Chapter 8
Theoretical Disagreements: A Restatement of Legal Positivism

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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.

We would like to thank Riccardo Guastini, Nicola Muffato, Diego M. Papayannis, Veronica Rodríguez Blanco, and Fred Schauer for helpful suggestions on a previous draft of this article.

[1] Shapiro (2011).

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D. Canale and G. Tuzet (eds.), *The Planning Theory of Law: A Critical Reading*, Law and Philosophy Library 100, DOI 10.1007/978-94-007-4593-3_8,

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)
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> 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)
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> 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).

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