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Law, Plans and Practical Rationality

ABSTRACT:

There is, according to many contemporary jurisprudential theories, a tight relationship between law and practical rationality: the law gives us, or at least it purports to give us, reasons for action. In his book, *Legality* (2011), Scott J. Shapiro puts forward what at first glance appears to be a new view in this vein. Shapiro calls it the “Planning Theory” of law; it provides an account of what the law is in terms of a particular kind of reasons: plans (a notion moulded, in his work in the philosophy of action, by Michael E. Bratman). In this paper, I provide a reconstruction of the Planning Theory as a view of the relationships between law and practical rationality, and I point to some fundamental issues which, when considered in this light, the theory leaves open, or which seem to raise trouble for it.

KEYWORDS:

Scott J. Shapiro, Planning theory of law, Practical rationality and the law, Legal reasons for action, Plans, Michael E. Bratman

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1. *The reasons paradigm* – 2. *The rationality of plans* – 3. *The possibility of law* – 4. *The authority of plans* – 5. *Fundamental issues* – 5.1. *Whose authority, over whom?* – 5.2. *Reconsideration* – *Suggested readings.*

1. *The reasons paradigm*

There is, according to many contemporary jurisprudential theories, a tight relationship between law and practical rationality: the law gives us, or at least it purports to give us, reasons for action. The rationale for this claim is not hard to find. The concept of a reason is – we may assume – the basic normative concept («reasons provide the ultimate basis for the explanation of all practical concepts»)¹. The law – we may further assume – makes, or at least it purports to make, a practical difference to our lives, in this way: it guides, or at least it purports to guide, our conduct, by telling us what we ought to do. This is – so the assumption goes – a basic fact about what the law is: a platitude any

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¹ RAZ 1979, 12.

plausible theory of the nature of law should be able to account for. From these two assumptions it follows that it must be possible to give an account of the law in terms of reasons and reasons-giving. We should be able to show, that is, how laws figure (or may, or should figure) in practical reasoning. Explaining this will amount to giving an account of what the law is – of its very nature.

We may call this general outlook “the reasons paradigm” in contemporary legal theory. Different versions of the reasons paradigm disagree, however, on just how the relevant relationship should be understood: on what the form, or forms, of reasoning are, purporting to guide our actions, which the law supports. Or, to put it in a different way, there is widespread disagreement, between defenders of the reasons paradigm, about what kind, or kinds, of reasons for action the law is supposed to (purport to) give us.

So, for instance, it may be held that the law merely gives us fragments of prudential reasons for action, by specifying conditions our behaviour has to satisfy if we are to achieve our desired ends². Or, to take another, influential, example

² This view is not characteristic of contemporary jurisprudence. It may be found, e.g., in Bentham’s and Austin’s theories of law. And, according to this view, law does not, as such, guide our behaviour – or even purport to guide it. It merely indicates the ways in which we are to behave, if we are to follow the lead of those factors which may actually be said to move us to action, namely, our desires. Thus, it may be disputed whether this view may properly be reckoned a version of the reasons paradigm, as defined in the text. I have mentioned it here, however, because – to the extent that fragments of complete prudential reasons may themselves properly be called “reasons” (e.g., that there are snakes around here is a good reason not to wear sandals, if you wish to stay alive) – it provides a perspicuous (though perhaps simplistic) interpretation of the general idea that the law purports to give us reasons for action (cfr. ENOCH 2011, 35).

(which, as we shall see, will have a prominent place in our discussion), according to Joseph Raz – the founder and champion of the reasons paradigm in contemporary jurisprudence – the law claims to provide “protected” reasons for action, i.e., first-order reasons for acting in specified ways, which are also second-order exclusionary reasons for not acting on (some of) the reasons against acting in the relevant ways³.

In his book, *Legality*⁴, Scott J. Shapiro has recently put forward what at first glance at least appears to be a new view in this vein. Shapiro calls it the “Planning Theory” (hereinafter PT, for short) of law. PT provides an account of what the law is in terms of a particular kind of reasons: plans; and of law’s role in practical reasoning as involving a peculiar kind of practical reasoning: planning, and the application of plans. As engaging, i.e., the rationality of planning.

Plans, as Shapiro understands them, are a kind of norms⁵. By “norm” Shapiro means «any standard [...] that is supposed to guide conduct and serve as a basis for evaluation or criticism»⁶. It is by no means unusual, of course, to characterize laws as norms. PT proposes a change of idiom: it provides an elaborate translation of usual talk of laws as norms – of “legal norms” – in the idiom of plans, and planning. The different kinds of norms that make up a legal system are transposed into different kinds of plans (“requirements”, “authorizations”, “instructions”, and so on)⁷.

Why is this translation – this change of idiom – supposed to be illuminating, or even informative at all? It all depends

³ RAZ 1979, 18.

⁴ SHAPIRO 2011a.

⁵ SHAPIRO 2011a, 127.

⁶ SHAPIRO 2011a, 41.

⁷ SHAPIRO 2011a, 227 ff.

on what plans are taken to be, and on their specificity. What kind of reasons are plans?

To be sure, the words “plan”, and “planning”, by themselves, do not say much. Shapiro is not asking us to check the “plan” entry in a good dictionary, and then re-write legal theory in terms of what we have found there. Rather, he wants to draw our attention to a particular theory of human action, built upon a particular notion of plan and planning; and he proposes a re-writing, adjustment, and further development of our views about what the law is in terms of that theory. The relevant notion of a plan is the notion moulded, in his work in the philosophy of action, by Michael E. Bratman⁸. In labelling his own theory a “planning” theory of law Shapiro should be understood as referring to Bratman’s planning theory of agency. It is the resort to this concept of a plan, and to Bratman’s way of understanding human agency as planning agency, that, according to Shapiro, makes substantial progress in jurisprudence possible. Why?

2. *The rationality of plans*

Let us start by rehearsing PT’s main tenets. The “central claim” of PT – the “Planning Thesis” – is that «legal activity is a form of social planning»⁹ (“legal activity” is defined as “the exercise of legal authority”¹⁰).

«Legal institutions plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are enti-

⁸ BRATMAN 1987; BRATMAN 1999.

⁹ SHAPIRO 2011a, 155.

¹⁰ SHAPIRO 2011a, 195.

tled to affect what others may or may not do. Following this claim, legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply. In this way, the law organizes individual and collective behaviour so that members of the community can bring about moral goods that could not have been achieved, or achieved as well, otherwise»¹¹.

«[L]aws are plans»¹². A legal system is «a massive network of plans, many of which regulate the same actions and many of which regulate the proper execution of each other»¹³.

¹¹ SHAPIRO 2011a, 155, see also 195. “Planlike” norms are norms which are not deliberately created with the purpose of guiding behaviour (which is a necessary feature of plans proper), but, nevertheless, operate as elements in complex plans (the paradigm case are customary norms within legal systems; SHAPIRO 2011a, 140 and 225). They will not be discussed here. Generally speaking, if plans are taken to belong to the domain of the intentional, it looks difficult for PT satisfactorily to accommodate customary legal norms and, specifically, to account for the possibility of legal systems whose “fundamental rules” (Shapiro’s term; see below, n. 13) are customary (cfr. GARDNER and MACKLEM 2011; SCARAFÀ 2011, 603 and 621, argues that PT «obscures the Hartian insight that customary practice is an ineliminable and fundamental feature of legal systems»). I shall leave this issue aside.

¹² SHAPIRO 2011a, 195.

¹³ SHAPIRO 2011a, 230. An alternative statement of PT’s main thesis (by no means equivalent to the one given in the text, as we shall see below, 5.1) is this: «the fundamental rules of legal systems are plans. Their function is to structure legal activity so that participants can work together and thereby achieve goods and realize values that would otherwise be unattainable» (emphasis omitted) (SHAPIRO 2011a, 119). PT, Shapiro claims, affords the resolution of some theo-

How does the law, *qua* plans, «organize [...] individual and collective behaviour» so that members of the community can achieve goals they could not achieve otherwise? To answer this question we have to understand what the role is that plans play in practical reasoning and intentional action. And to understand this we have to turn to Bratman's views.

Human cognitive capacities, Bratman observes, are limited¹⁴. We cannot always, at each moment in our lives, start from scratch in deliberating on what to do, by weighing all the pros and cons of all presently available options in the light of the whole set of our present desires (or, generally,

retical puzzles that have long affected jurisprudential inquiries. Specifically, it affords a solution to the Possibility Puzzle (how is legal authority possible? See below, 3) and it allows us to rebut Hume's challenge against positivistic theories of law (you cannot derive an "ought" from an "is"). It does so by vindicating the positivist conception of law (see below, 3) against the main objections so far raised against its most influential (i.e., Austin's and Hart's) versions. Moreover, according to Shapiro answers to the question about the nature of law (and, thus, PT) contribute to providing answers about what is the law on particular issues, by grounding claims about legal authority and by contributing to establishing what the proper interpretive method is in a given jurisdiction (SHAPIRO 2011a, 18-25) (Answers to the question about the nature of law make a difference to legal practice, by contributing to determining which legal facts obtain, and, thus, the truth or falsity of legal propositions.) I shall not discuss these further claims here. Mine will not be an exposition of the whole of Shapiro's theory of law. In particular, his treatment of issues concerning interpretation and meta-interpretation (SHAPIRO 2011a, chs. 9-13) will remain out of the picture. My topic is PT in so far as it can be regarded as a version of the reasons paradigm, and, specifically, what the implications of PT's main claim – the Planning Thesis – are for our understanding of the role that laws play (or may play, or should play) in our practical reasoning.

¹⁴ In this and the next six paragraphs I follow BRATMAN 1987, chs. 1-7.

pro-attitudes) and beliefs. Rather, in order to coordinate our activities, both intrapersonally across time (i.e., in order to arrange our activities from the past to the future in an ordinate and meaningful sequence, so as effectively to pursue ends) and interpersonally (i.e., in order to coordinate our actions with those of others in the achievement of complex goals, on the basis of relatively firm expectations about what the others will do), we need devices that constrain, and focus, our deliberation, enabling our present practical reasoning to develop continuously through time, and to influence the future – devices, that is, that make it possible for us not to be “time-slice” agents. Plans are such devices. By making plans, agents with limited rationality give shape to the practical problems they face, and become able to extend their agency across time, and to cooperate with others in doing things they could not do by themselves.

How do plans achieve this feat? Having a plan to A means that the issue of whether to A or not is *settled*. Plans settle practical questions; they are not up for grabs for reconsideration at every moment. Rather, they involve a characteristic sort of *commitment*: having a plan to A involves being committed to A-ing.

This commitment has two dimensions. Plans control our action, and they structure our practical reasoning. It is the latter dimension that concerns us here.

Plans are, typically, partial. When we adopt a plan, we typically leave its details, the means and preliminary steps to be taken in order to carry out the plan, and its specification in concrete circumstances, open, for future determination. So, to take a trivial example, if I plan to go to the bookstore tomorrow, I may (and often I will) leave it open, for now, how, and at what time, I will go there – and this holds, on a wider scale, also of more complex, articulated, or long-term plans. Breaking the plan into different parts, or subplans, finding out appropriate ways of executing it, or different parts of it, filling in

details, specifying the plan, or its parts, relative to circumstances, are usually left to future deliberation.

Plans, then, once adopted, pose, to our deliberation, a host of problems: problems concerning the means or preliminary steps to be taken for their execution; the different subplans into which they are to be articulated; their appropriate specification in concrete circumstances. In Bratman's phrase, adopting a plan puts an agent under a demand for "means-end coherence". The agent has to find out appropriate ways of carrying it out. Plans are, further, subject to requirements of consistency: an agent's plans have to be consistent with each other (i.e., it must be logically possible for them to be executed jointly), and they have to be consistent with the agent's beliefs (i.e., it must be logically possible for them to be executed in a world where the agent's beliefs are true). Or, in other words, planning agents are subject to distinctive norms of rationality, concerning (1) the selection of appropriate means, preliminary steps, subplans of a given plan, or its specification; and (2) the overall consistency of the agent's plans and beliefs¹⁵. These norms define what may be called "the rationality of planning"; they give rise to demands – normative requirements – a rational planning agent is supposed to live up to¹⁶.

¹⁵ A third category of norms of rationality in planning – norms for the rational reconsideration of plans – will be introduced below, 5.2.

¹⁶ Bratman conceives of different kinds of mental states in terms of distinctive sets of dispositions to act and to think in certain ways (having a mental state of type T typically involves being disposed to...) and associated norms of rationality (an agent having a mental state of type T should reasonably...). He terms this kind of outlook "functionalist" (BRATMAN 1987, 9 f.). In theories of this kind, the two series of items (on the one hand, what agents, given mental state S, typically are disposed to do or think, and, on the other hand, what they, given

These demands constrain our practical reasoning, and give it a shape. The demand of means-end coherence provides a standard of *relevance* of options. The demand of consistency, in turn, provides a standard of *admissibility* of options. When I have a plan to A, I am committed to considering, in my deliberation, only relevant and admissible (relative to A-ing) options. This gives a focus to my practical reasoning, enabling it to develop continuously, and extend its influence, across time. Thus, plans make intrapersonal coordination of the agent's various activities from the past to the future, and the formation of relatively firm mutual expectations (and, thus, interpersonal coordination) possible.

Thus, plans – typically, partial plans – play, in our practical reasoning, a characteristic role: they provide a framework within which our deliberations take a definite shape, defining the problems we face and the range of relevant and admissible solutions. Bratman summarizes these findings by saying that plans provide, as inputs to our practical reasoning, a peculiar kind of reasons, different from ordinary desire-belief reasons for action, which he terms “framework reasons”. Human agency is rationalized, *inter alia*, by such framework reasons. It is thanks to such reasons that we are not “time-slice agents”.

PT's fundamental tenets (above, in this section) have to be understood along these lines. In claiming that laws are plans, Shapiro is claiming that they play, in “our” (who are “we”, here? This is one of the important issues PT has to deal with; see below, 5.1) practical reasoning, this role. Laws, *qua* plans, involve a characteristic sort of commitment: they guide both our actions and our reasoning, by pos-

S, should – reasonably – do or think) mirror each other. How, and why, this could be so is a fundamental problem in the philosophy of mind we may leave aside here.

ing us problems concerning the ways in which they are to be carried out or specified (laws, says Shapiro, typically are partial plans: those in charge of their implementation, or application, have to fill in details, and devise appropriate subplans), subject to demands of consistency.

This is the core of PT, so far as law's impact on practical reasoning is concerned. As we have seen, planning, as a distinctive kind of commitment peculiar to agents of bounded rationality, enabling intrapersonal and interpersonal coordination across time, is subject (Bratman argues) to distinctive norms of rationality (means-end coherence, consistency, and – see below, 5.2 – norms of rational reconsideration); laws (PT claims) play the same roles, and are subject to these very same norms.

This, to repeat, is the core of PT (as far as its import on the reasons paradigm in jurisprudence is concerned). In order to get a fuller picture of the theory, however, we have to supplement some more elements.

Laws are not individual plans. They are, Shapiro argues, shared plans.

«Not only are some aspects of legal activity shared, but so is the whole process. 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. Each has a part to play in planning for the community. Call this the “Shared Agency Thesis”»: «legal activity is shared activity»¹⁷.

¹⁷ SHAPIRO 2011a, 204. In accounting for the possibility and structure of shared plans, Shapiro builds upon Bratman's work (BRATMAN 1999, chs. 5-8; BRATMAN 2009a) on “jointly intentional action”. In order to make room for the possibility – crucial to the existence of legal practice – of “alienated” participants, however, he further develops Bratman's views,

In fact, Shapiro claims¹⁸, groups of individuals faced with serious practical (and, specifically, moral) problems, whose solutions are complex, contentious, or (in the case of coordination problems proper, in the strict game-theoretical sense) arbitrary, will soon experience the limitations of spontaneous ordering, and will resort to social planning: likewise, they will soon experience the limitations of unstructured, unordered social planning (relying on negotiation, or the search for consensus), and develop sophisticated “technologies of planning”, enabling them to cope effectively with those problems. The basic ingredients of such technologies of planning are hierarchy (certain members of the group plan for the whole group, certain members of the group plan that certain members of the group will plan, *re* subject matter S, for the whole group, and so on), and its institutionalization (specifically, the creation of abstract, stable roles – “offices” – within the structure of planning activities, distinct from the concrete individuals temporarily occupying them; and the determination of the procedures to be followed in exercising these planning offices). The law is, Shapiro claims, a complex institutionalized structure of social planning of this kind¹⁹. Thanks to this structure, the community has available social plans which “do the thinking” for the group, settling for the whole community unique solutions to the practical problems it faces (coordination games, battles of the sexes, complex or contentious moral issues).

and moulds a new notion, “massively shared agency” (SHAPIRO 2011a, 143 ff.). I do not (apart from some hints, see below, 5.1) discuss this part of PT here.

¹⁸ SHAPIRO 2011a, chs. 6 and 7.

¹⁹ What the features are that distinguish the law from other structures of this kind (SHAPIRO 2011a, 210-226) need not detain us here (see for a discussion RIPSTEIN 2012).

«[L]egal activity [...] seeks to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize, and monitor the behaviour of individuals and groups. It does this by helping agents lower their deliberation, negotiation, and bargaining costs, increase predictability of behaviour, compensate for ignorance and bad character, and provide methods of accountability»²⁰.

3. *The possibility of law*

According to Shapiro PT entails the solution of a fundamental puzzle, which has long vexed legal theory. The puzzle (“the Possibility Puzzle”) concerns the very possibility of the law, and is, roughly, this: on the one hand, it takes an official to create a legal norm; on the other hand, it takes a legal norm to make an official (an individual can create a legal norm only if empowered to do so; and only a legal norm can empower an individual). This gives rise to an infinite regress (norm N1 is created by official O1, who is empowered to create norms by N2, which is created by O2, and so on), or to a vicious circle (N1 is created by O1, who is empowered to create norms by N1; or, O1 is empowered to create norms by N1, which is created by O1)²¹. PT, Shapiro claims, avoids both, and affords a way out.

How? The solution depends on the source of the authority of plans, and on the way in which they come into existence. Plans, observes Shapiro, are, undoubtedly, *positive*

²⁰ SHAPIRO 2011a, 200.

²¹ Some commentators have argued that, contrary to what Shapiro claims, this is not a genuine paradox, and that the appearance of a paradox stems from equivocation (SCIARAFFA 2011; CHIASSONI 2012, par. 7.5; POGGI 2012). We may remain agnostic on this issue here.

norms²²: they come into existence just in case they are formed and adopted by human beings. The power to form and adopt plans is not “conferred on us by morality”²³. Human agents have it, in virtue of the norms of instrumental rationality: the power to form and adopt plans, as we have seen (see above, 2), consists of a set of dispositions, typical of human agents, and associated norms of rationality²⁴.

The norms of instrumental rationality, in turn, are not created by anyone. They exist in virtue of their content («[t]hey exist simply in virtue of being rationally valid principles»)²⁵. Plans exist, when dispositions of the relevant kind occur, in (rough) accordance with these norms. They come into existence just in case agents exercise, as a matter of fact, this capacity. Thus, the existence of plans depends, given human capacity for planning, on non-moral, sociological and historical facts alone (it does not depend on moral norms). In the case of plans, says Shapiro, «positivism is trivially and uncontroversially true»²⁶.

This is the reason why PT – the thesis that laws are plans

²² SHAPIRO 2011a, 128.

²³ SHAPIRO 2011a, 119.

²⁴ But why “instrumental” rationality? Our capacity for planning, says Shapiro (SHAPIRO 2011a, 123) following Bratman (BRATMAN 1987, 35), has a “pragmatic rationale”: there are good pragmatic, or instrumental, reasons (such as the pursuit of complex ends with limited resources, or «a lack of trust in our future selves», SHAPIRO 2011a, 122) why humans engage in planning. In other words: plans are “universal means” (SHAPIRO 2011a, 173; BRATMAN 1999, 5): they enable agents effectively to pursue their various ends, whatever these may be. Thus, the rational demands they are subject to – and which are constitutive of the very capacity of planning (see above, 2) – are demands of instrumental rationality.

²⁵ SHAPIRO 2011a, 181.

²⁶ SHAPIRO 2011a, 119.

– solves, according to Shapiro, the Possibility Puzzle. And it affords, moreover, a positivistic solution to it. Human agents can form and adopt plans. This gives rise to a distinctive kind of commitment (see above, 2): plans have authority over planners. But this commitment (the authority of plans) presupposes no norm, apart from the norms of instrumental rationality. These are not positive norms (this avoids the regress, and the vicious circle)²⁷. Nor are they moral norms (and this gives the lie to natural law theories). Thus, if laws are plans, the existence of the laws ultimately depends on social facts (and on facts about human agency as planning agency), not on moral ones. Positivism is vindicated²⁸.

The authority that plans – including legal plans – have on agents, then, depends on the bare fact of their being formed and adopted (and on norms of instrumental rationality). According to PT, at the foundation of a legal system lies a distinctive human capacity – the capacity human agents have to commit themselves through forming and adopting plans – plus a set of historical or sociological facts (acts of exercise of this capacity)²⁹.

²⁷ No empowered official – thus, no norm empowering her – is required to put them into being.

²⁸ «[T]he creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans» (SHAPIRO 2011a, 119). SCHAUER 2010, 595, n. 33, observes that «[m]uch of Shapiro's argument is situated within [...] the attempt to explain how law can provide oughts – reasons for action – simply on the basis of social facts». This is, I think, right (but see below, n. 41 and accompanying text), provided that the important qualification set out in the next footnote is taken into account.

²⁹ It follows, then, that (as Shapiro explicitly claims in SHAPIRO 2011b, which is apparently an earlier version of the material in SHAPIRO 2011a, chs. 5-6, at 69) the existence of legal norms does in fact depend on normative facts, but these facts are facts about our planning psychology,

4. *The authority of plans*

But, we may wish to inquire further, what does the authority of plans consist in?

The adoption of a plan is, as we have seen (see above, 2), a way of *settling* on a course of action. This means that plans are not supposed to enter into the balance of ordinary, ground-level reasons for or against a given course of action. Rather, they are “supposed to preempt”, and purport to provide a reason to preempt³⁰, deliberation on the balance of

deriving from the norms of instrumental rationality which are partly constitutive of this psychology (see above, n. 16); the relevant normative facts do not – as natural law theory would have it – depend on, or derive from, moral norms. It should be noted, however, that in recent writings Bratman has developed, in addition to an instrumental justification of planning, a further, different rationale, having to do with human agents’ quest for self-governance and autonomy. See BRATMAN 2009b, 412, esp. n. 2 («for planning agents like us, our reason for conforming to these norms of practical rationality derives in part from our reason to govern our own lives»), 417–418, 429, 430, 436; BRATMAN 2009c, 54 and n. 64 («structures of cross-temporal and interpersonal planning are partly constitutive of [...] forms of cross-temporal integrity, cross-temporal self-government, [...] that we highly value»). Shapiro hints at these developments in n. 4 to ch. 5. To the extent that self-governance and autonomy may be held to be ideas strictly related to morality (or, perhaps, straightforward moral values) these developments may raise trouble for Shapiro’s purportedly positivistic plan-based solution to the Possibility Puzzle. If planning is constitutive of self-governance and autonomy, and if its rationale and justification is rooted (in addition to its instrumental value) in the moral value of self-governance and autonomy, then, in a sense, our capacity for planning is, indeed, “conferred on us by morality”. The existence and authority of the laws, *qua* plans, do indeed rest, according to this line of reasoning, on moral norms (as well as on the relevant norms of instrumental rationality).

³⁰ SHAPIRO 2011a, 128 f.

reasons and (as we have also seen; see above, 2) to structure further deliberation about how to carry them out. Plans, *qua* framework reasons, have preemptive force with respect to ordinary, ground-level reasons for action: when we have a plan to A, deliberation on the merits (about whether to A or not) is foreclosed – otherwise, it would be useless to have the plan in the first place.

What we have been calling the “authority” of plans consists of this peculiar kind of force the commitment involved in adopting a plan involves: the issue is settled, i.e. *deliberation on the merits is foreclosed*. Plans do not enter into the balance of ordinary reasons for action and – within limits (see below, 5.1) – they supplant the weighing of reasons. A planner’s rationality consists (up to a point, as we shall see) in *not* questioning whether there are good reasons for doing what the plan dictates, outweighing whatever reasons there may be against it. This justifies talking of plans as endowed with “authority” of a sort.

In PT this holds, since laws are plans, of laws as well³¹. And this entails, according to Shapiro, a very strong claim about the nature of law, and the ways in which the existence and content of the laws can be apprehended.

Plans, we have just seen, can play the role they are supposed to play only by pre-empting deliberation on the merits; thus, says Shapiro, «[t]he existence and content of a plan cannot be determined by facts whose existence the plan aims to settle»³² (this is what Shapiro, calls the “logic of planning”)³³.

³¹ See e.g. SHAPIRO 2011a, 201 f., 275.

³² SHAPIRO 2011a, 275.

³³ SHAPIRO 2011a, 275: «It would be self-defeating [...] to have plans do the thinking for us if the right way to discover their existence or content required us to do the thinking ourselves! [...] For example, suppose I want to know whether I have a plan to go to Mexico for

From this, argues Shapiro, it follows that «[l]egal facts are determined by social facts alone»³⁴. Shapiro calls this the “Exclusivity Thesis” (distinctive of exclusive legal positivism). In other words, PT supports, via the logic of planning, the rejection of inclusive legal positivism:

«[i]f the point of having law is to settle matters about what morality requires so that members of the community can realize certain goals and values, then legal norms would be useless if the way to discover their existence is to engage in moral reasoning. Legal norms that lack pedigrees are like can openers that work only when the cans are already opened»³⁵.

All this gives us a very austere picture of the kind of practical reasoning laws, *qua* plans, support. Legal plans should be discoverable independently of any inquiry about what the right answer is to the issues they are meant to settle; and, once discovered, they should be taken as supplanting – within limits³⁶ – any such inquiry. But, on the other hand, the kind of practical reasoning typical of agents who delib-

winter vacation. If I do have such a plan, then the right way to discover its existence cannot require me to first figure out whether I ought to go to Mexico this winter for vacation. After all, the whole point of having such a plan is to settle that very question. Deliberation on the merits would violate the logic of planning because I would be doing the activity that the plan is supposed to do for me. If I must deliberate in order to discover the plan, then I do not have the plan».

³⁴ SHAPIRO 2011a, 269. As well as by facts about instrumental rationality, constitutive of human capacity for planning (see above, nn. 16 and 29, and accompanying text).

³⁵ SHAPIRO 2011a, 275.

³⁶ But, as we shall see (see below, 5.2), it is not at all easy to determine what these limits may sensibly be taken to be, and PT’s sketchy answer to this question proves unsatisfactory.

erate within the framework provided by previously adopted plans may also be characterized as creative. Plans are, typically, partial; and planning agents have to devise appropriate means, preliminary steps, subplans, and ways of specifying them in concrete circumstances, in order to carry out their plans (see above, 2). All this requires, within the framework of the plan, a good measure of imagination and ingenuity.

Two comments are appropriate here. (1) The characterization of plans as endowed with preemptive force (relative to the balancing of ground-level reasons), and PT's argument for exclusive legal positivism (based, as we have just seen, on the "logic of planning") bear an obvious affinity to Raz's view that mandatory norms are protected reasons for action, involving second-order exclusionary reasons (see above, 1), and to his argument in favour of the Sources Thesis³⁷, premised on the assumption that law claims authority (roughly: legal directives purport to be authoritative; thus, they must be such that they can be authoritative; authoritative reasons for action include exclusionary reasons: they preempt deliberation on the merits of the case; thus, legal directives must be such that their existence and content can be discovered without resorting to deliberation on the merits – i.e., independently of moral considerations)³⁸.

Now, it is true that plans give shape to and focus our deliberation, by selecting relevant and admissible options, and that they settle practical issues. But they are not rea-

³⁷ RAZ 1994.

³⁸ The former affinity is noted by SCHIAVELLO 2012, par. 6, the latter by EDMUNDSON 2011, 278. See also SCHAUER 2010, 597. Schauer characterizes plans as providing "content-independent" reasons for action, and notes that, under this respect, they are «intimately connected with the content-independent notion of legal authority itself» (where authority is to be understood along the lines of Raz's theory of authority, SCHAUER 2010, 597; see also 607).

sons for action in the way in which Razian protected or exclusionary reasons are.

(a) They are not protected reasons. Razian protected reasons involve reasons to act in a certain way: *ceteris paribus*, or *pro tanto*, they make it rational to perform (or make eligible) the relevant action. But plans are not, in this way, reasons for acting as planned. Understanding them in this way would «lead [...] us to sanction unacceptable forms of bootstrapping»³⁹. If plans were, in this way, reasons for acting as planned, this would entail that a plan to A could, in principle, tip the balance of reasons for and against A-ing. Thus, it would at least sometimes be possible for an agent to make A-ing a rational thing to do, and to make A-ing rational of him, by simply adopting the plan to A. By adopting the plan, the agent could bootstrap himself into rationality, no matter whether A-ing is a sensible thing to do, and whether it would be rational of him to A, in the first place. This would indeed make it too easy for an agent to get off the hook of a charge of irrationality for having settled on A-ing understanding plans as reasons for acting as planned has highly counterintuitive implications.

It follows that, appearances notwithstanding, the idea that laws are plans cannot account for the assumption that the law provides reasons for acting in certain ways, by telling people what they ought to do⁴⁰. This assumption is the core tenet of the reasons paradigm in contemporary jurisprudence (see above, 1). Thus, appearances notwithstanding, PT does not in fact qualify as a version of the reasons paradigm⁴¹.

³⁹ BRATMAN 1987, 24.

⁴⁰ This is explicitly argued for in BRATMAN 2011, 75 ff. Bratman comments here «I am unsure whether I am disagreeing with Shapiro» (BRATMAN 2011, 75). And, indeed, it is hard to tell. But this, it should be emphasized, is no secondary issue.

⁴¹ Remember, however, Schauer's remark that «[m]uch of Shapiro's

(b) Plans are not exclusionary reasons either. The way in which plans structure practical reasoning – namely, as framework reasons (see above, 2) – differs from the way in which exclusionary reasons constrain it. They are not reasons for not acting on certain (sorts of) reasons. «[F]iltering out certain options from one’s deliberation» – which is what framework reasons do – is different from “disregarding certain reasons”,⁴²

Thus, one must be very careful in reading the claim that plans are framework reasons. This claim should be understood in accordance with what has just been said. Plans are not reasons for acting as planned, nor are they Razian norms. Thus, resemblance between Raz’ argument for the Sources Thesis and PT’s “logic of planning” argument for exclusive positivism might also prove superficial.

(2) It may plausibly be argued that Shapiro’s “logic of planning” argument for legal positivism, of the exclusive variety, proceeds too quickly, for two reasons⁴³. First, the possibility of a plan directing agents to make use, in specified circumstances (in which, e.g., they may be expected to act mindlessly), of their moral judgment, is not ruled out by the logic of planning. Second, a law, *qua* plan, may settle the issue concerning the applicability, to a given kind of case, of a certain moral predicate, or set of moral predicates, while leaving it open – and allowing the solution to that case depend on – whether a different moral predicate, or set

argument is situated within [...] the attempt to explain how law can provide oughts – reasons for action – simply on the basis of social facts» (SCHAUER 2010, 595, n. 33; cfr. also BIX 2012, 445; SIMMONDS 2012, 255, 259). It is very difficult, in reading *Legality*, to resist this impression. This is, precisely, what makes an inquiry into our subject, PT and practical rationality, appropriate.

⁴² BRATMAN 1987, 180, n. 11; cfr. also BRATMAN 2007, 290, n. 15.

⁴³ WALDRON 2011, 895 f.

of such predicates, applies or not applies in an individual case (of the kind it disciplines)⁴⁴.

5. *Fundamental issues*

When considered in the light of its impact on our understanding of the role of laws in practical reasoning, PT raises two fundamental issues.

5.1. *Whose authority, over whom?*

So far, I have been talking of the commitment that plans involve as inputs in “our” practical reasoning, and of the authority that plans have on “us”. But who are we? In the case of ordinary, garden-variety planning the answer is straightforward: the planners themselves. The commitment

⁴⁴ See also MELERO DE LA TORRE 2012, 230; EDMUNDSON 2011, 279: «incorporated moral norms can indeed “make a difference” in the reasoning of those to whom the law applies. By incorporating a certain moral value, such as fairness or equality, a legal norm can restrict the reasoning of a deliberator who would otherwise be inclined to weigh fairness against other moral values, such as utility». What Shapiro’s argument in *Legality* (elsewhere, Shapiro has paid attention to this kind of objection) does in fact show, on the one hand, is that «law [...] must resist re-evaluation of its underlying (moral) merits to be useful» (YANKAH 2011). This is a much weaker conclusion than the one Shapiro wants to draw (namely, the Exclusivity Thesis), which might perhaps ground some variety of normative legal positivism (WALDRON 2011, 893 f.; see also GUEST 2011, par. 1). (Meaning, by “normative legal positivism”, an ethical-political outlook built around this substantive thesis: it is desirable that the law should be such that it can be identified, and its content determined, on the basis of so far as possible non-controversial, easily identifiable, readily accessible social facts; cfr. CELANO 2013, par. 2.)

involved in planning is commitment on the part of the planning agent. The authority of plans is the authority plans have over planners. But what about *legal* plans?

Legal planning also involves, at first glance at least, planning *for others*. And this, it seems, is not a secondary or unimportant feature of the law. Laws, including the fundamental laws of a legal system (what Shapiro calls its “master plan”) are plans that certain individuals form and adopt (also) for other individuals, and that apply (also) to the latter’s behaviour. Legal plans claim authority over agents other than those who have created them. They purport to play the role plans as such are supposed to play (see above, 2 and 4) in the practical reasoning of the public at large.

Or do they? An affirmative answer to this question invites an obvious rejoinder⁴⁵: why on earth should *I* be bound – in the way that plans bind (by involving, i.e., a two-dimensional commitment; see above, 2) – by a plan that *somebody else* has created for me? Plans have authority over planners (see above, 4). But why should I take myself to be subject to the authority of a “plan” – a norm (see above, 1) – that somebody else has dictated for my behaviour? Why should such norms play the role of plans – the role, that is, of framework reasons, involving a two-dimensional commitment – in my practical reasoning?

There is a twofold problem here for PT. First, we do not, I take it, wish to allow that anybody can come across and dictate a norm for my behaviour, that *eo ipso* is binding on me, commits me to perform the prescribed action, and should play the role of a framework reason in my deliberation. There must be an explanation why some individual has – if anybody ever has it – the power to dictate binding norms to another individual. (Suppose X “plans” for Y. Ab-

⁴⁵ CELANO 2012a.

sent special considerations, Y might well object to X's "plan": so what?)

Second, why should such norms be termed "plans"? Bratmanian plans are formed and adopted by the planning agent (be the relevant agency in the first person singular, or in the first person plural; cfr. below, in this section). Suppose that X has the power to dictate to Y a binding norm – a norm such that Y ought to comply with it –; it seems that such a norm would not be a plan (in Bratman's sense). In this situation, the notion of a plan (in Bratman's sense), it seems, does not apply. It is one thing for X to form and adopt a plan (and, thus, to give to herself a framework reason for action), quite another for her to acquire a reason for A-ing because Y has "planned" that she should A. In the latter hypothesis, the word "plan" has not the same meaning as in the former.

There are two strategies open to PT in dealing with this difficulty. Both strategies, however, involve a dramatic re-adjustment of PT, and a drastic limitation of its explanatory ambitions. The first consists in narrowing the scope of the commitment involved in legal plans to their authors, namely, officials. The other is to narrow the application of PT to those in the citizenry, and among officials, who accept, making them their own, the plans formed for them.

What is *not* an open strategy, I think, is to take it for granted – or, worse, to regard as a conceptual truth, or as a matter of the fundamental nature of law – that, wherever a legal system exists, the whole set of the individuals to whose behaviour the norms of the system apply make up a single, unified macro-agent of sorts, whose plans (just like it happens in the case of individual planners) have authority over itself. True, plans may be shared by a plurality of individuals, whose actions and intentions are appropriately adjusted to one another so as to make up for the collective execution of a single, unified plan, via the execution, by

different agents, of its appropriately meshing sub-plans⁴⁶. So understood, agency in the first person plural is not an impossible, or indeed unusual, phenomenon. The paradigm case are small-scale groups of like-minded individuals, who share the intention of pursuing definite, relatively circumscribed goals. An example of this might be an orchestra playing a symphony, or a football team whose members are engaged in the enterprise of playing, to the best of their capabilities, a football match. It would be ill-advised, however, to try to understand the way in which a contemporary municipal legal system organises the behaviour of billions of willing and unwilling, consenting and often at least partly dissenting, often (as Shapiro himself rightly, and repeatedly, emphasizes)⁴⁷ alienated individuals, on the model of an orchestra or a sport team. The attitudes of these individuals toward the law are, typically, too disparate. Not to talk about differences in power, status and wealth, and the conflicts they give rise to. The operations of a whole legal system should not, I think, be understood as an instance of agency in the first person plural (in the above sense), where all the individuals to whose behaviour the norms of the system apply participate. This would be, I think, naïve, and simplistic⁴⁸.

So, let us explore the two strategies open to PT, and their import on PT's claim that laws play, in the practical reasoning of some agents, the role of plans.

(1) For *officials only*. The first strategy is to narrow the scope of the commitment involved in legal plans to their authors, namely, officials. In a hierarchical institutionalised

⁴⁶ As hinted above, n. 17, Bratman has explored various possibilities of "jointly intention action". Shapiro further develops some of his ideas.

⁴⁷ E.g., SHAPIRO 2011a, 97, 204.

⁴⁸ Cfr. further on this issue CELANO 2012a, par. 5.

structure of planning, such as the law (see above, 2), some of the officials will plan for other officials. But, so long as all of them are part of the institution (which, as we have seen, is an impersonal structure, consisting of abstract roles, or offices), occupying distinct offices in the structure, we may assume that all those officials for whom plans are formed and adopted (even alienated ones) are, in fact, subject to their authority.

This is a viable strategy. It has, however, the drawback of narrowing to the officials of the system (and the authors of its master plan) the scope of the guidance that the laws, *qua* plans, purport to provide. On this reading, PT's main claim – laws are plans – is true with respect to officials only.

(2) *Commitment through acceptance*. The second strategy consists in granting that PT's main claim is true only with respect to those, among the individuals to whose behaviour the laws apply, who – be they officials or laypeople – accept the plans formed for them, and so make these plans (formed by others) their own. According to this strategy, that is, legal norms are plans only with respect to those who adopt them as such for the guidance of their own conduct, thus subjecting to the authority of these plans (i.e., committing themselves to their execution, and to treating them as framework reasons in their deliberation).

This, too, may be a viable solution, depending on how the relevant notion of the “acceptance” of a plan is understood (Does the victim, in handing his purse to the proverbial gunman, “accept” the latter's plan to rob him of his purse?). It too, however, involves a drastic limitation of the truth of PT's main claim.

Which of these strategies PT actually deploys, or should – on grounds of consistency and coherence – deploy? It is not at all easy, I shall now argue, to answer this question. Neither strategy fits all of what Shapiro says. But, on the other hand, there are things he says that hint in both directions.

First, it remains unclear whether what PT claims is that the “fundamental rules” – *only* the fundamental rules – of a legal system are plans, or that laws – all legal norms as such – are plans. Shapiro sometimes seems to put forward the first, limited claim⁴⁹, while at other times he clearly states, or implies the latter (or, again, what he does in fact say entails the latter)⁵⁰. On the first hypothesis, it seems, PT applies to those individuals whose behaviour the “fundamental rules” of a legal system directly organise, namely, officials. On this hypothesis, in other words, law comprises a set of norms which are plans of the officials (and the authors of the master plan), plus a set of norms – those purporting to organise the behaviour of ordinary citizens – which are not, as such plans. On the second hypothesis, on the contrary, all laws are somebody’s plans. These two claims are different, and have different implications⁵¹.

⁴⁹ Cfr. e.g. the alternative statement of PT’s main claim in n. 13 above: «the fundamental rules of legal systems are plans. Their function is to structure legal activity so that participants can work together and thereby achieve goods and realize values that would otherwise be unattainable» (SHAPIRO 2011a, 119).

⁵⁰ “[L]aws are plans” (SHAPIRO 2011a, 195). Or see, again, the statement of PT’s main claim in the text above, 2: «legal rules are themselves generalized plans [...], issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply» (SHAPIRO 2011a, 155).

⁵¹ So, e.g., when Shapiro claims (alternative formulation of PT’s main claim) that «the fundamental rules of legal systems are plans. Their function is to structure legal activity so that participants can work together» (SHAPIRO 2011a, 119), by “participants” we presumably have to understand: officials; and the “working together” Shapiro mentions is, apparently, the complex set of officials’ activities. The individuals whose behaviour legal plans directly organise are, on this

Second, in arguing that laws are plans, and that legal activity is shared activity, Shapiro usually assumes that those to whom the relevant norms apply⁵² *accept* the plans others have formed and adopted for them. Let me give two detailed examples of this.

In the section titled *Introducing hierarchy*⁵³, what the “head chef” of the Cooking Club (Shapiro’s fictitious paradigm of a relatively simple kind of joint activity, in which shared organised planning gradually develops) does is, trivially, issuing *orders* («that is, I can *order* them to do so»)⁵⁴. It is only because we, the “sous chefs”, accept the plans he made for us, or because we accept his authority, that his orders are binding on us.

reading, the officials of the system. While, on the other hand, when he claims that “laws are plans”, the individuals whose behaviour legal plans are supposed to organise are, it seems to follow, all those to whose behaviour legal norms apply. And – unless Shapiro wants to “go Kelsenian” (STONE 2012, 225) and claim that all legal norms, as such, are addressed to officials (something Shapiro does not say, and that is quite alien to PT’s general drift; cfr. WALDRON 2011, 889 f.; STONE 2012, 225) – the two things are different. The latter claim (laws are plans), in fact, has a paradoxical ring to it: in what sense may a criminal statute prohibiting, e.g., murder, be held to be a “plan” for the behaviour of those to whom it applies? (For a sympathetic exploration of some possibilities see WALDRON 2011, 889-891, BIX 2012, 447; for criticism see STONE 2012, 224 f.) This difficulty is related to the one discussed in the text. With respect to whom, exactly, are – according to PT – legal norms plans?

⁵² Be they the members of the Cooking Club (SHAPIRO 2011a, 139), people working for Cooking Club Inc. (SHAPIRO 2011a, 144), inhabitants of Cooks’ Island (SHAPIRO 2011a, 157), residents at Del Boca Vista (SHAPIRO 2011a, 217), or people involved in the operations of a legal system.

⁵³ SHAPIRO 2011a, 140 ff.

⁵⁴ SHAPIRO 2011a, 141.

Shapiro writes⁵⁵: «when the head chef orders a sous chef to perform some action, we might say that she “adopts a plan” for the sous chef». So, can anybody, at will, adopt a plan for me? No, but, unsurprisingly, acceptance of plans adopted for me by someone else (i.e., *adoption*, in the first person, of the plan), and *commitment* to carrying it out, make me subject to the normative requirements planning is governed by. Thus,

«by issuing the order, the head chef places the sous chef under a norm designed to guide his conduct and to be used as a standard for evaluation. Moreover, the head chef does not intend her order to be treated as one more consideration to be taken into account when the sous chef plans what to do. Rather, she means it to settle the matter in her favour. And *because the sous chef accepts the hierarchical relationship, he will adopt the content of the order as his plan* [emphasis added] and revise his other plans so that they are consistent with the order. He will treat the order as though he formulated and adopted it himself»⁵⁶.

Again:

«parts of the shared plan authorize certain members of the group to flesh out or apply the other parts of the shared plan. These “authorizations” are accepted when members of the group *agree to surrender their exclusive power to plan and commit to follow the plans formulated and applied by the authorized members* [emphasis added]. Thus, when someone authorized by the shared plan issues an order, she thereby extends the plan and gives members of the group new sub-plans to follow»⁵⁷.

⁵⁵ SHAPIRO 2011a, 141.

⁵⁶ SHAPIRO 2011a, 141.

⁵⁷ SHAPIRO 2011a, 142.

When somebody else adopts a plan for me, and I myself adopt it – or commit myself to its execution (maybe, because I have somehow transferred to him my power to adopt plans for myself) – then I have a plan. Is this all Shapiro means? So, is PT to be understood as claiming that legal norms are plans just in case the individuals to whose behaviour they apply accept them as their own plans, committing themselves to carrying them out, and for these individuals only? Or perhaps what PT claims is that, as a matter of conceptual necessity, or of the fundamental nature of law, individuals to whose behaviour legal norms apply adopt them as plans? *Legality* does not provide a unique answer to these questions.

Consider, as a second example, the section in ch. 6 titled *The Inner Rationality of Law*⁵⁸. Here, the norms of instrumental rationality («the distinctive norms of rationality that attend the activity of planning»⁵⁹: consistency, means-end coherence, not reconsidering absent compelling reason) apply only to those who accept the fundamental legal rules (i.e., the master plan), that is, only to legal officials and to “good” citizens (The relevant norms of rationality govern the activity of planning; thus, they apply only to those who are committed to the plan.) Bad men – that is (or so it seems), all those who have not accepted the legal norms applying to their behaviour as their own plans – are not subject to their constraints⁶⁰. Laws are plans, it seems, only for

⁵⁸ SHAPIRO 2011a, 183.

⁵⁹ SHAPIRO 2011a, 183.

⁶⁰ «The inner rationality of law, of course, is a limited set of constraints because the rational norms of planning only apply to those who accept plans. The bad man, therefore, cannot be rationally criticisable for failing to obey legal authorities insofar as he does not accept the law» (SHAPIRO 2011a, 183). Cfr. also SHAPIRO 2011a, 149: «in order for a group to act together, they need not intend the success of

restricted and variable, depending on contingent factors (individuals' changing attitudes), sections of those to whose behaviour they apply.

So, Shapiro seems to imply that laws are plans only with respect to those who accept them as their own plans, or at least accept that their creators (i.e. officials) are entitled to plan for them⁶¹. This dispels the difficulty ("Whose plans?"). It dispels it, however, at a high price. If we *assume* that all individuals involved accept the relevant plans, making them their own as if they had designed and adopted them for themselves, talk of plans – and of the distinctive kind of commitment plans involve (their distinctive authority; see above, 2 and 4) – surely becomes appropriate. In this hypothesis, unsurprisingly, laws will in fact play, in the practical reasoning of these individuals, the role plans are supposed to play. But this is a way of making the intended claim (i.e., that laws are plans, and thus have, for those to whose behaviour they apply, the characteristic, non-moral, authority that plans as such have) trivially true. If we *assume* that the relevant individuals bind themselves, or commit themselves to complying with the law, we should not be surprised to find them bound, or committed⁶². True, in the case of the law we are

the joint enterprise. They need only share a plan. That plan, in turn, can be developed by someone who does intend the success of the joint activity. As long as participants accept the plan, intentionally play their parts, resolve their disputes peacefully and openly, and all of this is common knowledge, they are acting together intentionally».

⁶¹ Or, perhaps, for those accepting the plans *and* for the officials of the system, be they alienated or not, as forming part of the institutionalised planning structure (cfr. above in the text, where the "for officials only" hypothesis was introduced).

⁶² On Cooks' Island, «the plan which establishes the hierarchy for the

dealing with an institutionalised hierarchical structure for planning. But this only multiplies the difficulty. The required additional work could only be done, here, by a substantive theory of legitimation through acceptance⁶³.

island is a shared plan» (SHAPIRO 2011a, 165). Shapiro goes on (SHAPIRO 2011a, 165 f.): «notice further that since the shared plan was designed for the handful of social planners; it is they who share the plan, not the islanders as a whole. This means that it is not necessary for the community to accept the shared plan in order for it to *obtain* [emphasis added] – though, as a matter of fact, we do approve of the plan. Since we consider the social planners to be morally legitimate, we plan to allow the adopters 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» (cfr. also SHAPIRO 2011a, 150, 177, 183). What does the emphasized “obtain” mean, here? Are those inhabitants that do not have accepted the plan supposed to be subject to a *plan* (and the distinctive kind of commitment it involves)? If not, then, how can PT claim that laws are plans (unless, of course, the “for officials only” strategy is endorsed)? And I cannot see how the answer could plausibly be yes. Once again, why on earth should the “plan” you formed for me *eo ipso* put me under “rational pressure to act accordingly”?

⁶³ There are, in *Legality*, some clues of this. See e.g. SHAPIRO 2011a, 148 f.: «as we have seen, we respond to the challenge of managing a large group of inexperienced and unmotivated individuals by requiring them to hand over vast amounts of planning power to us. By accepting the shared plan, they not only assume certain roles but transfer their powers to adopt and apply plans when their plans conflict with the planning of the supervisors». “Transfer of planning power” by way of acceptance, or consent, has an obvious contractualist flavour. Does PT’s main claim (laws are plans) rest on unstated contractualist, or quasi-contractualist, premises? In fact, arguments which apparently presuppose a theory of legitimation by consent are scattered in Shapiro’s book. Consider for example the following principle (SHAPIRO 2011a, 142 f.): «the fact that someone adopts a plan for others to follow does not, of course, mean that, from the moral point of

Such a theory, however, is absent in *Legality*, and it is totally alien to Shapiro's theoretical enterprise. Moreover, the move – assuming that all the parties involved accept the plans applying to their behaviour – sheds no light on less irenic situations. The assumption is, where law is concerned, problematic. I take it that we do not want to make it a matter of conceptual necessity, or of the law's fundamental nature, that laws are accepted by all those subject to them.

Let us take stock. First, neither strategy fits all of what Shapiro says; second, there are things he says that hint in both directions; but, third, each one of these two strategies has, as we have just seen, serious drawbacks. And, finally, both strategies mandate, each in its own way, a dramatic readjustment of PT, and a radical limitation of its explanatory ambitions. In both hypotheses, PT's bold assertion that laws are plans has to be recanted.

These considerations warrant, it seems to me, a skeptical conclusion. Shapiro is unclear about which strategy, if any, he endorses. The issue, however, is crucial, and indeterminacy on such a crucial issue undermines the whole enterprise. Unless one of the two viable strategies (with its attendant drawbacks) is explicitly and decidedly endorsed, and, accordingly, PT's explanatory ambitions are cut down to size in the way it mandates, we are forced to conclude that

view, those others *ought* to comply. The plan might be foolish or evil and, thus, unless there are substantial costs associated with non-conformity, the subjects morally should not carry it out. However, if the subject has accepted the shared plan which sets out the hierarchy then, from the point of view of instrumental rationality, he is bound to heed the plan. *For if someone submits to the planning of another, and yet ignores an order directed to him, he will be acting in a manner inconsistent with his own plan* [emphasis added]. His disobedience will be in direct conflict with his intention to defer».

Bratman's notion of a plan cannot legitimately be put to the use to which Shapiro puts it. Unless one of the two viable strategies is endorsed, laws cannot coherently be characterized as (Bratmanian) plans⁶⁴.

5.2. Reconsideration

As noted above (see above, 2 and 4), plans are meant to settle practical problems. They are not up for grabs for reconsideration at every moment – otherwise, they would be useless: they would not be doing the thinking for us. This, however, does not mean that they should be executed *come what may*. Planning does not (reasonably) preempt deliberation on the merits whatever may happen, or whatever new information the agent may come to acquire. Plans can be, and sometimes they reasonably should be, reconsidered, and perhaps abandoned. The commitment involved in having a plan is a *defeasible* commitment.

This raises an obvious question. What are the conditions of rational reconsideration for plans? I.e., when is it reasonable for an agent to reopen the deliberation on the merits that lead her to the adoption of a plan, and to reconsider it in

⁶⁴ I have presented elsewhere (CELANO 2012a) a fully-fledged argument in support of this skeptical conclusion. In a nutshell: plans (Bratmanian plans) have authority over their authors. They involve a commitment on the part of planners. The laws, on the other hand, claim authority over many individuals, officials and non-officials, other than their authors. This is why plans can't do much for legal theory. (It is true, however, that Bratman himself is quite sympathetic to a marriage between his own views and legal theory. In his more recent work, he repeatedly credits Shapiro with suggestions and insights on these matters.)

the light of new information or unexpected circumstances⁶⁵?

Analogous questions arise for the various versions of the reasons paradigm in the field of legal theory⁶⁶. Roughly: granted that legal rules are second-order reasons, the upshot of the prior balancing of first-order reasons for and against a certain course of action, when – if ever – are we justified, in the light of new information or unexpected circumstances, in not taking them at face value, and turn back to the relevant first-order reasons, thus reopening our deliberation on the merits (just what the rule had supposedly settled)?

To take three influential examples, the question arises, first, with respect to J. Raz's theory of mandatory norms: given that norms provide second-order exclusionary reasons for action, when are we justified in suspending their application and in acting on the (sorts of) reasons which are, by hypothesis, excluded by them? Roughly the same issue may be put in terms of Raz's doctrine of authority: when does the possibility that an authoritative directive be mistaken reasonably warrant us in deliberating on the merits?

The question arises – second example – relative to F. Schauer's understanding of rule-based (*v.* "particularistic") decision-making. Rules are entrenched prescriptive generalizations. This means that their application will, sometimes, lead decision-makers to commit mistakes⁶⁷. When is an en-

⁶⁵ Bratman devotes sustained attention to this issue (defining norms of "reasonable stability" for plans). Cfr. BRATMAN 1987, ch. 5.

⁶⁶ As well as relative to the purported distinction between act- and rule-utilitarianism.

⁶⁷ Generalizations, as such, are over- and under-inclusive. Entrenching a generalization means not being disposed to check whether the case at hand is one with respect to which the generalization is over- or under-inclusive. Thus, rule-based decision-making will sometimes lead decision-makers to make mistakes.

trenched prescriptive generalization reasonably disentrenched? (Pursuing this issue leads Schauer to “rule-sensitive particularism”).⁶⁸

And it arises – third example – relative to the way in which M. Atienza and J. Ruiz Manero⁶⁹ draw the distinction between legal rules and principles. Legal rules are “opaque”: they hide to our view the balancing of principles which, we may assume, justifies them. When, if ever, are we justified in treating them as “transparent”, looking through them directly to the principles they supposedly embody, and their relative weight in the case at hand?

In general outlines, the problem is as follows. Rules are, in our practical reasoning, intermediate entities⁷⁰: they mediate between first-order reasons for action (it does not matter, here, whether these are understood as based on elements in the agent’s psychological makeup, e.g. desires and beliefs, or objectively, as facts) and action. In order to play this role, they have to be taken at face value, and followed according to their tenor. When a practical problem – a “case” – arises, such that the rule applies to it, the rule should be followed. If, on each occasion in which the rule applies, we were justified in considering whether and how the relevant first-order reasons apply, and whether their balancing in this kind of case militates in favour of the line of action the rule prescribes, the rule would be useless. It would be performing no mediating role (Notice the analogy between this line of argument and Shapiro’s “logic of planning” argument, see above, 4. According to the kind of view we are currently discussing, rules, just like Bratmanian plans, are supposed

⁶⁸ SCHAUER 1991a, 93 ff.

⁶⁹ ATIENZA and RUIZ MANERO 1996; ATIENZA and RUIZ MANERO 2000a; ATIENZA and RUIZ MANERO 2000b; cfr. RÓDENAS 1998.

⁷⁰ RAZ 2009.

to *settle* practical questions.) But, on the other hand, it would be unreasonable to follow the rule blindly on each and every occasion in which it applies. Unforeseen circumstances may present themselves, new information may shed a different light on some of the cases the rule, according to its tenor, applies to. In short, unforeseen cases may arise, whose peculiarities justify the agent in blocking the rule's application and reconsidering it, in the light of first-order, ground-level reasons for or against the line of action it prescribes. Thus, in order to perform reasonably their mediating function, rules should not *always* be taken at face value, come what may. We have, here, two conflicting exigencies – we may term them (by themselves, however, these labels are scarcely informative) “stability” and “flexibility”. A suitable equilibrium should be found between them.

It is easily understood that providing a satisfactory solution to this problem is of crucial importance for the theories I have mentioned (and for Shapiro's). Theories such as these draw, and they have to maintain, a distinction between two levels in our practical reasoning. Rules, authoritative directives, or, in PT, plans, are supposed to belong to the upper, intermediate level. But, on the other hand, the distinction, on pain of irrationality, shouldn't be too rigid. (This is only metaphorical, of course. How can the metaphor of “rigidity” be cashed? This, precisely, is the problem.) So, on the one hand, the divide between first- and second-order reasons must be firm enough so as to operate as a constraint on our deliberation. Allowing agents always to reconsider would have the upper level collapse on the lower one⁷¹. But, on the other hand, taking the constraint to be an absolute one would turn a two-tier theory of practical rationality into an apology of blind rule- (or plan-) worship.

⁷¹ This is what in fact happens, I have argued elsewhere (CELANO 2006), in the theory of Atienza and Ruiz Manero.

Shapiro's treatment of this whole issue is, in *Legality*, sketchy. According to Shapiro, legal norms, just like ordinary, everyday plans, are defeasible. But, he claims, one peculiar feature of legal norms, as contrasted with everyday plans, is that the laws themselves specify the conditions under which they should be reconsidered, or their application blocked – their defeaters. Legal norms (not necessarily one by one, perhaps jointly) specify their own defeaters⁷².

Is this a plausible position? The question for PT, here, is twofold.

(1) Can a norm – a norm of conduct – reasonably be taken to specify in advance, exhaustively and in non-vacuous terms (e.g., “unless there are compelling reasons to the contrary”), its own defeaters⁷³?

A rule including a (maybe empty) set of detailed exceptions is logically possible. And, as a matter of fact, a decision-maker uncharged of applying a given rule can treat a (perhaps empty) set of exceptions as exhaustive. The traffic lights, for instance, work in this way. But, I think, the possi-

⁷² See e.g. SHAPIRO 2011a, 201 f. («legal institutions are not in the business of offering either advice or making requests. They do not present their rules as one more factor that subjects are supposed to consider when deciding what they should do. Rather, their task is to *settle* normative matters in their favour and claim the right to demand compliance. For this reason, deliberating or bargaining with officials about the propriety of obedience normally shows profound disrespect for them, and for the law's authority. Regardless of whether seats belts are a good idea, passengers are required to buckle up – after all, it's the law»); SHAPIRO 2011a, 275 («laws guide conduct in the same way that plans do, namely, by cutting off deliberation and directing the subject to act in accordance with the plan»).

⁷³ Talking of a single norm doing that, or of further norms specifying the defeaters of a given norm, does not make any difference, here (cfr. SCHAUER 1991b).

bility that unforeseen circumstances present themselves, or that new information casts a different light on some of the cases the rule, according to its tenor, applies to, should be taken seriously. And, if we do take it seriously, treating rules (or sets of rules) as exhaustively specifying in advance their defeaters turns out to be (vacuous specifications aside) eminently unreasonable⁷⁴.

This does not rule out the possibility that, in special contexts, for particular reasons, it may be reasonable to hold decision-makers to a strict, exceptionless (apart from those detailed exceptions that, maybe, the rule already specifies) application of the rule, according to its tenor. There may be good, decisive reasons in favour of installing traffic lights at a given crossroads. Most importantly, the imposition of strictly rule-based decision-making on particular sets of decision-makers, relative to particular sets of decisions, may work as an effective device for the allocation of decisional power⁷⁵. But it is doubtful that *the law*, as such, might reasonably be regarded as such a special context – so as to conclude that legal norms, as such, may reasonably be treated as norms that exhaustively specify in advance (in non-vacuous terms) their defeaters.

(2) The second question is this: can, specifically, plans (in the strict, Bratmanian sense, adopted by PT) exhaustively and non-vacuously specify in advance the conditions of their own (justified) reconsideration or abandonment?

There are, in Bratman's treatment of the issue of rational reconsideration, significant clues supporting a negative answer to this question. According to Bratman, justified non-reconsideration typically takes place against a background of normalcy: typically, an agent is justified in nonrecon-

⁷⁴ Cfr. for a fully-fledged argument to this effect CELANO 2012b.

⁷⁵ SCHAUER 1991, ch. 7.

sidering her plan when the circumstances in which it is to be carried out are normal⁷⁶. This notion – normalcy in the circumstances of execution – is obviously not amenable to detailed specification⁷⁷.

What may the necessary and sufficient conditions be, warranting the conclusion that a given situation is normal?

An answer to the question whether plans can exhaustively and non-vacuously specify the conditions for their rational reconsideration has significant implications for PT. Were we to discover that a plan, properly so-called, cannot, as such, satisfy this condition, and were we to grant Shapiro that legal norms do satisfy it, Shapiro's claim that legal norms are plans would be put in jeopardy. Shapiro could not consistently claim both that legal norms are plans, and that they specify their own defeaters.

Suggested readings

- (1) The reasons paradigm in contemporary legal theory: RAZ 1975, RAZ 1979. For a general discussion, REDONDO 1996. For forceful recent criticism see ENOCH 2011.
- (2) The Planning Theory of law: SHAPIRO 2002, SHAPIRO 2011a.
- (3) Michael Bratman's work on plans: BRATMAN 1987, BRATMAN 1999. Bratman on the Planning Theory of law: BRATMAN 2002, BRATMAN 2011.
- (4) The current reception of the Planning Theory: BAER

⁷⁶ BRATMAN 1987, 70.

⁷⁷ CELANO 2012b.

2012; BANKS 2012; BIX 2012; CROCKER 2012; DYZENHAUS 2012; EDMUNDSON 2011; FARRELL 2011; GARDNER and MACKLEM 2011; GREENBERG 2011; GUEST 2011; KENDALL 2011; LOPEZ–LORENZO 2012; MELERO DE LA TORRE 2012; MURPHY 2011; MURPHY 2012; RIPSTEIN 2012; SCHAUER 2010; SCIARAFFA 2011; SIMMONDS 2012; STONE 2012; WALDRON 2011; YAFFE 2012; YANKAH 2011; the essays by RODRIGUEZ-BLANCO and SCHAUBROECK in BERTEA and PAVLAKOS (eds.) 2011, and those in CANALE and TUZET (eds.) 2012.

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