LIVING TOGETHER WITHIN A LEGAL PRACTICE:
A THEORY OF LAW AS COLLECTIVE INTENTIONAL ACTIVITY

By
CARLOS BERNAL

A DISSERTATION PRESENTED TO THE GRADUATE SCHOOL
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

2011
To Maria, Maria, and Manuela
ACKNOWLEDGMENTS

This project would not have been possible without the support of a number of institutions and people. Funding for undertaking and completing my PhD has been provided by the University Externado of Colombia (Bogota), the Department of Philosophy at the University of Florida, the Fulbright Commission, the Legal Scholarship Fund of New South Wales (Australia), and Macquarie University by means of a Macquarie Research Development Grant. For comments on the overall project as well as on early drafts of some specific parts, I am grateful to Scott Shapiro, Brian Bix, David Copp, Marina Oshana, Denise Meyerson, Larry Solum, Kevin Walton, Ryan Zarhai, the participants in my lectures at the Annual Conference of the Australian Society of Legal Philosophy held at the Melbourne Law School (June 2010), at the Julius Stone Institute of Jurisprudence of the Law School of the University of Sydney (April, 2011), and at the Centre for Research Excellence in Legal Governance (Core) of the Macquarie Law School (May, 2011). I am also grateful to Stanley Paulson and Robert Alexy, my academic mentors during the last thirteen years, for their constant encouragement and for sharing their wisdom with me. My most special thanks are to my supervisor, Prof. Kirk Ludwig, for his support and guidance.

This dissertation is dedicated to my wife, Maria (whose unconditional support to me has made of this project a joint activity), and our two little girls, Maria and Manuela. They are my (abundantly, exceedingly, above and beyond!) blessing and my treasure. Their love is my foundation, and their lives are my inspiration to keep pressing forward.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>4</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>7</td>
</tr>
<tr>
<td>CHAPTER</td>
<td></td>
</tr>
<tr>
<td>1 IN SEARCH OF THE ONTOLOGICAL STRUCTURE OF LAW</td>
<td>8</td>
</tr>
<tr>
<td>Dworkin's Challenge</td>
<td>8</td>
</tr>
<tr>
<td>Law as Social Practice</td>
<td>15</td>
</tr>
<tr>
<td>2 AUSTIN AND HART: CONCEPTUAL INTERPRETATIONS OF THE SOCIAL</td>
<td>27</td>
</tr>
<tr>
<td>PRACTICE THESIS</td>
<td></td>
</tr>
<tr>
<td>Methodological Assumptions of the Conceptual Approach to the Social</td>
<td>27</td>
</tr>
<tr>
<td>Practice Thesis</td>
<td></td>
</tr>
<tr>
<td>Austin and Law as the Habit of Obedience to the Sovereign</td>
<td>37</td>
</tr>
<tr>
<td>Hart and the Acceptance of Rules</td>
<td>42</td>
</tr>
<tr>
<td>3 THE PLANNING THEORY OF LAW</td>
<td>58</td>
</tr>
<tr>
<td>Methodological Background</td>
<td>58</td>
</tr>
<tr>
<td>Philosophical Background</td>
<td>59</td>
</tr>
<tr>
<td>Shapiro on Plans</td>
<td>64</td>
</tr>
<tr>
<td>Legal Activity as a Form of Social Planning</td>
<td>66</td>
</tr>
<tr>
<td>Essential Properties of Law</td>
<td>67</td>
</tr>
<tr>
<td>Coercion is not an Essential Property of Law</td>
<td>67</td>
</tr>
<tr>
<td>The Moral Aim Thesis</td>
<td>69</td>
</tr>
<tr>
<td>Fundamental Rules of Legal System as Shared Plans</td>
<td>70</td>
</tr>
<tr>
<td>The Possibility of Legal Authority</td>
<td>71</td>
</tr>
<tr>
<td>Normativity of Law</td>
<td>71</td>
</tr>
<tr>
<td>Some other Specific Features of Law as Social Planning</td>
<td>73</td>
</tr>
<tr>
<td>An Assessment of the Planning Theory of Law</td>
<td>75</td>
</tr>
<tr>
<td>Skepticism about Law As a Collective Intentional Activity</td>
<td>75</td>
</tr>
<tr>
<td>Evaluating Smith’s Objections</td>
<td>83</td>
</tr>
<tr>
<td>The Specific Properties of Law</td>
<td>89</td>
</tr>
<tr>
<td>Coercion and the Moral Aim of Law</td>
<td>90</td>
</tr>
<tr>
<td>Planning for Others and the Normativity of Law</td>
<td>94</td>
</tr>
<tr>
<td>Final Remarks on Shapiro’s Planning Theory of Law</td>
<td>95</td>
</tr>
<tr>
<td>The Ontological Structure of Legal Practice as a Collective Intentional</td>
<td>98</td>
</tr>
<tr>
<td>Activity: Desiderata</td>
<td></td>
</tr>
</tbody>
</table>
4 DWOR e AND LEGAL PRACTICE AS AN ARGUMENTATIVE SOCIAL PRACTICE

Reflective Equilibrium ........................................................................................................ 100
   The Concept of Reflective Equilibrium ........................................................................ 100
   Reflective Equilibrium and the Nature of Law .......................................................... 105
The Argumentative Nature of Legal Practice ................................................................. 106
An Assessment of the Argumentative Nature of Legal Practice ..................................... 110

5 LEGAL PRACTICE AS A COLLECTIVE INTENTIONAL ACTIVITY ...................... 115

A Concept of Intentional Action ...................................................................................... 116
The Event Analysis of Action Sentences ........................................................................ 117
A Concept of Action ......................................................................................................... 120
   Actions are Events ........................................................................................................ 121
   Negative Actions as the Upholding of States ............................................................. 121
   The Differentia Specifica of Actions .......................................................................... 123
A Concept of Intention ...................................................................................................... 127
Conclusion: A Concept of Intentional Action ................................................................. 128
A Concept of Collective Intentional Action .................................................................. 129
Legal Practice as a Collective Intentional Activity ....................................................... 134

6 CONCLUSIONS ............................................................................................................ 151

LIST OF REFERENCES ..................................................................................................... 165

BIOGRAPHICAL SKETCH .............................................................................................. 171
This investigation offers a theory of the law as a normative collective intentional activity. My central claim is that law has the ontological structure of a normative social practice of creating, adjudicating, enforcing, and following patterns of behavior. On the basis of some elements of theories of social ontology, I account for this practice as a collective intentional activity recurrently and continually performed by officials and citizens together.
CHAPTER 1
IN SEARCH OF THE ONTOLOGICAL STRUCTURE OF LAW

Dworkin’s Challenge

During the last three decades jurisprudence has turned its gaze to its own methodology. There has been an increasing interest on the part of legal theorists in methodological questions such as: What is jurisprudence? What are its objects and its purposes? and How should a jurisprudential inquiry be conducted? The point of these questions is to understand the kind of enterprises legal theorists are engaged in, and to assess the plausibility of their methodological choices, their rationales for them, and their connection to their theoretical results.

Methodological reflection on jurisprudence has experienced a remarkable revival since the debate between H.L.A. Hart and Ronald Dworkin. One of the central issues of this debate is whether a general theory of law can be descriptive. In the Postscript to The Concept of Law, Hart explains that his aim was to “provide a theory of what law is which is both general and descriptive.”¹ He further clarifies this by noting that his theory is descriptive in the sense that:

it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in [his] account of law…²

In the revised text of his Hart Lecture, delivered at Oxford in 2001, Dworkin challenges the possibility of a descriptive general theory of law. He argues that:

a general theory about how valid law is to be identified, like Hart’s own 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. If so, then a legal theory itself rests on moral and ethical judgments and convictions.³

Dwokin invokes two arguments supporting this claim. First, he claims that a Hart-style theory is about the nature of the concept of law, which is a political concept, and theories about the nature of these concepts (such as justice, liberty equality, democracy, and law) are necessarily non-descriptive in the sense above stated.⁴ Dworkin thinks that these theories are necessarily interpretive, that is to say, they necessarily depend, at least in part, upon certain evaluative facts.⁵ Accounting for the nature of the concept of law necessarily entails engaging in normative or practical argument. Defending an account of it “can only mean defending a controversial theory of political morality”.⁶

The second argument is that ‘descriptive’ is ambiguous, and each of the senses in which we might understand the project of describing law “proves patently inapplicable.”⁷ Such a project might either consist of a “semantic analysis” “aiming to uncover the

---

³ Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 (1) OXFORD JOURNAL OF LEGAL STUDIES 2 (2004). Reprinted in: RONALD DWORIN, JUSTICE IN ROBES 140-186 (2006). The passage is at 140–141. Hereinafter I will quote this article from *Justice in Robes*. Dworkin did not explicitly claim that descriptive jurisprudence is impossible. However, this seems to be a fair interpretation of his rejoinder to Hart. This interpretation can be drawn from Dworkin’s characterization of a Hart-style theory as an (evaluative) interpretation and not as a mere description of legal practice, and from his judgment that ‘Hart’s ambition of a purely descriptive solution to the central problems of legal philosophy is misconceived’. See, Ibid. 143

⁴ RONALD DWORIN, JUSTICE IN ROBES 149 (2006) (and at 162 on law as a political concept).


⁶ DWORIN, JUSTICE FOR HEDGEHOGS 404 (2011).

⁷ DWORIN, JUSTICE IN ROBES 147 (2006).
criteria that ordinary people actually use […] when they describe something” as legal or illegal; or it might be a “structural project,” one that “aims to discover the true essence of what people describe in that way”; or it might search for an “empirical,” “statistical,” “historical,” “sociological” or “anthropological” generalization of what people regard as law.  

By means of the argument from theoretical disagreement and the semantic sting argument, Dworkin endeavors to show that the project of semantic analysis cannot succeed. The point of this project is to uncover some shared criteria determining when propositions of law are true – that is to say, propositions that the law prohibits, commands or permits certain actions, or attribute powers to someone. Dworkin denies the existence of such shared criteria, which he calls the grounds of law. He maintains that there is disagreement among legal practitioners about the grounds of law. Dworkin refers to it as theoretical disagreement. He also seems to regard the grounds of law as the criteria providing the meaning of the word ‘law’, and establishing when a use of this word is correct. Hence, there is also disagreement about the criteria that provide the meaning of the word ‘law’. Consequently, the project of semantic analysis cannot be

---

8 RONALD DWORKIN, JUSTICE IN ROBES 150 (2006).


10 Dale Smith illuminates the double role of these criteria, namely, that Dworkin treats the criteria contained in the rule for using the word ‘law’ as also setting out the grounds of law. See Dale Smith, Theoretical Disagreement and the Semantic Sting, 30 (4) OXFORD JOURNAL OF LEGAL STUDIES 645 (2010). An example will illustrate this double role. Let us suppose that justice is a criterion providing the meaning of ‘law’. Then, ‘law’ would mean a just entity with such and such additional properties. The expression: ‘Just law’ would be redundant, and ‘unjust law’ would be an oxymoron. Accordingly, a claim of law should be accepted if and only if it is just, and a proposition of law, according to which ‘the law prescribes X’, would be true if and only if prescribing X is just.

11 For a discussion on this connection between criteria setting out the grounds of law, on the one hand, and the meaning of the word ‘law’, on the other hand, and on its use as an objection to legal positivism,
successful in describing the nature of law because there is nothing certain to describe. There are no secure shared criteria in the background of our use of the word 'law' that might reveal to us the nature of law. And even worse, since the project of semantic analysis presupposes the existence of these shared criteria, it misses accounting for an important element of the nature of law: precisely, accounting for the existence of theoretical disagreement.  

Concerning the project of “empirical” generalization, Dworkin says that Hart’s theory is not the result of any empirical study, and that, even if that were the case, it would fail as an account of the nature of law because, arguably, there are counter-examples to it, that is, there are propositions of law that are considered to be true, but which fail to meet the criteria of Hart’s theory of law (the criteria of the sources thesis, i.e., that there is a rule of recognition, accepted by the legal officials that makes claims of law true).  

Finally, Dworkin also holds that the “structural project” fails. This project consists in finding out certain kind of facts that define the essence of certain objects and, consequently, establish under which conditions a concept is correctly applied to talk about it. Dworkin’s views on this issue are complex. On the one hand, he thinks that this project, as a descriptive project, is only plausible for accounting for natural kinds. For instance, it is plausible for scientists to hold that certain facts (like a particular DNA
sequence) define the essence of a tiger, and for them to establish that the concept of tiger is correctly used if and only if it is attributed to an animal with the DNA of a tiger. Dworkin claims that the idea that we can discover a similar ontological structure in non-natural kinds, like law, “by some wholly scientific, descriptive, non-normative process” is “nonsense.”\(^\text{14}\) Along the same line of thought, in “Thirty Years On” Dworkin argues that the claim that law has an ontological structure that can be exposed purely through description is a “mysterious idea.” Only natural kinds have a describable essence:

> Atoms and animal DNA have inherent physical structures, and it makes sense to suppose that these structures dictate the ‘essence’ of hydrogen or of a lion. But there is nothing comparable about a complex social practice.\(^\text{15}\)

Nevertheless, Dworkin does not provide any argument supporting this skeptical claim. He only suggests that a dilemma would arise, at this point, and both of the horns would lead to a closed road. One possibility consists of understanding law as a natural kind. Dworkin is right when he categorically rejects this implausible alternative.\(^\text{16}\) The other possibility is thinking that there could be such a thing like an ontological structure of non-natural kinds like law that is describable. However, Dworkin says that this approach would lead us again to the semantic analysis that he rejects. Searching for the ontological structure of law, understood as a descriptive enterprise, would only be successful in case it were possible to formulate an account of what makes one feature of a social arrangement essential to its character as law whilst other features merely

\(^\text{14}\) RONALD DWORKIN, JUSTICE IN ROBES 152 (2006)


\(^\text{16}\) RONALD DWORKIN, JUSTICE IN ROBES 166 (2006): ‘We need not pursue this […] because Hart could not have thought that true claims of law form a natural kind. If liberty has no DNA, neither does law’.
contingent. Dworkin thinks that this account could only come from a reflection on the meaning of the word ‘law’, and that, again, this reflection would not lead to any reliable result due to the lack of shared criteria about the right use of it.

On the other hand, Dworkin seems to admit that law has an essence or an ontological structure. He contends that political concepts and values (like, in his view, freedom, justice, or law) are “real.” They have a “deep structure.” However, their ontological structure is different from the ontological structure of natural kinds. It is not “physical” but “normative.” In any case, it might be exposed:

just as a scientist can aim [...] to reveal the very nature of a tiger or of gold by exposing the basic physical structure of these entities, so a political philosopher can aim to reveal the very nature of freedom by exposing its normative core.

Dworkin’s views on the structural project raise, at least, two kinds of questions: one substantive and the other methodological. The central substantive questions are:

Does law have indeed an ontological structure? If so: What is it? And the central methodological question is: How can this ontological structure be known, or, as Dworkin puts it “revealed”? By means of a conceptual methodology? Or, as Dworkin suggests, by means of an interpretive methodology?

18 RONALD DWORKIN, JUSTICE IN ROBES 154 (2006).
21 With skepticism, Dennis Patterson puts this question as follows: “How is the deep structure of political concepts revealed?” “What is Dworkin’s normative analogue to DNA, atomic number and molecular formula?” See Dennis M. Patterson, Dworkin on the Semantics of Legal and Political Concepts, 26 (3) OXFORD JOURNAL OF LEGAL STUDIES 553 (2006).
22 There is certainly a third possibility that I will not take into account here, namely, the possibility of finding the ontological structure of law by means of an empirical methodology. On this possibility, see BRIAN LEITER, NATURALIZING JURISPRUDENCE. ESSAYS ON AMERICAN LEGAL REALISM AND
These two questions are inextricably linked. The plausibility of every answer to the substantive question is contingent upon the plausibility of the methodological approach, which, in turn, leads to every answer to the substantive question.

In principle, the intuition that law is real, and has an ontological structure seems plausible. Legal facts, like the fact that I am married or that Barack Obama is the President of the United States are real. They have an impact on lives that sometimes is even greater than natural facts. Moreover, they entail certain legal entities in the world, like courts or parliaments, whose existence is undeniable. Finally, we already have some unquestionable intuitions regarding the possibility of an ontology of law. As Michael Moore points out, legal ontology includes “entities, such as laws; properties (qualities, sets, classes), such as legal validity; and relations, such as legal obligations from one person to another.” Nevertheless, it is not clear how the ontological structure of law can be revealed by means of the conceptual strategy or by means of the interpretive methodology. In fact, those methodologies give rise to the following puzzle that can be called the puzzle of the ontological structure of law:

Since theoretical disagreement exists, on the one hand, it can be claimed that there are no shared criteria determining an ontological structure of law, one which can be revealed by means of conceptual analysis, and conceptual analysis cannot account for an important feature of legal practice, namely, the existence of theoretical disagreement. However, the fact that there is disagreement over conceptual analysis

---


does not entail that there is not a correct analysis and that the correct analysis reflects the share conceptual competency of all parties to the theoretical disagreement. What is needed is just a distinction between two different forms of knowledge, knowledge of how to deploy the concept of law, which is not fully propositional, and a theoretical description of the conceptual application conditions that the competence underwrites. Discovery of the latter can be a difficult matter, the possibility of which is underwritten by shared competence, but which can certainly give rise to theoretical disagreement as theorists try to sort out the structure of a complex domain by trying to uncover their intuitive understanding of it.\textsuperscript{24} It is no more surprising that there should be theoretical disagreement in this case than in the case of physics, nor any more pessimism about ultimately coming to the right view. On the other hand, interpretive theories can overcome this problem, and can account for theoretical disagreement, in part, because they are just controversial theories of political morality. However, for this same reason they cannot account for the reality of law, whose existence is not controversial at all.

**Law as Social Practice**

With this background, this dissertation aims to explore a common answer to the question of the ontological structure of law. This answer is that the nature of law, understood as a set of rules and principle of a special kind, is grounded on a social practice. Let me refer to this as the social practice thesis.

The concept of a social practice might be, and has been, interpreted in many ways. For the purpose of this dissertation, I will use a very broad and inclusive conception of social practice, according to which it is as a set of recurrent collective

\textsuperscript{24} I thank Kirk Ludwig for his remarks on this distinction.
intentional actions (i.e., it involves the recurrence of types of collective intentional actions). There are also several accounts of the concept of collective intentional action. However, there are at least two necessary conditions that are common to the most emblematic accounts of collective intentional actions:

1. The action must be performed by several individual agents acting together as a group. A collective action is neither an action of a collective agent with its own mind and its own intentions nor the mere addition of parallel and unrelated actions of several individual agents.

2. Individual agents acting together must act in accordance with, and because of, some appropriate we-intentions. We-intentions are intentions with a special content. Their content entails that the group performs the relevant action by means of the appropriate individual actions of its members.

In addition, typically, individual agents acting together must share appropriate knowledge about the performance of the action by the group, and the we-intentions of its members.

Understood with the help of this broad conception of social practice, the social practice thesis claims that the ontological structure of law is a recurrent set of collective intentional actions performed by certain appropriate individual agents together, acting as a group, in accordance with, and because of, some appropriate we-intentions, and sharing appropriate knowledge about the performance of the action by the group, and the we-intentions of its members. Theories of law endorsing, explicitly or implicitly, the

---


26 For a summary, and an assessment of these accounts, see: KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 210 f. (2011).

27 On these elements, and their relevance for the purpose of accounting for the nature of law, see: Rodrigo Sanchez Brigido, Collective Intentional Activities and the Law, 29 (2) OXFORD JOURNAL OF LEGAL STUDIES 305-306 (2009).

28 KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 168 (2011).
social practice thesis purport to account for what kind of agents do participate in it. What is the content of their we-intentions? How do they share appropriate knowledge of what they are doing together? How do they relate to each other in a group or in groups in order to build legal institutions? How does normativity arise within this institutional framework? And how is it possible to distinguish legal practice from other kind of social practices and collective intentional activities?

To be sure, relevant authors have endorsed alternative views on the ontology of law, e.g. that law is a form of social control, a structure of commands, norms, rules or principles, or a means for the institutionalization of reason, justice, morality or correctness.\(^{29}\) However, there are at least three reasons to consider the understanding of law as social practice as a relevant candidate for the purpose of the structural project in jurisprudence. First, this understanding is central to the other mentioned alternative candidates. Achieving social control or social order is an aim of the social practice of law.\(^{30}\) Creating, following and adjudicating legal commands, norms, rules and principles are a part of the content of this social practice. And the claim that law institutionalizes reason, justice, morality or correctness, or ought to do it, makes only sense if understood as the claim that the social practice of law actually does or ought to do it.

Second, the concept of law as social practice is also essential to the accounts of the nature of law as presented by the two main kinds of theories in jurisprudence: legal positivism and legal non-positivism. The central thesis of theories of positivistic tradition

\(^{29}\) On these different accounts of the ontology of law, see, among many others: HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 556 (1949); and, more recently, Brian Tamanaha, Law, in OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY Volume 4, 17–23 (Stanley N. Katz ed., 2009).

\(^{30}\) For a suggestion on it, see EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 24 (1936).
is the so-called *separability thesis*. According to the reading of this thesis by authors endorsing inclusive legal positivism, it states that “morality is not necessarily a condition of legality”\(^3^1\) or, as Hart described it: “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.”\(^3^2\) Exclusive legal positivist theories adopt this thesis in the sense that “determining what the law is does not […] conceptually, depend on moral or other evaluative considerations about what the law ought to be.”\(^3^3\) If this is true, then, morality can never be a condition of legality.\(^3^4\) In any case, both kinds of legal positivist theories claim that the possibility of law must be explained in terms of social facts. This is called the social facts thesis.\(^3^5\) There is disagreement between legal positivists about what are the social facts relevant to determining what the law is. However, some of the most emblematic accounts of legal positivism are based on the belief that these social facts creating the possibility of law structure a social practice or a social institution. Just to quote some examples, in the *Postscript* to *The Concept of Law*, Hart claimed that the aim of his theory was to “give an explanatory and clarifying account of law as a complex social and political institution

---


\(^3^4\) See: JOSEPH RAZ, *THE AUTHORITY OF LAW* 38 (2009): “[t]he law’s conformity to moral values and ideas is not necessary […] There can be no argument that of necessity the law has moral merits”.

\(^3^5\) On this thesis and its importance to legal positivism, see, JOSEPH RAZ, *THE AUTHORITY OF LAW* 37 (2009): “what is law and what is not is a matter of social facts”; and Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 115–116 (Jules Coleman ed., 2001): the social fact thesis states that “law’s possibility must be explained in terms of social facts. Nothing is more important to legal positivism.”
with a rule-governed (and in that sense "normative") aspect."\textsuperscript{36} In the same direction, Raz states that "[a]t its most fundamental, legal philosophy is an inquiry into the nature of law, and the fundamental features of legal institutions and practices."\textsuperscript{37} Finally, Coleman says that: "The aim of jurisprudence is to shed light on actual legal practice."\textsuperscript{38}

The central thesis of theories belonging to a non-positivistic tradition (the theory of natural law is one of these theories) is the \textit{connection thesis}. This thesis states that there is a necessary connection between law and morality. In the words of one of the authors endorsing non-positivism, the connection thesis states that "there is a necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other."\textsuperscript{39} Generally, non-positivist authors accept that law has a factual or institutional dimension.\textsuperscript{40} This institutional dimension involves a social practice. However, contrary to legal positivism, they think that this institutional dimension does not exhaust the nature of law, for it is conceptually connected to an ideal or critical dimension of justice, morality or correctness. According to some versions of non-positivism, this connection is


\textsuperscript{40} See, Robert Alexy, \textit{The Dual Nature of Law}, 23 (2) RATIO JURIS 173 (2010).
such that if a practice that has the characteristic features of a legal practice were extremely unjust it would not qualify as a law.41

In any case, the existence of the institutional dimension of law also highlights the central role of the understanding of law as a social practice for non-positivistic accounts on the nature of law. This central role also shows itself, in a clear way, in Law’s Empire, where Dworkin recognizes that law is a “social phenomenon,”42 points out that the "[g]eneral theories of law ... aim to interpret the main point and structure of legal practice,"43 and claims that, on his view, unlike other social phenomena, legal practice is “argumentative”;44 and in a passage of Justice in Robes in which he explains that interpretive concepts —like, from his perspective, the concept of law— “encourage us to reflect on and contest what some practice we have constructed requires”:45

the […] concept of law functions as an interpretive concept, at least in complex political communities. We share that concept as actors in complex political practices that require us to interpret these practices in order to decide how best to continue them, and we use the […] concept of law to state our conclusions. We elaborate the concept by assessing value and purpose to the practice…46

Finally, this centrality is implicitly present too in the most recent enunciations of the natural law theory. Regarding this point, John Finnis maintains that law has a dual

42 RONALD DWORKEIN, LAW’S EMPIRE 13 (1986).
43 RONALD DWORKEIN, LAW’S EMPIRE 90 (1986).
44 RONALD DWORKEIN, LAW’S EMPIRE 13 (1986).
45 RONALD DWORKEIN, JUSTICE IN ROBES 10 (2006).
46 RONALD DWORKEIN, JUSTICE IN ROBES 10 (2006).
character. It is at the same time a social practice and a set of reasons for actions. In particular, he claims that:

Natural law theory accepts that law can be considered and spoken of both as a sheer social fact of power and practice, and as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them. This dual character of positive law is presupposed by the well-known slogan “Unjust laws are not laws.”

And that:

Natural law theory of law has its most distinctive characteristic in its account of purely positive law which, though “entirely” dependent for its legal status on the fact that it has been authoritatively posited by some persons(s) or institution, nonetheless shares in law’s characteristic of entailing — albeit presumptively and defeasibly — a moral obligation of compliance.

Even Finnis, then, recognizes that the legal status of the entities that we call ‘law’ depends on their institutional creation.

And just to mention another example, let us consider Mark Murphy’s formulation of the natural law thesis as: “necessarily, law is a rational standard for conduct.” Murphy explains that this thesis allows for a strong and a weak interpretation. What is relevant for our purposes is the central role that the pre-theoretical understanding of law as legal practice plays in both interpretations. According to the strong interpretation:

…the fact that it is of the nature of law to provide a set of standards that rational agents should take as a guide to their conduct entails that any standard that rational agents could not take as a guide to their conduct is not law but is simply invalid.

---


49 Mark Murphy, Natural Law Jurisprudence, 9 LEGAL THEORY 244 (2003).

50 Mark Murphy, Natural Law Jurisprudence, 9 LEGAL THEORY 244 (2003).
Murphy suggests that a correct reading of this interpretation would entail that unjust, unreasonable laws or “laws unbacked by decisive reasons for action”, like the Fugitive Slave Act of 1850— that required citizens not to hinder and even to aid federal marshals who sought to return runaway slaves to bandage— “lack some feature whose assumed presence is central to any practice that would count as the practice of law.” This suggestion shows that even for this strong reading of the natural law thesis, the project of jurisprudence entails giving an account of legal practice. A theory of natural law endorsing this thesis should elucidate what can count as legal practice. Such account would be more demanding for this version of the theory of natural law, for it would also require for the inquirer to explain the admissible standard of reasonableness that legal practice should bear.

A similar assessment might be given to the weak interpretation of the natural law thesis, according to which any standard that rational agents could not take as a guide of their conduct is law but defective law. Here again a detailed explanation of this view would imply giving an account of legal practice and this account should also explicate the differences between defective and non-defective legal practices, and the nature and the extend of the possible defects that could affect them.

Third, the social practice thesis seems to be in line with important developments in social ontology that are having great impact across all social sciences. This thesis is grounded in the idea that the reality of law depends on the ability that we, as human beings, have to act collectively, that is to say, as members of groups or plural subjects.

---

This ability is called sociality.\textsuperscript{54} The exercise of this ability allows us to create a special part of reality, which might be called social reality. By means of our acting together, in groups, we are able to create social facts—like the facts that there is a state called Italy, that Barack Obama is the current President of the United States, and that the Peso is the official currency of Colombia—and institutions—like language, states, social clubs and churches. Social facts and institutions belong to social reality, a part of reality which exists in addition to physical reality. Entities belonging to social reality are epistemologically objective but ontologically subjective. They are no less objectively knowable than natural and physical objects, yet their existence depends on the subjectivity of human minds and, in particular, on certain subjective attitudes (like we-intentions) of agents participating in practices in which they arise.\textsuperscript{55} For instance, the fact that Barack Obama is the actual President of the United States is no less objectively knowable than the fact that there is a tree in the garden outside of my house. But the existence of this social fact depends on certain subjective attitudes of certain relevant individuals involved in a practice in which they recognize Barack Obama as the President, and accord certain status to the rules belonging to the Constitution of the United States of America as statements that legitimately determine who is empowered as the President of the country.


\textsuperscript{55} JOHN SEARLE, MAKING THE SOCIAL WORLD 1 f. (2010).
Work by Michael Bratman, Margaret Gilbert, Seumas Miller, John Searle, and Raimo Tuomela\textsuperscript{56} during the eighties and nineties have laid down the foundational principles of social ontology. Increasingly, since that time, more and more philosophers and social scientists have been discussing these principles,\textsuperscript{57} and applying them to account for the ontological structure of a great variety of social phenomena: from communication, technology, music, art, language, emotions, and violence, to values, the concepts of citizenship, human rights, government, legislation, corporations, and other political, and legal institutions.

With the intuition in mind that law belongs to social reality, some legal theorists have also exploited foundational work in philosophy on social ontology in explaining the nature of law as a social practice. Naturally, some of the ideas of these accounts are not entirely new. Ideas associated with the social practice thesis are already to be found in


classic legal theories of law. Examples of this are Austin’s idea of habits of obedience, and Hart’s suggestions according to which the acceptance of rules entails the existence of a general social practice, and that legal systems are grounded in the social practice of legal officials of accepting a rule of recognition specifying the ultimate criteria of legal validity. However, more accounts have arisen in recent times, such as the account by Christopher Kutz in *Complicity*, the one by Rodrigo Sanchez Brigido in *Groups, Rules and Legal Practice*, and the “planning theory of law,” a very sophisticated account of the nature of law grounded on Bratman’s theory of social ontology, introduced by Scott Shapiro in his recent book: *Legality*.

In this dissertation, I will examine the most emblematic positivistic interpretations of the social practice thesis that are to be found in the theories by Austin, Hart and Shapiro. I will also assess the interpretation of the social practice thesis by Ronald Dworkin, and the methodological presuppositions of all these interpretations. I will explain how these interpretations have tried to solve the puzzle about the ontological structure of law. My main purpose is to use some of the basic concepts developed in social ontology for achieving a better understanding of the theories by Austin, Hart, and Shapiro as interpretations of the social practice thesis. Then, I will present the basis of a positive account of the law as a social practice which aims to resolve some difficulties which extant approaches face. I will accomplish this goal as follows:

60 CRISTOPHER KUTZ, COMPLICITY (2000)
61 RODRIGO E. SANCHEZ BRIGIDO, GROUPS, RULES AND LEGAL PRACTICE (2010)
In Chapter 2, I will examine the interpretations of the social practice thesis by Austin and Hart, developed by means of a conceptual approach. In Chapter 3, I will examine the planning theory of law by Scott Shapiro. In Chapter 4, I will consider the view by Dworkin, based on an interpretive approach. And in Chapter 5, I will present my own view, which tries to solve some of the flaws that are to be found in the examined theories. Finally, in Chapter 6, I will state the conclusions of this investigation.
CHAPTER 2
AUSTIN AND HART: CONCEPTUAL INTERPRETATIONS OF THE SOCIAL PRACTICE THESIS

Methodological Assumptions of the Conceptual Approach to the Social Practice Thesis

Before examining the most emblematic conceptual interpretations of the social practice thesis, it is necessary to understand the methodological assumptions that they use as points of departure. Certainly, there are differences between the various accounts. However, there are at least four presuppositions that are common to the theories under consideration here.

First, conceptual theories do not just aim at elucidating the meaning or the meanings of the word ‘law’ but to account for law as the object or the entity that is the referent of this word. They are not lexicographical but ontological theories. The ontological project is usually understood as aiming to reveal the nature of law.

Second, they purport to grasp the reality of law by understanding the concept of law. The basic assumption is that concepts mediate between thought and language, on the one hand, and entities of the world, on the other. Concepts are common elements in distinct thought contents which help to determine what those thoughts are about or involve. The belief that A loves B and the belief that B loves A are distinct, but they share in common, and both deploy, the concept of love, and in virtue of that represent

---


2 This, despite the fact that considerations related to the use of words play an important role in the analysis. As J. L. Austin puts it: we “are looking not merely at words… but also at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena.” See: A Plea for Excuses, 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 8 (1956-1957).
something about what stands in the relation of loving in the world. Similarly, the beliefs that what John did was legal and the belief that what John did was not legal share the concept of legality. The one represents John’s action as having the property of being legal, and the other as not having that property. An analysis of the concept of law, then, aims to determine what properties the entity we call law has, and what kinds of entities can count as law, by means of understanding how the concept of the law is deployed in people’s beliefs about it.  

Third, conceptual theories always begin with a pre-reflective understanding of law. For the sake of the analysis, they assume first a paradigm of what law is, and then they inquire about the shared intuitions associated with it. In our times, the paradigmatic case of law is the law created by the state.

Fourth, conceptual approaches seek to explain the nature of law by means of identifying its essential properties. They aim to state a set of “propositions about the law which are necessarily true” or a set of “necessary truths about the law.” These propositions are about the properties that law has necessarily, i.e. the properties without which an entity would not be law but a different entity. These are the properties

---

3 Kenneth Einer Himma, Reconsidering a Dogma: Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy, in LAW AND PHILOSOPHY. CURRENT LEGAL ISSUES 4 (Michael Freeman and Ross Harrison, eds., 2007).


conferring on law its essence, its “identity,”\(^8\) or, in other words, the “essential” properties of law.\(^9\)

In relation to this, particular social facts determine particular properties of every legal practice in this country or in that community, as, for instance, that Islamic law is based on the *Sharia* (the concrete expression of God’s guidance for humanity) or that customary law of the aboriginals of Australia is influenced by their belief that the land and its creatures were created by the actions of ancestral, totemic beings in the “Dreamtime,” a set of events that happened in the past but can be made present through the performance of rituals, and that is the source of rules governing social relations. As Raz explains, parochial social facts like these “do not determine the nature of law, they only affect its instantiation.”\(^{10}\) If this is true, then, propositions describing these properties of legal practices are merely contingently but not necessarily true. The fact that an Islamic or an aboriginal legal practice bears one of the mentioned properties is only due to a contingent matter, that is, in the mentioned examples, to social facts that happened in particular times and places, namely, respectively, the acceptance of

\(^8\) SCOTT SHAPIRO, LEGALITY 10 and 11 (2010).

\(^9\) See: Joseph, Raz, *Can There Be a Theory of Law?*, in THE BLACKWELL GUIDE TO THE PHILOSOPHIE OF LAW AND LEGAL THEORY 324–325 (Martin P. Golding and William A. Edmundson eds., 2004). See, e.g., Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 108 (Jules Coleman ed., 2001): “[Jurisprudence] begins by asking whether there are features of law that are essential or, in an appropriate sense, necessary to law or to our concept of it: essential to our concept in the sense that a social practice that fails to have them could not qualify as law”. On the concept of essential property in general, See, MICHAEL A. SLOTE, METAPHYSICS AND ESSENCE 1 (1974): “A property p is essential to an entity e if and only if e (logically or metaphysically) could not have failed to have p.”

the *Sharia* and the acceptance of the “Dreamtime” as sources of law. For this reason, these properties cannot count as objects of necessary truths about law.\(^{11}\)

Fifth, these theories aim to express the essential properties of law by means of a set of necessary and sufficient conditions that something must meet in order to be law. In this way, there is a correlation between the concept and the nature of law: the necessary and sufficient conditions that an entity must possess in order to be law, and not something else, also establish the conditions under which the concept of law can be correctly applied to it. Thus, an elucidation of the necessary and sufficient conditions that an entity must meet in order to be law is, at the same time, an explanation of the nature of law, and an account of the concept of law.

Concerning this fourth assumption, with respect to some entities in the world, for example, some natural kinds, it is possible to distinguish between their nominal and their real essence. This distinction traces back to Locke, who famously distinguished between the nominal and real essence of an entity.\(^{12}\) While the nominal essence of an entity consists in the conditions under which the word we associate with the entity can correctly be applied to it; the real essence is its underlying explanatory nature, for example, its atomic constitution, which is the causal basis of all the observable properties of the thing. For natural kind terms like ‘gold’, the real and nominal essences are widely thought to diverge. An explanation of its nominal essence might be something like dense, soft, shiny, bright yellow, malleable, ductile pure metal, while an explanation of its real essence would be something like element with atomic number 79.

\(^{11}\) See, on the difference between necessary and contingent truths about the law: JULIE DICKSON, EVALUATION AND LEGAL THEORY 18 (2001).

\(^{12}\) See, Book III Chapter III of: JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1989)
However, for social institutions, like the social practice of law, which are not natural but social kinds, the nominal and real essences coincide—they have no essence beyond what we give to them. In this case, the nominal and real essence are given by the same set of necessary and sufficient conditions, which are just those for the proper application of the concept of the kind of social institution in question.

At this point two questions about this last assumption arise. First, whether it is possible to state a set of necessary and sufficient conditions that something must satisfy in order to be a legal practice; and, second, whether this strategy would provide the best possible account of the nature of law.

Certainly, the possibility that the concept of law qua social practice admits a reductive analysis, in the sense of an analysis providing an account of the application conditions of it in terms of more basic concepts, cannot be ruled out from the beginning. Some concepts allow for a neat reductive analysis in terms of a set of necessary and sufficient conditions. An example is the concept of a circle: For any x, x is a circle if and only if x is a set of points equidistant from a given point in the plane. This analysis of the concept of circle provides an account of the nature of a circle. However, it is more difficult to provide such neat, simple analyses for concepts (more complex than the concept of circle) that apply to a heterogeneous group of things. However, that it is more difficult is not a reason to rule out from the beginning the possibility of an analysis of the social practice of law in terms of a set of necessary and sufficient conditions.

Another concern is whether this strategy is the most appropriate for the purpose of explaining the nature of law. Joseph Raz recognized that, “more often than is

\[13\] I thank Kirk Ludwig for his illuminating comments on this point.
sometimes supposed,” accounts of the nature of things (like law) can be given by means of explanations providing “necessary and sufficient conditions for the application” of the concept”\textsuperscript{14}. Nevertheless, Raz warns us that “it is a mistake to believe that all good explanations must do so.”\textsuperscript{15} And, more than that, Raz seems to believe that accounts in terms of necessary and sufficient conditions could even have some strong disadvantages. In particular, he thinks that these kinds of accounts could hinder the achievement of the purpose of explaining the nature of an entity because they could overlook the “importance of other features”\textsuperscript{16} or the connections between the concept at stake and other concepts,\textsuperscript{17} and because they could lead to a false picture of what explanations seek to achieve – that is, the false picture that only a complete “list of necessary and sufficient conditions will provide a complete explanation” of the nature of a thing.\textsuperscript{18}

Nonetheless, Raz’s warning cannot count as a proof that accounting for the nature of an entity, like the social practice of law, by means of a set of sufficient and necessary conditions is not the most appropriate methodological strategy. Let’s consider Raz’s


\textsuperscript{17} Joseph Raz, Two Views of the Nature of the Theory of Law. A Partial Comparison, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 10 (Jules Coleman ed., 2001).

points in reverse order. First, naturally, this is not the only possible strategy to explain the nature of an entity. But it has the advantage of offering the highest degree of clarity, which is an ideal that all philosophical explanations seek and should seek. Second, accounting for the nature of an entity $\phi$ by means of a set of necessary and sufficient conditions does not imply overlooking the connection between the concept of $\phi$ and other concepts. The very explanation of the concept and nature of $\phi$ by means of a set of necessary and sufficient conditions, provided it is a reductive explanation in the sense stated above, that is, an explanation in terms of more basic concepts, entails identifying essential connections between the concept of $\phi$ and other concepts.

An explanation of this sort is an explanation of the concept of $\phi$ in terms of other more basic concepts that express the sufficient and necessary conditions for the application of the concept of $\phi$. This is what happens with the strategy suggested above, in which the nature of law qua legal practice and its concept is explained by means of other more basic concepts of social ontology, like the concepts of collective intentional activity, agents, intentions, acts and facts. A concept would not allow for an explanation in terms of necessary and sufficient conditions if it is a basic concept, that is to say, if it does not allow for a reductive explanation in terms of more basic concepts. In this case, the only available strategy is to explain this basic concept by means of explaining its connections with other basic concepts. However, this is not the case of law as social practice, which, on the face of it, is not a basic concept in this sense.

Finally, Raz does not claim that other properties than the essential should be included in an account of the nature of an entity, but that the importance of other properties could be overlooked by an account in the form of a set of necessary and
sufficient conditions. Surely, this is a risk. However, this risk is very low since the very
task of elaborating a list of necessary and sufficient conditions implies deciding what
properties are essential to the nature of an entity, what are merely important, and what
are neither essential nor important. The deliberation about the essential character of the
properties of an entity should help to ensure that all important properties and conceptual
connections will be taken into account, despite the fact that, at the end of the day, the
inquirer might have good reasons to include or exclude each one of them from the
definitive set of necessary and sufficient conditions. This deliberation could meet the
purpose of philosophical explanations, which, according to Raz, is to achieve “a more
systematic understanding of the concepts,” that is to say, “one that will not only guide
correct use [of concepts] but will also improve understanding.”\textsuperscript{19}

Concerning the last point, in recent paper, Schauer argues that an appropriate
account of the nature of law should not only include necessary and sufficient properties,
but also “those properties that are important but not necessary.”\textsuperscript{20} By “important”
properties of an entity, he means properties that are not exclusive to it “but which are, in
an empirical and probabilistic way, concentrated in” it. As example of important
properties, he mentions “flying” in birds or “coercion” in law. Despite the fact that not all
birds fly and not all law is coercive, flying and coercion are important properties of these
entities, because they are empirically concentrated in them and the inclusion in the

\textsuperscript{19} Joseph Raz, \textit{Two Views of the Nature of the Theory of Law. A Partial Comparison}, in HART’S
POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 25 (Jules Coleman ed.,
2001).

\textsuperscript{20} Frederick Schauer, \textit{Necessity, Importance, and the Nature of Law} 2 (2010). Available on line at:
explanation of the nature of them enriches our understanding of, respectively, birds and law.

Nonetheless, it is neither clear—and even if he could be right, Schauer does not offer an account about it—what degree of probabilistic concentration is sufficient, necessary or important for a property to be an important property of an entity, in general, and of law, in particular, nor how probabilistic methods allow us to identify the important properties of law and to distinguish them from unimportant properties.

Finally, there is the view, which traces back to Wittgenstein’s *Philosophical Investigations*, there are concepts (or words) which apply to things by way of family resemblance (in German: *Familienähnlichkeit*)—and a special case of this involves family resemblance to a paradigmatic instance, a prototype concept. Wittgenstein’s idea is that entities falling under a concept, which may be thought to meet a set of necessary and sufficient conditions, do not actually do that, but, instead, are connected by a series of overlapping similarities, and that there is no one property common to all. In this sense, in the analysis of a concept (like the concept of game, used by Wittgenstein), we should travel across the different uses of a word through “a complicated network of similarities, overlapping and criss-crossing.” On this view there are no sharp boundaries between the different uses of the same concept, and there are

---

21 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS. THE GERMAN TEXT, WITH A REVISED ENGLISH TRANSLATION (Gertrude Elizabeth Margaret Anscombe, trans., 2001).

22 On the statement of necessary and sufficient conditions of its application and on family resemblance, as alternative ways to express a concept, see PETER F. STRAWSON, INDIVIDUALS. AN ESSAY IN DESCRIPTIVE METAPHYSICS 11 (1959).

no necessary and sufficient conditions that all entities, which fall under the concept, share.\textsuperscript{24}

It might be the case that, after trying to discover a set of conditions that are each necessary and jointly sufficient for the application of the concept of law qua social practice, the result of the jurisprudential inquiry is that there is no such set of conditions which accounts for the nature of law as social practice, and differentiates it from other entities. It might also be the case that the concept of legal practice is applied to diverse entities that are merely linked by means of a network of similarities, overlapping and criss-crossing. It might happen too that the concept of legal practice is a prototype concept, and that there is a prototype of legal practice, like the concept of chair within category of furniture, such that entities falling under the concept of legal practice can only be understood as a variation of the prototype.\textsuperscript{25}

Nonetheless, on the one hand, the best way to arrive to at the conclusion that legal practice is a family resemblance concept is by means of showing that it is not possible to identify a set of sufficient and necessary conditions that an entity should meet in order to the a legal practice; and, on the other, the best way to explain a prototype concept of legal practice is also by means of stating a set of necessary and sufficient conditions explaining the nature of this prototype concept. For these reasons, identifying this set of necessary and sufficient conditions might still be a legitimate target of the jurisprudential inquiry from the point of view of conceptual theories of social practice.


Austin and Law as the Habit of Obedience to the Sovereign

In *The Province of Jurisprudence Determined*, John Austin develops a conceptual account of the nature of law that might be interpreted as a version of the social practice thesis. The main elements of this account are four:

1. Every law is a command\textsuperscript{26}
2. A command is the expression of a wish that someone shall do or forbear from some act, backed by the threat that a sanction (an evil) will “visit” her in case she does not comply with the wish\textsuperscript{27}
3. Every positive law is set by a sovereign person, or a sovereign body of persons\textsuperscript{28}
4. A person or a body of persons is sovereign if three conditions are met. First, this person or body of persons must be determinate and a common superior to (that is, the same superior for) the bulk of the society. Second, there must be a general habit of obedience to her or to them, that is, the bulk of the given society must be in a habit of obedience or submission to her or to them. And third, the person or body of persons who is the superior must not be in a habit of obedience to another determinate human superior.

In order to argue that Austin’s command theory of law can be interpreted as a version of the social practice thesis, it is useful to reconstruct these elements from the last to the first using the perspective of the concept of social practice. This task can be accomplished in two steps. The first step consists in analyzing the habit of obedience as an activity or as a set of recurrent actions. In this way, to say that the bulk of the population must have the habit of obedience to the sovereign is to say that it must recurrently obey the sovereign. It means that the bulk of the population must recurrently perform the actions or refrain from performing the actions known as commanded by the sovereign, and whose respectively performance or forbearance is backed by a threat of

sanctions. Correlatively, the sovereign must not obey anybody else, but must recurrently perform the action of issuing commands, that is, expressing wishes addressed to the people, according to which they shall do or forbear from certain actions with the threat that a sanction will visit them in case they do not comply with what is commanded.

The second step consists in understanding the general habit of obedience as a collective intentional activity carried out by the sovereign who issues the commands and by the bulk of the population who obeys them. Three elements of the concept of collective intentional activity are clearly instantiated in the general habit of obedience. First, this is an activity performed by several individuals. Even more, since the habit of obedience must be general, this kind of recurrent actions cannot be performed only by one individual. It is an activity that necessarily must be performed several individuals that together constitute the “generality” or the “bulk” of the members of the society.29 Second, these recurrent actions are not performed by the “bulk” of the population, understood as a kind of super-agent, but by means of the actions of the individuals belonging to this bulk acting together as a group or as a group of groups. And third, they perform the actions meeting the requirements expressed by the commands of the sovereign intentionally, motivated by the threat of sanctions. As we will see,30 intentions are grounded in desires and beliefs. In the present case, agents obeying the sovereign have the desire to carry out the actions commanded by him, and beliefs about how to


30 See, below, Chapter 5.
do so, which then leads to intentions directed at specific sorts of bodily movements whose upshot is seen at conforming to what is commanded.

From this point of view, Austin’s theory has the merit of advancing knowledge about the nature of law by pointing out that an essential property of law rests on the existence of some recurrent intentional actions of a plurality of subjects.

Nevertheless, Austin’s theory of law faces at least two difficulties in accounting for law as social practice: the problem of collectivity and the problem of normativity. First, the general habit of obedience is not necessarily a collective action in the socio-ontological sense of the expression. In other words, that there is a habit of obedience to a sovereign in a population is not sufficient for the members of the bulk of the population to be acting together intentionally in any sense. The concept of a general habit of obedience is ambiguous. It allows at least two readings: a distributive and a collective reading. According to the distributive reading, the general habit of obedience amounts to most of the individuals of the community having a personal and independent habit of obedience towards the commands issued by the sovereign. This does not require that they do not act together in accordance with, and because of, some appropriate we-intentions, whose content is that the bulk of the population, as a group, performs the activity of obeying the commands issued by the sovereign by means of the appropriate individual actions of its members. Self-interest or fear of sanctions might motivate an agent to recurrently obey the sovereign. Under this interpretation, the general habit of obedience is a mere aggregation of the personal recurrent actions of obedience by the individual members of the bulk of the population. This differs from the collective reading.

---

31 On a related though non identical understanding of these readings, see: KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTIONS (2011)
On the collective reading, the general habit of obedience is a collective intentional action. This implies that individuals forming the bulk of the population act together in accordance with, and because of, some appropriate we-intentions, whose content is that the bulk of the population, as a group, performs the activity of obeying the commands issued by the sovereign by means of the appropriate individual actions of its members.

At this point a question of interpretation arises, namely, whether the best reading of Austin’s habit of obedience is the distributive or the collective reading. Austin did not address directly the issue. The fact that the sovereign must be a “common” superior might be an indicator for the collective reading. However, the conclusion does not follow from this fact. It is possible that there is one and only one superior threatening the population with sanctions and that every member of the bulk of the society obeys it independently.\(^3\) The existence of a common superior does not necessarily presuppose coordination and interlocking of actions and we-intentions by different agents.

Besides collectivity, a second problem of Austin’s general habit of obedience is its inability to account for the normativity of law. H. L. A. Hart made this problem explicit by arguing that the general habit of obedience cannot capture some truisms about the normative dimension of law, like the facts that deviation from the general behavior generates criticisms, and that people think that this criticism is justified or, in other

\(^3\) H. L. A. Hart, without the background of the theories on social ontology, had also this intuition in mind when he argued that the general habit of obedience is too simple as a concept for accounting for the nature of law because: “In order that there should be such a habit no members of the group need in any way think of the general behavior, or even know that the behavior in question is general; still less need they strive to teach or intend to maintain it. It is enough that each for his part behaves in the way that others also in fact do”. See THE CONCEPT OF LAW 56 (1994).
words, that there are good reasons to manifest criticism against deviations.\textsuperscript{33} In addition, the general habit of obedience cannot explain the truism that legal authority is not only the one that has the ability to coerce compliance but the “legal right to do so”,\textsuperscript{34} and that this right, or, to be more precise, the legal competence to impose sanctions and the general legal competence to rule over the population, generate not only a habit but also a subjection to obey legal authority, and an obligation to follow the legal rules enacted by it.

Finally, Austin’s theory of law is also flawed because it cannot account for all that falls under the concept of law. The claim that the law is a set of commands issued by the sovereign and backed by threats of sanctions gives rise to puzzlement from the point of view of the grounds of law. To mention only one aspect of the problem, as Hart successfully showed, there is a variety of laws. Consequently, there are rules that are legal without being backed by threats of sanctions (like power conferring rules).\textsuperscript{35} Austin’s theory cannot account for the fact that a legal proposition like “I have the legal power to get married but I am not legally commanded to do so” is true, because this would contradict the assumption that all legal relations are grounded in commands.

These considerations lead to the conclusion that Austin’s theory of law can neither account for law as a social practice in the sense of a collective practice nor as a normative practice. In addition, it cannot account for everything that is recognized as a law, and so its scope is not adequate to the actual phenomenon.


\textsuperscript{34} See: SCOTT SHAPIRO, LEGALITY 76-77 (2011).

Hart and the Acceptance of Rules

Hart’s criticisms of the command theory of law led him to claim that law is a “more complex practice.” Accordingly, he developed some views about it, on the basis of the idea that law is a normative social practice consisting in the acceptance of social rules.

Hart claimed that the acceptance of a social rule entails the elements of the existence of a habit, that is to say, the performance of some recurrent actions by a plurality of individuals. In this sense, it entails regularities in social behavior. However, three more elements are needed: (1) that deviation gives rise to criticism and imposition of sanctions, and, as a consequence, there is pressure for conformity; (2) that criticism for deviation and imposition of sanctions is regarded as legitimate, justified or made with good reason; and (3) the so-called, ‘internal’ aspect of rules, i.e. that agents “must look upon the behavior in questions as a general standard to be followed by the group as a whole.”

The internal aspect of rules changes the way in which the members of society view the regularities in their social behavior. They perform some recurrent intentional actions associated with obeying the rules because they look upon these actions as general standards to be followed by the society as a whole.

It is clear that the first two elements are also a set of recurrent actions, or, in other words, an activity performed by several individuals. So, Hart’s concept of acceptance of rules implies three kinds of social activities or regularities in social behavior: the habit of obedience, the habit of criticizing deviations, and the habit of taking the criticism as legitimate.

---

Nonetheless, the third element is of a different kind. It refers to the attitude that members of society display towards law. Hart calls this attitude: the internal point of view. As Shapiro has illuminated, the internal point of view does not merely refer to the point of view of the insiders or the participants in the social practice of law. Its referent is only a special kind of attitude that these participants might have: the attitude of rule acceptance. And the attitude of rule acceptance is a disposition to what the internal aspect of rules describes, namely, endorsing a pattern of behavior as a standard of conduct, as a guide for conduct addressed to every one of the members of the society, and providing a legitimate reason for conforming to the pattern of behavior and for criticizing deviation. Hart defined it in the following way in the postscript to the Concept of Law:

“[Acceptance] consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure.”

At this point, several questions arise. First, how should the concept of acceptance of rules be understood? Second, is the acceptance of rules to be understood in terms of collective intentional action or the commitment to forms of collective intentional action? In relation with this second question: does the acceptance of a rule necessarily involve collectivity? Third, does the acceptance of rules solve the problem of accounting for normativity, and, in this respect, is it a development of jurisprudence, and step forward in comparison with Austin’s command theory of law? Finally, can the acceptance of

---

38 Scott Shapiro, What is the Internal Point of View?, 75 FORDHAM LAW REVIEW 1159 (2006).
rules be the target of the objection of theoretical disagreement, in the sense that it cannot account—as Dworkin claims—for disagreements about the grounds of law?

In the postscript to *The Concept of Law*, Hart suggests that the acceptance of rules is a standing disposition. On one hand, this might be understood in the sense of an attitude of the majority of the members of the society, namely, being disposed or having the proclivity to take the patterns of behavior of law as guides to future conduct, to act in accordance to them, and to criticize deviation from them, so that the patterns of behavior of law serve as reason for these actions and this criticism. However, this version of the concept of rule acceptance seems too weak. It might be problematically interpreted in the sense that the attitude of the members of society is such that it is *possible* that they take the patterns of behavior of law as guides of conduct, and not that they already *actually* take them as guides to future conduct.  

This does not seem to be in line with Hart’s analysis of the internal aspect of rules, which entails that the members of society actually look upon these patterns as general standards to be followed by the whole society.

On the other hand, Shapiro has suggested that the acceptance of a rule in Hart’s theory should be interpreted as involving a commitment to act according to the rule, which he seems to equate to having the intention to conform to the rule. In his words:

> one takes the internal point of view towards a rule when one intends to conform to the rule, criticizes others for failing to conform, does not to criticize others for criticizing and expresses one’s criticism using evaluative language.

---


41 Scott Shapiro, *What is the Internal Point of View?*, 75 FORDHAM LAW REVIEW 1163 (2006).
While Shapiro’s suggestion will accommodate the patterns of behavior we would expect upon acceptance in Hart’s sense of a rule, and indeed one form of acceptance might be just such a commitment, it seems to overintellectualize what Hart has in mind. It attributes to agents too much self-conscious awareness of the rules. It seems possible to speak of agents accepting rules without thinking that they have formed intentions to follow them. There are many rules that govern social life that we act in accordance with, and which are the result of social pressures of various sorts that amount to a form of training, and yet which we have never explicitly articulated and which have never been explicitly articulated for us either. We have formed rather habits of behavior in various circumstances that create dispositions to take the behaviors as rules to future conduct—as if we had a conditional intentional commitment to follow them when the relevant circumstances arise—though we do not really represent the rules. They are part of what John Searle has called the background of intentionality.42 This expresses the idea that there is an internal element of acceptance of rules, namely, the internal point of view, that is expressed in a disposition but which does not involve explicit commitment to conforming behavior to their content.43

Regarding the second question, that is, whether the acceptance of rules entails collectivity, the problem is that the acceptance of rules also allows for a distributive and a collective reading. In this respect, from the point of view of the concept of collectivity, it is similar to Austin’s idea of the general habit of obedience. It is possible that every one of the members of society obeys the rules, criticizes deviation, considers this criticism

42 JOHN SEARLE, INTENTIONALITY, CHAPTER 5 (1983). The Background is theorized to be a set of skills, capacities, and presuppositions that, while being nonrepresentational, makes all representation possible.

43 I thank Kirk Ludwig for a suggestion on this point.
legitimate, and has an individual disposition to take certain social rules as patterns of behavior for her and the whole society. Under this interpretation, the acceptance of rules would be the combination of two elements: an external element, that is, a set of aggregative recurrent actions of conforming to certain social rules, criticizing deviation and considering this criticism as legitimate, and an internal element, that is to say, a set of aggregative individual dispositions to conform to them, and to criticize deviation from them. The internal element is an I-attitude and not a we-attitude. In the distributive reading, the acceptance of a rule is a matter of forming an individual disposition to guide behavior by it or, in other words, of forming a conditional intention to act in accordance with it in the circumstances in which it is applicable. In contrast, under the collective reading, acceptance of a rule can be understood as a matter of forming in a group appropriate conditional we-intentions focused on acting in accordance with the rules in appropriate circumstances. However, this would require the rules to be rules governing joint actions. It would entail that members of the majority of society think about the acceptance of the social rules of law as a group-related activity, or, in other words, as a recurrent intentional action that the group should perform by means of the individual actions of the its members consisting in conforming to the rules, criticizing deviation and considering this criticism as legitimate; that there is public knowledge between them about it, and that the disposition to conform to these rules and to criticize deviation is a we-attitude. A we-attitude implies that each member of the majority of society has an attitude related to the acceptance of the social rules of law as a group-related activity. In this sense, I have a we-attitude towards rule-acceptance if I have the attitude that we,
as a group, take the relevant social rules as guide of conduct for us, are disposed to conform to them, and to criticize deviation.

Hart did not provide further clarification on this matter, and, at the end of the day, his theory does not rule out the distributive reading. In a similar to that in which Austin was concerned with the idea that people had the habit of obedience towards one only common superior, Hart focused on the problem of identifying one only common set of social rules as legal rules. For this reason, Hart argues that law is a combination of two kinds of social rules: primary and secondary. While primary rules require their addressees to do or abstain from certain actions (they generate obligations), secondary rules confer powers to create, change, and recognize primary rules. The key rule for solving the problem of identifying only one set of social rules as legal rules is the secondary rule of recognition. The rule of recognition aims to remedy the problem of uncertainty about legal rules. It is a “rule for conclusive identification of the primary rules.” This rule is to be accepted only by officials. The rest of the members of society should only obey the primary rules that pass the test established by the rule of recognition. The acceptance of the rule of recognition by legal officials is the key for identifying the set of rules belonging to the legal system. In Hart’s words: “Whenever such a rule of recognition is accepted, both private individuals and officials are provided with authoritative criteria for identifying primary rules of obligation.” In this sense, the foundation of the social practice of law is the social practice of acceptance of the rule of recognition by officials. However, even the acceptance of the rule of recognition allows


for the distributive and the collective reading. It is possible for every one of the officials to individually accept a rule of recognition like: what the Queen in Parliament enacts is law. This acceptance is not necessarily collective in the socio-ontological sense of the expression.

In a compatible way, Shapiro argues that the rule of recognition is social in two senses:

First, the rule of recognition exists and has the content it does because, and only because, of certain social facts. In particular [...] the fact that the members of a group take the internal point of view toward a certain behavioral regularity and use it to evaluate the validity of norms that falls within their purview. Second, the rule of recognition is social in the sense that it sets out a group wide standard.47

Neither of these two senses necessarily entails collectivity. It is possible to say that the members of society take the internal point of view toward a certain behavioral regularity, under the distributive interpretation. Moreover, the setting of a group wide standard does not depend on social we-attitudes necessarily related to the collective reading. Austin’s sovereign sets also out his commands as group wide standards.

This conception of the practice of law as the acceptance of the rule of recognition by officials creates another problem related to the concept of collectivity. Since the rule of recognition must only be accepted by officials and not by the bulk of the population, law cannot actually be said to be a social but just an official practice, that is to say, it is not a social practice of the whole group in which the legal system exists48 The only society wide requirement that Hart establishes for the existent of a legal system is that primary rules must be generally obeyed. Although he says that it is often the case that

47 SCOTT SHAPIRO, LEGALITY 84 (2011).
the rule of recognition is also generally (passively) accepted by the citizens by means of his obedience to the officials’ decisions, in his theory it must be effectively and actively accepted as a standard for the whole society only by officials. As a consequence, in Hart’s theory the foundation of the whole legal system consists in the practice of officials of recurrently performing the external actions of creating, changing and applying primary norms according to the rule of recognition, along with the internal element, that is to say, taking the rule of recognition as a standard for the whole society, along with the disposition to conform to it, and to criticize deviation from it.

This element enables Hart’s theory to explain why conduct that is widely practiced in a society might, at the same time, be prohibited by the law. What is necessary is that this conduct is prohibited in a rule enacted by an authority, and that the enactment of this rule happens according to the criteria established by the rule of recognition. Since the rule of recognition must only be accepted by officials, then they will accept that an authority prohibits a conduct widely practiced in society. Thus, there can be legal rules that are not practiced or even that are in conflict with a current practice.

However, the characterization of law as an official and not as a society wide practice also creates a problem for Hart’s theory. First, it cannot explain why an official practice gives rise to rules that are legally binding for the whole society. If only officials must accept the rule of recognition and the primary rules issued in accordance with it, then only they will be within the scope of the normativity of law. There is an asymmetry between the agents performing the practice that is at the foundation of the legal system, and the agents that are bound by the rules of this system. This problem shows Hart’s

theory to be similar (if not identical), in some respects, to Austin’s theory. According to Hart the difference between his theory and the command theory of law from the point of view of the subjects of law is that, while the addressee of an Austinian command is only obliged, the addressee of a Hartian rule has an obligation. And the difference between being obliged and having an obligation is precisely that, in the second situation, the internal aspect of rules is present in the agent. However, if the citizens do not accept the rule of recognition but only obey the primary rules, then they do not actually have the internal attitude towards the rules of recognition and, consequently, it is difficult to see how they could have them towards the primary and secondary rules of law issued in accordance with it. They just obey these rules because the officials created them. They just have a habit without any attitude. Consequently, at the end of the day, the Hartian legal system is a combination of a practice and a habit of obedience, namely, the combination of the official practice of accepting the rule of recognition and the primary and secondary rules created according to it, plus the general habit of obedience by the population to the rules that are the outcome of the official practice.

Concerning the third question, Hart’s theory of social practice cannot account for the normativity of law. This impossibility emerges from his conception of the rule of recognition. Hart characterizes the rule of recognition with four properties. First, it is a secondary rule or a rule about rules. This rule establishes the criteria for identifying the primary rules of the legal system. Second, it is an ultimate rule. It is the foundation of the validity of all other primary and secondary rules of the legal system. For instance, if a person who has signed a contract asks: Why is this contract valid? And Why do I have

---

50 For an analysis of the rule of recognition, see: SCOTT SHAPIRO, LEGALITY 84-85 (2011).
the obligation to honor it? The answer is: because it was enacted according to the laws of the country. Then, a further question might be asked, namely: Why are the laws of the country valid? The answer for this question is: because they were enacted according to the constitution. And then, the final question is: why is the constitution valid. The answer is because there is a rule of recognition establishing that rules of the constitution and all rules enacted according to the constitution are legal rules. However, we cannot ask further about the validity of the rule of recognition. We just have to say that it is the foundation of validity of all other norms because there is a practice among legal officials consisting in the acceptance of the rule of recognition. This practice has two elements: an external element that consists in the recurrent action by officials of conforming to the constitution; and an internal element consists in the internal aspect of the rule of recognition, namely, the fact that legal officials take the rule of recognition as a standard of future conduct, and as the basis for legitimate criticism against other officials who choose not to conform to the rule of recognition. Finally, the rule of recognition is a duty imposing rule because it creates the duty, whose addressees are legal officials, to recognize and apply as legal rules all rules created according to the criterion established in the rule of recognition.

Shapiro argues that this construction of the rule of recognition fails because it is grounded in a category mistake. According to Shapiro, in Hart’s theory social rules are reduced to social practices. On the one hand, this is a good strategy that allows Hart to provide a justification for the normativity of law without violating the Humean principle, according to which, one cannot derive an ‘ought’ from an ‘is’. On the basis of the

---

51 SHAPIRO, LEGALITY 102 (2011).
analysis of Hart’s theory by Kevin Toh. Shapiro claims that Hart endorses a kind of expressivism, in which the kind of normativity legal rules produce is only legal but not moral, and what normativity means is that legal officials take the internal point of view towards legal rules. This entails that they make normative judgments according to which legal rules are taken as standard for the guidance and evaluation of conduct. This is performed by means of normative judgments about legal validity. Hart calls them internal statements. And internal statements are factual in the sense that they just express the existence of a commitment to take a rule as a standard for future conduct. In this way, the rule of recognition, as a social practice, is a fact that gives rise to other facts: the recurrent collective intentional actions by legal officials of adjudicating cases on the basis of legal rules, and the internal acceptance of these rules as guides for future conduct. Consequently, in Hart’s theory an ‘is’ derives from an ‘is’. It respects the Humean principle, and does not incur in a naturalist fallacy.

However, on the other hand, according to Shapiro, the reduction of the rule of recognition and other social rules to social practices is a category mistake. He argues that this is the case because “rules and practices belong to different metaphysical categories.” While rules are abstract objects, objects of thought and not entities that exist within space and time, practices are concrete events: they take place within the natural world and causally interact with other physical events.

I agree with Shapiro that rules and practices belong to different metaphysical categories, and that while social rules are abstract objects, social practices are concrete

---


53 SHAPIRO, LEGALITY 100 (2011).

54 SHAPIRO, LEGALITY 103 (2011).
events. Social rules are objects of thought that might usually be reconstructed with the logical form of conditionals: “If circumstances C happen, then action A is required”. As defined at the beginning of this dissertation, social practices are sets of recurrent collective intentional actions. As we will see later, actions are events. For this reason, social practices are sets of events.

Nonetheless, I would like to suggest an alternative (and perhaps more charitable) interpretation of Hart, according to which, in his theory social rules are not reduced to social practices: What Hart actually claims is that a social practice consisting in the acceptance of the rule of recognition is the foundation of legal system, that is to say, that the acceptance of the rule of recognition generates all other social rules of law. This means that Hart does not make any kind of category mistake. He does not claim that abstract objects (rules) are reduced to concrete events (social practice) but only that due to the fact that there is a social practice, that is to say, a set of concrete intentional actions by officials of accepting the rule of recognition, they take certain abstract objects (legal rules produced according to the rule of recognition) as standard for future conduct for the whole society, and they use it as a paradigm to criticize deviation, and they think that this criticism is legitimate. On this interpretation, the rule of recognition and all other rules of the system are just objects of the practice by officials. Rules are the object of the intentional action by officials of taking them as guide for future conduct and a standard for criticizing deviation.

Nevertheless, Shapiro would also have an objection against this interpretation, for he argues that “social practices do not necessarily generate social rules” with the help of the following example drawn from baseball:
In baseball, for example, third basemen typically draw toward home plate when a bunt is suspected. Moreover, if they fail to draw near they would be criticized for not doing so. Drawing near, in other words, is a Hartian social practice. Yet, there is no rule that requires third basemen to draw near when a bunt is suspected. Contrast this practice with batters retiring after three strikes. The latter activity is rule governed.\textsuperscript{55}

However, maybe Hart does not need to demonstrate that social practices necessarily generate social rules, if he wants to account for the normativity of law and the possibility of legal authority on the basis of the social practice of acceptance of the rule of recognition. It is enough for him to show that it is conceptually possible for social practices to generate social rules or, in other words, that social practice might generate social rules.

Nonetheless, Hart does not succeed in showing it. He does not explain why if legal officials accept the rule of recognition they are bound by it, and by all other rules created according to the rule of recognition. He does not explain why the acceptance of the rule of recognition attributes legal normativity to this rule and, as a consequence, it becomes a duty imposing rule for legal officials. Certainly, in Hart’s view, accepting the rule of recognition implies that legal officials are disposed to take it as premise in practical reasoning. However, it does not imply that they ought to take it as a premise in practical reason nor that they ought to be disposed to do so. The disposition of legal officials to take the rule of recognition as a premise in practical reasoning neither binds them to do it nor to keep being disposed to do it.

And even worse (here the asymmetry between the official practice and the practice of citizens becomes relevant), Hart cannot account for the fact that from the acceptance of the rule of recognition by legal officials it follows that citizens are also

\textsuperscript{55} SHAPIRO, LEGALITY 103-104 (2011).
bound by the rule of recognition and all other rules generated within the system whose foundation is the rule of recognition. Even if, for the sake of the argument, the acceptance of the rule of recognition makes it binding for legal officials, it cannot be derived from it that this rule is also binding for the citizens who have not accepted it.

Finally, Hart’s theory is not able to explain legal authority, or in simpler words: why officials are officials. His point of departure is that the foundation of the legal system is the practice by officials of accepting the rule of recognition. But how do they become officials? Where does their authority come from? The source cannot be the rule of recognition for two reasons: first, because legal officials exist before the rule of recognition. What happens is just the opposite: the rule of recognition exists because of the practice of legal officials. And second, the source cannot be the rule of recognition because the rule of recognition is not a power conferring rule but a duty imposing rule. Thus, it cannot logically be the source of the power of legal officials. As a consequence, it is not clear why the rule of recognition, and all other rules of legal system, ought to be obeyed, why they have legal binding force.

Finally, Hart’s theory can also be the target of theoretical disagreement. This famous objection has been raised by Ronald Dworkin as a critique to the conceptual approach of Hart’s positivism. Using the analysis of some cases, Dworkin claims that there is disagreement in society about the fact that legal rules are only those which are created according to the rule of recognition, and that, consequently, Hart’s theory of law as social practice is mistaken.

---

Dworkin maintains that this can be shown by means of the case Riggs v. Palmer. On the 13th of August 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters and the remainder of the estate to his grandson, Elmer E. Palmer. Elmer Palmer knew of the provisions made in his favor in the will. He also knew that his grandfather wanted to revoke such provisions. Elmer Palmer willfully murdered him in order to obtain the immediate possession and enjoyment of his property. For this crime he was tried and convicted of murder in the second degree.

At the time of the commencement of the action leading to the decision of the Court of Appeals of New York Court, he was serving out his sentence in the state reformatory. In spite of these facts, he claimed the property, that is to say, the legal recognition of his right to the inheritance. The question for the Court in this case was whether Palmer had the right to this property.

To answer this question, in its reasoning, the Court developed an argument in three steps. First, it determined what legal rule provided the solution for the case. The answer was not obvious. The Court recognized that, according to a literal interpretation of the statutes regulating the making, proof and effect of wills, and the devolution of property, due to the fact that the will had been in force and had not been modified, the law ordered that the property be given to the murderer. The statutes did not prescribe an exception, according to which, if the inheritor murdered the testator, he lost the title to receive the property. Nevertheless, the Court said that this solution was not correct.

The Court gave an alternative interpretation of the legal system. It said that the purpose

---

of the statutes, the intention of the law-makers, the application of a rational interpretation, and the principle or general maxim of the common law, according to which: “No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime”, allowed the conclusion that: if the inheritor had murdered the testator, he would have no title to the property.

In a second step, the Court verified that Palmer had murdered the testator, that is to say, his grandfather. According to the Court, these reasons led to the following decision (the third step of the reasoning): the defendant Palmer could not possess any of the property as heir.

Dworkin’s main point is that, at the time of the decision, the principle according to which: “No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime” was not created according to the criteria of the American Constitution that the rule of recognition institutionalizes as supreme law of the land. This is only a moral principle. Thus, this counterexample shows that not all laws are generated as outcomes of the official practice of accepting the rule of recognition.⁵⁸ Hart’s theory of law as social practice is unable to explain why this is the case.

---

CHAPTER 3
THE PLANNING THEORY OF LAW

Methodological Background

In his recent book *Legality*, Scott Shapiro offers an account of law as a normative social practice. His account aims to solve the problems faced by Austin and Hart, his predecessors in the conceptual approach and in endorsing legal positivism as theory of law. Shapiro calls his account the planning theory of law. It represents the most advanced view of law as a social practice. For this reason, the task of examining it should play a central role in this dissertation.

Shapiro’s purpose is also to account for law as social practice from the conceptual point of view. He aims to elucidate the nature of law as a kind of social organization. Shapiro contends that the nature of law comprises two questions: the identity and the implication questions. The identity question refers to what set of properties make (possible or actual) instances of law instances of law and not something else. And the implication question is: What does necessarily follow (and what does not follow) from the fact that law is what it is and not something else?¹

His view is that it possible to answer both questions by clarifying what the necessary properties of law are.

In order to accomplish this explanation, Shapiro uses a kind of strategy of conceptual analysis consisting in gathering truisms, that is to say, self-evident states of affairs, and accounting for them.² This is a strategy of conceptual analysis for truisms are to be found in the intuitions of people about law. Interestingly, contra Dworkin,

¹ SCOTT SHAPIRO, LEGALITY 8 (2011).
² SCOTT SHAPIRO, LEGALITY 13 (2011).
Shapiro maintains that disagreement does not present a challenge for this methodology. On his view, disagreements are caused because people engage in fallacious reasoning, overlook relevant evidence, lack imagination, indulge in wishful thinking or bring to bear a different worldview than other people.\(^3\) Therefore, in case of disagreement, it is required to adjudicate between conflicting intuitions at stake on the basis of the way in which they fit together with other intuitions within the context of a theory. However, Shapiro does not provide any criterion to perform this task of adjudication between conflicting intuitions that give rise to disagreement. It is clear that law is a reality in itself and its objectivity does not depend on our intuitions. Our intuitions about it can collide, and we should be able to solve collisions between them. Nonetheless, in order to accomplish this goal, we need certain criteria determining the right way to adjudicate between conflicting intuitions. The problem with Shapiro’s methodology is that it does not provide any criterion of this kind, that is, criterion that we can use to know how to adjudicate in the right manner between conflicting intuitions or, at least, how not to do it.

**Philosophical Background**

In comparison with Austin and Hart, Shapiro is in a better position to account for the ontological structure of law as social practice. For this purpose, he is able to take advantage of some of the above mentioned advancements in the field of social ontology. Indeed, his planning theory of law is influenced by Michael Bratman’s planning theory of intentions and, in particular, by Bratman’s theories of shared intentions and shared activities. For this reason, it is helpful to explain the main elements of Bratman’s

---

\(^3\) SCOTT SHAPIRO, LEGALITY 16 (2011).
theories of shared intentions and shared activities, before we begin the examination of the planning theory of law.

Michael Bratman develops his theory of collective intentional behavior in a series of papers, on the basis of his well-known planning theory of intentions.\(^4\) For the purposes of this dissertation, I will basically take into account the views he endorses in four papers: “Shared Cooperative Activity,”\(^5\) “Shared Intention,”\(^6\) “Shared Intention and Mutual Obligation,”\(^7\) and “I intend That We J.”\(^8\)

In “Shared Cooperative Activity”, Bratman’s aim is to define what shared cooperative activity is. The framework of his analysis is not a massive collective activity such as the normative social practice of law, but “shared cooperative activities (SCA) that involve only a pair of participating agents and are not the activities of complex institutions with structures of authority,”\(^9\) like singing a duet or painting a house. In his account, according to Bratman, as it also is according to some other views on social ontology,\(^10\) the key point is to establish the relevant differences between collective intentional behavior—Bratman thinks that shared cooperative activities are a kind of collective intentional behavior—and the mere aggregation or summation of the


\(^6\) Michael Bratman, Shared Intention, 104 (1) ETHICS 97-113 (1993).

\(^7\) MICHAEL BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 130-141 (1999).

\(^8\) MICHAEL BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 142-161 (1999).


intentional actions of two or more individuals. Bratman thinks that collective intentional behavior is not the behavior of a collective super-agent, but the behavior of individuals sharing appropriate intentions.\(^\text{11}\) He also thinks that collective intentional actions are different from individual intentional actions, and that the relevant differences appear in the intentions of the agents performing the action. For this reason, Bratman focuses on understanding the characteristics of the appropriate intentions of the agents performing the collective action and in the relationships between these intentions. According to him, to be a shared cooperative activity an activity has to fulfill three requirements:

1. The first requirement is mutual responsiveness in the pursuit of a common goal, that is to say, mutual responsiveness to the intentions and actions of other agents.

2. The second requirement is commitment to the joint activity. Bratman argues that it is necessary that subplans of the agents mesh in a way that does not violate the subplans of the other agents. It is also necessary for the intentions of the agents to be interdependent. It is required that each agent intends that the group performs the joint action in accordance with a plan for the group and the subplans of the agents. In addition to this, it is required that the agents be committed to their plans meshing. Furthermore, coercion cannot be involved. Finally, in case you and I are members of the group performing a collective intentional action, for our common action (J-ing) to be a shared cooperative activity, I must intend that we J in part because of your intention that we J and its subplans. According to Bratman, it is possible to spell out the commitment to the joint activity by means of the following requirements. Our J-ing is a shared cooperative activity only if:

\[\begin{align*}
1. & \quad \text{(a) (i) I intend that we J} \\
1. & \quad \text{(a) (ii) I intend that we J in accordance with and because of meshing subplans of (1) (a) (ii) and (1) (b) (i)} \\
1. & \quad \text{(b) (i) You intend that we J} \\
1. & \quad \text{(b) (ii) You intend that we J in accordance with and because of meshing subplans of (1) (a) (i) and (1) (b) (i)} \\
1. & \quad \text{(c) The intentions in (1) (a) and in (1) (b) are not coerced by the other participant} \\
1. & \quad \text{(c) The intentions in (1) (a) and (1) (b) are minimally cooperatively stable.}
\end{align*}\]

\(^{11}\text{Michael Bratman, } Shared Intention, 104 (1) ETHICS 97 (1993).\)
(2) It is common knowledge between us that (1)

Bratman also claims that shared cooperative activities involve appropriately interlocking and reflexive systems of mutually uncoerced intentions concerning the joint activity.

3. Commitment to mutual support. Bratman’s third requirement for shared cooperative activity is the commitment to mutual support, that is to say, the commitment to support the efforts of the other participating agents to play their roles. If an action performed by various agents does not fulfill this requirement, then the action is not a shared cooperative activity but only a jointly intentional action. In the shared cooperative activity the intentions of the agents have to be minimally cooperatively stable. An intention is minimally cooperatively stable if there are cooperatively relevant circumstances in which the agent would retain that intention.

In addition to this, Bratman claims that if our J-ing is a shared cooperative activity, then three things must be true: we J; we have the appropriate attitudes; and these attitudes are appropriately connected to our J-ing. It is necessary that there be mutual responsiveness of intention and action between the agents. In order to express this, Bratman says that our J-ing is a shared cooperative activity if and only if: (A)we J, (B) we have the attitudes specified in (1) and (2), and (C) (B) leads to (A) by way of mutual responsiveness (in the pursuit of our J-ing) of intention and in action.

In his paper “Shared Intention,” Bratman enhances this initial analysis. Bratman explains that it is necessary for the agents involved in a shared cooperative activity to have shared intentions. This kind of intentions plays three interrelated roles. These intentions help the agents to coordinate their intentional actions, to coordinate their planning, and to structure their “relevant bargaining.” After the analysis of three

---

hypothetical views, Bratman arrives at a view of shared intentions according to which we intend to J if and only if:

1. (a) I intend that we J and (b) you intend that we J

2. I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b and meshing subplans of 1a and 1b.

3. 1 and 2 are common knowledge between us.

In his paper “Shared Intention and Mutual Obligation,” Bratman argues that it is too strong to say that shared intentions imply the creation of mutual obligations between the agents. According to Bratman, the normal etiology of shared intention does not include an exchange of promises. However, there is a purposive creation of expectation that normally grounds an obligation to act as one has indicted. This is the general feature of the normal etiology of a shared intention that grounds a web of mutual obligations and entitlements. In any case, the existence of obligations is not essential for shared intentions to play their characteristic roles.

Finally, in his paper “I intend That We J”, Bratman asks whether it is possible that I intend that we J. He answers the question in a positive way and says that this kind of intentions (we-intentions) can fulfill the following three conditions:

1. “OA condition: an intention necessarily includes a reference to the one who has the intention”.

---


15 On the concept of we-intentions as the intention an individual has in participating in a group’s doing something intentionally, see: Kirk Ludwig, Collective Intentional Behavior from the Standpoint of Semantics, 41 (3) NOUS 355 f. (2007); Raimo Tuomela and Kaarlo Miller, We-Intentions, 53 PHILOSOPHICAL STUDIES 367-389 (1988); Raimo Tuomela, We-Intentions Revisited, 125 PHILOSOPHICAL STUDIES 327-369 (2005).
2. “C condition: one cannot intend what one does not take oneself to control. In a normal case of shared intention we each recognize the other as an agent in control of her or his own actions”.

3. “S condition: if you have an intention, it presupposes your ability to settle issues that are up to you”.

**Shapiro on Plans**

On the basis of this methodological and philosophical background Shapiro aims to explain the nature of law. His main thesis is the planning thesis. According to it, “legal activity is an activity of social planning.” This means that:

legal activity is more than simply the activity of formulating, adopting, repudiating, affecting and applying norms for members of the community. It is the activity of planning.

In order to argue for this thesis, Shapiro develops two different theories: a theory of plans and a theory of legal practice as social planning. Following the tradition of legal positivism, he contends that legal rules are plans, and plans are posited for their existence depends on adoption and acceptance. Plans are created by means of adoption and are maintained by means of acceptance. The existence of a plan does not depend on the merits of the content of the plan but only on the fact that it has been adopted and accepted.

Let us examine first Shapiro’s theory of plans. According to him, plans are norms. They are “abstract propositional entities that require, permit, or authorize agents to act,

---

16 SCOTT SHAPIRO, LEGALITY 195 (2011).
17 SCOTT SHAPIRO, LEGALITY 195 (2011).
18 SCOTT SHAPIRO, LEGALITY 195 (2011). A concern that I will not pursue here is that a plan cannot be adopted without existing. If this is the case, then adoption of a plan cannot explain its existence.
or not act, in certain ways under certain conditions." In this sense, they play the same role of Hartian rules: they function as "guide for conduct and standard for evaluation". Shapiro characterizes plans with 11 features:

1. Plans are partial and, therefore, they have a nested structure: "They begin as empty shells and, as more details are added, they become more comprehensive and useful".

2. Plans are composite: "they have parts that are themselves plans".

3. Plans help to rationalize future behavior of the planner and other people.

4. Plans can be designed for other people. It is possible that not the planner but somebody else follows, that is, applies the plan.

5. Plans reduce deliberation costs. Once I have set a plan, I do not need to deliberate about my future course of action anymore. Plans preempt deliberation about what ought to be done. As Shapiro puts is: "the value of a plan is that it does the thinking for us."

6. Plans generate normativity because of principles of instrumental rationality: if I set a plan with the purpose of preempting future deliberation, it is rational for me to abide by the plan, and to perform the action required by it. Correlatively, it is irrational for me to abandon the plan unless a compelling reason is at stake.

7. Plans are positive entities: "they are created via adoption and sustained through acceptance."

8. Plans are the most effective strategy to coordinate behavior related to complex, contentious, and arbitrary activities, i.e. activities that

---

19 SCOTT SHAPIRO, LEGALITY 127 (2011).
20 SCOTT SHAPIRO, LEGALITY 127 (2011).
21 SCOTT SHAPIRO, LEGALITY 121 (2011).
22 SCOTT SHAPIRO, LEGALITY 130 (2011).
23 SCOTT SHAPIRO, LEGALITY 122 (2011).
24 SCOTT SHAPIRO, LEGALITY 126 (2011).
demand knowledge and skill, might give rise to disputes, and might allow for unpredictable behavior.\(^{27}\)

(9) Plans can be shared in the sense of Bratman’s shared activities.\(^{28}\) Several people can share a plan.

(10) Plans can be hierarchical. They allow for a vertical division of labor.\(^{29}\)

(11) Plans can regulate massive activities. They compensate for the distrust that members of groups might feel between each other in massive activities.\(^{30}\)

**Legal Activity as a Form of Social Planning**

The second theory by Shapiro is a theory of law that is grounded in his theory of plans. He develops this theory in two steps. Using a heuristic similar to the well-known state of nature, in the first step Shapiro gives an account of how a legal system can be made by means of adopting and accepting plans. In the second step, using a conceptual methodology, he clarifies what are the essential properties of a legal activity as a form of social activity.

Shapiro explains that the aim of the heuristic of the state of nature, which in his book is instantiated in an imaginary community of cooks who create a society in a South Pacific Island: the Cooks Island. The example is used to show that a legal system “can be constructed through human agency alone.”\(^{31}\) He believes that if this is the case, then it can be demonstrated that legal positivism is true, for the following reason:

---

\(^{27}\) Scott Shapiro, *Legality* 133-134 (2011).


\(^{29}\) Scott Shapiro, *Legality* 141 (2011).


“to build or operate a legal system one need not possess moral legitimacy to impose legal obligations and confer legal rights: one need only have the ability to plan.”

The heuristic of Cooks Island begins with two people cooking together who decide to create a food company. The company turns out to be very successful and ends employing many people and generating huge returns. However, owners and employees decide to sell the company and to move to a South Pacific Island. Due to complexities and lack of coordination, life without rules proves to be highly inconvenient. For this reason, they begin planning. Nevertheless, this creates huge costs in deliberation and bargain. Consequently, they create a master plan, that is, a plan of plans. In addition, they introduce hierarchy by empowering some people to plan for the group. But since even this empowerment is flawed for people empowered can died, step down or become physically or mentally incapacitated, they decide to create institutions, “abstract structures of control” designed to fulfill certain functions. Shapiro colloquially calls these institutions: “the office.” Since the office proves to be a successful invention, then different offices are created; while the function of some of them is to adopt plans, while others enforce and apply plans. Plan adopters issue policy directives to regulate behavior and authorize policies to empower people to plan for themselves.

**Essential Properties of Law**

**Coercion is not an Essential Property of Law**

When institutions are created, Shapiro claims, at the same time a legal system is put in place. His explanation is the following:

---

32 SCOTT SHAPIRO, LEGALITY 156 (2011).

33 SCOTT SHAPIRO, LEGALITY 166 (2011).
“At this point, it seems safe to say that Cooks Island has developed a legal system. The planners are the legal officials; the plan adopters are the legislators; and the plan appliers, the judges. The master plan is the constitution that defines their offices. The plans created and applied by these officials pursuant to the shared plan are the laws of the system: the policy directives are the duty-imposing rules and the authorizing policies are the power-conferring ones. Finally, the islanders all act according to plan. They are law-abiding citizens”.

From this claim Shapiro derives the conclusion that coercion is not a necessary property of law. His idea is that this heuristic proves the possibility of a legal system without sanctions. Furthermore, Shapiro thinks that the use of coercion is a more expensive, ineffective and dangerous way to combat what he calls the problem of bad character, that is to say, the transgression of moral norms. Naturally, he does not rule out the use coercion in the law. Indeed he maintains that sometimes the law uses coercion, and when it does it, it uses it in an organized way. What Shapiro claims is that there can be law without the use of force.

But, then, a relevant question arises: if coercion is not a necessary property of law, a property that has traditionally been used to distinguish legal systems from other kinds of normative systems like moral or religious systems, or etiquette, then what is the specific property of law, that is, the property that makes law what it is and not something else? The conjunction of planners, plan adopters, plan appliers, a master plan, plans, policy directives, authorizing policies, and plan followers is to be found in other planning activities, like organized sports, games, churches and social clubs. Thus, what makes law different from these other planning activities?

---

34 SCOTT SHAPIRO, LEGALITY 169 (2011).
35 SCOTT SHAPIRO, LEGALITY 174 (2011).
The Moral Aim Thesis

Shapiro maintains that the specific property of law that distinguishes it is its aim. This is called the moral aim thesis. According to this thesis:

The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.

He explains it further in the following way:

...legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality.

Drawing an analogy with the well-known Rawlsian “circumstances of justice,” Shapiro claims that:

The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious and arbitrary.

He thinks that it is possible to address the need of ordering behavior within the framework of the existence of these problems by means of many strategies: improvisation or spontaneous ordering, or even by means of other non-legal forms of planning, like: private agreements, communal consensus, or personalized hierarchies. However, in Shapiro's view, this would generate large costs and risks. The aim of law is to compensate for the deficiencies of non-legal forms of planning. And the way in which the law is able to perform this task is, in Shapiro’s words, “by planning in the “right” way,

36 SCOTT SHAPIRO, LEGALITY 215 (2011): the end that the moral aim attributes “is central to the law’s identity”. In the same page, Shapiro claims: “If we want to explain what makes the law the law, we must see it as necessarily having a moral aim”; and “it is part of the identity of law to have a moral mission”.


38 SCOTT SHAPIRO, LEGALITY 171 (2011).


40 SCOTT SHAPIRO, LEGALITY 170 (2011).
namely, by adopting and applying morally sensible plans in a morally legitimate manner.”41 The aim of law is to decrease the risk that bad plans will be adopted not in relation to one specific moral problem but to all possible moral problems.

**Fundamental Rules of Legal System as Shared Plans**

A second essential feature of law, according to Shapiro, is that fundamental rules of a legal system constitute a shared plan. Members of the group design this plan for the purpose of engaging in a joint activity that is publicly accessible, and accepted by most members of the group. Following Hart, he claims that members of the group are only the officials and not all the members of society. For this reason, their shared intentions and actions make the fundamental rules of legal system. In Shapiro’s words:

> if we want to discover the existence or content of the fundamental rules of a legal system, we must look only to [...] social facts [...] only to what official think, intend, claim, and do around here.42

The content of these fundamental rules does not depend on any moral fact. The shared plan can even be “morally obnoxious.” This is so because if it were otherwise, that is, if a plan depended on moral facts, it could not solve disagreements, and reduce arbitrariness and complexity, for members of the group would have to engage in deliberation about the questions whether those are the appropriate moral facts, and whether they indeed obtained.

However, this leads to a question, namely, how this could be compatible with the idea that the specific property of law is its moral aim? How is it possible for legal practice to have a moral aim, namely, to look for the right plan and, at the same time, to

---

41 SCOTT SHAPIRO, LEGALITY 171 (2011).

42 SCOTT SHAPIRO, LEGALITY 177 (2011).
allow for morally obnoxious plans? Shapiro’s answer is that: “What makes the law the law is that it has a moral aim, not that it satisfies that aim”.43

The Possibility of Legal Authority

A third essential feature of law is that “someone has legal authority only if he is authorized by the master plan of a particular legal system.” This is a necessary but not a sufficient condition. For someone to have legal authority, members of the community must also be disposed “to follow the norms created [by a legal authority] to guide their conduct.”44 Thus, legal authorities must also have the ability to motivate their subjects to obey the law.45 The first condition obtains, when members of the community commit to defer to the person or the body of persons appointed as legal authority. And the second condition obtains because instrumental rationality is in place. Since members of the community have authorized legal authorities to plan for them, instrumental rationality requires for them to obey the plans issued by legal authorities.

Normativity of Law

This relates to a fourth essential feature of law, namely, that, in the planning theory, the normativity of law is only a matter of instrumental rationality. Shapiro claims that “the normativity of the master plan of a legal system is of a very limited sort”.46 He agrees with Hart that the fundamental rules of a legal system exist only if legal officials adopt an attitude of acceptance towards them. However, Shapiro imposes an additional

---

43 SCOTT SHAPIRO, LEGALITY 214 (2011).


45 Maybe is enough that subjects are motivated to obey legal authorities and not also that authorities are indeed the cause of motivation.

46 SCOTT SHAPIRO, LEGALITY 182 (2011).
constraint. Since these fundamental rules are elements of a shared plan, they require officials to have a more complex attitude than Hart’s internal point of view. In his words:

...acceptance of a plan involves more than just committing to do one’s part; one must also commit to allow others to do their parts as well. Moreover, to accept one’s part is to adopt a plan. In other words, to accept one’s part does not merely commit oneself to following the plan; one also commits to filling out the plan, to ensuring consistency with one’s beliefs, subplans, and other plans, and to not reconsidering it absent a compelling reason for doing so.\footnote{SCOTT SHAPIRO, LEGALITY 183 (2011).}

Then, the attitude that officials must have, according to the Planning Theory of Law, is the attitude of acceptance of the fundamental rules, and this implies the “adoption of plans.” And Shapiro maintains that with it, norms of instrumental rationality attending the planning activity comes into play. The officials are required to abide by the plans and not to open the issues to deliberation again unless there is a “compelling reason to do so.”\footnote{SCOTT SHAPIRO, LEGALITY 183 (2011).} Shapiro calls these rationality requirements of legal systems: the “inner rationality of law.” Then, the normativity of law consists in the obligation to abide by this inner rationality. It is not necessarily a moral normativity for “there is no reason to think that the master plans of every possible legal system will be morally legitimate.”\footnote{SCOTT SHAPIRO, LEGALITY 184 (2011).}

As a consequence, legal authorities do not have the power to create and impose moral obligations. They only have the power to impose legal obligations from the legal point of view. These obligations are only binding (so far as their being legal goes) from the legal but not from the moral point of view.
Some other Specific Features of Law as Social Planning

On the basis of all these premises, Shapiro also characterizes legal activity as social planning with other specific features, that is, with features that allow distinguishing it from other planning activities. These features are the following:

(1) Laws as plans are settling.\(^{50}\) They are positive norms solving moral disagreements about what ought to be done. Unless compelling reasons are at stake, the reference to them preempts deliberation, negotiation or bargaining.

(2) Laws as plans are dispositive.\(^{51}\) They dispose addressees to obey. This instantiates the efficacy condition of law.

(3) Legal activity as planning activity is purposive. Its purpose is to create norms.\(^{52}\)

(4) Legal activity is an activity of social planning in three different senses: (a) It "creates and administers norms that represent communal standards of behavior"; it "regulates most communal activity via general policies"; and it "regulates most communal activity via publicly accessible standards."\(^{53}\)

(5) Legal activity is a shared activity. Shapiro explains this claim in the following way: "Legal activity is a shared activity in that the various legal actors involved play certain roles in the same activity of social planning: some participate by making and affecting plans and some participate by applying them".\(^{54}\)

However, Shapiro does not mean that the legal activity is a shared intentional activity. He maintains that officials need not intend to engage in it in order to do so. They may engage in it completely alienated from the process. They are only required to accept the master plan.

\(^{50}\) SCOTT SHAPIRO, LEGALITY 201 (2011).

\(^{51}\) SCOTT SHAPIRO, LEGALITY 202 (2011).

\(^{52}\) SCOTT SHAPIRO, LEGALITY 202 (2011).

\(^{53}\) SCOTT SHAPIRO, LEGALITY 203 (2011).

\(^{54}\) SCOTT SHAPIRO, LEGALITY 204 (2011).
The shared activity thesis explains that legal officials are members of groups and, consequently, members of specific legal systems (e.g. they are members of the U.S. legal system and not of the British or the French legal system).

(6) The design of the master plan does not require a complete agreement among all legal officials. It only requires that at least some part of officials design at least some part of the master plan.55

(7) Unity of a legal system. There is unity of a legal system for it encompasses all norms derived from the sociality of the group of officials. Consequently, the law of a certain system consists in the master plan and the plans created according to it.56

(8) Legal Activity is an official activity. Agents of law occupy offices.57

(9) The normativity of law is institutional. It does not depend on the intentions of legal officials but on authorizations and plans explaining how authorizations should be used. Intentions are replaced by procedures.58

(10) The exercise of legal authority is compulsory to the subjects of legal system. Consent to legal authority is not a necessary condition for being subject to the plans issued by it. Its plans are binding from the legal point of view.59

(11) The law has a moral aim irrespective of the aim of legal participants. Shapiro claims that in the same way in which assertions aim to convey true information despite the fact that the asserter might be lying, it is “an essential truth about the law that it is supposed to solve moral problems.”60 But then, how is it possible? Shapiro maintains that this possible for the following reason that because it is so important for the purpose of this dissertation, despite its length, it is worthy to quote in full:

“The law possesses the aim that it does because high-ranking officials represent the practice as having a moral aim or aims. Their avowals need not be sincere, but they must be made. These representations may take many forms, either explicitly in speeches, ceremonial steles, preambles to constitutions, prologues to legal codes, and judicial dicta, or implicitly

55 SCOTT SHAPIRO, LEGALITY 207 (2011).
56 SCOTT SHAPIRO, LEGALITY 208 (2011).
57 SCOTT SHAPIRO, LEGALITY 209 (2011).
58 SCOTT SHAPIRO, LEGALITY 211 (2011).
59 SCOTT SHAPIRO, LEGALITY 212 (2011).
60 SCOTT SHAPIRO, LEGALITY 216 (2011).
through the atmospherics of ritual dress and speech, the construction of monumental buildings housing legal activity, and the use of religious or moral iconography in legal settings. Perhaps most importantly, the moral aims of the law are represented through legal discourse. By describing legal demands as “obligating” nor merely “obliging”, and power as based on “right,” not merely “might,” elites present their practice as something other than a criminal enterprise or self-interested pursuit of pleasure, profit or glory.”

(12) Law is self-certifying in the sense that it enjoys a general presumption of validity.

**An Assessment of the Planning Theory of Law**

Shapiro’s planning theory of law is, without any question, the most developed account of law as social practice. However, it has been the target of at least three rounds of objections. First, in a 2006, some years before the publication of *Legality* but after Shapiro presented some of his ideas on law as social practice, Matthew Noah Smith raised some general concerns about the possibility of accounting for the nature of law on the basis of theories of collective intentional activity, like Michael Bratman’s theory. Despite the fact that Smith’s paper was written before the publication of *Legality*, his concerns are precisely about a theory like the planning theory of law. Second, in their reviews of *Legality*, Frederick Schauer, Brian Tamanaha and Bruno Celano maintained that Shapiro’s account is flawed and uninformative in several ways. I will discuss here both critical approaches to Shapiro’s account of the nature of law.

**Skepticism about Law As a Collective Intentional Activity**

In a paper published at the journal Legal Theory, Matthew Noah Smith claims that it is not appropriate to analyze the practice of law as a collective intentional activity. Smith focuses especially on Bratman’s theory of jointly intentional activities.

---

but he explicitly says that his objections also apply to accounts of law based on other theories of collective intentional action. Smith claims that even if we agree that these philosophical theories entail plausible accounts of collective intentional behavior and plausible answers to the question what it is to do something together in the case of small groups of people, they cannot explain massively collective activities like legal practices. In particular, with respect to law, Smith develops an argument aiming to show that it is inappropriate to use the framework of philosophical analyses of collective intentional action to give an account of the legal institutions at the foundations of the law, like Hart’s rule of recognition of Shapiro’s master plan.

Smith’s skepticism about understanding the law as a collective intentional activity begins from his understanding of what people do together in legal institutions. He builds a schematic understanding about this grounded in Joseph Raz’s theory of law. Since many of the elements that Smith considers relevant in Raz’s theories are also present in the positivistic theories of law by Hart and Shapiro, his criticisms are relevant here.

According to Smith’s interpretation of Raz’s theory, there are some characteristic activities that are constitutive of legal institutions. Raz’s accounts of these characteristics are highly complex. However, it is possible to state the set of characteristics that Smith considers relevant as follows:

- Legal institutions are a sort of social practice.
- In this practice officials (legislators, judges, attorneys, bureaucrats, etc.) create and adjudicate a set of rules.

---

This set of rules, called (by H. L. A. Hart) primary rules (and by Shapiro duty imposing rules and power conferring rules addressed to the citizen), governs a “bounded domain of agents not entirely coextensive with the domain” of officials.

There is also a set of rules (called also by H. L. A. Hart, secondary rules) creating and governing legal institutions.

Legal officials apply primary rules (especially but not only) to solve disputes between individuals.

The enforcement of the (primary and secondary) rules is usually guaranteed by coercion. Despite the fact that coercion is not a necessary property of law, it ensures the stability of the practice.

It is clear that Shapiro’s account of legal institutions as the outcome of social planning is not very different from this interpretation of this kind of Razian/Hartian account of law. Smith claims that it is possible to summarize all these characteristics of a positivistic account of law by means of the sentence: “officials create and apply primary rules.” Furthermore, he says that most of the analyses of the law as collective intentional activity try to explain “how officials create and apply laws together.” He takes as an example the analysis of the law performed by Jules Coleman in his book *The Practice of Principle*. Coleman conceives legal practices as a shared cooperative activity of the judges. This activity consists in the application of legal (primary) rules in order to solve cases. Shapiro’s planning theory of law shares also this property,

---


although Shapiro also attributes a very important role to the shared activity of citizens in creating the master plan.

Smith claims that Bratman’s theory of shared activities requires that for a practice to be a shared cooperative activity it must have five features that are to be found only in what he calls “hypercommittal social practices.” These five features are the following:

1. Conceptual agreement of the participating agents
2. Commitment of the participants to conceptual agreement
3. Epistemic agreement
4. Commitment to epistemic agreement
5. Strong practical commitment

Smith’s explanation of the importance of these features in Bratman’s theory is the following:

For example, suppose you say to me while we are standing on a basketball court and you are holding a basketball, “Let’s play some ball.” I respond, “Okay, let’s play some ball.” Now, it turns out that by “play some ball” you mean “practice one-on-one drives to the basket” and I mean “play pickup basketball.” So although at first blush our intentions mesh—we both have the intention that we play some ball—upon closer inspection, it looks like you actually have the intention that we practice one-on-one

drives to the basket and I actually have the intention that we play pickup basketball. Our intentions are not intensionally equivalent even if they turn out to be extensionally equivalent in this instance (we might say that our intentions have the same “implementation conditions” but are not intentions to do the same thing).

In this hypothetical situation, due to the ambiguity of the expression “play some ball”, the players could think that they have meshing intentions, but this is not the case. They have different intentions.

(2) According to Smith, the second feature is the commitment of the participants to conceptual agreement: “Parties who seek to share agency in the Bratmanian fashion must be committed both to establishing conceptual agreement and then, once it is established, to sustaining that conceptual agreement.”69 He continues: “Absent such commitment, if the joint activity extends over a long enough period of time, there is a strong possibility that the parties engaged in the shared activity may slowly come to have differing understandings of what they are up to.”

Smith is aware that Bratman does not require explicitly a commitment to conceptual agreement of this kind. As Smith says, such a requirement would be a collective intentional activity in itself and would originate an infinite regress. For this reason, Smith limits himself to saying that it is fine to think that “this agreement need be neither fixed nor maintained through the intentional action of the cooperating agents,” and that “the threat of deviation from conceptual agreement once it has been fixed is so limited that commitment is hardly necessary.”70 However, he argues “that in the case of analyzing legal institutions as shared activities, we cannot be sanguine about appealing to unintentionally adopted conventions and the lack of pressure on conceptual agreement.”

---


(3) The third feature is epistemic agreement. With respect to this feature, Smith says that it is possible to derive from Bratman’s explanations the requirement according to which the participating agents need to have a “reasonably accurate belief” about the contents of the intentions and the subplans of the other participating agents. This requirement appears in Bratman’s account when he speaks about common knowledge between the agents about their intentions. Bratman thinks that it is not difficult to fulfill this requirement. Nonetheless, Smith argues that “we will have good reason to doubt this supposition in the case of large-scale institutions like legal institutions.”71

(4) The fourth feature is the commitment to epistemic agreement. In order to explain this feature, Smith begins with the following account of “I intend that we J” by Bratman related to the analysis of the collective intentional action of painting a house:

“(1a) I intend that we paint

(1b) You intend that we paint

(2) My intention is known to you, and yours is known to me

(3a) The persistence of (1a) depends on my continued knowledge of (1b): if I did not know that (1b) I would not intend that we paint.

(3b) The persistence of (1b) depends on your continued knowledge of (1a): If you did not know that (1a) you would not intend that we paint.

(4) We will paint but only if (1a) and (1b)

(5) (1)-(4) are common knowledge between us”

According to Smith, (3a) and (3b) imply that “the persistence of shared intention depends upon continued true belief by the relevant agents about each other’s relevant intentions.”72 If there is something that interrupts this continued true belief, it is necessary for the agents to be able to speak about what they are doing. However, it


“requires a commitment” from the agents to do so. Again Smith argues here that epistemic agreement is difficult to achieve in some large-scale contexts and that the commitment to epistemic agreement is difficult to sustain in large-scale contexts.

(5) The last feature is the strong practical commitment. With the concept of “strong practical commitment” Smith summarizes Bratman’s ideas about the “commitment by each party to engage in the activity with the other parties and (if a shared cooperative activity) to being mutually supportive in the activity.” Again here Smith claims that in small-scale coordinated activities of brief duration “practical commitment is cheap.”73 Though, in cases of “longer-lasting forms of coordination, such practical commitment faces pressure from many sources,” like the incompatibility between the several commitments of every agent.

On the basis of these five features Smith claims that Bratman’s shared cooperative activity is hypercommittal.

His next step is to claim that legal institutions cannot fulfill such commitments and therefore it is not possible to give an account of them on the basis of Bratman’s theory. According to Smith, legal institutions are not able to fulfill the five features of Bratman’s theory for of the following reasons.

First, he claims that there is no conceptual agreement among officials about the concept law and that there is no commitment between them to conceptual agreement about the concept of law.74 Disagreement is everywhere between legal officials, not only with respect to the concept of law, but also to the meaning of legal concepts. This

---


characteristic of law would make it inappropriate to give an account of the legal practice as a shared cooperative activity, because, Smith claims, the intentions of legal officials:

cannot be interreferential in the Bratmanian fashion if there is not intensional equivalence of officials’ concepts of law. And in a large-scale and long-term social practice such as a legal institution—one in which there are many and heterogeneous officials and there is also a nonnegligible amount of turnover—there is likely to be a wide spectrum of intensions of officials’ concepts of law.”

It is not difficult to see how this objection is similar to Dworkin’s argument from theoretical disagreement that he uses to object to legal positivism. As explained in Chapter 1, disagreement on the grounds of law leads officials to disagree about the concept of law.

Second, Smith claims that in a large-scale legal institution there may not be epistemic agreement between officials: “even if there is conceptual agreement among officials about the concept law, there may remain disagreement among officials about what it is that they are doing.” Due to the heterogeneity of officials, “it is likely that there will be a nonnegligible diversity in the beliefs among officials about what it is that they are doing.” Furthermore, in legal institutions it is unlikely that all officials know who all the other officials are. Smith also says that there is no commitment to epistemic agreement between officials. Finally, concerning the strong practical commitment, Smith claims that in large-scale social practices it is common for the practical commitment “of an agent to be the product of either the threat of sanction or the promise of wages.”

---


However, the problem is that this kind of motivation leads only to a commitment to the minimum necessary to avoid sanctions or earn the wage, regardless of whether the activity of every agent contributes to the overall activity of the institution. This would be a characteristic of legal institutions.

These reasons lead Smith to conclude that Bratman’s theory is not an adequate framework to give an account of legal institutions.

Evaluating Smith’s Objections

In this section I consider the soundness of Smith’s objection on the general project of accounting for the nature of law on the basis of theories of collective intentionality, and also consider to what extend they affect Shapiro’s Planning Theory of Law.

To begin, I do not completely agree with Smith’s reading of Bratman’s theory. It seems to me that, in order to support his “hypercommittal” claim, Smith exaggerates the degree of practical commitment, epistemic agreement and commitment about epistemic agreement that Bratman’s theory actually requires from the participating agents in a collective intentional activity. Bratman correctly requires a minimal and not a maximal degree of practical commitment, epistemic agreement and commitment about epistemic agreement.\(^{78}\) For instance, it is possible to give an account of the activity consisting of singing a duet by means of Bratman’s theory. If I am a tenor and I would like to sing the duet “Il brindisi” of La Traviata with a soprano, I do not need to know the soprano’s part by heart, nor to know in every moment what she is singing, nor to commit

\(^{78}\) This minimalism is also a property of other theories of collective intentional action, and a requirement to apply them for accounting for the nature of law. On this minimalism, see: Rodrigo Sanchez Brigido, Collective Intentional Activities and the Law, 29 (2) OXFORD JOURNAL OF LEGAL STUDIES 305-306 (2009).
myself to know her part, nor even to know her (she can be behind the curtain and without knowing who she is we still can sing the duet). Thus, in spite of the fact that maybe in some places Bratman can indeed be read as requiring too much for an action to be a collective intentional activity, what seems hypercommittal is not Bratman’s theory, but Smith’s reading of it. Furthermore, Bratman accounts for shared cooperative activity which is a special sort of collective intentional behavior whose requirements are especially stringent.

Furthermore, Smith’s reading of Bratman overlooks a property of plans and other kinds of collective intentional activities emphasized by Shapiro, namely, that they are partial, nested, and composite. Even if Bratman’s theory of shared activity were hypercommittal, it is clear that Shapiro’s theory of plans does not require such high level of commitment among agents participating in designing or applying the plan. The partiality of plans allows for officials to further plan together without knowing exactly what all of them are doing in every relevant moment of the execution of the plan.

In addition, with respect to the first feature of shared cooperative activity (conceptual agreement of the participating agents, in Smith’s account), contrary to what Smith says, it looks like Bratman’s theory does not require of the agents participating in a shared cooperative action that their concepts of the common action (J-ing) are intensionally equivalent as well as extensionally equivalent. As we saw before, it is true that in “Shared Cooperative Activity” Bratman requires that the subplans of the agents mesh and that their intentions be interdependent. He also claims that if the subplans of the agents disagree in a relevant way or contradict each other, their action cannot be a shared cooperative activity.
Nonetheless, Bratman warns us as follows: “this may suggest that SCA requires agreement in the agent’s subplans. But this is too strong.”\textsuperscript{79} There can be some differences in our subplans – for instance “I intend that we paint the house with an inexpensive paint, and you intend that we paint it with a paint purchased at Cambridge Hardware. I don’t care where we buy the paint, and you don’t care about the expense”\textsuperscript{80} – though our action could still be a shared cooperative action. But the question arises: what is the limit of the allowed disagreement? Bratman gives us a relevant criterion, when he maintains that: “there is a way of our painting the house together such that none of the activities would violate either of our subplans.”\textsuperscript{81} If none of the activities would violate either of our subplans, our subplans would mesh in spite of their divergences.

This criterion about the violation of an agent’s subplans would also explain why legal institutions cannot function in an appropriate way when the officials’ subplans about the application of the law deeply disagree in a relevant manner with the general plan of applying the rules of certain legal system. This would happen, in Shapiro’s terms, when officials disagree about the master plan. This situation is commonly known in sociology of law as anomie. Anomie arises in a society when there is not a general agreement (especially between officials) about the law that is to be applied. Nevertheless, anomie does not arise when the plan for applying a legal order grounded in the actual constitution is not generally incompatible with the subplans of the officials, even if there is some degree of disagreement between the officials about the concept of

\textsuperscript{79} Michael Bratman, 	extit{Shared Cooperative Activity}, 101 (2) THE PHILOSOPHICAL REVIEW 332 (1992).
\textsuperscript{80} Michael Bratman, 	extit{Shared Cooperative Activity}, 101 (2) THE PHILOSOPHICAL REVIEW 332 (1992).
\textsuperscript{81} Michael Bratman, 	extit{Shared Cooperative Activity}, 101 (2) THE PHILOSOPHICAL REVIEW 332 (1992).
law or about the meaning of some legal concepts. For this reason, this cannot count as an objection against the Planning Theory of Law that presupposes agreement about the master plan.

Furthermore, in Bratman’s theory there is another element that supports the claim that his view includes a minimal (and not a maximal) requirement about conceptual agreement. As we saw before, Bratman thinks that shared intentions help to resolve relevant bargains between the participating agents. If the requirement about conceptual agreement were maximal, then, no kind of bargain would be possible. A minimal bargain would break the cooperation. Bratman requires only a minimal degree of conceptual agreement.

If all this is true, then Bratman’s theory does not require a hypercomittal conceptual agreement. It just requires that the subplans of the agents participating minimally mesh and that they do not violate the subplans of the other agents.

Smith’s reading of Bratman’s theory leads him to entirely reject the use of Bratman’s theory of collective intentional action (and the use of other theories of collective intentional behavior as well) for accounting for legal practice. Regarding Smith’s objections, because of his overstatement of the commitments between the participating agents, he requires too much for legal practice to be a collective intentional behavior. Contrary to Smith’ claims, it looks like it is not necessary for the law to be a collective intentional behavior that all officials agree about the concept of law and about specific legal concepts.

It is possible to say something analogous regarding Smith’s requirement about the agreement among the officials about the concept of law. Legal practice can function
in spite of the fact that officials have different conceptions of law. It is not necessary for officials to play their role that they have one unified conception of law or one unified account on the concept of law. A judge who believes in a necessary conceptual connection between law and morality and endorses a natural legal theory can decide cases in the same state in which a legal positivistic legislator makes some rules.

It is possible to raise an analogous objection to Smith’s overstatement about the commitment to conceptual agreement, the commitment to epistemic agreement, the strong commitment to practical support and the requirement of epistemic agreement.

Nevertheless, I think that Smith is right with respect to certain important remarks concerning some problems that arise if we try to give an account of legal practice on the basis of the theory of collective intentional action. First, it is appropriate to make a distinction between the questions “what it is to do something together” and the question “what is it that we do together.” However, I believe that it is indeed possible to give an appropriate philosophical answer to the first question that can be used as a framework to spell out whatever kind of collective intentional activity we are concerned with. If this is the case, then the answer to the second question would entail the answer that we give to the first one. For example, if we say that for an action F to be a collective intentional activity it is required that all the participants have appropriate we-intentions directed towards F. Furthermore, since the primitive actions, the group’s plan and the subplan of each member is part of the very definition of the appropriate we-intentions directed towards F, then we would say that for us to do F together is to perform the actions intended in the we-intentions of the members of the group as defined in the general account of we-intentions where the primitive actions, plan of the group,
subplans of the members of the group and the members of the group correspond to us doing F.

If this is true, then all collective intentional activities would have just one and the same nature. They would be a set of coordinate actions performed by individual agents with the appropriate we-intentions directed towards the common activity. Nevertheless, I agree with Smith that the account of massive collective intentional activities like legal practice are going to be more complex than the account of a small scale activity like singing a duet or cooking a dinner together. In large scale activities there are more agents, there are more actions, there is distribution of roles (and for this reason it is impossible to fulfill a requirement like the idea described by Velleman that each member of the group should participate equally in forming and maintaining the intention82), there are groups organized as institutions with several status functions derived from complex systems of constitutive rules.83 However, this is not in conflict with the idea that even large scale activities are collective intentional activities in which many individuals with the appropriate we-intentions coordinate conditionally their intentions and actions. It is possible to complete the general philosophical account of what a collective intentional activity is with the information of the relevant variables and other structures in order to give an account of every small or large scale activity in which two or more individuals

82 David J. Velleman, How to Share An Intention, 57 (1) PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 34 f. (1997).

83 According to John Searle, a constitutive rule has the logical form: X counts as Y in the context C. He claims that constitutive rules may create the possibility of an activity (such as playing a baseball game). Constitutive rules provide a structure for institutional facts forming social reality. Searle also claims that status functions are the glue that holds society together. Humans have the capacity to impose functions on objects and people where the objects and the people cannot perform the functions solely in virtue of their physical structure. The performance of the function requires that there be a collectively recognized status that the person or object has, and it is only in virtue of that status that the person or object can perform the function in question. See: JOHN SEARLE, MAKING THE SOCIAL WORLD 194 (2010).
act together intentionally. Indeed, Bratman’s account of shared cooperative activity does not apply to large scale collective intentional behavior because it is designed for small group activity. However, this account can be modified along the same lines to apply to larger groups. Arguably, Shapiro’s structure of the legal system as a set of plans seems to respond to the challenges raised by the fact that legal practice is massive.

The Specific Properties of Law

In their reviews of *Legality* Frederick Schauer and Brian Tamanaha discuss Shapiro’s account of the specific properties of law, that is to say, of the specific features distinguishing law from other entities.

On the one hand, based on his methodological conception of jurisprudence as a discipline that should aim to account for the nature of law by means of explaining not just the necessary but also the important properties of law, Schauer criticizes Shapiro for excluding coercion as a specific property of law. He maintains that one shared intuition about the law is that it entails coercion: “we know that all real legal systems employ sanctions.”\(^8^4\) However, he goes further. He claims that not only laws but plans in general often require the use of coercion:

> The whole point of planning, rather than just doing, is that plans aim to produce action in the face of desires or reasons to do something else. Once we see this systematic conflict between a plan and plan-independent reasons, we can appreciate that supporting social plans with organized coercion is not merely an epiphenomenal accessory. For a social plan to be effective, the members of society, absent sanctions, will need to set aside not only their self-interested desires but also their own views of what the group ought now to do for the group’s benefits. But this subjugation of individual views, required by the notion of planning, is systematically unlikely to occur without the threat of force. Sanctions are therefore a

---

\(^8^4\) Frederick Schauer, *The Best Laid Plans*, 120 YALE LAW JOURNAL 605 (2010).
predictable necessity whose importance emerges once we see the systematically frustrating dimension of social plans.\footnote{Frederick Schauer, \textit{The Best Laid Plans}, 120 YALE LAW JOURNAL 607 (2010).}

On the other hand, Brian Tamanaha claims that Shapiro is not able to differentiate legal from non-legal forms of ordering for he does not account for any specific properties of law. In Tamanaha’s words:

[in Shapiro’s] core theory of law: “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, though alternative forms of social ordering.” Shapiro relies crucially upon a negative criterion in that he pegs the identification of law on the inadequacy of “non-legal” forms of ordering — claiming that law solves the insufficiency of “alternative forms of social ordering.” Notice that this way of putting it, because it refers to the failure of non-legal forms of ordering, presupposes the capacity to distinguish legal from non-legal—but that is precisely what his theory of law is supposed to provide […] Weber used public authority and coercive force to help distinguish religious and moral norm enforcement from law. Shapiro, who denies that coercive force is a necessary element of law, offers no additional criteria.\footnote{Brian Tamanaha, \textit{What is “General” Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law}, unpublished manuscript 18 (2011). A thank you Brian Tamanaha for allowing me to read and quote this unpublished paper.}

\section*{Coercion and the Moral Aim of Law}

The criticisms by Schauer and Tamanaha do not target the general jurisprudential project of accounting for the nature of law by appeal to social ontology nor the project explaining law as social practice. They only address some particular features of Shapiro’s planning theory of law.

Schauer’s claim that plans rely on coercion or—in his words—that, concerning planning activities, “sanctions are therefore a predictable necessity” seems to be overly strong and, indeed, a mistaken requirement. First, as we saw in the analysis of Bratman’s theory of shared cooperative activities, there are some plans that by nature
exclude coercion. We can say that we are going together to New York to vacation, as a collective intentional activity, only if we do it in an unforced manner. If I kidnap you and take you to New York in the trunk of my car, I cannot describe this action as a collective intentional action in which you have participatory we-intentions. You do not have the plan to go to New York. You are just being taken as a hostage to New York. Second, it is possible for plans to include sanctions in case participants decide not to carry out what has been planned, but sanctions seem to be an accessory property. For instance, the members of the law and philosophy reading group can plan to attend the next World Congress in Frankfurt, and can go to the travel agency to organize the trip. This can be done as a collective intentional activity. The travel agency might warn that, once the flight and hotel reservations are made, if someone decides to cancel her participation in the trip, she will have to pay a fee. This can be understood as a sanction. But the point is that this sanction is incidental to the plan. We can have the plan to go to Frankfurt with and without the sanction. The sanction is neither a necessary condition for nor an important property of the plan. For this reason, the analysis of it does not illuminate in any special manner the nature of the plan as a collective intentional action. Most collective intentional action involves a plan of action with roles for the parties to it but most of them do not involve sanctions for dropping out. Examples are games of all sorts, and activities like taking a walk together or having a conversation.

Now, a different question is whether coercion is a necessary property of law social practice. Schauer is right when he claims that one of the reasons why Hart and Shapiro do not consider coercion as an essential property of law is because important
aspects of law are simply not coercive.\footnote{Frederick Schauer, *The Best Laid Plans*, 120 YALE LAW JOURNAL 604 (2010).} Typical examples of these elements are the power-conferring norms that enable us to sign contracts or get married. I am not commanded to get married but empowered to do it. However, from the existence of some non-coercive elements the conclusion does not follow that coercion is not a necessary property of law. At this point, Alexy’s idea about the relationship between coercion and the law, according to which this relationship allows for different degrees describable by means of different theses, is relevant. In one extreme, there is the “extreme coercion thesis” according to which:

all norms of any legal system are norms enforced by legally issued sanctions and … coercion is the only motivation for all participants to comply with the law.\footnote{Robert Alexy, *The Nature of Arguments about the Nature of Law*, in Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge, Rights, Culture, and the Law. Themes from the Legal and Political Philosophy of Joseph Raz, OUP, 2003, 7.}

This thesis cannot be true. It is incompatible with the existence of power-conferring norms that are not enforced by sanctions and the existence of what Shapiro calls the good citizen, that is, the law abiding citizen that complies voluntarily with the law without being motivated with the threat of sanctions. These facts are normally involved in our shared intuitions about law. We do not violate our shared linguistic practices relative to the use of the concept of law if we claim that the rules of the constitution conferring the powers to the President are law, or that the existence of law presupposes that the bulk of the population obeys it voluntarily.

On the other extreme, there is the extreme non-coercion thesis. According to it:

… something can be a legal system in spite of the fact that it includes no norm that may, or indeed must be enforced either by officials or by
individuals or states in defense of their rights, so that coercion can never be a motivation for any participant of the legal system to comply with the law\textsuperscript{89}.

As Alexy claims, this thesis cannot be true:

Such a system would be a system of morality in the Kantian sense, but not a legal system. It is required by the meaning of the concept of law, as presently used, that at least some norms of the legal system are enforceable and that coercion, at least sometimes and for some persons, can be a motivation to comply with the law. In this sense it is analytically true that law is connected with coercion\textsuperscript{90}.

However, from this there only follows a relative necessity of coercion as a property of law, in the sense that it is relative to the concept of law we have in our Western world not to the idea of law whenever and wherever there is. In this sense, coercion is entailed by our linguistic practices regarding the concept of law but this practice might change or might be different in other societies. Nonetheless, with an eye to the planning theory of law, coercion would also be absolutely necessary for the law to be able to fulfill its moral aim. It is plausible to argue that only by means of coercion law is able to compensate for the deficiencies of systems of social morality for the purpose of regulating complex, contentious and arbitrary conduct.

This relates also to Tamanaha’s objection against the planning theory of law. Tamanaha is not right when he claims that Shapiro does not offer any candidate for a specific property of law differentiating it from other practices and orders. The main criterion invoked by Shapiro is stated in the moral aim thesis, namely, that law aims to solve all moral quandaries of society. This is not a property of organized sports, rules of


etiquette, or customs. However, the problem here is that this property is also present in dominant moral orders and in most religious orders. In fact, there would not be a great variation in Shapiro’s heuristic involving Cook’s Island if instead of creating a master plan, the islanders begin obeying a list of public commands issued by God or considered just by the majority of the community. If this variation is introduced in the heuristic, the same result would obtain: a normative system would be created. However, it would not be appropriate to classify this normative system as a legal system. This would be a religious or moral order.

**Planning for Others and the Normativity of Law**

In ‘What Can Plans Do for Legal Theory?’ Bruno Celano argues that, in Bratman’s view, plans are produced and applied by the agent himself for future acting and thinking. They are a self-management tool. On the contrary, the point of the authority of law is to establish and apply plans for others, and the normativity of law is displayed towards others. Consequently, Bratman’s concept of plan cannot be used to analyze the law. It is not be helpful for the purpose of understanding the nature of law.

In particular, Celano claims that:

Shapiro illegitimately trades on the (Bratmanian) normativity that a plan has for the agent, or agents, who have adopted it for themselves, in order to claim that law, too, is normative. If this is true, then the Planning Theory of Law cannot explain the normativity of law in terms of the instrumental normativity that arises from plans. As Celano explains:

---


Instrumental rationality is rationality in the pursuit of goals, or ends. Whose ends, whose goals? In the case of first-person plans, the answer is straightforward: my goals [...]. But, in the case of ‘plans’ adopted for others, an alternative appears: are we talking about norms that are instrumentally rational for the planner, or for those for whom the ‘plan’ is adopted? Unless we presuppose--an unwarranted assumption--that these coincide, we have to grant that what is instrumentally rational for the one may not be instrumentally rational for the others, or vice versa.\(^\text{93}\)

In a recent interview for the Journal Legal Theory in China (still unpublished),\(^\text{94}\) Shapiro replies to Celano with the argument that:

…treating plans as interesting only because of their distinctive normative role in individual agency is to betray an excessively narrow understanding of plans. It is to miss their “technological” aspect.

However, Shapiro did not reply to the point of how the instrumental normativity that a plan imposes on the agent in the singular case can be imposed on the addressees of plans when they are not the planners. As a result, there is a gap in Shapiro’s reasoning from the step that leads from the normativity of plans in the singular case to the normativity of plans in the case of planning for others. There is no justification for the claim that we should obey plans that others make for us just because they are plans for us.

**Final Remarks on Shapiro’s Planning Theory of Law**

Shapiro’s Planning Theory of Law offers some advantages, in comparison with the theories by Austin and Hart, as an account of law as a social practice. It is more sophisticated and detailed. Furthermore, it resolves the ambiguity between the distributive and the collective reading in favor of the collective reading. Making,

---


\(^\text{94}\) I thank Scott Shapiro for making the text of this interview available to me.
applying, and enforcing plans, as Shapiro conceives them, are collective intentional activities in the socio-ontological sense of the expression.

Nonetheless, as a view on the ontological structure of law, it still has some problems. First, Shapiro is not able to reply to Celano’s objection, and, in this sense, to explain in a coherent way the normativity of law in terms of the instrumental rationality of plans. It is not hard to recognize a similarity between this objection against the Planning Theory of Law, and the objection against Hart’s idea of law as an official and not as a social practice. At this point, the Planning Theory of Law is target of the same objection as Hart’s theory about the acceptance of the rule of recognition as official practice: it does not explain why plans adopted and maintained by officials are not binding only for them but also to the citizens.

Shapiro seems to make two undischarged assumptions concerning this point. Both of them appear clearly in the heuristic of Cook’s Island. One is that all citizens participate in formulating the master plan. Nonetheless, this is not the case in any existing society. There is not a single country in which the enacting of a constitution is the outcome of a collective intentional action in which all citizens actively participate with their actual we-intentions and their actual actions in the group action. And the second assumption is that there is agreement between all officials and citizens about the master plan. This is also contrary to all evidence. All Constitutions, as master plans, are designed under conditions of deep disagreement, and entail tensions leading to collisions between interests of different agents in society trying to argue for the satisfaction of a myriad of needs. Shapiro thinks of the formulation of the master plan as a collective intentional action on the basis of both assumptions, but neither holds generally in actual practice.
There is no legal system in which all citizens participate with their we-intentions regarding the same goals and singular actions in a collective action of making the master plan, and there is no legal system in which all citizens coincide in their interests and aspirations about how they should be mirrored in the master plan.

Second, the following question arises: If the normativity of law is as weak as the normativity of the instrumental rationality of plans, then, would it mean that there is no difference between the normativity of law and the normativity of other planning activities? The 12 characteristics that Shapiro considers specific to the law are also present in other normative systems and planning activities: moral norms are also settling; norms of etiquette are also dispositive; creating rules for sports is also purposive; regulating social clubs is also an activity of social planning and a shared activity in Shapiro’s terms, and an activity that can be done without complete agreement between the agents enacting the regulation about the content of it; systems of moral norms have also unity; financial agencies or churches are also official and institutional; rules enacted by churches are also compulsory to their members; religious and moral systems have also a moral aim irrespective of the actual purpose of the participants in these practices; and rules enacted by tribal communities (that according to Shapiro neither need nor have legal institutions) also have a general presumption of validity.

Third, there is a concern that Shapiro’s endorsement of legal positivism might be in tension with the moral aims thesis. However, due to the fact that this is not related to his account of law as social practice, I will not pursue this issue here.

95 Mark Murphy, Book Review: Legality, 30 LAW AND PHILOSOPHY 369 (2011).
The Ontological Structure of Legal Practice as a Collective Intentional Activity: Desiderata

Finally, the Planning Theory of Law certainly clarifies some of the necessary elements in the claim that legal practice has the ontological structure of a collective intentional activity. However, in the explanation of some of them, perhaps a higher degree of analytical clarity would be desirable. In any case, it is worthwhile to state here what these elements should be:

1. What is the background model of collective intentional action used for the analysis?\(^{96}\)
2. What are the agents participating in legal practice?
3. Do they form only one group or several groups?
4. Is legal practice only an official practice?
5. What are the contents of the appropriate we-intentions of members of the group(s) carrying out legal practice?
6. How is this background model to be adapted to account for the following special properties of legal practice?
   a. Legal practice is massive.
   b. Legal practice encompasses officials and citizens.
   c. Legal practice is extended over time
   d. Legal practice is carried out by means of different intentional I-actions and we-actions performed by different agents with appropriate I-intentions and we-intentions that can be described in several ways.

\(^{96}\) It is not clear that Shapiro fully endorses Bratman's account of shared cooperative activity. In addition, his theory of plans does not spell out the sufficient and necessary conditions for a plurality of agents to have a plan and apply it.
(e) An essential element of legal practice is the authority of officials.

(f) An essential element of legal practice is the normativity of law.

(g) An essential element of legal practice is legitimate coercion.

In Chapter 5 I will explain how those properties might be put together in a model of law and social practice and what are the difficulties arising in doing it. However, before this, it is important to examine Ronald Dworkin’s account, according to which the ontological structure of law is the one of an argumentative or interpretive social practice.
CHAPTER 4
DWORKIN AND LEGAL PRACTICE AS AN ARGUMENTATIVE SOCIAL PRACTICE

In a variety of publications, from *Law’s Empire* (1986) to *Justice for Hedgehogs* (2011), Ronald Dworkin has endorsed an alternative account of law as social practice. According to Dworkin, law is an argumentative or interpretive social practice. In this chapter I will examine this claim. Dworkin’s account of law is the most salient non-positivistic theory of our time. The chapter is divided into three sections. In the first one, I will explain the methodological background of Dworkin’s account, namely, his adoption of the Rawlsian method of reflective equilibrium for understanding the nature of law. In section 2, I will describe Dworkin’s thesis of law as an argumentative social practice. In section 3, I will assess this thesis.

**Reflective Equilibrium**

**The Concept of Reflective Equilibrium**

On the basis of his criticisms of conceptual analysis as method for accounting for the nature of law, Dworkin adopts the Rawlsian procedure of reflective equilibrium as an alternative methodology for legal theory.¹ Consequently, the first questions that might be asked in order to understand Dworkin’s theory are: What is reflective equilibrium? How can it be used to account for the nature of law?

Dworkin claims that building an account of the nature of law requires more than description. In certain way, this is fairly obvious for every theory requires critical reflection. As a theory, an account of the nature of legal practice rests on beliefs, and, in particular, of intuitions. Intuitions are beliefs in the truth of a proposition that, at the same time, as Depaul claims, the inquirer “does not currently hold because of

perception or introspection or memory or testimony or because the person has explicitly inferred the proposition”, but simply because “the proposition seems true to [her] upon due consideration.”

When an inquirer uses conceptual analysis to investigate the nature of law, the theories resulting from it rest on intuitions and other kinds of beliefs about the nature of law. In a sense, it is clear that this cannot be enough. Many of these intuitions might turn out to be incompatible with each other. Consequently, they should be treated as revisable, and the jurisprudential inquiry should encompass a process that allows for adjudicating conflicting intuitions within the larger picture of the whole account of legal practice. Thus, the inquirer should undertake a process of reflection in order to decide which intuitions and beliefs to retain, to revise and to discard. This process is known as reflective equilibrium.

The concept of reflective equilibrium was introduced by Nelson Goodman, as a process of mutual adjustment of beliefs in the justification of rules of inductive and deductive logic. His idea is that there should be coherence between our beliefs regarding the rules of inductive and deductive logic, such that no rule would be acceptable as a logical principle if it is not compatible with what we take to be acceptable instances of inferential reasoning. In order to test this acceptability, we should undertake a process of correcting and revising our views about all our beliefs concerning these rules.

---


In the realms of ethics and political philosophy, reflective equilibrium was explained and developed by John Rawls in *A Theory of Justice*, as a method for examining our moral judgments about a particular issue by looking for their coherence with our beliefs about similar cases, and our beliefs about moral issues, and at the same time, as a result of the process in which this examination is accomplished. In this second sense, Rawls claimed that reflective equilibrium should be the outcome of the process that we use to find out the principles expressing the terms of fair cooperation that should govern a society of free and morally equal agents. This process should begin with the statement of our “considered convictions of justice.” These convictions are “provisional fixed points which we presume any conception of justice must fit.” Then, we examine if the possible principles expressing the terms of fair cooperation actually match our considered convictions of justice. In case of discrepancies, we have a choice: either we can reject every principle at stake or revise some of our considered convictions of justice. Once we have achieved consistency between the principles at stake and the considered convictions of justice, we achieve reflective equilibrium. However, even this equilibrium is provisional. It is always open and revisable, when new relevant considerations arise.

---

Nowadays, reflective equilibrium is considered “the end-point of a deliberative process in which we reflect on and revise our beliefs about an area of inquiry, moral or non-moral”.⁸

As Daniels explains, this method consists in “working back and forth among our considered judgments” (or intuitions) revising them wherever necessary “in order to achieve an acceptable coherence among” them.⁹ The method succeeds when we achieve reflective equilibrium, that is, “when we arrive at an acceptable coherence among our intuitions.”¹⁰ Acceptable coherence means that our intuitions do not contradict each other and they provide support for and help to explain the system of which they are parts. This sort of coherence is achieved when “we are un-inclined to revise [our intuitions] any further because together they have the highest degree of acceptability or credibility for us.”¹¹

The distinction between narrow and wide reflective equilibrium is well known in ethics and political philosophy. Narrow reflective equilibrium is a method of moral deliberation in which a moral inquirer works back and forth between a judgment about a moral issue, and the reasons justifying the judgment.¹² This process begins with the intuitions of the moral inquirer about the possible solution for a moral issue. Further

---


reflection on these intuitions leads to the expression by the inquirer of her considered moral judgments about the issue at stake. On this basis, the inquirer formulates a moral theory that explicates her considered moral judgments, and that justifies them by means of certain principles. Early on in the process, as suggested by Rawls, the inquirer holds her considered judgments constant while she formulates the relevant principles, tests them against considered judgments, and either reformulates the principles accordingly or revises the considered judgments. Finally, the inquirer takes into account possible conflicts between her intuitions, her considered moral judgments and the moral principles explaining and justifying them, and states a revised theory. The whole process implies a back-and–forth movement from intuitive judgments to general principles. The outcome of the process is a stable and coherent theory that does not need further revisions.

Wide reflective equilibrium is a further step in the moral inquiry. It is a process in which the inquirer considers alternative theories to her moral theory, and assesses the arguments that might be used for and against the alternative theories and her own theory.\textsuperscript{13} Wide reflective equilibrium entails a comparison between one’s own theory and alternative theories, replying to the possible challenges to one’s own original intuitions, considered judgments and principles, and comparing the advantages and disadvantages of one’s own theory with the advantages and disadvantages of

alternative theories.\textsuperscript{14} Wide reflective equilibrium can also involve empirical theories and other background theories in the comparison.

**Reflective Equilibrium and the Nature of Law**

In ‘Rawls and the Law’,\textsuperscript{15} Dworkin spells out his view on how reflective equilibrium should be used as a methodology for explaining the nature of law. The basis of this explanation is his claim that theoretical disagreement makes it impossible for legal theory to explain the nature of law in purely descriptive terms. His idea is that any concept of law, like Hart’s theory according to which law is a set of rules issued according to the rule of recognition, should be treated in the same way in which Rawls analyzed the concept of justice. It is Dworkin’s view that instead of supposing that there are shared intuitions in the background of the concept of justice (as conceptual analysis assumes), Rawls begins with the assumption that there is disagreement about the concept. People indeed agree in some abstract way about this concept and about some examples of just and unjust actions. Thus, in order to understand the concept of justice, we should proceed in the following way, by means of the method of reflective equilibrium:

We try to generate principles of some general scope and to match those general principles to the concrete judgments about what is just and unjust with which we begin, shifting our views about either principles or concrete judgments, or both, as becomes necessary to achieve an interpretive fit.\textsuperscript{16}

This understanding of the Rawlsian method of reflective equilibrium leads Dworkin to propose an analogous methodology for legal theory and, in particular, for the enterprise


of explaining the nature of law. According to Dworkin, reflective equilibrium should be undertaken in legal theory in two steps:

"We can identify what apparently goes without saying is part of our law—the speed limit, the tax code, the ordinary everyday rules of property, contract, and so forth, that we are all familiar with. These are [...] paradigm instances of law"; 17 and

“We can then try to provide a suitable conception of legality, that is, a conception of legality that brings our various preanalytic assumptions about concrete propositions of law into equilibrium with the general principles of political morality that seem best to explain the character and value of legality. In that way we can embed a theory about the truth conditions of propositions of law in a larger conception of value that we find convincing". 18

Thus, in the first step we identify some paradigmatic examples of law. 19 In the second step we attempt to spell out a conception of law that is to be found in the background of these examples. This conception consists in some assumptions. And the point of the juridico-philosophical analysis is to create a reflective equilibrium between these assumptions, or, in Rawlsian terminology, these considered judgments, and the best principles of political morality that explain the value of law. Naturally, a theory of this kind will be controversial for it implies endorsing a view of what the best principles of political morality are.

The Argumentative Nature of Legal Practice

This methodological background helps us to understand the way in which Dworkin conceives law as a social practice. Dworkin builds his argument on the basis of his criticisms to legal positivism, a doctrine that he calls “the orthodox picture.” In this

19 It is worthy to note that this first step is not too different from Shapiro’s suggestion that jurisprudential inquiry should begin by a recollection of truisms about law.
orthodox picture, on the one hand, morality consists of “a set of standards or norms that have imperative force for everyone,” and, on the other hand, law “belongs to a particular community,” is “made by human beings through contingent decisions and practices of different sorts,”\textsuperscript{20} “depends only on historical matters of fact: it depends finally on what the community in question, as a matter of custom and practice, accepts as law.”\textsuperscript{21}

Dworkin suggests an alternative explanation of law. He calls it interpretivism. The main thesis is that law is an “interpretive concept.” We should recall that, according to Dworkin, the concept of law has a connection to claims of law, that is, claims about what law requires for every situation. Dworkin’s view treats “lawyer’s claims about what the law holds or requires on some matter as conclusions of an interpretive argument.”\textsuperscript{22} He maintains that whoever attempts to account for the nature of law is involved in the discourse about law, and this discourse consists in a dialogue on the validity of claims of law. This involvement implies that the inquirer about the nature of law to participates in legal discourse by means of arguing claims about the validity of certain propositions of law. These claims are value-claims. These claims have a certain value related to the role that law should play in the whole picture of instantiating and satisfying the best principles of political morality. In this way, law is a “social phenomenon.”\textsuperscript{23} And the aim of general theories of this social phenomenon is not to describe it but to “interpret the main point and structure of legal practice.”\textsuperscript{24} Thus, general theories of law are stated by

\textsuperscript{20} RONALD DWORKIN, JUSTICE OF HEDGEHOGS 400 (2011).
\textsuperscript{21} RONALD DWORKIN, JUSTICE OF HEDGEHOGS 401 (2011).
\textsuperscript{22} RONALD DWORKIN, JUSTICE OF HEDGEHOGS 402 (2011).
\textsuperscript{23} RONALD DWORKIN, LAW’S EMPIRE 13 (1986).
\textsuperscript{24} RONALD DWORKIN, LAW’S EMPIRE 90 (1986).
participants in legal practice with the purpose of arguing for the validity of certain claims of law. Consequently, unlike other social phenomena legal practice is “argumentative.”\textsuperscript{25} It is an “enormous social practice”\textsuperscript{26} of argumentation in which every theory is a controversial theory about the role of that practice within the whole landscape of political morality. If follows that an examination of the concept of law aims to “encourage us to reflect on and contest what some practice we have constructed requires” (…). In Dworkin’s words:\textsuperscript{27}

the […] concept of law functions as an interpretive concept, at least in complex political communities. We share that concept as actors in complex political practices that require us to interpret these practices in order to decide how best to continue them, and we use the […] concept of law to state our conclusions. We elaborate the concept by assessing value and purpose to the practice…\textsuperscript{28}

But, how can the method of reflective equilibrium be used in order to account for legal practice in an interpretive way?

Dworkin says that it should be done in two steps. The first step is identifying “the political, commercial, and social practices” related to the concept of law.\textsuperscript{29} And the second step is constructing a controversial conception of law by means of “finding a justification of those practices in a larger integrated network of political value.”\textsuperscript{30} This conception consists in a coherent picture of the grounds needed to support claims of

\begin{itemize}
  \item \textsuperscript{25} RONALD DWORINE, LAW’S EMPIRE 13 (1986).
  \item \textsuperscript{26} Ronald Dworkin, \textit{Hart’s Postscript and the Character of Political Philosophy}, 24 (1) OXFORD JOURNAL OF LEGAL STUDIES 19 (2004).
  \item \textsuperscript{27} RONALD DWORINE, JUSTICE IN ROBES 10 (2006).
  \item \textsuperscript{28} RONALD DWORINE, JUSTICE IN ROBES 10 (2006).
  \item \textsuperscript{29} RONALD DWORINE, JUSTICE OF HEDGEHOGS 404 (2011).
  \item \textsuperscript{30} RONALD DWORINE, JUSTICE OF HEDGEHOGS 405 (2011).
\end{itemize}
law. We put together these grounds in a process of adjustment and fit until we achieve consistency between them. The result is a justificatory theory of the practice of law that is a branch of political morality, and that aims to interpret this practice in the light of the best principles of political morality.

These two steps follow the pattern of Rawlsian reflective equilibrium for the purpose of building a conception of justice. However, at this point Dworkin faces a challenge similar to the one that Austin’s, Hart’s, and Shapiro’s theories face, namely, how to distinguish law from similar phenomena—in the case of Dworkin, in particular, the challenge is how to distinguish law from other branches of political morality. Here Dworkin’s answer is surprising. He maintains that the key criterion for drawing this distinction is the existence of “some version of what Hart called secondary rules: rules establishing legislative, executive, and adjudicative authority and jurisdiction,” along with the instantiation of some version of the principle of separation of powers.

But, the problem here is how to understand the existence of this institutional framework, that is, the fact that secondary rules establishing legislative, executive, and jurisdiction are valid legal rules? And, how to understand that the rules instantiating the separation of powers are valid as well? Can this be done by means of normative arguments or by means of conceptual analysis?

Dworkin does not clarify further this issue. Using an analogy drawn from a situation in which a parent is forced to adjudicate between the claims of two of children, two teenagers arguing about some tickets for a concert, he says that by deciding question like this within the framework of the family and within the framework of law, we

---

31 RONALD DWORINK, JUSTICE OF HEDGEHOGS 405 (2011).
“construct a distinct institutional morality: a special morality governing the use of coercive authority.”\textsuperscript{32} The development of this institutional morality implies applying rules created in the past by means of historic facts. Dworkin’s point is that using rules created in the past (like precedents in common law) for adjudicating cases implies justifying the practice, and endorsing some moral principles justifying it, for example, principles of fair play, fair notice, and a fair distribution of authority. This justificatory role of the application of past rules makes it impossible for the practice to be about the application of a certain non-moral code.

An Assessment of the Argumentative Nature of Legal Practice

The question is how to understand Dworkin’s account of legal practice from the point of view of the theory of social ontology? It is clear that Dworkin does not offer a developed account of this practice from this point of view, one that has the level of sophistication and detail of explanation of, for example, Shapiro’s Planning Theory of Law. However, his claims entail some very interesting theses that we cannot overlook. First, it seems that, unlike Hart, Dworkin considers legal practice to be not only an official practice but also a social practice, that is, a practice in which the agents participating are all lawyers and all persons making “claims of law”, that is, claiming that some propositions of law, according to which such and such are legal rights and, therefore, should be enforced by the state apparatus, are true. Dworkin identifies the group of agents making these claims as the participants in legal practice. In Dworkin’s words:

Every actor in the [legal] practice understands that what law permits or requires depends on the truth of certain propositions that are given sense

\begin{flushright}
\textsuperscript{32} RONALD DWORKIN, JUSTICE OF HEDGEHOGS 408 (2011).
\end{flushright}
only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims.\(^\text{33}\)

On the one hand, this claim cannot be subject to the challenge of explaining why rules or plans created in an official practice bind all the citizens of the state. If legal practice encompasses all individuals, and valid norms are produced within it, then there is no necessity to explain why these norms bind all individuals. However, on the other hand, Dworkin does not clarify how this—in his words—“enormous practice” takes place. He does not render explicit the details and complexities entailed by it. For instance, he does not offer a clarification about how is it possible for a constitution to be created within this framework. It is clear that not all citizens participate in the enactment of the constitution with their actions, I-intentions and we-intentions. In the same way, it is clear that not all citizens participate in the collective intentional action of the Supreme Court of adjudicating cases, interpreting law, and deciding, for instance that segregation of students in public schools is against the constitution. If a legal practice is indeed a general social and not only an official practice, it is necessary to establish the different roles that different agents play in it.

Second, Dworkin claims that it is impossible to give a value-free, or value-neutral, description of this social practice. In fact, he goes on to claim that it is impossible to give such a description of any social practice. This claim is the product of his assumption that any one accounting for this practice is necessarily an agent participating in it and either criticizing it or justifying it. Since *Law’s Empire*, Dworkin seems to maintain that

\(^{33}\) RONALD DWORINK, LAW’S EMPIRE 13 (1986).
legal practice is only to be analyzed from the point of view of the participant.\textsuperscript{34} The participant in this practice is the legal practitioner: the judge or the lawyer (though Dworkin also includes “citizens, politicians, and law teachers”).\textsuperscript{35} And he assumes that lawyers and judges always make normative controversial claims about the validity of some claims of laws or the truth of some propositions of law.

The problem is that this entails a reduction of all possible discourses about legal practice to a first order discourse of participants. It excludes the possibility of a second order discourse from the point of view of legal theorists, who might not have interest at all in justifying or criticizing the actual legal practice but only in understanding it. Furthermore, Dworkin gets himself into trouble by claiming that the difference between legal practice and other kind of practices, like, for instance, the practice of evaluating actions from the moral point of view, consists in the existence of some kind of Hartian secondary rules. Then, the question that Dworkin has to answer is how to understand the existence of these rules (remember that the rule of recognition is one of these rules). Dwokin seems to be trapped in a dilemma: either he has to give up this claim about rules of recognition, and then it would be impossible to distinguish law from morality, or he should accept that the existence of secondary rules and, in general, of the institutions of law can only be understood in a second order discourse, in which the validity of these rules is explained in terms of acceptance or as an outcome of an collective intentional activity.

\textsuperscript{34} RONALD DWOR乾坤, LAW’S EMPIRE 14 (1986).

\textsuperscript{35} RONALD DWOR乾坤, LAW’S EMPIRE 14 (1986).
Moreover, it is hard to see how the existence of these rules and of the institution of law can be considered as a normative question that is to be answered by means of a controversial theory of political morality. As Patterson claims, Dworkin does not provide any clue about how it would be possible to reveal the ontological structure of law by means of a normative methodology.\textsuperscript{36} Even if we grant that the first-order discourse in law, that is, the discourse of legal practitioners, is normative and argumentative, from this does not follow that the second-order discourse is also necessarily normative or argumentative. In the same way in which we can assert that an institutional fact exists, like, for example, that Barack Obama is the President of the United States or that the Peso is the Colombian currency, without trying to justify or criticize it, it is possible for us to give a non-normative explanation of legal practice, as a general theory of law, by claiming that it is the product of recurrent individual and collective intentional actions performed by agents, acting sometimes by themselves and sometimes as groups, creating the constitution, enacting laws, issuing judgments, signing contracts, adjudicating cases and following all norms created within this institutional framework.

Finally, it is clear that Dworkin does not encounter the problem of explaining the normativity of law. Because of the fact that, according to him, law is a province of morality, then the normativity of morality is also the normativity of law. In other words, challenging the normativity of law would entail challenging the normativity of morality. This is also impeccable from the point of view of the Humean principle. From normative principles of morality follow normative principles of law. An ‘ought’ follows from an ‘ought’. However, the price that Dworkin has to pay is the impossibility of distinguishing

\textsuperscript{36} Dennis M. Patterson, \textit{Dworkin on the Semantics of Legal and Political Concepts}, 26 (3) OXFORD JOURNAL OF LEGAL STUDIES 553 (2006).
legal norms from moral norms. He claims that law should be unified with morality. But at this point, an objection against Dworkin can be made, on the basis of Shapiro’s claim about the function of legal practice. Legal practice cannot play the role of creating normative certainty in society and solving coordination problems if any time legal questions arise we should engage in moral arguments. Certainly, one function of law consists in preempting deliberation. This function cannot be fulfilled if law is only a branch of morality. And this is not only inconvenient but also a mistaken picture of legal practice. Legal practice cannot be described as if it were like conflict constrained by rules between soldiers in a war or players in chess, namely, as if the collective practice of the law were a matter of agents striving against one another to be victors and not victims in an endless game of claiming the validity of their legal rights as against others or seeking to justify propositions of law in their interest against others who seek to justify those in theirs. This might mirror one aspect of legal practice, the practice of legal practitioners, but it overlooks the possibility of agents in a society collaborating and living together within legal practice cooperatively.
CHAPTER 5
LEGAL PRACTICE AS A COLLECTIVE INTENTIONAL ACTIVITY

In this Chapter I would like to explain some of the basic elements that an appropriate view of legal practice as collective intentional activity should include. An account of these elements is needed in order to solve some of the problems that the interpretation of the social practice thesis by Austin, Hart, Shapiro and Dworkin face as theories of the nature of law. The basic elements presented in this chapter are the foundation of a social ontological theory of law that I will develop in the coming years.

Legal practice is constituted by actions and, in particular, either directly or indirectly, intentional actions. Individual and collective intentional actions are relevant for legal practice from the point of view of the addressees of legal norms and of the persons in charge of the creation, enforcement and adjudication of these kinds of norms. On the one hand, the addressees of the legal norms are individual agents and groups of agents. For instance, norms of criminal law and tort law establish descriptions of individual and collective intentional actions as crimes. On the other hand, the creation, enforcement and adjudication of the legal norms involve individual and collective intentional activities performed by the actions of certain individual agents or groups of agents such as the Congress or the Supreme Court. When intentional actions of groups are at stake, they are made possible by means of the individual intentional actions of their members.

The concept of intentional action is the basic building block of collective intentional activities. Consequently, the first step in understanding the nature of the legal practice as a collective intentional activity is understanding the concept of intentional action in the individual case.
In this chapter I will proceed in three steps. In section 1, I will give an account of the concept of intentional action to serve as a framework of my explanation of legal practice as a collective intentional activity. Due to the fact that intentional actions are a kind of actions, explaining the concept of intentional action presupposes taking a stand in relation to some other concepts in analytical philosophy of action. However, giving a complete account of them goes beyond what is required for present purposes. I will just present them as briefly as possible in order to make this work accessible to a legal audience not acquainted with analytical philosophy of action and to explicate for the philosophical audience the conceptual apparatus used as basis of the account, in terms of collective intentional activity, of the legal practice, which is explained in the remaining two sections. In section 2, I will explain Ludwig’s account of collective intentional action. I will use his account as a plausible model of the kind of action that is suitable for understanding legal practice as a set of a collective intentional activities. In section 3, I will account for the details of the model of legal practice that, on the basis of Ludwig’s theory, I will endorse here.

A Concept of Intentional Action

In order to explicate the concept of intentional action, it is necessary to clarify some basic concepts of analytical philosophy of action. These concepts, which I will introduce in this section, relate to the following questions: What is an action? What is an agent? What is an intention? and What is an intentional action?

However, before providing an answer to these questions, it is necessary to explain the methodological instrument to be used in order to achieve this goal, namely, a version of the so-called event analysis of action sentences.
The Event Analysis of Action Sentences

The event analysis of action sentences is an account of the logico-semantic form of action sentences that is a useful tool in discussing the concept of action.1 As for every analysis, the event analysis of action sentences aims to resolve a complex—namely, action sentences—into items that are simpler—in this case, the elements of action sentences—in order to aid understanding the complex. Using this analysis as a means for understanding the concept of action employs the strategy of going from semantics to ontology, or more precisely, from analyzing the logical form of the sentences we use to talk about actions to better understand what actions are. The main idea is that if we understand the logical form of action sentences, we will have an adequate understanding of what actions are for our present purposes.

Actions are described be means of sentences like:

[1] Paul signed the contract

In the section 48 (“The Problem of Individuals”) of his *Elements of Symbolic Logic*,2 Reichenbach was the first to suggest that action sentences like [1] could be illuminated by thinking of them as implicitly involving a quantifier. In this section, Reichenbach’s aim was not to give an account of actions. In fact, he does not even mention the word action within it. However, he does claim that there are individuals of a type called “event-type”, such as “[a] coronation, an assassination, an earth quake [or] an automobile accident.”3

---


3 HANS REICHENBACH, *ELEMENTS OF SYMBOLIC LOGIC* 267 (1947).
and that sentences like ‘the coronation of George VI took place’ or ‘Amundsen flew to the North Pole’ are to be represented in symbolic language by a bound variable and—this is what matters—“an existential operator,” that is, an existential quantifier.

Davidson influentially developed this idea in “The Logical Form of Action Sentences,” and claimed explicitly that actions sentences involved a quantifier over events.

To say that action sentences involve a quantifier over events is equivalent to saying that action sentences express a proposition to the effect that there is an event of a certain kind. This is represented by means of a variable bound by the existential quantifier in the representation of the logical form of the sentence.

So, the event analysis of actions sentences holds that an utterance of a sentence such as [1], namely, a sentence in past tense describing a simple singular action, is to be understood as expressing that:

[2] There is an event of which Paul is the agent and it is a signing of the contract.

This is a first step. However, this analysis can be enhanced. According to the original proposal by Davidson, action sentences introduce an implicit quantifier over

---

4 HANS REICHENBACH, ELEMENTS OF SYMBOLIC LOGIC 268(1947).


6 On this account of the event analysis of singular action sentences, see: KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 9 and 20 (2011).
events, and adverbs are predicates of the event variable. In this way, using ‘e’ for an event variable, [2] is to be analyzed as:

[3] There is an event e such that: signed (Paul, the contract, e)

If I use ‘(∃ e)’ for ‘there is an event such that’, then [3] is to be analyzed as:

[4] (∃ e)(signed (Paul, the contract, e)).

In his comments on Davidson, Castañeda suggested a widely accepted modification of this analysis, according to which the case roles of the agent and the object should also be separated out. If ‘agent(e, x)’ expresses the relationship existing between x and e when x is an agent of e, and ‘of(e, x)’ expresses the relationship existing between e and x when x is the object of the event, then [4] is to be analyzed as:

[5] (∃ e)(agent(e, Paul) & signed (e) & of(e, the contract))

On this view, every action verb with a direct object involves a relational predicate expressing a relation between an event and an agent that brought about the event and a relational predicate expressing a relation between an event and an object in or on which the event takes place.

---

7 DONALD DAVIDSON, ESSAYS ON ACTINS AND EVENTS 118 (2001): “The basic idea is that verbs of action –verbs that say ‘what someone did‘- should be construed as containing a place, for singular terms or variables, that they do not appear to.”


9 With this modification the event analysis of actions sentences is able to overcome the objection of dissolving the action “into the goings-on of states and events.” On this objection, see: Jennifer Hornsby, Agency and Actions, in AGENCY AND ACTION 20 (John Hyman and Helen Steward eds., 2004).


In addition, in *Understanding Collective Agency* Ludwig suggests a modification that, in the case of individual action sentences, makes explicit that the agent is also the sole agent of the event. This modification aims to separate out the relation of agency from the implication of sole agency. If ‘agent(e, x)’ expresses the relation of x being an agent of e, and [only y=x](agent(e, y)) expresses that only agents y identical to x are agents of e,\(^{12}\) then [5] is to be analyzed as:

\[
[6] (\exists e)(\text{agent}(e, \text{Paul}) \& [\text{only } y=\text{Paul}](\text{agent}(e, y)) \& \text{signed}(e) \& \text{of}(e, \text{the contract}))
\]

For the purpose of accounting for legal practice it is enough to show the basic logical form of this very simple kind of action sentences. Complexities are to be added when tenses and modal verbs are incorporated and variations related to the number of agents and objects as well. In addition, further refinements are possible for explaining the nature of adverbials in more complex sentences or for making explicit the distinction between an action of an agent and its consequences. But we will not need to go into these here.\(^{13}\)

**A Concept of Action**

As for every concept, it is possible to express the concept of action by means of determining its genus and its *differentia specifica*, that is to say, the particular characteristics.

---

\(^{12}\) See, KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 29 (2011).

\(^{13}\) For more details see: Kirk Ludwig, *Adverbs of Action and Logical Form*, in A COMPATION TO THE PHILOSOPHY OF ACTION (Timothy O'Connor and Constantine Sandis eds., 2010)
**Actions are Events**

As the event analysis of actions sentences shows actions are a subclass of events.\(^\text{14}\) Events are unrepeatable particulars, that is, concrete individuals, datable, countable and describable in many ways.\(^\text{15}\) From this it follows that if legal practice is a set of actions, then, it should be understood as a set of concrete individuals, datable, countable and describable in many ways, and not as an abstract entity.

An event is a change of state in an object or in regions of space that persist through time. As Ludwig explains, such a change “has occurred when an object acquires or loses a property.”\(^\text{16}\) In this sense, an event is the instantiation of any property of one of the following forms: either an object or a region of space having a property \(P\) at time \(t\) but not having \(P\) afterwards or not having \(P\) at \(t\) but having \(P\) afterwards.\(^\text{17}\)

**Negative Actions as the Upholding of States**

Additionally, in legal practice negative actions are also relevant. Negative actions are not events. They do not involve a happening, that is, an agent bringing about a change in any object or in any region of space. But what are they? Here it is also

---

\(^{14}\) On the thesis that actions are a subclass of events: see: DONALD DAVIDSON, ESSAYS ON ACTINS AND EVENTS 118-122 (2001); JAEGWOD KIM, SUPERVENIENCE AND MIND. SELECTED PHILOSOPHICAL ESSAYS 49 (1993).

\(^{15}\) On these properties of events, see: DONALD DAVIDSON, ESSAYS ON ACTINS AND EVENTS 118 f. and 181 f. (2001). Fortunately, for the purpose of this investigation it is not necessary to discuss the objections challenging the view that events are particulars (especially by Chisholm). On this objections and the view that events are universals, see: Favio Pianesi and Archile Varzi, Events and Event Talk: An Introduction, in SPEAKING OF EVENTS 5 f. (James Higginbotham, Fabio Pianesi and Archile Varzi eds. 2000).

\(^{16}\) See: KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 18 (2011); See, also JAEGWOD KIM, SUPERVENIENCE AND MIND. SELECTED PHILOSOPHICAL ESSAYS 33 (1993), who defines events as changes in substances: “The term ‘event’ ordinarily implies change... A change in a substance occurs when that substance acquires a property it did not previously have, or loses a property it previously had”.

\(^{17}\) KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 21 (2011).
possible to use the event analysis of action sentences in order to understand the nature of negative actions.

An example of a sentence describing a negative action is:

[7] Officer Smith refrained from arresting Paul

If ‘refrained’ were a verb describing a positive action, the analysis of [6] would be:

[8] (∃e)(agent(e, The officer Smith) and [only y=The officer Smith](agent(e, y)))
   and refrained (e) and of(e, Paul))

The problem with [8] is that ‘refrained’ does not express an event. As for all verbs describing negative actions, ‘refrained’ does not refer to a change in the state of an object or of a region of space consisting in the object or the region of space winning or losing a property. On the contrary, it conveys that the states both of the agent and of the object are the same through time, that is, that neither the agent nor the object gains or loses any (relevant) property at all through a certain period. If we take all of this into account, and we use ‘t¹-t²’ to express the period in which the states of both the agent and the object remained unchanged and we understand ‘to refrain’ to mean: to hold oneself back, to abstain from or to keep one’s self from action or interference, then [7] is to be analyzed in [9] as follows:

[9] There is a state of the agent (the officer Smith) that remains unchanged from ‘t¹-t²’, being the state of the agent not arresting the object.

In logical notation, this might be expressed as follows:

[10] (∃s)(of(s, Smith) & agent(s, Smith) & refraining(s) & from(s, arresting Jones))

---

18 See, on states as the relevant variable for negative actions though within a different account, KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 34-37 (2011).
This analysis shows that negative actions imply the maintaining of the states of the agent and of the object during certain space of time.

**The Differentia Specifica of Actions**

Defining positive actions as events and negative actions as the maintaining of the states of the agent and the object does not offer a full explanation of what actions are. Earthquakes are also events but not positive actions. Moreover, the fact that an object is driven by the force of inertia implies the maintaining of a state, namely, its state of motion. Nevertheless, it is not a negative action. The question then arises: What is the *differentia specifica* or, in other words, the particular characteristics of actions?

There are several interesting suggestions about the answer to this question. Let us reflect first about the particular characteristics of positive actions. A first intuition is that in a positive action the cause of the change of state in an object or in regions of space which persists through time is an agent. It is possible but not necessary for the agent to be also the object of the action, as it happens in the sentence: “Paul shaved himself”. This first intuition leads us a step forward, but not too far away, since the concept of agent or the concept of agency is related to the concept of action. If we do not introduce additional elements, then the definition of action would be circular, for the agent would just be the performer of an action.

Therefore, a second suggestion is relevant. As Davidson claimed, it is necessary to impute generally agency to a person.\(^\text{19}\) Nowadays, this suggestion may seem problematic since—at least metaphorically speaking—it is also possible to impute agency to such entities as animals, robots or even computers or informatics systems.

\(^{19}\) See: DONALD DAVIDSON, ESSAYS ON ACTINS AND EVENTS 121 (2001).
However, this problem is less relevant within the legal context, since animals and things are neither considered as addressees of the legal norms nor as participants in the legal practice.

Nevertheless, there is a problem that is also important within the legal context relating to persons. It is true that many of the changes in objects or regions in space that are made through the intervention of persons are actions. However, this is not always the case. Sometimes the person involved in a change in an object or in a region in space is passive rather than active. For instance, if Paul lost his balance because of an earthquake and in falling down he knocks a pedestrian into the path of a truck, it is not appropriate to say that Paul performed an action of killing a pedestrian. There is a distinction between actions and things that merely happen to people, or, in other words, “the events they undergo.” Consequently, in order to determine the differencia specifica of actions it is necessary to answer the question what the criterion is that distinguishes actions of an agent from things that merely happen to her.

It is intuitively plausible to claim that performing an action involves certain necessary conditions related to the instantiation of some physical and mental properties in the agent. To perform an action is to bring about or to do something. At least two kinds of things happen when an agent brings about or does something. On the one hand, in the case of positive actions it presupposes the occurrence of certain bodily movements of the agent or the occurrence of certain mental events in her. This occurrence of bodily movements or mental states is also a change in the agent itself or, in other words, the instantiation of certain properties in the agent, in the sense that the

---

agent either gains a property that she did not have before or loses a property that she had before. They can be called primitive actions when they are done but not by doing something else.\textsuperscript{21}

Nonetheless, the occurrence of bodily movements or mental events is also present in events the agent merely undergoes. For this reason for a happening of this nature to be an action the instantiation of certain mental properties in the agent is also required. It is a particular characteristic of actions that they are directed at chosen ends and that the agent is aware of the ends and of the happening of bodily movements or mental states as well.

Let us consider first the self-awareness. As Velleman notes, one basic element of action is the awareness of the agent of what she is doing.\textsuperscript{22} In his opinion, one essential element of the process of doing something is to know what one is doing:

The reason why you usually know what you’re doing […] is that you simply don’t do anything unless, first, you have already anticipated doing it next and, second, you have either just become aware of being just about to do it or just started paying attention to what you’re doing.\textsuperscript{23}

Self-awareness is expressed in the ability to name one’s own actions or, more specifically, to give a \textit{prima facie} description of the own actions\textsuperscript{24}. The expression “giving a \textit{prima facie} description of one’s own action” is ambiguous. In a narrower sense, it could mean giving a \textit{prima facie} description of primitive actions. This sense is not as relevant within the legal context as the broader sense, in which giving a \textit{prima facie} description of actions done for other purposes.

\textsuperscript{21} DONALD DAVIDSON, ESSAYS ON ACTINS AND EVENTS 49 (2001).
\textsuperscript{22} See: DAVID VELLEMAN, PRACTICAL REFLECTION 47 f. (2007).
\textsuperscript{23} DAVID VELLEMAN, PRACTICAL REFLECTION 53 (2007).
\textsuperscript{24} DAVID VELLEMAN, PRACTICAL REFLECTION 47 (2007).
facie description of one’s own actions implies describing (intended) consequences of one’s primitive actions, namely, events in the sense explained above. Self-awareness is a necessary mental element in actions in the sense that in performing an action it is unavoidable that one anticipate or foresee the happening of the event, that is, the change in the object or in the regions of the world that the primitive actions by the agent are bringing about. Velleman refers to this sense of self-awareness when he claims that in doing something it is unavoidable for the agent to “know what sort of action it will turn to be”25. Nonetheless, this might seem to strong. It seems plausible that if we perform a primitive action we are aware of having done so; and it seem plausible that if we undertake to do something we know what it is that we are undertaking to do. But it is not plausible that prior to performing a primitive action we must know what it is that we are going to do. For example, I may intend to raise my arm directly, and so intend what would be for me a primitive action, but my arm might be paralyzed without my knowing it, and so I find that I have not done what I intended. The point extends to the various redescriptions of primitive actions in terms of what they bring about: we are not omnipotent or omniscient, and so we always take a risk when we undertake to bring something about that what we intend to do will not come off.

In any case, self-awareness plays even a more important roll concerning negative actions. Let us remember that, according to the definition above, when a negative action is at stake, for example, when Officer Smith refrained from arresting Paul, the states of the agent remain the same through time. When an agent performs a negative action, there are no primitive actions that could be considered the cause of an

event, simply because there is not an event. However, self-awareness is a necessary element, in the sense that it is required for the agent to be able to give a prima facie description of the fact that because of her refraining from changing her states (i.e. because of her not performing certain movements) then the relevant states of the object remain the same through time. Absent this self-awareness it makes no sense to say that an action was performed. For example, it would not be reasonable to say that Officer Smith refrained from arresting Paul if Officer Smith was not aware of her own action. This would happen, for instance, if Officer Smith did not see Paul or if she saw him indeed but was convinced that the man she saw, was Peter and not Paul.

A Concept of Intention

According to Davidson, performing an action begins with some kind of motivational (pro-)attitude (a desire) towards the instantiation of the states of affairs that the actions brings with it, and with a belief that this states of affairs will effectively be instantiated as a result of the action. However, since we can have conflicting desires or beliefs about the performance of an action, in the process of acting we normally undertake a process of practical and rational deliberation in which we weigh the pros and cons of the desires and beliefs at stake. Accordingly, as Ludwig explains:

An intention is the terminus of the process of rational deliberation, that is, it is what a completed process of rational deliberation results in, a commitment to action which can be characterized generally as a commitment to a plan of action, even if it is specified as the doing of something to attain a certain goal.

Intentions are pro-attitudes. As a result of the process of practical deliberation, an intention entails a commitment, and, consequently, it cannot rationally conflict

27 KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 43 (2011).
with other intentions. In Searle’s terminology, if an intentional is directed toward a future action, it is a prior intention, and if it is directed towards a current action, it is an intention-in-action. A prior intention is the planning or mental projection of a future action. It represents the action before it happens, and the action is the condition of satisfaction of the prior intention.\textsuperscript{28} The intention-in-action is not formed in advance of the action, but rather causes the act by representing its conditions of satisfaction during the performance of the action.\textsuperscript{29}

Intentions can also be conditional. A conditional intention is a present commitment to do something upon a contingency obtaining. As Ludwig explains, “conditional intentions may be thought of as akin to conditional commands to oneself.”\textsuperscript{30} An example of a conditional intention is my intention of taking a taxi home from a party \textit{if} I drink too much. In this case, when I recognized at the party that I have drunk too much, my prior conditional commitment to take a taxi home if I do generates the unconditional intention to take a taxi home from the party.

**Conclusion: A Concept of Intentional Action**

There remain a number of controversies about intentional action in the philosophical literature, for example, concerning the possibility of an agent intentionally performing an action under a description even when he or she did not specifically intend to perform that action under that description,\textsuperscript{31} and specifically whether the agent also perform actions intentionally under descriptions which involve unintended but foreseen

\textsuperscript{28}JOHN SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 88 (1983).
\textsuperscript{29}JOHN SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 83-98 (1983).
\textsuperscript{30}KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 48 (2011).
negative side effects of them,\textsuperscript{32} and there remain also puzzles and disputes about how to handle so-called deviant causal changes.\textsuperscript{33} But we do not need to solve all of these problems for the purpose of this dissertation.

An intentional action is an event that someone brings about with the intention of doing so. The relevant intention can be a prior intention or an intention-in-action. Then, to say that Peter did something intentionally is to say that:

Peter did what he did with the intention of doing so, where the ‘what he did’ stands in or a particular description, since one does things intentionally under some descriptions but not others.\textsuperscript{34}

**A Concept of Collective Intentional Action**

For the purpose of analyzing legal practice as a collective intentional activity, in this dissertation I will follow Ludwig’s account of the concept of collective intentional action. In Understanding Collective Agency, Ludwig uses the event analysis of action sentences, and two strategies for accounting for the concept of collective intentional actions: (1) he goes from semantics to ontology; and (2) he goes from individual intentional action to collective intentional action. Indeed, concerning the second strategy, Ludwig claims that all the necessary concepts for the explanation of collective intentional action are to be found in the explanation of individual intentional action.

First, Ludwig points out that plural action sentences typically are ambiguous between a distributive and a collective reading. For example, ‘We went to a football game’ might be read as meaning ‘Each of us when to a football’ game, the distributive


\textsuperscript{33} DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 83 f. (2001).

\textsuperscript{34} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 113 (2011).
reading, or as meaning ‘We went to a football game (together)’. The latter expresses a collective action.\(^{35}\) If we put the standard event analysis of ‘x went to a football game’ with the distributive reading we get: ‘Each x of us is such that there is an event of which x is the agent and it is a going to a football game’. This does not imply collective action. Since there are two quantifiers in the sentence on this view, however, we can read the quantifiers in the reverse order (as we can in natural language when there are no syntactic barriers to doing so, as in ‘every met someone at the station’). So we should be able to read the sentence also as ‘there is an event such that each of us was an agent of it and it was a going to the football game’. This intuitively gives us the collective reading. Thus, when a group acts, it does what does it because, and only because, of what its members do. This is shown by the analysis of the logical form of plural action sentences on their collective readings, and also because only individuals, and not groups, are capable of having intentions, beliefs, desires and of carrying out procedures of practical deliberation. As a consequence: talking “of groups doing things […] comes to nothing over and above individuals, who are members of groups, doing things which have joint consequences.”\(^{36}\)

Just as the case of individual actions, groups can do things intentionally and unintentionally. An example of the first is a group of people singing together. And an example of a collective unintentional action is our polluting the environment together without having the intention to do it.

\(^{35}\) KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 122 (2011).

\(^{36}\) KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 148 (2011).
Second, Ludwig uses the strategy of establishing the differences between individual and collective actions. He says that, in the analysis of individual actions, when we ask what someone did, we answer this question by means of providing an action sentence: “which is made true by his doing of some primitive action […] and its having various consequences”.\textsuperscript{37} This implies that it is possible to distinguish between the primitive actions of the agent (for example, Peter pulling the trigger) and their consequences (for example, killing Paul). However, Ludwig claims, in the case of groups there are no primitive actions performed by the group.\textsuperscript{38} Despite the fact that, metaphorically speaking it would be possible to say that the mere summation of the primitive actions of the members of the group are the primitive actions of the group, the group as such cannot have prior intentions or intentions-in-action.

But then, what kind of intentions are at stake in the case of collective intentional actions?

As we saw before, according to the socio-ontological literature, members of the group performing a collective intentional action have a special kind of intentions: we-intentions.\textsuperscript{39} The differentia specifica of collective intentional action is the concept of we-intentions. We-intentions are intentions with special properties. First, we-intentions are not intentions of the groups as a super-agent, but intentions of individual members of the group. Second, we-intentions are not about the participatory actions of individual members in the group action but about what the group does by means of the actions of

\textsuperscript{37} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 150 (2011).
\textsuperscript{38} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 150 (2011).
\textsuperscript{39} Raimo Tuomela and Kaarlo Miller, \textit{We-Intentions}, 53 PHILOSOPHICAL STUDIES 367–389 (1988)
its members.\textsuperscript{40} Third, we-intentions are intentions with a distinctive content (in comparison to I-intentions). Elements of this distinctive content are: (1) they are about the group’s doing something; (2) the group’s doing something depends on the performance of contributory primitive actions by the group’s members; and (3) central to the existence of we-intentions is that members of the group share a plan about the performance of the group’s action by means of the performance of actions by the members of the group.\textsuperscript{41}

Ludwig makes clear that a we-intention does not necessarily entail the presence of the intent to coerce or exercise of power over other members of the group. In order to have a we-intention that our group does something, I only need to think:

that there is something that I can do which, given the circumstances, which can include what I expect others will do freely and of their own choosing, has a reasonable chance, weighted by the value of the outcome, or resulting in our doing something together in accordance with a shared plan”.\textsuperscript{42}

Ludwig explains further what sharing a plan is. As we saw in the discussion of the planning theory of law, plans are composite and can be more or less detailed, and members of the group can have different knowledge about details of the plan. It is not necessary that all members of the group share the plan in every possible level of detail. According to Ludwig’s view, the only requirement on sharing a plan is that we-intentions of the members of the group include at least one plan “such that each of them associates it with his intentions(s)-in-action in participating in the joint action.”\textsuperscript{43} This is a

\begin{itemize}
\item \textsuperscript{40} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 161 (2011).
\item \textsuperscript{41} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 176 (2011).
\item \textsuperscript{42} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 188 (2011).
\item \textsuperscript{43} KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 194 (2011).
\end{itemize}
key characteristic that, as we will see, it is relevant for the analysis of legal practice. It is not necessary that “every plan that each of them [the members of the group] associates with his intention(s)-in-action in participating in the joint action be shared with every other participant.” Members of the group should only share at least one plan.

Moreover, Ludwig does not include in his account the shared belief and knowledge requirement. He does not agree that there is any such conditions as the following on collective intentional action: “that each member of the group which intends to F believes that each other member of the group intends to participate and will do his or her part in the joint action and believes that each other members believes that each other members believes, and so on.” Ludwig claims that there is no such condition on an individual’s having a we-intention. Common knowledge is neither necessary nor sufficient for collective intentional action. Common knowledge is rather a typical (but not essential) a byproduct of the conditions under which it is typically rational to form a we-intention to do something with others in accordance with a shared plan.

These last two considerations makes Ludwig’s account less constraining than other accounts and more able to be used for the explanation of complex and massive

44 KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 194 (2011).

45 KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 197 (2011).

46 Ludwig uses the following interesting example of collective intentional action without common knowledge: “suppose that country X launches a pre-emptive nuclear strike against country Y. After the initial strike, some missile silos in country Y are still operative. However, country Y has established an elaborate procedure for firing its missiles as a safeguard, which requires two on-site operators, who are physically isolated from one another, and one remote operator, all to punch in a secret code and turn a firing key at their locations in order to launch a missile. Consider the team charged with this for surviving silo 451. After the strike, which interrupts communications between them, none of them knows whether the others have survived, and they have some reason, perhaps even preponderant reason, to think that they have not. Nonetheless, they intend to launch the missile. Each of them intends that they do it, and so each of them intends to do his part in launching the missile. Each punches in his code, and then turns his key, hoping that there are still others who are doing their parts, however unlikely it may seem; and so they launch the missile in silo 451 together, according to their prearranged plan, and they do so intentionally.” See: KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 197 (2011).
social practices (like the legal practice). For example, compared to Bratman’s account of shared cooperative activity, Ludwig’s view does not require that participants in collective intentional action “intend that all their subplans mesh and [...] that to succeed in doing something together intentionally it comes about in accordance with and because of all of their meshing subplans.” It also allows for competitive or adversarial activities (like playing chess) to be collective intentional actions. Some of the most important activities in legal practice have this nature.

In Ludwig’s view, collective intentional action is:

the bringing about of something by a group all of whom are agents of it and who in making their contributions are executing successfully intentions-in-action whose aim is that they do the thing together and that they do it together in accordance with a common plan.  

**Legal Practice as a Collective Intentional Activity**

The final questions of this dissertation are how to understand legal practice from the perspective of this background view of collective intentional activity, and whether legal practice has indeed the ontological structure of a collective intentional activity.

As we saw, Shapiro’s planning theory of law advances some interesting claims concerning the answer to this question. It also explains some elements related to the view of law as social practice. However, in the explanation of some of them, perhaps a higher degree of analytical clarity would be desirable. In this final section, I will undertake an explanation of this kind using as background Ludwig’s theory of collective intentional activity. My procedure will be to lay out a series of theses that provide the framework of an account of the law as a social practice, where that is understood as a

---

47 KIRK LUDWIG, UNDERSTANDING COLLECTIVE ACTION 240 (2011).
practice underwritten by collective intentional activity, but actual and potential, and that collective intentional activity, actual and potential, is understood in terms of actual we-intentions which individuals act on, and conditional we-intentions which individuals are prepared to act on. These theses help to articulate the particular kind of social practice which is the legal practice, and to illuminate the ways in which collective intentional activity informs it. At various points I will contrast the views I put forward with those of Hart and of Shapiro, and argue for the superiority, at certain points, of my account as against theirs.

(1) Law as normative social practice. The first claim is that law is (at least partially) a normative social practice. An explanation of law from the perspective of social ontology is not able to adjudicate between legal positivism and legal non-positivism. While legal positivism claims that all law is social practice or law is only social practice, legal non-positivism claims that law has two dimensions: an institutional and a critical or ideal dimension. In the critical dimension, law is (or aims at) the instantiation of correctness. In the institutional dimension, law is social practice. This explains why the existence of a normative social practice is a necessary element of law. There is no law without a social practice. But it might be the case (if non-positivism is true) for law to be more than a social practice. Social ontology cannot establish the truth or the falsity of the latter claim.

(2) Legal practice is made of individual actions and collective actions: Legal practice is carried out by means of different individual actions and collective actions (in particular, but not exclusively, intentional individual actions and collective intentional actions) performed by different agents and groups of agents with
appropriate I-intentions and we-intentions that can be described in several ways. An account of the legal practice in terms of collective intentional activity implies a highly complex description of the several different actions performed and roles played by agents and groups in the framework of what is legally possible, necessary and, even, impossible. Legal practice includes, for instance, individual actions of signing contracts, making legal declarations, and infringing laws, and collective actions like the Congress passing a law, the Framers enacting a constitution, voters electing deputies in an election, etc. Accordingly, there is huge complexity in the description of the content of the appropriate intentions of the agents participating in the legal practice, in the description of the several shared plans guiding collective actions, and in the description of the subplans of the agents in the case of these collective actions.

(3) Agents participating in legal practice. Legal practice is not only an official practice. It encompasses officials and citizens, creators and addressees of legal norms. Agents participating in legal practice are not only officials, who create and adjudicate legal norms, but also the addressees of these norms. For instance, it is undeniable that if two drivers follow the rules establishing what to do at traffic lights when both arrive at the same time at one intersection, they are involved in a legal practice. If A drives along University Avenue and he stops at the intersection with 13th street because the traffic light is red, and B drives along 13th street and he goes ahead at the intersection with University Avenue because the traffic light is green, both are involved in legal practice. Both have the we-
intentions directed towards the end of following the legal norms to drive in the city or, put in another way, to drive in the city together according to legal norms.

It is possible to generalize this example to say that people, who buy a house, sign a contract, get married, or claim compensation for damages, also participate in a legal practice as a collective intentional activity. This example shows that, in addition to officials, people bound and empowered by legal norms, that is to say, their addressees, are also agents who generally participate in the legal practice. The role of the addressees of legal norms as participants in legal practice is even more evident, if we take into account that custom is also a source of law. Addressees of legal norms also create laws by means of taking habitual behaviors as the rule to be followed in future conduct.

All agents of a legal practice are organized in a very complex way that exhibits at least three features. The first feature is that, as addressees of legal norms or as officials, agents might act as individuals or in groups. An example of an individual who is an addressee of a legal norm is the citizen under the criminal prohibition to steal. An example of an individual who is an official is the President acting with the empowerment to enact regulations. An example of a group who is an addressee of a legal norm is a company under the prohibition of poisoning the environment. And an example of a group which is an official body is the Federal Supreme Court issuing a judgment.

The second feature is that, concerning collective actions, agents are organized in primary, secondary, tertiary, etc. groups. For instance, if we analyze things from the side of the officials, we will see that every branch of the state is a
very complex group of groups of individuals. Let us think, for instance, in the members of the Parliament in a parliamentary regime. The group of the members of the Parliament is made of the several groups of the parties that have been elected. At their time, these parliamentary groups are made of the senators or representatives elected in different parts of the country because of the electoral success of various lists, and so on, until we arrive every time at smaller groups and, at the end, at individuals. This structure makes very complex any effort to spell out the group of agents participating in the legal practice.

The third feature regarding the group of agents involved in a legal practice is that, concerning officials, they belong to the group because they have a special status and fulfill some functions determined by a set of constitutive rules. For instance, members of the Congress belong to this group only while they have the status of senators or representatives according to the rules of the Constitution. Rules of the constitution are (inter alia) the constitutive rules of the status function of senator. For instance, it is a constitutive rule that establishes that John F. Kerry has the status of senator in the context of the organization and functioning of the U.S. Congress.

Nevertheless, this feature is also present in the case of the addresses of the legal rules. Addresses of the legal rules of the state X are such only because they have the status of citizens of this country (and for instance, they can vote abroad according to the Constitution and the Statutes of the state X), or, according to the principle of territoriality of the law, because they are in the

---

49 On status functions as elements of collective intentional activities, see: JOHN SEARLE, MAKING THE SOCIAL WORLD (2010).
territory in which the state X is sovereign (for instance, I am Colombian, but I am bound by the American Law while I am in U.S. territory). If an agent loses the status (for instance, she rejects citizenship), then she will no longer be an addressee of the relevant legal norms.

(4) Intentions. Actions relevant for the law can be undertaken intentionally or unintentionally. For instance, it is possible for an agent or for a group of agents to break the law unintentionally. This is the case when the driver of a private car enters a lane that is to be used exclusively for public buses, without knowing that it is a lane of this kind, and that it is forbidden for drivers or private cars to entering it. He might get a legal sanction (a fine) for this unintentional action.

However, in the case of individual agents and officials acting as individuals or in groups, it is normally the case that they perform intentionally the relevant legal actions of creating and enforcing legal norms, and adjudicating cases under this norm.

(5) Legal practice as collective intentional activity and legal positivism. Contra Shapiro, I would like to claim that understanding legal practice as a collective intentional activity neither rules out the possibility of non-legal positivism (in particular, of natural law) nor proves legal positivism to be true. Certainly, from the perspective of social ontology, a legal positivistic account of law is plausible, according to which law is only a legal practice, and a legal practice is a collective intentional activity, and this collective intentional activity is exclusively a matter of fact: a matter of agents performing individual and collective intentional actions with and because of the appropriate I-intentions and we-intentions. This might be
called the subjective view of intentions and the nature of law. However, natural law advocates can argue for an alternative view. This can be called the objective view of intentions. According to the objective view, for a collective intentional activity to count as legal practice and not only as (for instance) the collective intentional action of a gang of murders and evil people, legal officials must have the specific intention to formulate laws in a way that conforms with the demands of morality.\textsuperscript{50} Shapiro’s planning theory of law does not require this but only that “officials represent the practice as having a moral aim or aims.”\textsuperscript{51} He clarifies further that:

Their avowals need not be sincere, but they must be made. These representations may take many forms, either explicitly in speeches, ceremonial steles, preambles to constitutions, prologues to legal codes, and judicial dicta, or implicitly through the atmospherics of ritual dress and speech, the construction of monumental buildings housing legal activity, and the use of religious or moral iconography in legal settings.\textsuperscript{52}

However, put this way, this requirement is problematic. On the one hand, gangs of criminals can make insincere avowals and this does not turn their collective intentional activities into a legal practice. On the other hand, it can be shown that from the conceptual point of view, our intuitions about law do require legal officials to have the sincere intentions to act in a morally legitimate way. This can be shown by noting the performative paradox that is created, if, for example, the preamble of a constitution states: “We the people, with the help of God, enact

\textsuperscript{50} I thank Robert Alexy for his remarks on this idea. Veronica Rodriguez-Blanco argues for a view like this in her unpublished manuscript: LAW IN THE GUISE OF THE GOOD (2011).

\textsuperscript{51} SCOTT SHAPIRO, LEGALITY 217 (2011).

\textsuperscript{52} SCOTT SHAPIRO, LEGALITY 217 (2011).
this constitution that entails the following extremely unjust rules...”. This is patently absurd, and the absurdity is due to a performative paradox generated by the conflict between its content and its pragmatic presupposition, namely, that a constitution is a set of just rules, and that officials enacting these rules must do it with the sincere intentions to act in a morally legitimate way.\(^{53}\) This is a necessary element of legal practice that makes it different from other kinds of collective intentional activities.

(6) The ultimate foundation of legal practice. The question can be asked whether there is a collective intentional activity at the foundation of legal practice. As explained before, Hart claims that there is such activity, namely, the acceptance of the rule of recognition by officials. Shapiro claims that this activity consists in the creation of the master plan.

This question, whose answer concerns one of the most important issues of legal philosophy, namely, what is the foundation of the validity of the constitution, can be answered from two points of views: from the point of view of a specific legal system and from the point of view of general jurisprudence. From the point of view of a specific legal system, social ontology can explain the enactment of a constitution and its validity (at least in part) as a collective intentional activity. Let us suppose that there is a referendum and the majority of the population votes “yes” to the enactment of a new constitution. The majority of the population making this decision entails the performance of a collective intentional action. Then, in a new election, the members of a constitutional

---

\(^{53}\) On this performative paradox, see: ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE. A REPLY TO LEGAL POSITIVISM (2002).
assembly are elected. This is also a collective intentional action that presupposes that the majority of the population empowers the members of the constitutional assembly to enact the constitution. They attribute to them the status function of framers of the constitution, and to the norms they enact the status function of fundamental rules of the legal system. When members of the constitutional assembly enact the constitution, they do it also acting together in a collective intentional action. And the normativity of the constitution derives from the normativity of the empowerment they received from the majority of the population. Correlatively, the majority voting “yes” to the enactment of a new constitution, and electing the members of the constitutional assembly, are liable to and bound by the rules of the new constitution as a consequence of the empowerment they gave to the constitutional assembly. This would explain the normativity of law and the authority of legal officials that are elected and appointed according to the constitution. Finally, people who voted “no” to the enactment of a new constitution, or whose representatives were not elected to the constitutional assembly are liable to, and bound by, the rules of the new constitution as a consequence of the rule of the majority. For every party to the decision procedure agreed to be bound by its results, even if they may have hoped for a different result. However, this would presuppose an acceptance of the rule of the majority by all citizens, along with the acceptance of the constitutive rules attributing only to certain members of the community the status of citizens, so they can perform the function of empowering the members of the constitutional assembly. The problem is that this acceptance cannot be
understood as a collective intentional action or as a set of individual intentional actions that all members of society have actually performed. For this reason, the perspective of the specific legal system must be enhanced with the point of view of general jurisprudence.

From the point of view of general jurisprudence, it can be asked whether necessarily the fact that citizens obey the laws and do not rebel against the legal order, or whether officials creating, enforcing and applying laws do get involved in a collective intentional action that is at the foundation of every possible legal system. The former would be a too stringent requirement. It would entail that all addressees of legal norms must have share with all a plan to collectively obey them. This is plainly not so. In addition, obeying legal norms can be an individual matter. It is not always the result of a collective intentional action performed by all citizens of a country conceived as a group. Obeying some legal norms involves individual action, such as a prohibition against littering in the park. Many others govern interactions between people, even traffic regulations which coordinate activities of groups of people, though it is true that in these cases the groups are always a proper subset of the entire citizenry. Particularly important are the set of collective intentional activities by means of which laws are created and that are performed by officials, acting as primary, secondary, tertiary (etc.) groups. \(^{54}\) However, laws are also created by means of individual intentional activities performed by some officials (for instance, the President enacting regulations). In any case, there is something that it would also be necessary to accept, namely,

---

\(^{54}\) Primary groups are understood as groups of individuals. Secondary groups are understood as groups of primary groups. Tertiary groups are understood as groups of secondary groups, and so on.
that legal officials are such, that is, they can act as legal officials, only because of the majority of the society attributes to them the status function of legal officials by means of certain constitutive rules of empowerment defining the functions that they are competent to perform in their position. The attribution of this status function makes legal practice a social and not only an official practice. For instance, society has accepted the rules of the Constitution conferring to the individuals elected to the Congress the status of members of the Senate and the House of Representative. With this status comes along with an empowerment to make laws granted by means of some constitutive rules according to which, when members of the Senate and of the House of Representative perform certain actions in the relevant context, such as discussing and voting a proposal, if the appropriate conditions obtained (for example, that the majority of the senators and representatives vote yes to the proposal), then their actions will be considered as having passed a law, which is valid and binding for the whole society.

At this point, it might be interesting to revisit Shapiro’s ideas on the ultimate foundation of a legal practice. Shapiro claims that legal authority has the power to plan for all members of society because “instead of formulating and adopting their own plans, they accept a plan to defer to someone else’s planning.”55 In this sense, the foundation of validity of the whole legal system is the acceptance, by all members of society, of the plan that they will defer to legal

---

55 SCOTT SHAPIRO, LEGALITY 141 (2011).
authority to plan for them. Following Shapiro’s account on the normativity of law, this creates an instrumental obligation to defer to the plan adopter.

However, this would require all subjects of law to adopt the master plan empowering legal officials to create, enforce and apply legal plans. Assuming that all subjects of law perform a collective intentional activity of adopting the master plan is problematic. There is not a single country in which the enacting of a constitution is the outcome of a collective intentional action in which all subjects of law actively participate with their actual we-intentions and their actual actions as a group action. And Shapiro, indeed, does not make this assumption. He claims that only officials are the members of the group that must adopt the master plan.56

But then, under this condition, how can legal authority exist and how can law be normative? Why are legal plans created according to the master plan that has been adopted only by legal officials also binding on members of the whole society?

Two relevant insights for answering this question are to be found in Legality. First, in the heuristic of Cook Island, Shapiro maintains that it is not necessary for the community to accept the shared plan in order for it to obtain […]. Since we [the inhabitants of Cook Island] consider the social planners to be morally legitimate, we plan to allow the adopter and appliers to adopt and apply plans for us. For this reason, we consider the shared plan to be the “master plan” for the group.57

56 SCOTT SHAPIRO, LEGALITY (2011). At 119: “the existence of legal authority […] is a question of whether relevant officials of that system accept a plan that authorizes and requires deference to that body”

57 SCOTT SHAPIRO, LEGALITY 165 (2011).
If this is generalized, then the foundation of legal authority and of the normativity of law are the facts that subjects of law consider legal officials making the master plan as “morally legitimate” and that they plan to allow these legal officials to plan for the whole society. Independently of the problem of determining what “morally legitimate” means within this context, this requirement might be appropriate for the relatively small society but it seems too stringent if we apply it to any modern society in any country. For this reason, in its characterization of the essential properties of law, Shapiro mentions it only as a possibility but not as a requirement: members of the community “might all accept a general policy to obey the law or deem those in authority to be morally legitimate”. 58

Instead, Shapiro seems to indicate that the normativity of law would depend on two weaker conditions related to the subjects of law: the disposition of the members of the community to follow the plans adopted according to the master plan; 59 and the fact that the members of the community “normally heed all those who are authorized.” 60 The combination of both conditions might be interpreted as a tacit acceptance of the master plan.

If this is right, then the question is how to understand the tacit acceptance of a master plan? Is it a collective intentional action?

This tacit acceptance might be a matter of individual or collective action, and a matter of intentional and unintentional action. I would like to suggest that

58 SCOTT SHAPIRO, LEGALITY 181 (2011).

59 SCOTT SHAPIRO, LEGALITY 179 (2011): “unless the members of the community are disposed to follow the norms created to guide their conduct, the norms created will not be plans”.

60 SCOTT SHAPIRO, LEGALITY 180 (2011).
the most plausible understanding of this tacit acceptance is as a collective
unintentional activity. In the same way in which we all unintentionally pollute the
environment every time we start our car or use a spray, we all, members of the
community, tacitly and unintentionally accept the constitution of our legal system,
every time we abide by the laws and use them in our practical reasoning. If this is
ture, then legal practice is something that officials do intentionally together
because we, members of the community, unintentionally together, allow them to
do.

(7) Legal practice has some other specific properties that together make it different
from other collective intentional activities. Each one of these properties might be
found in a different collective intentional activity. Nonetheless, the combination of
them is the *differentia speciffica* of the legal practice. First, this practice is
extended over time. Every legal practice gives rise to a legal order, that is to say,
a system of rules and principles whose cornerstone is the constitution of the
state. The validity of the constitution has a vocation to perpetuity. Except for
some marginal cases (for instance, the enactment of the German Basic Law in
1949 as a provisional constitution until the reunification of Germany), every
constitution is enacted to endure forever. Due to this property, the account of the
law as collective intentional activity has to be highly complex. It must entail rules
of change that guarantee the succession of the officials and addressees
generation by generation. It also implies that the commitment of agents to the
collective intentional activity is strong enough to guarantee the perpetuation of
the practice.
Second, according to the weak coercion thesis, as stated before, an essential element of legal practice is coercion. The fact that legal officials are empowered to impose sanctions, and that fear of the imposition of institutionalized sanctions can motivate the obedience to law by the bad man, is the main reason for the claim that coercion is an essential element of legal practice. This property differentiates legal practice from the practice of coordinating behavior according to the rules of a moral system.

Finally, an essential element of legal practice is the authority of officials. A legal practice has a feature that other collective intentional activities like singing a duet or painting a house do not have. This feature is the authority of officials. The presence of this feature in the legal practice is not a reason that makes it inappropriate to give an account of this practice as a collective intentional activity. Nonetheless, authority introduces some complexity in the analysis of this practice. Authority implies giving to officials the power to perform some actions that in many cases are not strictly foreseen and described in the legal rules. In many cases the legal rules set a framework and the officials are empowered with discretion to choose between several possible actions within the legal framework. As a result, the content of the intentions of the addressees of the authority cannot be fully described and the conditionality of their action of obeying the law cannot depend on the content of the decisions made by the authority, but only on the fact that the decision is produced by the empowered authority within the legal framework.
In conclusion it can be said that law is (at least partially) a normative social practice, made of individual and collective intentional and unintentional actions, performed by citizens and officials, acting individually and as primary, secondary, tertiary (etc.) groups, actions that are relevant for the law because the majority of the society has attributed to the agents performing them some special status functions by means of constitutive rules. These actions can be intentional or unintentional. In the case of the intentional actions of officials, they must have the intention to perform their actions in a morally legitimate way. The foundation of legal system in to be found, on the one hand, from the point of view of specific democratic legal systems in the assumptions of the validity of the rule of the majority along with the empowerment by the majority of the framers of the constitution. This is also the foundation of the authority of legal officials and of the normativity of law. On the other hand, this foundation is to be found, from the point of view of the general jurisprudence, in the official practice of legal officials, understood as a set of collective intentional activities performed by officials, acting as primary, secondary, tertiary (etc.) groups along with a set of individual intentional activities performed by some of them (for instance, the President enacting regulations). In addition, it is necessary to accept that legal officials are such, that is, they can act as legal officials, only because of the majority of the society attributes to them the status function of legal officials by means of certain constitutive rules of empowerment defining the functions that they are competent to perform in their position. The attribution of this status function makes legal practice a social and not only an official practice. Finally, legal practice is extended overtime, and necessarily entails coercion and the exercise of
authority by legal officials. This is the way in which we can understand that we live together within a legal practice.
CHAPTER 6
CONCLUSIONS

The following claims are the result of this investigation:

1. **Aim:** The aim of this dissertation was to explore a common answer to the question of the ontological structure of law, namely, that law has the ontological structure of a social practice (the social practice thesis).

2. **Strategy:** To accomplish this aim, I have examined the way in which Austin, Hart, Shapiro and Dworkin stated the social practice thesis and the background methodologies that they used for developing their theories. In addition, in the final chapter, I have developed my own view about it.

3. **Background concepts:** In order to carry out this investigation, I understood a social practice as a set of recurrent collective intentional actions, and where a collective intentional action requires the fulfillment of at least two necessary conditions: (1) That the action must be performed by several individual agents acting together as a group; (2) That individual agents acting together must act in accordance with, and because of, some appropriate we-intentions. We-intentions are intentions with a special content. Their content is that the group performs the relevant action by means of the appropriate individual actions of its members in accordance with a shared plan. In addition, typically individual agents acting together share appropriate knowledge about the performance of the action by the group, and the we-intentions of its members.

4. **The aim of a theory endorsing the social practice thesis.** I clarified that the aim of a theory of law endorsing the social practice thesis should be (at least) to answer the following questions:
(1) What kinds of agents participate in legal practice?
(2) What is the content of their we-intentions?
(3) How do they relate to each other in a group or in groups in order to build legal institutions?
(4) How normativity does arise within this institutional framework?
(5) How is it possible to distinguish legal practices from other kinds of social practices and collective intentional activities?

5. Austin's Command Theory of Law. In Chapter 2, Section 1, I examined Austin's Command Theory of Law. The main elements of Austin's account of law are the following: (1) Every law is a command; (2) A command is the expression of a wish that someone shall do or forbear from some act, backed by the threat that a sanction (an evil) will "visit" her in case she does not comply with the wish; (3) Every positive law is set by a sovereign person, or a sovereign body of persons; and (4) A person or a body of persons is sovereign if three conditions are met, as specified in the following.

6. Austin's Theory of the Sovereign. Austin sets 3 conditions for the existence of sovereignty, namely: (1) The person or body of persons claiming to be sovereign must be a determinate and common superior to the bulk of the society; (2) There must be a general habit of obedience to her or to them, that is, the bulk of the given society must have a habit of obedience or submission to her or to them; and (3) The person or body of persons who is the superior must not have a habit of obedience to another determinate human superior.
7. Analysis of Austin’s theory from the perspective of collective intentionality.

Austin’s theory of law can be analyzed from the perspective of collective intentionality in two steps: (1) by treating the general habit of obedience as an activity or set of recurrent actions, that is, as a matter of the bulk of the population recurrently obeying the sovereign; (2) by treating the general habit of obedience as collective intentional activity.

8. The general habit of obedience as a collective intentional activity. Three elements of a collective intentional activity are instantiated in the general habit of obedience: (1) The general habit of obedience consists in several actions performed (even more: necessarily performed) by several individuals; (2) The bulk of the population is not a super-agent; the general habit of obedience only exists through the actions of the members of the bulk of the population; and (3) agents belonging to the bulk of the population act intentionally, that is, with the intention of obeying the sovereign.

9. Problems of Austin’s theory from the perspective of collective intentionality.

However, Austin’s theory raises two concerns, one concerning collectivity and another concerning normativity. The problem of collectivity is that the general habit of obedience is not necessarily a collective intentional activity. It allows for a distributive reading and a collective reading. The problem of normativity is that the general habit of obedience explains why the sovereign rules over the population but not why it has the right to do it. Due to these problems, Austin’s theory cannot account for legal practice as a collective and as a normative practice.
10. In Chapter 2 I also examined Hart’s theory on the acceptance of rules. The main thesis of Hart’s theory is that law is a normative social practice consisting in the acceptance of social rules.

11. Hart requires that the following conditions be met for a practice of acceptance of rules to take place. The existence of a habit (recurrent actions by a plurality of individuals) plus three elements: (1) that deviation gives rise to criticism and imposition of sanctions; (2) that criticism for deviation and imposition of sanctions is regarded as legitimate, justified or made with good reason; and (3) the so-called internal aspect of rules. All these requirements involve behavioral regularities but the last one involves an attitude as well.

12. The internal point of view. The internal point of view is a standing disposition to take rules as a standard of behavior for future conduct—as if we had an conditional intentional commitment to follow them when the relevant circumstances arise—though we do not really represent the rules. They are part of what John Searle has called the background of intentionality. This expresses the idea that there is an internal element of acceptance of rules, namely, the internal point of view, that is expressed in a disposition but which does not involve explicit commitment to conforming behavior to their content.

13. Hart’s theory gives rise to two problems from the point of view of collectivity: (1) the acceptance of rules (and, in particular, the acceptance of the rule of recognition by officials) allows a distributive and a collective reading. (2) The law is an official but not a social practice on Hart’s view.
14. Three problems in particular arise in Hart’s theory from the idea that legal practice is only an official and not a social practice: (1) it cannot explain why an official practice gives rise to rules that are legally binding for the whole society; (2) if only officials must accept the rule of recognition and the primary rules issued in accordance with it, then only they will be within the scope of the normativity of law; (3) if the difference between being obliged and having an obligation is the internal aspect of rules, and only officials must have it, then Hartian officials have an obligation but Hartian citizens are merely obliged (as citizens in the Austinian picture of law).

15. Official Acceptance of Rules and the Normativity of Law. Hart does not succeed in explaining why, if legal officials accept the rule of recognition, they are bound by it. He does not explain why the acceptance of the rule of recognition attributes legal normativity to this rule and, as a consequence, it becomes a duty imposing rule for legal officials. In Hart’s view, accepting the rule of recognition implies that legal officials are disposed to take it as a premise in practical reasoning. However, it neither implies that they ought to take it as a premise in practical reason nor that they ought to be disposed to do so. Finally, even if, for the sake of the argument, it were granted that the acceptance of the rule of recognition makes it binding on legal officials, it cannot be derived from this that this rule is also binding on the citizens who have not accepted it.

16. In Chapter 3, I examined Shapiro’s planning theory of law. This is also a conceptual theory. Its main thesis is the planning thesis, according to which:
“legal activity is an activity of social planning.” This is a positivistic theory of law claiming that legal rules are plans, and plans are posited, for their existence depends on adoption and acceptance, and the existence of a plan does not depend on the merits of the content of the plan but only on the fact that it has been adopted and accepted.

17. The planning theory of law consists in two theories: a theory of plans and a theory of law as planning activity.

18. Despite the fact that Shapiro uses for his analysis Bratman’s theory of shared cooperative activity, his theory of plans differs from Bratman’s. According to Shapiro, plans are norms. They are “abstract propositional entities that require, permit, or authorize agents to act, or not act, in certain ways under certain conditions.” They play the same role as Hartian rules: they function as a “guide for conduct and standard for evaluation.”

19. According to Shapiro, Plans have the following features: (1) Plans are partial and have a nested structure; (2) Plans are composite; (3) Plans help to rationalize future behavior of the planner and other people; (4) Plans can be done for other people; (5) Plans reduce deliberation costs; (6) Plans generate normativity because of principles of instrumental rationality; (7) Plans are positive entities; (8) Plans are the most effective strategy to coordinate behavior related to complex, contentious, and arbitrary activities; (9) Plans can be shared; (10) Plans can be hierarchical. They allow for a vertical division of labor; and (11) Plans can regulate massive activities. They compensate for the
distrust that members of groups might feel between each other in massive activities.

20. In Shapiro’s view, the following are the necessary properties of law as planning activity. (1) The moral aim thesis: “The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.” (2) Fundamental rules of legal system are shared plans: Members of the group (legal officials) design this plan for the purpose of engaging in a joint activity that is publicly accessible, and accepted by most members of the group. Their shared intentions and actions determine the fundamental rules of the legal system. (3) The master plan is the source of legal authority: “someone has legal authority only if he is authorized by the master plan of a particular legal system.” Legal authorities must also have the ability to motivate their subjects to obey the law. (4) The normativity of law is “of a very limited sort.” The normativity of law is only the normativity that arises from norms of instrumental rationality implicit in every planning activity. It requires one who has accepted them to abide by the plans and not to open the issues to deliberation again unless there is a “compelling reason to do so.” Shapiro calls these rationality requirements of legal systems: the “inner rationality of law.”

21. Advantages of the planning theory of law. The planning theory of law offers the following advantages: (1) it solves the problem of collectivity because it only allows for the collective reading; (2) it manages to explain the normativity of law, the binding force of the master plan to officials and citizens; and (3) it explains why officials are officials.
22. However, it also gives rise to some problems: (1) It makes too many assumptions about the existence of actual we-intentions of officials; (2) it is not clear why plans would be more informative than rules or norms; (3) it is not evident that the minimalistic conception of the normativity of law is sound; and (4) it is not clear whether it succeeds in rendering compatible the moral aim thesis with the endorsement of exclusive legal positivism.

23. In Chapter 4, I explained Dworkin’s theory of legal practice. This theory is a normative theory developed by means of the method of reflective equilibrium.

24. The main claims of Dworkin’s theory are the following: (1) the concept of law is an “interpretive concept.” We should recall that, according to Dworkin, the concept of law has a connection to claims of law, that is, claims about what law requires for every situation. Dworkin’s view treats “lawyer’s claims about what the law holds or requires on some matter as conclusions of an interpretive argument”; (2) whoever attempts to account for the nature of law is involved in discourse about law, and this discourse consists in a dialogue on the validity of claims of law. This involvement implies that the inquirer about the nature of law participates in legal discourse by means of arguing claims about the validity of certain propositions of law; (3) the aim of general theories of this social phenomenon is not to describe it but to “interpret the main point and structure of legal practice”; (4) consequently, unlikely other social phenomena legal practice is “argumentative.” It is an "enormous social practice" of argumentation in which every theory is a controversial theory about the role of that practice within the whole landscape of political morality.
25. Dworkin claims that the method of reflective equilibrium might be used in order to account for legal practice in an interpretive way in two steps. The first one is identifying “the political, commercial, and social practices” related to the concept of law. And the second is constructing a controversial conception of law by means of “finding a justification of those practices in a larger integrated network of political value.”

26. Examined from the point of view of social ontology, Dworkin’s theory offers some advantages and disadvantages: (1) unlike Hart, Dworkin considers legal practice not only as an official practice but as a social practice, that is, a practice in which agents participating include lawyers and all persons making “claims of law.” This claim cannot be the target of the challenge of explaining why rules or plans created in an official practice bind all the citizens of the state; (2) however, Dworkin does not clarify how this—in his words—“enormous practice” takes place. He does not render explicit the details and complexities entailed by it; (3) Dworkin claims that it is impossible to give a value-free, or value-neutral, description of this social practice. This entails a reduction of all possible discourses about legal practice to a first-order discourse among participants. It excludes the possibility of a second-order discourse from the point of view of legal theorists, who might not have any interest at all in justifying or criticizing the actual legal practice but only in understanding it; (4) Dworkin gets himself into trouble by claiming that the difference between legal practices and other kind of practices, like, for instance, the practice of evaluating actions from the moral point of view,
consists in the existence of some kind of Hartian secondary rules. Then, the question that Dworkin has to answer is how to understand the existence of these rules (remember that the rule of recognition is one of this rules). Dworkin seems to be trapped in a dilemma: either he has to give up this claim about rules of recognition, and then it would be impossible to distinguish law from morality, or he must accept that the existence of secondary rules and, in general, of the institutions of law, can only be understood in a second-order discourse, in which the validity of these rules is explained in terms of acceptance or as an outcome of an collective intentional activity; (5) Dworkin does not provide any clue about how it would be possible to reveal the ontological structure of law by means of a normative methodology. Even if we grant that the first-order discourse in law, that is, the discourse of legal practitioners, is normative and argumentative, from this it does not follow that the second-order discourse is also necessarily normative or argumentative; (6) finally, it is clear that Dworkin does not encounter the problem of explaining the normativity of law because, according to him, the law is a province of morality, so the normativity of morality is also the normativity of law. In other words, challenging the normativity of law would entail challenging the normativity of morality. However, the price that Dworkin has to pay is the impossibility of distinguishing legal norms from moral norms.

27. In the first sections of chapter 5 I explained a view on action, intentional action, and collective intentional action, drawn from work by Davidson, and, in particular, by Ludwig, which can serve as a basis of analyzing legal practice.
The main theses of this view are the following: (1) Actions are events, that is, changes of state in objects or in regions of space which persist through time; (2) an action involves certain necessary conditions related to the instantiation of some physical and mental properties in the agent. On the one hand, in the case of positive actions it presupposes the occurrence of certain bodily movements of the agent or the occurrence of certain mental events in her. This occurrence of bodily movements or mental states is also a change in the agent itself or, in other words, the instantiation of certain properties in the agent, in the sense that the agent either gains a property that she did not have before or loses a property that she had before. They can be called primitive actions when they are done but not by doing something else. On the other hand, it is a particular characteristic of actions that they are directed at chosen ends and that the agent is aware of the end and of those bodily movements or mental events of his that are primitive actions as well.

28. Intention. Performing an action begins with some kind of motivational (pro-) attitude (e.g., a desire) towards the instantiation of the states of affairs that the actions brings about (which could just be the primitive action itself in the limiting case), and with a belief that this states of affairs will effectively be instantiated as a result of the action. However, since we can have conflicting desires or beliefs about the performance of an action, in the process of acting we normally undertake a process of practical and rational deliberation in which we weigh the pros and cons of the things we want when we can’t get them all and in the light of our beliefs. Accordingly, as Ludwig explains: “An intention is the
terminus of the process of rational deliberation, that is, it is what a completed process of rational deliberation results in, a commitment to action which can be characterized generally as a commitment to a plan of action, even if it is minimally specified as the doing of something to attain a certain goal.”

29. An intentional action is an action that someone does with the intention of doing so.

30. Collective intentional actions are not just the mere aggregate of individual actions. They imply something more. They imply the action of a group of individuals. However, when a group acts, it does so because, and only because, its members do, because among other things, only individuals, and not groups, are capable of having intentions, beliefs, desires and of carrying out procedures of practical deliberation.

31. Members of the group performing a collective intentional action have a special kind of intention: we-intentions. The differentia specifica of collective intentional action is the concept of we-intentions. We-intentions are intentions with special properties. First, we-intentions are not intentions of the groups as a super-agent, but intentions of individual members of the group. Second, we-intentions are not about the participatory actions of individual members in the group action but about what the group does by means of the actions of its members. Third, we-intentions are intentions with a distinctive content (in comparison to I-intentions). Elements of this distinctive content are: (1) they are about the group’s doing something; (2) and doing something by way of the performance of contributory primitive actions by the group’s members; and (3)
they require that members of the group share a plan about the performance of the group’s action by means of the performance of actions by the members of the group.

32. Ludwig makes clear that a we-intention does not necessarily entail the intent to coerce or exercise power over other members of the group. Furthermore, he explains that the only requirement about sharing a plan is that we-intentions of the members of the group include at least one plan “such that each of them associates it with his intentions(s)-in-action in participating in the joint action.” Moreover, Ludwig does not include in his account any shared belief or shared knowledge requirement.

33. These last two considerations makes Ludwig’s account less constraining than other accounts and more able to be used for the explanation of complex and massive social practices (like a legal practice).

34. In Ludwig’s view, collective intentional action is: “the bringing about of something by a group all of whom are agents of it and who in making their contributions are executing successfully intentions-in-action whose aim is that they do the thing together and that they do it together in accordance with a common plan.”

35. In the last section of chapter 5, I explained the following view of legal practice as collective intentional activity:
   Law is (at least partially) a normative social practice, made of individual and collective intentional and unintentional actions, performed by citizens and officials, acting individually and as primary, secondary, tertiary (etc.) groups,
actions that are relevant for the law because the majority of the society has attributed to the agents performing them some special status functions by means of constitutive rules. These actions can be intentional or unintentional. In the case of the intentional actions of officials, they must have the intention to perform their actions in a morally legitimate way. The foundation of a legal system is to be found, on the one hand, from the point of view of specific democratic legal systems in the assumptions of the validity of the rule of the majority along with the empowerment by the majority of the framers of the constitution. This is also the foundation of the authority of legal officials and of the normativity of law. On the other hand, this foundation is to be found, from the point of view of the general jurisprudence, in the official practice of legal officials, understood as a set of collective intentional activities performed by officials, acting as primary, secondary, tertiary (etc.) groups along with a set of individual intentional activities performed by some of them (for instance, the President enacting regulations). In addition, it is necessary to accept that legal officials are such, that is, they can act as legal officials, only because of the majority of the society attributes to them the status function of legal officials by means of certain constitutive rules of empowerment defining the functions that they are competent to perform in their position. The attribution of this status function makes legal practice a social and not only an official practice. Finally, a legal practice is extended over time, and necessarily entails coercion and the exercise of authority by legal officials. This is the way in which we can understand that we live together within a legal practice.
LIST OF REFERENCES


BIOGRAPHICAL SKETCH

Carlos Bernal-Pulido has a Bachelor of Laws from the University Externado of Colombia, Bogota, a Doctorate of Laws from the University of Salamanca and a Master of Arts in philosophy from the University of Florida. He works at Macquarie Law School (Sydney, Australia) as a Senior Lecturer. He has research interests in the fields of Jurisprudence, Constitutional Theory, Theory of Rights, Comparative Constitutional Law, Judicial Review, Torts, Ethics, Theory of Legal Norms and Theory of Action. For the academic year 2010-2011, Carlos has been appointed as a Senior Research Scholar at the Yale Law School.