WHAT IS WRONG WITH LEGAL REALISM?[*]

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1. *Realism Again*

Scott Shapiro's book *Legality* engages in a difficult and exiting 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 Eighties and Nineties,[3] today Brian Leiter's work, in particular, calls our attention again to the realists' methodology and insights.[4]

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,

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

[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, p. 503)

not very charitable and misleading in some respect, 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.

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 professors, it is clear that this account fails as an instance of conceptual analysis insofar as it flouts many legal truisms.[7]

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."[8] 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.[9]

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."[10] 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.[11]

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

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[7] Shapiro (2011, p. 15).
[8] Shapiro (2011, pp. 15-6). Cf. Leiter (2007, p. 70).
[9] Shapiro (2011, p. 16).
[10] Shapiro (2011, p. 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).
[11] Shapiro (2011, p. 14; emphasis mine).

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.[12] 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.
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.[13]

> 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.[14]

> 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.[15]

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.[16]

I do not know if it is really bad news for Hart,[17] 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.[18] (I will try to explain it in more detail in the next section).

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[12] Shapiro (2011, chaps. 3-4). Cf. Shapiro (2000a) and (2002, pp. 437-9).
[13] Shapiro (2011, p. 70). See also Shapiro (2006, p. 1159), but cf. Schauer (2010).
[14] Shapiro (2011, p. 70).
[15] Shapiro (2011, p. 71).
[16] Shapiro (2011, p. 112).
[17] On this issue cf. Poggi's and Papayannis' contributions to the present volume.
[18] Shapiro (2011, p. 113). Cf. Shapiro (2011, pp. 191-2), 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 of violating Hume's Law performing a DINO pattern of reasoning (deriving the normative from the descriptive)[19] 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![20]

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. *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.
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.[21]

[19] Shapiro (2011, p. 113).
[20] 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".
[21] Holmes (1897, p. 458). On "The Path of the Law" cf. Fisch (1942), Twining (1973), Miller (1975), Grey (1989) and Burton (2000).

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 not to 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.[22]

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*.[23]

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 make accurate predictions.[24] 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.[25]

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, "nothing but confusion of thought

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[22] Holmes (1897, p. 459). Shapiro (2006, p. 1161) qualifies the bad man point of view as an external and practical one, consisting in a non acceptance 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".

[23] Holmes (1897, p. 459; emphasis mine).

[24] Shapiro is right when he observes that "Holmes's 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, pp. 146-7) On epistemic and motivational guidance, cf. Shapiro (1998, p. 490 ff.) and Coleman (2001, p. 135 ff.). Also Leiter (2007, pp. 104-6) claims that Holmes' point was epistemic, and stresses that "Hart misread the Realists as answering philosophical questions of conceptual analysis" (Leiter 2007, p. 18).

[25] Holmes (1897, p. 459).

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."[26]
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.[27]

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.[28]

> 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.[29]

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 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."[30] 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 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.[31] Others say 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.[32]
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.)

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[26] Holmes (1897, p. 460).
[27] Holmes (1897, pp. 460-1; emphasis mine).
[28] Holmes (1897, p. 458).
[29] Holmes (1897, p. 462). Cf. the critique of these and similar passages in Kelsen (1945, pp. 166-9).
[30] Holmes (1897, p. 458).
[31] See White (2004).
[32] See Haack (2005, pp. 86-7).

Hart and Shapiro show that the conceptual reading of Holmes' writing is wrong. But this does not imply that 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.

4. *On Prediction Theory as a Theory of Legal Knowledge*

4.1. *Hart's Critique*

In "Scandinavian Realism", which is a review of Alf Ross' book *On Law and Justice* published one year before, Herbert Hart provided a severe critique of Ross' thought.[33] 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.[34]
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.[35]

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.[36]
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> 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.[37]

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";[38] the former are normative statements that "manifest acceptance of the standards and use and appeal to them in various ways."[39] Ross, according to Hart, treats statements of legal validity as external statements

[33] Hart (1959). See Ross (1958). Cf. Shapiro (2006, pp. 1168-70).
[34] Cf. Hart (1961, chap. 2) and Kelsen (1945, pp. 165 ff.).
[35] Hart (1959, p. 165).
[36] Hart (1959, p. 165). As you may notice here, Hart is thinking at what he will call "Rule of Recognition". Cf. Shapiro (1998) and (2011, chap. 4).
[37] Hart (1959, p. 165).
[38] Hart (1959, p. 166).
[39] Hart (1959, p. 167). Cf. Muffato (2007).

predicting judicial behavior and feelings. "Yet the normal central use of 'legally valid' is in an internal normative statement."[40]
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."[41]
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 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.[42]

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.[43]

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 called a "reflective critical attitude".[44] 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.[45]

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."[46] Therefore there is virtually no disagreement

[40] Hart (1959, p. 167). Cf. Ross (1958, chap. 2).
[41] Hart (1961, p. 84).
[42] Cf. Shapiro (2000a), (2006) and (2011, pp. 99-101). I say "almost exclusively" because Shapiro sometimes provides external considerations like "Unintentional lawmaking is possible" (2011, p. 72) or "planlike norms must be analyzed differently from plans, given that they can, and often do, arise unintentionally" (2011, p. 386).
[43] Ross (1962, p. 1189).
[44] Hart (1961, p. 56 ff.). Cf. Ross (1958, p. 34 ff.).
[45] Ross (1962, p. 1189).
[46] Ross (1962, p. 1190). Cf. Kelsen (1945, p. 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).

between Hart and 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.[47]

One source of misunderstanding between them, Ross contends, was the term "validity": Ross says 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".[48] 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", "∀" is the universal quantifier and "→" is the symbol for material implication):

(A) $\forall x\,(Cx \rightarrow Sx)$.

The problem with statements of sort (A) is that they miss the normative dimension of law, legal conduct and decision-making.[49] Ross' external statements, on the contrary, have in my opinion the following logical form (where "O" is the deontic obligation operator):

(B) $O\,(\forall x\,(Cx \rightarrow Sx))$.

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:

(C) $O\,(\forall x\,(Cx \rightarrow Sx))$!

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 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.[50] Not to mention the fact that knowing the law also involves the knowledge of a complex set of social facts.[51] This *presupposes* of course a certain

[47] Ross (1962, p. 1190). This is not strictly speaking correct: Hart says that for the whole system, not for any single rule.
[48] Ross (1962, p. 1190).
[49] "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, p. 175)
[50] See Ross (1958, pp. 70-4). 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, p. 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, p. 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, p. 191)
[51] See e.g. Hierro (1996) and (2009).

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.[52] For one thing is the fact that plans are binding on the courts, quite another that they are effective.

5. *How Many Realisms?*

Leiter says that American legal realists had a theory of adjudication, not a theory of law strictly speaking.[53] 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).[54]

I think that Legal Realism, as any other legal theory, had a more or less implicit theory and ontology of law.[55] So, despite some cries against metaphysics, Realism 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.[56] 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.[57] 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."[58] 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

[52] Of course Shapiro claims it is possible (2011, p. 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".

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

[54] "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, p. 60)

[55] Cf. Tuzet (2007).

[56] 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, p. 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, p. 145)

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

[58] Leiter (2007, p. 70).

courts' rulings (at least in some contexts as appellate litigation).[59] 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.[60] 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?[61] I am not clear whether the planning theory has conceptual room for a description of failing plans.[62] If yes, however, it should say (how to determine) 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.[63] 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,[64] 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

[59] Leiter (2007, pp. 73-9). 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, p. 69)

[60] Cf. Shapiro (2011, chaps. 6-7).

[61] 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, p. 179)

[62] 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, p. 214)

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

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

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 in the former;[65] 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,[66] 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"[67]), 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.[68]

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.[69] 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".[70] 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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[65] Cf. Ross (1958, p. 31).
[66] 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.
[67] "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, p. 170)
[68] Shapiro (2011, p. 156).
[69] See e.g. Shapiro (2011, pp. 170-5). However, he suggests at various places that his claims are conceptual and based on thought experiments (p. 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 do 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.
[70] "The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality." (Shapiro 2011, p. 213)

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