and, as we have seen, the proper way to ascertain the existence or content of a shared plan is through an examination of the relevant social facts. A shared plan exists just in case the plan was designed with a group in mind so that they may engage in a joint activity, it is publicly accessible and it is accepted by most members of the group in question. As a result, if we want to discover the existence or content of the fundamental rules of a legal system, we must look only to these social facts. We must look, in other words, only to what officials think, intend, claim and do round here" (177).[19]

So: norms can be valid (i.e., binding) or not; their existence is one thing, their merits or demerits another. The reason why appeal to plans is illuminating is that it is clear, in the case of plans, that their existence conditions are independent from their merits or demerits.[20] *But* first-person plans, intended for self-governance, are normative, in virtue of the authority, conferred by instrumental rationality, each one of us has to adopt plans and policies. In the quoted passages (see the italicized words), what Shapiro claims is that this sheds light on the *validity* of legal norms—explaining how it can be determined, as positivists are supposed to maintain, solely on the basis of sociological facts. But legal norms are plans created for others. As such, they have no authority over (many of) their subjects. Precisely under this respect, they are utterly different from first-person plans and intentions, aimed at self-governance. Claiming that their being plans explains their *validity*—and that it does so along positivistic lines, because plans exist if adopted—short-circuits the relevant difference.

[19] Shapiro continues: "[n]otice further that the existence of the shared plan does not depend on any moral facts obtaining. The shared plan can be morally obnoxious: it may cede total control of social planning to a malevolent dictator or privilege the rights of certain sub-groups of the community over others. The shared plan may have no support from the population at large, those governed by it may absolutely hate it. Nevertheless, if the social facts obtain for plan sharing—if most officials accept a publicly accessible plan designed for them—then the shared plan will exist. And if the shared plan sets out an activity of social planning that is hierarchical and highly impersonal and the community normally abides by the plans created pursuant to it, then a system of legal authority will exist as well" (ibid.).

[20] See p. 119: "my strategy is to show that there is another realm whose norms can only be discovered through social, not moral, observation, namely, the realm of *planning*. The proper way to establish the existence of plans, as I argue below, is simply to point to the fact of their adoption and acceptance. Whether I have a plan to go to the store today, or we have a plan to cook dinner together tonight, depends not on the desirability of these plans, but simply on whether we have in fact adopted (and not yet rejected) them. In other words, positivism is trivially and uncontroversially true in the case of plans: the existence of a plan is one thing, its merits or demerits quite another."

We must, however, complicate the picture. Shapiro is not so naïve as my uncharitable reading of the passages commented so far may have suggested. He explicitly acknowledges that "the fact that someone adopts a plan for others to follow does not, of course, mean that, from the moral point of view, those others *ought* to comply. The plan might be foolish or evil and, thus, unless there are substantial costs associated with non-conformity, the subjects morally should not carry it out" (142). And he elaborates on Bratman's theory, putting forward qualifications, extensions, distinctions which are, I think, designed to avoid the pitfalls I have too hastily claimed he falls in. We have now to consider some of these moves.

6.5 Agency in the First Person Plural

My argument so far has been premised on the claim that plans are adopted by an agent for *her own* future action and deliberation. Under this respect, I have claimed, legal "planning" crucially differs from planning proper. Must this be understood as meaning that plans are relevant only where *individual* agency is concerned?

If so, my argument would be based on a serious mistake. Bratman himself has developed and extended his theory in order to account for shared activity and forms of social agency (Bratman 1999, chs. 5–8, 2006, 2007, ch. 13, 2009b). Here, it seems, is where one plans for others, as well as for himself.

Understandingly, Shapiro attributes great weight to Bratman's own extension of the planning theory of intention in order to account for forms of social agency, and he tries to capitalize on it. But this is not, I shall now argue, a promising route.

Legal activity is, Shapiro claims, shared activity,[21] where the relevant notion of a shared activity has to be understood as a development of Bratman's idea of a shared activity. But, I think, as far as the difficulties I have tried to point out in the preceding sections are concerned, it makes no difference whether the agency envisaged is in the first person singular or plural.[22]

[21] See p. 204: "the Planning Theory, however, makes a stronger claim. Not only are some aspects of legal activity shared, but so is the whole process. Legal activity is a shared activity in that the various legal actors involved play certain roles in the same activity of social planning: some participate by making and affecting plans and some participate by applying them. Each has a part to play in planning for the community. Call this the 'Shared Agency Thesis'": "legal activity is shared activity."

[22] Talk of agency in the first person plural is not, strictly speaking, correct, as far as Bratman's models of shared activity are concerned. Bratman's accounts of shared intention are, in fact, individualistic in spirit (1999, 108, 111, 129, 2009b, 163 f.). Bratmanian shared intentions are a set of appropriately interlocking individual intentions, satisfying appropriate conditions (Bratman calls this approach "constructivism" about shared intention: in accounting for shared intention we proceed "by constructing a structure of interrelated intentions of the individuals, and norms that apply to and guide those intentions"; 2009b, 155). Talk of agency in the first person plural in the text has to be understood accordingly.

Why? Because the key element in (Bratmanian) shared activity is shared intention and commitment.[23] The model is that of a small-scale group of people performing a well-circumscribed activity, with a definite goal (each one of us "intends that we J"). As Shapiro himself acknowledges and emphasizes, the kinds of intentions and commitments that, according to Bratman, are constitutive of shared activity simply do not fit legal practice, when this is taken (as it should be, according to Shapiro's Shared Agency Thesis) as a whole.[24] Bratman (2007, 309; see also 2002, 511, n. 2, 524, n. 13) gladly acknowledges that legal activity *may*—sometimes, in certain circles, in some respects—involve instances of Shared Cooperative Activity (SCA), or of Jointly Intentional Action (JIA). I have no quarrel with this, of course. That groups of legal officials, or groups of officials-cum-citizens, may somewhere, sometimes be engaged in a Bratmanian shared activity (or even a SCA!), or that a legal system may be conceived which fits this model, is not ruled out by my argument. What is, I think, mistaken is the conceptual or ontological claim, the claim that necessarily, as a matter of its "fundamental nature," the law, taken as a whole, always, everywhere fits the model (i.e., involves shared planning, in Bratman's sense).

Once again, it seems to me, severing the link between (Bratmanian) plans and intentions (remember that, according to Bratman, plans are intentions "writ large," and intentions are the building blocks plans are made of; this holds in the realm of shared agency, too) renders resort to "plans" in legal theory generic and uninformative. We have no reason to suppose that in legal "planning" the forms of commitment characteristic of Bratmanian plans—and of Bratmanian models of shared agency and deliberation, too—will have any room. Thus, once again, nothing in what Shapiro has shown ensures us that the norms of rationality governing planning will apply to legal "planning" as well.[25]

Bratman's models of shared activity (SCA and JIA generally), thus, prove unsuited to the workings of a legal system, taken as a whole. As remarked a few lines above, Shapiro himself acknowledges and emphasizes this. The notion of a Massively Shared Agency (henceforth MSA) is designed precisely to cope with this difficulty, while remaining within a broadly Bratmanian framework. I find MSA problematic, however. In MSA, all participants share a plan, but it is not true of each one of them—as it is in a (Bratmanian) JIA—that "I intend that we J." As Shapiro molds these concepts, sharing a plan and shared activity do not require intending the

[23] In "modest" sociality (see Sect. 6.6.1), "an intention-like commitment to our activity is at work in the practical thinking of each" (Bratman 2009b, 155).

[24] As is well known, the story began with Jules Coleman claiming that the rule of recognition of a legal system should be understood as a Bratmanian Shared Cooperative Activity (or SCA; Coleman 2001, crediting Shapiro for the basic idea) and Shapiro claiming (more plausibly) that it should be understood, rather, as a variation on a Bratmanian Jointly Intentional Activity (JIA; Shapiro 2002; see the discussion in Celano 2003). Neither proposal works, as Shapiro quickly realized. He has since then relaxed Bratmanian requirements, leaving room for alienated participants in MSA (see below).

[25] On "shared valuings" see below, n. 37.

shared activity.[26] This, however, does not seem consistent with Bratman's views: "if I plan to do something, I intend to do it" (Bratman 1999, 37 n.).[27] Shared activity is, in Bratman's models, activity explained by a shared *intention*;[28] correspondingly, norms governing shared activity are grounded in the norms individual intentions are subject to.[29]

Thus, in MSA sharing a plan is independent from intending that we J; and this runs counter Bratman's model of shared agency. It might be replied, of course: so what?[30] The issue, however, is, once again: is talking of plans, on this non-Bratmanian understanding of plans, illuminating? Does it add anything to talking of norms, or, for that matter, of orders backed by threats or other incentives?

Shapiro's leading idea remains, at bottom, that of a small number of friends performing together a well-circumscribed activity having a definite goal. This model does not fit legal practice—or, at any rate, we should not rule that it necessarily does, as a matter of conceptual analysis, or of the "fundamental nature" of law. True, Shapiro is well aware of this: he progressively extends the model, relaxing stringent Bratmanian conditions about the intentions shared by participants, until he envisages what he calls MSA. But, it seems to me, the extension cannot do the required work, for three reasons.

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[26] Cf., for example, pp. 136: "plan sharing does *not* require that members of the group *desire* or *intend* the plan to work" (and see the example of Dudley and Stephens, in nn. 11, 12 to ch. 5); 149: "in order for a group to act together, they need not intend the success of the joint enterprise. They need only share a plan." What accounts for *acting together* is *sharing a plan* (137: "Henry and I acted together because we shared a plan"; "shared plans are constitutive of shared agency"; cp. also n. 14 to ch. 5: "the analogy here is to individual agency: just as individual action is individual behavior explainable by an individual plan, shared action is group behavior explainable by a shared plan"). Further necessary conditions for shared activity ("all members of the group intentionally play their parts in the plan and the activity takes place because they did so," 138; common knowledge of the existence of the plan, and the disposition to "resolve their conflicts in a peaceful and open manner," ibid.) are not relevant for present purposes.

[27] The leading idea in the construction of shared intention in modest sociality is that of "intentions on the part of each in favor of our joint activity" (Bratman 2009b, 155).

[28] Bratman's constructivism "seeks […] to articulate a deep continuity—conceptual, metaphysical, and normative—between individual planning agency and modest sociality" (2009b, 155). In n. 12 to ch. 5, Shapiro observes that "because Dudley and Stephens do not intend to act together, they are not subject to the same rationality constraints as Henry and I are." The resulting picture I find quite implausible as a case of shared agency. How can it be said that these people "*share* a plan"?

[29] "The theory seeks, rather, to generate much of the relevant normativity at the social level out of the individualistic normativity that is tied primarily to the contents of the intentions of each" (Bratman 2009b, 161).

[30] Shapiro (418) explicitly takes issue with Bratman on this point (severing the link between participants' intentions and acting together), claiming that, in order to account for joint activity, the requirement of shared intention is "too strong." This is not, however, as Shapiro (ibid.) goes on to claim, merely a matter of conflicting intuitions about where to draw the boundaries of the concept *acting together*. The latter may well be, in fact, a verbal disagreement. As argued in the text, however, what is at stake is the very applicability, to the case of MSA (and, thus, to the law), of Bratman's concept of a plan, and its attendant necessary properties.

1. The model of MSA does not take into account an essential element in the "circumstances" of legality and politics: deep, serious conflict. MSA makes room for "alienated" participants. And Shapiro acknowledges the contentiousness of the issues the law is supposed to solve. But deep, serious conflict—neither mere "alienation" nor disagreement about how to solve together an issue all parties identify in the same way—does not enter into the picture. In game-theoretical terms, Shapiro does not seriously take into account prisoner's dilemmas, free rider problems, or other serious collective action problems.[31] He only envisages coordination problems, or battles of the sexes (of a limited sort).[32]
2. Bratman's models account for our performing well-circumscribed activities having a definite goal: each one of us intends that we J. What is the J in law, understood as a MSA? There is not, in the case of legal practice as a whole, a (non-vacuously specifiable) circumscribed activity with a well-definite goal[33]—or at any rate, we should not rule that there necessarily is one, as a matter of the very concept *law*, or of law's "fundamental nature".[34]
3. The notion of a MSA itself is, as we have seen, problematic. When participants do not, each one of them, "intend that we J," there is no shared intention, no shared activity (in Bratman's sense), and no (Bratmanian) shared plan (whoever plans, intends). There may well be "plans," here, in some other, generic, sense. But nothing especially informative follows from that. For all Shapiro has shown us, a crucial role is played, in MSA—and, thus, in the law—by orders backed by threats or other sorts of incentive-based prescriptions.

This is why Shapiro's account of shared agency remains, at bottom, too close to the starting point—interaction between a small number of individuals

[31] Shapiro does in fact discuss the adoption of policies designed to avoid free riding in his Cooks' Island narrative, but such policies are conceived, here, as jointly adopted by all the parties involved, and as leading to the establishment of a market economy. True, in his narrative of Cooks' Island Shapiro also contemplates disagreement, lack of consensus etc. But these are all envisaged as factors leading to the collective, unanimous adoption of a shared master plan by parties agreeing on the necessity of solving together any issue that may prove divisive. ("[t]he contentiousness of an activity might stem from its complexity, or from the simple fact that the members of the group have different preferences or values. In either case, it is crucial that potential conflicts be identified and resolved ahead of time. The function of planning here is to settle disputes correctly and definitively before mistakes are made and become irreversible," 133). Under this respect, Shapiro's jurisprudence seems to harbor a contractualist normative political philosophy, of a Lockeian brand ("the plan that establishes the hierarchy for the island is a shared plan," 165; it is true that, here, Shapiro goes on claiming that "it is not necessary for the community to accept the shared plan in order for it to obtain," 165–166: this point will be dealt with in Sect. 6.6.2). The model of free markets as a device for the resolution of conflicts (*Planning for Small-Scale Shared Activities*, 129 ff.) is clearly insufficient—or at least a substantive argument (both normative and empirical, it seems) is needed, in order to show that it is.

[32] This is perhaps a feature Shapiro's views share with J. Waldron's jurisprudence (cf. p. 421, n. 11 to ch. 6). See Waldron (1999) and, on this point, Gaus (2002), Benditt (2004).

[33] By a "vacuous specification," here, I mean one such as, for example, "the maintenance of a legal system," or "engaging in the practice of the law," and the like.

[34] Cf. Celano (2003).

performing a well-circumscribed activity with a definite goal. The extension Shapiro develops proves troublesome. It ends up by watering down its starting point (i.e., Bratman's insights), and it proves unsuited to the task (explaining what the law is). Complexities aside, what still misleads, at bottom, is the assumption that the law should be understood on the model of *self-* (be the Self an "I" or a "We") governance, and law's authority on the model of the authority each agent, or group of agents, has to create and adopt plans for themselves.[35] Abandoning this assumption would lead, in fact, to the abandonment, in accounting for the "fundamental nature" of law, of the notion of a plan.

6.6 Further Complexities

6.6.1 Planning in Institutional Contexts

In the preceding section I have raised some objections against Shapiro's resort to Bratman's views about shared agency. It will be replied that my objections, on the one hand, do not take into account some important features of the law which make it no less than natural that Bratman's models of JIA and shared intention do not directly apply to legal practice; and, on the other hand, they run afoul of the fact that Shapiro explicitly acknowledges this, and that his extensions—specifically, the notion of a MSA—are designed to allow for due consideration of these features. The relevant features are hierarchy, authority relations, and the institutional character of the law.

It is in fact true that Bratman repeatedly emphasizes (1999, 94, 142, 2002, 512, 2006, 1, 2009b, 122) that, in his account of shared activity and shared intention, he abstracts from "institutional structures and authority relations." His inquiries are limited to what he now calls "modest" sociality ("small scale shared intentional agency in the absence of asymmetric authority relations," 2009b, 122). This deliberately leaves room for developments in the direction of institutions and authority.[36] And, on the other hand, it is true that much of Shapiro's effort is devoted precisely to this task.

[35] It should be noted that Bratman's treatment of the apparent violation, in shared intention, of the "*settle* condition" on intentions (intentions may reasonably concern only what we understand as capable of being settled by ourselves; 1999, 149 ff.) does not, appearances notwithstanding tell against my objection. True, where each one of us intends that we J we go beyond the authority of planners to plan for themselves. Shared intention is, nevertheless, a system of interlocking, interdependent intentions. When each one of us intends that we J, the "*settle* condition" may not be violated because I may be able to predict what your intention will be (1999, 157). This has no parallel in the law.

[36] "Reflection on the underlying structure of such modest sociality may also help us think about larger scale cases, such as law and/or democracy" (Bratman 2009b, 150).

In the absence of explicit, sustained treatment of these issues on his part, we may only wonder what shape Bratman's ideas about shared activity in institutional contexts (i.e., where "institutional structures and authority relations" are in place) would take.[37] This is no argument, of course. In defense of my objections I can only say that Shapiro's proposed developments do not seem to me on the right track, precisely for the reasons indicated in the preceding section (see also Sect. 6.6.2). In Shapiro's theory, the relevant claims (laws are plans, legal activity is planning activity) are gained at the price of so much watering down the notions of a plan, and of planning, so as to make them wholly uninformative.[38]

[37] Bratman's discussion of "shared valuings" (Bratman 2006, 2007, ch. 13) appears to be a first step in this direction (see especially his discussion of the adoption, in a university department, of a policy concerning reasons for student admissions, and its relation to the attitudes of individual members). But, insofar as shared valuings, too, involve forms of *commitment* on the part of those involved—commitment to a given policy in deliberation (see esp. Bratman 2006, 3)—shared valuing, too, is a wholly different phenomenon from what a plausible account of the concept, or the "fundamental nature," of law would present us with. (We should, I think, resist the temptation of taking law as an essential part of the "package deal" our sociality consists in—Bratman 2006, 4; this would beg too many questions). Thus, norms of rationality involved in shared valuings—the rational requirements applying to them—do not, *eo ipso*, apply to legal "planning" (different norms, constituting the "inner rationality of prescribing" may apply to it—see above, n. 10; and there may well be deep affinities between the former and the latter).

[38] Planning "in institutional contexts" is, Shapiro claims, different from "individual" planning, at least under one crucial respect: "in institutional contexts [...] a plan may be created even though the one who adopted it did not intend to create a norm"; in the case of individual planning, on the contrary, "the process is the psychological activity of intending" (128). But why, then, talk of "plans" when referring to the law? Unless the relevant notion of a plan is the weak one introduced above (n. 16), I see no room here for plans and their characteristic commitments. It does not seem right any more to say that "understanding the law entails understanding our special psychology [as planning agents] and the norms of rationality that regulate its proper functioning" (119–120; this was, it will be remembered, one of the grounding claims of the planning theory of law). Moreover, granted that it is true that, in institutional contexts, as contrasted with personal planning, "a plan may be created even though the one who adopted it did not intend to create a norm," it remains quite mysterious to me how this could happen. (The legal theories of H. Kelsen and K. Olivecrona, too, face this difficulty; cp., e.g., talk of legal norms as "depsychologized commands," or as "impersonal and anonymous" commands, in Kelsen 1945, pp. 35–36). We find a sketchy explanation at p. 211: "the introduction of institutional normativity is a revolutionary advance in social planning. Plans can be adopted without the planners actually intending that the community act accordingly. As a result, the community need not worry about whether the planners had the appropriate intentions. They can know that they are legally obligated simply because the planners followed the right procedures. Of course, the institutionality of law is ultimately grounded in intentions. *Rules are legally valid because they were created pursuant to a rule that most officials accept* [my emphasis]. If officials stopped accepting the plan, then the plans created pursuant to it would cease to be legally valid as well." This seems to make institutionalized planning continuous with individual planning and its psychology, so as to rescue the claim that understanding the latter is entailed by a proper understanding of the former, but I still find the connection quite mysterious. Here, as in many other crucial junctures in Shapiro's argument, the necessary explanatory and justificatory work is done, in fact, by an unstated theory of legitimation through acceptance (see Sect. 6.6.2). And, are we assuming that officials, all of them, have the relevant *intentions*? (Remember that legal activity is supposed to be a MSA; see Sect. 6.5).

6.6.2 Acceptance

In arguing that laws are plans, and that legal activity is shared activity, Shapiro usually assumes that those for whom plans are adopted, be they the members of the Cooking Club, people working for Cooking Club Inc., inhabitants of Cooks' Island, residents at Del Boca Vista, or people involved in the operations of a legal system, *accept* the plans others have made and adopted for them (this, it should be noted, is true also in MSA).[39] This, of course, preempts most of my arguments. If we *assume* that all individuals involved accept the relevant plans, making them their own as if they had designed and adopted them for themselves, talk of the authority of planners becomes certainly appropriate. Or, at any rate, it becomes true by hypothesis that the activity under consideration is shared activity. But this is a way of making the intended claims (that laws are plans, that legal activity is planning activity, and that laws have, as such, binding force—though not grounded in their moral legitimacy) trivially true, depriving them of any significant informative or explicative power. If we *assume* that the relevant individuals bind themselves, or commit themselves to complying with the law, we should not be surprised to find them bound, or committed.[40] The move—assuming that all the parties involved accept the relevant plans—does not shed any light on less irenic situations. First, the assumption is, where law is concerned, problematic; we do not want to make it a matter of conceptual necessity,

[39] Cf., for example, 149 "in order for a group to act together, they need not intend the success of the joint enterprise. They need only share a plan. That plan, in turn, can be developed by someone who does intend the success of the joint activity. As long as participants accept the plan, intentionally play their parts, resolve their disputes peacefully and openly, and all of this is common knowledge, they are acting together intentionally." Some of the relevant material is quoted above, in n. 7. See also p. 182 and the section in ch. 6 titled *The Inner Rationality of Law* (183). Here, the norms of instrumental rationality ("the distinctive norms of rationality that attend the activity of planning," 183: consistency, coherence, not reconsidering absent compelling reason) apply only to those who accept the fundamental legal rules (i.e., the master plan), that is, only to legal officials and to "good" citizens. (The relevant norms of rationality govern the activity of planning; thus, they apply only to those who are committed to the plan). Bad men are not subject to their constraints. ("The inner rationality of law, of course, is a limited set of constraints because the rational norms of planning only apply to those who accept plans. The bad man, therefore, cannot be rationally criticizable for failing to obey legal authorities insofar as he does not accept the law," 183).

[40] Sometimes, however, Shapiro argues differently. On Cooks' Island, "the plan which establishes the hierarchy for the island is a shared plan" (165). Shapiro goes on (165–166): "notice further that since the shared plan was designed for the handful of social planners; it is they who share the plan, not the islanders as a whole. This means that it is not necessary for the community to accept the shared plan in order for it *to obtain* [my emphasis]—though, as a matter of fact, we do approve of the plan. Since we consider the social planners to be morally legitimate, we plan to allow the adopters and appliers to adopt and apply plans for us. For this reason, we consider the shared plan to be the 'master plan' for the group." (Cf. also p. 150, on MSA, p. 177, and above, on the "bad man," n. 39). Admittedly, this does not square with my comments in the text. But I cannot see how it squares with the rest of Shapiro's argument, either. It is not clear to me what the emphasized "obtain" means, here. Specifically, are those inhabitants that do not have accepted the plan supposed to be subject to the pressures norms of instrumental rationality impose on planners? If not, then in what sense laws are shared plans? In what sense is legal activity planning activity?

or of the law's "fundamental nature," that laws are accepted by all those subject to them.[41] And, second, the necessary theoretical work is done, here, by an (unstated) theory of consent: a normative, substantive (though not necessarily moral) theory of legitimation through acceptance.[42]

6.6.3 Coercion

Bratman (1999, 101–102, 122, 132, 2009b, 123) claims that, even in the presence of coercion or "hard bargaining," there can still be JIA (though not SCA) and shared intention. This is good news for the planning theory of law. It seems that the claim that laws are plans, and that legal activity is shared activity, may be now rescued suspicion of resting on an irenic view of the attitudes of legal officials or of legal subjects generally. True, legal activity rests on the acceptance of the law by all those concerned (see Sect. 6.6.2), but this should not trouble us, because even *coerced* acceptance will do.

(Remember the "Planning Thesis": "legal institutions plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are entitled to affect what others may or may not do. Following this claim, legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply.") And I cannot see how the answer could plausibly be yes. Once again (see Sect. 6.3), why on earth should the plan you made and adopted for me *eo ipso* put *me* under "rational pressure to act accordingly"?

[41] Perhaps Shapiro's claims (laws are plans, etc.) concern only legal officials and are not meant to include all the individuals involved in the operations of a legal system. (I find it hard to establish whether, in Shapiro's text, "participants" in a legal system includes only officials, or everybody in the relevant social group). But, even if we adopt this reading (which does not sit well with many of the things Shapiro writes; see, e.g., p. 169), the claim that legal activity is shared, planning activity, if resting on the assumption that all the parties involved accept the relevant plan, remains dubious. If we assume that it is (always, everywhere) true that all legal officials accept legal "plans"—if we picture legal officials as a unified body, all agreeing in the acceptance of legal "plans"—and we treat this assumption as sufficient ground for concluding that legal activity is shared activity, the latter claim becomes, it seems to me, rather uninformative.

[42] See, for example, pp. 148–149: "as we have seen, we respond to the challenge of managing a large group of inexperienced and unmotivated individuals by requiring them to hand over vast amounts of planning power to us. By accepting the shared plan, they not only assume certain roles but transfer their powers to adopt and apply plans when their plans conflict with the planning of the supervisors." "Transfer of planning power" by way of acceptance, or consent, has an obvious contractualist flavor. Do Shapiro's claims (laws are plans, legal activity is shared activity) rest on unstated normative contractualist, or quasi-contractualist, premises? Fragments of the relevant substantive normative theory of legitimation through consent are scattered in Shapiro's text. Consider, for example, the following principle (142–143): "the fact that someone adopts a plan for others to follow does not, of course, mean that, from the moral point of view, those others *ought* to comply. The plan might be foolish or evil and, thus, unless there are substantial costs associated with nonconformity, the subjects morally should not carry it out. However, if the subject has accepted the shared plan which sets out the hierarchy then, from the point of view of instrumental rationality, he is bound to heed the plan. *For if someone submits to the planning of another, and yet ignores an order directed to him, he will be acting in a manner inconsistent with his own plan* [my emphasis]. His disobedience will be in direct conflict with his intention to defer."

And, it will be said, whenever a legal system is in place—whenever a revolution or civil war is not actually taking place—there will be at least coerced acceptance.

Shapiro does in fact exploit this line of argument. In MSA, and, thus, in legal activity, acceptance of hierarchy, and the "transfer of planning power" to superiors that it involves (and that supposedly grounds the application of the relevant norms of instrumental rationality to the others for whom "plans" are adopted; see Sect. 6.6.2) may be the upshot of coercion.[43]

I confess I have no real argument against this move. It just seems to me too easy to gain shared activity at the price of so watering down the notion of shared agency, and of planning. Once again, by *assuming* that always, everywhere there is acceptance, and that, therefore, "plans" adopted for other people are their own plans (so that the relevant norms apply to them), we make the planning theory trivially true and deprive it of any significant informative or explicative power.

6.6.4 Alternatives to a Pragmatic Rationale for Planning

As we have seen, the planning theory of law owes much to Bratman's claim that planning has a pragmatic rationale. Plans are all-purpose means, analogous to Rawlsian primary goods. The claim that plans—and, thus, the law—are subject to the governance of norms of instrumental rationality may ultimately be traced to this fundamental idea.

In recent writings, Bratman has developed, in addition to an instrumental justification of planning, a further, different rationale, having to do with our quest for self-governance and autonomy (i.e., with "connections between planning and self-governance," 2009a, 412).[44]

Does any of this apply to legal "planning"? No, it seems to me, unless, once again we understand the authority of law as analogous to, or as identical with (i.e., a special case of), the authority an agent has on his own actions and deliberation (unless, i.e., we understand, once again, the whole of legal subjects, or of legal officials, as a unified body, all pursuing a well-defined goal and agreeing in the acceptance of

[43] "It should also not be overlooked that individuals might accept a subordinate role in a shared activity because they have no other viable option. They might desperately need the money or fear that they will be harmed if they do not. Even in cases of economic or physical coercion, once individuals form an intention to treat the superior's directives as trumps to their own planning, they have transformed their normative situation and are rationally—if not morally—committed to follow through unless good reasons suddenly appear that force them to reconsider" (143). Cf. also p. 180: if members of the community are not disposed to comply with legal plans (notice that a disposition to comply is, in Shapiro's theory, a necessary condition for the existence of a plan) "legal authorities can dispose them to comply through various forms of intimidation" (this point is reiterated on pp. 181, 202).

[44] As well as with the role of planning in forms of sociality we highly value (on this score, see Sects. 6.5 and 6.6.1). Cf., for example, Bratman 2009c, 54, and ivi, n. 64 ("structures of cross-temporal and interpersonal planning are partly constitutive of […] forms of cross-temporal integrity, cross-temporal self-government, and sociality that we highly value"); 2009a, p. 412, esp. n. 2 ("for planning agents like us, our reason for conforming to these norms of practical rationality derives in part from our reason to govern our own lives"), 417–418, 429, 430, 436. Shapiro hints to these developments in n. 4 to ch. 5.

legal "plans"; see Sect. 6.6.2). What strikes me in these recent claims of Bratman's about the reasons we humans have for planning, is that they turn on the capacity plans, and intentions, grant an agent for self-management. And this, I have claimed (see Sect. 6.3), is precisely where any plausible analogy with legal "planning" breaks down.[45]

6.6.5 The Preemptive Force of Plans (A Few Inconclusive Remarks)

The adoption of a plan is a way of settling on a course of action. Plans, intentions, and planlike attitudes generally, are not supposed to enter into the balance of reasons for or against a given course of action (this would be both too weak and too strong, allowing for unacceptable bootstrapping). Rather, they provide what Bratman calls "framework reasons," posing problems about means and preliminary steps, selecting relevant options, and filtering out inconsistent options (Bratman 1987). Plans, Shapiro says, are "supposed to preempt," and purport to provide a reason to preempt (128–129), deliberation on the balance of reasons, and to structure further deliberation about how to carry them out. And, in the planning theory of law, this holds, since laws are plans, of laws as well.[46]

[45] Part of Bratman's more recent complex justification for planning agency, its being constitutive of forms of integrity and self-governance, has directly and explicitly to do with the authority of planners over their own actions and deliberation (specifically, with attitudes having agential authority; cf., e.g., Bratman 2009c, 56: "this issue [what it is for a thought or attitude to speak for the agent, to have agential authority] is implicit in several of the rationales for planning agency I have been sketching. I have supposed that our answer to the question, why be a planning agent?, will appeal to structures involved in cross-temporal integrity and autonomy. And in both cases those structures involve guidance by basic attitudes that speak for the agent, that have agential authority. I have also supposed that our answer to the question, why be a planning agent?, will appeal to the role of planning agency in broadly effective agency—effective, that is, in the support of the values, cares, ends and concerns that constitute the agent's practical standpoint. And the question, what constitutes the *agent's* practical standpoint?, is a question about agential authority"). Here, Bratman's line of argument goes, interestingly, from conditions of self-governance and agential authority to the significance of planning. It is not only that planning presupposes the authority of planners (as I have been assuming throughout; see Sects. 6.2 and 6.3). Also, the other way round, it is our interest in agential authority that leads to (i.e., justifies) our planning. (See also ivi, 39). This, I think, strengthens the connection between planning and authority on which I have relied from the beginning, and which, I have claimed, does not hold in the case of legal "planning."

[46] See, for example, pp. 201–202 ("legal institutions are not in the business of offering either advice or making requests. They do not present their rules as one more factor that subjects are supposed to consider when deciding what they should do. Rather, their task is to *settle* normative matters in their favor and claim the right to demand compliance. For this reason, deliberating or bargaining with officials about the propriety of obedience normally shows profound disrespect for them, and for the law's authority. Regardless of whether seats belts are a good idea, passengers are required to buckle up – after all, it's the law"); 275 ("laws guide conduct in the same way that plans do, namely, by cutting off deliberation and directing the subject to act in accordance with the plan").

This all seems very close to the idea that plans, and norms generally, are (if valid) exclusionary reasons (Raz 1975a, b). Bratmanian plans, however, are not Razian exclusionary (or "protected") reasons (Bratman 1987, 178, 180, 2007, 290). And this is so under two respects at least: (a) norms of reasonable stability for plans may allow for reconsideration when exclusionary reasons would not. (b) The way in which intentions, plans, and the like structure practical reasoning—namely, as framework reasons—differs from the way in which exclusionary reasons constrain it. It would be interesting to investigate these differences.

According to Shapiro, legal norms, like ordinary, everyday plans, are defeasible. One peculiar feature of legal norms, as contrasted with everyday plans, is, however, that the law itself somehow specifies the conditions under which they should be revised or their application blocked—their defeaters.[47] Legal norms specify their own defeaters.[48]

Now, legal norms are, according to Shapiro, plans, or planlike norms. But, we may ask, can plans non-vacuously specify the conditions of their own revision or abandonment? The question is twofold. (a) Is it conceptually possible for a norm to specify in advance, in non-vacuous or nontrivial terms (e.g., "unless there are compelling reasons to the contrary"), its own defeaters? (b) Can plans (in the strict, Bratmanian sense) specify in advance the conditions under which they ought to be revised or abandoned?

I have argued elsewhere (Celano 2012) that treating norms as non-vacuously specifying in advance their defeaters is—special contexts aside—eminently unreasonable. (This is no argument, of course). The latter question, too, might have significant implications for the planning theory. For, were we to discover that a plan, properly so-called, cannot, as such, satisfy this condition, and were we to grant Shapiro that legal norms do satisfy it, Shapiro's claim that legal norms are plans, or planlike, would be put in jeopardy. Shapiro could not consistently claim both that legal norms are plans, or planlike, and that they specify their own defeaters. And, it seems to me, the idea that plans may non-vacuously specify in advance their own defeaters is quite alien to Bratman's theory. (This, too, is no argument).

6.7 Conclusion

Maybe Shapiro would see all of this as the upshot of a series of misunderstandings. Maybe he only means to say that legal norms typically are "partial, composite and nested," that they often are "created by a […] process, […] that is incremental,

[47] See pp. 202 ("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*. Laws, like all plans, are typically defeasible. When compelling reasons exist, the law will normally permit its subjects to reconsider its direction and engage in deliberation on 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"); 303 ("the law […] regulates the manner of its own defeasibility: it identifies the kinds of reasons that suspend the law's injunctions").

[48] Talking of a single norm doing that, or of further norms specifying the defeaters of a given norm, does not make any serious difference, I think.

purposive and disposes subjects to comply with the norms created" (129), and he rejects any improper analogy from planning in the first person to planning for others. If so, we are not disagreeing. What precedes should then be understood as a warning against the potentially misleading implications of some crucial passages of Shapiro's. But I would add that, once the appearance of an analogy is dispelled, talk of legal norms as plans turns out to be rather uninformative. The main thrust of Bratman's planning theory of agency lies in its capacity to shed light on the authority planning agents (individual agents, or groups of them) may have on themselves: on their actions, and deliberation. And it is here, precisely, that we find ourselves compelled to acknowledge, it seems to me, that talk of plans can't do much for legal theory.

References

Benditt, T.M. 2004. Acting in concert or going it alone: Game theory and the law. *Law and Philosophy* 23: 615–630.

Bratman, M.E. 1987. *Intention, plans, and practical reason*. Cambridge, MA: Harvard University Press.

Bratman, M.E. 1999. *Faces of intention. Selected essays on intention and agency*. Cambridge: Cambridge University Press.

Bratman, M.E. 2002. Shapiro on legal positivism and jointly intentional activity. *Legal Theory* 8: 511–517.

Bratman, M.E. 2006. Dynamics of sociality. *Midwest Studies in Philosophy* 30: 1–15.

Bratman, M.E. 2007. *Structures of agency. Essays*. Oxford: Oxford University Press.

Bratman, M.E. 2009a. Intention, practical rationality, and self-governance. *Ethics* 119: 411–443.

Bratman, M.E. 2009b. Modest sociality and the distinctiveness of intention. *Philosophical Studies* 144: 149–165.

Bratman, M.E. 2009c. Intention, belief, practical, theoretical. In *Spheres of reason. New essays in the philosophy of normativity*, ed. S. Robertson. Oxford: Oxford University Press.

Celano, B. 1990. *Dover essere e intenzionalità. Una critica all'ultimo Kelsen*. Turin: Giappichelli.

Celano, B. 2000. Validity as Disquotation. In *Analisi e diritto 1999. Ricerche di giurisprudenza analitica*, ed. P. Comanducci and R. Guastini. Turin: Giappichelli. http://www.giuri.unige.it/intro/dipist/digita/filo/testi/

Celano, B. 2003. La regola di riconoscimento è una convenzione? In *Il "Postscript" di H. L. A. Hart*, *Ragion pratica*, n. 21 (monographic issue), ed. M.C. Redondo, 347–360.

Celano, B. 2012. True exceptions: Defeasibility and particularism. In *The logic of legal requirements.Essays on defeasibility*, ed. J. Ferrer Beltrán and G.B. Ratti. Oxford: Oxford University Press, 268–287.

Coleman, J.L. 2001. *The practice of principle. In defense of a pragmatist approach to legal theory*. Oxford: Oxford University Press.

Gaus, G.F. 2002. The legal coordination game. *American Philosophical Association Newsletter on Philosophy and Law* 1: 122–128.

Kelsen, H. 1945. *General theory of law and state*. Cambridge, MA: Harvard University Press.

Raz, J. 1975a. *Practical reason and norms*. London: Hutchinson.

Raz, J. 1975b. Reasons for action, decisions, and norms. In *Practical reasoning*, ed. J. Raz. Oxford: Oxford University Press, 1978.

Shapiro, S.J. 2002. Law, plans, and practical reason. *Legal Theory* 8: 387–441.

Shapiro, S.J. 2011. *Legality*. Cambridge, MA: Harvard University Press.

Waldron, J. 1999. *Law and disagreement*. Oxford: Oxford University Press.

Chapter 7
Ruling Platitudes, Old Metaphysics, and a Few Misunderstandings About Legal Positivism

Pierluigi Chiassoni

7.1 A Tale of Betrayal and Misunderstanding

In his jurisprudence primer *Legality*,[1] Scott Shapiro proves a very well-trained, thoughtful, imaginative, sophisticated legal philosopher.

He claims his work to be a piece of "analytical jurisprudence", which he contrasts with "normative jurisprudence", this latter coming in a "positive" and a "critical" variety.

Shapiro's view of analytical jurisprudence, however, betrays the framers' original plan on basic issues, like the role of platitudes, meta-philosophy, conceptual analysis, and, last but not the least, the is/ought separation.

To begin with, as to the place of platitudes in theory-building, Shapiro seems to ascribe to them a paramount role, perhaps well beyond what is required by a critical conception of philosophical inquiry.

As to meta-philosophy, Shapiro seems to be affected by a nostalgia for old metaphysics: The "first philosophy" presumed to be able of getting to "philosophical truths" (a key-phrase in Shapiro's book) and providing people with the highest form of knowledge, above empirical knowledge.

The two views above result in (what, from an analytical standpoint, looks like) an immoderate view of conceptual analysis, as the way for digging ("philosophical") truths out of platitudes.

Finally, concerning the is/ought separation, Hume's law and the distinction between descriptive and normative issues, Shapiro looks well-aware of them and deeply concerned about passing their test or anyhow escaping their strictures.

[1] All the references in the text are from S. Shapiro, *Legality*, Cambridge and London: Harvard University Press, 2011.

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Nonetheless, his planning theory of law, to quote the most conspicuous example, seems to fly in the face of these pillars of analytical jurisprudence.

Apparently, the meta-philosophical and methodological views above have led Shapiro to (*1*) overlooking the point of classical legal positivism (to wit, the positivism of Bentham, Austin, Kelsen, Hart, Bobbio), (*2*) endorsing a spurious form of positivism, (*3*) assuming an indulging attitude towards exclusive legal positivism, and (*4*) setting forth a surprising solution to the "possibility puzzle".

In the following sections, I will try to provide some argument for the several charges I filed.

7.2 Ruling Platitudes

Shapiro's theory of platitudes presents two basic ingredients: first, an inventory of legal platitudes and second, a meta-philosophical claim about their proper place in the building of legal philosophies.

Shapiro provides an inventory of the "platitudes", or "truisms", concerning the law, where five different categories are singled out as follows:

1. Platitudes concerning "basic legal institutions" ("All legal systems have judges", "Courts interpret the law", "One of the functions of courts is to resolve disputes", "Every legal system has institutions for changing the law")
2. Platitudes concerning "legal norms" ("Some laws are rules", "Some laws impose obligations", "Laws are always members of legal systems", etc.)
3. Platitudes concerning "legal authority" ("Legal authority is conferred by legal rules", "Legal authorities have the power to obligate even when their judgements are wrong", etc.)
4. Platitudes concerning "motivation" ("Simply knowing that the law requires one to act in a certain way does not motivate one to act in that way", "It is possible to obey the law even though one does not think that one is morally obligated to do so", etc.)
5. Platitudes concerning "objectivity" ("There are right answers to legal questions", "Sometimes courts interpret the law incorrectly", "If I believe that the law forbids some action and you believe that the law permits it, then at most one of us can be in the know", etc.)

Shapiro maintains that any proper philosophical inquiry about the law should take these platitudes seriously in order to get to "philosophical truths" about *the nature of law*, which Shapiro regards as a *metaphysical* issue (*Legality*, 15–16).

Shapiro's theory of platitudes deserves a few comments:

1. Metaphysics concerns the properties in virtue of which something is *that* thing and not another thing – for instance, the properties in virtue of which something is, say, a bagpipe and not a washing machine.

   Likewise, metaphysical jurisprudence concerns the properties in virtue of which something is *law*, and not another thing – like, as Shapiro suggests, some idiosyncratic normative system a philosopher wishes to smuggle into the picture.

It is worthwhile noticing, however, that old-style analytical philosophers would proceed in a quite different way on this point.

First, the analysts would start by analysing the very issue concerning "the nature of law".[2] Unlike Shapiro, they would not take for granted that "the nature of law" stands for just *one* issue. Furthermore, provided it could also be conceived as a metaphysical issue, they would point out that there are very different conceptions of metaphysics around in the philosophers' garden. Old-style analysts would start their inquiries by posing – to my mind, very sensible – questions like the following: Which sort of answers do people expect as *adequate* answers, when they ask about "the nature of law"? What did legal philosophers actually do, when they coped with "the nature of law" issue? What may philosophers be looking for, when they set to "the nature of law"? etc.

Secondly, the analysts would emphasize that metaphysical issues, whenever *good* metaphysics is at stake, are tantamount to *conceptual* issues, to be faced and solved by suitable, analytical-style, conceptual analysis: namely, by means of an analysis that includes, very roughly speaking, one stage of conceptual description and one stage of conceptual reconstruction, leading to some philosophical concept that is, by hypothesis, neither true nor false but should be justified by some standards of theoretical or practical convenience. Otherwise, a metaphysical inquiry would be some mysterious enterprise, pretending to provide some kind of "higher" knowledge about the law, like old metaphysics did.

2. Coming to platitudes, one may notice that the role of platitudes in (legal) philosophy is by no means shared and settled. Indeed, we may see three different attitudes at work here.

   There are, to begin with, *platitudes-distrusters*. For these philosophers, platitudes are, if not a whole bunch of prejudice grounded on habit and false conscience, a set of simplistic modes of thinking that should be set aside in any well-ordered, useful, genuine philosophical inquiry.[3]

   There are, furthermore, *platitudes-analysts*. These philosophers believe platitudes may in fact be saddled with prejudice and false conscience. They also think, nonetheless, that platitudes are among the necessary starting points for useful philosophical inquiry. Of course, such an inquiry may lead to see how many of the platitudes around are, in fact, unsound prejudice, false, confused, or otherwise untenable beliefs, or even value-laden, interest-biased judgements. From the standpoint of the analysts, platitudes are at the service of philosophical inquiry, but it is not also the other way round for, had we simply stayed with platitudes, almost no progress

[2] H. L. A. Hart exemplifies the analyst's very prudent attitude on the point. On this aspect of Hart's approach, see, e.g. P. Chiassoni, *The Simple and Sweet Virtues of Analysis. A Plea for Hart's Metaphilosophy of Law*, in "Problema", 5, 2011, pp. 53–80, at pp. 66–67.

[3] In his 1797 *Metaphysische Anfangsgründe der Rechtslehre* (it. trans. *Primi princìpi della dottrina del diritto*, Roma-Bari, Laterza, 2005), Kant provides a clear case of a platitudes-distruster: Platitudes are distrusted just because they are (pretended) pieces of empirical, *a posteriori*, knowledge about law.

would have been made in the physical and moral worlds.[4] To put it in other terms, platitudes, here, are the useful (indeed, the "necessary") inputs for philosophical inquiries, they are the primary sources of philosophical doubt, and they prevent philosophical inquiries from going astray. The criteria of philosophical success, however, are platitudes-independent, rationality criteria, having to do with empirical foundation, determinacy, precision, coherence, demystification, and explanatory force.[5]

Finally, there are *platitudes-trusters*. For these philosophers, platitudes are the gates to philosophical truths. They must be taken seriously, at face value, and seriously accounted for. They rule over philosophical inquiry, from the beginning to the end, for they point to the natural properties of the object they refer to – since they have *some unique object* in view and they cast light on, and capture, some of its natural or necessary properties.

I think, as Shapiro himself seems to make clear in the first chapter of *Legality*, that Shapiro belongs to the club of platitudes-trusters – or, in any case, to something very close to it. Indeed, from what he says, we gather that he regards legal platitudes as the ultimate benchmark of genuine *legal* philosophy: for they would capture, contain, or mirror as many aspects of the very nature of law.

Platitudes-trusting, however, may turn out to be a hindrance to philosophical inquiry as a critical inquiry about modes of thought. This is suggested by the way Shapiro lays down his inventory of legal platitudes. What strikes me in that inventory is a remarkable, preliminary giving up of philosophical inquiry and criticism. Indeed, no doubt is being raised, if only by way of a warning, about the fact that these pretended truisms make up a heterogeneous set.

Some of them seem to convey genuine, unquestionable pieces of information about features of positive legal systems ("All legal systems have judges", "Courts interpret the law", etc.) – though they may also work as pieces of stipulative concepts of law, courts, legal systems, etc.

Other purported truisms, however, though couched in assertive, descriptive forms of language, may also convey committed attitudes as to the *practically* (morally, strategically, prudentially) *proper* way of seeing legal practice and acting in it ("Legal authorities have the power to obligate even when their judgements are wrong", "There are right answers to legal questions", "Sometimes courts interpret the law incorrectly").

Other truisms still, finally, are likely false – like, "If I believe that the law forbids some action and you believe that the law permits it, than at most one of us can be in the know", once we consider the possibility of there being gaps in the law.

Another mark of philosophical giving up has to do with the following. Indeed, in front of people's (and our) presumed platitudes, a further question pops up:

[4] Socrates's method of critical examination and refutation provides perhaps the oldest example of such an analytical attitude towards platitudes.

[5] Hans Kelsen, Karl N. Llewellyn, Hart, and Norberto Bobbio, to mention only a few, all seem to partake this attitude in their works.

Where do these truisms come from? When did they show up, and why? What is, in other terms, their genealogy? Before taking them for granted, an inquiry about pedigree would be in order. Perhaps, some truisms simply reflect people's own considered, overlapping beliefs and attitudes about the law. But, annoying as this may sound, we (people) – or at least many of us – may be the dupes of some piece of bad philosophy and false theory; we may have fallen prey of some mental cramp; furthermore, many of us may have some – material and/or ideological – interest in what we (assume to) believe. A misunderstood idea of philosophical correctness should not prevent us to cast a cold glance at platitudes: and indeed, the *more* so, just because they are, or pretend to be, truths sanctioned by common sense.

The remarks above suggest that we should not be ruled by platitudes. We should not give up cold analysis in front of them: unless, of course, we want our philosophical inquiry to accommodate to fiction, delusion, and (mostly undercover) interest. So, all things considered, the most convenient philosophical stance seems to be that one exemplified by the platitudes-analysts.

7.3 Misunderstanding Positivism I: Is Planning-Positivism Positivism?

I said that, to my view, Shapiro has misunderstood the original plan of classical legal positivism and, what's more, has endorsed a form of pretended legal positivism that is, in fact, spurious: an instance of *quasi-positivism*, we may say.

These are very serious charges, to be supported with serious argument. I do not know, for sure, if I am endowed with all the seriousness required by the task. We'll see, as the argument proceeds.

In the present section, I will deal with the idea of legal positivism connected to Shapiro's planning theory of law – a theory which Shapiro regards as a positivist theory of law ("Planning Theory is a positivistic account that ultimately grounds the law in social facts alone" [*Legality*, 239]).

Dealing with "legal positivism" is a risky business. Indeed, a variety of heterogeneous views (ideas, full-fledged theories, claims, ideologies, attitudes, approaches, etc.) go around under that label in the jurisprudential arena.

Some analysts (Hart, Bobbio, Ross, Scarpelli) in the late 1950s to early 1960s attempted to identify and single out the most important of those views, in order to defuse misunderstandings and emotion-ridden rhetoric, on the one hand, and clear the way for meaningful disputes and fruitful inquiries, on the other.

Taking stock of their work, we may say that "legal positivism" may be – and has in fact been – identified, in turn, with one or more of the following views:

1. *Ethical formalism* or *ethical legalism*. In this case, *legal positivism* is tantamount to the normative theory (ideology, doctrine) concerning political obligation, according to which individuals do have the moral duty to obey positive laws, just because they are positive laws. The duty may be considered, in turn, as (quasi) absolute or unconditional (Hobbes), or relative and conditioned (Locke).

The new, post-World War II, natural lawyers had precisely this view in mind, when they charged "legal positivism" as an accomplice of the Nazi regime and other totalitarian and authoritarian dictatorships.

2. *Juristic collaborationism.* In this case, *legal positivism* is tantamount to the professional ideology, according to which jurists ought to collaborate with any regime whatsoever ruling over their society: Jurists, being the technicians of the law, ought to serve the law, whatever it is and wherever it comes from.
3. *Juristic law-keeping*, *or the professional ideology of juristic fidelity to the modern, legislative, or constitutional state*. In this case, *legal positivism* is tantamount to the professional ideology of the jurists who work in a legislative democratic state or, later on, in a constitutional state. It places on them a moral duty of cooperation with these positive legal systems, in order to make them working more efficiently in the two dimensions of the formal and substantive rule of law. Such a cooperation, notice, is for the ever-better working of a rule-of-law legal order: Accordingly, jurists are not mere servants here; they are, rather, the guardians of the rule of law – usually, to protect it against thoughtless or rogue politicians.
4. *General, descriptive theories of positive law*. In this case, *legal positivism* is tantamount to (the working out of) general theories of positive law, purporting to account for the actual or possible structures, ingredients, and functions of positive legal systems. This is precisely what analytical legal positivists did from the late eighteenth century onwards.
5. *An empiricist epistemology about the knowledge of law in general*. In this case, *legal positivism* is tantamount to the epistemological (methodological, conceptual approach) view concerning the status and the method of legal theory. Here, legal positivism claims that:

   (a) It is worthwhile to distinguish carefully between the objective, empirical knowledge of positive law as it is in fact, on the one hand, and its moral evaluation and moral criticism, on behalf of some ideology about how the law ought to be, on the other hand.
   (b) Positive legal orders can fruitfully be the matter of empirical inquiries.
   (c) By comparing the several existing legal orders, it is possible to work out general theories about their ingredients, structures, and functions (about what and how they are, and how they work).
   (d) Provided the law is, in a relevant part, a linguistic phenomenon, made of speech acts, sentences, words, and concepts, an important part of a general theory of law has to deal, as Bentham claimed, with "terminology", that is, with analysing and clarifying the basic concepts we find in most legal experiences.

6. *An empiricist epistemology about the knowledge of the content of particular legal systems*. In this case, *legal positivism* is tantamount to the theory of legal science, according to which the description of the existence and content of any positive legal system, to be a genuine description, is a matter of describing self-qualified practices of lawmaking, law-applying, and law-abiding, as they are deployed by the participants to that legal system (legislators, judges, officials, jurists, laypeople, etc.), from the external point of view of a descriptive sociology.

As it is well-known, twentieth-century positivists claimed that among the six views above, the first two are spurious, having their roots in natural law thinking and the moral theology of powerful religious institutions. Contrariwise, according to (most of) them, the core of legal positivism is represented by the epistemological and theoretical views just mentioned, all having to do, on different though related levels, with the establishment of a sound, empirical knowledge of law, to be kept rigorously separate from moral evaluation and legal policy. According to them, in other words, the point of legal positivism was, and is, to establish within legal culture and opinion, and further elaborate, the basic Benthamite distinction between expository and censorial jurisprudence: between the role of the expositor and the very different, though as well important, role of the censor.

Let us come now to Shapiro's view of legal positivism.

Apparently, Shapiro identifies legal positivism with something like the following: Legal positivism is *a theory about the conditions that the concept of positive law must meet, in order to make objective, empirical knowledge about the existence and exact content of individual legal norms (or individual "laws") possible*.

This variety of legal positivism – notice – is not *epistemological*, though it depends on an empiricist legal epistemology.

Neither does it belong to some *moral axiology* of law: Existing laws may have a morally outrageous content and still be law, though (very) bad law (see, e.g. *Legality*, 182).

So, what sort of positivism is it, if any?

Apparently, some tinge of old metaphysics seems to show up here. Notice, indeed, that, according to Shapiro, the feature of being liable to objective knowledge:

(a) Is *not* a feature, and a goal, that the law, so to speak, receives *from outside*, from the external world of people's contingent interests and desires.
(b) It is rather a feature, a goal, that the law brings *within itself* once we see its *true nature* as summed up by the function of *organizing and coordinating human conducts by means of plan-like norms, so as to make moral deliberations unnecessary for the common subjects of the law* – as Shapiro's planning theory of law makes clear.

Legal positivism (in the planning version, or planning-positivism) is, hence, the theory that, by means of the concept of law it works out, makes us to *see* the law as the law itself, were it some speaking entity, would suggest us to see it. This leads, in turn, to a concept of law according to which the law consists, at any given time, of the *determinate*, empirically knowable *meanings* of the laws (plan-like norms) produced by competent and able-to-plan legal authorities.

Supporters of this form of legal positivism would perhaps call it *theoretical*, or even *analytical*.

To the eyes of an old-fashioned analytical jurist, however, those labels cannot be conceded. For the following reasons:

1. The planning-positivism's concept of law is a narrow concept, once we compare it with other theoretical concepts of law (like, e.g. Kelsen's), which do not make of determinacy the test for establishing whether "there is law", or not, on some issue.

   On the one hand, according to Shapiro, *when* the general legal norm to be applied to a case proves *indeterminate*, there is "no law to be known". This is so

because *either* the law provides *one clear answer* to a case at hand, that is, liable to objective, empirical knowledge grounded on social facts like linguistic uses and legislative purpose, *or* there is *no law* on that case (*Legality*, 252–258).

On the other hand, according to Kelsen, general legal norms are *always indeterminate*, in the light of the several methods of interpretation available in our legal systems. From a theoretical standpoint, however, such a situation does not mean that there is *no law* to be known. Contrariwise, there is something that can be known and marks the extreme borders of positive law on a case: It is the *frame* (*Rahme*) of the several possible alternative interpretations of the general norm at stake.

On Shapiro's view, the pre-existing law on a case may be, from an interpretive standpoint, *either determinate*, and hence *there is* law to be known and applied, *or indeterminate*, and hence *there is no law* to be known and applied.

On Kelsen's view, the pre-existing law on a case is always, from an interpretive standpoint, indeterminate: The law to be known is a frame of alternative norms; from a cognitive viewpoint, it is not that there is no law; it is, rather, that we are confronted, at least at the methodological level, with *an embarrassment of riches*.

For Shapiro, pre-existing law coincides with the *determinate* outputs of interpretive methods – there is law if, but only if, all the interpretive methods available appeal to factual inquiries and point to the *same*, *clear outcome* (law = authoritative sources + the determinate interpretive outputs thereof).

For Kelsen, contrariwise, pre-existing law coincides with *any possible outputs* of interpretive methods (law = authoritative sources + any possible interpretive outputs thereof).

Apparently, we are confronted with two different views of the same phenomenon. Which of the two pictures should we buy?

For sure, we may stay with just recording the difference. If, however, we ask for the pragmatic justification, if any, for such a difference, we come apparently to the following conclusion:

Kelsen's view seems more in tune with the ideal of a purely descriptive, value-free legal theory, which methodically rejects any temptation of including into its account of the law any evaluation-dependent feature whatsoever. For this reason, Kelsen maintains that positive legal systems may have any content whatever, even though some contents may undermine their very existence. For the same reason, one may say, Kelsen maintains that general legal norms are always indeterminate, from the standpoint of interpretive methods, whenever they have to be used to adjudicate a case or set forth proposals on how to decide it.

Shapiro's view, on the contrary, seems preoccupied with providing an account of law as a rational enterprise. The planning-positivism's concept of law is so narrowly defined, one may say, just in order to present the law as meeting the presumed practical needs of individuals conceived as planning agents. Shapiro's account of the law is, therefore, committed to a practical standard of means-to-end rationality.

2. Shapiro, to be sure, seems to resist such an interpretation of his theory of law. Indeed, the planning-positivism's concept of law is presented as the kernel of a description of the law as it is.

Unfortunately, such a "description" is, so to speak, *teleological* rather than merely *functional*: It is grounded on the idea that there is *one true*, *paramount*, *essential* function of law, and legal theory can *discover* it.

To an analytical mind, however, the idea of there being a true, essential function of law goes beyond the borders of a genuine empirical inquiry and clearly belongs to the realm of valuations (even though they may be *rationality* valuations).

To conclude, to the eyes of an old-style analytical jurist, Shapiro's pretended positivist theory of law is a hotchpotch of fact and value, of is and must be. It is, we may even say, a conspiracy between a pretended metaphysical, but actually evaluative, theory of law (the planning theory), on the one hand, and an empiricist, prescriptive model of legal knowledge and legal science, on the other, echoing pre-Benthamite times. Its pretence notwithstanding, it is, rather than an improved form of legal positivism, as Shapiro suggests, an instance of old-fashioned *quasi-positivism*, saddled with metaphysical teleologism and valuations dressed up as philosophical truths.

7.4 Misunderstanding Positivism II: Varnishing Exclusive Legal Positivism

Shapiro endorses so-called exclusive legal positivism (ELP) (*Legality*, 271 ff., p. 432 n. 16).

The basic tenets of ELP, according to Shapiro, run as follows:

1. A norm counts as law if, but only if, (*a*) it has a social pedigree and (*b*) is implementable without resort to moral reasoning – that is tantamount to the "exclusivity" and the "ultimacy" thesis: "legal facts are determined by social facts alone", and hence, they "are *ultimately* determined by social facts alone" (*Legality*, 269).
2. Dworkin's theory of hard-cases adjudication is wrong (he "misconstrued the evidence"): Judicial behaviour in hard cases does not show that formalism is true and judges lack strong discretion (*Legality*, 272).
3. In hard cases, where pre-existing, pedigreed norms have "run out", "judges are simply *under a legal obligation to apply extra-legal standards* […] the fact that […] judges are under an obligation to apply nonpedigreed norms does not imply that they are compelled to apply preexisting law; rather, they are merely under an obligation to reach outside the law and apply the norms of morality instead"; this means, in other words, that "when pedigreed standards run out, […] judges are simply under a legal obligation to exercise strong discretion, by looking outside the law to morality in order to resolve the case at hand" (*Legality*, 272, 273[6]).

Let us focus on the third tenet of ELP. From a meta-theoretical point of view, ELP, as a purported general theory of hard-cases adjudication, is clearly *false*. Though, of

[6] See also Shapiro (2011), 274: "Both the exclusive and inclusive legal positivist […] agree that judges are bound to apply moral norms when the pedigree standards have run out. They just disagree about how to describe what they are doing: for the inclusive legal positivist, judges are *applying* legal norms; for the exclusive legal positivist, they are *creating* legal norms".

course, it may be of some use either as a context-specific, descriptive theory or as a piece of a normative theory of law: meaning by that a theory setting forth an ideal model of law, a model of how the law ought to be. For such a conclusion, the following reasons may be invoked:

What judges *ought legally to do* in hard cases, that is, the content of their legal obligation, if any, in such predicaments, may be *either* a matter for *local descriptive* jurisprudence to account for relatively to *given* legal orders, by observing how they work from the standpoint of their participants, *or* a matter for *normative* jurisprudence to establish, by way of normative proposal. I do not see any third way, beyond the two ways above – unless, of course, one pretends to derive the existence of such a judicial obligation from the true concept or the true nature of law. But this would beg the question: being, under any reasonable standpoint, just a normative proposal about judicial duty, brought about under the cover of the myth of a true concept (conceptualism) or a true nature (natural law thinking) of law, *dictating* judicial duties.

In fact, it may happen – and has happened in the history of legal institutions – that, in a legal system, judges may be simply under the obligation of *avoiding* any decision whatsoever on the doubtful case at hand: that is, they *ought* to *turn down* people's claims, plaintiffs', defendants', and prosecutors' alike (*non-liquet* obligation). Alternatively, in hard cases, judges may also be under the obligation of *suspending* their judgement and *referring* the issue to the legislature, asking for the enactment of an apposite law (*référé legislatif* obligation).

The plain remarks above suggest a few conclusions:

> First, far from exposing either the falsity or the context-specificity, or even the non-theoretical, non-descriptive nature, of the ELP claim concerning judicial obligation in hard cases, far from, in other words, demystifying it, our author – Bentham would have said – has quietly presented it as a matter of course: He has, so to speak, varnished it.
>
> Second, since the planning theory of law – Shapiro's own legal theory – follows the lead of ELP on that point, it is likewise flawed on the central issue of hard cases.
>
> Third, provided neither ELP nor the planning theory of law would consent at being regarded as genuine but context-specific theories of law, they are either false general theories or normative theories, though undercover.[7]

7.5 Did Shapiro Solve the "Possibility Puzzle"?

> [T]he Possibility Puzzle – says Shapiro – purports to show that legal authority is impossible. On the one hand, legal authority must be conferred by legal norms; yet, on the other, legal norms must be created by legal authority. From these two assumptions, we get a classic

[7] In the passage I considered before (see the quotation in the text corresponding to footnote 6 above), Shapiro talks of "American" judges. I assume he did so by way of example. Otherwise, his theory would become a piece of local jurisprudence and, as such, could hardly be considered a non-interpretive, non-normative theory.

> chicken-egg paradox. Any time we try to establish a claim of legal authority, we either enter into a vicious circle (the authority created the norm which conferred the power on the authority to create that very norm) or an infinite regress (the authority got his power from another authority, who got his power from another authority and so on) (*Legality*, 179).

Shapiro claims to have found the key for solving the possibility puzzle in his planning theory of law that includes a conception of legal authority grounded on a planning theory of man (man is a planning animal; groups of men are planning groups, where master plans and derived plans obtain).

Here is Shapiro's solution to the puzzle:

> legal authority is possible because certain kinds of agents are capable of (1) creating and sharing a plan for planning and (2) motivating others to heed their plans (*Legality*, 181).

As to the first condition of possibility of legal authority (and legal systems), namely, the *authorization condition*, Shapiro sums up the gist of his argument in the following lines:

> the Planning Theory is able to secure the existence of fundamental legal rules [the rules granting to somebody the highest legal powers to make plans for others, ndr] without generating vicious circles or infinite regresses. Legal officials have the power to adopt the shared plan that sets out these fundamental rules by virtue of the norms of instrumental rationality. Since these norms that confer rational power to plan are not themselves plans, they have not been created by any other authority. They exist simply in virtue of being rationally valid principles. (*Legality*, 181)

As to the second condition of possibility of legal authority (and legal systems), namely, the *ability to plan condition*, Shapiro claims that

> there is nothing perplexing about this condition obtaining (*Legality*, 181).

We can concede that the latter condition may indeed obtain, being a pure matter of fact. As to the former condition, however, a few comments seem in order. It is worthwhile to read again Shapiro's crucial passage:

> the Planning Theory is able to secure the existence of fundamental legal rules [the rules granting to somebody the highest legal powers to make plans for others, ndr] without generating vicious circles or infinite regresses. *Legal officials have the power to adopt the shared plan that sets out these fundamental rules by virtue of the norms of instrumental rationality. Since these norms that confer rational power to plan are not themselves plans, they have not been created by any other authority. They exist simply in virtue of being rationally valid principles*. (*Legality*, 181; emphasis added)

Apparently, the possibility puzzle is solved by making appeal to a set of power-conferring norms, the existence of which depends on their *content*: They exist, claims Shapiro, "simply in virtue of being *rationally valid* principles".

What does Shapiro's argument amount to? Which sort of argument is it? Does it really do the trick, as Shapiro claims?

Shapiro's argument may be understood, I think, in three different ways: firstly, as a transcendental argument; secondly, as a Hegelian argument; and thirdly, as a natural law argument.

The Transcendental Argument. As a transcendental argument, Shapiro's argument would run, roughly, as follows: The norms of instrumental rationality exist (as *legal* norms?), because they *must* exist. Indeed, if they did not exist, legal authority

would not exist: They are, in other words, necessary for legal authority to exist. But legal authority does exist. Hence, they do exist too.

Unfortunately, if it were a transcendental argument, Shapiro's argument would not do against the possibility puzzle, because it would be plainly circular: In fact, one of its premises – that legal authority exists – is precisely what Shapiro wanted to establish.

Hegel Strikes Again. As a Hegelian argument, Shapiro's argument would run, roughly, as follows: The norms of instrumental rationality exist; they are *real* norms because they are *rational* norms; indeed, *whatever is real is rational, and whatever is rational is real*.

Once we wake up and get out of the Hegelian circus, we would appreciate that this pretended argument is tantamount to claiming that the norms of instrumental rationality exist, because we *like* them, we *desire* them, we *choose* them, and we *need* them to exist. Their existence as rationally valid principles is, here, nothing more than the outcome of a practical move: We – as autonomous moral agents – introduce them into the picture because they are the tools we need to establish legal authority.

An Appeal to Natural Law. Finally, as a natural law argument, Shapiro's argument would run, roughly, as follows: The norms of instrumental rationality exist, because they are the fundamental natural laws of human conduct; they exist in the very nature of man as a planning animal; they are the natural normative side to men's ability and willingness to make plans for themselves and others.

Unfortunately, besides the difficulty of accepting any natural law claim here and now, this way out seems, all things considered, unviable for Shapiro. How can he *consistently* ground his planning theory of law, as a positivistic theory, on natural law principles (even though they are the principles of instrumental rationality)?

Apparently, we cannot avoid to conclude that Shapiro's pretended solution to the possibility puzzle is just a sham: a wishful thinking grounded, Austin would have remarked, on a tissue of uncertain talk.

Can the puzzle be solved at all? Does Shapiro's failure in solving it shows that it cannot be solved?

Maybe, a different exit strategy should be followed. I have one possibility in mind that amounts, roughly, to defusing it. To show how it could work, I will refer to Shapiro's tale about the two sons of Lex, Positive and Natural.

Here is the tale:

> A few years into his reign, Positive changed the tithing rule so as to increase the amount of grain each member of the group must contribute to the communal storage. Since no one was happy with this decision, Natural saw an opening to challenge Positive's power. During the next village meeting, Natural stood up and announced that he would not abide by the new tithing rule. "But Natural", Positive protested, "I am the ruler and you are obligated to listen to me".
>
> […] In response to Positive's protest, Natural laid out the same puzzle about the possibility of legal authority that Phil had sprung on his father decades earlier: how can Positive have the legal authority to create rules, when rules are required to confer such authority and authority to create such rules? […]
>
> Positive argued [in reply to Natural, ndr] that legal authority ultimately rests on political power. Since he has the ability to punish anyone who does not tithe, he has the legal right to impose an obligation on them to obey. But Natural had a reply: "The mere fact that you can punish me is just a descriptive fact about the world. Your statement simply reports what

> *is* the case. However, in order for me to be legally obligated to listen to you, you must demonstrate that you legally *ought* to be obeyed. Since no one can derive an ought from an is, it follows that I cannot be legally obligated to listen to you".
>
> Positive conceded that Natural was correct, but tried another idea […] Legal authority, on this alternative view, derives from the practice of deference among members of the group. Positive has legal authority to obligate because everyone takes him to have that authority. But Natural had the same response: "To say that everyone thinks you have the right to tell them what to do is just to make a descriptive statement about the world. On the other hand, to infer that you actually have a legal right is to draw a normative conclusion. Normative statements can never be deduced simply from descriptive ones". Positive saw Natural's point and thus did not know what to say. So he did what rulers throughout the ages have done to dissidents who make sense: Positive executed him. (*Legality*, 46–47)

So, apparently, Positive had no way out from Natural's arguments – though, of course, Natural's execution was by no means the only ending available.

Perhaps, however, contrary to what Shapiro suggests, Positive could have appealed to some effective, reasonable way out from the arguments of Natural – different from the one provided by the planning theory that, as we have just seen, does not seem to work.

I suspect that both brothers acted under the influence of a bad adviser. Phil, the tribe's philosopher, played a key role in the tragedy and should be held morally responsible for that. Natural should have been more wary about Phil's tricks, had he not been blind with resentment, because of his having being excluded from power by Lex. Positive, too, should have noticed that something in Natural's, and Phil's, arguments was wrong. They, and their father Lex before them, had the bad chance of having in their community a philosopher like Phil, confused and confusing at once. Had Anfry (analysis freak) been at hand, instead, the outcome of the confrontation between Natural and Positive would probably have been different, as I will suggest below.

Anfry is an old-style, old-fashioned, analytical philosopher. Here you are, roughly, what he would have suggested to calm down Positive and Natural, had he be present.

In front of a law, two basic stances, two basic games, are available: the player's and the observer's.

The player's game is a commitment, practical game: To play, we must decide who plays which role, what each role involves as to rights, duties, etc., when, if ever, the rules produced by the rule-maker may be contested and how, etc.

The observer's game is a theoretical game; it consists in coping with the following problems: how does the game we call "law" in fact work? How does any of such law-games start? How are they being played? etc.

Legal positivism, in the epistemological and theoretical varieties mentioned above (Sect. 7.3), pursues the aim of providing people with an empirical, value-free, dispassionate theory of positive legal orders. It is not concerned with what people ought to do morally but rather in *reporting* what they ought to do *from the standpoint of, or according to*, a given legal order.

Natural law theories, contrariwise, pursue the aim of providing people with reasons for abiding by (completely, or only up to a certain point), or not abiding by, the rules and standards of positive legal orders.

In the light of the trivial remarks above, Positive could have reacted differently to Natural's objections.

For instance, he could have replied to Natural's protest that he would have not obeyed the rule, because he had no legal authority, as follows:

> "Wait a minute, Natural! If I may say so, you are mixing things up in your apparently sound argument. Let me try to explain why.

Two different issues are at stake here that should be kept distinct.

On the one hand, there is the theoretical question about whether, on the basis of some empirical, value-free view of the law, we may say that, according to our constitution, I have the legal authority of making rules and this rule too.

On the other hand, there is the practical question about whether you ought morally to obey the laws I am making in my capacity of lawmaker, and this law in particular.

As to the first question, nobody would deny that, from an empirical point of view, we have a legal system here, where somebody (me) has the legal authority to make laws. We may explain this in the following terms: When our father Lex was alive, he and other people held a constitutional convention concerning the proper way to govern our society. Surely it was a *legal* convention, for its proclaimed business was the establishment of a *legal system*, though not by way of a formal legal authorization (*ex facto jus oritur*, isn't it?). The output of the convention was a decision according to which Lex was provided with lawmaking and law-applying powers; it was also agreed upon that on his death, Lex will appoint who will go to succeed him in performing those roles. Since then, the people in our society abode, by and large, by the rules Lex made and also cooperated to his law-applying acts. The same happened as to my own exercise of lawmaking and law-applying powers. I – and the police officers I have appointed, paying them out of public revenues – have the might necessary to enforce laws and orders; I also made covenants with neighbour peoples concerning the spatial borders of our community (from Alligators' vineyard to the pinnacles of Mount Shibboleth).

So, in front of how positive law – and our legal system – work, the chicken-egg problem is ill-posed; it clearly mirrors a mental cramp, needing philosophical therapy. The existence of what are clear, platitudinous cases of legal systems suggests that, usually, legal authority arises out of some *constituent* fact, that is, established and regarded as having in itself the character of a *legal* fact. As a consequence, the alternative posed by the chicken and egg principles is too narrow to be good. It runs as follows:

> *Egg*: Somebody has power to create legal norms only if an existing [legal] norm confers that power.
> *Chicken*: A norm conferring power to create legal norms exists only if somebody with [legal] power to do so created it.

However, by way of imagination, what happened at the down of legal orders is something of an individual or collective *fiat* like this:

> We are going *hereby* to establish procedures for making and applying rules concerning our behaviors as to other people, lands, trades, etc., and we are going to call these procedures, and the rules flowing from it, *law*, *our law*.

Later on, law-founding acts get the character of revolutions *and coup d'états*:

> We are going *hereby* to establish a new procedure for making and applying legal rules, and this will be *our law* from now on.

And it may happen that people in other legal orders would react as follows:

> OK, you did that. But we shall see if you really have the strength and popular support needed to make your new order by and large effective,

Or, in a human-rights, anti-sovereignty, international context:

> You did that. But even though you have the force to make your rules effective, we are going to consider them legally null and void, and your exercise of political power unlawful, for you are responsible of gross violations of human rights. As soon as we can get hold of you, we will bring you and your accomplices to the international criminal court, where you'll be made to answer for your crimes.

To sum up, in front of this simple *explanations* of law's existence (of how legal authorities are possible), the chicken and egg principles stink of misguided foundationalism – and we may notice by the way that Kelsen, with his idea of a *presupposed* basic norm, the *Grundnorm*, saw clearly the point.

Accordingly, it seems possible to provide a reasonable solution to the theoretical problem whether I (and everybody else in this world) *can* have the legal authority of making rules, once we adopt the perspective, to repeat, of an empirical, value-free, theory of law.

In front of this conclusion, however, you may argue that, so far as our particular legal system is concerned, I did not have the legal authority to make *that particular rule*, imposing a heavier tithing regulation. In other words, you may turn the issue from an apparently general, momentous, foundational, metaphysical, philosophical one, concerning the very "possibility" of the law, into a problem of *constitutional interpretation*. Does the founding constitutional convention grant to me the power of making a rule with *that* content, or such a rule should be regarded as null and void, being outside of the granted powers? Do I have the power to make only reasonable rules for our community, or can I make whatever rule I please, even unreasonable ones? Who is to decide about the reasonableness of the rule, in any case? I think – but this is, of course, a piece of committed argument, from a participant's viewpoint – that our constitution entrusted the ruler with the power of making *reasonable* rules for the community; I also think, however, that it entrusted the ruler with the *absolute power* of establishing if a rule is, or is not, reasonable for the community. From this (practical and argumentative) point of view (from an empirical point of view, an observer may only record that such an issue is new for our society, that constitutional interpretation never came up as a problem, that past behaviours seem to suggest that people did not and do not have any clear idea about the law-making power of the ruler, etc.), I claim to conclude that, according to our constitution, if properly interpreted, *you* have the legal duty to abide by the tithing rule I made, and *I* am entitled to order you to do so.

Now we come to the other issue: whether you *ought to* abide by that rule; whether, in more precise terms, you are (also) *morally obliged* to do so (for, by way of an

open-question argument, we may always say: "OK, according to the legal order *LS*, I have in fact the legal duty to do *x*; but, *should* I do *x morally*? Am I morally *justified* in doing *x*?"). Moral duties cannot but depend, ultimately, on what we commit ourselves to. They depend on each agent's ultimate act of choice, allegiance, and assumption of moral responsibility towards one's fellows.

On this issue, I would argue – again, not for theoretical reasons but as a committed participant – that our legal system is morally good, that it promotes the rule of reason in public affairs, and that, in any case, the tithing rule is not so unreasonable or morally outrageous to justify the costs the society would bear due to an act of disobedience (*your* act of disobedience). Hence, I claim not only that you have in fact the legal duty to behave as I say but also that you (morally) *ought to* do so, for several good reasons you should accept. Of course, you may think differently. You may endorse a different view about good government and morally legitimate rule-making. "You have to be clear, however, that these positions have nothing to do with the *theoretical* issue of my having, as a fact, some legal authority (and, more generally, with the issue of the *empirical existence* of legal systems and legal authorities)".

Natural decides to leave the community, having seen Positive's point. Positive grants to him ten cows and three bushels of corn. Phil is sentenced a 1-year term of meditation on Mount Karnap.

Exeunt omnes.

Chapter 8
Theoretical Disagreements: A Restatement of Legal Positivism

Jordi Ferrer Beltrán and Giovanni Battista Ratti

8.1 Introduction

In this chapter, we want to analyze the portions of Shapiro's primer *Legality*,[1] which deal with the problem, allegedly irresolvable by legal positivism, of legal disagreements and the related theory of interpretation (and meta-interpretation) which Shapiro deploys in order to overcome such difficulty. The question of legal disagreements and its seemingly inconsistency with the main assumptions of legal positivism makes it unavoidable to pay some attention to the current accounts of such jurisprudential conception. As a consequence, the structure of this chapter will be as follows. In the first section, we shall deal with legal positivism in the way it is commonly accounted for by Anglo-American jurisprudents. In the second section, we shall present our own account of legal positivism, much indebted to Norberto Bobbio's and Alf Ross's works. In the third section, we sum up and analyze the argument from disagreements and the difficulties it allegedly poses to legal positivism. This leads us to the fourth section, where we analyze Shapiro's conception of legal interpretation and consequent response to such a challenge. In the fifth and final section, we briefly take stock.

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[1] Shapiro (2011).

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8.2 The Anglo-American Debate on Legal Positivism (in a Nutshell)

Shapiro's views on legal positivism are well known and deeply ingrained in the Anglo-American debate between the schismatic schools of inclusive legal positivism (ILP) and exclusive legal positivism (ELP), famously being Shapiro a champion of the latter.[2]

To understand Shapiro's own theory, we have to recap, although very briefly, the debate between ILP and ELP defenders.[3]

In Anglo-American jurisprudence, legal positivism is often organized around two main tenets, the "social thesis" and the "separability thesis".[4] The "social thesis" states that what counts as law in any particular society is fundamentally a matter of social facts. The "separability thesis" is the claim according to which what the law is and what the law ought to be are separate questions. The two theses are usually read in conjunction. Or, better put, the separability thesis is read through the lenses of the social thesis.[5] The jurisprudential debate, in fact, has pivoted on the question "whether or not the Social Thesis should be interpreted as stating merely the existence-conditions for a Rule of Recognition […] or whether the Social Thesis also states a constraint on the content of the test for legal validity that any Rule of Recognition can set out".[6] Famously, ILP advocates the former tenet, whereas ELP defends the latter.

The different interpretations of the social thesis (advocated, respectively, by ILP and ELP) are then tied to the question whether or not law can be separated from morals. ILP, in fact, defends the claim that "it is not necessarily the case that in any legal system the legality of a norm depends on its morality," whereas ELP defends the claim that "it is necessarily the case that the legality of a norm does not depend on its morality".[7] This is to say that for ILP, the law may be "ontologically" connected (as well as unconnected) to morality, whereas for ELP the law can never be so connected.

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[2] See the defense of ELP in Shapiro (2001).

[3] See Leiter (2007: 66–68). Shapiro (2011: 240–242) explains the debate in terms of what he calls the "Ultimacy Thesis" (which states, "Legal facts are ultimately determined by social facts alone" and is defended both by ELP and ILP) and the "Exclusivity Thesis" (according to which "Legal facts are determined by social facts alone" and is defended *only* by ELP).

[4] The third claim (the so-called discretion thesis), which usually accompanies the two claims mentioned in the text, will be analyzed at the end of the present section. It is worth noting that the analytical jurisprudential debate in the civil-law area is also (at least) partially based on such theses, although their interpretation differs significantly from the interpretation generally assumed in the common-law area. See, e.g., Bulygin (2007).

[5] As we shall see, this is quite misleading, since they pertain to different levels of inquiry into the law.

[6] Leiter (2007: 67).

[7] See Coleman (1998: 265). Observe that in Coleman's formulation, ELP's tenet implies ILP's tenet since "necessary" entails "possible." However, this is a rather counterintuitive implication. In order to avoid such a counterintuitive result, ILP's tenet must be reformulated as follows: "It is not necessarily the case that in any legal system the legality of a norm depends on its morality *and* it is

Shapiro has provided one of the most known attempts of defending ELP, on the basis of the claim that an incorporationist legal system cannot provide public guidance. His new book, *Legality*, is another link in the chain of his sustained, and sophisticated, defense of hard positivism. One of the main theses of the book is, in fact, that plans stop deliberation about the very facts that they are designed to settle. This means that if we want law to guide behavior, no reference to morality is admitted, since this would make it necessary to deliberate again about the very facts that triggered the master plan and so render the master plan (i.e., the rule of recognition) and the point of having a legal system completely useless. This is, admittedly, just a reformulation of Shapiro's already classical argument that ELP is conceptually preferable to ILP, precisely for the fact that the latter cannot countenance the guiding function of law, since ILP's rule of recognition is not able to guide behavior (neither epistemically nor motivationally).

Another point of interest of Shapiro's presentation of the ILP/ELP debate is his discussion of what is usually called the "discretion thesis." Shapiro's views on the subject can perhaps be recapped as follows:

1. Law, being a human artifact, is limited and cannot cover all possible legally relevant situations.[8]
2. ILP and ELP give different explanations of judicial behavior in cases which are not covered by rules based on social facts; whereas ILP maintains that judges can contingently reach out to moral standards, which are valid in virtue of the rule of recognition,[9] ELP denies that.
3. Accordingly, for ILP "Judges would be finding the law even as they engage in moral reasoning because they would be using norms that are picked out at the highest level by some social fact" (Shapiro 2011: 271).
4. For ELP, instead, this is not possible, for any norm lacking a pedigree cannot be a legal norm. According to ELP, "the Limits of the Social argument implies that the law contains many gaps and unresolved inconsistencies, and that judges have no choice but to act as legislators" (Shapiro 2011: 272) or to apply norms which are external to the system within which they operate.[10]

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not necessarily the case that in any legal system the legality of a norm does not depend on its morality." This means that it is a contingent matter whether a norm depends or not on its merits in order to be legally valid. Since "contingent" and "necessary" are incompatible, we have an explanation that does not imply the counterintuitive consequence that ELP entails ILP. We owe this clarification to Jorge Rodríguez.

[8] Shapiro (2011: 266): "[…] it is impossible for social facts to pick out a complete set of rules for all conceivable cases."

[9] More precisely, inclusivists believe that it depends on the rule of recognition applicable in a certain society, and so although some rules of recognition might allow this, others would not, and the inclusivists say that both would count as law.

[10] Shapiro (2011: 272): "exclusive legal positivists agree with Dworkin's observation that judges always assume that there are norms which resolve hard cases and which they are legally obligated to find and apply. But, they contend, Dworkin has misconstrued the evidence: judicial behavior in hard cases does not show that formalism is true and that judges lack strong discretion. For in hard cases, where the pedigreed rules run out, judges are simply *under a legal obligation to apply*

We substantially agree about Shapiro's reconstruction of judicial behavior according, respectively, to ILP and ELP, although with some qualifications.

In the first place, it seems that Shapiro maintains that moral systems are always determinate, when he says that legal gaps are easily solved by reaching out to moral norms. We do not want to tackle the question here, but just mention that it is very doubtful that moral systems always give a unique answer to any legal question. Indeed, it is not hard to imagine or find many incomplete moral systems.[11]

In the second place, it seems that Shapiro holds the view that systems of positive laws, according to positivists of any sort, are necessarily incomplete, which appears to be quite surprising. There are many points where Shapiro argues for such a conclusion:

> it is impossible for social facts to pick out a complete set of rules for all conceivable cases. Pedigreed norms will frequently run out, leaving many gaps and unresolved inconsistencies. And because [exclusive] positivists deny that non-pedigreed moral norms are law, they cannot fill the legal void. (Shapiro 2011: 266)
>
> The exclusive legal positivist, on the other hand, accepts [the] claim that legal positivism is committed to moderate antiformalism. The law is determined by social facts alone, and since social facts cannot settle all questions in advance, the law will contain many gaps and inconsistencies. (Shapiro 2011: 273)
>
> The law is completely determinate, then, when it regulates every action under every possible description. The law will be indeterminate, in turn, whenever the law does not regulate some action under some possible description. This will occur in a number of situations, including when the action falls within the penumbra of some rule but not the core of a more specific rule, the core of a morally loaded rule but not the core of a more specific morally neutral rule, or the core of two inconsistent rules when there is no rule that resolves such conflicts. Since actions inevitably fall within one of these categories, it follows that the law will never be completely determinate. (Shapiro 2011: 281)

The theory of law's necessary "gappiness" that Shapiro deploys appears to be flawed by some shortcomings. In our opinion, the question whether or not legal systems are complete is an empirical question, not a conceptual one. It is not conceptually impossible (although empirically hard) that a lawgiver legislates completely about a certain topic. Once a certain universe of discourse is identified, the lawgiver has the chance of completely regulating the actions which fall within such a universe. Shapiro, in dealing with ELP, seems to rule out this very possibility in saying that "it is impossible for social facts to pick out a complete set of rules for all conceivable cases" because "social facts cannot settle all questions in advance." If "conceivable" means "conceivable within a certain universe of discourse," we cannot see why this should be regarded as impossible. Lawgivers can settle, at the abstract level (i.e., at the level of generic classes of actions or state of affairs), all the

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extra-legal standards. In other words, the fact that judges are under an obligation to apply non-pedigreed norms does not imply that they are compelled to apply pre-existing law; rather, they are merely under an obligation to reach outside the law and apply the norms of morality instead."

[11] Moreover, it is possible that, in case of a legal gap, different moral systems are available. In absence of an ordering meta-criterion, it would probably be inconsistent to pick out a moral solution, case by case, from different and competing moral systems.

questions in advance: what they cannot do, because of extensional and intensional vagueness, is to completely determine the judicial decisions at the particular level of application (i.e., at the level of individual cases).[12]

The main conceptual reason why Shapiro thinks that law is *necessarily* incomplete may be that he holds that the law is completely determinate only when it regulates every action under every possible description. His argument, as far as we can see, runs as follows: since actions have infinite descriptions, it cannot be the case that human lawgivers, which can handle only limited sets of descriptions of actions or state of affairs, can conceive and regulate them all. However, this does not seem to us to be a sound argument. First, the lawgivers could provide a general rule of closure (usually a general permission)[13] for all the possible universes of discourse (although they do not know all the possible descriptions).[14] This would make the law complete under any possible description, but it would also render the law inconsistent since more specific cases (i.e., cases identified by means of a richer set of properties) would be connected to solutions incompatible to those attached to less specific cases (i.e., cases identified by means of a narrower set of properties).[15] However, legal systems usually provide solutions for *certain* universes of discourses (i.e., their designers are not interested in reaching all the possible universes of discourse): this means that they are not intended to solve any case under any possible description. So, the definition of "complete determinacy" provided by Shapiro, although interesting, is not relevant for *actual* legal systems. They are rather indented to solve questions under the *legally relevant* description. If this is correct, we cannot see why a legal system can *never* be complete.

Another argument for indeterminacy used by Shapiro is that cases may fall into one of these three categories: (1) the penumbra of some rule but not the core of a more specific rule, (2) the core of a morally loaded rule but not the core of a more specific morally neutral rule, or (3) the core of two inconsistent rules. Since this is

[12] Alchourrón and Bulygin (1971: 31–34), Alchourrón (1996).

[13] Other rules of closure, such as "All that is not otherwise legally qualified is obligatory" or "All that is not otherwise legally qualified is forbidden," bring about several well-known logical difficulties.

[14] In effect, what makes abstract legislation possible is the rule of augmentation (alias, strengthening the antecedent), according to which a conditional sentence implies a conditional in which the original antecedent is augmented by adding a new proposition whatsoever (in symbols: "$(p \supset q) \supset (p \ \& \ r \supset q)$"). So that lawgivers, by definition, cannot conceive all the possible future combinations of properties but can regulate them precisely by means of (the implicit acceptance or presupposition of) the rule of augmentation.

[15] See Alchourrón and Bulygin (1971: 137–138, and 194 ff). To clarify the point, let us consider the following case. There is a norm providing that if there is a valid will and the killing of the testator, it is forbidden to inherit ("$w \ \& \ k \supset O \sim i$"). However, the less fine case characterized only by the presence of a valid will is, by hypothesis, not solved by any specific rule of the system (and solutions provided by finer norms are not applicable, for logical reasons, to less fine norms). So, we can apply to it the general permissive rule of closure: accordingly, it turns out to be legally permitted ("$w \supset \sim O \sim i$"). As a consequence, the case where there is a valid will and the killing of the testator is connected, via strengthening the antecedent, to two incompatible solutions ("prohibited" – "permitted").

impossible to avoid, Shapiro concludes "that the law will never be completely determinate".[16] It should be noted that the categories Shapiro singles out appear to be conceptually controversial. In the first place, the former two categories seem to affect individual cases, not generic classes of action or state of affairs. That is, they refer to the subsumption of particulars under general norms, but the subsumption of a particular under a generic rule might be doubtful even if the law is complete as to the classes of actions or state of affairs it aspires to regulate.

The third category, of course, must be limited in a twofold sense: first, one must distinguish between inconsistencies that can be solved and those that cannot be solved by legal meta-criteria; second, one must distinguish between inconsistencies for contrariety (e.g., Op & O~p) and inconsistencies for contradictoriness (e.g., Op &~Op), being only the former actually irresolvable from a practical point of view.[17] It must also be noted that, in the case of inconsistencies, the judge always applies a valid norm to the case (by means of a hierarchical ordering)[18] so that it may be contentious to talk about law "running out," or law's indeterminacy.

For these reasons, it cannot be taken for granted that legal positivism implies that law is necessarily indeterminate from a systemic point of view. Obviously, this does not have a bearing upon indeterminacy from an interpretive point of view: that is, the claim that it is not necessary that law is *systemically* indeterminate by no means implies the claim that it is not necessary that law is *interpretively* indeterminate.

8.3 Legal Positivism and the Restatement of the Separation Thesis

We hold the view that the way in which legal positivism has been conceived of in the Anglo-American debate, although very influential, is quite misleading and substantially unfaithful to the modern origins of legal positivism, as found, for example, in the works of Jeremy Bentham and John Austin and as defended, more

[16] The complete quotation is as follows: "Since actions inevitably fall within one of these categories, it follows that the law will never be completely determinate" (Shapiro 2011: 281). In the draft discussed at the Milan conference, the sentence was: "Since actions *frequently* fall within one of these categories, it follows that the law will never be completely determinate" (emphasis added). With the change from "frequently" to "inevitably," it seems that the original fallacy of improper generalization was corrected by means of a controversial move from "contingency" to "necessity." However, of the three categories Shapiro mentions, only instances of the first seems to us to be unavoidable or necessary (although vagueness can be diminished by means of properly framed definitions). If we are correct, Shapiro owes the reader an explanation of the necessary character of instances of the other two categories he mentions.

[17] In the case of antinomies for contradictoriness, the norm-addressee is always legally better off by complying with the obligation to p (hence, by not using the permission not to p).

[18] Gavazzi (1993: 145).

recently, by means of partially renewed philosophical tools by Norberto Bobbio and Alf Ross.[19] In particular, we submit, the "separation thesis"[20] is systematically misunderstood within such a debate.

Legal positivism, in our opinion, may be regarded (at least) in a twofold manner[21]:

1. Methodologically, legal positivism is the epistemological claim that law is liable to be known in strictly empirical terms, founded on the observation of certain social facts.[22] In other words, it is the claim that the law can be described value-neutrally: that is, in a nutshell, the *epistemic reading* of the separation thesis.
2. Theoretically, legal positivism may be regarded as the orderly account of such (contingent) social facts.

These two aspects, though related in practice, should not be confused in theory.

The first, methodological, way of conceiving of positivism (the epistemic separation thesis as opposed to the metaphysical separation, or separability, thesis) has been almost entirely gone lost in the Anglo-American debate. This may sound surprising, since the majority of the jurisprudential curriculum in the common-law world is organized precisely on the "separation thesis." However, such a thesis is read as a substantive claim and not as an epistemic claim. In effect, the whole inclusive vs. exclusive legal positivism debate we have just sketched out has revolved around whether or not law can incorporate morality. But this looks like a mere "labeling" issue about what one wants to call "law".[23] Exclusive legal positivism, in particular, looks like a mere stipulation of "law," whose major consequence consists in denying the title of "law" to those systems of social norms which purport to incorporate or refer to morals.[24] It is a matter of course that lawgivers may want to

[19] Ross (1998: 150) affirms that it is "highly misleading" to conceive of the separation thesis as a *substantive or ontological* thesis about the separation of law and morality.

[20] We prefer the term "separation thesis" to "separability thesis" because the latter conjures up a *possible word ontology* which is completely at odds with the *hard facts ontology* implied by the epistemic reading of such a claim, which is best expressed by reference to the neat separation (and not only separability) of the domains of facts and values.

[21] Bobbio (1965: 101–126), Ross (1998: 148–149).

[22] According to Ross (1998: 150), Austin's battle cry that the law is one thing and its merit or demerit another should be so understood.

[23] Shapiro (2011: 274) is very much aware of this objection when he affirms that it must be conceded "that the debate between exclusive and inclusive legal positivism is essentially such a [labeling] dispute. The point of contention, after all, is whether it is proper to call a non-pedigreed norm that judges are legally bound to apply a *legal* norm. Both the exclusive and inclusive legal positivist, in other words, agree that judges are bound to apply moral norms when the pedigree standards have run out. They just disagree about how to describe what they are doing: for the inclusive legal positivist, judges are applying legal norms; for the exclusive legal positivist, they are also creating new legal norms."

[24] So understood, ELP very much resembles the logical structure of definitional natural law theories, on which see Celano (2005). In what follows, we give a different reading of ELP.

incorporate or refer to morals, so that it is not clear what the advantages are in denying the title "law" to such systems of norms.[25]

Inclusive legal positivism, in turn, has watered down the separation thesis to so a minimal thesis that it has lost virtually any appeal. Legal positivism, according to defenders of ILP, would be on safe ground in holding that law and morals are separable in at least one *possible* world. However, this thesis admits, a contrario, that law and (objective) morality are hardly separate in the *real* world: so that it is difficult to figure out why we should keep on using the term "positivism" for such an anti-empirical thesis.

Contrary to such views, legal positivism, understood as a *methodology*, only places constraints on the method for acquiring genuine legal knowledge, but not on the facts which constitute the grounds of law. And the separation thesis, the kernel of such methodology, amounts to nothing more than the following claim: *law may be known in a value-neutral manner*. That is to say that, epistemologically, law can be known as a mere fact, no evaluation is necessary to know it.

What places constraints, instead, on the grounds of law is, in our opinion, one's conception of metaethics. We hold the view that the only viable conception of metaethics is noncognitivism. Since objective moral facts do not exist, possible references to such moral entities by the legislature must be regarded as failed attempts of incorporating objective moral norms into a certain legal system or of imposing on judges to apply norms which belong to another normative system (as a matter of course, an inexistent one).

We do not have enough space here for engaging in an elaborated defense of moral noncognitivism. However, our main reason to defend it may be stated in quite plain terms. We believe that objective moral facts do not exist for a very simple reason. We think that, according to our common methods of scientific knowledge, we have no proof in favor of the existence of objective moral facts.

[25] Fred Schauer observed, in private communication, that we might be too quick to say that exclusive positivism is simply stipulating a definition of law. ELP's definition does capture an empirical reality in which laws, law books, law schools, and the like occupy a separate (albeit with fuzzy edges) empirical universe. Indeed, although we talk about the empirical connection between law and morality, there are also important ways in which they are empirically distinct. We agree with Schauer's observation, but we hold the view that such an empirical separation eminently concerns the "institutionalization" of the sources of law, not their interpretation nor the contingent "references" that such sources can make, more or less successfully, to morality. In our view, ELP, understood in a Razian mood, does not have the necessary tools to offer an explanation of these interpretative and legal drafting phenomena we have just referred to. We rather would need a different, "sanitized," version of ELP, which only holds the factual, value-neutral, identification of legal sources *plus* a moderately skeptical view on legal interpretation (which does not necessarily deny – as a strict ELP's theory of interpretation would have it – interpretive relations between the legal sources' meaning and axiological, or moral, considerations). On this point, see Ratti (2012). For a strict, Razian, ELP's theory of legal interpretation, see Marmor (2005: 95) who holds the view that "legal positivism cannot accept the view that law is always subject to interpretation. It just cannot be the case that every conclusion about what *the law is*, is a result of some interpretation or other."

When there is no proof whatsoever in favor of a certain claim, one is entitled to think that it is false – at least at the level of *induction*, being the argument ad ignorantiam a well-known *deductive* fallacy (but, famously, scientific discovery and proof-finding are primarily inductive). This is exactly what happens with objective moral truths: we do not have any proof of their existence; and for, according to our scientific rules, we deem false what cannot count on any empirical proof, we are entitled to regard objectivism in ethics as a false claim. It follows from that that law cannot but consist of empirical facts, for the very prosaic reason that only empirical facts exist. If it is so, inclusive legal positivism and dworkinism are simply accounts of what legal participants *believe they are doing* and *not* of *what they are really doing*. In particular, inclusive legal positivism is just a way of saying that legislators sometimes want to incorporate objective moral norms, independently of the question of whether such an incorporation turns out be successful or not (in our view, in case legislatures want to incorporate objective moral norms, their attempts are necessarily doomed to fail).[26]

From the *theoretical* perspective, instead, legal positivism may be regarded as an account of the social facts which law is made of. It is no quest for the "essence" or the "nature" of law (which may be regarded as characteristic, rather, of natural law theories)[27] but an inquiry into the *contingent structures and forms* that legal systems might take.

Within such a framework, and after having been depurated them from any essentialist tendency, ILP and ELP, thus, are more fruitfully regarded as (or, better put, should be restated as) theoretical enterprises, which seek to explain such contingent forms and structures. Although both disagree on many aspects of the theoretical reconstruction of law, there is a main assumption of both of them which is particularly important for the analysis to follow. The core claim that both maintain is that law is based on agreement or convention: that is, the social facts captured by the ultimacy thesis consist, fundamentally, of practices of convergent behavior based on consensus.

By keeping apart these two perspectives on legal positivism (the methodological one and the theoretical one), we submit, one is much better off in dealing with legal disagreements, since Dworkin's challenge may perhaps affect theoretical positivism (especially that kind of positivism which explains law, or its existence, in terms of agreement) but in no way affects methodological positivism (i.e., the claim that law is susceptible to be known, scientifically, in mere empirical terms).[28]

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[26] For relevant discussion on this issue, see Priel (2005).

[27] This way of conceiving of jurisprudence – as Guastini (1996: 8) suggests convincingly – is not easily severable from a natural law background, because it presupposes the misleading tenet that all legal systems share some necessary common properties (regardless of their space and time location). Another theoretical possibility is that jurisprudence seeks the "natural" *concept* of law and it may turn out to be the case that such "natural" concept is one according to which law is always separate from morals.

[28] Bobbio (1965: 124–126).

8.4 The Argument from Disagreement as a Supposed Refutation of Legal Positivism

Much of Shapiro's book's second part is organized around Dworkin's argument from disagreement as a supposed refutation of legal positivism. Let us briefly sketch the argument.

As is known, Dworkin uses two dichotomies in order to attack legal positivism on the topic of legal disagreements.[29]

The first dichotomy is the grounds of law/propositions of law distinction. The latter are propositions bearing upon the existence of a norm in a certain legal system. The former are the stuff that makes propositions of law true. What the grounds of law are deemed to be manifestly depends on each one's theory of law. Indeed, one of the main jurisprudential quarrels is whether moral facts may or must figure among the truth conditions of propositions of law.

The second dichotomy deals with the nature of possible disagreements about law. A first kind of disagreement (which Dworkin dubs "empirical") consists in controversy about whether the grounds of law have in fact obtained (e.g., if a bill was passed by the requisite majorities). A second kind of disagreement (which Dworkin names "theoretical") consists in controversy about what the grounds of law are. We would face a theoretical disagreement whenever, for instance, we are in a situation where different subjects disagree about whether or not social normative standards (constitutions, statutes, judicial decisions, etc.) do exhaust the pertinent grounds of law.

As Shapiro (2011: 286) convincingly puts it, one of the main theses held by Dworkin in *Law's Empire* is the following: "on the plain fact view, theoretical disagreements are impossible. The reason is simple: […] a fact f is a ground of law only if there is agreement among legal officials that it is a ground of law. Disagreements among legal officials about whether f is a ground of law, therefore, are incoherent: without consensus on whether f is a ground of law, *f is not a ground of law.* On the plain fact view, we might say, theoretical disagreements are self-defeating. […] Coherent disagreements about the law can only involve conflicting claims about the existence or nonexistence of plain historical facts. They must, in other words, be empirical disagreements".[30]

As we observed elsewhere,[31] in order both to grasp and demystify Dworkin's challenge, different kinds of disagreement in law should be singled out. This is

[29] Dworkin (1986: 3–6).

[30] In the draft discussed in the Milan conference, the quoted passage had a different formulation – which is very similar to the last passage of section 4.A in Shapiro (2007: 37) – "on the plain fact view, theoretical disagreements are impossible. The reason is simple: […] legal participants must always agree on the grounds of law. It follows that they cannot disagree about the grounds of law. Any genuine disagreement about the law, therefore, must involve conflicting claims about the existence or nonexistence of plain historical facts. They must, in other words, be purely empirical disagreements."

[31] See Ratti (2009).

mainly due to the fact that the expression "grounds of law" is used by Dworkin ambiguously and many of the arguments Dworkin articulates about the disagreements on the grounds of law are flawed by equivocation fallacies. In fact, the term "grounds of law" denotes, in a first sense, the possible *sources of law* (i.e., constitutions, statutes, judicial decisions, etc.), whereas in a second sense denotes the *meaning* of these sources of law. Of course, there may be disagreements about what the sources of law are or about what their meaning is.

We may thus redefine "theoretical disagreements in a proper sense" those that stem from the competing theories which judges (and jurists at large) employ when dealing with the identification of the sources of law. By "source of law," we mean here any *norm-formulation* (i.e., any ought-sentence), which may be used by judges to justify their decision.[32]

We should rather call "interpretive disagreements" those divergences that bear upon the validity, the ordering or the use of different canons of interpretation, which must be employed in attributing a meaning-content to the different legal sources.

Of course, there may be links between theoretical and interpretive disagreements. However, this is absolutely contingent. For a disagreement at the level of the theory of the sources of law by no means necessarily implies a disagreement about what the meaning of these sources is.

We hold the view that the distinction between "proper theoretical disagreements" and "interpretive disagreements" indeed dissolves the whole question posed by Dworkin, since legal positivism has only to show that generally an agreement exists as to what the sources of law are and not necessarily on what their interpretation is.[33] This is easily proved, if we think of two different situations: probably, we can say that a rule of recognition exists if there is an agreement about what is the main legal source of a legal system (e.g., the constitution) even though the interpretation of such a source is controversial. However, no such rule can be said to exist when judges massively disagree on the very master source on which a system supposedly is based on (e.g., some judges think that it is the constitution, others that it is the Koran, others that it is the Bible, others that it is the set of the "Chicago Boys" articles, and so on).

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[32] This amounts to *partially* rearticulating Alf Ross's concept of a legal source. Cf. Ross (1958: 77): "*Sources of law*, then, are understood to mean the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision." In this sense, not only authoritative texts are legal sources. Also, implied or implicit norms may be legal sources. But if they count as such, it is because a legally competent organ formulates them in what is considered their canonical form. This definition allows considering as legal sources such different "objects" as authoritative texts, ideological principles, customary norms, and judicial precedents.

[33] Hart (1994: 266–267): "Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus. That it does so rest seems quite clear in English and American law for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a *source of law* having supremacy over sources includes the fact that his judicial colleagues concur in this as they predecessors have done" (emphasis added). It seems clear from this quotation that Hart holds that the rule of recognition, which is the outcome of judicial consensus, bears upon *sources of law*, rather than their meaning.

Since theoretical disagreements in Dworkin's sense deal with disagreements on meaning and not on sources,[34] legal positivism is on safe ground to hold that consensus is at the basis of law's existence.[35]

However, contrary to our view, the conclusion one can draw, manifestly, from the treatment of disagreements Shapiro offers in *Legality* is that what legal positivists mean (or should mean, if they construe positivism adequately) by "agreement" is both "agreement on sources" and "agreement on their meaning." For a legal system to exist, we need both.

Shapiro, for instance, affirms that

> Debates about proper interpretive method pose an even greater difficulty for legal positivism. As Ronald Dworkin has argued, the mere fact that such disputes take place indicates that law cannot rest on the kind of facts that positivists believe form the foundation of legal systems. For positivists have maintained that the criteria of legal validity are determined by convention and consensus. But debates over interpretive methodology demonstrate that no such convention or consensus exists. In other words, disagreements about interpretive method are impossible on the legal positivist position. Nevertheless, they seem not only possible, but pervasive.
>
> These objections, we can see, are instances of yet another version of the challenge from legal reasoning. According to this version, legal positivists cannot account for a certain type of disagreement that legal reasoners frequently have, namely, disagreement concerning the proper method for interpreting the law. The only plausible explanation for how such disagreements are possible, this version of the objection continues, is that they are political disputes that are resolvable only through moral reasoning. Contrary to legal positivism, the law does not and cannot rest on social facts alone, but is ultimately grounded in considerations of political morality. (Shapiro 2011: 283)

And again:

> Debates about whether legal texts ought to be read strictly or loosely; in accordance with original public meanings, evolving social mores, deeply rooted traditions, framer's intentions, expected applications, or moral principles; with deference to past judicial interpretation, administrative agencies, treatise writers or laws of other nations; or in conjunction with legislative history or similar textual provisions, or in isolation, are absolutely commonplace occurrences in many modern legal systems. Dworkin has pointed out that legal positivism, at least as it is currently conceived, cannot make sense of this truism and hence is incapable of accounting for a central feature of legal practice. (Shapiro 2011: 291)

By anticipating the main outcome of our research, we cannot but affirm that we disagree on this issue. The main reasons are the following.

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[34] This observation is suggested by the very examples Dworkin chooses in order to attack legal positivism and by the account he provides of such cases in *Law's Empire*. See Leiter (2009).

[35] We must observe, in passing, that we do not think that law is necessarily based on agreement. We rather think that it is based on force. As a consequence, from a theoretical point of view, we completely adhere to the statement made by Schauer (2011: 621) according to which "All too often Shapiro's book is trapped within a jurisprudential milieu which slights the pervasiveness of coercion and exaggerates the significance of the decidedly counterfactual possibility of sanction-free law." At any rate, what we hold in the text is that even those who believe that law is based on consensus have a very easy way out from Dworkin's purported predicament.

Methodological positivism only investigates law as a fact: from this perspective, the claim that *law is what factually is* does not exclude that among such facts there can also be the (possibly diverging) evaluations of lawgivers, judges, and lawyers.[36] This, in turn, means that it may be the case (though it need not be the case) that disagreements are rampant, and any legal question needs interpretive evaluation to be settled. In such an event, the methodological positivist must confine herself in knowing that there are certain facts that constitute the sources of law and other facts which constitute the (diverging) evaluations of jurists about the meaning of such sources.

From a theoretical standpoint, once the relevance of agreement is assumed, one cannot but account for the main cases of agreement and disagreement in a legal system and try to articulate a comprehensive explanation of them as features of the legal system. And here, again, what seems to us the best explanation is that legal systems are generally characterized by a massive agreement on the sources and partial (but pervasive, at least at the highest adjudicatory levels) disagreements on their interpretation. As a matter of course, to account for such interpretive disagreements, a theory of legal interpretation is actually needed. Since Anglo-American legal positivism has hardly developed a full-fledged theory of (the canons of) interpretation,[37] it comes to no surprise, thus, that it cannot explain disagreements about interpretation in law: we can perhaps say that, as of yet, it has not elaborated the means to account for them.

Rebus sic stantibus, we deem the previous claims rather conclusive.

However, Shapiro has filled such a theoretical gap and has developed, in the last chapters of his book, a sophisticated and articulated theory of interpretation which deserves a careful analysis and obliges us to expand on such an issue. It is what we do in the next section.[38]

8.5 Shapiro on Legal Interpretation

In *Legality*, Shapiro (2011: 305) introduces an interesting dichotomy between interpretation and meta-interpretation in order to tackle Dworkin's critique on disagreements. Interpretation sets out a specific methodology for interpreting legal texts, whereas meta-interpretation sets out a methodology for determining which interpretive methodology is proper.

[36] Bobbio (1965: 124).

[37] Leiter (2007: 74–76), Guastini (2004: 57–61).

[38] In what follows, we shall only deal with those features of Shapiro's theory of interpretation that we deem fundamental for the analysis of legal disagreements. For a more thorough analysis of such a theory, we refer the reader to the paper by Giorgio Pino, "we refer to the paper by Giorgio Pino, in this volume."

If we understand Shapiro correctly, "interpretation" denotes a *prescriptive* doctrine designed to attribute meaning to legal texts, for example, "legal texts should be read literally," or "legal text should be read purposively."

The expression "meta-interpretation," in turn, denotes a *prescriptive* doctrine which determines which interpretive theory is proper, for example, "The proper interpretive methodology is that which make planners' aims effective," or "The proper interpretive methodology is that which makes the system appear in its best moral light."

With these new stipulations at hand, Shapiro reformulates Dworkin's argument from theoretical disagreements.

> The plain fact view, it turns out, is a meta-interpretive theory. It claims that interpretive methodology is determined by the methodology accepted by all legal officials in a particular system. The problem with the plain fact view, as Dworkin points out, is that it rules out the possibility of meta-interpretive disputes. If officials disagree about interpretive methodology, then according to the plain fact view, there exists no proper methodology. However, since meta-interpretive disagreements are not only possible but common, the plain fact view cannot be a correct meta-interpretive theory. (Shapiro 2011: 305–306)

This reformulation of Dworkin's challenge, at first, is not so easy to grasp. In our view, it is commonly assumed that the "plain fact view" (which is but Dworkin's label for exclusive legal positivism) is (or at least aspires to be) a *descriptive* theory: that is, it is not a doctrine about how law should be interpreted, it is (or aspires to be) rather a theoretical account of how law is. The fact that judges disagree on meta-interpretive theories, and also on interpretive theories, is not at odds with exclusive legal positivism, as we understand it, since it only aims at explaining which the criteria of legality and the constraints existing on them are. If the judges by and large think that "law as integrity" is the proper meta-interpretive doctrine, exclusive legal positivism – as we understand it – suggests that we record and explain it as a social fact and nothing more than that.[39] If judges do not share a unique meta-interpretive or interpretive doctrine, exclusive legal positivists might still explain the situation at hand in terms of (partial) agreement. First, an agreement exists as for *who the judges are*. Second, an agreement exists as for *what the legal sources are*; otherwise, no meta-interpretive or interpretive divergence would make sense. Anyway, it seems to us that exclusive legal positivism, correctly construed, has nothing to say about what is the *proper* interpretation, if this is understood in a prescriptive sense. It only is interested in saying something, from a descriptive and detached stance, about what is considered as "proper" by legal participants.

It is true, however, that ELP is commonly construed as a theory which *implicitly entails or presupposes* a certain normative doctrine of interpretation. Curiously, though, it is not the doctrine that Shapiro evokes in *Legality*. ELP, at least in the formulation of Raz and Shapiro himself in previous works, is characterized by the

[39] Shapiro (2011: 382) is aware of that, when he affirms: "That some set of goals and values represents the purposes of a certain legal system is a fact about certain social groups that is ascertainable by empirical, rather than moral, reasoning."

idea that practical deliberation by norm-addressees should be preempted by legal rules. This means in turn that norm-addressees cannot use, if the system is to discharge its motivating and epistemic functions, those interpretive canons which refer to the supposed underlying reasons of rules (since this would imply a new deliberation on the moral questions the law is there to settle). It follows from that that the reconstruction of ELP offered by Shapiro ends up caught in a puzzle: either the proper meta-interpretive methodology is fixed by agreement (but in this case, should purposive canons of interpretation be accepted, it is not warranted that rules may work as exclusionary reasons) or proper meta-interpretive methodology is fixed by the essential preemptive functions of law (and in this case, only literal and "originalist" – we can say "literal qua originalist" – canons seem to be admitted). We can, thus, distinguish between a *consensus-based ELP's meta-interpretive methodology* and an *exclusionary-reasons-based ELP's meta-interpretive methodology.*[40]

In *Legality*, however, Shapiro rejects ELP's consensus-based methodology on the basis of the fact that disagreements abound:

> the plain fact view, or any other account that privileges interpretive conventions as the sole source of proper methodology, ought to be rejected. Because theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper. (Shapiro 2011: 381)

What Shapiro seems to affirm is that the "consensus-based methodology" (recall, a seemingly normative doctrine of interpretation)[41] is not always useful to indentify the proper set of interpretive techniques, because meta-interpretive disagreements abound. Whenever there are disagreements about interpretation, other meta-interpretive theories should be used.

Once rejected a "consensus-based methodology," Shapiro seems to opt for an "exclusionary-reasons-based methodology."

More in detail, Shapiro's reply to Dworkin's challenge is based on a particular theory of trust, which can be roughly summed up in a simple claim: the more trusted a subject is, the more interpretive liberty she is provided with and vice versa.[42] It is

[40] It must be noticed that it can be the case that both are coextensive when the by and large accepted methodology is a "literal qua originalist" one. But, as a matter of fact, this is hardly the case.

[41] Shapiro (2011: 305): "I call it a theory of *meta*-interpretation insofar as it does not set out a specific methodology for interpreting legal texts, but rather a methodology for determining which specific methodology is proper. It provides participants of particular systems, in other words, with the resources they need to figure out whether to endorse textualism, living constitutionalism, originalism, pragmatism, law as integrity and so on." This formulation seems to be compatible with an explicative interpretation: meta-interpretation is not the choice of interpretive canons but a presupposition of it (what renders it possible). However, in other parts, Shapiro (2011: 381) more clearly endorses a prescriptive stance on meta-interpretation: "the Planning Theory maintains, with Dworkin, that in such cases proper interpretive methodology for a particular legal system is primarily a function of which methodology would best further the objectives that the system aims to achieve."

[42] See Shapiro (2011: 331): "the Planning Theory entails that the attitudes of trust and distrust presupposed by the law are central to the choice of interpretive methodology. Roughly speaking,

not very clear to us whether Shapiro's aspires to be a description of what actually happens, a technical rule about what should happen if we assume some anankastic proposition as true, or just a recommendation to lawgivers about legal orders' design.

At any rate, once one rejects "consensus-based methodology" as the proper methodology, one has to spot the resources which allow identify this other methodology (without allowing new deliberation on the basic matters law is designed to settle). With regard to this point, Shapiro affirms:

> Proper interpretive methodology is established by determining which methodology best harmonizes with the objectives set by the planners of the system in light of their judgments of competence and character. (Shapiro 2011: 382)

Shapiro's account of meta-interpretive methodology appears to be clearly *prescriptive*, since it imposes on interpreters the obligation of reconstructing planners' objective in designing a legal system. However, quite curiously, according to Shapiro, this seemingly prescriptive doctrine appears to have an explicative (viz., descriptive) upshot:

> A virtue of this type of proposal is that, insofar as interpretive methodology need not be determined by a specific convention about proper methodology, it is able to account for the possibility of theoretical disagreements. Participants in a practice can disagree over proper interpretive methodology because they disagree about whether their practice is best described as an authority or an opportunistic system, and hence to whose judgments they ought to defer.[43] (Shapiro 2011: 382)

However, from all this, Shapiro concludes:

> Note further that this theory is positivistic. Because it takes a regime's animating ideology as its touchstone, this account *may end up recommending an interpretive methodology based on a morally questionable set of beliefs and values*. The legal system in question, for example, may exist in order to promote racial inequality or religious intolerance; it may embody ridiculous views about human nature and the limits of cognition. Nevertheless, the positivist interpreter takes this ideology as given, and seeks to determine which interpretive methodology best harmonizes with it. (Shapiro 2011: 382, emphasis added)

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the Planning Theory demands that the more trustworthy a person is judged to be, the more interpretive discretion he or she is accorded; conversely, the less trusted one is in other parts of legal life, the less discretion one is allowed. Attitudes of trust are central to the meta-interpretation of law, I argue, because they are central to the meta-interpretation of *plans* – and laws are plans, or planlike norms."

[43] In previous drafts, the beginning of the quoted passage ran like this: "A virtue of this type of proposal is that, insofar as interpretive methodology *is* not determined by a specific convention about proper methodology, it is able to account for the possibility of theoretical disagreements" (emphasis added). With the passage from "is" to "need," again we experience a tricky shift from contingency to necessity. In fact, it is not clear whether it is an alethic or, as it were, a "normative necessity." On the first interpretation, it is not clear what the anankastic proposition which would underpin such a necessity is. On the second interpretation, it is not clear whether it expresses a genuine prescription (i.e., a norm) or rather a descriptive statement bearing on a prescription (i.e., a normative proposition). Note that in this latter case, no necessity would be at stake.

If we are not wrong in getting the meaning of this passage, it seems that Shapiro's doctrine is no purely *descriptive* theory of interpretation (and hence *cannot value-neutrally account for* any phenomenon), but rather an ideology of interpretation which imposes on interpreters the implementation of a legal system's moral conception (if any). This appears to be a form of ethical or ideological positivism.[44] If this is so, it belongs to a different kind of discourse from the methodological and theoretical forms of positivism that we have sketched out above.

As far as legal policy is concerned, we strongly reject a general obligation of obeying the law or of implementing a legal system's morality (independently of its merits).

In any case, we are not interested at all in establishing a normative doctrine of (the interpretation of) law but rather in engaging in descriptive and value-neutral jurisprudence: from this standpoint, we cannot but observe that, if we are not wrong, Shapiro's account of interpretation is not purely descriptive. For this reason, it cannot be a part of a purely descriptive theory of law and, more importantly for our present purposes, cannot account at all for legal disagreements (it can only recommend how to solve them, once they have been identified).

8.6 Conclusion

The main conclusions to be drawn from what we have argued so far are the following:

1. The debate on legal positivism which is typical in Anglo-American jurisprudence conflates different aspects of legal positivism which should be kept separate. In particular, the separation thesis is read, by the participants in such a debate, either as an analytical truth about "law" or an extraordinarily weak ontological claim, whereas it is more charitably understood as a strong epistemic claim.
2. Dworkin's objection is easily rebutted both methodologically and theoretically. From a methodological stance, disagreements about interpretation of sources are not problematic, since a methodological positivist may confine herself to knowing them as mere facts. From a theoretical stance, legal positivism, which seeks to explain law in terms of consensus, is tenable insofar as it explains law in terms of agreement on sources and not necessarily on their meaning.
3. The theory of interpretation that Shapiro deploys to tackle Dworkin's critique seems to us to be, on the one hand, supererogatory and, on the other hand, unfaithful to the genuine spirit of traditional positivism. It is supererogatory because such a great amount of philosophical sophistication and intellectual effort is not, in our view, necessary for meeting Dworkin's objection. And it is unfaithful to positivism, since it conflates descriptive and justificatory aspects of legal interpretation.

[44] Bobbio (1965: 110–112).

References

Alchourrón, C.E. 1996. On law and logic. *Ratio Juris* 9(1996): 331–348.
Alchourrón, C.E., and E. Bulygin. 1971. *Normative systems*. Wien/New York: Springer.
Bobbio, N. 1965. *Giusnaturalismo e positivismo giuridico*. Milan: Comunità.
Bulygin, E. 2007. *Il positivismo giuridico*. Milan: Giuffrè.
Celano, B. 2005. Giusnaturalismo, positivismo giuridico e pluralismo etico. *Materiali per una storia della cultura giuridica* XXXV/1: 161–184.
Coleman, J.L. 1998. Second thoughts and other first impressions. In *Analyzing law. New essays in legal theory*, ed. B. Bix, 257–322. Oxford: Oxford University Press.
Dworkin, R. 1986. *Law's empire*. London: Fontana.
Gavazzi, G. 1993. *Studi di teoria del diritto*. Turin: Giappichelli.
Guastini, R. 1996. *Distinguendo. Studi di teoria e metateoria del diritto*. Turin: Giappichelli.
Guastini, R. 2004. *L'interpretazione dei documenti normative*. Milan: Giuffrè.
Hart, H.L.A. 1994. *The concept of law*, IIth ed. Oxford: Oxford University Press.
Leiter, B. 2007. *Naturalizing jurisprudence. Essays on American legal realism and naturalism in legal philosophy*. Oxford: Oxford University Press.
Leiter, B. 2009. Explaining theoretical disagreement. *University of Chicago Law Review* 76: 1215–1250.
Marmor, A. 2005. *Interpretation and legal theory*, IIth ed. Oxford: Hart.
Priel, D. 2005. Farewell to the exclusive-inclusive debate. *Oxford Journal of Legal Studies* 25: 675–696.
Ratti, G.B. 2009. Los desacuerdos jurídicos en la jurisprudence anglosajona. *Analisi e diritto*: 273–290.
Ratti, G.B. 2012. Estudio introductorio. in B. Leiter, *Naturalismo y teoría del derecho*. Madrid: Marcial Pons, 9–25.
Ross, A. 1958. *On law and justice*. London: Stevens & Sons.
Ross, A. 1998. Validity and the conflict between positivism and natural law (1961). In *Normativity and norms*, ed. S. Paulson and B. Litchewski, 147–163. Oxford: Oxford University Press.
Schauer, F. 2010. The best laid plans. *Yale Law Journal* 120: 586–621.
Shapiro, S. 2001. On Hart's way out. In *Hart's postscript*, ed. J.L. Coleman, 149–191. Oxford: Oxford University Press.
Shapiro, S. 2007. The "Hart-Dworkin" debate: A short guide for the perplexed. In *Ronald Dworkin*, ed. A. Ripstein, 22–55. Cambridge: Cambridge University Press.
Shapiro, S. 2011. *Legality*. Cambridge, MA: The Belknap Press of Harvard University Press.

Chapter 9
'What's the Plan?': On Interpretation and Meta-interpretation in Scott Shapiro's *Legality*

Giorgio Pino

9.1 Introduction

Scott Shapiro's book, *Legality*, is a very rich and challenging contribution to analytical legal philosophy – or, as Shapiro would say, to 'analytical jurisprudence'.[1] The book, though quite long and rich of historical and theoretical diversions (both useful, of course, to bolster the book's main argument), has a remarkably linear structure: it embraces one fundamental thesis about the nature of law ('Law as Plan'), which is developed in an articulate and detailed fashion, consistently defended against possible rivals, and applied to many different facets (actually, to all facets) of the phenomenon under analysis (i.e. the law).

In sum, Shapiro's endeavour is that of elaborating a full-fledged theory of law, in the mark of the tradition of legal positivism. Obviously enough, such a theory of law comprises also a theory of legal interpretation. Indeed, any theory of law is incomplete if it does not flesh out the consequences it is supposed to bear on matters of interpretation. A theory of law that bears no consequence at all on interpretive issues or, the other way round, a theory of interpretation that can be attached to any possible theory of law are, though not unconceivable, highly suspect.

The aim of this chapter is to explain and evaluate Shapiro's theory of legal interpretation, as outlined in *Legality* – an important part of Shapiro's theoretical enterprise that has not yet attracted, as far as I know, much interest in the already conspicuous literature on *Legality*.[2]

More specifically, in this chapter I will try to provide (*a*) a reconstruction of Shapiro's theory of legal interpretation, as it is developed in *Legality* (Sect. 9.2);

[1] See Shapiro (2011, 2–3), on the distinction between 'normative' and 'analytical jurisprudence'.

[2] To my knowledge, the only published comment that deals, in part, with the place of legal interpretation in *Legality* is Edmundson (2011).

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(*b*) an assessment of this theory of interpretation on its own terms (i.e. its internal coherence, its overall persuasiveness) and (*c*) an evaluation of the compatibility of this theory of legal interpretation with the general project of 'Law as Plan' (Sect. 9.3). By 'compatibility' here, I do not mean a matter of logical consistency, but rather a matter of 'soundness': in other words, as long as sound theory construction is concerned, a theory of interpretation should not be construed in such a way as to frustrate the general aims of the theory of law to which it relates.[3]

My analysis of Shapiro's theory of legal interpretation, as it is formulated in *Legality*, will point to some serious problems in his account that concern the role of substantive evaluative judgements (including also moral judgements) in the process of legal interpretation and in the extraction of the 'economy of trust' and the unduly narrow scope of the Planning Theory of legal interpretation. I conclude that all these three problems are, in turn, related to one major problem related to the proper identification of the actors that can be considered the real authors of the legal plan.

9.2 The Planning Theory of Law: From the Concept of Law to Legal Interpretation

Roughly a good half of *Legality* (chapters VIII–XIII) is devoted to matters of (the theory of) legal interpretation. In other words, matters of interpretation are vital for the project of law as plan, and Shapiro is perfectly aware of this.

Let us take a brief look, then, at the theory of legal interpretation associated to law as plan.

9.2.1 A (Very) Brief Survey of the Planning Theory of Law

The first thing to note, perhaps, is that Law as Plan is not only a positivistic theory but a *strong* positivistic theory. Indeed, Law as Plan, or 'the Planning Theory of Law' (Shapiro 2011, 195) or 'plan positivism' (Shapiro 2011, 178), is admittedly a reformulation of exclusive, or 'hard', legal positivism (Shapiro 2011, 267–273), with the help of some new philosophical tools: mainly, the concept of 'plan' borrowed from Michael Bratman's recent work.[4]

[3] Since I believe that a theory of law and a theory of interpretation 'hang together' in a sort of reflective equilibrium, the converse also holds: as long as sound theory construction is concerned, a theory of law should not be construed in such a way that renders matters of interpretation trivial.

[4] See in particular Bratman (1987). It is not entirely clear if the way in which Shapiro puts the concept of plan to use in the legal domain can be deemed successful. Some important doubts to this concern are raised by Celano (2012).

I will not deal here with the details of Shapiro's elaborated theoretical framework; for my argument's sake, suffice it to say that:

- A plan is a kind of norm (Shapiro 2011, 127–129): it is a guide for conduct (it picks out courses of action that are required, permitted, or authorized under certain circumstances) and a standard of evaluation (it is supposed to be used as a measure of correct conduct). A plan need not discipline entirely and all at once the kind of behaviour it applies to: it can be 'partial'. Moreover, a plan is a 'positive purposive' entity: 'a norm is a plan as long as it was created by a process that is supposed to create norms' (Shapiro 2011, 128), and it disposes its subjects to follow it.[5]
- Plans reduce deliberation costs in circumstances of uncertainty: circumstances in which the relevant actors face the complexity, contentiousness, and arbitrariness of communal life, due to substantial moral disagreement between individuals, uncertainties about the more appropriate ways to achieve some valuable end, and so on.
- The law (in the sense of 'the legal system') is a planning organization: an organization that exercises planning activity, that is, that produces plans; the adoption of (legal) plans is called for by the 'circumstances of legality': 'the circumstances of legality obtain whenever a community has numerous moral problems whose solutions are complex, contentious or arbitrary' (Shapiro 2011, 170).
- If contrasted with other planning organizations (such as criminal organizations, for instance), the law is defined by its distinctive aim or function[6]: 'the fundamental aim of the law is to rectify the moral deficiencies associated with the circumstances of legality' (Shapiro 2011, 213)[7] ('the moral aim thesis'); this is, according to Shapiro, the fundamental function of the law.

Legal activity is a planning activity – a planning activity is the activity of making (devising, developing, and implementing) plans – and plans are norms. As a consequence, plans issued within the legal activity are legal norms, and conversely, legal norms are plans – or at least 'plan-like', in case they are not positively created by a planning organization but just adopted thereby (Shapiro 2011, 120).

Moreover, legal activity is a planning activity not only because it produces plans (norms) but also because *it is itself structured as a plan* (Shapiro 2011, 176). By

[5] Shapiro (2011, 129): 'a plan is a special kind of norm. First, it has a typical structure, namely, it is partial, composite and nested. Second, it is created by a certain kind of process, namely, one that is incremental, purposive and disposes subjects to comply with the norms created.'

[6] The idea that the law has one single fundamental function, and that it would be possible to define the law with specific reference to this single fundamental function, is embraced by so diverse authors as (among others) Finnis (1980), Dworkin (1986, 93), Shiner (1992, 129), and Moore (1992, 221). For a critique of this idea, see Raz (2009, Chap. 9), Hart (1994, 249), and Green (1996, 1709–1711).

[7] How do we know that the law has such a moral aim? We know this because, according to Shapiro (2011, 216–217), 'high-rank officials represent the practice as having a moral aim or aims'; 'they depict it, in other words, as an activity that is supposed to solve moral problems and should be obeyed for that reason'. It seems, then, that the main reason we have to postulate that the law has a moral aim as its fundamental function is that officials act, or speak, as if the law indeed has a moral aim.

this, Shapiro means that at the root of the activity of legal planning (production, modification, and enforcement of legal norms) lies a 'master plan' that regulates the further activities of planning to be carried on by officials, marking the relevant divisions of institutional labour between them – the formulation and adoption of new plans, their enforcement, etc. (Shapiro 2011, 176–180). In most legal systems, the master plan can be conveniently identified with the constitution (Shapiro 2011, 169, 205), even if part (indeed, even a large part or the totality) of the master plan can also be customary in character, and hence only plan-like. Such a set of fundamental rules (the master plan) exists because it is a 'shared plan'.[8]

9.2.2 The Place of Legal Interpretation in the Planning Theory

With this few general remarks on the overall framework of the Planning Theory in mind, let us now take a closer look at the rile of legal interpretation according to the Planning Theory.[9]

Interpretation is the activity through which a legal text is given a certain meaning: any act of interpretation, then, can be subsumed under a certain 'interpretive methodology', that is, 'a method for reading legal texts' (Shapiro 2011, 304).

Every legal culture allows for a vast array of interpretive methodologies (for instance, textual interpretation, intentional interpretation, historical interpretation, purposive interpretation, and so on). Moreover, in any given case (*a*) more than one interpretive methodology can be legitimately available to the interpreter, and (*b*) the different interpretive methodologies available to the interpreter can lead to different interpretive results. The conclusion immediately follows that the interpreter, in most cases (maybe, always), is supposed to make a choice between the various interpretive methodologies available. This choice is a matter of 'meta-interpretation'; it belongs to a meta-interpretive theory (Shapiro 2011, 304–306).

Now, the first interpretive implication of the Planning Theory is rather straight forward: if legal norms are plans, then legal interpretation is interpretation of plans (Shapiro 2011, 194). Recall that a plan is a device that is supposed to reduce deliberation costs in situations of uncertainty, complexity, controversy, etc. (the circumstances of legality), and that it does so by 'tying the hands' of its addressees: they

[8] See Shapiro (2011, 177): 'A shared plan exists just in case the plan was designed with a group in mind so that they may engage in a joint activity, it is publicly accessible and accepted by members of the groups in question. As a result, if we want to discover the existence or content of the fundamental rules of a legal system, we must look only to these social facts.'

[9] According to Shapiro, the theory of interpretation belongs to the domain of the 'implication questions': it does not belong to the definition of law, of what makes the law what it is (the 'identity question') – rather, it follows from that. See Shapiro (2011, 331): 'To know how to interpret the law […] we must answer the Implication Question about law.' See also Shapiro (2011, 25, and generally 8–10), for the difference between 'identity questions' and 'implication questions'.

will just have to follow the plan blindly,[10] without making any further deliberation. Shapiro calls this the 'Simple Logic of Plan' (SLOP): 'The existence and content of a plan cannot be determined by facts whose existence the plan aims to settle' (Shapiro 2011, 275). Since legal norms are plans and plans are supposed to perform this very function, it follows that legal norms have to be interpreted (and must be amenable to be interpreted) in a way that does not resuscitate those very controversial issues that the plan was supposed to settle.[11]

Shapiro deals with this issues under the heading of the 'General Logic of Plans' argument (GLOP): the interpretation of any member of a system of plans cannot be determined by a fact whose existence any member of that system aims to settle (Shapiro 2011, 311).

Shapiro praises, then, a theory of meta-interpretation that respects GLOP. This requires resorting to the concept of 'trust': legal systems are plans, and plans are based on certain attitudes of trust.[12] The meta-interpretation mandated by the Planning Theory, then, focuses on the actual distribution of trust within the legal system. Every plan (and every legal system) is premised on a certain system of trust management: if a plan (or, more correctly, the plan designers) shows a significant amount of trust that a given (type of) actor in a given (type of) situation will be able to overcome the circumstances of legality, then the system will authorize that actor to develop the plan (the plan will grant him interpretive discretion). If, on the contrary, the system assumes that a given (type of) actor in a given (type of) situation is not trustworthy, or not trustworthy enough – in other words, if the system assumes that the actor will not be able to overcome the circumstances of legality in a given situation – then it grants that actor a constricted role (he will just have to follow the plan blindly, without trying to develop it) (Shapiro 2011, 353).

This is what Shapiro calls the 'economy of trust' of a system (Shapiro 2011, 331).

The economy of trust is essential in the choice of an interpretive methodology, for the allocation of decision-making power operated by an interpretive methodology must be consistent with the economy of trust of the system. Now the rather obvious question is: 'how are we supposed to ascertain the actual economy of trust on which the system is premised?'[13] Shapiro stipulates two possible (families of) methods.

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[10] There are limits to this, of course: a plan should not be followed 'come what may', at all costs. See Shapiro (2011, 202, 303) (every plan has an inbuilt 'unless compelling reasons arise' clause).

[11] Shapiro (2011, 275): 'It would be self-defeating […] to have plans do the thinking for us if the right way to discover their existence or content required us to do the thinking ourselves!'; Shapiro (2011, 307): 'the content of laws, insofar as they are plans, must be discoverable in a way that does not require the resolution of questions that laws are meant to resolve'; Shapiro (2011, 309).

[12] Shapiro (2011, 313) ('plans are sophisticated devices for managing trust and distrust').

[13] Shapiro (2011, 338) takes for granted that the distribution of interpretive tasks based on considerations of trustworthiness is the job of *legislators*. As a consequence, it seems that we should primarily look at legislation to solve meta-interpretive questions. But this is clearly a mistake, since it begs the question of the determination of the level of trust granted to *legislators themselves*. It is plainly possible that the master plan accords comparatively more trust to legislators for some matters and less for others.

The first method is the 'God's-eye method'; it requires that each (meta-) interpreter autonomously decide about his own degree of trustworthiness: if he deems himself to be in the position of deserving a great amount of trust (either in absolute or in some specific circumstances), he will grant himself interpretive discretion; if, on the other hand, he deems himself untrustworthy, he will 'tie his own hands' and will defer to someone else's judgement.

The second method is the 'Planners method': in such a case, 'a meta-interpreter should not assess her own trustworthiness, but rather defer to the views of the system's planners regarding her competence and character'[14] and choose an interpretive methodology accordingly.

In other words, an interpreter who resorts to the God's-eye method is actually resorting to his own judgement in determining the proper economy of trust of the system. On the other hand, an interpreter who resorts to the Planners method tries to refer to the economy of trust as it is designed by the plan designers (i.e. the Framers) and 'embedded in the plans of the legal system'.[15]

Obviously enough, the Planning Theory requires the Planners method of meta-interpretation and firmly rejects the God's-eye method: the former is perfectly consistent with the GLOP, whereas the latter openly violates it and reopens the 'Pandora's Box' of the circumstances of legality (Shapiro 2011, 348).

But this is not yet a final verdict against the God's-eye method and in favour of the Planners method of meta-interpretation. Indeed, the choice between the God's-eye method and the Planners method depends on the *reasons* and *attitudes* of actual participants in the legal system: 'In an "authority" system, the reason why the bulk of legal officials accept, or purport to accept, the rules of the system is that these rules were created by those having superior moral authority or judgement. The authoritative provenance of these rules, in other words, is deemed to be of paramount moral importance. In an "opportunistic" system, by contrast, the origins of most of these rules are deemed morally irrelevant. Officials in these regimes accept them because they recognize, or purport to recognize, that these rules are morally good and hence further the fundamental aim of law' (Shapiro 2011, 350).

It is an empirical question whether a given legal system is the 'authority' or the 'opportunistic' type. As a matter of fact, Shapiro believes that the actual US legal system, for instance, belongs to the former kind (Shapiro 2011, 351). At any rate, the Planners method is appropriate (indeed, required) for authority systems alone.

[14] Shapiro (2011, 345): 'Her [*scil*. the interpreter's] task is to extract the planners' attitudes of trust as they are embedded in the plans of the legal system, and then to use these attitudes to determine how much discretion to accord herself. Planners' confidence in competence and character should yield significant levels of interpretive discretion; doubt and suspicion ought to issue in low levels of discretion.'

[15] For the view that the plan designers are those who created the constitution, Shapiro (2011, 347) (see also *infra*, Sect. 9.4).

So in an authority system, the economy of trust – the system's planners attitudes of trust (Shapiro 2011, 351) – will be ascertained through the Planners method, which in turn results in a theory of meta-interpretation articulated in three steps:

1. *Specification* ('What competence and character are needed to implement different sorts of interpretive procedures?')
2. *Extraction* ('(a) What competence and character which the planners believe actors possess led them to entrust actors with the task that they did? (b) Which systemic objectives did the designers intend various actors to further and realize?')
3. *Evaluation* ('Which procedure best furthers and realizes the systemic objectives that the actors were intended to further and realize, assuming that they have the extracted competence and character?')

At the end of all this, and after taking into account also possible matters of 'competition',[16] the meta-interpreter will be in a suitable position to individuate the proper interpretive methodology for any given kind of interpreter. This whole process, moreover, is rooted on social facts alone, such as the judgements of competence and character made by the planners and the 'regime's animating ideology' (Shapiro 2011, 382; a rather similar presentation of the interpretive task is also in Shapiro 2007): legal positivism is, then, vindicated.

In sum, then, the theory of legal interpretation developed in *Legality* is, admittedly, doubly limited. In the first place, it is supposed to apply *only* to legal systems that have certain specific features – only to 'authority systems', as defined above. Second, the concrete bearings (the whole panoply of meta-interpretive issues) of this theory of interpretation are indeterminate, because they are radically *contextual*: it all depends on how a given legal system allocates amounts of trust and distrust between its officials – its economy of trust. Accordingly, if the legal system deems a certain kind of official trustworthy, or comparatively more trustworthy than some other kind of official, it will grant him a considerable amount of interpretive discretion (allowing him to use purposive styles of interpretation, for instance). If, on the other hand, the legal system distrusts a certain kind of official, or distrusts her comparatively more than some other kind of official, it will require her to keep her interpretive powers at bay, probably by adhering strictly to the wording of the rules laid down by the plan designers (or by some other more trustworthy officials).

So, in the end, Law as Plan does not require any specific interpretive methodology. Rather, it requires that each interpreter choose the interpretive methodology that appears to be the more appropriate, in relation to that interpreter's role and place in

[16] Shapiro (2011, 377): 'The competitive relationship between social planners is itself a crucial meta-interpretive determinant. This is so because legal plans do not merely manage trust; they manage *conflict* as well. Plans, as we have noted before, are extremely useful tools for settling political disputes. When plans play a conflict-management function, I would now like to argue, the more competitive the planning relationship is, the more constraining the interpretive methodology; conversely, the more collaborative the exercise of social planning, the more interpretive discretion is warranted.'

the system's economy of trust. And it is each interpreter's task to ascertain his own role and place in the system's economy of trust, under the regime's animating ideology.

9.3 Legal Interpretation in the Planning Theory: Some Doubts and Queries

Given this general, and quite complex, theoretical framework, I will now try to assess some possible critical points in the treatment of the issues of interpretation and meta-interpretation in Shapiro's Planning Theory.

9.3.1 Value-Free Adjudication?

According to Shapiro's theory of law and legal interpretation, legal reasoning is necessarily amoral (Shapiro 2011, 240, 244, 266–267, 276). This means that, as far as genuine legal reasoning is concerned, the interpreter does not (and should not) resort to moral considerations: he will just have to look at social facts, in the guise of positive laws. Of course, Shapiro concedes, the resolution of a dispute may require the judge to 'reach outside the law', to look also at moral facts in order to adjudicate a dispute; sometimes, according to Shapiro, this may indeed prove inevitable, since laws are the product of human beings, whose ability to foresee all the relevant disputes and all the relevant features of possible disputes (indeed, whose ability to plan) is limited. Since law is a human product, and since human beings have cognitive as well as moral limitations, law is intrinsically limited.[17] When the interpreter is confronted with a case whose solution (or maybe whose optimal solution) is not provided by existing law, the decision of such a case is to be attained outside the law. And in such a case, the judge would not be engaged in legal reasoning (which is necessarily amoral) but in sheer legal decision-making: he is not applying pre-existing law; he is just solving a dispute.[18]

[17] Shapiro (2011, 276): 'When the pedigreed norms run out (which they must given the Limits of the Social argument), the social planning that the law provides runs out as well.'

[18] Shapiro (2011, 273): 'Judicial practice in the American legal system, therefore, does not require the legal positivist to give up the idea that the law is ultimately *and* exclusively determined by social facts. For when pedigreed standards run out, American judges are simply under a legal obligation to exercise strong discretion, by looking outside the law to morality in order to resolve the case at hand.' At first sight, the distinction drawn by Shapiro between legal reasoning proper and legal decision-making seems to echo Joseph Raz's distinction between legal reasoning about the law and legal reasoning according to the law (see Raz 1993). The crucial difference, though, is that according to Raz, they are *both* instances of legal reasoning.

Translating all this in the jargon of the Planning Theory, in some cases (hard cases) the original plan can 'run out', and judges are required to write a new plan on their own in order to adjudicate the case at hand.[19]

Now, I wonder if the portrait of the judicial task elaborated as an upshot of the Planning Theory is really illuminating. Indeed, I suspect that it obscures important parts of judicial legal reasoning.

My main contention, here, is that each and every act of interpretation necessarily involves value judgements. This is true, of course, in cases of extreme indeterminacy, gaps, conflicts of norms absent a clear criterion of composition, conflicts between legal and moral requirements, etc. (hard cases). But it is *also* true in cases in which there is a legal text, formulated in clear words. This derives from the following main factors:

(a) Even clear words have to be interpreted (they do not carry their own meaning on their face), and even clear words can have 'penumbras' of meaning (a relative degree of vagueness and indeterminacy is always an ineliminable feature of language).[20] Moreover, even the interpreter's choice of resorting to literal meaning is namely that: a choice.
(b) A given legal text is clear only insofar as it is not 'upset', unsettled by a specific case which happens not to match perfectly with the formulation of the legal text (what would be the job of the interpreter in such a case? Should he resort to such controversial entities as the 'purposes' of the plan, even if he has been deemed untrustworthy by the plan designers – and indeed, even if he deems himself so?).
(c) In precedent-based systems, a given case can usually be subsumed under more than one precedent; moreover, from any given precedent usually more than one *ratio decidendi* can be inferred.
(d) In statute law systems, the interpreter always confronts a vast array of legal materials, not just one statute, or part of a statute. So, the interpreter has to reconstruct the 'plan' (the relevant legal norm) out of an array of raw legal materials, and in so doing he will be, again, faced with substantive choices.
(e) The interpreter normally has to engage in an enquiry into the validity of the norm to be interpreted (is the relevant legal norm still in force? Does it present grounds of unconstitutionality? And so on), and this requires further interpretive activities.

What I am trying to point out with the preceding observations is that the interpreter consistently faces various substantive choices not only in hard cases but also in purportedly easy cases, and these choices are guided by substantive value judgements

[19] Shapiro (2011, 276): 'The fact that judges routinely rely on moral considerations in such instances simply indicates that they are engaged in further social planning.'

[20] On this topic, see especially Endicott (2000).

(ideas of reasonableness, soundness, etc.[21]). If all this is correct, then Shapiro's distinction between legal reasoning properly understood (which is necessarily amoral) and judicial decision-making (which involves the exercise of some kind of moral judgement by judges) is misguided, because amoral legal reasoning never obtains. The only exception I can think of is when legal reasoning is aimed only at establishing that a given law is in force because some facts obtained. But this is very far from exhausting the complexity of legal reasoning even in the easiest of easy cases.

Moreover, if the argument above is correct, a significant adjustment is needed in the Planning Theory as far as legal interpretation is concerned. Indeed, since (*a*) value-free adjudication does not exist and (*b*) every interpreter is always required to add something to the plan, then (*c*) the difference between plan designers and plan appliers collapses. At the very least, that difference is just a matter of degree.[22] But a stronger (and maybe more coherent) implication of the argument would be that judges are always not only plan appliers but also plan designers. I will return on this point later on (§ 4).

The argument of the limits of law prompts also another, related, perplexity. True, law has limits, because it is a human, social enterprise. As a consequence, it can easily happen that, in some cases, we just 'run out of law', at least apparently. But I find it quite unrealistic to argue that when the law runs out, the interpreter is simply entitled to reach outside the law, looking for an answer in the realm of morality. Indeed, as a matter of fact, in most contemporary legal systems I am aware of, when the law has apparently run out, interpreters do not just look for a good solution on purely moral grounds: instead, they keep on looking for guidance from the law also in hard cases.[23] In other words, positive law still exerts a kind of 'gravitational force' on judicial reasoning also when it does not strictly control the case at hand. This could happen by requiring that the interpreter decide the case with reference to general (or constitutional) principles, precedents, analogies, and so on. Of course, in such cases, the interpreter has to rely more heavily on evaluative, substantive considerations, and the solution may be more controversial than in other cases since, for

[21] The so-called argument *ab absurdo* (the interpretive methodology that proscribes the interpreter to reach absurd results) is a paradigmatic case in point. For a nice inventory of even quite routinary cases that involve the exercise of substantive moral judgement by judges, see Waldron (2008).

[22] In much the same vein, Hans Kelsen famously argued that law application and law creation are not separate activities, since 'The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act': Kelsen (1967, 349). According to Green (2003), this is 'a general truth about norms'.

[23] Hart (1994, 274): 'when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law'. See also J. Finnis (2000, 1601–1602).

example, different principles may support different analogies and outcomes (Hart 1994, 275). But still, the same happens also in easy cases, as we have seen. Thus, the difference between hard cases and easy cases, between legal reasoning and legal decision-making (in Shapiro's words), is just a matter of degree.

Moreover, that judges decide hard cases by reaching outside the law is just a contingent, system-specific possibility (Chiassoni 2012): for instance, a given legal system could require judges to refrain from deciding hard cases and defer them to the legislature instead. So, the thesis that in hard cases, when the law (or plans) runs out, judges necessarily reach a decision outside the law should be understood at any rate not as a conceptual truth about the law but rather as a contingent, system-specific matter. This, in turn, would also be more consistent with the limited domain of the Planning Theory of legal interpretation. As we have seen (supra, Sect. 9.2), the Planning Theory of interpretation does not provide definite answers to interpretive problems in general but requires a careful inquiry on the economy of trust within a given legal system instead. So, a given legal system could deal with hard cases at least in one of the following ways (or even in a mix between them): it could require judges to adjudicate the case anyway, resorting to some kind of moral reasoning; or it could require judges to defer the judgement to the legislature, or to a higher, specialized court; or it could even require judges to state that the hard case at hand has no solution in the law and hence that it does not require a judicial pronouncement (*non liquet*).

So, it is not a conceptual truth that in hard cases judges resort to moral reasoning outside the law: they do so only if they are required by the relevant legal system to adjudicate the hard case at hand anyway, and even in these cases, in my opinion, it could be shown that positive law can still exert some control on judicial reasoning. Even in hard cases, positive law can limit the range of permissible interpretive outcomes, and legal reasoning does not become free-floating moral reasoning.

Contra Shapiro, then, my conclusion on this point is that legal reasoning is always contaminated by moral arguments, both in hard and in easy cases. We can decide to call it legal decision-making if we wish, but then we have to acknowledge that this is what judges do all the time and not just occasionally in hard cases. And moreover, is it not an important truism about the law that the job of judges is to apply the law? This truism cannot be explained by Shapiro's idea that a 'morally contaminated' legal reasoning is no more legal reasoning (but sheer decision-making reaching outside the law instead), once we acknowledge that adjudication always involves value judgements.

9.3.2 Extracting the Economy of Trust from the Master Plan

According to Shapiro, the construction of the meta-interpretive theory mandated by the Planning Theory requires individuating the economy of trust embedded in the

system.[24] Moreover, Shapiro claims that the existence and content of the master plan are a matter of descriptive fact (Shapiro 2011, 192).[25]

As we have seen, this process involves three steps – specification, extraction, and evaluation (*supra*, Sect. 9.2). Here I will focus briefly on the extraction stage of meta-interpretation.

Extraction is 'essentially an explanatory process. The meta-interpreter attempts to show that a system's particular institutional structure is due, in part, to the fact that those who designed it had certain views about the trustworthiness of the actors in question and therefore entrusted actors with certain rights and responsibilities. The views extracted through this practice are those that best explain the construction and adoption of the *texts* that guide the practice.' Moreover, 'their [i.e. the designers'] views on the trustworthiness of actors are legally significant only insofar as they played a causal role in the actual design and adoption of the authoritative texts' (Shapiro 2011, 361–362, italics in the original). According to Shapiro, extraction need not be a holistic (Dworkinian-style) enterprise: the meta-interpreter may be content with assessing the attitudes of trust that the system shows towards his role only. As a general criterion, low-rank officials need not embark in wide assessments of relations of trust in the system, whereas top-rank officials can often be required to do so.

The meta-interpreter will derive the designers' attitudes of trust from 'the structure of the legal system'[26] or, if needed, from a 'more detailed historical investigation' (Shapiro 2011, 365–366).

Shapiro is perfectly aware that this is no easy job. Legal systems usually have a very long lifespan; many generations, many different social, cultural, and political forces contribute to shaping them; and they can embed different attitudes of trust at various levels (for instance, a constitutional norm might embed a certain attitude of trust towards a certain type of interpreter, whereas a statutory norm might embed a different attitude of trust *towards the same type of interpreter*). 'Because legal

[24] Shapiro (2011, 359): 'An 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, on the supposition that the actors have the competence and character imputed to them by the designers of their system.'

[25] See also Shapiro (2011, 177): 'Shared plans must be determined exclusively by social facts *if they are to fulfill their function*. As we have seen, shared plans are supposed to guide and coordinate behavior by resolving doubts and disagreements about how to act. 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' (italics in the original).

[26] Shapiro (2011, 205–206): 'When legal systems are designed to achieve certain moral or political goals, it is often possible to recover the goals of a system by a close examination of its master plan. For example, a system that made provisions for voting, representation, elections, and some protection for public deliberation would be one in which democratic self-rule was prized.'

systems are built and rebuilt over time, usually by the hands of many individuals, it would be extremely surprising to find a coherent set of views about trust underlying the totality of the law. As a general matter, the task of the meta-interpreter is not merely to recover these disparate attitudes of trust, *but also to synthesize them into one rational vision*. A system's economy of trust, thus, *is constructed during meta-interpretation, not simply found*' (Shapiro 2011, 366, italics added).

Shapiro describes this process as a kind of *factual inquiry on social facts* (Shapiro 2011, 275, 382–383). This, in turn, grounds Shapiro's assumption that Law as Plan is a strongly positivistic theory and also, apparently, the very idea of conceiving of law as a plan.[27]

Now, I find it rather surprising that the extraction stage within the process of meta-interpretation can be plausibly conceived as a factual inquiry on social facts. Of course, that somebody has a certain kind of belief, ideological or ethical stance, etc., it is certainly a matter of fact. But when it comes to describing or constructing the *content* of such beliefs, ethical or ideological stances, etc., it is quite odd to conceive *this* as a factual, empirical inquiry.[28] All the more so if the interpreter is also required *to make sense* of the empirical data he collects, that is, to 'synthesize them into one rational vision'.

For my part, I would rather argue that individuating the economy of trust of a system *is not* a purely (or even mainly) empirical matter: instead, it requires a *substantive* inquiry on the purposes of the designers, their attitudes and intentions, their ideologies, their compromises (since those ideologies can be and often are diverse and incompatible), and on how much of all that is actually written into the text of the constitution. All this requires, inevitably, the (meta-) interpreter to resort to value judgements, that is, substantive evaluative judgements of soundness such as the ones required by the 'principle of charity'.[29] Once the (meta-) interpreter puts his hands into this kind of stuff, he cannot be deemed to carry on a merely empirical, factual research. And if, on top of all this, we also add that according to Shapiro the law has a fundamental moral aim (see *supra*, Sect. 9.2), it is hard indeed to see how moral evaluations and substantive evaluations, more generally, can be ruled out from this enterprise.

This becomes particularly clear, for instance, when the (meta-) interpreter faces internal inconsistencies in the master plan, that is, when the plan seems to rely on conflicting trust judgements. To deal with such cases, Shapiro counsels an

[27] Shapiro (2011, 178): 'To seek to discover the existence or content of such a mechanism [*scil*. the master plan] by looking to moral philosophy, as the natural lawyer recommends we do, would frustrate the function of the master plan.'

[28] Raz (1990, 18): 'beliefs, though not their content, are also facts'.

[29] For an extended argument to this effect, Villa (1997) and Celano (2002, 2005). One could also recall here some remarks made by Joseph Raz (2009, 94) regarding Hart's theory of the rule of recognition: 'Attempting to formulate criteria of validity based on complex court practices that are in a constant state of change and that are necessarily vague and almost certainly incomplete, involves not only legal perceptiveness and theoretical skill, it demands sound judgement and reasonable value decisions as well.'

epistemological procedure borrowed from the revision of inconsistent theories in philosophy of science[30] – a procedure that, to my mind, could also be described as the search for a kind of Rawlsian reflective equilibrium.[31]

Note that my objection does not involve taking sides in the alternative between internal and external point of view. I mean to say that what is in question here is not the possibility of making detached or uncommitted, instead of committed, evaluative statements: in either case (*scil*., internal and external evaluative statements), what is at stake is exactly this: an evaluative statement that involves the use of substantive arguments (even if, ex hypothesis, only in a detached way). And an evaluative statement is not an empirical statement.

In sum, my objection here is that conceiving of the extraction stage of meta-interpretation as a factual, empirical inquiry is a distortion, whose aim is to provide (hard) legal positivists with a self-assuring portrait of legal reasoning as based exclusively on social facts.

9.3.3 Is the Scope of the Planning Theory of Interpretation Too Narrow?

My arguments so far have dealt with problems of internal consistency of Shapiro's theory of meta-interpretation. Now I want to advance a critical argument from a slightly different perspective.

Shapiro's theory of meta-interpretation is based on the assumption that the legal system under consideration has certain features, namely, it has to be an 'authority system', as contrasted to an 'opportunistic system'.

Recall that 'in an "authority" system, the reason why the bulk of legal officials accept, or purport to accept, the rules of the system is that these rules were created by those having superior moral authority or judgement. The authoritative provenance of these rules, in other words, is deemed to be of paramount moral importance. In an "opportunistic" system, by contrast, the origins of most of these rules are deemed morally irrelevant. Officials in these regimes accept them because they recognize, or purport to recognize, that these rules are morally good and hence further the fundamental aim of law.'[32]

Only in 'authority systems' that the Planners method is supposed to work. Now, a given system is an authority system or an opportunistic one depending on the

[30] Shapiro (2011, 367–368). 'This theory sets forth various hypotheses concerning the general competence and character of individuals and how particular settings affect their trustworthiness. When a revision of a legal system injects conflicting trust judgements into this "theory", the meta-interpreter should then engage in minimal revision: she should synthesize judgements of trust by holding the most recent judgements fixed and revising the earlier judgements as little as possible so as to render them consistent.'

[31] Rawls (1971, 40 ff).

[32] Shapiro (2011, 350).

attitudes of the bulk of officials. If the relevant attitude is that of according to special moral status to the planners, then we have an authority system. If, on the other hand, officials think that the plan they happen to be stuck with is morally good (regardless of any opinion on its authors), then we have an opportunistic system.

Notice that, on its face, this enterprise is different from meta-interpretation. Meta-interpretation requires, *inter alia*, extracting the trust attitudes of the *planners*. Here, instead, we are dealing with (moral?) attitudes of *officials*. So, we can resort to the Planners method of meta-interpretation only after we have decided, through a purportedly different procedure, that the relevant system is an authority system.

All this raises, I think, the following questions: How much agreement do we need within the bulk of officials about this feature of the system, in order to obtain the relevant kind of system? How do we ascertain it? Is it not quite possible that different officials have disparate ideas (and sometimes, even no idea at all) about that? What happens if the officials are split between the two attitudes referred above?[33] Who exactly are the plan designers, towards whom high moral respect is directed in authority systems (only the Framers, or also subsequent legislators and judges)?

I do not have precise answers to these questions, but I think the Planning Theory should. Quite to the contrary, the relevant passages in *Legality* are rather quick. Here we would expect an argument about the procedure to identify the relevant attitude in officials, the amount of convergence in attitudes required in order to have the relevant kind of system, as well as an argument about a description of the current situation in a given legal system (such as the US), with reference to actual attitudes of officials such as courts, legislatures, and so on. Instead of all this, Shapiro leaves us with just a few scattered impressions and a quote from a newspaper article (Shapiro 2011, 351–352), without no further evidence in favour of his (crucially important) point that the US system is in fact an authority system.

For my part, I will just point to a couple of vague intuitions. First, answering at least some of the questions listed above would require, again, an inquiry into substantive reasons, intentions, propositional attitudes, and ideologies. In short, it requires, again, a substantive evaluative inquiry, not just an empirical one.

Second, if, as I suspect, in contemporary, complex, and multiple-actor legal systems (as opposed to 'charismatic' ones, as Max Weber would have it) it is never or rarely the case that the bulk of legal officials accept, or purport to accept, the rules of the system simply because these rules were created by those having superior moral authority or judgement, then it follows that the whole meta-interpretive machinery deployed by Shapiro has indeed a very narrow scope of application. Arguably, most, if not all, contemporary legal systems would require a rather different meta-interpretive theory than the one envisaged by the Planning Theory.

[33] The thesis that the unity of the legal system is not *per se* defeated by the fact that officials follow different rules of recognitions has indeed some jurisprudential credit: see for instance Raz (1990, 147, 2009, 95), Kramer (2004, 105–110), and Pino (2011).

9.4 Who Are the Planners?

The doubts I have tried to raise in the previous sections are probably compounded by a single major doubt that has already surfaced here and there in this chapter. This doubt relates to the difficulty of identifying, in Shapiro's argument, who exactly are the planners of a legal system.

I think that Shapiro has done little to clarify this rather ambiguous point, since in many passages he makes it clear that (insofar as the US legal system is concerned) he has in mind the Framers, including also the ratifiers and the authors of the Amendments, at any rate those who originally designed the system (indeed, part of his refutation of Dworkin's arguments takes advantage of a rich and very interesting historical digression on the trust attitudes of the Framers).[34] At some other junctures, Shapiro includes in the category of planners also other officials who can and do affect the original plan – more recent legislators, apparently.[35] This move is certainly reasonable, but the question can be raised if it is still consistent with the definition of an 'authority system', upon which a good deal of Shapiro's argument on meta-interpretation is premised. Moreover, in still some other places, Shapiro says that the allocation of interpretive discretion between officials (which should be one of the main features of the master plan) is the exclusive job of legislators (Shapiro 2011, 338), who thus would turn out to be the 'plan designers'.

To make my argument more clear, I should point to the fact that the Planning Theory is premised on (*inter alia*) two ideas that in the end may prove quite difficult to reconcile: (*a*) the idea that the logic of planning requires that the content of the plan is ascertainable without resorting to the same kind of arguments that the plan was supposed to settle,[36] with (*b*) the idea that plans can be incomplete and can be designed 'incrementally' (Shapiro 2011, 122–124, 199–200, 277–279).

Suppose that a judge discovers that for some kind of case, the 'legal plan' just happens to 'run out'; this is rather inevitable since, according to the Planning Theory, the law has limits (in an exclusive positivism vein). And suppose that in such a case the judge decides to adjudicate the case anyway, 'adding to' the original plan,[37]

[34] Shapiro (2011) devotes considerable attention to the views of the Framers (366, 'designers of the early American republic'; 371). See also 338, 346, 350, and generally chapter XI.

[35] Shapiro (2011, 356): 'The designers of the present American system include not only the framers and ratifiers of the Constitution of 1787, but the numerous agents who have changed the complexion of the system over the past 200 years. The framers and ratifiers of the Fourteenth Amendment are as much the designers of the current regime as the framers and ratifiers of the original Constitution. Insofar as the meta- interpreter focuses on the current system, the relevant set of planners for meta-interpretation is the current one, namely, those whose planning has not yet been modified or extinguished by subsequent planners.'

[36] Shapiro (2011, 178): 'Plans can do the thinking for us only if we can discover their existence or content without engaging in deliberation on the merits.' From this, both SLOP and GLOP would follow.

[37] Indeterminacy, according to Shapiro, 'is a feature, not a bug. Perfectly precise rules, even if they could be constructed, would inevitably be arbitrary and likely create havoc. In many instances, it is better to let others fill in the details when they are in a superior position to judge which course of action is best': Shapiro (2011, 257).

which clearly involves resorting to the same kind of controversial arguments that the plan was supposed to settle. Now, how are we to describe this situation according to the conceptual framework of the Planning Theory of Law? According to idea (*a*) above, the plan clearly did not work,[38] and the judge has in some sense written a new plan[39]; on the other hand, according to idea (*b*) above, the judge has just 'added to' the same original plan that now has been developed incrementally.

So, the Planning Theory seems to struggle with two independently sound, but apparently irreconcilable, ideas: the idea that plans perform their specific role when they eliminate the deliberation costs that affect decision-making in environments of uncertainty, moral controversy, etc. (which in turn requires that a plan can be interpreted, and must be interpreted, in a non-evaluative fashion), and the idea that a total planning would indeed be a nightmare, if at all possible: plans are capable of being developed in an incremental fashion, and it belongs to the normal structure of plans (including legal plans) that they make room for areas of indeterminacy.

The only possibility to cope with these two conflicting claims is, I think, to 'enrol' judges as plan designers – contrary to the structure of Shapiro's argument (as I read it, at least) which seems to reserve the honorific label of 'planners' only to those high-rank officials that are in charge with structuring the plan: the Framers in the first place and maybe also legislators ('system designers') (Shapiro 2011, e.g. 346–349).

Now, what would be the implications of enlisting also judges in the category of planners?[40] I think that the main implication is that also the plans produced by the judiciary, the 'doctrines' developed by courts, shape the legal plan as a whole: the legal plan is (also) what the courts say that it is, and so all this must be taken into account in the 'extraction' stage of meta-interpretation (that in turn becomes perhaps even more complex and even less 'empiric-like' than envisaged by Shapiro).

This goes hand in hand with another similar point. At many stages of his argument, Shapiro refers to 'system designers' as a closed circle, a *hortus conclusus*. I wonder if this is a sound vision of the law, especially in contemporary, highly complex legal systems in which power relations between different actors are relentlessly negotiated – their battleground often carrying the label of 'legal interpretation', of course.

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[38] Shapiro (2011, 256): 'In many instances, the best explanation for why lawyers do not know the law is that *there is no law to know*. They may find, for example, that their case falls within the penumbra of a rule. Or one statute may say one thing, while another statute says another. The uncertainty on how to proceed in these cases, then, will not reflect their ignorance of the law; it concerns their doubts about how the law ought to be developed or how a court will eventually rule' (emphasis added).

[39] According to the Planning Theory, this should be understood as '*a mandate to engage in further social planning*. The pedigree-less norms that they eventually apply are then understood as *generating new plans/laws*, not the finding of old plans/laws. For if the old plans/laws could only be found through moral reasoning, there would be absolutely no point in having them in the first place': Shapiro (2011, 276–277, emphasis added).

[40] In an obvious and weaker sense, judges are always planners: since a legal norm is a plane and since a judicial ruling is a (individualised) norm, then judges are engaged in individualized planning every time they decide a case.

In contemporary legal systems, many different actors shape the law; many different actors shape and reshape their own decision-making powers – and the powers of other actors as well. In the US, after all, the power of the Supreme Court to review legislation has been established by the Supreme Court itself.[41] Constitutional courts in many European countries have consistently acted so to expand their powers, for instance by stating that a number of constitutional principles would be immune from constitutional amendment (and that such amendments could then be subject to judicial review). The process of integration of European national legal systems into European Union Law has been largely dealt with by courts (both national Supreme courts and the ECJ) and so on.

So, the idea that a legal system is the product of a closed and fixed number of plan designers sounds a bit simplistic. In the picture I have drawn, all the actors I have mentioned should be described as consistently resorting to the God's-eye approach in meta-interpretation: each of them evaluates his own degree of trustworthiness and decides accordingly. Shapiro says that the God's-eye approach 'frustrates the ability of the law to achieve its fundamental aim' (Shapiro 2011, 347). Then maybe we should conclude that, according to Shapiro, a vast amount of contemporary legal systems are just 'peripheral cases' of legal systems.

Legal systems evolve, and their structural evolution is not only, and not always, a matter of top-down planning by legislators. The evolution of legal system is sometimes a consequence of judicial decisions; judges are not only plan appliers but sometimes are, in a very important way, plan designers as well.

References

Bratman, M. 1987. *Intention, plans, and practical reason*. Cambridge, MA: Harvard University Press.

Celano, B. 2002. Come deve essere la disciplina costituzionale dei diritti? In *La legge e i diritti*, ed. S. Pozzolo, 89–123. Torino: Giappichelli.

Celano, B. 2005. Giusnaturalismo, positivismo giuridico e pluralismo etico. *Materiali per una storia della cultura giuridica* XXXV/1: 161–184.

Celano, B. 2012. What can plans do for legal theory? In *The planning theory of law*, ed. D. Canale and G. Tuzet, 129–152. Dordrecht: Springer.

Chiassoni, P. 2012. Ruling platitudes, old metaphysics, and a few misunderstandings about legal positivism. In *The planning theory of law*, ed. D. Canale and G. Tuzet, 153–168. Dordrecht: Springer.

Dworkin, R. 1986. *Law's empire*. Cambridge, MA: Harvard University Press.

Edmundson, W. 2011. Shmegality. *Jurisprudence* 2(1): 273–291.

Endicott, T. 2000. *Vagueness in law*. Oxford: Oxford University Press.

Finnis, J. 1980. *Natural law and natural rights*. Oxford: Clarendon.

Finnis, J. 2000. On the incoherence of legal positivism. *Notre Dame Law Review* 75(5): 1597–1611.

Green, L. 1996. The concept of law revisited. *Michigan Law Review* 94(6): 1687–1717.

[41] Marbury vs. Madison, 5 US (1 Cranch) 137 (1803).

Green, L. 2003. Legal positivism. In *Stanford encyclopedia of philosophy*. (Spring 2003 Edition), E.N. Zalta (ed.), http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/.
Hart, H.L.A. 1994. Postscript. In H.L.A. Hart, *The concept of law*, 2nd ed. Oxford: Oxford University Press.
Kelsen, H. 1967. *Pure theory of law*. Berkeley: University of California Press.
Kramer, M. 2004. *Where law and morality meet*. Oxford: Oxford University Press.
Moore, M. 1992. Law as a functional kind. In *Natural law theory: Contemporary essays*, ed. R.P. George, 188–242. Oxford: Clarendon.
Pino, G. 2011. Farewell to the rule of recognition? *Problema* 5: 265–299.
Rawls, J. 1971. *A theory of justice*. Cambridge, MA: Harvard University Press.
Raz, J. 1990. *Practical reason and norms*. Oxford: Oxford University Press (1st ed. 1975).
Raz, J. 1993. On the autonomy of legal reasoning. In *Ethics in the public domain, 1994*, ed. J. Raz, 326–340. Oxford: Clarendon.
Raz, J. 2009. *The authority of law. Essays on law and morality*. Oxford: Oxford University Press (1st ed. 1979).
Shapiro, S. 2007. The 'Hart-Dworkin' debate: A short guide for the perplexed. In *Ronald Dworkin*, ed. A. Ripstein. Cambridge: Cambridge University Press.
Shapiro, S. 2011. *Legality*. Cambridge, MA: The Belknap Press of Harvard University Press.
Shiner, R. 1992. *Norm and nature*. Oxford: Clarendon.
Villa, V. 1997. Legal theory and value-judgements. *Law and Philosophy* 16(4): 447–477.
Waldron, J. 2008. Do judges reason morally? In *Expounding the constitution. Essays in constitutional theory*, ed. G. Huscroft, 38–64. Cambridge: Cambridge University Press.