SOCIOLOGIA DEL DIRITTO

RIVISTA QUADRIMESTRALE XL/2013/2
fondata da Renato Treves

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Contents

SCOTT SHAPIRO'S PLANNING THEORY OF LAW. REMARKS ABOUT A CRITICAL READING*

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1. *Introduction*

In contemporary analytical jurisprudence Scott Shapiro's book *Legality* (2011) represents one of the most popular and contentious inquiries into the overarching question of the nature of law. Even before its publication, the main ideas of Shapiro's book gave rise to conflicting assessments among legal philosophers and were discussed in many conferences and seminars. A new volume edited by Damiano Canale and Giovanni Tuzet, entitled *The Planning Theory of Law. A Critical Reading* (2013)[1], includes a revised version of the papers first presented in a workshop held in Milan, Bocconi University, in December 2009. The original papers aimed to discuss Shapiro's project of a planning theory of law and to give some suggestions to emend it. Of course, the essays collected in the volume also refer to the final version of Shapiro's planning theory published two years after the Milan meeting. Unfortunately, the volume does not include a response by Shapiro as planned at the beginning of the workshop. My comment on the critical essays in the volume is a contribution to the debate on Shapiro's ideas and also takes the

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[1] This is the table of contents: Damiano Canale & Giovanni Tuzet, *Introduction*: ix ff.; Ch. 1, Damiano Canale, *Looking for the Nature of Law: On Shapiro's Challenge*: 1 ff.; Ch. 2, Francesca Poggi, *The Possibility Puzzle and Legal Positivism*: 27 ff.; Ch. 3, Giovanni Tuzet, *What Is Wrong with Legal Realism?*: 47 ff.; Ch. 4, Aldo Schiavello, *Rule of Recognition, Convention and Obligation: What Shapiro Can Still Learn from Hart's Mistakes*: 65 ff.; Ch. 5, Diego M. Papayannis, *Legality: between Purposes and Functions*: 89 ff.; Ch. 6, Bruno Celano, *What Can Plans Do for Legal Theory?*: 129 ff.; Ch. 7, Pierluigi Chiassoni, *Ruling Platitudes, Old Metaphysics, and a Few Misunderstandings About Legal Positivism*: 153 ff.; Ch. 8, Jordi Ferrer Beltrán & Giovanni Battista Ratti, *Theoretical Disagreements: A Restatement of Legal Positivism*: 169 ff.; Ch. 9, Giorgio Pino, *What's the Plan?: On Interpretation and Meta-interpretation in Scott Shapiro's Legality*: 187 ff.

opportunity to propose some possible replies to some of the criticism raised about them.

One of the most significant aspects of the essays here considered is that they come by authors representing the main trends of legal positivism in contemporary jurisprudence: the Anglo- and North-American jurisprudence, on the one side, and the Continental and South-American jurisprudence, on the other side. My comment also attempts to bridge the gap that often exists between those two trends.

Briefly, three main criticisms are addressed to Shapiro's *Planning Theory of Law* (henceforward, *'PTL'*) in the volume here reviewed.

The first criticism is addressed to the picture of legal positivism made by Shapiro, especially in examining his predecessors, mainly Austin and Hart. Their legal theories are said in the essays to be misinterpreted by *PTL*. In the eyes of its critics, *PTL* is based on a fallacious understanding of the methodological legal positivism developed in continental Europe in the XIX century. For this reason, on the one hand, *PTL* is said to fall unwittingly into some of the deficiencies of the theories mentioned above, inter alia *PTL* would not explain the genesis of legal systems and the role played in this process by individual acceptance of law. On the other hand, it would not take into any account the critical contributions to legal positivism in the works of Kelsen, Ross and the Italian analytical legal philosophers, such as Bobbio.

The second criticism is related to the specific content, theses and solutions of *PTL*. According to its critics, *PTL* does not give a better response than legal positivism to the questions that it attempts to answer, about the nature and the general features of law, legal systems, legal interpretation, legal reasoning and all the legal phenomena which Shapiro thinks to be important (*Legality*, 3). Shapiro's use of the notion of a "plan" appears to his critics to be a flawed strategy that impedes rather than supporting whatever inquiry into the origin and the nature of law in general and the real life and specific features of legal systems actually in force in our societies.

The third criticism against *PTL* is methodological, involving the metaphysical and ontological assumptions of the theory. In the opinion of its critics in the volume, *PTL* is based on an old-fashioned metaphysics and an inadequate ontology. Furthermore, it implies a highly unsatisfactory methodology in that it would use a vocabulary and conceptual tools that appears to be ambiguous, slippery and, in any case, inadequate to explain law and legal phenomena.

The criticisms

2.1. The assumptions and the methodological apparatus of Shapiro's theory

Each essay in the volume points its attention to different features of *PTL* and provides an assessment of Shapiro's theses.

Canale stresses that Shapiro's approach to social and legal realities is based on a deceptive monistic ontology, by which he means that in *PTL* the social world and the legal world are blended into the same kind of reality, flouting the special features of the legal domain (Ch. I, § 1.5, 16-18). Poggi is of the same opinion (Ch. II, § 2.5.2, 37 ff.; § 2.6, 45-46). In several essays it is said that Shapiro's description of legal phenomena is less rich and sharp than Hart's and confuses or obliterates the functional variety of entities which are significantly different, such as legal obligations, non-legal duties and coercive situations, social regularities and rules, legal rules and social practices, legal and moral obligations or constraints, and so on. In Poggi's words, "Shapiro rejects the autonomy of legal reasoning and denies the existence of a plurality of normative systems. Normativity appears to be a moral matter only" (Ch. II, § 2.6, 46). Schiavello also examines this topic from a different and perhaps opposite point of view: contra Poggi and Canale, according to Schiavello, Shapiro is still too close to Hart in drawing an impractical division between law and morality (Ch. IV, § 4.6, 80 ff.).

In spite of these critiques, in my opinion, Shapiro's ontological perspective does not fail to give a realistic portrait of social and legal phenomena in *PTL*. The idea that law is a form of social planning is supported by an accurate analysis of social reality and its various institutions (families, private associations, enterprises, etc.) and an even more accurate analysis of legal phenomena in primitive, historical and contemporary societies. In *Legality* we find an insightful description of individual planning, group planning, customs, hierarchy, small and large scale planning activities, etc. All their distinctive features are examined in detail. Shapiro examines many interesting aspects of these phenomena, including their costs and the empirical constraints that affect the various forms of human cooperation, as well as the psychological and normative attitudes of participants (see *Legality*, Ch. V about non-legal plans; Ch. VI about legal planning and its distinctive features).

Legality can be considered, basically, as an essay in descriptive metaphysics, insofar as it purports to answer two metaphysical questions: the *Identity Question* (i.e. *"what makes the law what it is?" or "which*

are the necessary and interesting properties of law?") and the *Implication Question* (i.e. "*what necessary follow from the fact that the law is what it is and not something else?*") (*Legality*: 9-12).

The essays in this volume disapprove Shapiro's approach and the core position of both the Identity Question and the Implication Question in *PTL*, since these questions, in the eyes of his critics, are too ambiguous and obscure to be a convenient start for a legal theory. Especially Canale, Chiassoni and Celano stress this fault of *PTL* (Ch. I, § 1.2: 6-7; Ch. VII, § 7.2:154 ff.; Ch. VI, § 1: 130).

In spite of this, Canale observes that by the term 'nature' Shapiro denotes social facts and human dispositions rather than physical or empirical states of affairs. Of course, *PTL* is not an empirical inquiry: at the end, it is a conceptual analysis into the nature of law and thus, in Shapiro's own words, "an exercise in rational reconstruction" (*Legality*: 17). The special purpose of *PTL* is to combine with conceptual analysis the four strategies of analysis called "comparative", "puzzle-solving", "anecdotal", and "constructivist" (*Legality*: 18-22) and to pay close attention to the "institutional considerations" that inform the everyday activity of lawyers, judges and other officials (*Legality*: 32). To understand the nature of law – Shapiro says – is to figure out the principles that structure actual legal practice, which means the *real* legal world, which is also made by law professors and participants who defend and justify their actions with regards to law (*Legality*: 32-34).

The conceptual analysis implied in *PTL* in order to answer the *Identity Question* and the *Implication Question* is not a mere linguistic clarification. The aim of *PTL* is not to give a definition of words such as 'law', 'authority', 'obligation', etc., but rather to grasp the nature of the entities that fall under such concepts and are identified in social reality as laws, authorities, obligations, and so on (*Legality*: 4-8, 13-22).

In the volume here discussed this approach is said to be incompatible with methodological legal positivism and a merely descriptive jurisprudence. This criticism is found in the first place in Chiassoni's essay, and both Canale and Poggi are of the same opinion (Ch. VII, § 7.2: 154 ff.; § 7.3: 157 ff.; Ch. I, § 1.3: 7 ff.; Ch. II, § 2.3: 28-32).

As a matter of fact, Shapiro believes that analytical jurisprudence is traditionally an inquiry into social reality, rather than into the meaning of words in a vacuum. Glanville Williams' and then Herbert Hart's analyses have shown, in Shapiro's opinion, that the answer to "What is the law?" cannot be reduced to a mere linguistic issue and to a simple problem of definition (*Legality*: 23 and Ch. I: note 9 and 22, 405). Moreover, for Shapiro all speculations about the nature of law cannot be

either pure analyses of the discourses about law or entirely unbiased inquiries: even legal philosophers are, in some ways, engaged in legal activity and all answers will impinge on the relation between law and morality (*Legality*: 24).

Another general criticism put forward in the book is that *PTL* seems to deduce from the fact that human beings are "planning creatures" the inner features of legal activity as a form of social planning, and legal rules are depicted as "planlike norms" (Ch. I, § 1.3: 11; Ch. IV, § 4.6: 84; Ch. 5, § 5.4: 102 ff.; Ch. VI, § 6.6.1 and 6.6.2: 145-148). Canale points out that *PTL* postulates some inner properties of law and legal entities without explaining whether they are conceptually or metaphysically necessary (Ch. I, § 1.6: 19 ff.). Chiassoni, moreover, thinks that *PTL* does not make clear the inner structure of legal phenomena and how to get to such necessary properties of law (Ch. VII, § 7.1 and 7.2: 153-157). In short, in the opinion of Canale, Chiassoni and Celano (Ch. VI, § 6.3: 131 ff.), *PTL* seems to take certain philosophical truths about law for granted, with no explanation or justification. A prime cause of this would be "the semantic blindness" of *PTL* (Ch. I, § 1.6: 22; § 1.7: 24; Ch. VII, § 7.3: 157 ff.).

However, as said before, *PTL* does not contain a semantic analysis of legal language and does not deal with the linguistic features specific of the law, even though Shapiro makes clear his linguistic approach in accordance with Hart's view of the open texture of legal discourses and natural language (*Legality*: 249). *PTL* is rather an inquiry into the practical aspects of (legal) reasoning and embraces a conventionalist approach to language in general and legal language in particular. On the one hand, Shapiro explains in detail that planlike norms are characteristically purposive norms, which means "abstracts objects" that are "created to be" a guide for human conduct and "[...] function[s] as a guide for conduct and a standard of evaluation" (*Legality*: 127); on the other hand, law "does not track actions themselves", but "under certain descriptions" (*Legality*: 281). The capacity and activity of planning is a feature of human beings that involves instrumental rationality, but legal norms as plans do not exist simply in virtue of this, since they must be created by human creatures according with institutional prescribed procedures (*Legality*: 127-129).

Furthermore, several essays in the volume say that *PTL* would lead to a "strong" or even "spurious" version of legal positivism. Ferrer and Ratti agree with Chiassoni and Poggi on this topic (Ch. VIII, § 8.5 and § 8.6: 185; Ch. II, § 2.3: 28 ff.; Ch. VII, § 7.3: 157 ff.). In particular, Chiassoni charges *PTL* to overlook "the point of classical legal positiv-

ism [...] of Bentham, Austin, Kelsen, Hart, Bobbio" and to endorse a sort of pre-Benthamite approach, saddled with a metaphysical teleological substratum, on the one hand, and compromised with "an empiricist and prescriptive model of legal knowledge and legal science", on the other hand (see Ch. VII, § 7.1: 154 and § 7.3: 161). In short, the remark is that *PTL* would be a surreptitiously value-laden theory of law, rather than a genuine descriptive inquiry.

Yet, Shapiro is perfectly aware that all "those who inquire into the nature of law" have "effect on the practice of law of any kind", and he tells us that one of his main goals is "to show that analytical jurisprudence has profound practical implications for the *practice of law*" (*Legality*: 25). In this regard, the last chapter of *Legality*, entitled "The value of Law" is an open declaration of purpose: both the "questions about what law is" and the "questions about what law *ought* to be" are central to *PTL* (*Legality*, 389). Shapiro frankly acknowledges that "[l]egal systems, therefore, not only must heed the Rule of Law but also must have views about how the Rule of Law itself is best heeded" (*Legality*: 398).

In several points of our volume the question is raised whether *PTL* does belong to classical legal positivism: contra Chiassoni, Poggi thinks that Shapiro's theory may be genuinely included among positivist theories (Ch. II, 2.6: 44). The opposite opinions in the volume depend on different conceptions of legal positivism and the role of jurisprudence. On this point I agree with Tuzet that Shapiro's theory has its place in legal positivistic tradition, insofar as it "conforms to the *social sources thesis*, because there is no plan without social facts and no law without plans, and the thesis of the *separation between law and morality*, because the substantive merit of plans has nothing to do with their existence conditions" (Ch. V, § 5.4: 106). I think that, up to this point, *PTL* does not seek to bridge the gap between the social facts thesis and the moral aim thesis; both these theses are independent cornerstones of Shapiro's theory. However several of the essays contest this (Ch. II, § 2.6: 44-46; Ch. VII, § 7.5: 162 ff.; Ch. IV, § 4.6: 80 ff.),

2.2. The law as a plan and the internal point of view

Especially Celano points out that the central claim of *PTL*, i.e. the legal activity is a form of social planning, would not provide a new or a special answer to the question "what is law?" (Ch. VI, § 6.1: 129-30; § 6.2: 130-1). Shapiro's assumption about law as a plan is also contested by Canale and Poggi (Ch. I, § 1.5: 17; Ch. II, § 2.5.2: 37 ff.); while in Schiavello's opinion, *PTL* answers "the question 'How is law possible?'

in a more convincing way than other conceptions of law", and it should only renounce the fallacious distinction between moral authority and legal authority (Ch. IV, § 4.1: 66 and § 4.6: 86). Apart from this, according to all the critical essays collected in the volume, neither law in general nor fundamental or constitutional laws would be genuinely characterized as Bratmanian plans. In particular Celano states that the resort to Bratman's concept of plan is based on an unwarranted assimilation between the first-person and the third-person agency cases and dismisses the relevant differences existing between individual and legal planning (Ch. VI, § 6.3: 133-135, 136-137; § 6.7: 151-152).

From this viewpoint, the usual idiom of norms, rules, principles, obedience, acquiescence, etc., would much better clarify the nature of law than the conceptual apparatus and the terminology of Bratman's theory used by Shapiro (Ch. VI, § 6.1, 130 and § 6.4: 137-141).

In fact, Shapiro attempts to describe the merits of his approach, by describing the activity of planning, the structure of plans, the motivation in creating them and the rational constraints to this activity, with regard to individual, group and social planning in hierarchical and non-hierarchical contexts, among small and large numbers of people (*Legality*: 120, see Ch. V and VI). In this way, *PTL* sheds lights on some features of law in a way that the usual approach does not, starting with the collective, instrumental, long-standing and cooperative character of law. In contrast to the usual approach, *PTL* gives importance to the so-called "economy of trust" in the legal process, since trustworthiness is a fundamental feature of the internal point of view, especially of officials.

One of the main topics of *PTL* is the "possibility of law", i.e. its origin (*Legality*: 35 ff.). This issue is addressed in *PTL* by using the so-called chicken-egg paradox (*Legality*: 39-40). However, both Poggi and Chiassoni especially point out that Shapiro frames this paradox in a spurious form (Ch. II, § 2.1: 27 and § 2.4: 32 ff.; Ch. VII, § 7.5: 162 ff.). Poggi, in particular, rephrases Shapiro's paradox by pointing out his key-issue, i.e., "how it is possible that the authors of the fundamental norms had the power to create norms which belong to the legal system [...] without being authorized by the other norms belonging to (or being valid in) it", or "how is it possible that the fundamental norms of every legal system belong to that legal system, in spite of them not being valid?" (see Ch. II, §, 2.4: 35, and § 2.6: 44). In Poggi's opinion, *PTL*'s solution of deriving the power of creating legal plans from norms of instrumental rationality is not satisfactory because these norms would not be "*stricto sensu* norms", but just "technical norms" that "do not motivate behaviours" (see Ch. II, §, 2.6: 44-5). Also Celano argues, contra

Shapiro, that the principles of instrumental rationality cannot motivate agents and it is therefore not enough that they have the power of planning and creating legal plans (Ch. VI, § 6.3: 131 ff.). Chiassoni examines three possible interpretations of this claim: as a transcendental argument, as a Hegelian argument and, finally, as a natural law argument (Ch. VII, § 7.5: 162 ff.).

Yet, none of these arguments in my opinion is an authentic description of Shapiro's view of instrumental rationality. Chiassoni's transcendental argument has in fact this content: "The norms of instrumental rationality exist (as legal norms?), because they must exist. [...] if they did not exist, legal authority would not exist [...]. But legal authority does exist. Hence, they do exist too" (Ch. VII, § 7.5: 163-4).

Shapiro's instrumental rationality has a "pragmatic justification" (*Legality*, note 4 Ch. 5: 416). In Shapiro's view, rationality and the so-called "inner rationality" of (legal) planning are genuinely instrumental and internal, given that "to adopt a plan and not use it, or use it incorrectly, is irrational" (*Legality*: 126-7). On the other side, an official who accepts a plan "will be rationally criticisable if he disobeys her superiors, fails to flesh out their orders [...], adopts plans that are inconsistent with these orders, or reconsiders them without a compelling reason to do so" (*Legality*: 183). The "inner rationality of law" is, at the end, "a limited set of constraints" for all those who "accept the law", starting with "the fundamental legal rules" and the "master plan" of the prime designers. In this perspective, the condition that officials accept these rules is a pragmatic condition of law, to be determined sociologically (*Legality*: 183 and 119).

Canale, Schiavello and Chiassoni deny that *PTL*, just by starting from some truisms about law and construing the concept of law as a planning activity, be able to display the nature of law itself and to solve such heterogeneous issues as the identification of law, as well as its implications, justification and legitimacy (Chapters I, IV, and VII). In this regard, Poggi stresses the fact that no concept of law, including Shapiro's, is able to answer at one time ontological questions about law the existence of the laws in force, the identification of the fundamental rules of a particular legal system and, finally, the determination of the content of a law in a single case (Ch. II, § 2.3: 28 ff.).

I fully agree with Poggi on this last claim. However, I think that Shapiro does not pretend to answer all the questions mentioned above simply by defining the term 'law'. *PTL*, as I said, does not provide a definition of that term. Rather, it is a clarification of the characteristic features of legal activity as a planning activity, and of legal norms as

planlike norms. Legal systems and (fundamental) rules are created by humans in order to organize their future life together, and their enforcement depends, in each place and time, first of all on the acceptance of officials. Moreover, for Shapiro the existence of law and of laws with a certain specific content is one thing, their merit or demerit another. Further, the content of law in single cases depends on legal processes, which means taking into account factual aspects, as well as interpretative discretion and language indeterminacy. So all these topics require very different explanations also for Shapiro, as for his critics in this book.

In all the essays, especially in Schiavello's analysis, *PTL* appears to be affected by some ambiguities about normativity and in the way he draws the line between law and morality. On the one hand, *PTL* seems to involve a cognitivist and objectivist meta-ethics and to connect legal to moral authority, as well as legal to moral obligation (Ch. IV, § 4.6: 85). On the other side, *PTL* explicitly holds that it is conceptually possible to distinguish rational constraints from moral constraints, and legal authority and obligations from moral obligations: as Pino observes, legal reasoning in *PTL* is conceived as necessarily a-moral (Ch. IX, § 9.3.1: 194 ff., § 9.3.2 and § 9.3.3: 197-201).

Shapiro does not embrace a cognitive or objective moral theory (whatever it is). Moreover, he draws an explicit distinction between legal and moral domains, norms and reasoning, etc. In *PTL* there is a definite separation between law and morality, is and ought. Nevertheless, Shapiro tells us that "the Planning Theory treats legal systems as planning systems that are designed to achieve certain political and moral ends", and in this perspective he proposes, for instance, "interpretative methodologies [...] to achieve those ends" (*Legality*: 370).

In spite of this, in Tuzet's essay, as well as in Poggi's and Chiassoni's, it is said that *PTL* misconceives many aspects of the Hartian distinction between the internal and the external point of view. In particular, Tuzet underlines that Shapiro does not take advantage of some important conclusions of legal realism, especially of its Continental approach with Alf Ross' theory (Ch. III, § 3.4: 54 ff.).

Tuzet, similarly to Poggi and Chiassoni, reminds us that two basic stances are available towards law: the player's and the observer's games (Ch. III, § 3.4: 54 ff.; Ch. VII, § 7.5: 165; Ch. II, 2.5.2: 43). The latter cannot be reduced to the former, just as internal statements cannot be reduced to external ones (Ch. III, § 3.4. 55). Yet, it would be arguable whether internal and external statements have a place in *PTL* and where

the divide line between planners and observers is drawn (Ch. III, 3.5: 60).

In particular, in Tuzet's opinion *PTL* misconstrues the so-called "bad man picture", since it does not distinguish accurately a normative from a prudential or an instrumental pattern of reasoning and, in addition, a descriptive one (Ch. III, 3.2: 48 ff. and § 3.5: 58 ff.). As Tuzet explains, the external or bad-man perspective may be referred to two distinct perspectives: practical and epistemic. The practical perspective of the bad man is normative, not legal, but rather prudential, in this form: "I want to avoid sanctions! / If I do not do A, I will be (probably) sanctioned by a court. // I have to do A!". The epistemic perspective of the bad man is descriptive, consisting in a prediction on adjudication, such as the following one: "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" (Ch. III, § 3.2: 51). Therefore *PTL* would seem to disregard an important epistemic point (Ch. III, § 3.3: 54). The predictions about law enforcement are heuristically indispensable to get a satisfactory view of the legal activity as a form of social planning, especially if law is designed as a plan that binds the courts. *PTL* is only concerned with the internal game of participants, and does not deal with the external game of observers. As a result, *PTL* does not cope with some issues which are essential for its success. The first issue is whether legal plans might be ineffective and how this might be determined. The second one is which kind of external statements are available to those legal scholars who accept Shapiro's theory of law. A further issue is whether there is room in *PTL* "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" (Ch. III, § 3.5: 59-60).

I agree with Tuzet that *PTL* does not go into detail about law enforcement and the problem of law efficacy. Perhaps this could give rise to a further development of *PTL*. Actually, Shapiro's theory is mainly an analysis conducted from the internal point of view, since its final purpose is to explain on which conditions law can be an optimal form of social planning and how the Rule of Law can flourish (*Legality*: 398).

2.3.Shapiro's theory of legal interpretation

According to Pino, "Shapiro's endeavour is that of elaborating a full-fledged theory of law, in the mark of the tradition of legal positivism", that "comprises also a theory of legal interpretation" (Ch. IX, § 9.1: 187). In this regard Ferrer and Ratti point up especially the distinction

between "interpretation" and "meta-interpretation" (Ch. VIII, § 8.5: 181). As they explain, legal "interpretation" sets out, in the light of *PTL*, a prescriptive methodology for reading legal texts and, hence, determining the meaning of planlike normative statements. Two examples of common interpretative doctrines in Anglo-American legal culture are the "literal meaning interpretative doctrine", according to which "legal texts should be read literally", and the "purposive meaning interpretative doctrine", according to which "legal texts should be read purposively" (Ch. VIII, § 8.5: 181-2). Whereas "meta-interpretation" in *PTL* is a prescriptive methodology to determine which interpretative methodology is the most proper to "make planners' aims effective" and displays the law "in its best moral light" (Ch. VIII, § 8.5: 181-182). As Ferrer and Ratti observe, *PTL* endorses rather than a specific interpretative methodology, a peculiar meta-interpretation (Ch. VIII, § 8.5: 183). The meta-interpretation recommended by *PTL* is the "Planners Method" (Ch. IX, § 9.2.2:190 ff., 193; Ch. VIII, § 8.5: 181 ff.). According to this method, each interpreter must choose the interpretative methodology that best fits with the economy of trust embedded in the legal system: roughly speaking, each interpreter should interpret planlike normative statements in tune with the master plan and, therefore, with the views, values and beliefs of the plan designers. In Shapiro's word, in order to perform their planning function, legal texts should be interpreted in a way that does not restore those highly controversial issues that the plan was supposed to settle (viz. the "Simple Logic of Plan" and the "General Logic of Plans" arguments: *Legality*: 275 and 311).

In this regard, a first objection to Shapiro's Planners Method is that, in *PTL*, it would appear to involve an explanatory or descriptive upshot, whereas it is just a prescriptive doctrine for implementing the morality embedded in a legal system (Ch. VIII, § 8.5: 185; Ch. IX, § 9.2.2: 193-194). Shapiro's theory is accused of mystifying relevant parts of the legal process and of adjudication, overlooking the role of substantive, evaluative or genuinely moral judgements in legal interpretation and especially in the "extraction stage" of the economy of trust (Ch. IX, § 9.3: 194 ff.). In short, several critical essays state that descriptive and prescriptive aspects of legal interpretation and judicial reasoning conflate in Shapiro's approach (Ch. VIII, § 8.6: 185; Ch. II, § 2.5.2: 37 ff.; Ch. VII, § 7.5: 162 ff.).

In *PTL*, legal interpretation, meta-interpretation and its extraction stage are neither free political and moral activities, nor purely epistemic or factual inquiries. As Shapiro states, *PTL* "seeks social facts" (*Legality*: 382), but this claim must be rightly read. Shapiro's legal interpreta-

tion approach is openly normative and purposive. In his words, "[t]hat some set of goals and values represents the purposes of a certain legal system is a fact about certain social groups" (*ibidem*). In *PTL*, "interpretative methodology involves attributing aims and objectives to the law", and this requires to be able to understand the purposes of the designers' plan: every interpreter must use the methodology that "best harmonizes with the objectives set by the planners of the system in light of their judgements of competence and character" (*ibidem*).
Besides this general criticism, in some essays other and more specific critiques are addressed to Shapiro's legal interpretation theory.

Firstly, in Ferrer's and Ratti's opinion, Shapiro's theory of legal interpretation would be quite supererogatory, related to the task of criticising Dworkin's interpretative theses. In order to demolish them there would be no need of such an apparatus: the usual legal positivistic approach to legal interpretation would be sufficient (Ch. VIII, § 8.4: 178 ff., and § 8.6: 185). However, I think that *PTL* gives a suitable portrait of American legal process as it is.

As a further matter, according to Pino, Shapiro's picture of easy cases is fictitious and too simplistic (Ch. IX, § 9.3.1: 194 ff.). According to *PTL*, in easy cases laws (that is, planlike norms) pre-exist to interpretation, whereas in hard cases plans must be settled in adjudication. As also Chiassoni observes, by using the Planners Method the law is determinate and knowable by its interpreters, which means that ultimately planlike norms are entities that pre-exist to interpretation, at least in easy cases (Ch. VII, § 7.3: 159-160). In hard cases each judge is required to add something to the master plan, reaching outside the law and looking at morality in order to decide. Some essays point out to two main fallacies of Shapiro's approach: first, *PTL* does not see that what is law depends on various substantive choices not only in hard cases but also in so-called easy cases; second, as value-free adjudication does not exist, the difference between plan designers and plan appliers is just a matter of degree (Ch. IX, § 9.3: 194 ff., and § 9.4: 202 ff.; Ch. VI, § 6.3: 131 ff.).

It should be pointed out, however, that actually *PTL* is based on the idea that law as a legal plan is not a finished framework, but a continuous incremental process, so that the real authors of the legal plan are not only the original designers of the master plan and historical legislators but also, in addition, judges (*Legality*: 349-352 and 396).

One last remark concerns Shapiro's thesis on the defeasibility of law. In *PTL* plans are defeasible norms, but it is not specified who are the defeaters and how they operate (see Ch. VI, § 6.6.5: 151). I agree with

Celano that this is an unsolved issue of Shapiro's theory, that would require further analysis.

3. *Along the lines of the Oxonian connective analysis*

In the essays collected of the volume under discussion we also find another way of reading of *PTL*. Papayannis opines that Shapiro's theory may be understood as a specification of Hart's position (Ch. V, § 5.5.1.1: 110). According to Hart the basic purpose of law is to guide human conduct within a social group. *PTL* says more, that the aim of law is to solve those complex, serious and contentious moral problems that arise in a community and cannot be solved by other means (Ch. V, § 5.5.1.1: 110).

According to Papayannis, *PTL* incorporates a double and complementary theory of law that provides a more complete understanding of legal phenomena, in continuity with Hart's thinking. More precisely, *PTL* consists in a conceptual analysis from the internal viewpoint of the participants, that portrays law as a social plan to solve those moral problems of a community that cannot be settled by non-legal organizations. From an external point of view it consists in a functional analysis of law and its services, whose appraisal may be summed up in this claim: "the function of law is to allow social groups to overcome the circumstances of legality" (see especially Ch. V, § 5.5.2.2: 122, and also Ch. III, § 3.5: 61). However, Papayannis presents this latter functional explanation as a re-interpretation of *PTL*, which is alien to the original project of Shapiro and at odds with his main purpose. No external functional theory would in fact be able to answer the Identity Question formulated by Shapiro (see Ch. V, § 5.5.2.2: 122). I disagree with this last point, however; in my opinion, in *Legality*, Shapiro writes a new chapter of the analysis offered by Hart in The Concept of Law.

In this perspective, *PTL* is a highly original legal theory in the horizon of the post-Hartian debate, thoroughly dominated by the Dworkinian doctrines and the controversies between "inclusive" and "exclusive" legal positivists. Of course, Shapiro is portrayed as a champion of exclusive legal positivism (Ch. VIII, § 8.5: 181 ff.). However, in *PTL* there is a rather detached attitude towards this question (Ch. VII, § 7.5: 161 ff.). A close examination of Shapiro's theory makes it apparent that *PTL* avoids the leitmotivs, technicalities and self-reference, that are typical of discussions between the partisans of Dworkin and inclusive-exclusive legal positivism (Ch. IV, § 4.1: 65). Even if a part of *Legality*

deals with this debate, *PTL* theory takes a different direction, in order to explain, on very different theoretical bases, how and why law is apt to guide human conduct in a specific normative way. *PTL* seeks to understand where this capability comes from and how it structures massive social groups and organizations (Introd.: ix).

Shapiro's approach, rather than to the post-Hartian debate about inclusive-exclusive legal positivism, seems much closer to the background of practice theories and the background of analytical philosophy at the time of the linguistic turn and Hart's jurisprudence. As said above, especially Canale in our book debates on how Shapiro conceives of his own conceptual analysis and the role of his own philosophical strategies. Of course, there is a wide range of notions of conceptual analysis in current analytical philosophy (Beaney 1998, 2000, 20007; Oberdiek, Patterson 2007), and opinions as to Shapiro position vary.

Canale considers Shapiro's conceptual analysis as being "far from the traditional Oxford-style search for analytically necessary and sufficient conditions", seeing it rather "closer to the Canberra-style approach to metaphysics provided by Frank Jackson" (Ch. I, § 1.3: 8 and 12). The influence of Jackson's theses (1998; Jackson, Chalmers 2001; see also Beaney 2001; Braddon-Mitchell, Nola 2008) is not disputable (*Legality*, note 11, Ch. 1). Yet, Shapiro's conceptual analysis shows a great propinquity with Oxonian analytical philosophy and jurisprudence, beginning with its ancient Aristotelian roots (*Legality*, note 7, Ch. 1). Also the influence of J.L. Austin is significant (*Legality*, Ch. 5). In this regard, Shapiro shares an idea that is widespread in contemporary Oxford analytical philosophy, and according to which a primary aim of conceptual analysis is no longer the specification of necessary and sufficient conditions, but rather to understand, by means of a connective analysis of our concepts, the nature of those entities that fall under them (Ricciardi 2008; Patterson 2006; Perri 1998).

Canale sees a similarity between Shapiro's analytical jurisprudence and Joseph Raz's legal philosophy (Ch. I, § 1.2: 4). I dare to differ. Shapiro's conceptual analysis reminds to me more Gilbert Ryle's approach in The Concept of Mind, whose manifest purpose is to "rectify the logical geography of the knowledge which we already possess" (1949: 9). In Ryle's book we find a connective rather than a reductive conceptual analysis, which elucidates the relationships between concepts without assuming a set of intrinsically basic concepts. Hart and Shapiro follow this route. Both Hart's analysis of the concept of law and Shapiro's inquiry into the nature of law represent connective conceptual

analyses of the law that are not purely linguistic but metaphysical (with regard to Hart: Ricciardi 2008).

Hart's analysis of law is far from being essentialist and does not assume the existence of natural social kinds in the social world. At the same time, it cannot be reduced to a lexical definition of the word 'law', taken from the ordinary usage of this word's in English. I agree with M. Moore (2000: 91-92) that "[r]ather, Hart's sociology mines the social practices of civilized societies for the concept of law implicit in those practices to give the word, 'law', a meaning. [...] his kind of jurisprudence aims to refer to the phenomenon, law, through a concept of law".

Equally, in Shapiro's view, "Legal philosophy is not lexicography" and it would be a mistake to think that analytical jurisprudence be preoccupied with semantic issues. Hence, the main attempt of *PTL* is not "to define the word 'law'". Shapiro's theory rather makes "an effort to understand the nature of a social institution and its products" (*Legality*: 7).

This idea echoes Hart's suggestion that *The Concept of Law* could be read as "an essay in descriptive sociology" (1961). Apart from the ambiguity of this expression, in fact Hart's investigation is far from being a merely conceptually-oriented legal philosophy (Burge-Hendrix 2013: 40). As it has been noted, it rather consists of a conceptual inquiry "at the intersection of philosophy and sociology" (Gardner 2012: 275). In Hart's legal theory, as well as in Shapiro's theory, 'descriptive' means 'non-evaluative', not 'empirical'. As in The Concept of Law, so in *Legality* the account of the nature of law is neither empirical nor evaluative. With regard to Shapiro's approach, perhaps, we can repeat what has been said to explain the incipit of Hart's book: by means of an analytical inquiry "the description of a thing adds to our understanding of that thing. So when we are concerned with law, we describe laws and law-following as part of our development of a broader picture of law as a social phenomenon" (Culver 2008: 79). In brief, *The Concepts of Law* and, I surmise, *Legality* too can be read as essays in descriptive sociology, assuming that the "understanding of what can be learned about the idea of law" is extracted from the "observation of situations where is said to be 'law' exists" (Culver 2008: 79). In this regard, the analysis of law in primitive societies outlined in Hart's theory is renewed in *PTL*, where anthropological and historical surveys play of course a greater role.

4. *A functional and teleological theory of law*

Furthermore, as Jules L. Coleman acknowledges (2002: 342), Hart's conceptual analysis consists in "an essay in descriptive sociology" because "[i]t is possible to read Hart's argument in Chapter 5 of The Concept of Law as a kind of social-scientific/functionalist explanation of law". Even if this is not perhaps the way in which contemporary legal philosophers intend Hart's approach (Tamanaha 2012: 4), I surmise that this is just Shapiro's idea.

Thus, similarly to *The Concept of Law*, *PTL* maintains to be a second "fresh start" designing a functional concept of law based on the "technologies of planning" (*Legality*, 118 ff., 156). The central claim of *PTL* is that "the law is first and foremost a social planning mechanism", whose "fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality" (*Legality*: 171 and 172). In *PTL* we can see legal systems and institutions in a new light, as the most "sophisticated technologies of social planning" we have invented to co-operate for our future and well-being (*Legality*: 171 and 173).

In Papayannis' view, *PTL* offers a kind of functional explanation whose traces can be found in the methodology of Emile Durkheim. This hypothesis is arguable. The instrumentalist and functionalist characters of *PTL* are better seen, rather, as a creative conjunction of the Oxonian analytical philosophy mentioned above and American pragmatism, starting with Peirce and Dewey, and their successors in the field of jurisprudence.

However, Shapiro's inquiry into the nature of law is not only functional, but IS also teleological. In this regard it is useful to distinguish two teleological dimensions of *PTL*: a first dimension is related to the concept of law involved in the theory; a second dimension concerns the theory itself (Gometz 2011: 20-21, 24-25, 30). Shapiro's concept of law is plainly teleological. More precisely, as in the Hartian view, so in Shapiro's view laws have some functions and the law itself – better to say: the law in general – is seen as an instrument to achieve some purposes and a complex aim (*Legality*: 173, 201 ff., and especially 213 ff. about the Moral Aim Thesis; at 399 Shapiro's sums up his view declaring that "law is, in the end, an instrument").

Thus, *PTL* represents a teleological theory of law under four different points of view. The first point is methodological, giving that *PTL* assigns a primary role to the teleological perspective in investigating law. The second point is theoretical because, according to *PTL*, an answer to

the *Identity Question* – "What is the law?" – requires making an insight into the instrumental or technical character of law. The third point is explicative, since in the light of *PTL* a satisfactory explanation of law requires taking into account the teleological links which exist between the legal domain and the other human domains (such as institutional, social, and moral) (*Legality*: note 16, Ch. 1; Ch. 5 and 6). The fourth and last point is directly related to the definition (the concept) of law: according to *PTL*, as seen above, law is a shared, institutionalized, self-certified planning organization whose fundamental aim is to remedy the moral deficiencies of the circumstances of legality (*Legality*: 171, 213, 221).

Therefore, contrary to the opinion of his critics, Shapiro's functional and teleological view does not seem to be compromised with essentialism (Moore 1992, 2000). Instead, as said above, it has a conventional and artificial nature, on account of the principle of instrumental rationality. Even if Shapiro uses conceptual tools derived from collective action theories, it is important to note that the notion of collective intentionality, which is central to such theories, plays no significant role in *PTL*. As Papayannis observes, this should be considered a positive feature of *PTL*, giving that law can fulfil non-intentional functions (Ch. V, § 5.6: 124). *PTL* represents a good example of how a functional analysis of law, as a social shared phenomenon, may well disregard this contested notion (of collective intentionality) without losing its explanatory power.

Finally, the use of the concept of plan, in lieu of the concept of norm, denotes a significant change in investigating the legal domain. As I said above, according to *PTL* law coexists with other non-legal forms of ordering human behaviour and other ways to guide, coordinate and monitor our conduct in a community; however, law is the highest and most sophisticated instrument hitherto invented to arrange our life, protect our-selves from natural disasters, transfer goods, reduce the costs of private bargaining, share resources, organize labour, venture in commercial activities, redistribute income, and so on (*Legality*, Ch. 6: 173). Therefore, in virtue of the concept of law as plan, Shapiro's theory spotlights the physiology, rather than the pathology of law. Law is not only a conflicting arena and an instrument to establish boundaries; nor is it but a mechanism to sanction or to administer force. Law in the form of planlike norms is pervasive and entrenched in every human and social activity, even in those cases in which no conflict has arisen yet. Such conflicts can always occur and, at all events, we need to arrange and organize our lives together. In my opinion, this focus on the physiological

aspects of the law and legal systems is the main merit and the most distinctive feature of *PTL* in the current jurisprudence landscape.

Contrary to the criticism in the volume that has been discussed in this essay, Shapiro's theses about law as a legal plan do not represent a petitio principii and do not postulate any philosophical (or perhaps fictitious) truth. Rather, Shapiro's theses about law as a legal plan seem to be obvious as any general statement about law itself, since legal reality is our common reality and planning is a daily common activity. In this perspective, I agree with Shapiro that our common truisms about law are the cornerstones of any philosophical insight into the nature of law.

5. *A postscript*

As said above, one of the most serious criticism to *PTL* put forward in the volume discussed is that, under an apparent descriptive and value-free approach, it hides the evaluative aspects of legal reasoning and gives an intrinsic value to the law as such (whatever it is). This appraisal is rather uncharitable. Shapiro's Planning thesis is far from being an ideological and covertly evaluative position.

In Shapiro's own words (2009):

> if we take the rule of recognition of a legal system to be constituted by the norm-creating and applying provisions of its shared plan, then I believe that it does exist. Like Hart's rule of recognition, this norm is always at least partially constituted by official convergence on a standard of conduct. [...] These happy convergences provide the pre-interpretive materials that form the heart of the system's economy of trust and from which the determination of interpretive methodology must proceed. [...] As long as disputants think that there is such convergence, or at least act as though they do, each side can fashion, against this assumed common ground, coherent arguments for originalism, interpretivism, pragmatism or whichever -ism they support. The absence of presupposed consensus merely precludes either side from being correct. [...] In these cases at least, I believe that Hart's description of fundamental constitutional controversies is correct. "Here, all that succeeds is success." A misguided legal argument, or covert political argument, may catch on and be taken as true by the legal community. Should this happen, the embraced political position will be transformed into a true legal conclusion and the plan that they all share will shift accordingly.

This disenchanted view refutes the criticisms of false conscience addressed to *PTL* and shows the open endeavour of Shapiro's (legal) philosophy in elucidating the aspects of the legal process.

In this regard, the Planning Theory of Law may be considered a valuable result in the field of jurisprudence achieved by classical American

pragmatism. The pragmatic attitude implicit in Scott Shapiro's philosophy and jurisprudence is well outlined by this passage of John Dewey (2008: 93-94):

> if one will connect the story of philosophy with a study of anthropology, primitive life, the history of religion, literature and social institutions, it is confidently asserted that he will reach his own independent judgment as to the worth account which has been present today. [...] we have a living picture of the choice of thoughtful men about what they would have life to be, and to what ends they would have men shape their intelligent activities. [...] the task of future philosophy is to clarify men's ideas as to the social and moral strives of their own day.

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