Interpreting Plans: A Critical View of Scott Shapiro's Planning Theory of Law

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Introduction

In his new book, *Legality*, Scott J Shapiro states in a comprehensive and fully articulated way his jurisprudential theory, which characterises legal activity as a form of shared 'planning activity' the fundamental aim of which is to solve moral disagreements that cannot be properly resolved by purely moral deliberation. Nevertheless, he not only addresses the issue of the identification of the necessary features of the legal system, but also the theories of legal interpretation – or the theories about how to extract a theory of legal interpretation – embedded in the structure of the legal system. In the following sections, I will reconstruct some of the central elements of his argument about legal reasoning and legal interpretation, and then propose a critical analysis of his work. My objective is to illustrate some of the problems of the methodology chosen by Shapiro and to discuss the most important problems of legal interpretation that his theory intends to solve.

The first section attempts to reconstruct the main arguments of Shapiro's book. At section 1.1, I explain Shapiro's views on the nature of jurisprudence, with particular emphasis in his distinction between 'normative' and 'analytical' jurisprudence, and attempt to reconstruct his understanding of positivism and how it bears on legal reasoning. In sequence, at section 1.2, I present his answer to the so-called 'Identity Question', that is, the question about the nature of law and how legal validity is to be ascertained. Moreover, I focus on one particular point of

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this answer, the Moral Aim Thesis, which holds that the 'fundamental aim' of law is to rectify the deliberative deficiencies of moral reasoning, and on the Simple Logic of Planning Argument, which holds that the existence and the content of legal norms can never depend on moral reasons. The second section, in turn, attempts to criticise the central arguments found in the first section. In short, I claim at this section that Shapiro's Planning Theory of Law is a form of 'normative' positivism that is not entirely coherent with its own views on the nature of jurisprudence, since it adopts an interpretive attitude towards the law that does not square well with the claim that the Planning Theory is circumscribed to an ontological or 'analytical' inquiry into the nature of law. Furthermore, I hold that there are two serious problems in Shapiro's legal theory. Firstly, it does not have a sound explanation for the presence of moral reasons in legal documents and in adjudication. And secondly, its meta-interpretive theory is as abstract and philosophical as the theories that Shapiro criticises for giving too much interpretive power to legal officials.

1. An Overview of Scott Shapiro's Planning Theory of Law

1.1 ON POSITIVISM AND THE NATURE OF JURISPRUDENTIAL INQUIRY

Shapiro's Planning Theory of law intends to be a jurisprudential inquiry which shares the same spirit of Hart's descriptive approach to legal theory. He sees his own theory as an 'analytical', rather than 'normative', type of jurisprudence. While 'normative' jurisprudential theories deal 'with the moral foundations of law,' the Planning Theory is part of an 'analytical' strand of juristic theories that examines its 'metaphysical foundations.'[1] It is thus as an inquiry into the 'fundamental nature of law,'[2] which claims to be very different from the natural law theories whose purpose is to providing a moral justification for the legal system. While natural law theories are supposed to 'undertake a critique of practical viewpoints', with a view to 'identify conditions and principles of practical right-mindness, of good and proper order among persons, and individual conduct,'[3] his legal theory intends to be an exercise on 'social ontology', which is 'a branch of analytical philosophy that studies the nature of entities belonging to social reality.'[4] The main question to be answered by such inquiry is the 'What is

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1 Shapiro, above n 1, 2.

2 Ibid 8.

3 John Finnis, *Natural Law and Natural Rights* (2nd ed, 2011) 18.

4 See Carlos Bernal Pulido, 'Austin, Hart and Shapiro: Three Variations on Law as an Entity Grounded in a Social Practice' (2012) *Rechtstheorie*, forthcoming, where the author provides an elegant explanation for Shapiro's

law?' question, which should be sharply distinguished from the 'What is *the* law?' question, since it is concerned with the 'nature of law in general,' rather than with any specific legal system.[5]

The problem about the nature of law, in turn, can be split into two different, but correlated, more specific questions. The first is the so-called 'Identity Question.' To ask about the identity of X, Shapiro says, 'is to ask what is it about X that makes it X and not Y or Z or any other such thing.'[6] The second question, in turn, is the so-called 'Implication Question,' which concerns 'not what makes the object the thing that it is,' but rather what '*necessarily follows from* the fact that it is what it is and not something else.'[7] When one considers the Implication Question, one no longer asks about how to identify a thing, but inquires into the properties that it necessarily has.

Once these distinctions are fixed, Shapiro turns to the problem of the practical relevance of jurisprudence. According to his argument, whoever intends to address 'the most pressing practical matters that concern lawyers' – including not only the question of who has authority to make law, but also the problem of how the law is to be interpreted – must necessarily answer the analytical questions raised by conceptual jurisprudence. 'In order to prove conclusively that the law is thus-and-so in a particular jurisdiction, it is not enough to know who has authority within the jurisdiction, which texts they have approved, and how to interpret them. One must also know a general *philosophical truth*, namely, how *legal authority* and *proper interpretive methodology* are established in general.'[8] Hence, a jurisprudential disagreement such as the debate between positivists and natural lawyers is a debate over both the *necessary properties* of the law and the correct way to *interpret* the law.[9] As we can see, Shapiro is well aware that 'the resolution of certain legal disputes depends on the ability to resolve certain philosophical questions as well.'[10]

Hence, the practical question of how the law is to be interpreted depends on one's answer to the ontological question of what the law is or how legal validity is to be ascertained.

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ontological claim that laws are social plans that coordinate social action and pre-empt moral and political reasons in practical deliberations.

5 Shapiro, above n 1, 7.

6 Ibid 8.

7 Ibid 9.

8 Ibid 25.

9 Ibid 26-7.

10 Ibid 29.

Shapiro's answer to the ontological question of the nature of law is, as one might suspect, strongly committed to legal positivism. Yet it is not simply a 'casual' form of legal positivism which is indifferent to one's interpretive attitude towards a legal norm. On his view, positivim's solution to the 'Identity Question' bears heavily on one's answer to an 'Implication Question' concerning the choice of the right interpretive approach to the legal system. Hence, if Raz and other positivists are right when they contend that 'all laws are source-based,'[11] then 'the only way to demonstrate conclusively that a person has legal authority or that one is interpreting legal texts properly is by engaging in sociological inquiry.'[12] Therefore, Shapiro holds that jurists should not (and need not to) engage in any form of moral inquiry or further philosophical reflection in order to determine the content of a particular legal system.

This strikingly positivist view on methodology leaves its mark in Shapiro's attitude towards legal philosophy throughout the book. For he divides very sharply the competences of legal philosophers and practical lawyers: 'The philosopher's job is to identify *the proper method for determining the content of the law*,' while 'the lawyer's job is to put that method into practice.'[13] Thus, Shapiro's view on the character of legal theory is very different from, say, Dworkin's. While the former thinks that the job of legal philosophy is to reveal the 'philosophical truths' which determine the nature or the essential features of law and legal reasoning, the latter does not see philosophical reflection as qualitatively different from the kind of reflection that practical lawyers make about legality.[14] A philosophy of law, for Dworkin, is also a constructive interpretation of the political concept 'law', rather than the search for the 'essence' of a thing or a brute social fact which pre-exists the inquiry and is left untouched or unaffected by the arguments used to describe it.[15]

1.2 THE ANSWER TO THE IDENTITY QUESTION: LAWS AS PLANS

Shapiro's strongest jurisprudential claim is that 'the fundamental rules of the legal system *are* plans', and thus 'the existence conditions for the law are the same as those for plans.'[16] This implies, on his view, that 'legal activity is best understood as social planning and that legal rules themselves

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11 Raz, Joseph. *Ethics in the Public Domain* (revised ed, 1996) 194.

12 Shapiro, above n 1, 29.

13 Ibid 31-2.

14 Ronald Dworkin, *Law's Empire* (1986) 87 f.

15 Ronald Dworkin, *Justice in Robes* (2006) 140-186.

16 Shapiro, above n 1, 149.

constitute *plans*, or *planlike* norms.'[17] A plan, here, is not a 'mental state' or a personal intention. Shapiro emphasises the normative aspects of plans and defines them as 'abstract propositional entities that require, permit, or authorize agents to act, or not to act, in certain ways under certain conditions.'

Since laws are plans, the argument goes, legal authority is possible *because* of the ability of social planners to create plans that are binding upon the members of the social group. The creation and persistence of the fundamental rules of law 'is grounded in the capacity that all individuals possess to adopt plans.'[18] Human beings, as Michael Bratmann has famously argued, are 'planning creatures'[19] and thus have a 'special kind of psychology: we not only have desires to achieve complex goals, but we also have the capacity to settle on such goals and to organize our behaviour over time and between persons to attain them.'[20] This assertion is regarded by Shapiro as an ontological claim about the nature of human activities, which in his interpretation will provide the basis for an ontological claim about the nature of law and legal reasoning.

Therefore, when maintaining that legal activity is a form of social planning, Shapiro claims not only to be offering an 'analogy,' between laws and plans, but rather to be 'drawing an implication' from the nature or essence of the fundamental rules of legal systems.[21]

Let us consider in a bit more detail what Shapiro means by a planning activity.

On the basis of Bratmann's insights on the relations between planning and practical reasoning, Shapiro thinks that plans have a 'partial' character and a 'nested' structure, since the activity of planning 'typically

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17 Ibid 120.

18 Ibid 119.

19 Mitchel Bratmann, *Intention, Plans and Practical Reason* (1999).

20 Shapiro, above n 1, 119.

21 See: M E J Nielsen, 'Scot Shapiro' (interview with) in M E J Nielsen (ed), *Legal Philosophy: 5 Questions* (2007), 214, where Shapiro literally states this point in the following terms: 'I want to be clear here that I am not simply offering an analogy – I am drawing an implication. The existence conditions for law are the same as those for plans because the fundamental rules of legal systems *are* plans. Their function is to structure legal activity so that participants can work together and thereby achieve the political objectives of the practice. As a result, whether someone has legal authority in a particular system depends on whether the officials in that system plan to defer to this person in the relevant circumstances and not whether they morally ought to do so.'

involves the creation of... larger plans' which are needed to accommodate and execute the original plan.[22] When we plan to do something, even small things such as cooking tonight, we usually end up having to engage in further planning like going to supermarket to get food or leaving work early to check on whether we have the ingredients for the meal.

Furthermore, a plan is seen as a *norm*, that is, as 'an abstract object that functions as a guide for conduct and a standard for evaluation.'[23] Plans can be characterised as 'purposive entities' that are created according to the principles of 'instrumental rationality' with a view to 'settle... questions about what is to be done.'[24] Similarly to Raz's views on authority, Shapiro holds that 'when one has adopted a plan, for oneself or for another person, the plan is supposed to *pre-empt deliberations about its merits*, as well as purporting to provide a reason to pre-empt deliberations about its merits.'[25]

This pre-emptive character of plans makes them an indispensable tool in the realm of *shared activities*. When we think of social groups, it seems virtually impossible to coordinate action without engaging in planning activity. 'Shared plans ... bind groups together,' since they 'explain how groups are able to engage in the activity.'[26] Plans 'lower deliberation costs and compensate for cognitive incapacities' of the members of the group, as well as 'coordinate' the behaviour of the participants of the community. The plan provides a higher degree of *predictability* for social action and 'serves a crucial control function,' since 'it enables some participants to channel the behaviour of others in directions that they judge to be desirable.'[27]

This control function is maximised as soon as planners introduce hierarchy as a means to allocate planning capacities and requirements for the members of the group. Planning within a hierarchical structure enables the creators of the plan to compensate for their lack of trust in some individuals (for instance, in the bulk of the staff of a company, who are not entirely committed to their work and do not care about the success of the business) and to capitalise on the trust that they have in others (for instance, the managers and supervisors, to whom the planners may allocate a greater degree of discretion and planning competence).[28] As Shapiro explains, plans 'are powerful tools for managing the distrust generated by alienation. For the task of institutional design in such circumstances is to create a practice

22 Shapiro, above n 1, 121.
23 Ibid 127.
24 Ibid 128-9.
25 Ibid 129.
26 Ibid 137.
27 Ibid 132-3.
28 Ibid 148.

that is so thick with plans and adopters, affecters, appliers, and enforcers of plans that alienated participants end up acting in the same way as non-alienated ones.'[29]

In larger communities, this need for planning increases exponentially, for shared agency becomes impossible unless the power to plan is concentrated in the hands of a few.[30] Shapiro refers to these situations as the 'circumstances of legality,' ie, the 'social conditions that render sophisticated forms of social planning desirable.'[31] In this view,

> The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary. In such stances, the benefits of planning will be great, but so will the costs and risks associated with non-legal forms of ordering behaviour.[32]

We can see, here, what makes the law indispensable is precisely the inefficiency of moral principles, ie, the incapacity of moral standards to act as an independent guiding standard for the community. 'The law is first and foremost a social planning mechanism whose aim is to rectify the moral deficiencies of the circumstances of legality.'[33] It is here that the value of *legality* or, in other words, the Rule of Law, resides: 'its value derives entirely from the benefits that social planning generates and is best served when legal structures maximise these benefits.'[34] Legal systems and institutions are justified *only* as a *means* to social planning, and their fundamental aim '*is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality.*'[35]

We can see, therefore, that Shapiro's positivism is based on the 'instrumental' character that he ascribes to the legal system. 'To build or operate a legal system', he says, 'one need not possess moral legitimacy to impose legal obligations and confer rights: one need only have the ability to plan.'[36] The law is therefore an 'universal means' to coordinate social action in the direction desired by the authors of the Master Plan. Since the fundamental rules of the system are 'a shared plan' accepted by legal officials, then according to Shapiro they must be ascertained through an

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29 Ibid 150.
30 Ibid 143.
31 Ibid 170.
32 Ibid 170.
33 Ibid 172.
34 Ibid 396.
35 Ibid 171, emphasis as in the original.
36 Ibid 156.

examination of the 'relevant social facts.'[37] Shapiro pays tribute to the Social Sources Thesis, which states that the existence and the content of law 'can be identified by reference to social facts alone, without resort to any evaluative argument.'[38]

Nevertheless, though Shapiro is promising us an 'ontological' argument about the 'nature' of law, I do not think he is able to offer us more than a moral argument to prove his point. His basic answer to the Identity Question is that 'a group of individuals are engaged in legal activity whenever their activity of social planning is shared, official, institutional, compulsory, self-certifying, and has a moral aim.' Or, in a more straightforward formulation,

> What makes the law, understood here as a legal institution, *the law* is that it is a self-certifying, compulsory planning organization *whose aim is to solve those moral problems* that cannot be solved, or solved as well, through alternative forms of social ordering.[39]

Of the features that Shapiro uses to state this answer to the Identity Question, there is at least one which is not fully compatible with his strict methodology which forbids moral and political evaluations from the legal theorist. Even if this purely analytical jurisprudence could vindicate the claims that the legal system is a 'self-certifying' organization, in the sense that it is 'free to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid,'[40] and that laws are planning organizations, it is very improbable that a purely sociological inquiry would be able to grant the Moral Aim Thesis, which holds that 'the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.[41]

According to the Moral Aim Thesis, the law plays a pivotal role for resolving coordination problems because its authoritative character has a special value, which stems 'not only from its ability to lower deliberation costs and compensate for cognitive capacities, but also from its power to coordinate the participant's behaviour.'[42] The costs and risks associated with any form of non-legal deliberation under the circumstances of legality are so high that no stable and legitimate society is able to afford them. These costs and risks can only be reduced through 'sophisticated

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37 Ibid 177.
38 Raz, above n 12, 210-211.
39 Shapiro, above n 1, 225.
40 Ibid 220-221.
41 Ibid 213.
42 Ibid 134.

technologies that only legal institutions provide', such as universal laws, publicly ascertainable rules and previously established procedures.[43] The fundamental aim of the law, which is its 'moral aim,' is indeed to 'enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone.'[44]

Shapiro extracts far-reaching consequences from the Moral Aim Thesis. This thesis is important to provide the answers both to the Identity Question, as we have seen above, and the Implication Question.

Since the law claims to settle moral disputes, it also claims that the norms that it establishes are morally obligating, although in specific cases this claim may not be satisfied. 'What makes the law *the law* is that it has a moral aim, not that it satisfies it.'[45] We may say, however, that '*from the legal point of view*' or the 'perspective' of the law, legal authorities settle moral disputes in a morally legitimate way.[46] One may reason about the law even without morally endorsing its norms or approving the solution offered by the legal system. Legal reasoning is seen as a 'descriptive', rather than normative or prescriptive, type of discourse. The word 'legal', sometimes, 'registers our agnosticism' about a particular moral issue: 'We do not know or care whether the law's normative judgments are correct – we are simply reporting these judgments and, in effect, bracketing them off in a special kind of invisible commas.'[47] We are, to be sure, 'thinking inside the box,' since as legal interpreters we 'suspend our moral judgments and show fidelity to the legal point of view.'[48]

This 'perspectival' attitude should always be adopted in legal reasoning, since otherwise the law would not be able to settle the moral disputes it purports to. To sum up, legal reasoning is entirely *amoral.*

As the author states,

> Shared plans must be determined exclusively by social facts *if they are to fulfil their function*... The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that

43 Ibid 170.
44 Ibid 171.
45 Ibid 214.
46 Ibid 184-5.
47 Ibid 186.
48 Ibid 398.

> plans are designed to settle. Only social facts, not moral ones, can serve this function.[49]

At this point, the Planning Theory of Law states a very ambitious ontological claim. The contention stated at the quote above, for Shapiro, is a 'metaphysical truth,' not a moral argument.[50] It not only demonstrates that exclusive positivism is *the* correct type of legal theory and that natural law is wrong to believe that the validity of laws depends partially on moral facts; to be sure, it goes way beyond that, since it provides both an answer to the Implication Question and a genuinely positivistic theory of legal reasoning, which excludes moral and evaluative considerations from the realm of legal argumentation.

In a more straightforward formulation, this reasoning can be presented in the form of what Shapiro calls the 'Simple Logic of Planning Argument', which is enunciated in the following terms:

> *SLOP*: The existence and content of a plan cannot be determined by facts whose existence the plains aims to settle.[51]

There are at least two important points worth mentioning here.

First, with the SLOP Argument Shapiro intends to dismiss not only natural lawyers and non-positivists, but also the so-called 'inclusive positivists', who believe that a legal system may contingently incorporate moral criteria into the rule of recognition. 'The problem with inclusive positivism', he argues, 'is that it too violates SLOP. If the point of having law is to settle matters about what morality requires so that members of the community can realize certain goals and values, then legal norms would be useless if the way to discover their existence is to engage in moral reasoning.'[52]

Second, SLOP leads to a theory of legal reasoning that entirely excludes moral considerations from the realm of legal reasoning. Sociological inquiry, rather than moral or philosophical arguments, suffices to offer an answer to every legal question. The law dictates its own interpretive methodology, which has to be extracted by an empirical analysis of social facts.

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49 Ibid 177.
50 Ibid 275.
51 Ibid 275.
52 Ibid 275.

The Planning Theory entails that the *master plan* of the legal system, ie its fundamental rules, express attitudes of 'trust' and 'distrust' towards all agents and legal officials. At this stage, Shapiro introduces the notion of 'economy of trust', which rests at the core of his views on legal reasoning and legal interpretation. According to Shapiro, the economy of trust can be understood as 'the distribution of trust upon which a plan is predicated'.[53] For every legal system, one of the tasks of its Master Plan is to allocate burdens, competences and discretionary powers among participants in the legal activities. By entrusting some officials to decide important matters while binding others with very strict rules and directives, the framers of the Master Plan may channel the behaviour of the whole society in the direction that they find appropriate.

As one would expect, it would be odd to claim that the authors of the Master Plan would ascribe relevant decision-making powers to agents in whom they do not trust, or that they would assign a great amount of interpretive freedom to officials who lack either interest in public policies or the institutional competences for making legal judgments and moral or political evaluations. Decisions about the quality and the range of discretion that will be attributed to someone will thus be based on a particular 'economy of trust', since it is part of the nature of plans that they are 'sophisticated devices for managing trust and distrust' because they 'allow people to capitalize on the faith they have in others or compensate for its absence.'[54]

It is on the basis of the economy of trust, rather than any abstract philosophical theory about the character of legal interpretation, that one is to solve all 'meta-interpretive' disagreements that may affect legal reasoning. A meta-interpretive disagreement, for Shapiro, is a special type of 'theoretical disagreement' which concerns the best interpretive theory for a particular legal system.

Hence, when lawyers defend different interpretive theories of law they must take into consideration both the Moral Aim Thesis and the SLOP argument, which refer to the 'fundamental aim' of the legal system.

On the basis of SLOP, Shapiro raises a strong criticism on Dworkin's theory of adjudication. Since, as we have seen, the Planning Theory 'maintains that the fundamental aim of all legal systems is to rectify the moral deficiencies of the circumstances of legality,'[55] a methodology such

53 Ibid 335.
54 Ibid 334.
55 Ibid 209.

as Dworkin's fails because it 'defeats the purpose of law.'[56] It is at this stage that Shapiro states what he calls the 'General Logic of Planning argument', which is an adaptation of SLOP to the context of meta-interpretive disagreements.

> GLOP: The interpretation of any member of a system of plans cannot be determined by facts whose existence any member of that system aims to settle.[57]

GLOP is used, in the last four chapters of the book, to support Shapiro's own meta-interpretive theory, which claims to be determined by social, rather than moral, considerations.

2. A Critical Assessment of Shapiro's Planning Theory of Law

2.1 PLANNING THEORY AS NORMATIVE POSITIVISM

My main objection to the Planning Theory is that it is much closer to the tradition of 'normative positivism' than it intends to be. As we have seen above, the Moral Aim Thesis is the central aspect of Shapiro's account of the nature of legal systems. The 'fundamental aim' of every legal system is to 'rectify the moral deficiencies of the circumstances of legality.'[58]

Law becomes indispensable precisely because no other form of social ordering is as efficient, controllable and certain as it is. The existence of the legal system promotes a set of basic moral values in such a way that the law becomes in itself *morally* valuable because no other normative system is better equipped to solve *moral* quandaries in a *morally correct* way. The universal character and the predictability of legal rules have a very specific moral worth, which helps participants in legal discourse to maintain the 'social pressure' for the compliance with the law. The moral attributes of law, in this scheme, play a crucial role to keep and strengthen the normativity of the legal system.

As Shapiro asserts in defence of the Moral Aim Thesis,

> Of course, the aim of the law is not planning for planning's sake. If legal systems were merely supposed to adopt and apply plans regardless of method or content, the task would be better solved by flipping a

56 Ibid 310.
57 Ibid 311.
58 Ibid 172.

> coin. Rather, the law aims to compensate for the deficiencies of nonlegal forms of planning by planning in the 'right' way, namely, by adopting and applying morally sensible plans in a morally legitimate manner.[59]

Therefore, Shapiro's exclusive positivism, which is at the core of the SLOP argument, has a moral root. Since the law is understood by the Planning Theory as a 'universal means' to solve moral disputes in the best possible way, it is obvious that the Moral Aim Thesis is at the end of the day a *moral* argument for a non-moral criterion to identify the law.

Only if the Moral Aim Thesis is true can we say that the SLOP argument is correct, and that Shapiro's exclusive positivist view is a proper way to remain faithful to the 'fundamental' point of the law. As I had a chance to argue in a previous writing,

> It is very implausible to hold, unless one is advocating a natural law position, that the Moral Aim Thesis is simply a 'truism' or a 'metaphysical truth' that is part of the essence of every legal system, rather than a normative thesis in defence of a particular conception of law. If the Moral Aim Thesis is to endure, this is not because it is a philosophical dogma which is simply a part of the immutable 'nature' of law and that has to be merely 'acknowledged' by jurisprudents. It is not something that is simply 'out there' to be 'found' by our sensorial perception. On the contrary, the Moral Aim Thesis is itself the result of a political choice of the legal theorist when she constructs her own interpretive theory of law.[60]

If this is true, then the Moral Aim Thesis is not only a thesis about the point of law, but also a moral and political argument for Shapiro's interpretation of the value of legality. Rather than a 'truism' or an 'ontological' or 'philosophical truth' about the nature of law, the Planning Theory would thus be an instance of normative positivism, ie the kind of legal positivism which starts with a *moral* argument in support of its own constructive interpretation of the concept of legality.[61]

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59 Ibid 171.

60 Thomas Bustamante, 'Legality, by Scott Shapiro' (2012) 32 *Legal Studies – The Journal of the Society of Legal Scholars* 3, 499-507, at 504.

61 Therefore, as I argued elsewhere, normative or prescriptive positivism 'resists accepting the "natural law versus positivism" paradigm. It starts with a moral thesis and then, as a result of the truth of the moral ideal which is claimed to be the "point" of law, draws positivistic inferences on how the

As Waldron has famously stated, 'the claim of normative positivists is that the values associated with law, legality, and the rule of law – in a fairly rich sense – can be best achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is.'[62] Thus, prescriptive positivists such as Waldron or Campbell attempt to 'rehabilitate' positivism by stressing the 'strong normative aspects' of its main tenets. Positivism is viewed as 'strongly motivated by certain moral values and political concerns which is in no way at odds with the positivist mantra that we must always distinguish between the law as it is and as it ought to be.'[63]

The key difference between 'normative' or 'prescriptive' legal positivism, on the one hand, and 'descriptive' or 'neutral' legal positivism, on the other hand, seems to be that the former is not committed to any form of 'logical' or 'philosophical' positivism. It neither claims to be neutral nor holds that it is merely acknowledging a purported 'essence' or a 'truism' about the nature of law, as Kelsen purports to do when he holds that his legal theory is 'purified of all political ideology' and 'focus solely on the cognition of law rather than on the shaping of it,'[64] or as Hart says when he holds that his account 'does not seek to justify or commend on moral or other grounds' the rules, forms and structures of legal systems.[65] When Shapiro holds that he is engaging in 'analytical jurisprudence'[66] or inquiring 'into the fundamental nature of law'[67] to discover the 'properties that it *necessarily* has'[68] by 'gathering truisms,'[69] he is promising us a descriptive form of legal positivism, but in the end he does not give us more than an interpretive theory (in Dworkin's sense) which justifies its adherence to exclusive positivism on his own interpretation of the moral aim of the legal system.

Therefore, Shapiro's exclusive positivist view is justified by political values which entail a particular attitude towards legal reasoning and

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law is to be ascertained and legal reasoning is to be conducted' (Bustamante, above n 61, 505) .

62 Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (2001) 411-433, 421.

63 Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (2004) 5.

64 Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Pauson trans, 1992) 1.

65 H L A Hart, *The Concept of Law* (2nd ed, 1994) 240.

66 Shapiro, above n 1, 3.

67 Ibid 8.

68 Ibid 9.

69 Ibid 13

interpretation. As it happens with the most successful arguments for legal positivism, this is a 'moralistic' argument for an 'a-moral' reading of the law, ie a set of 'purely practical and moral grounds' that make a case for legal positivism.[70] And it is precisely because of this normative or prescriptive aspect of its positivism that the Planning Theory is successful in explaining the connection between the criteria that we use to define the concept of legality and the interpretive attitudes of the norm-users.

2.2 METAPHYSICAL TRUTHS OR INTERPRETIVE CONCEPTIONS? A NOTE ON THE CHARACTER OF JURISPRUDENCE

The argument at the previous sections shows that Shapiro's substantial views on the nature of law are inconsistent with the essentialism that he purports to defend while he distinguishes sharply between 'normative' and 'conceptual' jurisprudence. To be sure, this methodological divide is at odds with the Moral Aim Thesis, which stands at the core of Planning Theory and provides the basis for the 'Simple Logic of Planning' argument.

Furthermore, as Mark Murphy has shown in his review of *Legality*, Shapiro's approach to jurisprudence is very close to that of natural lawyers such Aquinas or John Finnis. Though his exclusive positivism separates him from these thinkers, his view of the 'inquiry into the nature of law' as having 'not only theoretical interest' but also 'a practical upshot' brings him very close to the tradition of *normative* jurisprudence[71].

I am convinced, for reasons that I have stated in length elsewhere,[72] that the whole project of descriptive positivists is deemed to fail, since any theory of law is based on constructive interpretations that cannot avoid deep-level moral and political evaluations. In my opinion, Shapiro is not the only one to commit the methodological fallacy of denying the normative character of his jurisprudence In the case of Shapiro, however, the coincidence between his views on the fundamental aim of law and those of self-professed normative positivists like Waldron or Campbell is so strong that it does not even make sense to argue – as he does at the first chapter of *Legality* – that his project is merely to develop a purely analytic type of jurisprudence.

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70 Neil MacCormick, 'A Moralistic Case for A-Moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1, 11.

71 Mark C Murphy, 'Scott J. Shapiro. Legality (Book Review)' (2011) 30 *Law and Philosophy* 369, 371.

72 Thomas Bustamante, 'Comment on Petroski: On MacCormick's Post-Positivism' (2011) 12 *German Law Journal* 693, esp p 700-707

It makes more sense to hold, as Dworkin does, that 'any theory of law, including positivism, is based in the end on some particular normative political theory.'[73] Hence, Shapiro is repeating the same mistake that Hart committed when he held that his jurisprudence 'is *descriptive* in that it is morally neutral and has no justificatory aims.'[74]

With regards to this point, I think that though Hart believed that his theory was purely 'conceptual' in Shapiro's sense, he did not manage to free his theoretical inquiry from arguments of political morality. I can think of two of his most central arguments as genuine examples of the moral-political commitments of his theory, which will be analysed in the following paragraphs.

The first argument which exemplifies Hart's moral-political commitments appears in his reply to Radbruch's post-war papers against positivism. In one of his most celebrated essays, Hart heavily criticises Radbruch and the German Constitutional Court for the decisions that applied the so-called 'Radbruch Formula' and thus denied legal character to a set of Nazi Laws which imposed racist measures on people of the Jewish religion. In particular, Hart was not satisfied with the reasoning provided by the Constitutional Court to justify, in a set of criminal cases, the conclusion that some statutes are too unjust to deserve any form of obedience. Instead of saying that the laws which legalised murder against the Jews lacked legal validity because of their extreme injustice, Hart argues, the court should have admitted that these statutes had indeed legal character, although the law in that case was too wicked to be obeyed. In order to correctly justify its decisions, the court should have recognised the legal character of the old statutes while creating a new legal rule with retrospective effects. In Hart's own words:

> Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of

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73 Ronald Dworkin, 'A Reply' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (1984) 247-300, 254.

74 Hart, above n 66, 240. For a very successful attempt to rewrite Hart's *Postscript*, translating it into the language of normative positivism, see Tom Campbell, 'Rewriting Hart's Postscript: Thoughts on the Development of Legal Positivism' (2011) 5 *Problema - Anuario de Filosofía y Teoría del Derecho*, 23 ff.

> morals it is that the thing to do with a moral quandary is not to hide it.[75]

It is clear, therefore, that one of Hart's most famous arguments in reply to non-positivism is a genuinely moral and political argument, which has very little neutrality in it. A positivist definition of law should be preferred to a non-positivist one because it would make plain the sacrifices and the choices that one has to make in order to impose legal obligations with retrospective effect.

The second argument, on the other hand, is even more expressive of the moral or political preferences of the author, for it clearly demonstrates that the allegedly descriptive theoretical account proposed in *The Concept of Law* has important normative elements built into it. Hart's central argument in support of the idea that a legal system must have not only 'primary rules' according to which humans are required to do or abstain from certain actions, but also 'secondary rules' which are concerned with the primary rules themselves, is grounded on a *reductio ad absurdum* that exposes the inadequacies of a political organisation which uses only the former type of rules. An imaginary society where there are only primary rules of obligation would suffer from the problems of *uncertainty*, for there would be no procedure for settling any doubt about the validity of a rule; of having a *static character*, for there would be no means, in such society, for deliberately adapting these rules to novel circumstances; and of *inefficiency*, since there would be no procedure to keep the diffused social pressure by which rules are enforced and maintained.[76] It is because of this that we need secondary rules to provide a remedy for these three serious problems for any legal society. Nevertheless, as Dworkin correctly argues, such construction is far from being neutral or purely conceptual, as Hart claims it to be. Dworkin's words about this point are particularly illuminating:

> He [Hart] develops his own account of the main elements of law by showing how the device of a secondary rule of recognition responds to these particular defects by making possible a new set of rules that are flexible, efficient, and certain. This, I believe, does support my suggestion about the political basis of positivism.[77]

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75 H L A Hart, 'Positivism and the Separation of Law and Morals' in Ronald Dworkin (ed), *The Philosophy of Law* (1977) 17-37.

76 Hart, above n 66, 92–93.

77 Dworkin, above n 74, 255.

If Dworkin is right about this, then Hart's advocacy of neutrality in jurisprudence is inconsistent with his own theory, for the choice of his theoretical position is entirely determined by political considerations.

If I am right, then, the Planning Theory suffers from the same defects of Hart's methodology.

> The only explanation for the fact that Shapiro is unaware of the fact that his own theory is a form of normative positivism is his insistence on the view that his theory is a metaphysical demonstration of the 'necessary' features of law, rather than a normative 'conception' of legality. When Shapiro holds that the fundamental aim of law is to settle moral disputes which arise in the 'circumstances of legality', he needs to adopt an *interpretive attitude* in order to justify the choice of this purpose for legal activity.[78]

According to Dworkin, when one adopts an interpretive attitude towards a social practice such as law or courtesy, this interpretive attitude has 'two components.' The first is that such practice 'does not simply exist but has a value', i e that 'it serves some interest or purpose or enforces some principle – in short, that it has some *point* – that can be stated independently of just describing the rules that make up the practice.'[79] And the second, in turn, 'is the further assumption' that the practice is 'sensitive to its point,' since this point guides the ways in which we should understand and interpret the practice.[80] Just like Hart's theory, Shapiro's Planning Theory 'is not a neutral description of legal practice, but an interpretation of it that aims not just to describe but to justify it – to show why the practice is valuable and how it should be conducted so as to protect and enhance that value.'[81]

At this point, at least, one cannot help but to agree with Dworkin that 'Archimedian Philosophies' that 'look down, from outside and above, on morality, politics, law, science and art'[82] are inadequate to understand political concepts such as justice, democracy and law, since they 'ignore the way in which political concepts actually function in political argument.'[83] When a philosopher defines a political concept, she is 'taking sides,' ie she is making 'normative claims' about the content of that concept and the role that it should play in political argument. This is so, for Dworkin, because

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78 Bustamante, above n 61, 506.
79 Dworkin, above n 15, 47.
80 Ibid 47.
81 Dworkin, above n 16, 141.
82 Ibid 141.
83 Ibid 148.

political concepts are not 'natural kinds' that are 'real' entities in the sense that 'neither their existence nor their features depend on anyone's invention or belief or decision.'[84] While the 'deep structure of natural kinds is physical', that of 'political values is not physical,' but 'normative.'[85] Jurisprudential theories, hence, are different 'conceptions of legality' which claim to be correct when the value of 'legality' or 'the rule of law' is applied as a political argument.

As Dworkin has persuasively shown in his comment on the Postscript to Hart's Concept of Law, all different jurisprudential views 'represent a common adherence to the value of legality,' albeit with different conceptions of what legality is. 'Conceptions of legality differ,' the argument proceeds, 'about what kinds of standards are sufficient conditions to satisfy legality and in what way these standards must be established in advance; claims of law are claims about which standards of the right sort have in fact been established in the right way.'[86]

Shapiro's Planning Theory, then, is a defence of a conception of legality which claims that the fundamental point of the legal system is to cut down moral deliberation by means of ascertainable plans which pre-empt value judgments of the people and the legal officials who are in charge of the application of law. It is because the social practice of 'law' is sensitive to this point that Shapiro believes, like normative positivists do, that the law is to be determined by social facts alone.

2.3 ON THE DISTINCTION BETWEEN LEGAL REASONING AND JUDICIAL DECISION-MAKING

Another problem with the Planning Theory of law is that its method for choosing interpretive methodologies is somewhat at odds with the sharp distinction that Shapiro establishes between legal reasoning and judicial decision-making.

Shapiro makes this distinction while he is comparing his exclusive positivism with legal formalism, which implies that judges lack competence to decide cases on the basis of moral considerations. In fact, Shapiro understands legal formalism as committed to the following four theses: (1) *Judicial Restraint*, for the judicial role is always limited to asserting and applying the law, since 'only the legislature may amend the law'; (2) *Determinacy*, for the law is inherently accurate and 'always exists and is available to judges for deciding cases'; (3) *Conceptualism*, for the law is

84 Ibid 154.
85 Ibid 155.
86 Ibid 170.

understood as a logical system which resembles a 'squat pyramid', since 'by knowing a limited number of top-level principles, a judge can derive the lower-level rules'; and (4) *Amorality of Adjudication*, since judges must resolve all cases 'without resort to moral principles.'[87]

Nevertheless, Shapiro is happy to acknowledge that the formalist picture of adjudication is far from being accurate to describe the way judges reason in modern legal systems. When legal systems apply standards such as that of 'reasonableness' or use concepts such as 'public interest,' 'best interest of the child,' 'fair use,' 'justice,' 'unconscionable,' 'human dignity,' 'cruel punishments' etc, they are thereby granting officials discretion to decide cases on the basis of their own moral evaluations.

However, the presence of these concepts in Constitutions, Treaties and statutes creates a puzzle for the thesis that legal reasoning is necessarily an *amoral* process.

Shapiro finds a way out of this puzzle by defining legal reasoning as merely the process of 'discovering the law,' rather than the resolution of a dispute. He admits, however, the possibility of *moral reasoning* within the practice of 'judicial decision-making,' whose aim is the 'resolution of a dispute.'

Hence, Shapiro is not necessarily committed to a theory of adjudication that prevents judges from making moral judgments while they hand down their decisions in pivotal cases. It may perfectly be the case, for instance, that the legal system entrusts the judges of the higher courts with a law-making authority similar to that of the legislator, when the basic norms of the Constitution deploy moral concepts whose meaning and interpretation cannot be determined solely on the basis of empirical judgments over social facts.

In hard cases, when 'pedigreed primary norms run out,' it is often the case that 'judges are simply *under a legal obligation to apply extra-legal standards.*'[88] At this point, Shapiro is following Raz's view that it is perfectly feasible that the law itself requires us to look beyond the law to reach a decision in a difficult case. When judges are under a legal obligation to apply norms that lack a social pedigree, then, the Planning Theory interprets this requirement as an authorisation to create, rather than apply, novel legal rules.

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87 Shapiro, above n 1, 241-242.

88 Ibid 272.

Following Hart,[89] Shapiro distinguishes very sharply between 'legal reasoning' and 'judicial decision making.' Strictly speaking, 'the object of legal reasoning is the discovery of the law,' while the aim of judicial decision making 'is the resolution of a dispute.' Hence, though the 'positivistic privileging of social facts' indicates that legal reasoning is amoral, it does not necessarily claim that the same goes for 'judicial decision making.'[90] As long as linguistic indeterminacy leaves 'cracks' or 'gaps' in the system, 'a judge who is obligated to rule cannot employ legal reasoning, and therefore has no choice but to rely on policy arguments in order to discharge his duty.'[91]

When legislators deploy moral concepts, they thereby establish a 'legal obligation to apply extra-legal standards.'[92] Moral concepts in legislation are thus read as 'mandates' authorising legal officials to engage in further social planning or to decide legal disputes according to their own moral considerations.[93] Let us call this contention the 'Moral Mandate Thesis'.

According to the Moral Mandate Thesis, the application of moral standards by judges would be like the application of foreign laws when the rules of a domestic legal system obligate the judge to decide a case in accordance with the law of a foreign jurisdiction. As Raz has famously argued, neither the foreign law nor the moral concepts used by legislators become 'part' of the law from the sole fact that the legal system makes it obligatory to apply them to concrete cases. 'The distinction between normative systems is preserved even when one system borrows from another.'[94]

Nonetheless, the Moral Mandate Thesis is not free from some very uncomfortable inconveniencies. Though this thesis is elegant from the analytical point of view, it pays a high price when we consider its practical implications. In effect, most of the normative requirements contained in the texts of contemporary Constitutions and Charters of Rights would be classified as 'non-legal' or merely 'law-like' provisions. When the 14th Amendment of the American Constitution forbids states to 'deny to any person within its jurisdiction the equal protection of the laws,' it would be merely granting the judges a 'mandate' to engage in further social planning. In European Human Rights Law, for instance, the entirety of the European

89 H L A Hart, *Essays in Jurisprudence and Philosophy* (1983), 62-66.
90 Shapiro, above n 1, 248.
91 Ibid 248.
92 Ibid 272.
93 Ibid 276.
94 Ibid 272.

Convention of Human Rights would not be labelled 'law,' and we would be left with a European Court of Human Rights whose competence would be to legislate nearly from scratch. It would be a court of non-law, who would be very tempted to regard itself as free to engage in sheer judicial activism.

One of the problems generated by the Moral Mandate Thesis is that it empowers judges to rely on their *own* moral judgment, rather than to 'reconstruct' in a hermeneutical process the 'political morality' of the community. Hence, although the Moral Mandate Thesis might settle with unprecedented clarity what the law is, it unsettles in even greater extent than most natural law theories do the question of how legal cases are to be decided. Let us compare, for instance, Dworkin's interpretive methodology with Shapiro's proposal to explain the presence of moral concepts in constitutions and legislation. While Dworkin holds that judges have a 'political responsibility' to undertake their political judgments in the light of the institutional history of legal systems and the political morality that supports it, since 'political rights are creatures of both history and morality,'[95] a judge who follows the Moral Mandate Thesis would be in the dark when it comes to balancing moral arguments that may be employed to define the meaning of clauses like the 'equal protection.' She would find no directive on how these moral principles ought to be balanced, but that won't stop her from receiving an authorisation to resolve these cases with no institutional constraint.

Hence, while Dworkin's methodology 'condemn a style of political administration' that can be classified as 'intuitionistic,'[96] the Moral Mandate Thesis seems to recommend it.

As we can see, the Moral Mandate Thesis is nothing more than an *ad hoc* response to some criticisms that the Sources Thesis has received in other contexts.[97] This response should not have been imported by the Planning Theory because it does not fit very well with the rest of the theory, and particularly with the meta-interpretive approach that Shapiro suggests to solve theoretical disagreements over interpretive theories. It should be stressed, here, that Shapiro's solution to meta-interpretive debates is to attempt to extract from the system's 'economy of trust' the criterion to choose amongst the interpretive theories available to the theorist. While the Planning Theory respects the economy of trust of legal systems, the Moral Mandate Thesis unequivocally does not.

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95 Ronald Dworkin, *Taking Rights Seriously*, (5th printing, 1978) 87.

96 Ibid 87.

97 See Gerald J .Postema, 'Law's Autonomy and Public Practical Reason' in Robert George (ed), *The Autonomy of Law*, (1996) 79-118, where the reader finds a more developed critic of Raz's version of the Moral Mandate Thesis.

The Moral Mandate Thesis gives rise to a paradox for the Planning Theory of Law, which can be stated thus: If the Planning Theory does not trust judges and legal officials to 'interpret' the law on the basis of the political morality embedded in the basic norms of the legal system, it cannot at the same time authorise them to use unrestricted discretion and to give full weight to their moral judgments when it comes to 'creating' new legal norms when the Constitution or a Bill of Rights makes reference to evaluative or morally-laden concepts. The Planning Theory becomes very strict when it comes to 'identifying' the law, but extremely permissible when it comes to developing the law through adjudication or carving exceptions to the legal rules on the basis of vague moral principles.

2.4 THE CHOICE OF INTERPRETIVE METHODOLOGIES

Furthermore, apart from the objections raised in the previous sections, it is not clear whether Shapiro can offer us a meta-interpretive theory which avoids all the problems that he sees in hermeneutic theories such as that of Dworkin.

When we compare Shapiro and Dworkin's views on interpretation, it does not take too long to notice that there is an initial agreement between Shapiro's Planning Theory and Dworkin's model Law as Integrity, since they both intend to explain the existence of theoretical disagreements over the proper interpretive methodology for legal reasoning. This initial agreement covers the following three points, which are stated in their literal wording:

> 1. The Planning Theory concedes that the plain fact view, or any other account that privileges interpretive conventions as the sole source of proper methodology, ought to be rejected. Because theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper.
>
> 2. The Planning Theory also agrees with Dworkin that when theoretical disagreements abound, ascertaining proper interpretive methodology involves attributing aims and objectives to the law. [Disagreements on interpretive methodologies] are disputes about the point of engaging in a particular practice of law.
>
> 3. The Planning Theory maintains, with Dworkin, that in such cases proper interpretive methodology for a particular legal system is primarily a function of which

> methodology would best further the objectives that the system aims to achieve.[98]

This initial agreement, however, stops when it comes to decide how one is to attribute purpose to the legal practice. As Waldron argued in a comment on this particular issue, Shapiro may well be in trouble when it comes to explain what a judge is supposed to do when an 'allegedly settled plan uses terms like "reasonable" or "cruel" and "excessive", or entirely abstract ideas like "equal protection" and "due process."' For Waldron, what Shapiro does tell us is merely that his Planning Theory 'explains why these are difficult questions' and that 'whatever the right strategy of interpretation is (originalist, textualist, purposivist), it certainly can't be Dworkinian.'[99]

The reason it cannot be Dworkinian, for Shapiro, is that Dworkin's interpretive methodology violates the GLOP argument. The right interpretive methodology must be, for Shapiro, 'established by determining which methodology best harmonizes with the objectives set by the planners of the system in the light of their judgments on competence and character.'[100] One should undertake, thus, a sociological inquiry into the intention of the creators of the 'master plan', looking for something like the institutional history of a particular community, as Shapiro did in order to criticise Dworkin,[101] and into the 'economy of trust' of the legal system.

The most pressing factor for this choice, however, is not institutional history, but the 'economy of trust' of the legal system. To be sure, it is evident from Dworkin's 'chain novel' metaphor that his model of 'law as integrity' is highly sensitive to institutional history, since every judge must construct her interpretation in the light of the constitutional history of her

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98 Shapiro, above n 1, 381.

99 Jeremy Waldron, 'Planning for Legality' (Review Essay) (2011) 109 *Michigan Law Review* 883, 900.

100 Shapiro, above n 1, 382.

101 Ibid 307-330.

community.[102] Rights, for Dworkin, are 'creatures both of history and morality.'[103]

The feature that distinguishes Shapiro's methodology from 'Law as Integrity' lies elsewhere. In contrast to Dworkin's model, Shapiro insists that the Planning Theory 'does not demand that interpretive methodologies be justified from the moral point of view... Interpretive methodology is pegged not to the truth of any abstract philosophical or social-scientific theory, but rather to the law's presuppositions concerning the trustworthiness of legal actors.'[104] That is to say: 'the planner's method will never license interpretive methodologies that are inconsistent with the system's distribution of trust and distrust.'[105]

This brings us to another question that is vital for Shapiro'a Planning Theory of Law: can Shapiro offer us a meta-interpretive theory that does not violate GLOP?

If the answer is 'yes', then his arguments against Law as Integrity might be sound, although they will still depend on the plausibility of GLOP, which is far from evident, since according to the views defended in this essay GLOP is not a 'truism', but just one of the possible interpretations of the point of having an interpretive theory of law.

If, however, the answer is 'not', then Shapiro's central argument against Dworkin's theory of legal interpretation is fundamentally flawed, since the Planning Theory of Law would be in no better position than the model of Law as Integrity to avoid 'intensely abstract and relentlessly philosophical' arguments in judicial decision-making.[106]

At this point, it is worth noticing that Shapiro's meta-interpretive theory can only offer a real alternative to Dworkin or any other abstract theory of legal interpretation if it can provide a criterion to interpret the law

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102 See Dworkin, above n 15, 227, where the author explicitly states that history plays an important part in law as integrity, though the institutional history shall be interpreted in a hermeneutic way that looks both to the past, to the present and to the future. Law as integrity 'insists that the law – the rights and duties that flow from past collective decisions and for that reason license or require coercion – contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them. History matters because that scheme of principles must justify the standing as well as the content of these past decisions.' (Ibid 227).

103 Dworkin, above n 96, 87.

104 Shapiro, above n 1, 357.

105 Ibid 357.

106 Ibid 296.

which is not dependant on abstract philosophical considerations. Shapiro would have to construct a scientific, rather than hermeneutic, meta-interpretive theory of law.

Shapiro attempts to move into this direction when he holds that the legal system's distribution of trust and distrust depends upon contingent features of the legal system, such as the constraints that the authors of the law's 'master plan' place upon each of the actors or officials in the social group. 'Legal interpretation is always *actor-relative*,' since texts are to be interpreted correctly 'only in relation to an actor and her particular place within the system's economy of trust.'[107] The degree of discretion and the character of the interpretive competences of actors such as judges, policemen, administrators etc is thus determined both by the 'level of trust' accorded to them and to the 'roles' assigned to them by the economy of trust of the legal system.[108]

The Planning Theory, thus, does not give us a general interpretive theory to be applicable to every legal system. Yet it can offer a meta-interpretive theory that intends to be useful for determining the interpretive theories of concrete legal systems. Nonetheless, when we take a closer look at this meta-interpretive theory, it becomes obvious that it violates GLOP in the same measure as Dworkin allegedly does, since Dworkin's *interpretive* theory of law is very similar to Shapiro's *meta-interpretive* theory.

Shapiro's meta-interpretive theory comprises three steps which need to be progressively taken by the meta-interpreter: (1) specification, (2) extraction, and (3) evaluation.

The first step, *specification*, is meant to ascertain 'the basic properties of various interpretive methodologies.' It inquires into the 'competence' and the 'character' needed to 'implement different interpretive procedures' to check which of these alternative procedures is compatible with the distribution of trust and competence found at the master plan of a concrete legal system.[109]

At the second step, *extraction*, the meta-interpreter must 'assess whether, from the system's point of view, interpreters and other actors have the competence and character to implement these methodologies effectively.'[110] At the extraction stage, the meta-interpreter reconstructs the economy of trust of the system, and solves the problem of which

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107 Ibid 358.
108 Ibid 359.
109 Ibid 359.
110 Ibid 361.

interpretive theory is suitable for each interpreter within the system. This is done by acknowledging the 'planner's attitudes regarding the competence and character of certain actors, as well as the objectives that they are entrusted to promote.'[111] Furthermore, once the meta-interpreter has *recovered* these disparate attitudes towards different actors within the legal community, she has to *synthesize* them into 'one rational vision.' As Shapiro states, this assessment of the economy of trust is not a mere empirical verification, but a creative process in which the meta-interpreter participates: 'A system's economy of trust is *constructed* during meta-interpretation, *not simply found*.'[112] Finally, the meta-interpreter has to extract the 'objectives that various actors are entrusted with serving.' When the meta-interpreter is a legal official, for instance, she has to determine what her role in the system's operative activity is and what part she is meant to play in legal activity.[113]

At the third and final step, 'evaluation', the meta-interpreter should 'apply the information culled from the first two tasks in order to determine the proper interpretive methodology', ie 'she must ascertain which interpretive methodologies *best further* the extracted objectives in light of the extracted attitudes of trust.'[114] The meta-interpreter is now in a position to choose the interpretive methodology that is *most appropriate* to the legal system, and this is to be done on the basis of the *evaluation* of the interpretive methodologies 'extracted from the institutional arrangements.'[115] At this point Shapiro's solution for meta-interpretive problems is still very abstract and, indeed, more philosophical than he intended, as we may see in the following excerpt:

> To evaluate interpretive methodologies, the meta-interpreter engages in a thought experiment: for any given methodology, she imagines what the world would be like if the interpreter claimed to be following the methodology when interpreting legal texts *and* possessed the competence and character that the designers attribute to him as well as to others. ... While engaging in this thought experiment, the meta-interpreter grades interpretive methodologies according to their performance in the imagined circumstances. Methodology M ranks above methodology N just in case the goals that the legal actors are entrusted with advancing are better served in the imagined

111 Ibid 359.
112 Ibid 366 (emphasis added).
113 Ibid 369.
114 Ibid 359.
115 Ibid 370.

> circumstances when M is claimed to be followed that when N is claimed to be followed. The interpretive methodology that is ranked highest when all methodologies are considered is the correct one for the particular legal system. [116]

As we can see, almost any interpretive methodology may be compatible with the meta-interpretive view entailed by the Planning Theory, depending on the economy of trust of the legal system at stake. Yet the economy of trust, itself, is not an evident social fact which may be discovered without an interpretive reasoning in Dworkin's sense. Its details and normative significance are not simply given, since the law is not a natural kind that can be merely captured by external observation. In fact, it is not very difficult to notice that judgments about the economy of trust are not purely empirical or analytical discoveries, but rather constructive interpretations defended by the participants in legal discourse. Hence, Shapiro fails to achieve his main purpose while he rejects Dworkin's interpretive methodology, which is precisely to prevent legal officials from embarking on highly philosophical and abstract value judgments. Since the economy of trust stems from the interpretation of the master plan of the legal system, the planning theory is entering a vicious circle, for the choice of the interpretive theory already depends on a constructive interpretation of the law.

By the same token, according to Shapiro's meta-interpretive theory each and every interpretive theory must be understood *in its best light* if it is to make any sense, and this meta-interpretation must pay attention to the political principles that these interpretive theories pursue. An interpretive theory, just like any interpretive practice, has its sense derived from the 'point' or 'purpose' that one attributes to it. Hence, at the 'evaluation' stage of the three-step procedure that Shapiro establishes for choosing an interpretive theory, the question of which interpretive methodology *best furthers* the objectives of the framers of the 'master plan' is as abstract or philosophical as Dworkin's inquiry over the 'right answer' to a legal question. When Shapiro searches for the interpretive theory that best furthers the economy of trust of a legal system, he is impliedly claiming that there is a *right answer* about the *correct* interpretive theory for each and every legal system, and this 'correct' interpretive theory is unachievable unless there is also a right answer about the economy of trust of the legal system.

In effect, the best understanding of Dworkin's 'moral reading of the constitution'[117] is not to say that Dworkin is defending that judges are

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116 Ibid 370.

117 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American*

authorised to engage in unconstrained moral reasoning when the legal sources run out. To be sure, this is probably how a positivist who accepts Shapiro's Moral Thesis would depict the job of the supreme courts when they face legal gaps in hard cases, but not how Dworkin sees it. For this author, the reasoning of judges and legal officials is neither strictly 'legal' nor purely 'moral'. One of the distinctive features of the law is that moral and political concepts are embedded in its sources, in such a way that many legal concepts can only make sense if they are illuminated by moral considerations.[118] Yet these moral concepts do not necessarily retain their original senses once they have been incorporated by legal documents. As Waldron explains in a very persuasive way, 'what we have here is a mélange of reasoning – across the board – which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine.'[119] This hybrid or intertwined type of reasoning stems from the interpretive attitude that one is supposed to adopt while constructing the meaning of the legal sources, since these sources normally refer to political concepts whose senses derive from their uses.

It is now clear why Shapiro fails to produce a meta-interpretive theory that does not violate GLOP. The same interpretive freedom that Dworkin attributes to constitutional lawyers is found on Shapiro's meta-interpreter, when she is called to decide which interpretive theory best suits the economy of trust of a particular legal system. Shapiro's meta-interpretive theory is exactly as abstract and philosophically demanding as Dworkin's interpretive theory. Shapiro simply moves the constructive interpretation from what he calls the 'second stage of interpretation', in which one applies an interpretive theory to decide a particular case, to the 'first stage of interpretation', in which one decides which interpretive theory will be employed. [120] Nevertheless, he does not explain how one makes the transition from the one of these stages to the other, or why it is important to allocate the 'constructive' aspects of juristic interpretation at the first level, since the choice of the interpretive theories, at the 'evaluation' stage, depends on one's interpretation of the fundamental rules of the legal system, at the 'specification' and the 'extraction' levels.

Constitution (1996).

118 Dworkin, above n 16, 51.

119 Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2, 2-24, at 12. It must be stressed, however, that Waldron does not believe that this approach to legal interpretation should be adopted.

120 Shapiro, above n 1, 305.

Shapiro needs to answer, therefore, the following two questions: How can we know who is authorised to make the move from the 'second' to the 'first' stage of interpretation? Does it make any practical difference if we distinguish between the two stages and if we make the move from the 'second' to the 'first' stage of legal interpretation?

As to the first question, Shapiro does not give a direct answer, but I think that he is probably thinking that it is the legal official herself who is going to decide which interpretive theory best fits the economy of trust of her legal system, for otherwise the Planning Theory would be impliedly advocating a sort of Platonic government of 'philosophers' and legal theorists, which is at odds with the ambition of the planning theory to free the interpretation of legal statutes from moral, political and philosophical considerations. Shapiro cannot be thinking that it is up to a legal theorist to determine which interpretive theory best fits a given legal system because this answer would dismiss his very strong claim that the law should be interpreted from the 'point of view' of the legal system, rather than from abstract philosophical considerations about the nature of legal argument. Yet if every judge or legal official is authorised to embark on a constructive interpretation to decide which interpretive theory is more appropriate to the legal system, then Shapiro is giving us no more than an illusion of methodological certainty, since this argument already presupposes that the choice of the interpretive theory is just a part of the reasoning process that judges have to take up in order to lay down valid and properly justified decisions.

The second question, in turn, could only be answered in the affirmative if in the previous answer we had said that the judge was not authorised to balance interpretive methodologies before she reached a decision about which interpretive methodology she would employ. But since this answer is not allowed by the planning theory, this theory is no less evaluative, abstract and philosophical than Dworkin's model of law as integrity. Since every judge is authorised at any time to move from the 'second' to the 'first' stage of legal interpretation, this distinction does not make any practical difference because every judge remains enjoying the same interpretive freedom as before.

3. Concluding remarks

Shapiro's Planning Theory of Law has gained a lot of attention from the academic community, and I will not be surprised if *Legality* becomes one of the most influential books on jurisprudence of the coming decades. It has attracted, as one would expect, all sorts of criticisms. Some have argued that Shapiro is not fair to Hart on the criticisms that he addresses to his

theory of the rule of recognition as a social norm.[121] Others have argued that Shapiro is wrong when he claims that the attitude of fidelity to the 'legal point of view' is enough to explain how the moral legitimacy of legally authoritative directives is obtained.[122] Others, finally, have criticised Shapiro for neglecting the importance of coercion as an ingredient of legality.[123] Neither of these criticisms, however, have been discussed here. Instead, I prefer to take a more general look on Shapiro's fundamental thesis on the nature of plans and on the interpretive issues that he touches upon in his book. I relied, in part, on some of Waldron's insights on the connection between the Planning Theory and normative positivism,[124] and then attempted to demonstrate how this bears on the meta-interpretation proposed by this theory.

My conclusion is that the Planning Theory touches on very important points and is a valuable contribution to the development of legal theory. Nevertheless, it must be revised on several issues which refer, in their majority, to the methodological essentialism that underlies the book. Firstly, the Planning Theory should be able to recognise that, in the end, it is a form of normative positivism, and hence that its foundations lie on a moral proposition about how the law is to be understood. Secondly, it should give up the very ambitious claim that it is actually revealing a 'philosophical truth' about the 'essential properties' or the 'fundamental nature of law,' which seems to presuppose that the law is a physical entity that is 'out there' to be discovered independently of our attitude towards it. Thirdly, it should give up the Moral Mandate Thesis and find a better explanation for the presence of moral concepts in written legislation and in the fundamental rules of the legal system. Even if it insists on that thesis, it must at least give us a clue on how legal officials ought to decide moral disputes in such a way that does not violate the SLOP argument. And finally, it must recognise that its meta-interpretive theory requires the same sort of constructive interpretation as other hermeneutic theories such as Dworkin's law as integrity. All of this poses, to be sure, a relevant challenge to the theory.

However, if we rewrite Shapiro's Planning Theory as a genuine normative or prescriptive theory of law and legal reasoning, we may find in

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121 Stefan Sciaraffa, 'The Ineliminability of Hartian Social Rules' (2011) 31 *Oxford Journal of Legal Studies* 603.

122 Veronica Rodriguez-Blanco, 'The Moral Puzzle of Legal Authority: A Commentary on Shapiro's Planning Theory of Law' in Stefano Bertea and George Pavlaklos (ed), *New Essays on the Normativity of Law*, (2011), 86 f.

123 Frederick Schauer, 'Best Laid Plans' (Review Essay) (2010) 120 *Yale Law Journal* 586.

124 Waldron, above n 100.

it a good starting point for the choice of a positivist theory of legal interpretation that can take the institutional capacities of the legal officials seriously, and that explains the relations of mutual dependence between one's jurisprudential theories about the nature of law and one's interpretive approaches to legal reasoning. Shapiro's insight that legal interpretation depends on the economy of trust of the legal system is beyond any doubt an important ingredient to construct a sound interpretive theory of legal interpretation. Perhaps Shapiro's most important contribution to legal interpretation is not to show that Dworkin is wrong because his method entails that judges undertake abstract philosophical reasoning, but rather to bring our attention to the distribution of trust and distrust contained in the fundamental norms of the legal system, which is indeed an important factor that should play a part in legal interpretation.