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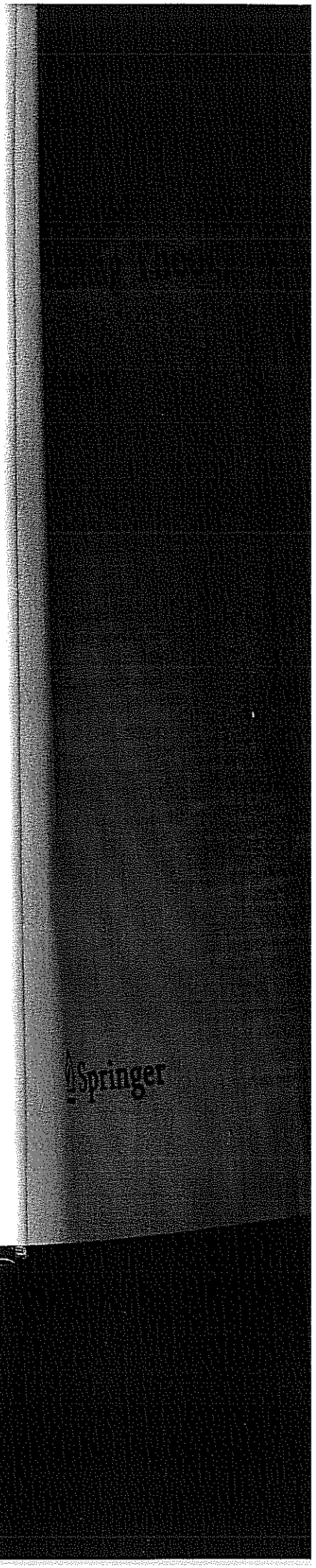

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The Planning Theory of Law

A Critical Reading

Springer

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100th Edition Announcement

The editors of the Springer *Law and Philosophy* series – Francisco Laporta, Frederick Schauer, and Torben Spaak – are pleased and honored to recognize this book as the 100th volume in the *Law and Philosophy* series.

The *Law and Philosophy* series was started in 1985, with the late Michael Bayles and Alan Rabe as the initial editors. Shortly thereafter Aulius Aarnio joined them, thus creating the three-person team that entrenched the series as an important, thoroughly academic, and always peer-reviewed publication outlet within the world of legal philosophy.

Although the series has, over its 27 years and 100 volumes, published work by some of the major figures in Anglo-American legal theory – Neil MacCormick and Robert Summers are noteworthy in this regard – its primary mission can be understood in terms of two other concentrations. One is to make available the best English-language legal philosophy emanating from non-English-speaking countries. Increasingly, and for better or for worse, English is becoming the major language of worldwide academic discourse, and legal philosophy is no exception. This phenomenon, however, has produced a publication gap, since most of the major academic publishers in English-language countries focus predominantly on work coming from those countries. This focus threatens to make legal philosophy increasingly provincial, and the editors are proud of the fact that the series has become the pre-eminent publication outlet for some of the best scholarship in the philosophy of law coming from countries whose primary language is not English. The series has been and will always be in English, and it is a publication requirement that the books be fluent and idiomatic in that language, but the more that the English language tends to predominate as the international language of legal philosophy, the more important becomes this aspect of the mission of the series.

In addition, the series has always been the principal outlet for the best legal philosophy produced in a more formal idiom. More particularly, scholarship that makes important contributions to our understanding of legal reasoning and legal argument has often taken advantage of the precision that formal logic can offer, or has frequently engaged with advances in artificial intelligence, or has connected with work in the theory of argumentation. Because of its more formal nature and

sometimes heavy reliance on symbolic logic, academic work of this variety may be less widely accessible, but that does not make it any less important. The series has always recognized that part of its mission is to provide a publication outlet for the best research in this genre, and again it is an aspect of the mission that is expected to continue for some time to come.

In some respects, therefore, the volumes published in the series are within the same tradition as books published by other academic publishers, but in other respects the series makes available important work that might otherwise remain unpublished. The mission of the series is thus a multifaceted one, and the editors and the publisher are committed to ensuring that this continues for the next 100 volumes.

Conten

Contents

Chapter 6
What Can Plans Do for Legal Theory?*

Bruno Celano

6.1 Introduction

In his book, *Legality*,[1] Scott Shapiro puts forward what he claims to be "a new, and hopefully better" (better, namely, than the ones given so far) answer to "the overarching question of 'What is law?'" (3), that is, an account of the "the fundamental nature of law" (4).

The central claim of this new account is that "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" (119, emphasis omitted).

Thus, Shapiro goes on, the "central claim of the book"—the "Planning Thesis"—is that "legal activity is a form of social planning" (155; "legal activity" is defined as "the exercise of legal authority," 195). "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 entitled 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 behavior so that members of the community can bring about moral goods that could not have been achieved, or achieved as well, otherwise" (155).

*An earlier version of this paper was presented at the workshop "The Planning Theory of Law. A Workshop with Scott Shapiro" (Università Bocconi, Milan, December 10–11, 2009). I would like to thank all participants to the workshop, as well as Scott Shapiro, for valuable discussion.

[1] Shapiro (2011). References by page number in the text and footnotes are to this work.

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The planning theory of law, Shapiro claims, affords the resolution of some puzzles that have long vexed legal theory. Specifically, it affords a solution to the possibility puzzle (how is legal authority possible?) and it allows us to rebut Hume's challenge (you cannot derive an "ought" from an "is"). It does so by vindicating the positivist conception of law 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, the planning theory) 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 (18–25). (Answers to the question about the nature of law make a practical difference, by contributing to determining which legal facts obtain and, thus, the truth or falsity of legal propositions).

All this is afforded, basically, by resort, in legal theory, to the concept of a *plan*, and to the leading idea that human agents are planning agents. To be sure, the word "plan," by itself, does not say much (and the same holds of the phrase "planning agents"). The relevant notion of a plan is the notion molded, in his work on the philosophy of action, by M. E. Bratman. When claiming that human agents are planning agents, Shapiro should be understood as referring to Bratman's planning theory of agency. It is 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 legal theory, along the lines indicated above, possible.

Let us ask, then, what can (Bratmanian) plans do for legal theory. Does resort to Bratman's concept of a plan in fact provide new and special insight into the nature of law? Does the Planning Thesis—understood (as it should be) along Bratmanian lines—tell us anything especially informative about what law and laws are? The issue is, in fact, twofold. First, does the conceptual apparatus, theoretical syntax, and terminology of Bratman's planning theory of agency allow us to discover and express important truths about the nature of law, truths that could not be expressed in the usual idiom of norms, rules, principles, or even, maybe, orders, threats, and obedience or acquiescence? Second, can Bratman's notion of a plan be legitimately put to the use to which Shapiro puts it? In other words, can laws (or perhaps only "fundamental" laws) legitimately be characterized as (Bratmanian) plans? I have doubts on both counts.[2]

6.2 Planning in the Third Person

Plans (Bratmanian plans, of course; henceforth, this qualification will be omitted) arecreated and adopted by an agent for *her own* future action and deliberation. They area device intended for the *self*-governance of agents. And, according to Shapiro,

[2] Bratman himself is quite sympathetic to a marriage between his own views and legal theory, and, in his more recent works, he repeatedly credits Shapiro with suggestions and insights on these and related matters. What I am asking is how solid this marriage can be.

law should be understood as a set of plans concerning also, and mainly, the actions and deliberation of people other than the planner. Laws are, typically, plans created and adopted (also, and mainly) for others.

Is it helpful to think of law on the model of self-governance? And, are we dealing with the same notion, or are we equivocating on the word "plan"?

It is certainly possible, in some sense of the word "plan," to make plans for others. In Bratman's theory of agency, however, planning is envisaged as an aspect of first-person agency (be it singular or plural; see Sect. 6.5). It is to first-person planning that the set of regularities and associated norms (means-end coherence, plan and plan-cum-beliefs consistency, agglomeration, reasonable stability) set out by Bratman (1987, 1999, 2009a) apply. It is this set of regularities, and associated normative requirements, that defines the relevant notion of planning, and it is the discovery, and analysis, of these regularities and associated norms that makes Bratman's planning theory an illuminating conception of human agency. When "planning" for others is concerned, however, this set of phenomena is not involved (which is not to deny that similar phenomena may be involved). "Planning" for other people involves, rather, the old, familiar panoply of issues: authority, binding force, power, coercion, etc. Nothing is gained—on the contrary, distinctions are blurred—by recasting this whole net of interrelated issues in terms of planning. In the third-person case, talking of "plans"—plans adopted by somebody for somebody else—provides, *re* these issues, no new or illuminating insight. Thus, it cannot yield any special, new insight where our understanding of the law is concerned.

These are the broad outlines of my argument. And this, I think, is the conclusion we are forced to draw as the upshot of an examination of some of Shapiro's arguments, to which I now turn.

6.3 The Authority of Planners

I shall argue that, in some crucial passages of his book, Shapiro illegitimately trades on the normativity (to be defined soon) that a plan has for the agent, or agents, who have adopted it for themselves, in order to suggest that law, too, is in the same way normative (i.e., it is "binding," as Shapiro often puts it)[3]—that, namely, it is normative in such a way that its normativity does not consist in, nor derive from, its moral legitimacy.

The reason why, according to Shapiro, "understanding fundamental laws as plans [...] provides a compelling solution to [the] puzzle about how legal authority is possible" is that "the creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans" (119). There is, then, a

[3]It has to be stressed that what is at stake in the planning theory of law is the possibility of conceiving of the law as "binding" (165–166, 201, 218) or (as Shapiro once says: 168) as endowed with "binding force." What is at stake is "how legal authority is possible" (119). (I take these—"How is legal authority possible?" and "How can the law be binding?"—to be, in the planning theory, alternative formulations of the same question).

peculiar "capacity" which is at issue in the coming into existence of plans. "This power," notes Shapiro, "is not conferred on us by morality." True. But then, what kind of capacity, or power, is it?

The answer—Bratman's answer—is as follows: forming an intention, or adopting a plan, is a distinctive kind of "commitment"—setting oneself one or more "framework reasons" (see Sect. 6.6.5), thereby subjecting oneself to a distinctive set of normative requirements (Bratman 1987, ch. 7). Thanks to the exercise of this capacity—thus, by virtue of the creation and adoption of a plan—individuals give rise to, and find themselves subject to, normative requirements. From now on, I shall call this capacity "the authority of planners."[4] It has to be understood, as we have just seen, as a distinctive power of giving rise to commitments, thereby bringing into existence normative requirements.

How can the authority of planners be supposed to provide "a compelling solution to [the] puzzle about how legal authority is possible"? Shapiro's leading idea is this (or at least I can gather no alternative argument from what he writes): just as, by virtue of their authority, planners can give rise to normative requirements, so, likewise, by virtue of the creation and adoption of plans legal officials bring into existence normative requirements, thereby subjecting the relevant individuals to these requirements—their doing so is, plainly, what their authority ("legal authority") consists in. The latter, the authority of legal officials, is, then, but a special case of the authority of planners.

This argument, however, is flawed. The "capacity that all individuals possess to adopt plans"—to be understood, as explained, as the capacity to engage in a distinctive kind of commitment, and thus as a source of normative requirements—is the capacity each individual has to adopt plans *for himself*.[5] What is at stake in legal authority is, on the other hand, mainly the creation and adoption of plans *for others*. And, when adopting plans for others—that is, telling them what they ought to do ("legal institutions plan for the communities over which they claim authority [...] *by telling members what they may or may not do*," 155, my emphasis)—comes into play, the whole array of issues concerning social, political, and legal authority is back. Nothing has been said to solve the old familiar puzzles.

So, let us grant that the capacity each one of us possesses to adopt plans "is not conferred on us by morality," that it rather "is a manifestation of the fact that we are planning creatures" (i.e., it is a core component of the "special kind of psychology" which is distinctive of adult human beings in our modern world, as Bratman claims; 119). This, by itself, does nothing to show that any one of us has the capacity—this very same capacity (to be understood, along Bratmanian lines, as the capacity to engage in a distinctive kind of commitment, and as a source of normative

[4] The authority in question is not, *eo ipso*, autonomy. Bratman's views about (what he calls) "agential authority"—the authority an attitude may have to speak for the agent—are quite complex (see Bratman 2007, 2009a) and need not detain us here. Intentions, and intention-like attitudes (e.g. plans), do not have, as such, this kind of authority, nor may their creation or adoption, as such, be said to be an exercise thereof.

[5] The important exception of shared intention will be dealt with in Sects. 6.5 and 6.6.1.

requirements)—to adopt plans for others, nor that the latter capacity, whenever it exists, is not "conferred on us by morality." The authority each one of us has for creating and adopting plans for himself is conferred on us by the principles of instrumental rationality: there are rational (instrumentally rational) pressures in favor of planning, supporting the normative requirements (means-end coherence, etc). it is subject to (Bratman 1987, 2009a, c). Why should all this be supposed to apply when "planning" for others is concerned?

One key passage is found on p. 127. I shall quote it at length and comment on it. "When a person adopts a personal plan," writes Shapiro (and note that the case envisaged here is, specifically, the case of the adoption of *personal* plans), "she thus [since 'plans [...] are norms,' 127] places herself under the governance of a norm. This power of self-governance is conferred on her by the principles of instrumental rationality." The capacity at issue is, then, a "power of self-governance," and it is conferred on *X*, not by morality (see also the passage from p. 119 quoted above), but by "the principles of instrumental rationality." This should be understood as following from the fact that planning has, as Shapiro (following Bratman 1987) claims, a "pragmatic rationale" (123): there are good pragmatic, or instrumental, reasons (such as complex ends, limited resources, "a lack of trust in our future selves," 122) why humans engage in planning.

This we know already. Let us read further on p. 127. "When a person adopts a personal plan, she thus [since 'plans [...] are norms'] places herself under the governance of a norm. This power of self-governance is conferred on her by the principles of instrumental rationality. Planning creatures [Shapiro goes on], in other words, have the rational capacity to subject themselves to norms." Here, it is understood that planning, in the relevant sense, has to do with *self*-governance. It does not follow that planning creatures have the rational capacity (to be understood, in the same way, as a "power of governance": the power to place somebody "under the governance of a norm") to subject *others* to norms. This claim is, as yet, neither here nor there, and it would have to be explained what this capacity might consist in and stem from. True, we may happen to lay down instrumentally rational norms of conduct for others. But whether or not attempts of this kind will succeed depends on much more, or something else, than the power we have, by hypothesis, *qua* planning creatures. (The first question that comes to mind is, obviously, "instrumentally rational" from whose standpoint? See below, in this section). The power *X* may have to subject *others* to norms, if and when it exists, surely is not something she has simply *as a planning creature*.

But—it will be objected—Shapiro is talking, here, about *personal* plans. So, it is not surprising that the point he is making does not apply where "planning" for others is concerned.

Things are not so simple, however. "Indeed [Shapiro continues], *this* capacity [my emphasis] explains the efficacy of planning. Planning psychology is unique not only because it enables planners to form mental states that control future conduct but insofar as it enables them to recognize that the formation of these states generates rational pressure to act accordingly." Does this apply to personal plans only or to *the law* as well (remember that the law instantiates "planning for others")? If the latter,

there is, I take it, something wrong here. Why on earth should our shared "planning psychology," by itself, lead me to recognize that the plan *you* made and adopted for me puts *me* under "rational pressure to act accordingly"? Surely something more—be it morality, or prudential reasoning—is required for this conclusion. "Thus [the passage continues (127–128)], when an individual adopts a self-governing plan, the disposition to follow through is not akin to a brute reflex; it is instead mediated by the recognition that the plan is a justified standard of conduct and imposes a rational requirement to carry it out."

It must be stressed, I think, that all this does not apply to "planning" for others—and, thus, to the law. Shapiro does not say it does. And—as we shall see below—he elsewhere argues to the contrary. But, and this is my point, he is not at all clear about this: he doesn't always speak with the same voice on this issue. The gist of the planning theory of law is, precisely, that what accounts for the fundamental nature of law is our planning psychology—that "understanding the law entails understanding our special psychology [as planning agents] and the norms of rationality that regulate its proper functioning" (119–120); and, further, "the creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans" (119). The "inner rationality" of law (183), grounded in the rational requirements our planning is subject to, is supposed to flow from this capacity. So, it seems to me, there is an unwarranted analogy, or an assimilation, between the first- (be it "I" or "we"; see Sect. 6.5) and the third-person case at work, here.

Shapiro writes (156): "my aim in what follows is [...] to build on the discussion in the previous chapter by demonstrating that *technologies of planning*, even the highly complex ones that are mobilized by the law, *can be constructed through planning alone. In other words, to build or operate a legal system one need not possess moral legitimacy to impose lrgal obligations and confer legal rights: one need only have the ability to plan* [my emphasis]." Now, this—the latter, italicized claim—is, Ithink, surprising: it suggests that legal systems, though not necessarily the product of the exercise of moral authority, are *obviously* something different from complex structures of orders and incentives; that they are something endowed with a kind of authority ("legal authority," 119), *because* they are the product of the exercise of our ability to plan, that is, because they enjoy the authority we have as planners. "The existence of law, *therefore*, [my emphasis] reflects the fact that human beings are planning creatures, endowed with the cognitive and volitional capacities and dispositions to organize their behavior over time and across persons in order to achieve highly complex ends" (156).

The conclusion that there is an unwarranted analogy, or assimilation, between the first- and the third-person case at work in Shapiro's argument is corroborated by a further passage at pp. 128–129: "while all plans are positive purposive norms, not all positive purposive norms are plans. Threats are created by human action, and are created to guide action, but they are not typically structured norms: unlike plans, they are not characteristically partial, composite or nested." This suggests that the *differentia* of plans be their structure. The suggestion is, however, misleading, in the light of what follows. "More importantly, these norms do not aim to guide conduct by settling questions about how to act, nor do they purport to settle such questions. [What is meant here by 'settling' will be discussed later, see Sect. 6.6.5]. Threats are

merely supposed to be, and merely purport to be, one factor among many to be considered. It shows no irrationality or disrespect to deliberate about whether to capitulate to a threat—the gunman, after all, gives you a choice: 'your money or your life'. By contrast, when one has adopted a plan, for oneself *or for another person* [my emphasis], the plan is supposed to preempt deliberations about its merits, as well as purporting to provide a reason to preempt deliberations about its merits." So, the *differentia* of plans is (what we may call) their "preemptive force." But note that plans merely *purport* to have preemptive force (i.e., they *claim* authority)—and, thus, to "preempt," or "provide a reason to preempt," deliberation. Does Shapiro mean that, in contrast to what happens in the case of threats, in the case of a plan adopted by *X* for *Y* "it shows some sort of irrationality or disrespect on the part of *Y* to deliberate about whether to let his actions be guided by the plan"? Shapiro doesn't say so. Rather, he writes that, while it shows no irrationality etc. in the case of threats, plans, be they for the planner or for others, *are supposed to* preempt (and they *purport* to provide a reason to preempt) deliberation. Fine. By arguing this way, however, Shapiro misses an important difference between personal, first-person plans, intended for self-governance, and "plans" created for others: while (as is entailed by any defensible theory of the reasonable stability of plans) it does show some kind of irrationality always to reconsider personal plans once adopted, and while it does indeed show some kind of irrationality to consider a personal plan, once adopted, as one reason for action to be balanced against all the other relevant reasons applying to the case (this might lead to paradoxical bootstrapping—see Bratman 1987: plans, according to Bratman, work as "framework reasons," posing problems concerning means and preliminary steps, selecting relevant options, and filtering out options that are inconsistent with them—see, again, Bratman 1987), considering whether to follow through in the case of a "plan" somebody else has adopted for you, or balancing the fact that somebody else has adopted it for you against all other relevant first-order reasons, does not, by itself, show any irrationality. On the contrary. And this is a deep difference. Under this respect, "plans" adopted for others are on a par with orders backed by threats and other incentive-based prescriptions. So, where is the difference?[6] For all Shapiro has shown us, when "planning" for others, what we are doing is, trivially, issuing commands or, generally, incentive-based prescriptions ("threats" says, here, Shapiro).[7]

[6] Remember that one obvious answer—legal plans are no mere orders backed by threats: they are the dictates of morally legitimate authority—is not available to Shapiro, given the basic premises and aims of the planning theory of law.

[7] In the section titled *Introducing hierarchy* (140 ff.), what the head chef does is, trivially, issuing *orders* ("that is, I can *order* them to do so," 141). 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 (on the role of acceptance and consent in Shapiro's argument, see Sect. 6.6.2). Shapiro writes (141): "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.

In other words. Let us grant that, as Bratman claims, plans owe their authority to instrumental rationality, and are governed by its norms. 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 (or perhaps *our* goals; see Sect. 6.5), whatever the way in which it may be determined what these goals are. 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.[8] The idea of laws as plans supported by a pragmatic rationale, and subject to the requirements instrumental rationality imposes on plans, rests, it seems, on the assumption that we—officials, all of them, and ordinary people—share the same relevant goals or ends: that all individuals involved in the operations of a legal system necessarily, as a matter of conceptual necessity, or of law's "fundamental nature," share the same relevant goals, or ends. And this seems too irenic, and a purely contingent matter anyway (see Sect. 6.5).

Thus, it does not seem to be true that "understanding fundamental laws as plans [...] provides a compelling solution to [the] puzzle about how legal authority is possible" (119). Laws, it seems, are not, as such (i.e., simply *qua* laws) plans. The norms of rationality they are subject to are not, it seems, the norms of rationality that govern the proper functioning of our special psychology as planning agents.[9]

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 favor. And *because the sous chef accepts the hierarchical relationship, he will adopt the content of the order as his plan* [my emphasis] 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" (ibid.). 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* [my emphasis]. 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" (142). When somebody else adopts a plan for me, and I myself adopt it—or commit myself to it (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? Or does the planning theory of law claim that, as a matter of conceptual necessity, or of the "fundamental nature" of law, individuals affected by the law adopt legal plans? (See Sect. 6.6.2).

[8] The trouble is apparent, it seems to me, where Shapiro puts forward his solution to the possibility puzzle (181): "legal officials have the power to adopt the shared plan which sets out these fundamental rules by virtue of the norms of instrumental rationality. Since these norms that confer the rational power to plan are not themselves plans, they have not been created by any other authority. They exist simply in virtue of being rationally valid principles." *Whose* ends are served by the fundamental rules of a legal system, and *who* is subject to the relevant rational pressures?

[9] Corresponding, in the case of intentions and plans, to the issue of the violation of (i.e., deliberate noncompliance with) a norm is the issue of giving in to temptation. Bratman sees the key to the rationality of resisting to temptation in the anticipation, by the agent, of future regret (1999, ch. 4, 2007, ch. 12). This makes good sense because, in the case of intentions and plans, the agent is one and the same: the planner. I can see no parallel in the case of legal norms.

(It might be that "understanding the law entails understanding our special psychology [as planning agents] and the norms of rationality that regulate its proper functioning" (119–120), but, as yet, nothing has been done to show that it is so).

It seems to be false, in sum, that "the creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans" (119). For all Shapiro has shown, it is, rather, grounded in our capacity to issue "threats" and other incentive-based prescriptions.[10]

6.4 A Tentative Diagnosis

So, to repeat, at some crucial junctures of his argument Shapiro trades on the normativity of first-person planning (i.e., on the authority of planners; above, see Sect. 6.3)[11] in order to suggest that law, too, is normative—in a sense which does not involve moral legitimacy (in order, i.e., to explain "how legal authority is possible," 119). Plans are, indeed, normative, and their normativity is grounded in norms of instrumental rationality. This does not hold, however, when, as it happens in the case of the law, we are "planning" for others, that is, telling them what they ought to do, whether they want to do it or not, and, maybe, offering them incentives for doing so. Shapiro acknowledges that the law claims to have moral binding force and that it may fail in this. I agree. But we should not rule by definition, or as a conceptual point, or as a matter of its "fundamental nature," that, when it does, it nevertheless is binding, because of norms of instrumental rationality.[12]

[10] Which is not to rule out that there can be norms of rationality laws, *qua* prescriptions, can be subject to, and rational pressures for means-end coherence, consistency and agglomeration deriving from them. Norms defining the "inner rationality of prescribing" may be identified, building on defeasible assumptions concerning the psychology of prescribers (Celano 1990, 127–150, 187–191, 269–282).

[11] Talk of the "normativity of plans" is shorthand for saying that, as explained in the preceding section, adopting a plan involves a distinctive form of commitment and thereby subjects the agent to distinctive normative requirements.

[12] My point, then, is that the relevant analogy between individual planning, on the one hand, and legal "planning" does not hold. Shapiro explicitly claims that he wants to flip Plato's soul-State analogy (19): rather than moving from an inquiry into the nature of (justice in) the State to an inquiry about the individual, he moves from an inquiry about the individual as a planning agent to consideration of the law as a set of plans. Laws, he claims, "play the same role in social life that intentions play in individual and shared agency: they are universal means that enable us to coordinate our behavior intra- and interpersonally" (194). The first part of this statement, however, is misleading, for the reasons I have explained. The second part may well be true. In fact, many aspects of the individual-State analogy, in Shapiro's version, are, I think, perfectly to the point. See, for example, at p. 200: "by characterizing legal activity as planning activity, my aim thus far has been to highlight the incremental nature of the law's regulatory behavior. But the parallel does not end there. As I would now like to show, legal activity also seeks to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize and monitor the behavior of individuals and groups.

Assuming, then, that there is this unwarranted analogy, or assimilation, at work in Shapiro's argument, where does it originate? My tentative diagnosis is as follows.

Shapiro severs the link between plans and intentions, and this leads him into trouble. Bratman's planning theory is, first and foremost, a planning theory *of intention*. It is one of the building blocks of Bratman's theory that plans are "intentions writ large", and that, correspondingly, intentions are to be understood as the component parts of plans—intentions, we might say, are, according to Bratman, the stuff plans are made of.[13] Laws, however, are not intentions, not even intentions "writ large" (and Shapiro acknowledges and emphasizes this). What Shapiro is interested in, as a conceptual framework affording an adequate understanding of the law, are "plans" in a much weaker—and less informative—non-Bratmanian sense. In legal "planning," the forms of commitment, and the rationality requirements (means-end coherence, consistency, agglomeration, reasonable stability), characteristic of Bratmanian plans,[14] either do not apply or apply in very different ways—in ways that we may deem to be, for all Shapiro has shown us, characteristic of orders, threats, and, generally, incentive-based prescriptions.[15]

Appeal to plans appears, at first sight, promising for legal theory for two reasons: plans are a kind of norms which are (1) positive and (2) endowed with authority (an authority stemming from the principles of instrumental rationality). So, it seems, by resorting to the concept of a plan—by claiming that laws are plans and that the key to understanding the nature of law is our special psychology as planning agents—it will be possible to solve, in a positivistic vein, familiar puzzles about the law, stemming from its Janus-faced nature (law is a social fact, and it is also, at least *prima facie*, normative). Appearances are deceptive, however. It turns out that only personal (first-person) plans, intended for self-governance, have, as such, both properties (being positive and endowed with authority). "Plans" adopted for others are, indeed, positive, but they have, as such, no authority. If and when they—or their

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it does this by helping agents lower their deliberation, negotiation and bargaining costs, increase predictability of behavior, compensate for ignorance and bad character, and provide methods of accountability." I have no quarrel with this. Similarly with the following (p. 203, in ch. 7): "[...] not every way of guiding conduct counts as 'planning.' Indeed, planning is a very distinctive way of guiding conduct. For this reason, the Planning Thesis makes a strong jurisprudential claim. According to it, legal activity is not simply the creation and application of rules. It is an incremental process whose function is to guide, organize and monitor behavior through the settling of normative questions and which disposes its addressees to comply under normal conditions." In these passages, the relevant notion of a plan is a rather weak one, far less demanding than the one Bratman has developed (see also below, nn. 16, 38).

[13] Accordingly, what Bratman is interested in, as far as forms of sociality are concerned (see Sect. 6.5), are shared *intentions* (these are common both to SCA and to less stringent forms of JIA). (Bratman's treatment of the "Mafia case" of shared activity—(1999), 100, 117–118, (2009b), 158—remains quite obscure to me. But it does not seem relevant to the present point anyway).

[14] Or of Bratmanian shared intentions (see Sect. 6.5).

[15] In such a way, that is, as to define what might be called the "inner rationality of prescribing" (above, fn. 10).

authors—have authority, this can only be so on further grounds, wholly different from the authority conferred on the author of a first-person plan, intended for self-governance, by the principles of instrumental rationality. Legal norms, however, are mainly norms adopted for others. So, if the point of treating legal norms as plans was the apparent possibility of explaining, in a simple and economic way, their being, at once, positive and authoritative, the analogy—or the identity claim (laws are plans)—breaks down. So, why treat legal norms as plans? Of course, we may still say that they are "plans" created and adopted for others.[16] But this, by itself, doesnot say much more than saying that they are positive norms. And this is something we knew from the beginning.[17]

We may perhaps go deeper than that in seeking an explanation for Shapiro's unwarranted analogy, or assimilation. Shapiro adopts a disquotational account of validity as binding force:[18] a norm is valid just in case one should act as the norm prescribes ("as I will be using the term, norms need not be valid. Norms always *purport* to tell you what you ought to do or what is desirable, good or acceptable, but whether they actually succeed at this task is another matter entirely. A norm that tells you to do something that you shouldn't do is an invalid norm. It is a bad norm, not a non-norm"; 41–42). It remains unclear, however, whether Shapiro thinks that *legal* norms (laws) are, as such, valid. At times, talk of laws as plans leads Shapiro to conflate, in the case of legal norms, existence and validity. And this seems to be a central, though hidden, move in the groundings of the planning theory of law.

[16] One important qualification. If Shapiro is to be understood as claiming that what is distinctive of "plans" is their structure (partiality, nestedness, etc.) only, then I have no quarrel with him. But this is no slight departure from Bratman's concept of a plan. See, for example, the concluding paragraph of the section titled *Individual Planning* in ch. 5 (129), where a summarizing definition of the relevant notion of a plan—or so it seems—is provided: "to conclude, a plan is a special kind of norm. First, it has a typical structure, namely, it is partial, composite and nested. Second, it is created by a certain kind of process, namely, one that is incremental, is purposive and disposes subjects to comply with the norms created." I have no quarrel with seeing legal norms in this light. So understood, the claim that laws are plans turns out to be rather weak, when compared to what plans are in Bratman's theory. (Both the idea of the partiality of legal norms and of their incremental specification in application are to be found, I think, in Kelsen's jurisprudence. The same holds, of course, as far as reflexivity—"plans for planning"—is concerned: the law regulates its own production).

[17] Perhaps, at least some of the deep differences that, appearances notwithstanding, drive a wedge (or so I have claimed) between Bratman's planning theory of agency and Shapiro's understanding of the fundamental nature of law may be traced to a further difference concerning the ontology of plans—a difference that should strike us for its sharpness, although it is not easy to understand its implications, and the connection (if there is one) between it and the difficulties for Shapiro I have been indicating in the text. In short, Bratmanian plans have to be understood as attitudes, while Shapiro's "plans" are abstract contents, the objects, or contents, or possible attitudes. See, respectively, Bratman (1999), 37, 248; and Shapiro (2011), 127 ("by a 'plan,' I am not referring to the mental state of 'having a plan.' Intentions are not plans, but rather take plans as their objects. For my purposes, plans are abstract propositional entities that require, permit or authorize agents to act, or not act, in certain ways under certain conditions").

[18] On validity as disquotation, see Celano (2000).

This, I shall now argue, may be seen, crucially, where Shapiro introduces his own solution of the problem about law and morality (176–177): "why might one claim – as legal positivists do – that law and morality do not share the same basic ground rules? Why is *the determination of legal validity* [my emphasis] a matter of a sociological, rather than moral, inquiry?" In his answer to the latter question, Shapiro short-circuits existence and validity: "I hope that my answer to these questions is now apparent: namely, that the fundamental rules of a legal system constitute a shared plan and, as we have seen, the proper way to ascertain the existence or content of a shared plan is through an examination of the relevant social facts. A shared plan exists just in case the plan was designed with a group in mind so that they may engage in a joint activity, it is publicly accessible and it is accepted by most members of the group in question. As a result, if we want to discover the existence or content of the fundamental rules of a legal system, we must look only to these social facts. We must look, in other words, only to what officials think, intend, claim and do round here" (177).[19]

So: norms can be valid (i.e., binding) or not; their existence is one thing, their merits or demerits another. The reason why appeal to plans is illuminating is that it is clear, in the case of plans, that their existence conditions are independent from their merits or demerits.[20] *But* first-person plans, intended for self-governance, are normative, in virtue of the authority, conferred by instrumental rationality, each one of us has to adopt plans and policies. In the quoted passages (see the italicized words), what Shapiro claims is that this sheds light on the *validity* of legal norms—explaining how it can be determined, as positivists are supposed to maintain, solely on the basis of sociological facts. But legal norms are plans created for others. As such, they have no authority over (many of) their subjects. Precisely under this respect, they are utterly different from first-person plans and intentions, aimed at self-governance. Claiming that their being plans explains their *validity*—and that it does so along positivistic lines, because plans exist if adopted—short-circuits the relevant difference.

[19] Shapiro continues: "[n]otice further that the existence of the shared plan does not depend on any moral facts obtaining. The shared plan can be morally obnoxious: it may cede total control of social planning to a malevolent dictator or privilege the rights of certain sub-groups of the community over others. The shared plan may have no support from the population at large, those governed by it may absolutely hate it. Nevertheless, if the social facts obtain for plan sharing—if most officials accept a publicly accessible plan designed for them—then the shared plan will exist. And if the shared plan sets out an activity of social planning that is hierarchical and highly impersonal and the community normally abides by the plans created pursuant to it, then a system of legal authority will exist as well" (ibid.).

[20] See p. 119: "my strategy is to show that there is another realm whose norms can only be discovered through social, not moral, observation, namely, the realm of *planning*. The proper way to establish the existence of plans, as I argue below, is simply to point to the fact of their adoption and acceptance. Whether I have a plan to go to the store today, or we have a plan to cook dinner together tonight, depends not on the desirability of these plans, but simply on whether we have in fact adopted (and not yet rejected) them. In other words, positivism is trivially and uncontroversially true in the case of plans: the existence of a plan is one thing, its merits or demerits quite another."

We must, however, complicate the picture. Shapiro is not so naïve as my uncharitable reading of the passages commented so far may have suggested. He explicitly acknowledges that "the fact that someone adopts a plan for others to follow does not, of course, mean that, from the moral point of 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" (142). And he elaborates on Bratman's theory, putting forward qualifications, extensions, distinctions which are, I think, designed to avoid the pitfalls I have too hastily claimed he falls in. We have now to consider some of these moves.

6.5 Agency in the First Person Plural

My argument so far has been premised on the claim that plans are adopted by an agent for *her own* future action and deliberation. Under this respect, I have claimed, legal "planning" crucially differs from planning proper. Must this be understood as meaning that plans are relevant only where *individual* agency is concerned?

If so, my argument would be based on a serious mistake. Bratman himself has developed and extended his theory in order to account for shared activity and forms of social agency (Bratman 1999, chs. 5–8, 2006, 2007, ch. 13, 2009b). Here, it seems, is where one plans for others, as well as for himself.

Understandingly, Shapiro attributes great weight to Bratman's own extension of the planning theory of intention in order to account for forms of social agency, and he tries to capitalize on it. But this is not, I shall now argue, a promising route.

Legal activity is, Shapiro claims, shared activity,[21] where the relevant notion of a shared activity has to be understood as a development of Bratman's idea of a shared activity. But, I think, as far as the difficulties I have tried to point out in the preceding sections are concerned, it makes no difference whether the agency envisaged is in the first person singular or plural.[22]

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[21] See p. 204: "the Planning Theory, however, makes a stronger claim. 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."

[22] Talk of agency in the first person plural is not, strictly speaking, correct, as far as Bratman's models of shared activity are concerned. Bratman's accounts of shared intention are, in fact, individualistic in spirit (1999, 108, 111, 129, 2009b, 163 f.). Bratmanian shared intentions are a set of appropriately interlocking individual intentions, satisfying appropriate conditions (Bratman calls this approach "constructivism" about shared intention: in accounting for shared intention we proceed "by constructing a structure of interrelated intentions of the individuals, and norms that apply to and guide those intentions"; 2009b, 155). Talk of agency in the first person plural in the text has to be understood accordingly.

Why? Because the key element in (Bratmanian) shared activity is shared intention and commitment.[23] The model is that of a small-scale group of people performing a well-circumscribed activity, with a definite goal (each one of us "intends that we J"). As Shapiro himself acknowledges and emphasizes, the kinds of intentions and commitments that, according to Bratman, are constitutive of shared activity simply do not fit legal practice, when this is taken (as it should be, according to Shapiro's Shared Agency Thesis) as a whole.[24] Bratman (2007, 309; see also 2002, 511, n. 2, 524, n. 13) gladly acknowledges that legal activity *may*—sometimes, in certain circles, in some respects—involve instances of Shared Cooperative Activity (SCA), or of Jointly Intentional Action (JIA). I have no quarrel with this, of course. That groups of legal officials, or groups of officials-cum-citizens, may somewhere, sometimes be engaged in a Bratmanian shared activity (or even a SCA!), or that a legal system may be conceived which fits this model, is not ruled out by my argument. What is, I think, mistaken is the conceptual or ontological claim, the claim that necessarily, as a matter of its "fundamental nature," the law, taken as a whole, always, everywhere fits the model (i.e., involves shared planning, in Bratman's sense).

Once again, it seems to me, severing the link between (Bratmanian) plans and intentions (remember that, according to Bratman, plans are intentions "writ large," and intentions are the building blocks plans are made of; this holds in the realm of shared agency, too) renders resort to "plans" in legal theory generic and uninformative. We have no reason to suppose that in legal "planning" the forms of commitment characteristic of Bratmanian plans—and of Bratmanian models of shared agency and deliberation, too—will have any room. Thus, once again, nothing in what Shapiro has shown ensures us that the norms of rationality governing planning will apply to legal "planning" as well.[25]

Bratman's models of shared activity (SCA and JIA generally), thus, prove unsuited to the workings of a legal system, taken as a whole. As remarked a few lines above, Shapiro himself acknowledges and emphasizes this. The notion of a Massively Shared Agency (henceforth MSA) is designed precisely to cope with this difficulty, while remaining within a broadly Bratmanian framework. I find MSA problematic, however. In MSA, all participants share a plan, but it is not true of each one of them—as it is in a (Bratmanian) JIA—that "I intend that we J." As Shapiro molds these concepts, sharing a plan and shared activity do not require intending the

[23] In "modest" sociality (see Sect. 6.6.1), "an intention-like commitment to our activity is at work in the practical thinking of each" (Bratman 2009b, 155).

[24] As is well known, the story began with Jules Coleman claiming that the rule of recognition of a legal system should be understood as a Bratmanian Shared Cooperative Activity (or SCA; Coleman 2001, crediting Shapiro for the basic idea) and Shapiro claiming (more plausibly) that it should be understood, rather, as a variation on a Bratmanian Jointly Intentional Activity (JIA; Shapiro 2002; see the discussion in Celano 2003). Neither proposal works, as Shapiro quickly realized. He has since then relaxed Bratmanian requirements, leaving room for alienated participants in MSA (see below).

[25] On "shared valuings" see below, n. 37.

shared activity.[26] This, however, does not seem consistent with Bratman's views: "if I plan to do something, I intend to do it" (Bratman 1999, 37 n.).[27] Shared activity is, in Bratman's models, activity explained by a shared *intention*;[28] correspondingly, norms governing shared activity are grounded in the norms individual intentions are subject to.[29]

Thus, in MSA sharing a plan is independent from intending that we J; and this runs counter Bratman's model of shared agency. It might be replied, of course: so what?[30] The issue, however, is, once again: is talking of plans, on this non-Bratmanian understanding of plans, illuminating? Does it add anything to talking of norms, or, for that matter, of orders backed by threats or other incentives?

Shapiro's leading idea remains, at bottom, that of a small number of friends performing together a well-circumscribed activity having a definite goal. This model does not fit legal practice—or, at any rate, we should not rule that it necessarily does, as a matter of conceptual analysis, or of the "fundamental nature" of law. True, Shapiro is well aware of this: he progressively extends the model, relaxing stringent Bratmanian conditions about the intentions shared by participants, until he envisages what he calls MSA. But, it seems to me, the extension cannot do the required work, for three reasons.

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[26] Cf., for example, pp. 136: "plan sharing does *not* require that members of the group *desire* or *intend* the plan to work" (and see the example of Dudley and Stephens, in nn. 11, 12 to ch. 5); 149: "in order for a group to act together, they need not intend the success of the joint enterprise. They need only share a plan." What accounts for *acting together* is *sharing a plan* (137: "Henry and I acted together because we shared a plan"; "shared plans are constitutive of shared agency"; cp. also n. 14 to ch. 5: "the analogy here is to individual agency: just as individual action is individual behavior explainable by an individual plan, shared action is group behavior explainable by a shared plan"). Further necessary conditions for shared activity ("all members of the group intentionally play their parts in the plan and the activity takes place because they did so," 138; common knowledge of the existence of the plan, and the disposition to "resolve their conflicts in a peaceful and open manner," ibid.) are not relevant for present purposes.

[27] The leading idea in the construction of shared intention in modest sociality is that of "intentions onthe part of each in favor of our joint activity" (Bratman 2009b, 155).

[28] Bratman's constructivism "seeks [...] to articulate a deep continuity—conceptual, metaphysical, and normative—between individual planning agency and modest sociality" (2009b, 155). In n. 12 to ch. 5, Shapiro observes that "because Dudley and Stephens do not intend to act together, they are not subject to the same rationality constraints as Henry and I are." The resulting picture I find quite implausible as a case of shared agency. How can it be said that these people "*share* a plan"?

[29] "The theory seeks, rather, to generate much of the relevant normativity at the social level out of the individualistic normativity that is tied primarily to the contents of the intentions of each" (Bratman 2009b, 161).

[30] Shapiro (418) explicitly takes issue with Bratman on this point (severing the link between participants' intentions and acting together), claiming that, in order to account for joint activity, the requirement of shared intention is "too strong." This is not, however, as Shapiro (ibid.) goes on to claim, merely a matter of conflicting intuitions about where to draw the boundaries of the concept *acting together*. The latter may well be, in fact, a verbal disagreement. As argued in the text, however, what is at stake is the very applicability, to the case of MSA (and, thus, to the law), of Bratman's concept of a plan, and its attendant necessary properties.

1. The model of MSA does not take into account an essential element in the "circumstances" of legality and politics: deep, serious conflict. MSA makes room for "alienated" participants. And Shapiro acknowledges the contentiousness of the issues the law is supposed to solve. But deep, serious conflict—neither mere "alienation" nor disagreement about how to solve together an issue all parties identify in the same way—does not enter into the picture. In game-theoretical terms, Shapiro does not seriously take into account prisoner's dilemmas, free rider problems, or other serious collective action problems.[31] He only envisages coordination problems, or battles of the sexes (of a limited sort).[32]
2. Bratman's models account for our performing well-circumscribed activities having a definite goal: each one of us intends that we J. What is the J in law, understood as a MSA? There is not, in the case of legal practice as a whole, a (non-vacuously specifiable) circumscribed activity with a well-definite goal[33]—or at any rate, we should not rule that there necessarily is one, as a matter of the very concept *law*, or of law's "fundamental nature".[34]
3. The notion of a MSA itself is, as we have seen, problematic. When participants do not, each one of them, "intend that we J," there is no shared intention, no shared activity (in Bratman's sense), and no (Bratmanian) shared plan (whoever plans, intends). There may well be "plans," here, in some other, generic, sense. But nothing especially informative follows from that. For all Shapiro has shown us, a crucial role is played, in MSA—and, thus, in the law—by orders backed by threats or other sorts of incentive-based prescriptions.

This is why Shapiro's account of shared agency remains, at bottom, too close to the starting point—interaction between a small number of individuals

[31] Shapiro does in fact discuss the adoption of policies designed to avoid free riding in his Cooks' Island narrative, but such policies are conceived, here, as jointly adopted by all the parties involved, andas leading to the establishment of a market economy. True, in his narrative of Cooks' Island Shapiro also contemplates disagreement, lack of consensus etc. But these are all envisaged as factors leading to the collective, unanimous adoption of a shared master plan by parties agreeing on the necessity of solving together any issue that may prove divisive. ("[t]he contentiousness of an activity might stem from its complexity, or from the simple fact that the members of the group have different preferences or values. In either case, it is crucial that potential conflicts be identified and resolved ahead of time. The function of planning here is to settle disputes correctly and definitively before mistakes are made and become irreversible," 133). Under this respect, Shapiro's jurisprudence seems to harbor a contractualist normative political philosophy, of a Lockeian brand ("the plan that establishes the hierarchy for the island is a shared plan," 165; it is true that, here, Shapiro goes on claiming that "it is not necessary for the community to accept the shared plan in order for it to obtain," 165–166: this point will be dealt with in Sect. 6.6.2). The model of free markets as a device for the resolution of conflicts (*Planning for Small-Scale Shared Activities*, 129 ff.) is clearly insufficient—or at least a substantive argument (both normative and empirical, it seems) is needed, in order to show that it is.

[32] This is perhaps a feature Shapiro's views share with J. Waldron's jurisprudence (cf. p. 421, n. 11 to ch. 6). See Waldron (1999) and, on this point, Gaus (2002), Benditt (2004).

[33] By a "vacuous specification," here, I mean one such as, for example, "the maintenance of a legal system," or "engaging in the practice of the law," and the like.

[34] Cf. Celano (2003).

performing a well-circumscribed activity with a definite goal. The extension Shapiro develops proves troublesome. It ends up by watering down its starting point (i.e., Bratman's insights), and it proves unsuited to the task (explaining what the law is). Complexities aside, what still misleads, at bottom, is the assumption that the law should be understood on the model of *self-* (be the Self an "I" or a "We") governance, and law's authority on the model of the authority each agent, or group of agents, has to create and adopt plans for themselves.[35] Abandoning this assumption would lead, in fact, to the abandonment, in accounting for the "fundamental nature" of law, of the notion of a plan.

6.6 Further Complexities

6.6.1 Planning in Institutional Contexts

In the preceding section I have raised some objections against Shapiro's resort to Bratman's views about shared agency. It will be replied that my objections, on the one hand, do not take into account some important features of the law which make it no less than natural that Bratman's models of JIA and shared intention do not directly apply to legal practice; and, on the other hand, they run afoul of the fact that Shapiro explicitly acknowledges this, and that his extensions—specifically, the notion of a MSA—are designed to allow for due consideration of these features. The relevant features are hierarchy, authority relations, and the institutional character of the law.

It is in fact true that Bratman repeatedly emphasizes (1999, 94, 142, 2002, 512, 2006, 1, 2009b, 122) that, in his account of shared activity and shared intention, he abstracts from "institutional structures and authority relations." His inquiries are limited to what he now calls "modest" sociality ("small scale shared intentional agency in the absence of asymmetric authority relations," 2009b, 122). This deliberately leaves room for developments in the direction of institutions and authority.[36] And, on the other hand, it is true that much of Shapiro's effort is devoted precisely to this task.

[35] It should be noted that Bratman's treatment of the apparent violation, in shared intention, of the "*settle* condition" on intentions (intentions may reasonably concern only what we understand as capable of being settled by ourselves; 1999, 149 ff.) does not, appearances notwithstanding tell against my objection. True, where each one of us intends that we J we go beyond the authority of planners to plan for themselves. Shared intention is, nevertheless, a system of interlocking, interdependent intentions. When each one of us intends that we J, the "*settle* condition" may not be violated because I may be able to predict what your intention will be (1999, 157). This has no parallel in the law.

[36] "Reflection on the underlying structure of such modest sociality may also help us think about larger scale cases, such as law and/or democracy" (Bratman 2009b, 150).

In the absence of explicit, sustained treatment of these issues on his part, we may only wonder what shape Bratman's ideas about shared activity in institutional contexts (i.e., where "institutional structures and authority relations" are in place) would take.[37] This is no argument, of course. In defense of my objections I can only say that Shapiro's proposed developments do not seem to me on the right track, precisely for the reasons indicated in the preceding section (see also Sect. 6.6.2). In Shapiro's theory, the relevant claims (laws are plans, legal activity is planning activity) are gained at the price of so much watering down the notions of a plan, and of planning, so as to make them wholly uninformative.[38]

[37] Bratman's discussion of "shared valuings" (Bratman 2006, 2007, ch. 13) appears to be a first step in this direction (see especially his discussion of the adoption, in a university department, of a policy concerning reasons for student admissions, and its relation to the attitudes of individual members). But, insofar as shared valuings, too, involve forms of *commitment* on the part of those involved—commitment to a given policy in deliberation (see esp. Bratman 2006, 3)—shared valuing, too, is a wholly different phenomenon from what a plausible account of the concept, or the "fundamental nature," of law would present us with. (We should, I think, resist the temptation of taking law as an essential part of the "package deal" our sociality consists in—Bratman 2006, 4; this would beg too many questions). Thus, norms of rationality involved in shared valuings—the rational requirements applying to them—do not, *eo ipso*, apply to legal "planning" (different norms, constituting the "inner rationality of prescribing" may apply to it—see above, n. 10; and there may well be deep affinities between the former and the latter).

[38] Planning "in institutional contexts" is, Shapiro claims, different from "individual" planning, at least under one crucial respect: "in institutional contexts [...] a plan may be created even though the one who adopted it did not intend to create a norm"; in the case of individual planning, on the contrary, "the process is the psychological activity of intending" (128). But why, then, talk of "plans" when referring to the law? Unless the relevant notion of a plan is the weak one introduced above (n. 16), I see no room here for plans and their characteristic commitments. It does not seem right any more to say that "understanding the law entails understanding our special psychology [as planning agents] and the norms of rationality that regulate its proper functioning" (119–120; this was, it will be remembered, one of the grounding claims of the planning theory of law). Moreover, granted that it is true that, in institutional contexts, as contrasted with personal planning, "a plan may be created even though the one who adopted it did not intend to create a norm," it remains quite mysterious to me how this could happen. (The legal theories of H. Kelsen and K. Olivecrona, too, face this difficulty; cp., e.g., talk of legal norms as "depsychologized commands," or as "impersonal and anonymous" commands, in Kelsen 1945, pp. 35–36). We find a sketchy explanation at p. 211: "the introduction of institutional normativity is a revolutionary advance in social planning. Plans can be adopted without the planners actually intending that the community act accordingly. As a result, the community need not worry about whether the planners had the appropriate intentions. They can know that they are legally obligated simply because the planners followed the right procedures. Of course, the institutionality of law is ultimately grounded in intentions. *Rules are legally valid because they were created pursuant to a rule that most officials accept* [my emphasis]. If officials stopped accepting the plan, then the plans created pursuant to it would cease to be legally valid as well." This seems to make institutionalized planning continuous with individual planning and its psychology, so as to rescue the claim that understanding the latter is entailed by a proper understanding of the former, but I still find the connection quite mysterious. Here, as in many other crucial junctures in Shapiro's argument, the necessary explanatory and justificatory work is done, in fact, by an unstated theory of legitimation through acceptance (see Sect. 6.6.2). And, are we assuming that officials, all of them, have the relevant *intentions*? (Remember that legal activity is supposed to be a MSA; see Sect. 6.5).

6.6.2 *Acceptance*

In arguing that laws are plans, and that legal activity is shared activity, Shapiro usually assumes that those for whom plans are adopted, be they the members of the Cooking Club, people working for Cooking Club Inc., inhabitants of Cooks' Island, residents at Del Boca Vista, or people involved in the operations of a legal system, *accept* the plans others have made and adopted for them (this, it should be noted, is true also in MSA).[39] This, of course, preempts most of my arguments. 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 the authority of planners becomes certainly appropriate. Or, at any rate, it becomes true by hypothesis that the activity under consideration is shared activity. But this is a way of making the intended claims (that laws are plans, that legal activity is planning activity, and that laws have, as such, binding force—though not grounded in their moral legitimacy) trivially true, depriving them of any significant informative or explicative power. 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 committed.[40] The move—assuming that all the parties involved accept the relevant plans—does not shed any light on less irenic situations. First, the assumption is, where law is concerned, problematic; we do not want to make it a matter of conceptual necessity,

[39] Cf., for example, 149 "in order for a group to act together, they need not intend the success of 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." Some of the relevant material is quoted above, in n. 7. See also p. 182 and the section in ch. 6 titled *The Inner Rationality of Law* (183). Here, the norms of instrumental rationality ("the distinctive norms of rationality that attend the activity of planning," 183: consistency, 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 are not subject to their constraints. ("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 criticizable for failing to obey legal authorities insofar as he does not accept the law," 183).

[40] Sometimes, however, Shapiro argues differently. On Cooks' Island, "the plan which establishes the hierarchy for the island is a shared plan" (165). Shapiro goes on (165–166): "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* [my emphasis]—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." (Cf. also p. 150, on MSA, p. 177, and above, on the "bad man," n. 39). Admittedly, this does not square with my comments in the text. But I cannot see how it squares with the rest of Shapiro's argument, either. It is not clear to me what the emphasized "obtain" means, here. Specifically, are those inhabitants that do not have accepted the plan supposed to be subject to the pressures norms of instrumental rationality impose on planners? If not, then in what sense laws are shared plans? In what sense is legal activity planning activity?

or of the law's "fundamental nature," that laws are accepted by all those subject to them.[41] And, second, the necessary theoretical work is done, here, by an (unstated) theory of consent: a normative, substantive (though not necessarily moral) theory of legitimation through acceptance.[42]

6.6.3 Coercion

Bratman (1999, 101–102, 122, 132, 2009b, 123) claims that, even in the presence of coercion or "hard bargaining," there can still be JIA (though not SCA) and shared intention. This is good news for the planning theory of law. It seems that the claim that laws are plans, and that legal activity is shared activity, may be now rescued suspicion of resting on an irenic view of the attitudes of legal officials or of legal subjects generally. True, legal activity rests on the acceptance of the law by all those concerned (see Sect. 6.6.2), but this should not trouble us, because even *coerced* acceptance will do.

(Remember the "Planning Thesis": "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 entitled 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.") And I cannot see how the answer could plausibly be yes. Once again (see Sect. 6.3), why on earth should the plan you made and adopted for me *eo ipso* put *me* under "rational pressure to act accordingly"?

[41] Perhaps Shapiro's claims (laws are plans, etc.) concern only legal officials and are not meant to include all the individuals involved in the operations of a legal system. (I find it hard to establish whether, in Shapiro's text, "participants" in a legal system includes only officials, or everybody in the relevant social group). But, even if we adopt this reading (which does not sit well with many of the things Shapiro writes; see, e.g., p. 169), the claim that legal activity is shared, planning activity, if resting on the assumption that all the parties involved accept the relevant plan, remains dubious. If we assume that it is (always, everywhere) true that all legal officials accept legal "plans"—if we picture legal officials as a unified body, all agreeing in the acceptance of legal "plans"—and we treat this assumption as sufficient ground for concluding that legal activity is shared activity, the latter claim becomes, it seems to me, rather uninformative.

[42] See, for example, pp. 148–149: "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 flavor. Do Shapiro's claims (laws are plans, legal activity is shared activity) rest on unstated normative contractualist, or quasi-contractualist, premises? Fragments of the relevant substantive normative theory of legitimation through consent are scattered in Shapiro's text. Consider, for example, the following principle (142–143): "the fact that someone adopts a plan for others to follow does not, of course, mean that, from the moral point of view, those others *ought* to comply. The plan might be foolish or evil and, thus, unless there are substantial costs associated with nonconformity, 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* [my emphasis]. His disobedience will be in direct conflict with his intention to defer."

And, it will be said, whenever a legal system is in place—whenever a revolution or civil war is not actually taking place—there will be at least coerced acceptance.

Shapiro does in fact exploit this line of argument. In MSA, and, thus, in legal activity, acceptance of hierarchy, and the "transfer of planning power" to superiors that it involves (and that supposedly grounds the application of the relevant norms of instrumental rationality to the others for whom "plans" are adopted; see Sect. 6.6.2) may be the upshot of coercion.[43]

I confess I have no real argument against this move. It just seems to me too easy to gain shared activity at the price of so watering down the notion of shared agency, and of planning. Once again, by *assuming* that always, everywhere there is acceptance, and that, therefore, "plans" adopted for other people are their own plans (so that the relevant norms apply to them), we make the planning theory trivially true and deprive it of any significant informative or explicative power.

6.6.4 *Alternatives to a Pragmatic Rationale for Planning*

As we have seen, the planning theory of law owes much to Bratman's claim that planning has a pragmatic rationale. Plans are all-purpose means, analogous to Rawlsian primary goods. The claim that plans—and, thus, the law—are subject to the governance of norms of instrumental rationality may ultimately be traced to this fundamental idea.

In recent writings, Bratman has developed, in addition to an instrumental justification of planning, a further, different rationale, having to do with our quest for self-governance and autonomy (i.e., with "connections between planning and self-governance," 2009a, 412).[44]

Does any of this apply to legal "planning"? No, it seems to me, unless, once again we understand the authority of law as analogous to, or as identical with (i.e., a special case of), the authority an agent has on his own actions and deliberation (unless, i.e., we understand, once again, the whole of legal subjects, or of legal officials, as a unified body, all pursuing a well-defined goal and agreeing in the acceptance of

[43] "It should also not be overlooked that individuals might accept a subordinate role in a shared activity because they have no other viable option. They might desperately need the money or fear that they will be harmed if they do not. Even in cases of economic or physical coercion, once individuals form an intention to treat the superior's directives as trumps to their own planning, they have transformed their normative situation and are rationally—if not morally—committed to follow through unless good reasons suddenly appear that force them to reconsider" (143). Cf. also p. 180: if members of the community are not disposed to comply with legal plans (notice that a disposition to comply is, in Shapiro's theory, a necessary condition for the existence of a plan) "legal authorities can dispose them to comply through various forms of intimidation" (this point is reiterated on pp. 181, 202).

[44] As well as with the role of planning in forms of sociality we highly value (on this score, see Sects. 6.5 and 6.6.1). Cf., for example, Bratman 2009c, 54, and ivi, n. 64 ("structures of cross-temporal and interpersonal planning are partly constitutive of [...] forms of cross-temporal integrity, cross-temporal self-government, and sociality that we highly value"); 2009a, p. 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. Shapiro hints to these developments in n. 4 to ch. 5.

legal "plans"; see Sect. 6.6.2). What strikes me in these recent claims of Bratman's about the reasons we humans have for planning, is that they turn on the capacity plans, and intentions, grant an agent for self-management. And this, I have claimed (see Sect. 6.3), is precisely where any plausible analogy with legal "planning" breaks down.[45]

6.6.5 *The Preemptive Force of Plans (A Few Inconclusive Remarks)*

The adoption of a plan is a way of settling on a course of action. Plans, intentions, and planlike attitudes generally, are not supposed to enter into the balance of reasons for or against a given course of action (this would be both too weak and too strong, allowing for unacceptable bootstrapping). Rather, they provide what Bratman calls "framework reasons," posing problems about means and preliminary steps, selecting relevant options, and filtering out inconsistent options (Bratman 1987). Plans, Shapiro says, are "supposed to preempt," and purport to provide a reason to preempt (128–129), deliberation on the balance of reasons, and to structure further deliberation about how to carry them out. And, in the planning theory of law, this holds, since laws are plans, of laws as well.[46]

[45] Part of Bratman's more recent complex justification for planning agency, its being constitutive of forms of integrity and self-governance, has directly and explicitly to do with the authority of planners over their own actions and deliberation (specifically, with attitudes having agential authority; cf., e.g., Bratman 2009c, 56: "this issue [what it is for a thought or attitude to speak for the agent, to have agential authority] is implicit in several of the rationales for planning agency I have been sketching. I have supposed that our answer to the question, why be a planning agent?, will appeal to structures involved in cross-temporal integrity and autonomy. And in both cases those structures involve guidance by basic attitudes that speak for the agent, that have agential authority. I have also supposed that our answer to the question, why be a planning agent?, will appeal to the role of planning agency in broadly effective agency—effective, that is, in the support of the values, cares, ends and concerns that constitute the agent's practical standpoint. And the question, what constitutes the *agent's* practical standpoint?, is a question about agential authority"). Here, Bratman's line of argument goes, interestingly, from conditions of self-governance and agential authority to the significance of planning. It is not only that planning presupposes the authority of planners (as I have been assuming throughout; see Sects. 6.2 and 6.3). Also, the other way round, it is our interest in agential authority that leads to (i.e., justifies) our planning. (See also ivi, 39). This, I think, strengthens the connection between planning and authority on which I have relied from the beginning, and which, I have claimed, does not hold in the case of legal "planning."

[46] See, for example, pp. 201–202 ("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 favor 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"); 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").

This all seems very close to the idea that plans, and norms generally, are (if valid) exclusionary reasons (Raz 1975a, b). Bratmanian plans, however, are not Razian exclusionary (or "protected") reasons (Bratman 1987, 178, 180, 2007, 290). And this is so under two respects at least: (a) norms of reasonable stability for plans may allow for reconsideration when exclusionary reasons would not. (b) The way in which intentions, plans, and the like structure practical reasoning—namely, as framework reasons—differs from the way in which exclusionary reasons constrain it. It would be interesting to investigate these differences.

According to Shapiro, legal norms, like ordinary, everyday plans, are defeasible. One peculiar feature of legal norms, as contrasted with everyday plans, is, however, that the law itself somehow specifies the conditions under which they should be revised or their application blocked—their defeaters.[47] Legal norms specify their own defeaters.[48]

Now, legal norms are, according to Shapiro, plans, or planlike norms. But, we may ask, can plans non-vacuously specify the conditions of their own revision or abandonment? The question is twofold. (a) Is it conceptually possible for a norm to specify in advance, in non-vacuous or nontrivial terms (e.g., "unless there are compelling reasons to the contrary"), its own defeaters? (b) Can plans (in the strict, Bratmanian sense) specify in advance the conditions under which they ought to be revised or abandoned?

I have argued elsewhere (Celano 2012) that treating norms as non-vacuously specifying in advance their defeaters is—special contexts aside—eminently unreasonable. (This is no argument, of course). The latter question, too, might have significant implications for the planning theory. For, 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, or planlike, would be put in jeopardy. Shapiro could not consistently claim both that legal norms are plans, or planlike, and that they specify their own defeaters. And, it seems to me, the idea that plans may non-vacuously specify in advance their own defeaters is quite alien to Bratman's theory. (This, too, is no argument).

6.7 Conclusion

Maybe Shapiro would see all of this as the upshot of a series of misunderstandings. Maybe he only means to say that legal norms typically are "partial, composite and nested," that they often are "created by a [...] process, [...] that is incremental,

[47] See pp. 202 ("that the law is supposed to settle, and purports to settle, normative questions should not be taken to mean that the law demands that its dictates be followed *come what may*. Laws, like all plans, are typically defeasible. When compelling reasons exist, the law will normally permit its subjects to reconsider its direction and engage in deliberation on the merits. The catch here is that the law claims the right to determine the conditions of its own defeasibility. It attempts to settle when the quandaries it has resolved become unsettled"); 303 ("the law [...] regulates the manner of its own defeasibility: it identifies the kinds of reasons that suspend the law's injunctions").

[48] Talking of a single norm doing that, or of further norms specifying the defeaters of a given norm, does not make any serious difference, I think.

purposive and disposes subjects to comply with the norms created" (129), and he rejects any improper analogy from planning in the first person to planning for others. If so, we are not disagreeing. What precedes should then be understood as a warning against the potentially misleading implications of some crucial passages of Shapiro's. But I would add that, once the appearance of an analogy is dispelled, talk of legal norms as plans turns out to be rather uninformative. The main thrust of Bratman's planning theory of agency lies in its capacity to shed light on the authority planning agents (individual agents, or groups of them) may have on themselves: on their actions, and deliberation. And it is here, precisely, that we find ourselves compelled to acknowledge, it seems to me, that talk of plans can't do much for legal theory.

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