The Unplanned Nature of Law: A Critical Approach to Shapiro's Legal Theory

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Abstract

Scott Shapiro's Planning Theory of Law represents the most sophisticated attempt to understand the nature of law through the lens of shared action. This is not only an ambitious project, but an important one in encouraging the development of research at the intersection of legal philosophy and social ontology. It does this by shifting the methodological focus of traditional analytic jurisprudence from investigating the nature of legal norms to the groups and shared activities that create them. To support this endeavour, this thesis presents a thorough, comprehensive analysis and critique of Shapiro's legal theory in order to identify both its flaws and virtues. It does so by elucidating and examining its three main claims: (1) *the group claim*: legal organisations are social planning organisations; (2) *the activity claim*: legal activity is social planning activity; and (3) *the norm claim*: legal rules are plans and plan-like norms.

The thesis begins by unpacking *the group claim*. Partly due to a methodological inconsistency, it argues that Shapiro does not provide a sufficient account of legal organisations. To help with this task, some recent contributions on the ontology of groups are explored as well as Brian Epstein's metaphysical framework for analysing the nature of groups. While the thesis concludes that legal organisations are not social planning organisations, it suggests that the beginnings of an alternative account can be provided by utilising Epstein's framework.

Next, the thesis examines *the activity claim* which is central to Shapiro's view and explores two main questions which arise from it: (a) *What makes legal activity social planning activity*? and (b) *How do legal organisations carry out legal activity*? The thesis considers Shapiro's answers to these questions and presents some challenges to each. Although *the activity claim* will ultimately be rejected, the thesis briefly suggests an alternative way to answer the second question – rather than relying on Michael Bratman's theory of shared agency to explain how legal organisations perform legal activities, a more promising option is provided by Raimo Tuomela's account of group action.

Lastly, the thesis assesses *the norm claim* by considering Shapiro's analysis of the nature and normativity of plans. It argues that this claim fails for two reasons. First, that legal rules cannot be characterised as different types of plans, and second, that plan rationality cannot explain the normative force of law, despite Shapiro's best attempt to show that it can. The chapter ends by exploring, and ultimately rejecting, the possibility for Shapiro to hold on to a weaker version of his *norm claim*.

While this thesis argues that none of the Planning Theory's main claims survive scrutiny, it nonetheless highlights the significance of Shapiro's project in laying the foundations for a more constructive dialogue between legal philosophers and social ontologists. It contributes towards this goal by calling for a fresh start that moves away from the deadlocked Hart-Dworkin debate of traditional analytic jurisprudence in identifying new lines of enquiry in social ontology that can help us to understand law's institutional nature.

Table of Contents

Acknowledgements

"The best laid schemes o' Mice an' Men
Gang aft agley"

- Rabbie Burns, *To a Mouse*

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Chapter 1

Introduction

1.1. The methods of Analytic Jurisprudence

Legal philosophy is a rich and varied discipline, which can be split into three main areas of study: analytic jurisprudence, normative jurisprudence, and critical legal theory. As the topics with which this thesis is concerned fall within the former, I will begin by briefly contrasting each of these three fields before focusing exclusively on analytic jurisprudence, where I will explicate its principal question and methodological approach.

While there are several characterisations of these three branches, Kenneth Himma (2001) provides a nice summary of the distinctions between analytic, normative, and critical jurisprudence in his IEP entry on the philosophy of law:

> Analytic jurisprudence involves providing an analysis of the essence of law so as to understand what differentiates it from other systems of norms, such as ethics. Normative jurisprudence involves the examination of normative, evaluative, and otherwise prescriptive issues about the law, such as restrictions on freedom, obligations to obey the law, and the grounds for punishment. Finally, critical theories of law, such as critical legal studies and feminist jurisprudence, challenge more traditional forms of legal philosophy.

With this, we can see that the chief difference between each field is one of aim: analytic jurisprudence is concerned with elucidating the fundamental nature of law; normative jurisprudence is focused on studying the moral foundations of law; and critical legal theory aims to challenge law's moral underpinnings. So, while both normative and critical jurisprudence deal with the moral features of law, they do so from a different perspective. Normative jurisprudence asks what the *purpose* of these features are, where answers *describe* what the law says about them, i.e., it aims to provide an account of how the law currently *is* on a particular moral issue (e.g., abortion, marriage). By contrast, critical legal theory asks what *justifies* the current laws on moral issues, where answers take a stance on what the law *should* be, and thus have a political agenda.

While both normative and critical jurisprudence are both important and interesting areas of study, they will not be considered further in this thesis. Going forward, I will be solely concerned with the aims of analytic jurisprudence. As Himma puts it, "[t]he principal

objective of analytic jurisprudence has traditionally been to provide an account of what distinguishes law as a system of norms from other systems of norms, such as ethical norms" (ibid.). In quoting John Austin, Himma elaborates that this project endeavours to identify the *nature* or *essence* of law. In other words, the leading question of analytic jurisprudence is *What is law?* where an answer will provide the "necessary and sufficient conditions for the existence of law that distinguish law from non-law" (ibid.). In more recent years, this specific research area has come to be known as *the metaphysics of law*, where legal philosophers working on this topic are understood as developing metaphysical accounts of the nature of law. The main method used to undertake this task is conceptual analysis, which is "a process that uses a concept to analyze the nature of the entities that fall under it" (Shapiro 2011: 405, fn. 9). While this approach is not universally accepted, it remains the most widely employed methodology of analytic legal philosophers. It has also generated two rival theories of law: Legal Positivism and Legal Non-Positivism. Since it is not the purpose of this thesis to argue for either side, I will only present a quick overview of the debate as required to establish the relevant context.

Although the disagreement between Positivists and Non-Positivists has been characterised in various ways, the predominant discussion in contemporary views is expressed in terms of a dispute over what kind(s) of facts ultimately determine the existence and content of law, i.e., legal facts.[1] Positivists argue that legal facts depend only on social facts, whereas Non-Positivists hold that legal facts depend on both social and moral facts. By maintaining that the existence and content of law depends on social facts alone, Positivists make a metaphysical claim about the nature of law; that a necessary property of law is that it is fully determined by social facts. Likewise, but in opposition to this, Non-Positivists hold that it is a necessary property of law that it depends on both moral and social facts.

While this has arguably been the central debate of analytic jurisprudence, also carrying some important practical implications, I will not be concerned with it in this thesis. The main reason that I will not engage with this discussion is that I take it to be the result of an enquiry into the nature of law, and not the starting point. As clarified above, analytic jurisprudence approaches its main question, *What is law?*, neutrally. It does not begin by already assuming the answer, and so, constraining the investigation to fit any preference. Thus, if we begin by endorsing either a Positivist or Non-Positivist perspective on the nature of law, I suggest that we are not, strictly speaking, doing analytic jurisprudence. Likewise, if our evaluation of a

[1] In contemporary metaphysics, the determination relation is understood as a grounding relation; however, since the Positivist/Non-Positivist debate is compatible with various views about ontological dependence, I will remain neutral as to what exactly is the determination relation in place.

particular view is based purely on whether it is categorised as Positivist or Non-Positivist, then we are, at best, missing out on its contribution, and, at worst, advancing fallacious arguments by begging the question.

Instead, in what follows, I critically examine the main elements of a particular metaphysical account of law: Scott Shapiro's *Planning Theory of Law*. Despite being guilty of beginning his analysis of law with a Positivist answer in mind, Shapiro's legal theory is rich and deserving of consideration in its own right. In the remainder of this chapter, I will introduce Shapiro's novel view by drawing attention to its most interesting and distinctive elements before outlining those aspects that will be assessed throughout the rest of the thesis.

1.2. An organisational turn

In setting out his project, Shapiro notes that the guiding question, *What is law?*, is ambiguous. This is due to the polysemous nature of the word 'law'. After demonstrating various of its meanings, Shapiro suggests that a more precise term which better tracks the way it is used by analytic legal philosophers is 'legal system'. Yet, he concedes that this, too, suffers from a similar ambiguity: "[f]ollowing one usage, a legal system is a particular system of rules… In other cases, however, the term "legal system" denotes a particular institution or organization" (2011: 5). As a result, by replacing 'law' with 'legal system', our guiding question, rephrased as *What are legal systems?*, can be approached in at least two different ways. The first is to take it as enquiring into the nature of law as a system of rules, which would involve analysing legal norms. The second is to understand it as asking about the nature of law as a particular kind of group, i.e., a legal organisation. This alternative view would require investigating the nature of groups in order to make sense of the role groups play in the existence and content of law. As Shapiro nicely puts the distinction, "in the first sense of "legal system," legal systems are constituted by *norms*; in the second sense, they are constituted by *people*" (ibid.). Though, as he points out, given that these are two significantly different projects, when legal philosophers tackle the question *What is law?* or *What are legal systems?*, it is not always clear which is their target.

In any case, Shapiro maintains that a complete account of the nature of law requires examining *both* legal norms and legal organisations. The particular way in which he approaches this task is the first distinctive and interesting element of his view. Let me take a moment to elaborate on this.

Departing from the majority of legal philosophers who "study legal phenomena by analyzing the norms that legal organizations produce" (2011: 6), Shapiro argues that we should begin instead by considering the organisations that produce them. That is, he thinks that as a prerequisite for understanding what legal norms are, we need to develop an account of *how* and *why* legal organisations produce them. Shapiro credits what he calls 'the organisational turn' for inspiring him to take up this particular methodological approach. The organisational turn is a method of analysis, popular in various other disciplines, which focuses on investigating organisations "in order to study individual and group behaviour in institutional settings as well as the behaviour of institutions themselves" (ibid.). Impressed by the effectiveness of the organisational turn in creating new research agendas in other fields, Shapiro not only thinks that an enquiry into the nature of law also stands to benefit from this approach, but that it is in fact "a prerequisite for tackling questions about the nature of legal norms" (2011: 7). Armed with this fresh perspective, Shapiro promises an original contribution that has the potential to add significantly to the main discussions in analytic legal philosophy by attempting to understand the nature of law through the lens of groups and collective action. With this, he shifts the methodological focus of traditional analytic jurisprudence from investigating the nature of legal norms to the groups and shared activities that create them.

It is not only this fresh perspective to long-standing questions that makes Shapiro's organisational turn a particularly interesting approach for legal philosophers to consider; despite the centrality of legal organisations in legal practice, and theories on the nature of law, they have not yet been put under the spotlight of investigation. That is, while it is taken for granted that law is socially constructed and legal organisations (i.e., groups of legal officials) are often assigned a central role in the explanation of law's construction and maintenance (by creating, identifying, applying, and changing law), there has yet to be an analysis of what exactly they are. In recent years, a discussion seems to be emerging about who 'the true authors' of legal systems are (Burazin 2015, Banaś 2022), where the task is to explain "the metaphysical role of legal officials in constituting legal systems" (Banaś 2022: 160). One side maintains that legal officials create legal systems by way of certain shared attitudes and concepts, whereas the other argues instead that the true authors of legal systems are a more general group of citizens, of which legal officials are a subgroup that the citizens delegate certain powers to. The upshot of this debate is to determine whether the position of legal officials within a theory of law should be elevated or diminished. Crucially, though, in order to decide the place of each group in the social construction of law, we have to be clear about how each group can be distinguished. This looks to be particularly important in the

case of the second view which takes legal organisations as a subgroup of the citizens. In order to proceed, then, we need an account of each kind of group (comprising structure, function, features, powers, etc.).

Brian Tamanaha has been more direct in calling for legal philosophers to consider the relevance of organisations in developing their views. He criticises theories of law for failing "to account for fundamental changes that have taken place in law and society with the rise of organizations" (2016: 1). The changes he has in mind concern the various amendments that have been made to laws, as well as the creation of new laws, to protect the interests of organisations and the individuals that interact with them; the establishment of different government organisations to achieve designated legal purposes; and the outsourcing of legal activities to private companies (e.g., private prisons used by the government to incarcerate criminals, universities with their own police forces, etc.) which blurs the distinction between legal and non-legal organisations. According to Tamanaha, no existing theory of law adequately accounts for these aspects of contemporary law. More specifically, his objection is that "[l]egal theorists typically characterise law as a rule system maintaining social order" (ibid.: 5), yet these "significant aspects of contemporary law do not involve rules and do not involve social ordering" (ibid.: 10). Moreover, he further criticises legal philosophers for analysing courts in terms of judges and judging rather than, in what he argues is a more accurate light, as organisations with the function of processing cases. What all this signals is that there is considerable space for a legal theory which acknowledges the importance of organisations in accounting for the nature of law.

It also highlights the need for a sharper distinction between the different groups involved in the existence and content of law, which is exactly where Shapiro's work fits in: unlike other legal theories which utilise legal organisations without explaining them, Shapiro promises to begin his analysis of law by providing a well overdue account of legal organisations. We will see more about this in §1.4 when I elucidate the three main claims of his Planning Theory of Law. Though, to make sense of this, it is necessary to clarify what Shapiro understands by an enquiry into the *nature* of something. I will only outline this here, saving an elaborated presentation and criticism of it in §2.3.2.2.

When it comes to his conception of *nature*, Shapiro claims that it has two different senses. On the one hand, when one endeavours to analyse the nature of something, one is asking about its *identity*. Alternatively, on the other hand, when one studies the nature of something, one aims to examine what *necessarily follows* from its identity, that is, what its identity *implies* about it. To capture these two senses, Shapiro formulates his *Identity Question* and

Implication Question, respectively. He thinks that a metaphysical account of any object requires answering both questions, where an answer to the former "must supply the set of properties that make (possible or actual) instances of X the things that they are" (2011: 8); and an answer to the latter will be concerned with "what *necessarily follows from* the fact that it is what it is and not something else" (ibid.: 9). Answering the *Identity Question* for law amounts to discovering "what makes all and only instances of law instances of *law* and not something else"; whereas answering the *Implication Question* for law "would be in part to discover its necessary properties, that is, those properties that law could not fail to have" (ibid.).

Combined with Shapiro's organisational turn, then, it is fair to expect that Shapiro's metaphysical account of the nature of law will begin with an endeavour to answer the *Identity* and *Implication* questions for legal organisations. Nevertheless, we will shortly see that this is not, in fact, how his project commences. Though, that is a matter for the following chapter. For now, I will continue presenting the relevant background required to appreciate Shapiro's account, moving now to some of the most pressing problems which motivate it.

1.3. Some problems for Legal Positivism

A second distinctive and interesting element of Shapiro's project is the way in which he approaches the classical Positivist/Non-Positivist debate. While, as I mentioned in the previous section, Shapiro begins his analysis of law by endorsing Legal Positivism, he recognises the limitations of setting out to determine the foundations of legal systems by asking if legal facts rest on social facts alone or moral facts as well. He takes such questions concerning the fundamental nature of legal facts to be "too abstract for anyone to make significant headway" (2011: 45). Instead, he thinks a more promising strategy is to ask "the same question in the form of a puzzle about the possibility of law" (ibid.). This puzzle, which he calls *The Possibility Puzzle*, is presented as a 'Chicken-Egg' style problem: "any body with power to create legal norms must derive its power from some norm, while any norm that could confer such a power must itself be created by someone with the power to do so. But in order to show that law is possible, we have to stop this threatened regress" (ibid.: 42).[2]

[2] It should be noted that not everyone accepts Shapiro's *Possibility Puzzle* as a genuine puzzle. For instance, Stefan Sciaraffa argues that Shapiro fails to recognise "the fundamental insight that customary rules necessarily lie at the heart of all legal systems" (2011: 623). Roughly, the idea is that customary rules, in arising out of social practices, are different from legal norms given that the latter but not the former must be validated. Sciaraffa charges Shapiro with making a 'category mistake' by obscuring this distinction, which, once

Shapiro explicates two ways of doing this: to posit an 'ultimate authority', thereby doing away with the condition that legal authority must be generated by some norm; or to postulate an 'ultimate norm' which establishes legal authority and does not itself depend on its being created by anyone with the relevant power.

In surveying different possible answers to this puzzle which can be taken as supporting that there is either an ultimate authority or norm, Shapiro returns to the Positivist/Non-Positivist debate by drawing a line between those solutions which take legal authority to depend on social facts alone and those which maintain instead that it is also depends on moral facts. The details of these views are not important, though, what is important is that regardless of what one takes to be the source of legal authority (and thus the existence and content of law), there appears to be no winning side. To see this, we need to first appreciate the practical ramifications of either answer to the Possibility Puzzle. As Shapiro explains:

> For if the positivist solutions are correct, and the law rests on social facts alone, then the only way to definitely determine the fundamental rules of a particular legal system and its proper interpretive methodology is to engage in sociological inquiry. However, if the natural lawyer is correct, and the law rests on moral facts as well, then these legal questions can be conclusively answered only by engaging in moral argument. (2011: 45)

Put differently, this amounts to saying that "the metaphysics of law has a direct bearing on its epistemology" (2011: 46). Now, the problem with this for Legal Positivists is that "knowledge of the law is normative whereas knowledge of social facts is descriptive" (ibid.: 47). As a result, in claiming that the existence and content of law is based in social facts alone, Positivists open themselves up to another problem concerning how normative conclusions about what one legally *ought* to do can result from purely descriptive premises about what socially *is* the case. Shapiro calls this *Hume's Challenge* after Hume's Law which he introduces as stating "that one can never derive an ought from an is" (ibid.).[3] Importantly, as Shapiro elaborates, Non-Positivists do not violate this principle since they hold that law is founded on moral facts, and thus, legal questions can only be answered by engaging in moral argument – Non-Positivism, then, naturally derives normative conclusions from normative premises. However, Shapiro points out that the Non-Positivist answer to the

observed, shows that *The Possibility Puzzle* is 'illusory'. Similarly, Brian Leiter explains that "legal power arises, often enough accidentally, from a non-legal customary practice" (2020: 14). According to Leiter, the problem with *The Possibility Puzzle* is that it is formulated based on what he takes to be a contested 'truism' presented by Shapiro, namely, that "legal authority is conferred by legal rules" (ibid.: 7).

[3] Though, Sciaraffa (2011) maintains that this is not a challenge for all Positivists, arguing that Shapiro mischaracterises Hart's view, but that once adequately characterised, it easily meets Hume's Challenge.

Possibility Puzzle does not fare any better since it leads to an alternative problem, unique to this view: "[b]y insisting on grounding legal authority in moral authority or moral norms, natural law theory rules out the possibility of evil legal systems" (ibid. 49). Positivists do not face the same issue since they explain legal authority purely in terms of social norms, leaving it possible for morally illegitimate legal systems to exist.

The upshot of all this is that, since Shapiro begins his project by endorsing Legal Positivism, he must find a way of both solving The Possibility Puzzle and answering Hume's Challenge. It will be the purpose of §4.5 to present and analyse his attempt at doing so. For now, I will continue laying the foundation for the coming discussions by finally introducing the three main claims of Shapiro's Planning Theory of Law.

1.4. Three claims of The Planning Theory

As mentioned in §1.2, based on his notion of *nature* and his distinctive methodological approach to focus on organisations, we might anticipate that Shapiro's investigation into the nature of law will begin by answering the *Identity* and *Implication* questions for legal organisations, thus discovering all those properties that make legal organisations the kind of groups that they are, with special emphasis on their necessary properties. As a result, it would be fair to expect that the main thesis of his view will concern the nature of legal organisations. Yet, this is not, in fact, the way that Shapiro's project develops. Instead, the central tenet of his Planning Theory is what he calls *The Planning Thesis*: legal activity is social planning activity. Since legal activity is carried out by legal organisations, and produces legal rules, it follows from Shapiro's view that legal organisations are social planning organisations that engage in social planning activity to produce social plans. To keep track of all this, I suggest that Shapiro's Planning Theory is best understood as comprising three main claims, which I formulate as follows:

> *The group claim*: legal organisations are social planning organisations.
>
> *The activity claim*: legal activity is social planning activity.
>
> *The norm claim*: legal rules are plans and plan-like norms.

It will be the purpose of this thesis to unpack and examine each of these claims in detail, questioning whether any of them hold. For now, I wish simply to motivate this coming discussion by elaborating on the place of these claims within Shapiro's legal theory. With this, I hope also to demonstrate that analysing them is a necessary task, not only for those interested in a full assessment of Shapiro's account, but also for any legal philosopher

looking to shed light on new lines of enquiry that can help us to understand the nature of law. I reserve the next section for detailing and expanding on the originality to be found in some aspects of Shapiro's view. For now, I will present an overview of its key elements.

As mentioned, Shapiro himself recognises that his *Planning Thesis* (what I call *the activity claim*) is the main thesis of his Planning Theory. The reason for this is that both the *group* and *norm* claims follow from it, and, taken together, these claims allow him to advance a Positivistic picture of law: if legal organisations, legal activity, and legal rules can be reduced to social planning organisations, social planning activity, and social plans, respectively, then legal facts are determined purely by social facts. Let me spell this out.

The norm claim is perhaps the more crucial claim that results from Shapiro's *Planning Thesis*, and likely the most interesting for legal philosophers given their focus on legal norms in distinguishing law from other normative systems (e.g., morality, religion, etc.). Since the product of social planning activity is plans, and legal activity just is social planning activity, it follows that the product of legal activity, i.e., legal rules or norms, are plans and plan-like norms (where the latter are norms that resemble plans but are not themselves plans). This result is important for Shapiro as plans are normative but are not moral norms, and so, the normativity of plans is explainable purely in terms of social facts concerning goals, acceptance, and rationality to follow the plan. By characterising laws as plans, Shapiro explains the normativity of law in the same way, as based on rationality and not morality.

Another important consequence of *the activity claim* is *the group claim*. If legal activity is social planning activity, then, according to Shapiro, it follows that legal organisations (as the group engaged in this kind of activity) must be social planning organisations. The upshot of this thesis is that in order to engage in social planning activity, the legal authority need not be legitimate, in the sense of moral legitimacy, rather, legal organisations need only have the capacity to plan for the community.

For Shapiro, then, explaining the nature of legal activity is important as it secures the Positivist thesis that law (understood both as a system of rules and as groups of officials) depends solely on social facts. While it may appear that his focus on legal activity is another distinctive and interesting element of his view, Shapiro was not the first legal philosopher to suggest that legal activity plays a crucial part in explaining the nature of law. For that, we can look further back to the work of Neil MacCormick and Ota Weinberger. In his presentation of the main discussions and methodologies of analytic jurisprudence, MacCormick elaborates on the centrality of activity in developing a theory of law:

> In the case of law, the subject of the inquiry is or includes human social activity which sets and to some extent establishes a normative order in society. This activity is carried on by conscious rational agents whose activity is structured by reference to a conceptual framework, the relevant concepts being legal concepts, though they are by no means exclusively legal ones. This being so, the findings and theories of analytical and other legal theorists are apt to be incorporated in, or at least to have influence on, the practical activity of legal agents and agencies. (1986: 94)

For MacCormick, analysing legal activity illuminates the particular kind of social order that results from it. Without going into all the details, we can see that, although also highlighting it as an important element in a theory of law, MacCormick's interest in legal activity contrasts sharply with Shapiro's. That is, while MacCormick thinks an account of legal activity can help us to understand legal order as a special form of institutional normative order, Shapiro's project is to reduce legal activity to social planning activity in order to show that legal rules can similarly be explained in terms of plans, thus propounding a Positivist theory of the nature of law.

With his *activity claim*, then, Shapiro aims to elucidate *how* law is created by legal officials, i.e., they engage in social planning activity. Yet, this is only part of the story. As I mentioned in §1.2, despite various legal theories revolving around the role of legal organisations in explicating the existence and content of law, there has not yet been an analysis of what they are. Though, by arguing for his *group claim*, that legal organisations are social planning organisations, this is precisely one of the tasks that Shapiro takes up. With this, he promises to provide a metaphysical account of law which takes seriously the contribution of legal organisations and acknowledges the need to provide an explanation of their nature in order to tackle questions about the nature of legal norms. As Shapiro puts it, "we cannot understand what laws are unless we understand how and for what purposes legal systems produce them in the first place" (2011: 7).

So, from Shapiro's Planning Theory, we have that legal organisations construct law by engaging in social planning activities which produce plans with normative force over the community. Though not explicitly acknowledged by Shapiro, the elucidation of these elements requires significant engagement with *Social Ontology* – a neighbouring discipline which explores topics including, but not limited to, the construction of social reality, the metaphysics of groups, and the nature of group activities. I turn now to these discussions in order to explain how taking a closer look at them can help us to understand the nature of law.

1.5. The value of Social Ontology

Contemporary analytic social ontology examines how we construct the social world, and what exactly it is, that is, what constitutes social reality.[4] As Brian Epstein puts it in his SEP entry on the topic, "Social ontology is the study of the nature and properties of the social world. It is concerned with analyzing the various entities in the world that arise from social interaction" (2021). While such a general scope makes it difficult to demarcate a narrower subject matter, some of the main phenomena that social ontologists focus on include groups, shared action, collective intentionality, rules, institutions, social practices, and artifacts. In presenting various other topics of investigation, Epstein explains that "the entities explored in social ontology largely overlap with those that social scientists work on" and, as a result, "[a] good deal of the work in social ontology takes place within the social sciences" (ibid.). In particular, Epstein notes that "[m]any important questions in social ontology are connected to jurisprudence" (ibid.). In order to emphasise these connections, I will begin by outlining some of the most relevant discussions in social ontology on the nature of groups, shared action, collective intentionality, social practices, and artifacts.[5] With all this in hand, I will then consider how these debates connect with jurisprudence and how engagement with them can improve our understanding of the nature of law. Finally, I will point out some of those legal philosophers who are already working at this intersection, drawing attention to both the advances and limitations of their research as well as how we can make further progress.

1.5.1. Key discussions in Social Ontology

Given that the social world is constructed by groups of people, the starting point for understanding the nature of social reality is arguably to analyse social groups. Although taken for granted that people form groups and act together in various ways, it is unclear how this is possible. Some of the most pressing questions that arise include: *What are social groups? Are they anything over and above their members? What is the relationship between a group and its members? How are social groups constructed? What makes something a social group as opposed to merely a collection of people? Can groups act intentionally? If*

[4] Brian Epstein takes social ontology to be a subfield of metaphysics and argues that both disciplines stand to benefit from paying closer attention to their often overlooked relationship (2016: 125).

[5] Perhaps the clearest and most influential connection between social ontology and legal philosophy is with John Searle's work on constitutive rules and institutional facts (as developed in his 1995 and 2010). Despite the extensive discussion this has generated in both fields, I will not discuss it here. The reason for this is that Searle is interested in different phenomena than Shapiro: he does not have an account of groups nor of collective intentionality, shared action, etc. Likewise, Shapiro is not concerned with constitutive rules or in developing a theory of institutional facts.

so, how? Can groups hold attitudes (e.g., intentions, beliefs, desires)? If so, how? Answering any of these questions requires beginning with the ontological question, *Are there any social groups?* – that is to ask if social groups exist at all. While this has generated a wide debate amongst social ontologists arguing either for Group Realism or Group Eliminativism (cf. Ritchie 2015 for a detailed overview), others are of the view that the answer to this question is "an easy and obvious 'yes'" (Thomasson 2019); rather, the more important question we should focus our attention on is what exactly they are. Once we have an answer to this, we will be in a better position to tackle other questions about the relationship between groups and their members and how we construct social groups. Perhaps more significantly, we can also investigate *how* groups have been able to build the social world, that is to ask how groups can act and if they can hold various attitudes.

Exactly these questions have been taken up by social ontologists studying *group agency*. They are concerned with examining what makes a group an agent, i.e., able to act intentionally. While there have been many attempts to identify exactly what the distinctive features of group agency are, there is a general agreement that it requires the capacity of *collective intentionality*. [6] This is "the power of minds to be jointly directed at objects, matters of fact, states of affairs, goals, or values" (Schweikard & Schmid 2021), and it "comes in a variety of modes, including shared intention, joint attention, shared belief, collective acceptance, and collective emotion" (ibid.). Crucially, understanding how groups can act together intentionally requires an account of shared intention as this is what "enables the participants to act together intentionally, in a coordinated and cooperative fashion, and to achieve collective goals" (ibid.). Though, clarifying this attitude is not an easy task and it raises several challenging questions like, *Can groups be agents? Can they perform shared activities? What are shared intentions? Can they be reduced to individual intentions? If not, how can a group be attributed with mental attitudes? What distinguishes an individual's attitudes from their attitudes as a member of a group?* Answering these questions impacts on more than just our understanding of shared action, but also in making sense of how groups can have goals, make decisions, form beliefs, possess knowledge and be held responsible for the consequences of their actions. That is, how we understand the mechanics of group agency and collective intentionality has practical significance on how we can distribute both praise and blame to groups resulting from their conduct.

In studying how the social world is constructed by certain conducts, social ontologists have also been interested in the *ways* in which groups of people act together to create social

[6] For a much more detailed overview of this topic see Roth 2017.

entities of various kinds. Those who focus on investigating the method and constitutive elements of which social reality is built are concerned with the nature of *social practices*. Though there are many opposing characterisations of what these are, they can broadly be understood as recurrent collective intentional actions performed by groups. Social practices are interesting because while they are usually taken as the building blocks or constituents of the social world, they are also the products of shared action, and so are themselves constructed social entities. Some of the central questions concerning social practices include: *What are social practices? How do they differ from other, similar kinds of behaviours (habits, customs)? How are they constructed? What social entities do they construct and how? What role do they play in building the social world?* Clearly, answering these questions is an important and illuminating task. For one, being able to distinguish between social practices and other kinds of shared actions will allow us to determine which groups are involved in which activities as well as what follows from these activities, i.e., their products. This, again, is not only necessary for understanding the nature of our social world, but is also an important means for being able to attribute responsibility to groups for the consequences of their actions.

In addition to elucidating *how* groups construct social entities (i.e., through social practices), social ontologists are also concerned with analysing the intentional products of shared action, namely, *artifacts*. As well as being intentional objects, artifacts must also be created to fulfil a certain purpose, that is, they necessarily have a specific function, and, on standard accounts, their creation involves the modification of materials (cf. Preston 2022). The key questions facing those interested in artifacts include: *What are artifacts? Are they mind-dependent? If so, does this make them less 'real' than other kinds of entities, e.g., natural kinds? Can there be abstract artifacts? If so, how can we account for their construction and existence? Are artifacts necessarily social objects? Can the function of artifacts change?* Answering these questions will not only contribute towards our understanding of the social world, but will also reveal important insights into distinctive features of the human mind as well as our cognitive and behavioural development. Making sense of why and how we create the objects that we do can tell us something about our reasons for engaging in certain kinds of activities. In other words, this kind of project is concerned with explaining how we shape and are shaped by the world around us.

So much for some of the salient topics in social ontology. Now all that is left is to mention how these discussions can shed light on an investigation into the nature of law, along with

an overview of those legal philosophers who have paved the way for this interdisciplinary approach. Let me begin with the former task.

1.5.2. Elucidating the nature of law with Social Ontology

It might have been noticed that each of the topics presented above overlap with the three claims of Shapiro's Planning Theory of Law, and thus with some of the key elements in need of clarification for any adequate metaphysical account of law. As we saw in §1.2, identifying the 'true authors' of legal systems requires being able to distinguish between the various groups involved in the creation and maintenance of law. In order to do this, we need an account of these different kinds of groups which involves analysing their nature. Given that some views take legal officials to be a subgroup of a larger group of citizens, this is a tricky task, and in order to proceed we need to understand what groups are, if they are anything over and above their members, what the relationship is between groups and their members, what makes something a social group as opposed to merely a collection of people, and how social groups are constructed. In other words, we need to engage with some of the main questions explored by social ontologists working on the nature of groups. In doing so, we will also be in a position to analyse Shapiro's *group claim*, that legal organisations are social planning organisations.

As we saw in §1.4, another important task in understanding the nature of law is in elucidating legal activity as this will explain both *how* legal officials create law and the social order that results from this practice. Following from an account of legal organisations as certain kinds of groups, we can explore how they perform the activities they do by engaging with the literature on group agency and shared action. To do this requires making sense of how groups can act together intentionally, which in turn involves getting to grips with the notion of collective intentionality and investigating if/how individuals can share attitudes (e.g., intentions, beliefs, desires, etc.), what distinguishes an individual's attitudes from their attitudes as a group member, and if group attitudes can even be reduced to individual shared attitudes. Evidently, this endeavour will draw on various topics already well developed in social ontology.

Though, an account of legal activity will not only need to explain *how* legal organisations act together, but it should also explicate the *ways* in which they perform these activities, i.e., what exactly legal activities consist in. Exploring what legal activities are amounts to providing an account of legal practices which can be illuminated by considering some of the more general work developed on social practices regarding what they are, how they differ

from other similar behaviours (like habits and customs), how they are constructed, and what kinds of entities they construct, as well as their overall role in constructing social reality. Given that legal practices are a species of social practices, this framework will provide a strong basis for analysing legal practices and their role in constructing legal reality. Furthermore, in exploring both *how* and the *ways* in which legal organisations carry out legal activities by appealing to the literature in social ontology, we will be able to critically assess whether Shapiro's *activity claim* holds, i.e., the claim that legal activity is social planning activity.

Despite the centrality of both legal organisations and legal activity in the social construction and maintenance of law, we saw in §1.2 that the majority of legal philosophers begin their investigation into the nature of law by analysing legal norms as these are taken to be what distinguishes law from other normative systems. Thus, as mentioned in §1.4, it is likely that examining the nature of legal norms remains the most interesting topic for legal philosophers. Since legal norms are the result of a particular kind of practice, i.e., recurrent collective intentional action, and they are created for a certain purpose, i.e., they have specific functions, it seems that they are salient examples of *artifacts*. As a result, engaging with the literature on artifacts may bring fresh insights into the artifactual nature of legal norms by offering a novel explanation of what they are, which involves exploring whether they are mind-dependent, if they are as 'real' as ordinary objects (e.g., instances of natural kinds), if they can be abstract, and if so, how we can account for their construction and existence, as well as exploring their function and whether it can change. All this can help explain the existence, persistence, function, structure, features and perhaps even the normativity of legal norms, which will be of help also in assessing Shapiro's *norm claim*, that legal norms are plans and plan-like norms. Moreover, as with the more general discussion of artifacts in social ontology, this endeavour will not only contribute towards our understanding of the construction of our social (and legal) reality, but it will also reveal important insights into our cognitive, behavioural, and social development. Raz made a similar point when he said that "in working out a theory of law we are explicating our own self-understanding of the nature of society and politics" (2009: 97).

What all this makes clear is that there is fertile ground for such an interdisciplinary approach in analysing the nature of law. While there has not yet been extensive communication between legal philosophers and social ontologists, there are some important exceptions of scholars working at this intersection, who have demonstrated how each discipline stands to

benefit from consideration of the other. It will be the purpose of the rest of this section to present a brief sketch of some of these discussions.

1.5.3. The beginnings of a Social Ontology of Law

Although we saw in §1.2 that Shapiro's organisational turn is a novel approach to analysing the nature of law in terms of legal organisations, he is not the first or only legal philosopher to notice the relevance of focusing on them in order to understand something about the activities they perform. For instance, Rodrigo Sánchez Brigido (2010), while primarily interested in elucidating an account of law as an institutional practice modelled on collective intentional actions, suggests that a key element of legal practice that distinguishes it from other social practices is that it is constituted by the practice of norm-applying officials (ibid.: xvii). Despite this being a necessary condition for there to be law, Sánchez Brigido contends that "there is no consensus (and in fact there is a long standing dispute) about how to understand such practice" (ibid.). As far as he is concerned, the way to make sense of this practice is to recognise that "some institutional practices in general, and legal practice in particular, are instances of the activity of groups with normative unity" (ibid.: xxiv-xxv), where there are two types of normative unity that groups can possess, depending on whether or not group members conceive of themselves as under a duty to act in a certain way *qua* group member. Without going into further details of Sánchez Brigido's account of law as the institutional practice of norm-applying officials, we can see that, although undeveloped, his view depends on understanding the nature of the group of legal officials, and in particular, the relationship that holds between this group and its members. In this way, we can charitably take Sánchez Brigido as laying the foundations for further consideration of the relevance of the social ontology of groups, as well as shared action and social practices for elucidating the nature of law.

Another legal philosopher who alludes to the centrality of groups in a metaphysical account of law (and in particular, for explaining legal activity) is Richard Ekins (2014). He criticises various legal philosophers (including Shapiro) who do "not discuss group agency at all, focusing instead on joint action simpliciter, without attending to how or if the group in question is formed to act in a way that avoids incoherence or inconsistency" (ibid.: 314). Inspired by the work of Philip Pettit and Christian List on group agency, praising it as "the most interesting development in social ontology" (ibid.), Ekins maintains that

> one should consider the possibility that a people form a group agent such that the law that governs this people is somehow the act of this singular agent. Or, less grandly,

> one should at least consider the way in which various legal and political institutions - courts, cabinets and legislatures, say - form group agents, disciplined to act jointly like a rational natural person. (ibid.: 315)

Despite the implication of the importance of analysing groups in the works of both Sánchez Brigido and Ekins, it is clear to see that there is plenty of space for an account of legal organisations that engages significantly with the resources developed by social ontologists on the nature of groups. In Chapter 2, I will present the beginnings of such an account.

What is also evident from the above discussions is that legal philosophers have already employed some of the work on shared action that has been advanced by social ontologists. As mentioned in §1.4, Shapiro was not the first to notice the relevance of such theories for explaining various aspects of the nature of law. While not focusing explicitly on legal activity, but rather on the relationship between collective action and individual accountability in legal and moral contexts, Christopher Kutz (2000a and 2000b) presents a comprehensive overview of the most prominent accounts of collective action offered by social ontologists. Recognising that they are unable to account for the nature of collective action in larger, less committed social contexts, such as law, he offers his own view of collective action in terms of overlapping participatory intentions (individual intentions to do one's part in a joint action) in order to propose an account of complicity.

Following Kutz, Sánchez Brigido, and Shapiro, Carlos Bernal (2014a and 2014b) has aimed to show how the "conceptual apparatus of social ontology can assist us in illuminating the nature of law" (2014b: 336) by focusing on theories of collective intentionality, collective intentional action, and social practices to elaborate and expand on three of the main social practice theories of law (those offered by John Austin, H.L.A. Hart and Shapiro). He takes this endeavour to clarify the success and failures of these accounts, which in turn can help us identify new avenues leading towards progress in our understanding of law 'as a socio-logical entity'.

Following from more classical debates in analytic jurisprudence, another group of legal philosophers have been more interested in updating the discussion around law as a legal system of norms by employing the work developed on artifacts. So-called *artifact theories of law* "appeal to the debate over the nature of artifacts… in order to enquire whether an explanation of law in terms of technical artifacts could shed new light on the question of the nature of law, legal systems, and legal institutions" (Burazin et al. 2022: viii). It is fair to say that this topic has gained in popularity in recent years, establishing itself as one of the core

areas of study in contemporary legal philosophy. Roughly, the idea shared amongst artifact theories of law is that legal systems (understood as systems of norms) are constructed by legal officials to fulfil a certain purpose. While the details of how they are constructed and for what purpose are disputed, the general agreed result is that legal systems are abstract institutional artifacts.[7] By focusing on different aspects of the nature of artifacts, legal philosophers have arrived at various conclusions about the nature of law. On the one hand, there are some who argue that the artifactuality of law "entails that law cannot have essential attributes (not even functional ones)" (Leiter 2018, cf. Burazin et al. 2018: viii-ix). As Schauer nicely explains this idea,

> an important implication of recognizing the artifactual nature of law is recognition of the capacity that humans possess to remake or at least modify that which they themselves have made. It is not simply that humans can remake or modify particular laws, or reconstruct or alter all or part of some legal system, but that humans can remake or modify the very concept of law that exists within some community (2018: 30)

Some, on the other hand, defend not only that law has essential features, but that we cannot be mistaken about them since law is created and used by us (Marmor 2018). An important result of this view for legal theory is "that genuine disagreements about what law is are not possible because collective acceptance is constitutive of what artifacts are" (ibid., cf. Burazin et al. 2018: ix), though people can disagree about law's internal structure. On a similar note, Kenneth Himma argues that law's particular conceptual function is 'to keep the peace' and the way that it performs this function is by "backing some legal norms with authorized coercive enforcement mechanisms" (2018: 154). Consequently, from law's artifactual nature, Himma draws a necessary connection between law and coercion. Finally, some others think that appealing to artifacts can solve the problem of accounting for law's normativity (i.e., how to answer Hume's Challenge). In reconciling the ideas that law is a social practice and an artifact, Kenneth Ehrenberg argues that artifacts have an inbuilt normativity regulating their usage and recognition, and so, in turn, "locating the law within the metaphysical genre of artifacts allows us to say that it is a set of (normative) rules that is also a (descriptive) practice" (2018: 178).

[7] Though, Miguel Garcia-Godinez (2022) departs by arguing that legal systems should not be understood as artifacts but rather as institutional practices with the purpose of producing artifacts of various types (e.g., laws, legal judgements, treaties, etc.) through the performance of legal activities.

1.5.4. Continuing the project

While this has only been a cursory overview of some recent developments at the intersection of legal philosophy and social ontology, it is clear to see not only that there is value in this project, but also that it is well underway. Though, it is also evident that despite the significant progress of employing various discussions in social ontology to help elucidate the nature of law, several aspects of this approach remain undeveloped. Most notably, given the lack of attention given to legal organisations, there is still much to be said about how work on the nature of groups can inform an analysis of distinct legal groups in order to understand their role in the construction and maintenance of law. Moreover, although legal philosophers have taken great strides in characterising law as a kind of social practice engaged in a certain collective intentional activity by borrowing heavily from the literature in social ontology, there is still some way to go before completing this task to the same level of detail.

Nevertheless, it is clear that this interdisciplinary project is a success. Commenting on the connection between legal philosophy and social ontology, Giovanni Tuzet instructs us not to read this exchange "as a mere armchair debate on scholarly issues: the most fruitful thing to do is to read it as a way of better grasping the nature of law in the spirit of general legal theory or jurisprudence. If successful, this will inevitably illuminate our understanding of legal phenomena in the real world" (2014: 288). In a similar spirit, Canale thinks that this interdisciplinary strategy has 'at least two important advantages':

> Firstly, it shows which answers social ontology (or, rather, a certain account of social entities) might provide to certain classical questions of jurisprudence, such as "What is law?", "Why is law normative?", "What distinguishes legal practice from other kinds of social practice?", etc. Secondly, it links these answers to the tradition of analytical jurisprudence: the insight of social ontology into legal entities is presented as a step forward in an established tradition of thought rather than an exotic theoretical framework which dismisses the contribution of this tradition to our understanding of law. (2014: 290)

Though, as I hope to have shown in this section, the relationship between legal philosophy and social ontology is not one-sided. With the coming discussion in the rest of this thesis, I want to further the idea that legal philosophers can return the favour. More specifically, by clarifying the nature of law, they can help by providing an important test-case for social ontologists looking to apply their theories to real-world problems. To echo Canale, distinguishing the features of legal entities from other social phenomena "is not only a

fundamental condition for a reliable account of legal entities but might also improve the ontological understanding of social reality in general" (ibid.:291).

1.6. Looking forward

This thesis aims to continue with the task of demonstrating the fruitfulness of applying work in social ontology to elucidate the nature of law. It will do so by presenting a thorough analysis and comprehensive critique of Scott Shapiro's Planning Theory of Law, which represents one of the most sophisticated attempts to develop research at the intersection of legal philosophy and social ontology. Although I will ultimately argue that Shapiro does not offer a viable metaphysical account of law, his endeavour to investigate legal phenomena through the lens of groups and collective action is a valuable contribution that can inform the work of legal philosophers and social ontologists alike. I will consider both the flaws and virtues of Shapiro's Planning Theory as follows.

Chapter 2 will examine Shapiro's *group claim*, that legal organisations are social planning organisations. The chapter can be taken as comprising two parts: the first is largely exegetical but also raises some objections against his accounts of both of legal organisations and social planning organisations. Here, I point out a methodological inconsistency with Shapiro's project and explain how it impacts on both his analysis of legal organisations and the activities they perform. The second half of the chapter is more positive: it aims to refocus the discussion and fill the gaps exposed in Shapiro's account of legal organisations by appealing to some recent contributions in social ontology on the nature of groups. The chapter concludes by applying this work in an attempt to answer some of the objections previously raised against *the group claim*. Although it ultimately argues that legal organisations are not social planning organisations, the beginnings of an alternative account are offered based on the insights gained from studying the relevant discussions in social ontology.

Following from this, Chapter 3 reviews Shapiro's *activity claim*, that legal activity is social planning activity. The chapter is structured by two main questions which arise from this claim: (1) *What makes legal activity social planning activity?* and (2) *How do legal organisations carry out legal activity?* The first half details Shapiro's answer to the former question, while the second half recounts his response to the latter. In each case his attempts are met with a critical note: on the one hand, Shapiro does not give us any reason to think that legal activity is social planning activity; and on the other, he is unable to explain how

legal organisations carry out legal activity in terms of Bratman's Planning Theory of Intention. As a result of all this, Chapter 3 concludes by rejecting Shapiro's *activity claim*, though it does suggest how recent contributions in social ontology on shared agency might help in elucidating how legal organisations perform the activities that they do.

Despite having shown that the central tenet of The Planning Theory cannot be upheld, the thesis continues by assessing Shapiro's *norm claim*, that legal rules are plans and plan-like norms. It does so for three reasons: first, because it might be that Shapiro can respond to the arguments advanced against his view or he may opt to weaken *the activity claim*; second, *the norm claim* is an interesting claim in its own right that is worth investigating given the important insights it can reveal; and third, this final claim is arguably the most significant and controversial claim of Shapiro's Planning Theory of Law, making its consideration necessary for a comprehensive review of his metaphysical account of law.

This critique is taken up in Chapter 4, which starts with a reconstruction of Shapiro's analysis of (shared) plans and plan-like norms, paying particular attention to their normative character. It then shows how Shapiro applies his account of plans to legal rules in order to characterise the latter in terms of the former. Nevertheless, the chapter presents several challenges which leads to the rejection of *the norm claim*. In the spirit of charity, the chapter proposes a way for Shapiro to preserve his account by formulating a more limited version of the Planning Theory. Though, in the end, it concludes in the negative that this weaker version cannot survive scrutiny.

Despite this result, the thesis closes on a more positive note by considering the virtues of Shapiro's project, particularly in helping us to identify new lines of enquiry in social ontology that can advance our understanding of law's institutional nature. It tries to do justice to this endeavour by suggesting how we can build on the foundations of Shapiro's theory to construct a stronger and more successful metaphysical account of the nature of law.

Chapter 2

Are Legal Organisations Social Planning Organisations?

2.1. Introduction

As we saw in §1.2, Shapiro's 'organisational turn' is a particularly interesting methodological approach towards analytic legal philosophy. Despite the centrality of legal organisations in legal practice, and theories on the nature of law, they have not yet been the focus of investigation. This is why it is worth taking time to analyse his claim that legal organisations are social planning organisations – what I call Shapiro's *group claim* – more thoroughly, which is precisely the goal of this chapter. I will unpack it in more detail in order to highlight four problems with it. The first, outlined in §2.2, points to a methodological inconsistency with Shapiro's project which, I maintain, has ramifications for his account of both the nature of legal organisations and the activities they perform. In §2.3, I move to more direct attacks against Shapiro's *group claim*. Here, I present two distinct challenges – one which targets Shapiro's characterisation of legal organisations (Ehrenberg 2016), and the other which criticises his enquiry into their nature (Mellin 2020). In §2.4, I argue that Shapiro's account of legal organisations suffers due to it being based on a similarly incomplete and flawed account of organisations. In an effort to refocus Shapiro's project and help him provide a detailed analysis of groups, I explore how some recent contributions in social ontology which investigate the nature of groups can be utilised. In §2.5, I revisit the objections raised in §2.2 and §2.3 and try to answer them by employing a metaphysical framework which aims to provide a unified way of analysing the nature of different kinds of groups. I conclude in §2.6 that legal organisations are not social planning organisations and offer the beginnings of an alternative account.

2.2. What makes legal organisations social planning organisations?

Given Shapiro's enthusiasm for the organisational turn and, as a result, the methodological approach he sets out at the beginning of *Legality* (2011: 6-7), we might expect that the starting point for Shapiro's project will be an enquiry into the nature of legal organisations. That is, to ask both the *Identity* and *Implication* questions for legal organisations, leading to an answer which details all of the properties that all and only legal organisations possess, with special focus on their necessary properties. However, this is not the route that Shapiro takes.

This will become clear in considering his answer to the main question of this section: *What makes legal organisations social planning organisations?* This will be presented in §2.2.1. In §2.2.2 I will raise some concerns with Shapiro's answer, and in particular, I will argue that it is incompatible with his own methodological approach. This is not merely a superficial issue, although I also do not consider it to immediately disqualify his account of legal organisations. This later point, concerning the plausibility of his account, will be taken up in §2.3 and §2.5. For now, the purpose of the objection in §2.2.2 is to highlight that Shapiro does not deliver an account of law that takes legal organisations as its focus, despite his promise to do so. Moreover, in failing to do this, Shapiro overlooks a crucial element necessary for an account of *how* legal organisations carry out legal activity. As will be emphasised in §2.6, this is not as innocuous as it may appear. Indeed, there are important ramifications. I will gesture towards some potential problems that result from this, saving a more detailed evaluation of these for the following chapter.

2.2.1 Shapiro's answer

Shapiro develops his characterisation of legal organisations from his *Planning Thesis*, which he takes to be 'the main idea' behind his Planning Theory of Law (2017: 1). According to this, "legal activity is an activity of social planning" (ibid.: 2). In order to motivate this claim, Shapiro clarifies what he means by both 'planning' and 'social'. He explains 'planning' as "the activity of formulating, adopting, repudiating, affecting, and applying plans" (ibid.). He describes the planning as 'social' in that its function is "to guide, organize, and monitor the behaviour of members of the community" (ibid.).

Shapiro justifies this thesis by analysing and comparing both legal activity and social planning activity in some detail as well as the similarities between their products (i.e., laws and plans). However, I won't elaborate much on this here, since a thorough treatment of Shapiro's *Planning Thesis* is the topic of the following chapter and an analysis of his view that laws are plans will be presented in Chapter 4. All that is important to mention for now is that Shapiro uses this thesis to formulate his account of legal organisations: "If legal activity is social planning activity, *then it follows* that legal authorities are social planners. In other words, they exercise their power by formulating, adopting, repudiating, affecting and applying plans" (2011: 204, emphasis added).

Yet, Shapiro concedes that there are many groups which perform social planning activities but do not perform legal activities. Here, he considers parents to point out that there are clear and important differences between this kind of social planning group and legal organisations.

However, again, Shapiro thinks that the explanation of this can be found in terms of the activities that each group performs, rather than properties of the groups themselves. So, he endeavours to find what is missing from his analysis of legal activity. This amounts to him asking the *Identity Question* for legal activity and providing an answer which details all of the properties that all and only legal activity possesses.

The approach he takes to discover these extra properties of legal activity is to compare it with the social planning activities of parents. In doing so, he discovers that legal, but not parental, planning activity is also official and institutional. Let me consider each of these features more closely.

Legal activity is official in that it is performed by individuals who occupy offices, or "positions of authority" (2017: 15). An essential feature of an office which Shapiro identifies is that "the holders of power are "fungible", namely, that the rights and responsibilities that attend to the office do not depend on the identity of those who inhabit the office" (ibid.). Though, if we exchange 'office' for 'position of authority', then it looks as if parents can also qualify as officials in this sense. Shapiro admits that parenthood is, in fact, fungible, but because offices "normally possess two other properties, none of which is necessary but are typically present" (ibid.), which parents do not possess, they do not count as occupying offices. These properties are: normative stability, and turnover. In the case of the former, as Shapiro puts it, "offices are typically stable. Rights and responsibilities should not fluctuate over time but remain constant throughout." (ibid.). As for the latter, "turnover in occupancy is not only possible, but an expected occurrence." (ibid.). All this is to say that the roles of officeholders do not usually change but are often vacated by one individual and assumed by another. This is not the case for parents since their responsibilities towards their children typically decrease and change over time. Moreover, it would be unusual for parents to vacate their role for another individual to take over.

Next, legal activity is institutional in that formal procedures are established for officials or groups to perform certain actions. The following of these procedures does not require corresponding intentions from individuals or group members. Or, as Shapiro describes it:

> [T]he normativity of law is "institutional" in nature, which is to say that the legal relations may obtain between people independent of the particular intentions of those people. This institutionality is made possible by the structure of master legal plans. Master plans not only contain authorizations, but instructions as well, namely, plans which specify how the authorized power should be exercised. These instructions will

> typically set out formal procedures which allow people to exercise power even without the intention to do so. (ibid.: 16)

As an example, Shapiro consider legislatures who can vote to validate a rule by saying 'Yea' (ibid.). If the majority of legislatures simply say 'Yea', then the rule is legally valid. Whether or not any of the legislatures actually intend to enact the rule or even realise they are enacting it is beside the point (think e.g., of a voting process which involves raising one's arm to affirm one's choice and imagine someone who involuntarily twitches at the inopportune moment of vote casting, despite not wishing to align with that side). Shapiro takes it to be clear that parents do not enjoy this same planning mechanism: if a parent wants their child to do something, they must intend that something happen and express that intention directly to their child.

With these extra features which Shapiro attributes to legal activity, he draws the following conclusion:

> any group that engages in a shared, official and institutional activity is an "organization". It follows then that legal systems are *planning organizations*. Legal officials constitute such organizations because they are engaged in a shared activity of social planning, occupy offices and are capable of instituting normative relations irrespective of particular intentions. (ibid.: 17)

Though, as Shapiro realises, this is still not enough to distinguish legal activity/organisations from other social planning activity/organisations. He makes three further distinctions that will be discussed at length in §2.3. Before getting to these, I will first present some challenges to Shapiro's characterisation of legal organisations as social planning organisations.

2.2.2 A methodological concern

As I mentioned in §2.1, the originality of Shapiro's investigation into the nature of law comes from his promise to begin with an analysis of legal organisations in order to uncover how and why legal norms are created. However, this is not what he delivers. Instead, his account of legal organisations is shaped by his account of legal activity as social planning activity, which is itself initially motivated by drawing out the similarities between the products of legal activity, i.e., laws, and the products of social planning activity, i.e., plans (ibid.: 2-9, 2011: 119-29). So, in this way, he does not offer us the fresh approach that he claims to champion. Even worse, he is closer to following in the footsteps of those legal philosophers

whom he criticises for beginning their analyses of law's nature with an account of legal norms.

While this concern may at first appear to be more superficial than substantive, upon further inspection, we can appreciate the impact that this has on Shapiro's view. For instance, his account of legal organisations has been constrained by his presupposition that they are social planning organisations. This characterisation comes directly from his *Planning Thesis* which he supports by comparing laws with plans. In other words, his analysis of legal organisations begins with the thesis that legal activity is social planning activity, and so his resulting account of them is, unsurprisingly, formulated in terms of *the activity* he takes them to perform. In fact, he is explicit that this is the case when he asserts that "any group that engages in a shared, official and institutional activity is an "organization". It follows then that legal systems are *planning organizations*" (2017: 17).

Not only does this conflict with the methodological approach that Shapiro sets out for his project, but it also has further implications for his theory. In order to say anything about *how* or *why* a group performs the activities it does, we first need an account of *the group* in question. This account cannot be provided based on an analysis of the activities it performs, as this would be to put the cart before the horse.

Another problem with Shapiro's understanding of legal organisations as social planning organisations regards the official and institutional activity he identifies as characteristic of organisations. For a start, when he elaborates on what he means by official activity, he does not refer at all to any kind of activity. Rather, he explains what official *roles* are. Since roles attach to role-holders, this does not help us to understand what official *activity* is, apart from that it is the activity carried out by officials. We do not even have a definition of 'official' here that we can use to make sense of what official activity would be for Shapiro, as the conditions for this kind of activity depend on more than just that it is carried out by officials since there are also certain rules and procedures that set out what kinds of activities count as official.

This also brings out the issue with Shapiro's treatment of institutional activity. He presents this as distinct from official activity, but it is unclear what this difference could be since there is, in fact, only one kind of activity being discussed. Shapiro presents institutional activity as the rules and procedures that legal officials follow in order to perform legal activities. But as mentioned, he presents official activity as the *roles* that give legal officials their powers to perform certain actions, and so is not explaining any activity. So, it seems

from Shapiro's perspective that there is no distinction to be made between "official activity" on the one hand and "institutional activity" on the other since it is only in the case of the latter that he is concerned with any kind of activity. I will return to Shapiro's characterisation of legal activity as institutional in the following chapter.

2.3. What makes legal organisations *legal*?[1]

In the previous section, I presented Shapiro's claim that legal organisations are social planning organisations. However, as Shapiro is aware, this is not enough to answer the *Identity Question* for legal organisations as there are many other kinds of groups that also qualify as social planning organisations that are certainly not legal organisations. I will begin in §2.3.1 by briefly reminding the reader why such a distinction is so important for Shapiro's thesis. I will then present his answer to the *Identity Question* for legal organisations, namely that they possess three extra properties which, taken together, separates them for other similar kinds of groups. In §2.3.2, I will present some challenges to this. Ultimately, this section will argue two things: (i) that Shapiro's answer to the *Identity Question* is inadequate, and (ii) that his *Identity Question* as formulated is insufficient for an enquiry into the nature of something. As a result of this, I maintain that Shapiro's proposed distinction between the *Identity* and *Implication* questions ends us clouding the discussion and is more of a hindrance than a help. Thus, to avoid further ambiguity, it is better to drop talk of them both.

2.3.1 Shapiro's answer

Recall the importance of legal organisations for Shapiro's account: in order to analyse the nature of legal norms, we first need an account of the nature of the groups (e.g., legal organisations) that produce them so we can understand *how* and *why* they are produced. Since our account of the nature of legal norms partly depends on the group that produces them, we need to make sure that this group can be distinguished from other similar kinds of groups. That is to say, we don't want the products of non-legal groups to count as laws. This problem will be particularly clear below when we consider some of Shapiro's own examples of non-legal social planning organisations in order to bring out the extra features possessed by legal organisations.

The first kind of group that Shapiro considers are parents. Though they are not organisations (since they are not official nor institutional, and perhaps do not perform a shared activity,

[1] The work in this section largely mirrors the discussion I presented in §2 – §4 of Mellin (2020).

e.g., lone parents), Shapiro notices a similarity between the *compulsory* nature of parental authority and legal authority. In both cases, the validity of each type of authority does not require consent. Children are subject to the rules of their parents and citizens are subject to laws regardless of whether or not they accept them. As Shapiro puts it, "children cannot "quit" their parents", just like the subjects of legal authority (citizens) cannot quit the law (2017: 17). Children may refuse to follow the rules of their parents and citizens may refuse to follow the law, but both cannot simply opt out, as the consequences of refusing to follow parental rules or the law often show.

Though, as Shapiro notes, the compulsory nature of legal authority is not enough to distinguish legal organisations from other, very different kinds of groups. Criminal organisations also qualify as compulsory social planning organisations – they perform a shared criminal activity, have official roles and formal procedures that members follow in order to formulate, adopt, and enforce plans to carry out the criminal activity. They do not require the subjects of those plans to accept them, nor do they allow for anyone to "quit" or refuse to follow them. Yet, we certainly do not want an account of legal organisations that includes non-legal groups or criminal organisations such as the Mafia or to mistake their rules as laws! To paraphrase Shapiro, all legal organisations are compulsory social planning organisations, but not all of the latter are instances of the former (ibid.: 20). So, what distinguishes legal organisations from other compulsory social planning organisations like the Mafia? According to Shapiro, the difference concerns their *aim*. He claims that legal organisations necessarily have a *moral aim* while criminal organisations do not. It might be the case that a legal organisation fails to meet this aim, but it cannot fail to have it, or it is not a legal organisation. There is no similar requirement that criminal organisations have a moral aim.

Nevertheless, legal organisations are not the only kind of group which qualifies as a compulsory social planning organisation with a moral aim. Shapiro (ibid.: 22-7) considers a retirement community in Florida which establishes an official 'Condo Board' responsible for regulating the behaviour of its residents by creating rules and applying them in order to solve any moral issues that may arise. By comparing the Condo Board with the legal system of Florida, Shapiro determines that the third and final distinguishing property of legal organisations is their general presumption of validity by superior social planning organisations. In this case, the US Federal legal system is superior to Florida State legal system, which is superior to the Floridian Retirement Community Condo Board: "US law pre-empts state law just as the state law pre-empts the rules of the Condo Board" (ibid.: 24).

Although state law is subordinate to federal law, "federal law automatically presumes that state law complies with federal law" (ibid.). The upshot of this being that Florida need not demonstrate the validity of its rules before enforcing them. However, the same cannot be said of the Condo Board. The Condo Board must seek approval from Florida before enforcing its rules because it does not enjoy the same presumption of validity.

Shapiro calls this general presumption of validity the property of self-certification. For him, legal organisations necessarily possess it. Since Condo Boards do not, they do not qualify as legal organisations.

2.3.2 Objections

Though one may challenge any of the properties that Shapiro identifies as properties of legal organisations, the property of self-certification seems to be the most salient as well as the most contentious. It is the subject of the challenge advanced by Kenneth Ehrenberg (2016), presented in §2.3.2.1. In §2.3.2.2, I present my own objection which does not take issue with any of the properties Shapiro claims that legal organisations possess. Instead, I argue that Shapiro's conceptions of both *nature* and *identity* are problematic, which renders his answer to the *Identity Question* incomplete. It is this incompleteness, I argue, that prevents him from being able to distinguish between legal organisations and other similar kinds of groups.[2]

2.3.2.1 Ehrenberg's challenge

Ehrenberg argues that Shapiro's answer to the *Identity Question* is incorrect because self-certification is not the defining property that Shapiro thinks it is. He argues that it is an arbitrary property that is possessed by other non-legal groups. Worse than this, it is not clear to Ehrenberg that legal organisations are actually fully self-certifying. These are serious objections that, if not met, will derail Shapiro's whole project, given how important it is for his thesis that he can isolate legal organisations from other similar groups in order to analyse the norms they produce. In this subsection, I will develop Ehrenberg's challenges and consider the ways in which Shapiro responds. I will agree with Ehrenberg that these are

[2] Another issue with Shapiro's answer to the *Identity Question* for legal organisations is that he conflates two separate questions: (i) What are the properties of legal organisations as a *kind*? and (ii) What are the properties of legal organisations as specific *types*, i.e., courts, police, legislatures, etc.? In the case of (i), legal organisations are a broader category under which various distinct groups fall (i.e., the types as in (ii)). It seems that Shapiro is after a very precise account of the former. However, although there will be general properties that all legal organisations share, they will diverge in other properties they possess. This is not to say that an analysis of legal organisations as a kind is not possible or worthwhile. I think it is and will show how we can go about achieving this in §2.5.2.2. Another virtue of the method presented there is that it can also be used to analyse legal organisations as more specific types. Though, throughout this chapter, when I discuss legal organisations, I follow Shapiro in only meaning to refer to them as *kinds*.

important objections of which Shapiro does not adequately counter. Though, in §2.5.2.2, I will show how Shapiro can meet Ehrenberg's challenges after all.

Let us consider, firstly, Ehrenberg's objection that self-certification is an arbitrary property of legal organisations that is possessed by other non-legal groups. While he does not provide us with any argument for the claim that self-certification is an arbitrary property of legal organisations – he simply states that it "seems like it might just be an arbitrary feature that happens to be common among legal systems at the moment" (ibid.: 335) – he argues for the second claim, that it is a property shared by other non-legal kinds of groups, by using Shapiro's own example of the skinny-dipper at his fictional Floridian Retirement Community. Here, Shapiro considers a law enacted by Florida that prohibits skinny dipping from all pools, both public and private. In such a scenario, if a resident at the Floridian Retirement Community breaks this law, the community's Condo Board does not have the power to remove the resident skinny-dipper from their own pool, but must contact the police who can do so without seeking further permission. Shapiro admits that this is because Florida law "does not permit owners to enforce their property rights through this form of self-help" (2017: 25). But, as Ehrenberg correctly notes, this could have been different (2016: 336). As a result, self-certification is not the defining property of legal systems that Shapiro claims it is, and so is not enough to distinguish legal organisations from some similar, non-legal kinds of groups.

To reinforce this point, Ehrenberg reconsiders the example above. At first blush, it may seem to show that legal organisations are self-certifying while the Condo Board is not, but Ehrenberg argues that this is not the case. Rather, all it shows is that the Condo Board is not self-certifying *in this way*. That is, if we consider property rights, then it is correct that the Condo Board does not enjoy a presumption of validity to enforce them, however, there are a great many other kinds of actions which the Condo Board can carry out without prior authorisations from a superior group (e.g., when to switch the tv off or which day to play Bingo). So why does Shapiro think that Condo Boards are not self-certifying but legal organisations are? Ehrenberg suggests that this problem arises because Shapiro's notion of 'enforcement' is too narrow. In particular, his understanding of what it is to enforce a rule seems to be something more physical. Consider again the skinny dipper: the police can enforce the rules by 'yanking' the resident out of the pool, but the Condo Board does not have this same power. As Ehrenberg mentions, the enforcement of this rule requires the performance of an action that can infringe on certain rights held by the individual, such as the right to bodily integrity. He points out (2016: 336) that in the case of non-legal groups,

actions that do not threaten to interfere with such closely guarded rights are less likely to require authorisation from a superior prior to enforcement. Thus, by broadening our view of what counts as enforcing rules, Ehrenberg concludes that self-certification is not unique to legal organisations.

Potentially the most damaging objection that Ehrenberg levels against Shapiro is that legal organisations are not fully self-certifying. I will briefly present the examples he uses to argue for this as well as his dismissal of the two responses given by Shapiro. Consider the following example that Ehrenberg takes to undermine self-certification. The system of government in some Commonwealth countries requires that the Governor General (the representative of the Crown) approves all acts of Parliament before they become law. The first response offered by Shapiro suggests that in cases like this where a legal organisation's actions are not presumed valid by a superior group, the former is a subsidiary of the latter – i.e., it is part of the same legal system. Returning to our example of Commonwealth countries, "where the governor general exercises real authority to withhold Crown approval, the system is simply a sub-part of the British legal system" (ibid.: 337). Yet, as Ehrenberg points out, Shapiro takes State law as a distinct system, afforded the presumption of validity by Federal law, and so it is difficult to see where Shapiro draws the line between subsidiaries and distinct legal systems. Ehrenberg argues that Shapiro's only way to do this seems to be by using self-certification. But this is circular: Shapiro is trying to argue that what appears to be a non-self-certifying legal organisation is not a counterexample to the self-certification of legal organisations because the former is in fact a subsidiary of a superior, self-certifying legal system. Yet, that subsidiaries are not self-certifying is the only way we can identify them from legal systems. In other words, in order to argue for this property, we have to use it.

Let us consider Shapiro's second response to see if it fairs any better. He concedes that self-certification, as well as the other properties he identifies legal organisations as possessing, come in degrees. Take, for example, the compulsory property of legal authority. Some laws are more or less compulsory, given a certain context, e.g., conscientious objectors are imprisoned as a consequence of their refusal to take up arms, but they are not forced to fight. They have a right to refuse to follow the law commanding conscription. As Shapiro puts it, they cannot quit the law entirely, but they can quit some part of it under certain circumstances (2017: 27). While that is the case in some legal systems, it is not the case in others, and so some legal systems can be said to be more or less compulsory than others. Just as this property comes in degrees, so does self-certification: some groups can be more or less self-

certifying than others if more or less of their actions are presumed valid by a superior. According to Shapiro, we should expect that legal organisations are almost always self-certifying. From all this, he suggests that legality itself also comes in degrees: "the more self-certifying or compulsory an organisation is, the more legal it should be considered" (Shapiro 2017: 27). However, none of this helps Shapiro answer the objections raised by Ehrenberg: the *Identity Question* remains. In fact, this response highlights the issue: self-certification cannot be used to draw a clear line between legal organisations and other similar, but non-legal groups since, as Shapiro admits, some legal systems are more or less self-certifying than others, and as Ehrenberg has argued, some non-legal groups seem to possess a fair degree of self-certification. Appealing to the degree of this or any other property of a group is too vague since it is possible to have groups with a high degree of each property that still do not qualify as legal, and others with a lower degree which should. Short of fixing some ad-hoc threshold, Shapiro fails to give the clear-cut distinction he needs to separate legal organisations from other similar kinds of groups and Ehrenberg is correct to reject this as a satisfactory response.

However, as difficult as these challenges may be for Shapiro to meet, I do not take them to be fatal for his Planning Theory. Rather, I think there is a response open to Shapiro which will allow him to revise his answer to the *Identity Question* by offering an alternative way of making the distinction he needs for his project. Though, an outline of this will have to wait until §2.5.2.2 as I will presently consider one last objection against Shapiro's account of the nature of legal organisations.

2.3.2.2 *Nature* and *Identity*

In the previous subsection, I presented Ehrenberg's challenge against Shapiro not because I take it to be decisive, but rather because it represents a symptom of a larger problem. In this subsection, I will diagnose what I take this to be.[3] I will leave the remedy for §2.5.2.2.

Let me start by siding with Ehrenberg. I agree that self-certification does not seem to be a property exclusive to legal organisations, nor is it clear that all legal organisations even possess it. That is to say, it does not appear to be a necessary property of them, much less the salient property Shapiro takes it to be. The result of all this is that Shapiro fails to answer his *Identity Question* for legal organisations and so, he cannot distinguish legal organisations

[3] The work presented here draws significantly from that which I developed in Mellin (2020).

from other, similar kinds of groups. Even more crucially, he cannot distinguish them from *non-legal* social planning organisations.

Yet, I do not think that this is a surprise. The reason for this has nothing to do with the particular properties that he characterises legal organisations as possessing. Rather, the problem here and the reason he is unable to distinguish them from other, similar, but non-legal groups is that he does not in fact provide a complete account of their identity. Short of this, we cannot expect otherwise.

Here is where I depart from Ehrenberg. I argue that Shapiro fails in his answer to the *Identity Question* for legal organisations due to an inaccurate conception of *nature* which leads to an incomplete notion of *identity*. As a result of this, his *Identity Question* is too narrow and he cannot hope to give a complete account of the nature of legal organisations, which in turn, prevents him from being able to distinguish them from other, similar, but importantly different groups. Though, all is not lost for Shapiro's project: once these notions are clarified, we can better understand exactly what an account of the nature of legal organisations must include. The purpose of the present subsection is exactly that – by elaborating on, and correcting, the problems with Shapiro's conceptions of both *identity* and *nature*, we will be able to provide such an account in §2.5.2.2. Before getting to this point, I will detail what I take to be the issues.

Firstly, let us consider Shapiro's understanding of *nature*. In presenting his project as concerned with an enquiry into the 'fundamental nature of law', Shapiro unpacks his main question, *What is Law?*, "by asking what exactly it is that we want to know when we inquire into the nature of something" (2011: 8). According to him, there are two possibilities. The first is that "we are asking about the thing's *identity*, that is, what it is to be that thing" (ibid.). He goes on, "[i]n general, to ask about the identity of X is to ask what it is about X that makes it X and not Y or Z or any other such thing" (ibid.). This kind of enquiry he calls the *Identity Question*, where a correct answer to it "must supply the set of properties that make (possible or actual) instances of X the things that they are" (ibid.). In relation to his project concerning the nature of law, it must "discover what makes all and only instances of law instances of *law* and not something else" (ibid.: 9). The second sense of *natur*e that Shapiro considers is what he names the *Implication Question*. This enquiry, in contrast to the *Identity Question*, is not concerned with the properties that make an object the thing that it is, but rather with "what *necessarily follows from* the fact that it is what it is and not something else" (ibid.). In other words, he says, "[i]n this second sense of "nature," to discover an entity's nature is in part to discover those properties that it *necessarily* has", where "an object

has a property necessarily just in case it could not fail to have it. Thus, to discover the law's nature, in this second sense, would be in part to discover its necessary properties, that is, those properties that law could not fail to have" (ibid.).[4] When it comes to law, in asking the *Implication Question*, then, "we want to know which properties law necessarily possesses in virtue of being an instance of law and not a game, social etiquette, religion, or some other thing" (ibid.: 9-10).

With this, Shapiro clarifies that to give an account of the nature of something, we must answer both the *Identity* and *Implication* questions, and so, his project to investigate the fundamental nature of law will do exactly this. However, his formulation of these questions is unclear and problematic. For a start, he takes the *Identity Question* for an object X "to ask what it is about X that makes it X and not Y or Z or any other such thing" (ibid. 8), where a correct answer "must supply the set of properties" of X. Yet, he says of the *Implication Question* that when we ask it for law "we want to know which properties law necessarily possesses in virtue of being an instance of law" and not something else (ibid. 9-10). But this is to ask the very same question! As a result, the distinction Shapiro is trying to track between these questions falls apart and his notion of *nature* is left ambiguous.

To be charitable to Shapiro, we may be able to interpret a distinction between his *Identity* and *Implication* questions: the latter is concerned exclusively with necessary (and contingent) properties. As mentioned, Shapiro is explicit that the *Implication Question* involves discovering those properties that an object necessarily has. Though, as I will presently argue, this strategy will not help him out since it leads to an incomplete notion of *identity* and results in an inaccurate notion of *nature*. Let me explain.

Starting with the latter claim, I take his conception of *nature* to be inaccurate because, on the charitable interpretation offered above, he seems to regard the necessary properties of an object as separate from its identity and phrases it as a separate question (the *Implication Question*). But this is not a separate question: these properties (e.g., necessary and contingent properties) are part of what constitutes the identity of an object, and so included in an answer to the *Identity Question* will be a list of the object's necessary properties. Thus, it is not a different question with a different answer. Of course, it is not problematic to want to focus on an object's necessary properties – there are many reasons why one may wish to focus on particular kinds of properties. However, it is certainly problematic to split the notion of *nature* in this way.

[4] Though, he later adds that this question is also concerned with an object's contingent properties.

Moreover, it impacts on Shapiro's notion of *identity* since an object's necessary properties are crucial in providing an account of its identity. Thus, by separating them from this notion, it is unclear what an answer to the *Identity Question* will provide, as it cannot possibly amount to the identity of an object. Perhaps the reason for this ambiguity is that Shapiro does not appear to be following any particular discussion about identity, and so it is hard to tell what exactly is the notion he is trying to elucidate.[5] It seems that there are at least three different kinds of enquiries which he conflates in his discussion of *identity*. I think it is worth clarifying these so that we can try to make sense of what exactly Shapiro is trying to capture and how it fits with his larger project.

Let me draw out these different possibilities by considering some object, *X*. When we ask *What is the identity of X?*, following Shapiro's discussion, we might be asking, (1) about the *properties* that constitute it, so that our question can be rephrased more accurately as 'What makes *X* the thing that it is?'. This tracks a more standard conception of what an investigation into an object's *nature* amounts to. Another option is that we are instead asking, (2) 'What kind of thing is *X*?', where an answer to this will determine what *kind* of object *X* is by appealing to its properties (e.g., as specified in our answer to the first question). Or, (3) we may be after the conditions to *individuate X* from other instances of the same kind, or to track *X* through time and possibilities. This is to search for a Criterion of Identity, or in other words, a formula which logically expresses an identity relation (e.g., the conditions that *X* must satisfy in order to guarantee that it is one and the same object across times and possible worlds). Since in this case we are trying to individuate *X* from other instances of the same kind, we must have already determined its kind, which is to have answered (2) by way of (1).

This helps us to clarify Shapiro's project since, by asking the *Identity Question* for legal organisations, we can see that he already starts with the *kind* of object he is interested in, i.e., legal organisations. Given that he is not trying to determine this, his project is not along the lines of (2). Notice further that he is also not trying to establish a Criterion of Identity for a particular legal organisation, and so is not concerned with (3) either. Rather, he sets out to determine what properties legal organisations possess in order to distinguish them from other similar kinds of objects, e.g., non-legal organisations, which is to undertake (1).

As we saw in the previous subsection, Ehrenberg argues that Shapiro does not achieve this goal. While I agree with this criticism, I differ in thinking that we cannot expect Shapiro to

[5] As it would take the discussion too far off-course, I cannot elaborate on this further here. Though, see Noonan & Curtis (2022) for a detailed summary of the main debates on identity in the literature.

do so given that his conception of *nature* is problematic in a way that renders his notion of *identity* incomplete (by excluding an object's necessary (and contingent) properties). Worse still, as I have just demonstrated, his notion of *identity* is equivocal (and perhaps even idiosyncratic). Given all this, I suggest that it is better to proceed with the standard conception of *nature* (along the lines of (1)) rather than Shapiro's problematic attempt to distinguish between two different senses of this notion. As a result, the *Identity* and *Implication* questions, in representing these two separate enquiries, will be dropped.

In what follows, I will consider how Shapiro's investigation into the nature of law, beginning with an analysis of legal organisation, can be further improved by turning to some related projects in social ontology. More specifically, §2.4 will assist Shapiro in answering (1) by identifying some of the properties that make legal organisations the kind of group that they are. §2.5 will then gesture towards how a more accurate analysis can be provided.

2.4. What are groups?

What are groups? is a question that asks about the nature of groups in general, and is one that Shapiro does not consider. While this may, at first, seem to be a question rather disconnected from his project, its relevance will become clear in trying to answer it, as well as another, narrower question that it will raise; namely, *What are organised groups?* Although Shapiro does not address the first, more general question about the nature of groups, he does come some way towards analysing the nature of organised groups. I will begin in §2.4.1 by recounting Shapiro's characterisation of organisations before complimenting it in §2.4.2 by introducing one of the most sophisticated accounts of the nature of groups, developed by Katherine Ritchie. In §2.4.3, I will argue that a further distinction made to this view by Miguel Garcia-Godinez can help bring Shapiro closer to developing an account of the nature of legal organisations.

2.4.1 Shapiro on organisations

Recall from §2.2.1 that, for Shapiro, an organisation is "any group that engages in a shared, official and institutional activity" (2017: 17). In §2.2.2, I argued that by first characterising legal activity as the shared, official, and institutional activity of social planning, Shapiro puts the cart before the horse resulting in his constrained thesis that legal organisations are social planning organisations. I also argued that Shapiro does not, in fact, distinguish between official and institutional activity, as when he elaborates on the former, he is instead discussing the *roles* that allow legal officials to perform certain activities.

The first challenge points to a methodological inconsistency with Shapiro's overall project; as we can also see from his analysis of organisations, Shapiro makes the same mistake by characterising them in terms of the kind of activities he takes them to perform. A solution to this problem will require refocusing his project to begin with a more general investigation into the nature of groups. With this, we can then hone in on specific kinds of groups, such as organisations to present an account of them that does not depend on an examination of the activities they carry out. This will be the goal of §2.4.2.

For now, let us return to the second issue I raised in §2.2.2. Luckily for Shapiro, this can be more easily met. That he is not elaborating on any kind of activity when explaining what he understands as "official activity", but is rather discussing roles or *offices*, actually inadvertently helps his project. From his characterisation of organisations, this is the only feature which does not describe the activity, but rather something about the group itself, or more specifically, its structure. This makes it possible to reframe Shapiro's analysis of organisations (and subsequently, of legal organisations) in a way that retains methodological consistency with his project: organisations are groups that are constituted by fungible 'positions of authority', or offices. That is to say, organisations are groups with a certain structure, i.e., networks of roles which bestow occupiers with specific normative powers and responsibilities.

While this is a good start, much is left to be said. In order to fill the gaps in Shapiro's characterisation of (legal) organisations, I will presently consider one of the most prominent accounts of the nature of groups and show how well it fits with the reframing of Shapiro's analysis as offered above.

2.4.2 Ritchie on feature and organised groups

In several works (2013, 2015, 2018, 2020), Katherine Ritchie has developed a 'Structuralist' account of social groups, so-called because of the role group structure plays in distinguishing between different sorts of groups.[6] Ritchie focuses on two kinds which she labels *feature groups* and *organised groups*. Feature groups "include racial, gender, sexual orientation, and other groups that involve sharing (or being taken to share) some features" (2018: 13). Roughly, groups of this sort are instantiations or realisations of social kinds rather than of structures. For instance, the social group of women is the instantiation of the social kind

[6] One of the main motivations Ritchie has in developing her account is to defend Group Realism – the view that there are such entities as groups. This is in opposition to Group Eliminativism which argues that, while it may be convenient to talk as if groups exist, this is purely metaphorical as there are no such things as groups, but rather merely collections of individuals and relations between them.

woman, i.e., all those who possess or are taken to possess the property of *being a woman* instantiate the group of women. Note that one need not choose to be a member of a particular feature group, in fact one may not identify as a member of that group at all, yet if one is taken to possess a certain feature, one is automatically categorised as belonging to that group. Moreover, that for a particular feature group to exist requires the *instantiation* of the corresponding social kind is important – without this, there would be no concrete object (e.g., the group), rather, there would only be an abstract object (e.g., the kind).

Organised groups, on the other hand, are realisations of social structures or "structured wholes" and "include groups like teams, committees, courts, and clubs" (ibid.). Social structures are "complexes, networks, or "latticeworks" of relations" (2020: 405) that "can only be defined with reference to social factors" (ibid.: 412) like beliefs, intentions, habits, and practices. They are composed of nodes (or positions) and edges (or relations), where "a node is defined in terms of its relations to other nodes" and edges are these "largely functional" relations (which can be asymmetric or symmetric) that hold between nodes (2015: 316). As positions in group structures, nodes can only be occupied by "people/social creatures or structured groups of people/social creatures" (2020: 411) that satisfy the requirements (i.e., stand in certain relations) specified by the nodes. Thus, the structure captures a group's functional organisation. For example, the Scottish Government's structure captures the functional roles of the First Minister, Deputy First Minister, Health Secretary, etc. with relations like *presenting policy to*, *stepping in on behalf of*, and *working alongside*, etc.

As was the case with feature groups, organised groups can only be said to exist when their structures are *instantiated*, i.e., when the nodes are occupied. An uninstantiated structure is merely a structure – its instantiation is what brings a particular group into existence.

It is clear from Ritchie's distinction between feature and organised groups that, for our purposes, we need only focus further on the latter as these are the kinds of groups with which Shapiro is concerned. It should also be evident that the suggested reframing of Shapiro's analysis of organisations as groups structured by roles which bestow specific normative powers on occupiers, fits particularly well with Ritchie's characterisation of organised groups so far. For this reason, in the rest of this subsection, I will elaborate on three distinctions in social structures that Ritchie uses to identify what she considers to be salient features of organised groups. Given that this kind of groups is consistent with Shapiro's organisations, Ritchie's account can be taken as providing a detailed picture of the nature of

organisations that we can use to help fill the gaps in Shapiro's account of (legal) organisations.

The first distinction that Ritchie discusses is between overt and covert social structures. The former are those structures that are 'openly acknowledged' as depending on social factors e.g., the Senedd (Welsh Parliament), whereas the latter is generally regarded as being independent of social factors, e.g., race. This is not to say that covert social structures do not depend on the social, but rather that they appear not to – it is only upon further reflection and examination that their social dependence is detected.

The second distinction Ritchie makes concerns the way in which social structures relate to intentions. As she points out, they can be either intentionally or unintentionally created/instantiated. Since the intentional creation of a structure requires collective intentionality to create it, usually such structures are also intentionally instantiated, i.e., people intend to play certain roles, and thus intentionally occupy the nodes in the structure. However, Ritchie leaves room for occasions where these features may come apart.

The final distinction she considers is between internal and external social structures. A structure is internal when its nodes are defined by relations to other nodes in the structure. To illustrate this, Ritchie uses the example of a baseball team: "The relations between nodes in a baseball team are internal to the team. It is the team itself that is configured or structured by the baseball team structure" (2020: 409). In contrast, a structure is external when some of its nodes are defined by relations to other nodes that are outwith the structure. To see this, Ritchie asks us to consider the structure of the social group women:

> a node labelled 'women' might be related to a node labelled 'men' by relations of sexual dominance (i.e., men sexually dominate women), economic subordination (i.e., women are economically subordinated in relation to men), and so on. These relations relate the node 'women' to other nodes. They are outside or external to the node women. (ibid.: 409-10)

Putting all this together, we have that organised groups have structures that are usually overt, internal, and intentionally created/instantiated.[7] While we can use this to supplement Shapiro's account of organisations, it only works as the foundation for a deeper analysis of specific types of organisations. In the following subsection, I will present a modification of

[7] Though, as Ritchie points out, this may not always be the case (2020: 410).

Ritchie's view that I maintain can be used by Shapiro to develop his account of legal organisations, finally allowing him to distinguish them from other, similar kinds of groups.

2.4.3 Garcia-Godinez on institutional groups

In a recent book chapter, Miguel Garcia-Godinez advances a theory of institutional groups based on Ritchie's structuralism. By introducing and defending a further distinction in group structures, he argues for the thesis that institutional groups (as a species of organised groups) are instantiations of *formal* group structures. I will suggest here that not only can we use Garcia-Godinez's institutional account of groups to characterise legal organisations, but that we can also use it to see how they differ from some other, similar kinds of groups.

In his (2020), Garcia-Godinez notes that, although it is "a good starting point for a more detailed ontological analysis of organised social groups" (ibid.: 40), Ritchie's account "is not yet fine-grained enough to accommodate a further distinction between organised groups" (ibid.: 45). In this case, the distinction Garcia-Godinez wants to make is "between institutional groups and other kinds of organised groups" (ibid.). Ritchie fails to do this by bundling the former in with the latter, which prevents us from being able to make important distinctions between radically different kinds of organised groups. This criticism is echoed by the point I made above – that we can use Ritchie's work to supplement Shapiro's account of organisations, but not to provide an account of *legal* organisations. Thus, we are unable to distinguish between legal organisations and other groups that in some ways appear to be similar, but in other ways are wildly different, e.g., criminal organisations.

The key to accounting for this difference, according to Garcia-Godinez, is to recognise that some organised groups have an informal group structure, while others have a formal group structure. For a group structure to be informal (or formal) it must be both informally (or formally) created and informally (or formally) instantiated. As Garcia-Godinez argues, only institutional groups are formally created and formally instantiated. Let me unpack this.

Some groups are established by way of an authoritative act "i.e., by someone or some group exercising the power to create certain roles and relations" (ibid: 47), while others are not – they are established simply through common beliefs and practices about what being a member of the group requires. This distinction amounts to whether a group is formally or informally created.

Likewise, in order to join some groups, prospective members must follow certain formal processes in order to "[make] explicit their collective acceptance attitude through performing certain actions e.g., by signing a contract, filling out a membership form, making an oath,

etc" (ibid: 46), where these actions are officially regulated. Meanwhile, to join some other groups, individuals need only form appropriate attitudes and be accepted as a member of the group by its members. This distinction amounts to whether a group is formally instantiated or informally instantiated.

Garcia-Godinez takes formal instantiation to explain "why the individuals occupying the corresponding roles in the formal group structure are both internally and externally recognised as institutional group members" (ibid.: 49). While this may appear to utilise Ritchie's internal/external group structure distinction, it is important to notice here that Garcia-Godinez introduces a further distinction between internal and external *recognition*. The former is "when group members take each other as group members" and the latter is "when some people are taken to be group members, regardless of their accepting themselves to be group members" (ibid.).

This distinction, although subtle, is powerful. It can be used to differentiate between feature, organised, and institutional groups. As Ritchie demonstrated with feature groups, individuals need not identify as belonging to a particular group to be taken as a member, rather, they need only be taken as possessing the property which corresponds to the social kind that is instantiated by the group. This is a case whereby all that is required for an individual to occupy a node or role, e.g., the instantiation of the social group, is external recognition. While Ritchie comes close to acknowledging the need for internal recognition when it comes to organised group membership, this is only explicitly pointed out by Garcia-Godinez (ibid.). All organised groups, whether formal or informal, require for their instantiation internal recognition, which can be explicit (i.e., via formal processes in the case of the former) or implicit (i.e., via appropriate attitudes and acceptance in the case of the latter). Though, it is only in the case of the instantiation of institutional groups that the structure needs to be both internally and externally recognised. This is due to the formal instantiation of institutional groups, i.e., membership requiring individuals to make explicit their acceptance attitude of the group structure. To see this distinction between the recognition involved for informal and formal groups compare, e.g., a referee for a street football team with the UK Prime Minister. The referee need only be recognised as such by the rest of the team to occupy the role, where this recognition does not involve any formal process. Boris Johnson, on the other hand, must be recognised both by the UK Government and its citizens through the formal processes of voting and the appointment of the office by the reigning monarch in order to become the UK Prime Minister.

Since “being recognised as an institutional group member involves having (and being taken to have) certain deontic powers determined by the corresponding institutional role” which results in the role-occupier being “normatively committed to (not) performing certain intentional actions, which can contribute to the realisation of an institutional group action” (ibid.: 49), Garcia-Godinez introduces the notion of *job-descriptions* to account for institutional roles. Job-descriptions “specify both the requirements for role-occupancy and the deontic powers attached to it” (ibid.: 49-50). With this, he proposes re-describing the formal structure of institutional groups “as a formal network of job-descriptions” (ibid.: 50).

By using Garcia-Godinez’s distinctions between formal/informal creation and instantiation, as well as his notion of job-descriptions, combined with the required external recognition of formal group structures, we can see that certain groups, e.g., legal organisation are institutional groups, while others e.g., criminal organisations, are not. The latter would not qualify since group members are not externally recognised as having any deontic powers corresponding to their institutional role. Moreover, parents can also be distinguished from legal organisations as they are not formally created or instantiated.

Although, again, this distinction only works to separate institutional groups from organised groups, and so cannot distinguish legal organisations from other institutional groups like condominium boards, national football teams, and married couples. More work would need to be done to make these further distinctions. Such a project is too large to undertake here, but some points to consider may be found in the deontic powers determined by different institutional roles. A way of categorising these which may help with separating legal organisations from other non-legal institutional groups will be gestured towards in §2.5.2.2.

2.5. A metaphysical account of legal organisations

This section will consider how we might answer each of the challenges presented throughout this chapter by exploring and applying relevant literature in social ontology.

2.5.1 The structure of legal organisations

In §2.2.2, I raised a concern to the effect that Shapiro’s project is methodologically inconsistent since, despite his promise to begin an analysis of the nature of law with a metaphysical account of legal organisations, Shapiro’s starting point is instead an account of the activity he takes the latter to perform. He then uses this, as well as a similarly flawed

account of organisations to characterise legal organisations simply as groups with the features necessary to perform these activities.

While I have not examined his account of legal activity here, as it will be the subject of the following chapter, in §2.4.1, I considered the incomplete and problematic view he espouses of organisations. I argued that this is largely the result of his failure to consider the nature of groups more generally. In the rest of §2.4, I took up the task of trying to help Shapiro fill this gap and generate a more detailed and accurate account of (legal) organisations. As a result, in this subsection, I simply wish to propose what a refocusing of Shapiro's project to fit with his own methodological approach would look like, based on the application of the most promising metaphysical accounts of groups.

From Ritchie's distinction between feature groups and organised groups, we can see clearly that organisations fit into the latter category as their structure consists in complex networks of positions and relations. Following Ritchie, we can illuminate some further features of organised groups: they have an internal and overt structure which is intentionally created and instantiated. Though, as mentioned in the previous section, this only helps Shapiro with an account of organisations as it extends the more simplistic characterisation he provides of them as official, institutional groups. More work is thus needed to individuate legal organisations from this more general kind.

I suggested that Garcia-Godinez's theory of institutional groups is a good starting point as he develops on Ritchie's work to distinguish this further kind of group within her framework. On his account of institutional groups as a species of organised groups, legal organisations seem to be a clear example as they fit his characterisation of formal groups. Consequently, we have a more detailed picture of legal organisations as *formally* intentionally created and instantiated internal, overt structures that are both externally and internally *recognised*.

By using Garcia-Godinez's formal/informal group distinction in the previous section, we were able to see how legal organisations can be distinguished from some of the other, similar kinds of groups that Shapiro considers. However, as Garcia-Godinez's aim is to make room in Ritchie's theory for institutional groups, it is still too general in accounting for legal organisations specifically, and so cannot help to distinguish them from all other institutional groups. I considered one way that this might be achieved, i.e., by focusing more on the deontic powers determined by different institutional roles. In the following subsection, I will gesture towards a more sophisticated framework which should be able to help distinguish

more specific kinds of institutions as well as types of legal organisations for a more accurate account of their natures.

2.5.2 The features of legal organisations

In this subsection, I will consider two different options open to help Shapiro separate legal organisations from other, similar kinds of groups. The first, explored in §2.5.2.1, is offered by Ehrenberg in response to the objections he raises against Shapiro's characterisation of legal organisations as *self-certifying* planning organisations. Though, as I will argue here, Ehrenberg's alternative faces its own challenges, and also cannot escape analysing the nature of legal organisations. The second option, presented in §2.5.2.2, involves utilising Brian Epstein's metaphysical framework for analysing the nature of groups. As I will show, this is a promising way forward for Shapiro as it will allow him to identify the most salient properties of legal organisations, and thus provide a more detailed account of their nature. Though, it should be noted that the task of applying this framework to generate such an account is too big an undertaking here, and so I will only gesture towards how this can be achieved.

2.5.2.1 Ehrenberg's institutional artifacts[8]

In §2.3.2.1, I considered Ehrenberg's self-certification objection to Shapiro's account of the nature of legal organisations. While agreeing that this poses a significant challenge to his view, I suggested that Shapiro could meet it. Here, I will begin by presenting Ehrenberg's proposed solution to the problems he raises before rejecting it in favour of an alternative I will provide in the following subsection.

Simply put, Ehrenberg thinks that Shapiro should abandon his focus on self-certification, not only because of the problems he has highlighted, but also simply because "it is not what makes [legality] special" (2016: 340). Rather, according to Ehrenberg, what makes law special is that we make it in a certain way to have a certain status: "we make it special by making it an institution with a special status, conferred when appropriately sourced norms are used to solve for the conditions of legality" (ibid.). More specifically, this is to say that "the particular kind of plan that law represents is an institutionalised abstract artefact" (ibid.: 338), where:

> its institutional nature is captured by Searle's theory; its abstract nature is captured by Shapiro's claim that law is a plan and hence an abstract entity; and seeing it as an

[8] In both this and the following subsection, I reuse the ideas presented in Mellin (2020). Thanks to De Gruyter for giving me their permission to do so.

> artefact is meant to call up more clearly the notion that the law is a tool created by human beings to address specific tasks, that it has a set of functions. (ibid.: 329)

For Ehrenberg, the function of law is to solve social problems (ibid.: 340).[9] Though, as he is aware, a concern here might be that other normative systems can also solve these problems. However, echoing Shapiro (2017: 19), Ehrenberg argues that other normative systems cannot solve these problems completely or as well. This is because, for Ehrenberg, law "is expressly designed for the purpose of solving those problems and designed to be recognised as such" (2016: 339). That is to say, law's artifactual nature as "a tool created by humans to address specific tasks" (ibid.: 329) is a crucial aspect of Ehrenberg's view.

With this understanding, Ehrenberg takes the *Identity Question* to lose its force and suggests that we should not be so worried about answering it, for it is no longer needed in order to see what "sets the law apart" (ibid.: 340).[10]

However, there are many problems with Ehrenberg's answer. Most notably, it is unclear what he means by 'law'. There are at least two different claims he appears to be making: on the one hand, he characterises law as an institutional abstract artifact, and on the other, he draws on Searle to say that "law is a specifically created status that provides for the institutional creation and assignment of other statuses" (ibid.: 339). Though, it seems to me that in the latter case, he does not mean to speak of law as a status, but rather *legality*. Still, when it comes to his claim that law is an institutional abstract artifact, he could mean one of two things by 'law'. One option (and this seems more likely to me) is that he is referring to law as a legal system (e.g., as constituted by norms), given this abstract element. Yet, bearing in mind what he says elsewhere about law as an "expressly designed social institution" (ibid.: 340), he may mean instead that law as an institution is an institutional abstract artifact. Though, this second notion raises further problems in that institutions are commonly taken to be constituted by more than just rules and roles, but of people and objects as well, so that an institution cannot be an abstract artifact. Therefore, it seems the most charitable assumption to make here is that when Ehrenberg claims that law is an institutional abstract artifact, by 'law' he means system of legal rules.

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[9] Although it would be more accurate to characterise the goal of *legal organisations* as solving social problems through the performance of legal activities, I leave this point for now. I will say something more about this in §3.2 and §4.2.1.

[10] Of course, as I've already argued, Shapiro's *Identity Question* is problematically formed and so is better dropped. Yet, I do not agree that Shapiro's project (as represented in part by this question) loses its force. Rather, I think that precisely the problem with the *Identity* and *Implication* questions is that they cloud what exactly his investigation involves.

This assumption also seems to fit better with Ehrenberg's attempt to relate his view with Shapiro's, since he takes his understanding of law's abstract nature to be "captured by Shapiro's claim that law is a plan" (ibid.: 329). Again, on the face of it, the claim that Ehrenberg is attributing to Shapiro is at best ambiguous, and at worst, incorrect. Shapiro does not say that law is a plan, but rather that *laws* are plans. However, as mentioned above, it seems to me that by 'law', Ehrenberg means system of legal rules, which although not the same as individual laws, gets close enough to Shapiro's view that we can make sense of Ehrenberg using Shapiro here to elaborate on what makes law abstract.[11]

In general, Ehrenberg presents his view as an alternative way of answering Shapiro's *Identity Question* and intends for his account to be compatible with Shapiro's Planning Theory of Law. Yet, it is not so much a solution to the problem he raises against Shapiro's own answer as an entirely different approach to the question. More specifically, by suggesting that law is instead an institutional abstract artifact, Ehrenberg is shifting focus from (concrete) legal organisations to the (abstract) systems of rules that they create. For this reason, his alternative is methodologically incompatible with Shapiro's distinctive approach to begin his investigation into the nature of law by centralising the role of legal organisations. As we have already seen, Shapiro thinks that an important oversight in analytic legal philosophy has been the priority of legal organisations, and endeavours to distance himself from the traditional line of enquiry which instead focuses on legal norms to explain legal phenomena. It is in this way that Shapiro's project is so interesting and distinctive: he proposes to update the historical focus from legal norms to legal organisations so that an account of the nature of law begins by analysing the nature of legal organisations. Thus, since Shapiro's account of law depends on his account of legal organisations, it is crucial that he can distinguish them from other similar kinds of groups. This is why Ehrenberg's suggestion of abandoning the *Identity Question* for legal organisations and replacing it with an analysis of legal norms is not an option for Shapiro: by undermining the role of legal organisations in the analysis of law's nature, Ehrenberg strays too far from the focus of Shapiro's project.

Even if we gloss over this methodological mismatch, Ehrenberg's suggestion to take law as an institutional abstract artifact raises more questions than it answers. The most immediate concerns we may have include: *What is an institution with a special status? How is it made?*

[11] Unless, in this instance, by 'law' Ehrenberg is referring to Shapiro's Master Plan. There is some other textual evidence of this when he suggests that "the particular kind of plan that law represents is an institutionalised abstract artefact" (ibid.: 338). Though, I do not think this helps to clarify anything as it is unclear what it means to say that the law *represents* the Master Plan. Much more work would be needed before we would be in a position to analyse this claim.

What is this special status that the institution possesses? And how does the institution come to possess it? What are appropriately sourced norms? And how are they created?

More troublesome for Ehrenberg is that in order to answer all these questions, it seems that we need an account of legal organisations. If I am correct about this, then Ehrenberg is unable to avoid analysing the nature of legal organisations, and his contention that we look elsewhere to find what is distinctive about law is defeated. As a result, all Ehrenberg's suggestion does it to further motivate the importance of Shapiro's project, and to highlight the urgency of providing an account of legal organisations. I will presently consider each of the concerns stated above and show why I think that legal organisations are at least partly involved in answering each one.

Firstly, *What is an institution with a special status?* As previously discussed, Ehrenberg takes 'law' as a status. However, I argued that his use of 'law' is unclear, and suggested that in this instance, he meant 'legality'. Another way to state this question, then, is: *What is a legal institution?* Although Ehrenberg does not develop any such account here, from the other claims he makes about 'law', along with his general aim to remain compatible with Shapiro, it seems that whatever he takes legal institutions to be, they are partly constituted by legal organisations. We can find some support for this in his other description of law as "an expressly designed social institution for solving social problems" (ibid.: 340). This characterisation sounds familiar: for Shapiro, legal organisations are social institutions designed to solve social problems through social planning: "legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality" (2011: 171). Therefore, if we want to press Ehrenberg on an answer to the question, *What are legal institutions?*, then we also need him to provide an account of legal organisations since they partly constitute them.

Moreover, we need Ehrenberg to say more about this special status, which takes us to the next question: *What is this special status that the institution possesses*? This is to ask what the 'legal' status amounts to when assigned to entities. It seems to me that an answer to this question will appeal to certain properties such as powers and responsibilities that are held by the institution, individuals, and objects within it. Many more questions surface here, amongst them: *How* does an institution hold this status? *What* exactly holds it? Again, answering these questions will involve enquiring into the collective agent which assigns the institution this status, along with the powers and responsibilities possessed by the institution, its members, and the objects within in. Since legal organisations partly constitute legal institutions, Ehrenberg cannot escape the task of giving an account of their properties.

This is true also of the third question which concerns the construction of legal institutions: *How do we make an institution with a special status*? (e.g., how do we make a *legal* institution?). Again, Ehrenberg does not tackle this question nor any of the others it generates here. Though, it is clear that in order to do so, he would need an account of legal organisations since, however legal institutions are created, part of this process would involve creating legal organisations, and so we must know about their properties.

This brings us to the last of the concerns raised above: *What are appropriately sourced norms? And how are they created?* These questions are closely related in that the appropriate source of the norms in question is tied to their creation. So let us consider the second question first. According to Ehrenberg, such norms are institutional abstract artifacts, where his conception of institutionality follows Searle. This means that, amongst other things, they are collectively intentionally created. Consequently, to answer both questions, we need to know more about the group which creates them, and so, we need an account of legal organisations. Moreover, as for the first question, given the role of the source in identifying specific norms as appropriate, it is paramount that we can distinguish this source (i.e., legal organisations) from other similar sources (i.e., other similar kinds of groups). When it comes to the second question, we need to investigate the collective intentional group activity responsible for creating these norms. This, in turn, will depend on the kind of group which performs this collective intentional activity, and so, in both cases, we first need a metaphysical analysis of this kind of group.

In fact, this is something endorsed by Ehrenberg himself: "there is some limitation on what kinds of social plans are candidates for legal plans, set both by the *methods by which they are created and adopted* and the purposes to which they are put" (ibid.: 339, my emphasis). That is to say, we need to analyse the method by which legal norms are created and adopted, which will partly involve an account of the group which creates and adopts them. This line of Ehrenberg's view is in keeping with the thought behind Shapiro's approach: "we cannot understand what laws are unless we understand how and for what purposes legal systems produce them in the first place" (2011: 7). Therefore, even with his alternative account of law which he presents as avoiding the problems he takes Shapiro to face as a result of his concern with answering the *Identity Question* for legal organisations, by his own lights, Ehrenberg must also meet the challenge of providing an account of the nature of legal organisations, and so we are back to Shapiro's project.

2.5.2.2 Epstein's metaphysical framework

In this subsection I will sketch a more promising alternative which will allow Shapiro to answer many of the challenges discussed above. By implementing Epstein's recent metaphysical framework for understanding the nature of groups, Shapiro can provide an account of legal organisations that separates them from other similar kinds of groups. I will also use this framework to demonstrate the incompleteness of his notion of *identity*, as raised in §2.3.2.2.

In his (2019), Brian Epstein sets out an ambitious project to "help classify and categorise groups, and shed light on group agency" (ibid.: 4899) He proposes studying the features of specific kinds of groups against four complimentary 'profiles', these are: the *Construction* profile, the *Extra-Essentials* profile, the *Anchor* profile, and the *Accident* profile.

Epstein demonstrates the fruitfulness of his framework by way of considering how four different kinds of groups can be characterised in terms of these profiles. However, as it is not my purpose to develop such a thorough account of legal organisations, I will not present his examples here, nor will I fully fill out his four profiles for legal organisations. Though, I think the value of Epstein's framework can be appreciated by explaining what sorts of features are included in each of his profiles, as well as matching up the properties we have identified legal organisations as possessing. In doing so, we will be able to see three things. First, just how much room there is for an account of legal organisations which can separate them from other institutional groups; second, just how incomplete Shapiro's notion of *identity* really is; and third, where to begin in completing the analysis of legal organisations. To achieve this, let me begin by looking more closely at each of the four profiles.

For Epstein, filling out the *Construction* profile is the first task for analysing the nature of groups. This is because it is concerned with how groups come to exist (their existence conditions), how groups persist over time (their persistence conditions), how groups can be individuated or identified across time and possibilities (their criterion of identity), and how groups are built out of their members (their constitution conditions). While Epstein provides a precise analysis of each of these conditions by developing formulae to be filled out for whichever group is the subject of enquiry, I will not go into the same level of detail here. It is enough for our purposes to simply consider the components therein.

As mentioned, existence conditions concern how a group comes to exist and can involve the performance of a particular activity or that individuals realise certain roles. Persistence conditions establish what is required for a group to continue to exist. Some groups may cease

to exist when a certain activity is no longer performed, others might be able to persist through breaks, while others must be officially disbanded. In a similar fashion, some groups may be able to survive changes to their members, where this might include periods without any members at all. The constitution conditions capture this feature as well as whether or not members are required to play certain functional roles or hold collective intentions (as is the case with organised and institutional groups). The final element in the *Construction* profile is the Criterion of Identity (which I presented in §2.3.2.2). For Epstein, this sets out the minimal relation which must hold between two groups of a kind (or two stages of the same kind of group) to guarantee that they are one and the same group (or stages of the same group). The criterion invoked can concern properties found in any of the profiles and depends on the kind of group being analysed. For instance, for two groups of a kind, g_1 and g_2, the Criterion of Identity may concern the constitution conditions of the group so that to guarantee the identity of g_1 and g_2, e.g., $g_1=g_2$, requires that g_1 and g_2 have the same members across times and worlds.

Though Epstein's *Construction* profile represents some necessary (or essential) properties of groups, it is not exhaustive. The other necessary properties are accounted for in two other profiles: the *Extra-Essentials* and *Anchor* profiles. The former includes the additional essential properties possessed by certain groups and, in some circumstances, their individual members, e.g., abilities, powers, responsibilities, norms, and limitations. While these properties may be deontic, they are not always – as Epstein notes, groups may have abilities or powers but have no obligations to exercise them. When it comes to group members, some may possess certain limitations or powers that others in the same group do not, which allows Epstein's framework to account for asymmetric structures, i.e., hierarchies.

The *Anchor* profile depicts how groups are designed or set-up, e.g., it uncovers the metaphysical basis for groups to have the properties that they do. To better understand the task of this profile, let us consider Epstein's example. As we have already seen, it is the job of the *Construction* profile to capture the constitution (or membership) conditions when analysing some kind of group. Though, we may also be interested to know *why* these are the conditions, or *what makes it the case* that these are the conditions. Epstein suggests that to understand the former requires a causal explanation of the membership conditions, i.e., a history or genealogy for why they were set up in such a way, whereas the latter requires a constitutive explanation of what makes these the membership conditions, i.e., the intentions and actions involved. As Epstein puts it:

> The anchor profile of a kind of group is a list of facts that metaphysically put in place various properties of that group. Even for a given kind of group, some properties may be anchored in one way, while others are anchored in a different way. (ibid.: 4924)

That is, some properties are anchored by causal explanation while others are anchored by constitutive explanation. So, the purpose of the *Anchor* profile is to capture how groups are set-up by investigating the metaphysical basis of the properties they have. These properties are captured by the rest of Epstein's profiles, and so, the *Anchor* profile allows us to ask what sets up, or anchors, a group's existence, persistence, and constitution conditions, its criterion of identity, and the powers or restrictions it or its members possess.

The final profile in Epstein's framework is the *Accident* profile. Echoing Shapiro (2011: 10), Epstein notes that when enquiring into the nature of something, we are not only interested in its necessary (or essential) properties, but we are often also interested in its accidental (or contingent) properties. As he puts it, these properties "can be equally or more important to understanding what groups are, and to classifying them or developing typologies" (2019: 4926). As with the *Extra-Essentials* profile, this profile is concerned with the properties of both groups and their members. In more detail:

> Profiling the accidental properties of a kind of group might include anything at all. They can include properties that groups of the kind actually have in all or most cases, properties that members have, historical properties, size, location, and so on. Among the accidental properties are also various causal properties: the causes by which they came to exist, the causes for them to have the actual memberships they do, the causes for exercising various powers. There are also the causes for the anchors to be in place. (ibid.)

With this reconstruction of Epstein's framework, we are now in a position to match up the properties we have identified legal organisations as possessing, as well as the features that Shapiro takes as distinguishing them from other, similar but non-legal kinds of groups. As we shall see, this exposes the incompleteness of Shapiro's account and demonstrates how much work is left to be done in providing a metaphysical analysis of legal organisations.

2.5.2.3 Profiling legal organisations

Let me return now both to Shapiro's characterisation of legal organisations and the more detailed analysis of their nature that I proposed with the help of Ritchie and Garcia-Godinez.

According to Shapiro, legal organisations are self-certifying, compulsory, social planning organisations with a moral aim. As I have argued throughout this chapter, we have no reason to take legal organisations as social planning organisations since this picture results from Shapiro's contention that legal activity is social planning activity. Instead, I suggested that we analyse the nature of legal organisations by beginning with the more general question, *What are groups?* This exercise resulted in applying Garcia-Godinez's theory of institutional groups to more accurately understand legal organisations as formally intentionally created and instantiated internal, overt structures that are both externally and internally recognised. Let me now undertake the difficult task of categorising all of these properties into Epstein's framework.

Starting with Shapiro, at first glance, it seems as if all the properties he identifies legal organisations as possessing will feature in the *Extra-Essentials* profile, since he takes all of these to be necessary properties. This certainly seems to be the appropriate place to find the self-certifying and compulsory properties. More specifically, we'd find these amongst the extra-essential properties of the group, rather than its members. That legal organisations have a moral aim is a feature also captured by the extra-essentials profile. While others may argue that having a moral aim is a contingent property of legal organisations, Shapiro is clear that it is a necessary property as "a legal system cannot help but have a moral aim if it is to be a legal system" (2011: 215). Similarly in the case of the other extra-essential properties identified thus far, the moral aim is a feature of the group rather than its members.

Let us now consider how to categorise legal organisations as formally intentionally created and instantiated internal, overt structures that are both externally and internally recognised. This characterisation clearly tells us something about how the group is constructed and, in Epstein's terms, anchored. Although tricky to tell which profile captures which properties, it seems to me that the *Construction* profile captures the recognition, internal structure, and formal creation/instantiation features of legal organisations. Let me elaborate on this.

Recognition seems to partly explain how legal organisations come to exist and is also required for them to continue to exist (or persist). Thus, this property is captured by both the existence and persistence conditions within the *Construction* profile. Next, the internal structure concerns the relations between members of a group, and so it seems to say something about the constitution conditions of legal organisations. As for their formal creation, given that this requires an authoritative act, I take this to be another part of the existence conditions for formal, or institutional, groups since it tells us something about how the group comes to exist. Similarly, formal instantiation requires that members take on their

roles explicitly, though some kind of process like signing a contract or filling out a membership form. Thus, this feature belongs to the constitution conditions and is therefore also captured by the *Construction* profile.

As for the other properties of legal organisations – their overt structure and intentional creation/instantiation – these seem to be captured by the *Anchor* profile as each of them says something about what makes certain conditions the case. More specifically, they provide constitutive explanations of the membership and existence conditions. Let me consider each in turn.

That legal organisations have an overt structure means that it is 'openly acknowledged' as depending on social factors. This explains the conditions for the existence of the group structure – that it depends on social practices, habits, beliefs, attitudes, etc. Likewise, the intentional creation of legal organisations tells us what sets up their existence conditions, i.e., collective intentionality. This is the metaphysical basis which figures in a constitutive explanation of how the existence conditions are established. Similarly, with the intentional instantiation of legal organisations. This involves individuals intentionally occupying certain positions (or nodes) in the group structure, and so is part of a constitutive explanation of how the membership conditions are established.

Three things should be clear from this attempt to profile legal organisations. First, that Shapiro's characterisation of them was severely incomplete and that a much deeper analysis is provided by Garcia-Godinez's improvement of Ritchie's structuralist account of groups. Second, that Epstein's framework is an indispensable tool for clarifying and accounting for their various properties. Third, that there are many more properties that must be accounted for before we can boast a complete account of the nature of legal organisations.

Although I have declined to offer this here, I hope to have shown not only that such a task is interesting and informative, but also that, against the views of sceptics, it is, in fact, possible. Additionally, by using Epstein's framework, we have a better idea of the gaps that remain and can look to the empty profiles for guidance on where to start.

2.6. Conclusions

This chapter analysed the first main claim of Shapiro's Planning Theory of Law; *the group claim*, which says that legal organisations are social planning organisations. Although Shapiro does not take this to be the central thesis of his view, I argued that it is if we stay

true to his methodological aim to begin an analysis into the nature of law by focusing on legal organisations. Unfortunately, due to a methodological inconsistency whereby Shapiro instead begins with his *activity claim* that legal activity is social planning activity, he draws the conclusion that legal organisations are social planning organisations. Yet, as I have argued throughout the chapter, this is to put the cart before the horse: in order to determine the nature of legal activity, we first need an account of legal organisations. To refocus Shapiro's project in this way, I considered his brief account of organisations. In doing so, I teased out those properties he identifies them as possessing which do not follow from his assumption that they are necessarily engaged in social planning activity. All this yielded was a characterisation of organisations as groups with a certain structure, i.e., groups constituted by official roles. However, clearly this is not enough to uphold *the group claim* as Shapiro gives us no reason to identify legal organisations as social planning organisations based on such an incomplete analysis of organisations.

However, while this gives us reason to doubt *the group claim*, it is not enough to defeat it. No arguments were given to demonstrate that legal organisations are not social planning organisations. For this reason, it leaves some space for Shapiro to provide a full metaphysical account legal organisations in a way that supports (or at least does not undermine) his *group claim*. I suggested that, in line with his insufficient account of organisations, the most promising way to embark on this task is to appeal to some recent work in social ontology on the nature of groups, and particularly, on institutional groups. More specifically, I maintained that the most sophisticated account we can currently give of legal organisations is that they are institutional groups, based on Garcia-Godinez's metaphysical analysis of institutional groups as formally intentionally created and instantiated internal, overt structures that are both externally and internally recognised. Although this is not yet a complete account of legal organisations, with the help of Epstein's metaphysical framework for understanding the nature of groups, the project of offering one is on the horizon.

Though, I leave this undertaking for another occasion. Instead, I opt to continue in critically engaging with Shapiro's Planning Theory of Law by moving on to examine the second of its main claims, *the activity claim*, which says that legal activity is social planning activity.

Chapter 3

Is Legal Activity Social Planning Activity?

3.1. Introduction

In this chapter, I will investigate Shapiro's claim that legal activity is social planning activity (*the activity claim*). I will explore what I take to be the two main questions which arise from this: (a) *What makes legal activity social planning activity*? And (b) *How do legal organisations carry out legal activity*? §3.2 considers in detail Shapiro's answer to the first of these questions before challenging how closely legal activity resembles social planning activity. §3.3 changes tack. It proceeds by assuming that we can, indeed, draw this parallel in order to tease out what, according to Shapiro, makes legal activity *legal*. It ends with a critical note that Shapiro's answer here is inaccurate and perhaps even circular. To try and see how Shapiro might be able to hold onto a planning theory of legal activity, §3.4 presents Bratman's Planning Theory of Intention, which Shapiro himself relies on. By considering the modifications he makes to Bratman's account in §3.5, I will return to Shapiro's answer to the second question above concerning the agency of legal organisations. I will evaluate Shapiro's answer and present some challenges to it. Although I will ultimately reject Shapiro's *activity claim*, I will hint at how recent contributions in social ontology on shared agency can help us to answer how legal organisations perform the activities that they do. I conclude in §3.6.

3.2. What makes legal activity social planning activity?

As we saw in §2.2.1, Shapiro's *Planning Thesis,* that legal activity is social planning activity, is the central claim of his Planning Theory of law (2011: 155). As such, it is important to unpack and analyse this claim in detail. This section does exactly that. I will begin in §3.2.1 by reconstructing Shapiro's view of social planning activity in order to see what he takes to make legal activity a form of social planning activity. In §3.2.2, I will present some reasons to doubt Shapiro's *Planning Thesis*.

3.2.1 Shapiro's answer

The claim that legal activity is social planning activity raises at least four main questions: (i) What is planning activity? (ii) What is *social* planning activity? (iii) What is it about legal activity that makes it an instance of social planning activity? (iv) What makes legal activity

legal, or in other words, what separates legal activity from other instances of social planning activity?

Although all these questions follow from Shapiro's claim, fortunately, he does not leave us without any answers. In this subsection I will consider Shapiro's answers to questions (i)-(iii) which will amount to unpacking his claim about the nature of legal activity. It will be the purpose of §3.3 to present and evaluate Shapiro's answer to question (iv), that is, what is distinctive about *legal* social planning activity.

First, in answer to (i), Shapiro gives a brief definition of planning as "the activity of formulating, adopting, affecting, applying, enforcing and repudiating plans" (2017: 2) before elaborating on its characteristic features. Second, in answer to (ii), he says that "[t]he planning is "social" in that its function is to guide, organize and monitor the behavior of members of the community" (ibid.), though he later reveals three different senses of *social* that he considers relevant. Since both the characteristic features of planning as well as the different senses of *social* identified by Shapiro are utilised in his answer to (iii), I will present all this in more detail now.

In order to say what makes legal activity an instance of social planning activity (thus answering (iii)), Shapiro's approach is to provide a detailed analysis of planning activity and then show how legal activity possesses the same features. This is the bedrock from which, combined with his later explication of what makes some planning activities *social*, Shapiro justifies his claim that legal activity is social planning activity. Let us begin by considering the features Shapiro takes to exemplify planning activity before seeing how he extends this analysis to legal activity.

Shapiro characterises planning as "a process that not only produces norms in an incremental fashion but also (1) produces norms that are supposed to settle, and purport to settle, questions about how to act; (2) disposes addressees to obey; and (3) is purposive, that is, has the function of producing norms" (2011: 201).

Although Shapiro lists three features of planning activity, he discusses at least four – including the incremental way in which planning produces norms, or plans. I will consider this feature last since in drawing it out more explicitly, Shapiro relies on the example of legal regulation and so it is best seen in light of this analogy.

First, let us consider (1). While planning is the subject of the quoted sentence above, this settling property is attributed by Shapiro to the norms that planning produces, i.e., plans. As this is not strictly speaking a feature of planning activity, but rather of plans, a more detailed

analysis of it will be given in Chapter 4. For now, it will be enough to say that "a plan is a special kind of norm… it is supposed to settle, and purports to settle, questions about what is to be done" (ibid.: 129). This is so, because they are the norms that result from an activity that is "subject to several norms of rationality" which "not only demands that we fill in our plans over time; it also councils us to settle on plans of actions that are internally consistent and consistent with each other" (ibid.: 123). Once we settle on these plans of action, or in Shapiro's terminology, when we adopt them, we are under another norm of rationality: "[t]o adopt a plan and not use it, or to use it incorrectly, is irrational" (ibid.: 126-7), which is to say that "[t]here would be no point in making plans if we did not use them to guide our conduct" (ibid.: 126) since "[t]he plan is supposed to settle the matter of whether [an agent] should act in a certain way and, thus, to deliberate before execution undermines the fundamental purpose of the plan" (ibid.: 416, fn. 5). What Shapiro seems, correctly, to be saying here is that planning activity is the process through which one tries to settle questions about how to act. This matter is settled when the process comes to an end, since at this point, there is a plan which has the purpose of guiding conduct, and so it is the plan which settles any questions about how to act.

That the settling property is a feature of plans rather than planning activity gains further support with the following consideration. If one is unsure about how to act, one's behaviour will not be settled by an activity as the very problem is that one does not know how one should act. The problem cannot then be solved by acting in a certain way! Instead, action is guided by norms, e.g., plans. In such a case, then, one should look to a plan, and if no plan exists, one should create a plan in order to have the means to settle questions concerning conduct. That plans are settling is given further support by David Plunkett in his summary of the "seven most important features of plans that Shapiro emphasizes" (2013: 152). More specifically, he says, "one of the core purposes of plans is to settle deliberative questions about what to do" (ibid.).[1]

Therefore, despite entering into Shapiro's characterisation of planning activity, it is clear that he instead takes this settling property as a feature of plans. Returning now to planning activity, let us consider what Shapiro identifies as its second feature – its dispositive character.

[1] Though, it should be noted that in his elaboration of this feature of plans, Plunkett also unfortunately conflates plans with planning activity by saying that plans "settle deliberative questions about what to do (by producing norms for what to do)" (ibid.). Plans do not produce norms for what to do since plans are exactly that – norms which settle what to do. It is planning activity which produces these. Though, it is still the plan that is settling since, as Shapiro later explains, plans are created for a certain purpose – to settle questions about how to act (2011:129).

Shapiro does not say much about the dispositive power of planning activity. Rather, his attribution of this feature to planning comes as a by-product of his discussion which aims to distinguish plans from other kinds of norms: “a norm is a plan only if it is created by a process that disposes the subjects of a norm to follow it” (2011: 129). In his elaboration of this, Shapiro considers two examples: “If I plan to cook dinner tonight, I will be disposed to cook dinner tonight” demonstrates a case whereby a plan disposes its subject to comply, whereas “[i]f a madman “plans” to withdraw the United States Army from Iraq, no withdrawal plan exists because the madman’s decisions have absolutely no effect on troop movements” (ibid.) is an example of when, according to Shapiro, no plan is in fact generated as the process does not instil the required dispositions in the subjects to comply with the proposed plan.

What about the third feature Shapiro attributes to planning activity – its purposive character? As he puts it, planning is purposive in that it “has the function of producing norms” (ibid.: 201). Again, Shapiro only develops this point in relation to the distinction he sets out to make between plans and other kinds of norms: “a norm is a plan as long as it was created by a process that is supposed to create norms” (ibid.: 128). More specifically, the process involved in individual planning “is the psychological activity of intending” (ibid.) whereas in institutional contexts, as we saw in §2.2.1, the process is somewhat different in that intentions are not required, rather, there are formal procedures which are established for officials or groups to perform certain actions. The result is that plans may be created without any corresponding intentions to create them.

Before considering Shapiro’s characterisation of the incremental nature of both planning activity and legal activity, let me demonstrate how he extends each of the abovementioned features to legal activity, thus taking himself to show that legal activity as settling, dispositive, and purpose, is a form of social planning activity.

Firstly, as I’ve shown, by Shapiro’s own lights it is not the *activity* which is settling, but rather the norm that the activity produces. As we have just seen in the case of planning activity, it is the plan which is settling, and so it would seem plausible to predict that in the case of legal activity, Shapiro will likewise take legal rules or laws to be what settles the matter of how an agent should act. Yet, the original ambiguity is retained by Shapiro when moving to his analysis of legal activity and elaborating on what exactly possesses this settling property.

In Chapter 7 of *Legality* as well as his 2017 paper which closely follows it, Shapiro sets out to show how all the features he identifies as characteristic of planning activity can also be attributed to legal activity in order to show that "the core idea of The Planning Theory, namely the Planning Thesis, is valid" (2011: 201). He takes up this task in a subsection entitled "Legal activity as Settling, Dispositive and Purposive" (2011: 201-2; 2017: 9-10). Although from this it would seem that Shapiro will attempt to show how legal activity possesses all these properties, at least in the case of the settling property, it is unclear whether he, in fact, takes this to be a feature of legal activity or, rather, of laws:

> It makes perfect sense to say, for example, that legislation requiring passengers to wear their seat belts is not "just a good idea". Legal institutions are neither in the business of offering advice nor 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 seat belts are a good idea, passengers are required to buckle up – after all, it's the law. (2011: 201-2)

As we can see from this passage, Shapiro seems to be describing both laws and legal activity as settling. However, as previously argued of planning activity, this cannot be a property of the activity – it is not an activity we look to when trying to settle the matter of how we should act, there is nothing about any activity that can give us reasons for action. Rather, it is the very nature of norms to provide us with this and thus, settle such matters. This amounts to Shapiro conflating what is normative. Laws have normative force because they are created by legal officials who are recognised as possessing the required authority to perform the relevant activities. Thus, it is not the legal activity that is settling, but rather, the product of such an activity, i.e., the legally valid norms produced by exercising legitimate authority which, by their very nature, help to settle questions of how one should act.

So much for the settling property. Let us consider now how Shapiro extends to legal activity the dispositive feature he identifies planning activity as possessing. To show how legal activity is also dispositive, Shapiro relies heavily on what he calls 'general efficacy'. This, he says, is a condition of legal systems to which "[a]ll legal philosophers agree" (ibid.: 202), holding that, for a legal system to exist, it has to be generally efficacious, that is, normally obeyed. Now, with this, Shapiro does not mean to take any stance on what makes law

generally efficacious – he simply wishes to point out the connection between this condition and the dispositive character of legal activity:

> [i]f we accept the correctness of the general efficacy condition, which I think we should, we must conclude that legal activity is dispositive in nature. For according to the general efficacy condition, if an activity did not generate a general disposition to obey in a certain community, then it would not be a legal activity. (ibid.)

Shapiro is succinct when it comes to demonstrating how legal activity, like planning activity, is purposive in nature: "[t]he legislative process does not just happen to produce laws as a side effect of its pursuit of some other end. Its very point is to create norms that are supposed to settle questions about how to act" (2017: 10). More specifically, as we will see in more detail in the following chapter, according to Shapiro, because "a norm is a plan as long as it was created by a process that is supposed to create norms" (2011: 128), we get the result that laws are plans.

Before moving on to consider what Shapiro thinks makes law a *social* planning activity, let us consider the final property he identifies both planning activity and legal activity as possessing: an incremental nature. Shapiro takes this as a paradigmatic feature of both activities, and is a reason why he thinks his planning theory is particularly promising: "[o]ne reason that the Planning Theory emphasizes the planning nature of law is to highlight the often-overlooked incremental feature of legal regulation" (2017: 2). Now, before elaborating on this, it is worth mentioning that it is unclear what Shapiro means by 'legal regulation'. At times, it seems as if he simply means 'legal rules' or 'laws', but it seems more likely that he is using this term to refer to a particular kind of legal activity. Since Shapiro wants to attribute this incremental feature to legal activity, I will assume that this is what he means by 'legal regulation'.

Shapiro develops different examples to illustrate this, though the idea is simple: neither plans nor laws are formed all at once, but rather are filled in over time. That is to say, "[i]n the law, as in ordinary life, agents don't usually settle on an entire course of action all at once" (ibid.). Rather, agents begin by "setting the basic ends to be achieved, and preliminary steps to be taken, and then settling on means to achieve those ends as the time for carrying out the plan approaches" (ibid.).[2]

[2] For an extensive explanation of how this happens with legal regulation, see Shapiro's example as developed in (2017: 4-6).

Now that I have considered all of the features that Shapiro identifies as common to both planning activity and legal activity, it is a good time to take stock and recall the questions presented at the beginning of this subsection to see which are still awaiting an answer.

By reconstructing Shapiro's analysis of planning activity and seeing how he extends the results of this to legal activity to show that it is an instance of planning activity, we have answered (i) What is planning activity? and have come some way towards answering (ii) What is *social* planning activity? as well as (iii) What is it about legal activity that makes it an instance of social planning activity? All that is left for the remainder of this subsection, then, is to consider Shapiro's characterisation of *social* planning activity and to see if legal activity can be taken as an instance of this more specific kind of planning activity.

As Shapiro reminds us, "[t]he Planning Thesis does not simply state that legal activity is an activity of planning, it claims that it is an activity of *social* planning", where it is *social* in three different senses: (i) "the activity creates and administers norms that represent *communal standards of behavior*", (ii) "the planning regulates most communal activities via *general policies*", and (iii) "the planning regulates most communal activity via *publicly accessible standards*" (2011: 203.). Let us look at how Shapiro uses each of these conditions to claim that legal activity is a form of social planning activity.

The first condition says that the products of social planning activity are norms which apply to a whole community and require that members of the community conform to the standards that the norms represent. Within a legal context, these norms are laws which apply to the entire community and anyone who does not follow these standards will be held accountable by legal officials.

As for the second condition, since general policies are a kind of plan, a more detailed analysis of them will be provided in the following chapter, but for now, it is enough to think of these as general, non-specific plans. That is, plans that address the community, rather than particular individuals. Within a legal context, this amounts to saying that laws do not target specific individuals: "actors are regulated only insofar as they instantiate the general description set out in the rules" (ibid.).

Finally, the third condition requires that social planning produces plans that are accessible to the community members. 'Secret plans', as Shapiro calls them, cannot be the result of social planning since they are meant to guide the behaviour of the community, and they cannot do this if they remain hidden. In the legal context, laws must be accessible to the community required to conform to them, so there also cannot be secret laws.

At last we are in a position to evaluate Shapiro's answers to each of the three questions presented at the beginning of this subsection. Before taking up this task in the following subsection, it will be instructive to conclude here by stating his answers more briefly.

Shapiro's answer to (i) What is planning activity? is that it is an incremental process which has the purpose of producing norms that settle questions about how to act and disposes subjects to comply with those norms. His answer to (ii) What is *social* planning activity? encompasses his answer to (i), but adds that the planning activity, in being social, produces publicly accessible norms that apply to and regulate a whole community. Lastly, his answer to (iii) What is it about legal activity that makes it an instance of social planning activity? is that it is planning activity (i.e., it is an incremental process which purposely produces norms, or laws, which settle questions about how to act and disposes subjects to comply) which also meets the conditions he sets out for a planning activity to be social – legal activity produces norms, i.e., laws, which are publicly accessible and apply to and regulate an entire community.

3.2.2 Objections

In this subsection, I will raise some worries against both Shapiro's characterisation of planning activity and his contention that legal activity mirrors it. Let me begin with the former.

As we saw in the previous subsection, the very first feature that Shapiro attributes to planning activity, i.e., that it is *settling*, is not in fact possessed by planning activity, but rather its products, namely, plans. Unfortunately for Shapiro, it looks like some of the other properties he identifies planning activity as possessing might be similarly incorrectly attributed to it. I will re-consider these features, starting with planning activity's supposed dispositive character.

Recall that Shapiro thinks that "a norm is a plan only if it is created by a process that disposes the subjects of a norm to follow it" (ibid.: 129) and backs this up by considering some examples, including the case of a madman who 'plans' to withdraw US troops from Iraq. According to Shapiro, no plan is in fact generated because the madman's decision has no effect on troop movement since it does not instil the required dispositions in the subjects to comply. Yet, from this example, it does not seem that planning activity is what disposes subjects to comply, or not. Rather, subjects are disposed to follow *laws*, or in Shapiro's terms, legally valid plans. That is, plans that have been created by a legal authority. Thus, it seems

to me that Shapiro is here confusing authority with the *exercise of* authority (which Shapiro understand in terms of activity, legal activity in the case of the exercise of legal authority).

To see this, let us briefly consider Shapiro's account of legal authority (ibid.: 178-182). There are two requirements for someone or something to qualify as a legal authority: (a) it is authorised by the master plan of the legal system, and (b) it is able to motivate, or dispose, subjects to obey its directives. Therefore, it is clear that the activity cannot generate the disposition to obey, since this disposition is prior to the exercise of legal authority, i.e., legal activity. If there is no legal authority, there can be no exercise of it. So, there must already be a disposition instilled in the subjects to comply with the plans created by the authority. If there is not, then no plan will be generated. While the authority must generate this motivation to obey, what it is that subjects are disposed to comply with is the directives of the authority, i.e., its plans. In fact, it seems that Shapiro agrees: "unless the members of the community are disposed to follow *the norms* created to guide their conduct, the norms created will not be plans" (ibid.: 179, emphasis added).

So, in Shapiro's example of the madman, the decision has no effect on troop movements, not because the planning activity lacks dispositional force, but because the madman is not an authority – the madman does not satisfy either (a) nor (b). The former condition remains unmet since the madman is not authorised by the master plan of the legal system, and the latter condition of the madman being able to motivate compliance to obey is also unsatisfied.

Let us next consider the incremental nature of planning activity. Shapiro takes it to be a virtue of his Planning Theory that it can account for the incremental nature of legal activity. However, again, it seems that this is not a property of the activity, but rather, its product. It is plans, and as Shapiro wants to say also, laws, that are filled in over time. Planning is not something that can be incremental – it is a steady process which sets out the different steps to be taken in order to achieve certain ends. If planning activity were incremental, then it would be mostly incomplete and there would be certain steps needing filled out that would bring us closer to planning activity. Clearly, though, this does not make sense, and planning is not the sort of thing that can be properly described as incremental. Rather, it is plans that are in need of being filled out in order to be completed.

So much for the worries against Shapiro's analysis of planning activity, and by extension, legal activity. It should be noted, however, that even if these objections hold, all they show is that Shapiro's characterisations of planning activity and legal activity are lacking. Crucially, they do not show that legal activity is not a form of planning activity after all, just

that more work needs to be done in examining the nature of these kinds of activities. What we need, then, to raise doubts over Shapiro's *Planning Thesis*, that legal activity is social planning activity, is to show that legal activity possesses some properties that planning activity does not, or *vice versa*. In the remainder of this section, I present some concerns along these lines.

Shapiro, himself, points out a difference between legal regulation and 'ordinary, non-legal planning'. As mentioned in the previous subsection, it is ambiguous what Shapiro means by 'legal regulation'. I proposed that we take a more charitable approach and assume that he is using this term to refer to a particular kind of legal activity. This suggestion is lent further support by Shapiro's direct comparison between legal regulation and non-legal planning, where he recognises that the former is developed "over many decades involving numerous actors and agencies" (2017: 5) and as a result, the plan being developed has been revised and repudiated many times. This is in opposition to ordinary, non-legal planning where "plans must be fairly stable, which is to say that they must be reasonably resistant to reconsideration" (2011: 124).

Shapiro further brings out this contrast by pointing to the 'life span' of plans: "legal regulation differs from ordinary, non-legal planning, where the shorter life span of plans renders repudiation and revision a less common, though not entirely unusual phenomenon" (2017: 6). Unfortunately, Shapiro does not elaborate any further on this distinction, even although it might be taken as a reason to think that legal activity might not be planning activity after all. For instance, in reflecting further on the life span of normal, non-legal plans and planning activity, they certainly look to be considerably different from laws and legal activity. More specifically, it seems that only non-legal plans actually have a life span – we engage in planning activity in order to achieve a certain goal. A plan is a vehicle for achieving this goal, and once we have succeeded in this task, the plan is no longer needed, and in fact, no longer exists. This is clearly not the same for legal rules or legal activity as far as Shapiro is concerned – with his example of legal regulation, legal planning can take place over decades, or perhaps even indefinitely where the goal may also change, and thus the plan is constantly being revised or repudiated. In this sense, there is no way to follow the steps of the plan and achieve the goal, since both can be forever changing.

On a related note, it is also disputable that the purpose of legal activity so closely mirrors the purpose of planning activity. As Shapiro puts it, both types of planning are purposive in nature since they have "the function of producing norms" (2011: 201). While this may be true of both activities, in the case of regular, non-legal planning, it seems that the reason for

this is in achieving some goal – this is where the emphasis is placed. Whereas, in the case of legal planning, it seems that the reason for producing norms is "to guide, organize and monitor the behavior" of those who are subjects of the plan – this is, instead, where the emphasis is placed. While I agree that the purpose of legal activity is such, it seems forced to say that this is also the purpose of planning activity, particularly the idea that one function is to create norms in order to *monitor* the behaviour of the plan's subjects. Though this does not seem unusual in the legal context, it does for regular planning.

The final worry I would like to mention before concluding this section, is that legal activity is an umbrella category which encompasses many different kinds of activities, including, as Shapiro notes, "formulating, adopting, affecting, applying, enforcing and repudiating" law (2017: 2). Given that legal activity captures all these different kinds of activities, we might wonder if it can *all* be considered as planning activity, or if it might be a little strained to attempt to explain all of these various activities in such terms.

Consequently, while the concerns I have raised here may be answerable, the main issue which remains is that Shapiro's analysis of legal activity as social planning activity disintegrates since, as I have here demonstrated, most of the features he identifies as belonging to planning activity are, instead, features of plans. Although this does not defeat Shapiro's thesis – legal activity may be planning activity after all – the point is that he does not provide us with a detailed enough account of planning activity in order to prove it, or simply to spell this out. All we are left with from Shapiro's characterisation of planning, and thus legal activity, is that they are both purposive activities with the function of producing norms. Though, as I pointed out, it is not clear that this comparison is as close as Shapiro thinks it is. Therefore, I take it that I have at least shown that Shapiro's *Planning Thesis* is unsupported and requires further analysis. This is a serious problem for his Planning Theory since its central element is the *Planning Thesis* (2011: 155; 2017:2).

Perhaps there is a way to help Shapiro out. Given that his understanding of planning activity closely follows Bratman, I will consider his account in some detail in §3.4. However, before moving to this, I will finish the analysis of Shapiro's characterisation of legal activity in the following section, by exploring what separates legal activity from other similar, but non-legal planning activities. This may also shed some further light on how legal activity can be understood as a form of planning activity.

3.3. What makes legal activity *legal*?

In the previous chapter, I explored Shapiro's claim that legal organisations are social planning organisations. Crucial to this claim was a qualification made by Shapiro: while all legal organisations are social planning organisations, not all social planning organisations are legal organisations. Similarly, we can draw an analogous qualification here: according to Shapiro, all legal activity is social planning activity, but not all social planning activity is legal activity. In this section I will outline what Shapiro thinks distinguishes legal activity from other, non-legal social planning activity, thus answering question (iv) What makes legal activity *legal*, or in other words, what separates legal activity from other instances of social planning activity? as previously presented in §3.2.1.

3.3.1 Shapiro's answer

First and foremost, Shapiro emphasises that legal activity is a shared activity. He recognises that "[v]irtually everyone would agree that certain aspects of legal activity are shared activities" (2017: 11), but notes that his Planning Theory 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. (ibid.)

That legal activity is shared activity is what Shapiro calls the *Shared Agency Thesis*. Combining this with his *Planning Thesis* (that legal activity is social planning activity), we have that legal activity is the shared activity of social planning. In elaborating on this, Shapiro argues that in order for legal officials to engage in this shared activity, it is not necessary that they "intend to act in a collective manner or be committed to its success", rather they are "simply required to accept the master plan of the system" (ibid.). I will return to this point in §3.5.1.2 when discussing how Shapiro modifies and applies Bratman's planning account of shared agency to make room for alienated participants. For now, I will continue by presenting the two considerations Shapiro takes to justify his *Shared Agency Thesis*.

The first is that "it accounts for the core intuition that some legal officials are related to one another in a special way: they are each *members* of particular legal systems" (ibid.: 11-12). Shapiro thinks the *Shared Agency Thesis*, for instance, explains why we recognise French legal officials as part of the French legal system, rather than the German legal system –

French legal officials are engaged in one collective activity, whereas German legal officials are engaged in another collective activity. Though, Shapiro makes an even stronger claim than this:

> the Shared Agency Thesis… provides an intuitive account of group membership within a legal system. Group membership, on this view, is constituted by the shared activity in which its members are supposed to participate… officials are members of the same legal system because they are supposed to participate in the same collective activity of social planning. (ibid.: 14).

Here, Shapiro is arguing for the priority of the shared activity for determining the constitution conditions of legal organisations, and not only as a means for recognising or categorising officials of different legal systems.

The second consideration he makes to justify his *Shared Agency Thesis* is that is can also explain "how it is that legal systems are able to do what they typically do" (ibid.: 12). The idea here is that the goals of legal systems are "unachievable solely by individual agency", instead "collective and concerted action is essential. Members of the group must work together and do so in an organized fashion" (ibid.), which is exactly what Shapiro says with his *Shared Agency Thesis*.

However, as we saw in the previous chapter, Shapiro is aware that this does not provide a complete analysis of legal activity, since there can be shared social planning activities that are not legal activities. In order to tease out what separates legal activity from other similar, but non-legal activities, Shapiro considers other groups that engage in shared social planning to find out what extra properties legal activity possesses.

In §2.2.1, we saw how comparing legal activity with parental activity led to Shapiro identifying the former, but not the latter as official and institutional activity. However, as I argued in §2.2.2, there is only one kind of activity here mentioned since in his discussion of official activity, Shapiro is in fact only concerned with official *roles* which are instead a feature of group structure. Therefore, the only extra property of legal activity that Shapiro identifies is that it is institutional. Recall that an institutional activity is one whereby participants need not share intentions nor hold relevant intentions towards the shared activity in order for its success. This is because certain formal procedures are established for officials or groups to perform certain actions. All that is required for the success of the shared activity, then, is that officials follow these procedures, not that they have or share any corresponding intention to do so.

3.3.2 Objections

While identifying legal activity as institutional shared social planning activity may help to distinguish it from other similar, but non-legal shared social planning activities, it is still not enough. As we saw in the previous chapter with his attempt to separate legal organisations from non-legal social planning organisations, Shapiro considers the compulsory nature of legal authority, the moral aim of legal organisations, and their self-certifying power. Yet, these are all clearly properties of the group, not the activity it performs. Thus, Shapiro is unable to distinguish the *activities* of legal organisations from those of criminal organisations and condo boards by his characterisation of legal activity alone.

One may argue that this is not a problem for Shapiro after all, since if he can distinguish between the groups which perform the activities, then he can distinguish legal activity (as performed by legal organisations) from non-legal shared social planning (as performed by non-legal groups). Now, this is a view which I am happy to endorse, and is in fact what I began arguing for in the previous chapter – in order to analyse the nature of legal activity, we first need an account of legal organisations. Though, this changes the question from *What kind of activity does this group perform?* to *How does this kind of group perform the activities that it does?*

Although I welcome this change, it causes problems for Shapiro's project. Despite his endeavour to start his investigation into the nature of law by analysing legal organisations, we have seen that he gives priority instead to legal activity. As I concluded in the previous chapter, in refocusing Shapiro's project to begin with an account of the nature of legal organisations, we have no reason to think that they are social planning organisations. Consequently, the central claim of his Planning Theory, the *Planning Thesis* (that legal activity is social planning activity) falls apart.

Of course, it may be that he can provide an analysis of how legal organisations carry out legal activity which is consistent with his view that legal activity is social planning activity. This is, in fact, what Shapiro tries to do. If he can accomplish this, then his *Planning Thesis* can reclaim its position within his theory. It is the task of the following section to argue that this is not possible by presenting and analysing the results of Shapiro's account of the shared agency of legal organisations.

3.4. Bratman's Planning Theory of Intention

In this section, I will present some necessary background for understanding Shapiro's account of how legal organisations carry out legal activities. Since the inspiration behind his view comes from Michael Bratman's so-called 'Planning Theory of Intention', I will begin by outlining this in §3.4.1 before moving in §3.4.2 to reviewing some classical objections raised against it by Baier, Stoutland, and Velleman, along with Bratman's own responses. This will prove to be an instructive exercise when considering Shapiro's modifications of Bratman's account in §3.5.

3.4.1 Bratman's account

Bratman's starting point is his observation that humans are planning agents. He takes this fact to be "an important key to an adequate philosophical treatment of (1) the very idea of intention, (2) basic features of our agency, (3) important forms of shared agency, and (4) important forms of responsible agency" (1999: 1). In his earlier work (in particular, his 1987), he provides a planning account of the intentions involved in individual agency as well as the role that plans play in our practical reasoning. In his later work (especially his 1999), he endeavours to extend his planning theory of the intentions of individuals "to provide useful conceptions of shared intention, shared intentional activity, and shared cooperative activity" (ibid.: 9). It is with this later part of his work and in clarifying these three phenomena that I will be concerned with here.

For Bratman, shared intention is "the basic idea… at the heart of these phenomena" (ibid.: 142) since it is a condition for the realisation of both shared intentional activity and shared cooperative activity. I will discuss both of these kinds of activities and the difference between them after elaborating further on Bratman's account of shared intention.

Shared Intention

As mentioned, Bratman draws on his view of individual intention when analysing shared intention. He says of the former that "intention is a distinctive attitude, not to be reduced to ordinary desires and beliefs; that intentions are central to our shared understanding of ourselves as intelligent agents; and that "the study of intention" is in part "the study of planning"" (ibid.: 110). Bratman extends this view to shared intention by understanding it "in the basic case, as a state of affairs consisting primarily of appropriate attitudes of each individual participant and their interrelations"[3] (ibid.: 111), famously specified as "I intend

[3] The qualification here is made to leave room for common knowledge.

that we *J*", where *J* is a 'cooperatively neutral act type', i.e., its performance need not be cooperative, though it can be. I will return to this notion in the following subsection.

In order to provide a more thorough analysis of what shared intentions consist in, Bratman asks the related question: "What do shared intentions do, what jobs do they have in our lives?" (ibid.: 112). Bratman's strategy in asking this question is to "specify roles distinctive of shared intention: roles such that it is plausible to identify shared intention with what plays those roles" (ibid.: 142). He argues that shared intention has three main, interrelated roles: (1) to help coordinate activities (i.e., our intentional actions); (2) to help coordinate our planning; and (3) to structure relevant bargaining. Let us consider each of these functions in more detail.

Firstly, a shared intention coordinates the actions of each individual participant in order that the participants realise their shared goal. The shared intention can do this because it carries with it a normative constraint over the participants. For example, if you and I intend to organise a conference together, this shared intention will result in one of us inviting the speakers and the other in booking the venue. The shared intention exerts a rational pressure on us to coordinate our actions so that the shared goal is realised.

Secondly, the success of the shared goal requires planning. The larger the group, the more complex the planning. Thus, the shared intention must coordinate the planning of each individual participant so that, together, they can achieve the shared goal. Again, it is the normative constraint of the shared intention which ensures that the individuals coordinate (or as Bratman calls it, "mesh") their sub-plans. For instance, our shared intention to organise a conference together requires that we each know what the other plans to do. If I know that you plan to invite the speakers, then I am rationally required to book the venue.

Thirdly, and lastly, should conflict arise, the shared intention constrains the background for bargaining. To return to our example, if you and I disagree about who should invite the speakers or who should book the venue, our shared intention to organise a conference together constrains our bargaining to be about how to solve this conflict and, thus, who should perform each of these activities. That is, it ensures that we do not end up questioning whether or not we should engage in the shared activity after all.

The next step for Bratman is to work out if there are "attitudes of each of the individual agents – attitudes that have appropriate contents and are interrelated in appropriate ways – such that the complex consisting of such attitudes would, if functioning properly, do the jobs of shared intention" (ibid.: 112). By considering different cases and the options that follow

from them, Bratman eventually arrives at his suggestion that public, interlocking webs of intentions play all three roles mentioned above. Thus, he identifies shared intention with this web of individual intentions.

Before returning to the other two phenomena that Bratman aims to clarify, let me briefly explain what he means by public, interlocking webs of intentions. Quite straightforwardly, 'public' intentions are intentions of individuals that are known to the rest of the group, i.e., they are "out in the open" (ibid.: 117). These are 'interlocking' in that an individual's intention to *J* is partly due to their belief/knowledge that other members of the group intend to *J* and that their plan to *J* does not impede on the other group members' plans to *J*. An important point here that Bratman notes (ibid.: 120) is that the group members need not have exactly matching subplans leading to their *J*-ing, Rather, their shared intention to *J* only requires that their subplans *mesh*, that is, they allow each other to perform their corresponding parts of the plan, where these parts have been adopted and are carried out in a way that ensures consistency with the others. Finally, 'webs of intentions' are these individual intentions and the relations between them.

More formally stated, we have Bratman's famous account of shared intentions:

> *Shared Intention Thesis (SI thesis):* We intend to *J* if and only if
>
> (1) (a) I intend that we *J* and (b) you intend that we *J*.
>
> (2) I intend that we *J* in accordance with and because of (1)(a), (1)(b), and meshing subplans of (1)(a) and (1)(b); you intend that we *J* in accordance with and because of (1)(a), (1)(b), and meshing subplans of (1)(a) and (1)(b).
>
> (3) (1) and (2) are common knowledge between us. (ibid.: 131)

Therefore, we can understand Bratman as presenting an individualistic view of shared intentions, since for him, shared intentions consist in, and so are reducible to, this web of individual intentions (i.e., individual intentions and their relations).

Shared Intentional Activity (SIA) and Shared Cooperative Activity (SCA)

Now that we have seen Bratman's account of shared intention, we can continue reviewing his analyses of both shared intentional activity and shared cooperative activity. The former is a slightly weaker form of intentional joint action since it is "explainable by a shared intention and associated forms of mutual responsiveness", whereas the latter carries two further conditions: "the absence of certain forms of coercion and commitments to mutual support in the pursuit of the joint activity" (ibid.: 9). I will begin by considering the

conditions for the realisation of shared intentional activities before moving to those for shared cooperative activities.

Since I have already explicated Bratman's reductionist account of shared intention, all that is left to reconstruct his account of shared intentional activity is to elucidate what he means by 'mutual responsiveness'. He states that for this feature to be present in a joint activity, "each participating agent attempts to be responsive to the intentions and actions of the other, knowing that the other is attempting to be similarly responsive" (ibid.: 94). Examples of shared intentional activity involve having a conversation together, dancing together, walking together, etc. In these kinds of activities, each participant guides their behaviour based on the behaviour of the others, and knows that the others are doing the same.

So much for shared intentional activity. Shared cooperative activity, for Bratman, is more demanding since it also requires two further conditions: the absence of coercion and commitments to mutual support. Let me begin by explaining the former. Bratman mentions two kinds of coercion: the first is when an individual's intentional agency is bypassed (e.g., a friend forcing you to join them on a trip by kidnapping you) and what he calls 'attempted coercion' when the coercer's attitude is not one of cooperation, but "does include the efficacy" of the coerced individual's intention from threat to action (e.g., a gunman threatening to pull the trigger unless the victim agrees to accompany them on a trip) (ibid.: 102). Neither of these cases is acceptable in an account of shared cooperative activity, and so Bratman introduces the condition into his account of SCA that the intentions of the participants are not coerced by other participants. He goes a step further by noting that "this mutually uncoerced system of intentions will be in the public domain. It will be a matter of common knowledge among the participants" (ibid.). As a result, Bratman includes in his account of SCA a further condition that the absence of coercion (amongst other conditions) is common knowledge between the participants.

However, this is still not enough for an activity to count as a shared cooperative activity. According to Bratman, commitments to mutual support are also needed: "In SCA each agent is committed to supporting the efforts of the other to play her role in the joint activity" (ibid.: 95). To bring out the importance of this feature of SCA, Bratman introduces the example of the 'unhelpful singers' (ibid.: 103-4). In this case, two singers intend to sing a duet together. However, each singer lacks the disposition to help the other should they stumble and sing a wrong note. This is because each prefers the other's failure to their joint success. Bratman even allows this disposition to be common knowledge, though this does not matter for his purposes. What matters is that the singers share an intention to sing a duet together but "do

not have commitments to support each other of the sort characteristic of SCA" (ibid. 104). Thus, the activity here is jointly intentional but not an instance of a SCA.

Bratman acknowledges that "[s]ome participants in a SCA may be willing to incur what would normally be seen as fairly high costs in helping the other" whereas others would only be willing to help if the costs "would normally be seen as minimal" (ibid.). He takes the willingness to support other participants as coming in degrees and attempts to state what the threshold of mutual support in a SCA is: participants have an uncoerced shared intention to *J*; a problem arises for one participant such that they require help from another participant to successfully *J*; another participant can help without undermining their own contribution to the *J*-ing; there are no new reasons for the supportive participant to help; and all this is common knowledge. Bratman describes the circumstances which satisfy all this as "*cooperatively relevant to our J-ing*", where for the "*J*-ing to be SCA there must be at least some cooperatively relevant circumstance" in which each of the participants would be prepared to provide the necessary help to other participants (ibid.).

From this, Bratman concludes that in a SCA the participants must have 'minimally cooperatively stable' intentions where "an intention is *minimally cooperatively stable* if there are cooperatively relevant circumstances in which the agent would retain that intention", or to put it otherwise, "[t]his stability of intention ensures that there is a commitment to help in some cooperatively relevant circumstance" (ibid.: 105).

With all this, he states his account of SCA as follows:

> (1)(a)(i) I intend that we *J*.
> (1)(a)(ii) I intend that we *J* in accordance with and because of meshing subplans of (1)(a)(i) and (1)(b)(i).
> (1)(b)(i) You intend that we *J*.
> (1)(b)(ii) You intend that we *J* in accordance with and because of meshing subplans of (1)(a)(i) and (1)(b)(i).
> (1)(c) The intentions of (1)(a) and (1)(b) are not coerced by the other participant.
> (1)(d) The intentions in (1)(a) and (1)(b) are minimally cooperatively stable.
> (2) It is common knowledge between us that (1). (ibid.)

Now that I have presented in some detail Bratman's planning theory of shared intention and clarified his accounts of both shared intentional activity and shared cooperative activity, I will presently consider some challenges raised against his view.

3.4.2 Objections to Bratman's account

The most popular target in Bratman's work is right at its heart: his account of shared intention. Since this central phenomenon is required for both SIA and SCA, it is important that he can resist these objections. In this subsection, I will consider some of the most prominent challenges levelled at Bratman's account of shared intention and consider his responses to these. I will begin by surveying what Bratman takes to be the two main concerns that he faces.

The first worry is that his argument for the identification of shared intentions is incomplete. Recall that Bratman's strategy here was to analyse the roles of shared intentions in order to see what plays those roles so that the latter can be identified as the former. We saw in the previous subsection that Bratman identifies shared intentions as public, interlocking webs of intentions. However, it may be argued that shared intentions are multiply realisable so that there might be other phenomena that play the roles Bratman attributes to them. From this, Bratman concedes, "I think that at most what I was in a position to conclude in my earlier papers was that the indicated web of interlocking intentions was one important case of shared intention" (ibid.: 144). He goes on, "To reach a stronger conclusion I would have needed to show that there is no other way in which these roles would be played; and it is not clear that is true" (ibid.). He responds to this objection by suggesting that his account is still compatible with multiple realisability and considering two options that he takes to be available to him: (1) a Putnam-style reply which takes "shared intention as a higher-order functional state of our two-person system, and see the cited web of individual intentions as one "realization" of that functional state", or (2) a Lewis-inspired answer which takes public, interlocking webs of individual intentions as a species of shared intention with different "complexes that play the roles of shared intentions" as other species (ibid.). This approach admits that "the cited web of individual interlocking intentions really is one important kind of shared intention – though there may also be other kinds" (ibid.). While Bratman thinks that either response is compatible with his account and wishes to leave both options open, he shows a slight preference for the second by assuming it in his response to some other challenges which I will consider shortly.

The second worry that Bratman acknowledges with his account of shared intention regards how an individual can intend the activity of a group: "[i]t makes use of the idea that *I* might intend that *we J*" (ibid.: 145). Bratman resists a circularity worry here, arguing that this idea is not yet one of shared intention since for a shared intention, other conditions must hold, including there being other participants with analogous intentions. Neither is the activity, *J*,

a joint activity. Rather *J* is a 'cooperatively neutral' action in that "joint performance of an act of that type may be cooperative, but it need not be" (ibid.: 94-5). This is distinguished from 'cooperatively loaded' actions which require cooperation, for instance, building a fence together (the key word being 'together'). Though, it may be argued that this distinction does not help Bratman much. Even if the *J* is cooperatively neutral, this constrains the kinds of activities his account can explain. Since exactly what is of interest to those working on group agency is in explaining necessarily cooperative activities (Bratman's 'cooperatively loaded' actions) this severely limits the explanatory power of his account in an important way.

Beyond this circularity worry, Bratman does recognise that there looks to be an issue with an individual intending the actions of others, and in fact, it might be thought that his "use of this idea begs many of the hard questions that arise in trying to make sense of the very idea of a shared intention" (ibid.: 145). He identifies the challenges of Baier, Stoutland, and Velleman as relating to this issue and attempts to respond to them. I will consider each of these here as his answers will have important implications when we look to Shapiro's extension of his Planning Theory of Intention to cases of massively shared agency in the following subsection.

The objections raised by Baier, Stoutland, and Velleman are only very subtly different. In order to bring out their differences, let me formulate each of them briefly here before taking more time to consider each individually. Firstly, Stoutland and Baier both raise the objection that individuals can only intend their own actions, which means that, e.g., *I* cannot intend that *we J*, contra Bratman's individual shared intentions. Second, Baier argues that individuals can only intend what is under their control, so that, e.g., *I* cannot intend that we *J* since *J*-ing depends also on the other participants. Finally, Velleman's challenge is that individuals can only settle what they think their so intending settles, therefore, e.g., I cannot intend that we *J* since this alone does not settle our *J*-ing; the intentions of all the participants that we *J* is what settles the action.

The flavour of these three challenges is nicely summarised by Bratman himself: [t]he objection is that an appeal to my intention that *we J* is illicit, even if *J* is neutral with respect to shared intentionality. It is illicit, or so it is alleged, for it appeals to intentions that violate a basic condition on being an intention" (ibid.: 148). To be more precise, there are in fact three basic conditions that Bratman's theory violates. He names these as: *the own action* (OA) condition, the *control* (C) condition, and the *settle* (S) condition. Let us consider each in turn.

Bratman credits both Stoutland and Baier as independently raising this objection, though I think the clearest formulation of it is presented by Stoutland when he says: “an intention necessarily includes a reference to the one who has the intention. An agent can intend only to do something *herself*” (1997: 55). Bratman calls this the *own action* OA condition and quickly rejects it without much discussion by agreeing with a point made by Velleman that “there is nothing problematic about first-person plural intentions in themselves. One person can decide to plan the behavior of a group, for example, if he holds authority or control over the behavior of people other than himself” (1997: 34). Though, I take Bratman’s response here to be problematic as it seems inconsistent with his aim to analyse simple cases of shared agency as between a pair of agents, and “that do not involve relations of authority” (1999: 142). This is a point that Bratman is at pains to make, and is something that he reinforces several times throughout his work (ibid.: 94, 110, 142).

Putting the OA condition aside, Bratman does however concede that the main challenges to his account are the *control* (C) and *settle* (S) conditions – that one can only intend what is under one’s control and that which is settled by one’s intention, respectively. As Bratman considers both of these conditions together in his response to the corresponding objections, let me elaborate on each in turn, beginning with the former.

This time it is Baier who raises the objection that “one cannot intend what one does not take oneself to control” (1997: 25). This point is formulated by Bratman into the *control* (C) condition. He points out that the difference between this and the OA condition is that the former, unlike the latter, allows for individual plural intentions as long as one controls the actions of the other agents. So what exactly does this objection amount to? The problem with violating the C condition is nicely explained by Bratman: “[i]n a normal case of shared intention we each recognize the other as an agent in control of her or his own actions. So it is not clear how in such cases my supposed intention that we *J* will satisfy this control condition” (1999: 149).

In a similar vein, Velleman points out that “[y]our intentions are the attitudes that resolve deliberative questions, thereby settling issues that are up to you” (1997: 32). Bratman reformulates this and calls it the *settle* (S) condition: “I may only intend what I think my so intending settles” (1999: 149). This challenges Bratman’s account when it comes to activities which are supposed to be determined by the participants jointly, i.e., standard cases of joint action. As Velleman puts it, “how can I frame the intention that “we” are going to act, if I simultaneously regard the matter as being partly up to you? And how can I continue to regard the matter as partly up to you, if I have already decided that we really are going to act?”

(1997: 35). To see this problem in Bratman's vocabulary, consider his statement of the puzzle:

> [i]n such a case how can I intend that we *J*, consistent with the S condition? For me to intend that we *J* I must – according to the S condition – see my intention as settling whether we *J*. But that seems incompatible with seeing you as also intending that we *J* and so as also having an intention that settles whether we *J*. (1999: 149-50)

Roughly, Bratman's way of responding to this challenge is to consider the C and S conditions in more detail. He does this by way of introducing various examples which rely on intuitions to show that both conditions are too strong. He reflects on these examples to arrive at and motivate weaker versions of both the C and S conditions. Once he has watered both conditions down, he demonstrates how his account can accommodate individual plural intentions without violating these new, weakened C and S conditions. Let me explain how Bratman does this in more detail.

In developing different cases, he argues that individuals can in fact intend their own individual action even while aware that control over this action is mediated by another agent: "I may intend *X* while believing that my control over *X* would proceed by way of a process that involves other agents responding to my intention. I need only see my intention as settling whether or not *X* given what will happen, and what others will do, if I do so intend" (ibid.: 152). Consider one of Bratman's examples: Abe intends to pump water into his house, but pumping water into his house depends on Bill turning a valve at the appropriate time as he monitors the system and turns the valve when he detects Abe's pumping. Bratman thinks "[s]o long as Bill's contribution is known by Abe to be reliable, Abe can form an intention whose success requires Bill's contribution" (ibid.: 151). All this moves Bratman to argue that "[p]lausible C or S conditions should allow for such, as I will say, *other-agent conditional mediation*" (ibid.: 152). So that the original conditions are not so strong: agents need not intend only what is under their control or what their so-intending settles; they can also intend what is mediated by the control of other agents.

After introducing this notion by way of examples of individual intentions, Bratman returns to the original objection regarding how an individual can intend the actions of others, i.e., the problem of individual plural intentions of the form "I intend that we *J*", and how other-agent conditional mediation impacts on this.

According to Bratman, a certain structure of intention and knowledge is required such that, e.g., my intention that we *J* depends on my continued knowledge that you intend that we *J*,

and your intention that we *J* depends on your continued knowledge that I intend that we *J*. If I do not know that you intend to *J*, then I would not intend that we *J*, and the same goes for you: should you not know that I intend to *J*, then you would not intend that we *J*. From this, utilising his house-painting example. Bratman says, "I can infer that we will paint if, but only if, I intend that we paint. I can also infer that this role of my intention goes in part through your relevant intention and action: My intention supports your intention… and your intention supports our painting" (ibid.: 153). Now, you can also infer the same about your intention and its role in our painting, which means that "[w]e can each infer… that we each have control over our painting that is other-agent conditionally mediated" (ibid.), and thus, Bratman can explain how it is that his account of shared intention can answer the objection in a way that remains consistent with the (weakened) C and S conditions.

However, as Bratman recognises, there is still much to explain before this can be taken as a satisfactory response to the objection, "for it is not yet clear how we can newly arrive at such a structure of intentions" (ibid.: 154). That is, I only intend to *J* if I know that you intend to *J*, but you only intend to *J* if you know that I intend to *J* – but how do we come to be in such a position? It seems that I can only intend to *J* after you have formed the intention to *J*, but for you to form the intention to *J*, I must already intend to *J*. The upshot of this is that the S condition cannot be satisfied after all. As Bratman concedes, I know that your intention that we *J* is not already fixed and "since your later formation of this intention is required for success, it seems that I cannot simply settle the matter" of whether we *J* (ibid.). Therefore, I cannot intend that we *J*.

Yet, Bratman resists this result by arguing that in such cases, "I know you are not yet settled on this course of action because you are not yet confident of my attitude. But I know you would settle on this course of action if only you were confident about my appropriate attitude" (ibid.: 155). From this, I can then infer that if you knew my intention that we *J*, you would form the same intention that we *J* and, as a result, we would *J*. So, what is required here is that I can *predict* your response: "I need to predict that you will form an intention you do not yet have, in response to my intention" (ibid.: 157). You later intend to *J* in response to your recognition that I already intend that we *J*. So, Bratman allows for "a kind of temporal asymmetry" (ibid.) while upholding that we intend the same thing.

With all this, Bratman reconsiders Velleman's original questions: "[h]ow can I frame the intention that "we" are going to act, if I simultaneously regard the matter as being partly up to you? And how can I continue to regard the matter as partly up to you, if I have already decided that we are going to act?" (1997: 35). His answer to this is that I can intend that we

J based on the prediction that you will, as a result of knowing of my intention, also come to form the intention that we *J*. However, "[w]hile I confidently predict you will come so to intend, I also recognize that you remain a free agent and this decision really is up to you" (1999: 157), "[i]t is just that I am fully confident that you will" concur (ibid.). As a result, we arrive at the structure of intentions required by Bratman's theory, and so "we can each see the matter as partly up to us" (ibid.), thus satisfying the (weakened) C and S conditions.

Though Bratman points out some additional problems that his account now faces and offers his responses to them, we need not consider any further issues beyond this point, for this is more than enough for our purposes – as we will see in §3.5.1.2, Bratman's appeal to predictability in order to meet the weakened C and S conditions is not compatible with Shapiro's 'massively shared agency', and so, as a result, his account of individual plural intentions cannot do the work that Shapiro demands from it.

3.5. How do legal organisations carry out legal activity?

Let us return now to Shapiro's Planning Theory of Law and see how he applies Bratman's comprehensive Planning Theory of Intention to his own account of how legal organisations carry out legal activity. As Shapiro is aware, Bratman is interested in explaining the activities of significantly different groups than he is: what Bratman calls 'modest sociality' – these are small groups that lack asymmetric relations, such as authority. Given that Shapiro is concerned with legal systems, he needs to analyse the activity of much larger groups with asymmetric relations, and in particular, large groups with authority relations. It would seem, then, that on the face of it, these are two important incompatibilities between Bratman's account and the one Shapiro is looking to develop. Yet, Shapiro thinks there is a way to marry his account with Bratman's, and this will be the topic of §3.5.1, where I will recount the issues as identified by Shapiro in applying Bratman's account to his own, as well as reconstructing the modifications he proposes. In §3.5.2 I will advance some challenges towards these. Ultimately, the purpose of this section will be to cast doubt on Shapiro's Bratmanian account of legal organisations as engaged in the shared activity of social planning.

3.5.1 'Massively Shared Agency'

Shapiro begins by noting what he takes to be a gap in theories of action: while philosophers of action might have recently started focusing more on shared agency as opposed to being solely concerned with individual agency, they have not yet considered the kind of agency

required for larger, more complex groups, such as legal systems or corporations. Shapiro names such cases as *massively shared agency*. It is his mission to develop an account of massively shared agency in order to explain how legal officials participate in a legal system, i.e., how legal organisations perform legal activities (understood as social planning). According to Shapiro, "philosophy has no viable theory for analyzing these ubiquitous activities" (2014: 258) since "the accounts of shared agency produced are unable to account for the existence of massively shared agency" (ibid.). Thus, Shapiro's goal is to modify what he takes to be "the most interesting and plausible theory of shared agency that currently exists, namely, the one developed by Michael Bratman" in order to propose "a new account of shared agency, one that will be applicable to small egalitarian ventures and large-scale institutional practices involving authority structures" (ibid.: 259). Let us consider in this subsection how he does this.

After presenting Bratman's account of shared intention and shared intentional activity, Shapiro introduces 'two major limitations' of it, i.e., two aspects of his account which prevent him from being able to explain cases of massively shared agency. More specifically, the first limitation is "that it applies only to ventures characterized by a rough equality of power" and the second is "that is applies only to small-scale projects among similarly committed individuals" (ibid.). In other words, says Shapiro, Bratman's theory cannot account for authority, nor can it make sense of alienated participants. In what follows, I will present the modifications Shapiro argues are to be made to Bratman's account of shared agency in order to make room for cases of authority and alienation. Let us begin by considering in §3.5.1.1 how Shapiro attempts to extend Bratman's model to account for 'Shared Intentional Activity with Authority' (SIAA), saving a discussion of how he accommodates alienated participants for §3.5.1.2.

3.5.1.1 Allowing for authority

As Shapiro notes, while many shared activities do not involve authority, "[t]here are many cases, however, where one member of the group has authority over others and yet it is entirely appropriate to consider their joint venture a collective activity" (ibid.: 264). To argue for this point, he asks us to consider the following example: a group of friends decide to sail from New York to Nova Scotia. Recalling the various problems that arose during a past voyage, they decide this time to appoint a captain "designated as having authority over the others" (ibid.: 265). Since Shapiro takes it to be uncontroversial that their previous trip was a shared intentional activity, he thinks "it is reasonable to assume that the mere appointment of an authority would not preclude their second trip from also being one" (ibid.), and in fact,

the purpose of appointing a captain this time is to ensure successful cooperation in achieving their shared goal.

Yet, as Shapiro is aware, under Bratman's conditions for shared intention, it seems that the current trip cannot be a shared intentional activity for two reasons. First, the requirement that participants mesh their subplans does not seem compatible with one participant being an authority – as Shapiro puts it in relation to his example: "[t[he captain of the boat does not intend to mesh her subplans with those of her crew – rather, they are supposed to mesh their plans with her" (ibid.). Second, the requirement of mutual responsiveness (i.e., that participants must attempt to be responsive to the intentions and actions of the others, while knowing that the others are attempting to be similarly responsive) also seems to be inapplicable when one participant is an authority – that is, it seems that authorities need not respond to the intentions or actions of those below them.

Though, Shapiro argues that upon further reflection, in the case of the apparent lack of the authority meshing their subplans, this problem is merely illusory; and in the case of mutual responsiveness not seeming present in cases involving authorities, this is a minor issue that can be explained away with the help of a slight modification. I will presently consider each of his arguments.

When it comes to meshing subplans, authorities are in fact committed to doing so. This is because the success of the shared activity to which they are committed depends on all participants sharing a plan which is internally consistent. Though, as Shapiro points out, for an authority to be committed to meshing subplans does not mean that they are committed to *revising their* subplans in case of conflict. Yet, it is important to note that this option is still available – authorities may choose to revise their own subplans to fit with the other participants, however, they need not. This is because authorities have a special trick up their sleeves: they can *order* others to act in accordance with their intentions, and so can ensure the meshing of subplans without having to revise their own part in the shared plan – it is this ability that leads Shapiro to call them 'mesh-creating mechanisms' (ibid.: 269). He nicely summarises his argument that authorities are committed to meshing subplans after all as follows:

> In a SIAA, therefore, every participant is committed to acting in accordance with meshing subplans. Authorities and subjects are distinguished, however, by what those commitments require them to do given their differing roles. Whereas

> authorities can achieve interpersonal consistency either by revising their subplans or issuing orders, their subjects do not have that luxury. (ibid.: 266)

Given this, Shapiro proposes a definition of SIAA:

> Our J-ing is a SIAA if and only if
> (1) J is a shared intentional activity.
> (2) If one of us has J-authority over the other, then
> (a) The authority intends that the subject adopt the content of her orders as subplans and revise the subject's subplans so that they mesh with the orders.
> (b) The subject intends to adopt the content of the authority's orders as subplans and revise his subplans so that they mesh with the orders.
> (c) (a) and (b) are common knowledge.
> (3) Either I have J-authority over you or you have J-authority over me. (ibid.: 266-7)

As we can see, then, a SIAA is simply a Bratmanian SIA supplemented with conditions (2) and (3) – essentially introducing authority and distinguishing the role of an authority from that of a subject. [4]

Indeed, it seems that Shapiro is correct to argue that there is no incompatibility with Bratman's account of SIA and Shapiro's SIAA since authorities really do appear to be committed to meshing subplans. Let me now consider Shapiro's contention that, with a minor modification, Bratman's mutual responsiveness condition is also compatible with SIAA.

While Shapiro has certainly shown how responsive authorities are to the intentions and actions of their subjects and *vice versa*, he concedes that this has the unwanted effect of showing how "participants in SIAA are not mutually responsive to one another" (ibid.: 269). By emphasising the power of authorities to mesh subplans in order to coordinate the behaviour of their subjects, the subjects no longer need to be mutually responsive to the intentions and actions of each other. Shapiro's response to this is to discard this condition: "Bratman's account of shared agency is compatible with authority relations, provided that some slight modifications are made. In particular, the requirement of mutual responsiveness in action must be dropped" (ibid.: 269-70). Although Shapiro is unclear here whether or not

[4] Shapiro adds to this an analysis of how authority relations arise in shared intentional activity – the intentions of the participants 'vertically interlock' (ibid.: 267). He explains this idea by reformulating (2) into a definition of J-authority. Shapiro calls the relation 'J-authority' rather than simply 'authority' because "many activities are morally noxious, and there can be no obligation to participate in morally noxious enterprises" (ibid.: 268). Such activities may involve structures of J-authority which is why Shapiro wants to retain the distinction between the relation of J-authority and authority *simpliciter*.

he also thinks that mutual responsiveness in *intention* should also be rejected, as we will see later, he argues that "Bratman's requirement of Mutual Responsiveness in Intention must be dropped completely" (ibid.: 280). He also alludes to this in the present discussion when he says that in SIAA subjects will "respond to the rules laid down rather than to each other's intentions and actions" (ibid.: 269).

So, despite Shapiro claiming that only a minor modification must be made to extend Bratman's SIA to SIAA, it seems that a rather significant change must be made after all. I will consider this point and its implications further in **§3.5.2**. Before getting to the objections, though, we still have to consider how Shapiro tries to extend Bratman's account of SIA to accommodate alienated participants. I turn to this task in the following subsection.

3.5.1.2 Making room for alienated participants

While Shapiro thinks that Bratman's account can be easily modified to account for shared activities involving authority, he is not so optimistic when it comes to those involving alienated participants – these are participants who are, according to Shapiro, not committed to the success of the joint activity, for whatever reason. He takes the problem to "center on Bratman's demand that all participants in shared activities must share a plural intention in favor of the activity" (ibid.: 270). This is too strong a requirement, Shapiro argues, since it "excludes activities that employ large numbers of participants, given the doubtfulness that participants in these activities will, or can, all share the necessary commitments" (ibid.). To be clear, Shapiro recognises the merit of Bratman's theory for allowing that participants may have different *motivations* for engaging in the same shared activity; his concern is rather that some participants are simply not committed to the shared activity at all: "it is often the case that participants engage in a shared activity even though some, perhaps all, are not committed to the joint activity. People can work together, in other words, despite the absence of a shared intention that the group J" (ibid.). The problem, then, is that while Bratman can account for committed participants who hold a shared intention to *J* for various, differing reasons, he cannot account for those participants who lack commitment, and thus an individual plural intention.

To illustrate why he thinks the requirement that participants have shared intentions is too strong for shared activity involving alienated participants, Shapiro asks us to consider the following example: Abel employs Baker and Charlie to paint his house. Baker is to scrape off the old paint and Charlie is to paint the fresh coat afterwards. If they do all this, Shapiro says, it would seem that Baker and Charlie have intentionally painted the house together and

so each held individual plural intentions to paint the house. However, Shapiro asks us to imagine instead that Charlie decides to quit halfway through the job. Baker does not care about this since he will still be paid for doing his part. Given his indifference, Baker "never formed a plural intention… He has the singular intention to do as Abel says… but not the plural intention that *they* paint the house" (ibid.: 271). What these examples are meant to show is that, if Charlie does not quit, then Bratman's model would appear to consider his and Baker's painting as a shared intentional activity; yet, if Charlie quits, the activity is suddenly no longer and never was a shared intentional activity. But, if Charlie changes his mind and decides to paint again, then the activity is back to being a shared intentional activity. This does not seem to be the correct result: either the activity is a SIA from the beginning, or it is not. Thus, Shapiro concludes, "Bratman's model of shared agency, therefore, appears to exclude cases of shared agency among alienated participants" (ibid.). As a result:

> If Bratman's model is inapplicable to the case of the alienated painters, then it will be unsuitable for virtually *any* instance of massively shared agency. For in any large-scale activity, there are bound to be participants that intentionally contribute to the group effort but are not committed to the success of the group venture. (ibid.: 272)

To reinforce this point, Shapiro introduces another example of Dilbert, the apathetic software engineer employed by Microsoft who simply wants paid and does not care about the success of the new operating system that the company has asked him to work on. According to Shapiro, "[h]e does not form a plural intention in favor of the group venture because he does not share its goals" (ibid.). I will return to this example in the following subsection where I will argue that there are more to these kinds of cases than Shapiro considers, and that by elaborating on them, we can see that they do not in fact show that there is shared agency without joint commitment.

To argue his case that Bratman's shared plural intentions requirement for shared agency is too strong, Shapiro appeals to Velleman's objection that we surveyed in §3.4.2. Recall that this objection is, roughly, that Bratman's account of shared intention violates a basic condition on being an intention, namely, the settle condition, which says that individuals can only settle what they think their so intending settles. As I also mentioned in §3.4.2, Bratman's appeal to predictability in order to meet the weakened C and S conditions is not compatible with Shapiro's 'massively shared agency', and so, as a result, his account of individual plural intentions cannot do the work that Shapiro demands from it. The reason for this is that institutional structures eliminate the need for predictability, but Bratman cannot discard this requirement because he retains the shared *content* of intentions and needs

predictability to explain how one can form an individual plural intention, i.e., 'I intend that *we J*'. The problem, then, is not that predictability in institutional contexts is not possible, but rather, that it is not needed as participants know exactly how other group members will act in given situations due to institutional structures and procedures. However, Bratman cannot do without appealing to predictability since he still has to explain how individual plural intentions are possible. This explanation cannot simply be in terms of individual intentions towards one's job role, since this would no longer require shared intentions to perform a shared intentional activity. Shapiro is also aware of this limitation of Bratman's view, and makes clear why predictability does not enter into MSA: "[w]hen multitudes work together on a project, it will be unlikely that any participant will know the identity of all the other participants" (ibid.). Given this, participants will not be able to predict the actions of each other, and "in such ventures cannot coherently possess, let alone share, the same plural intentions because each cannot settle the matter for the rest" (ibid.: 274).

So how does Shapiro suggest moving forward with a Bratmanian account that can explain cases of massively shared agency, which by their nature are likely to involve alienated participants?

After taking himself to have presented further examples which show that "shared agency is possible without shared plural intentions, and even without any shared intentions", Shapiro suggests that what characterises shared agency is that it is "activity guided by a shared *plan*" (ibid.: 277). More specifically, Shapiro formulates his proposal as follows:

> A group G engages in a shared intentional activity to J, on this account, when five conditions are met:
> (1) There is a shared plan for G to J;
> (2) Each member of G intentionally follows her part of the shared plan;
> (3) Members of G resolve their conflicts about J-ing in a peaceful and open manner;
> (4) It is common knowledge that (1), (2) and (3); and
> (5) J takes place in virtue of (1) and (2). (ibid.)

Shapiro uses this to redescribe what happens in the painting case: when Baker and Charlie paint together, they do not have shared plural intentions to do so, rather, they simply share a plan; a plan that was created for them by Abel. Though Shapiro's characterisation of shared intentional activity as guided by a shared plan doesn't tell us when a plan is shared, with the painting example, Shapiro suggests that a plan is shared by a group when (i) "the plan was designed, at least in part, for the members of the group so that they may engage in the joint

activity", (ii) "each member accepts the plan"[5] (ibid.: 278), and (iii) "that a shared plan must be at least "publicly accessible" (ibid.: 279) – i.e., that participants can discover the content of the plan if they wish to. Though this much will suffice for now, I will say more about shared plans in the following chapter.

From all this, Shapiro concludes that "Bratman's model of shared intentional activity is actually a special case, namely, one that applies to ventures structured by highly rudimentary shared plans and where participants are consequently forced to devise for themselves which parts that they will play" (ibid.). This is so because planning activity in this sense requires plural intentions. However, as Shapiro is keen to point out, in cases of massively shared agency, participants need not possess plural intentions: "if someone can design a plan for others to implement, then those who implement the plan need not have plural intentions" (ibid.) since the participants need only be committed to acting in accordance with the plan that they have accepted: "[t]hese attitudes play the coordinating and resolving roles characteristic of shared plural intentions. Hence, in such cases, shared plural intentions are superfluous" (ibid.: 279-80).

Shapiro takes this to motivate weakening Bratman's shared plural intention requirement and replacing it with his own 'Commitment to a Shared Plan' principle:

> **Commitment to a Shared Plan**: The participants each have an appropriate commitment (though perhaps for different reasons) to a plan developed, at least in part, for them so that they may engage in the joint activity, and their engagement in the activity is in the pursuit of this commitment. (ibid.: 280).

Rather than requiring that participants are committed to a joint activity, Shapiro's principle requires only that participants are committed to the shared plan and act in accordance with it. Thus, it is only because of their commitment to the shared plan that participants engage in the joint activity and not because they have individual plural intentions towards the joint activity.

Though Shapiro's introduction of commitment towards shared plans rather than shared plural intentions towards a joint activity is the most prominent modification he makes to Bratman's theory, he also requires that Bratman's "Mutual Responsiveness in Intention be

[5] Though, it should be noted that Shapiro later relaxes this condition so that *most* participants (rather than all) accept the plan. This is because "only shared intentional activities involving the smallest groups could pass a test of universal acceptance, for it is inevitable that some participants will either be apathetic, lazy, misguided" (ibid.: 282) etc. and thus will not be committed to the shared plan or refrain from interfering with the commitment of others to act in accordance with their parts of the shared plan.

dropped completely" (ibid.). This follows his previous suggestion that Bratman's mutual responsiveness in action condition be dropped in cases of authority since subjects will no longer look to each other to guide their behaviour, but will instead look to the authority. Similarly, since in such cases where participants do not design their own plans and need only follow their parts of the shared plans, they will not be responsive to the intentions of the other participants, but will instead simply look to the plan (which is based on the shared plural intentions of the planners, not their fellow participants).

In sum, it is by replacing Bratman's shared plural intentions with his commitment to a shared plan principle as well as axing both Bratman's mutual responsiveness in action and intention conditions that Shapiro takes himself to develop his account of massively shared agency – large-scale joint activity involving authority relations and alienated participants.

3.5.2 Objections to Shapiro

In this subsection, I will raise several worries and challenges concerning the modifications Shapiro proposes be made to Bratman's Planning Theory of Intention in order to explain cases of massively shared agency. Though, before getting to these, I would like to make a brief note regarding Shapiro's methodological approach here.

Notice that his motivation for making changes to Bratman's account are based on differences between the kinds of group that each are focused on. In Bratman's case, he is analysing small groups without authority relations and alienated participants whereas Shapiro wants to explain exactly the opposite: the joint action of large groups with authority relations and alienated participants. This reinforces the argument I made in §2.2.2 that before investigating a group's activity, we first need to know about the kind of group in which we are interested. As Shapiro is clearly aware, the nature of the groups he is focused on differs significantly from the nature of the groups Bratman targets. By his own lights, Shapiro realises the need to adapt an account of group agency around the particular kind of group. Yet, as I will soon reinforce, this is not ultimately what Shapiro does since his analysis is already constrained by the kind of activity he takes legal organisations to perform. Though, as this point will be all the stronger after laying down some more specific concerns regarding his use and modifications of Bratman's theory, I will return to it shortly. First, I would like to take a moment to consider exactly why Shapiro was attracted to Bratman's account to begin with.

Given the differences between the kinds of groups that each are concerned with, it may seem puzzling as to why Shapiro would think Bratman's account of shared intention would look so promising for his project of explaining cases of massively shared agency. When

considering the changes that Shapiro proposes are made to Bratman's work, his strategy appears all the more puzzling: as much as Shapiro tries to undermine these as 'minor modifications' they are in fact really quite drastic since they target Bratman's account of shared intention, which as we saw in §3.4.1 lies at the heart of his work. Given that shared intention is identified by Bratman as the most basic phenomenon that informs his accounts of both shared intentional activity and shared cooperative activity, by revising Bratman's notion of shared intention and thus effecting all three of the key phenomena he analyses, Shapiro ends up changing the entire landscape of Bratman's work. With this, it seems legitimate to ask not only if Shapiro is only proposing a few simple modifications to Bratman's view, but if his account can really be taken as Bratmanian at all? Moreover, it emphasises the question as to why Shapiro would decide to follow Bratman's theory in the first place? In what follows, I'll answer the first question by giving some reasons to think that Shapiro's view has the potential to follow Bratman more closely, but I will maintain that because of the changes Shapiro makes, he unnecessarily distances himself so that his account can only be said to be superficially Bratmanian. As for the second question, I will presently consider Shapiro's answer.

The reason that Shapiro gives for following Bratman's view is simply that there are no other accounts of shared agency that make room for massively shared agency, and that his is the most appealing. When introducing massively shared agency, he says:

> philosophy has no viable theory for analyzing these ubiquitous activities. Although the theory of action has seen a recent turn from a more or less exclusive concern with individual agency to concerns with pervasive forms of shared activity… the accounts of shared agency produced are unable to account for the existence of massively shared agency. (ibid.: 258)

He goes on,

> [t]he reason for this is twofold. First action theorists have largely eschewed giving analyses of activities involving authority structures… Second, philosophers of action have largely concentrated on analyzing shared activities among highly committed participants. (ibid.: 258-9)

Shapiro takes it to be "unclear whether action theorists have intentionally limited the ambitions of their theory or have been operating under the notion that shared activity requires these forms of commitments" (ibid.: 259), concluding that, regardless of which is the case, "[t]his restriction… has rendered these theories inapplicable to instances of massively shared

agency… And to the extent that models of shared agency developed by philosophers rule this out, these models must be supplemented or revised accordingly" (ibid.: 258-9). While Bratman's view is one of these theories in need of revision, he favours it above all others since he takes it "to be the most interesting and plausible theory of shared agency that currently exists" (ibid.: 259). Though, as Shapiro does not justify his preference, he gives us no reasons as to why Bratman's account should be considered as such.

More troublesome is Shapiro's claim that 'philosophy has no viable theory' for analysing massively shared agency due to philosophers of action having 'eschewed giving analyses of activities involving authority structures'. This is simply untrue. Prior to the publication of Shapiro's chapter on MSA, there was already a famous theory of exactly this kind of group action developed by Raimo Tuomela. Labelled alongside Bratman, Margaret Gilbert and John Searle as one of "the big four" working on shared, or collective, intentionality[6], Tuomela in his 2013 book *Social Ontology* extends his already sophisticated account of group action to large-scale groups with authorities. In fact, in this book, Tuomela provides a much more thorough analysis of 'massively shared agency' than Shapiro does by considering two different types of authorities:

> The theory presented in this book assumes that some social groups, including large organized groups, can be viewed as functional *group agents*. This means that we can on functional grounds attribute as-if mental states such as wants, intentions, and beliefs, as well as actions and responsibility to these groups… The group agent approach, I argue, is especially useful with respect to large, typically hierarchical groups (e.g., corporations and states), cases in which theorizing about individuals and their interrelations is impractical. In the specific analyses of various group notions in the book the starting point often is a hierarchical group with "internally" or "externally" authorized leaders. (2013: x)

An internally authorised leader is simply one that has been authorised by the group members through collective acceptance, whereas an externally authorised leader is one that has not gained their authority through the collective acceptance of group members, but rather has been authorised by a source external to the group, but is nonetheless obeyed by the group (e.g., a town council ordering a house-owning company to comply with certain standards) (ibid.: 39, 88).

[6] As introduced by Chant, Hindriks, and Preyer (2014: 1-2).

With this, Tuomela can distinguish between the shared agency involved in corporate activity (where authorities are largely externally authorised) and the shared agency involved in legal activities (where authorities are largely internally authorised). In fact, to demonstrate this, Tuomela considers and develops detailed examples of authority and cooperation in both corporations and states (ibid.: 167-72). Without going into any details, since there is not enough space here for this, we can already see that when it comes to large-scale groups with authorities, Tuomela provides us with a much richer analysis than Shapiro's one dimensional account of authority, also explaining exactly how two of the most salient cases of MSA work.[7]

As for alienated participants, although not explicitly considered by Tuomela, he can account for them through the different strengths of cooperation he makes room for in shared intentional activities, i.e., the different ways in which individuals function as group members. By recognising that individuals can be committed to a shared goal for either private or group reasons, Tuomela distinguishes between intentions held in the I-mode and the we-mode, respectively (2013: 6-7; 64-73). Though this is only a general overview as within each mode there are further variations which specify the strength of the attitudes held by individuals which correspond to the ways in which they function as group members (e.g., as a private person, as a group member, or in part as a private person and in part as a group member). A full explication of Tuomela's account of shared agency would unfortunately take us too far from the present discussion, though, it should be clear from this (albeit fleeting) mention of it that it already has the resources required to account for both alienated participants and different kinds of authorities in large-scale group action. Thus, Tuomela's work provides a much more sophisticated account of massively shared agency than modifications of Bratman can hope to achieve and so would have been not only a more appealing and plausible prospect, but the obvious choice for Shapiro to follow.

So, with this, we are still left wondering why Shapiro would decide to follow Bratman's theory in the first place since he gives us no reasons to think that his is 'the most interesting and plausible theory of shared agency that exists' and we can now see that it clearly is not. Here, the methodological concern raised at the beginning of this subsection returns: I said that although Shapiro seems to realise that it is important to be clear about the kind of group under investigation before analysing the activity it performs, as we saw in the previous

[7] Moreover, this provides us with another way of distinguishing between different kinds of legal systems based on authoritative structure, rather than following Shapiro's claim that this can be elucidated based on how plans are constructed (2011: 206-7) – democratic states are internally authorised whereas authoritarian states are externally authorised.

chapter, he does not proceed in this way. Though, it is not only his analysis of legal organisations that is constrained by the kind of activity he takes them to perform, but it seems that his account of shared agency, i.e., *how* legal organisations carry out legal activities is also influenced by what he takes this activity to involve. His *Planning Thesis,* that legal activity is social planning activity, seems to underscore his reason for taking Bratman's account of shared agency to be the most interesting and plausible given the centrality that Bratman gives to planning – he begins by emphasising the importance of understanding "that we are planning agents" (1999: 1) in giving "an adequate philosophical treatment" (ibid.) to "(1) the very idea of intention, (2) basic features of our agency, (3) important forms of shared agency, and (4) important forms of responsible agency" (ibid.). As a result, it makes Shapiro's use of Bratman seem *ad hoc*: he begins with the thesis that legal activity is social planning activity and so finds an account of group agency which fits that rather than with an investigation into the nature of legal organisations and then analyse how they perform shared activities. For this, as we have seen with Tuomela, there is at least one stronger account available to Shapiro. Though, it does not start with the thesis that shared activity is planning activity: Bratman is unique in this sense.

Since there is, in fact, another account of shared agency compatible with Shapiro's massively shared agency, Bratman is clearly not best placed to explain such cases. Given this, it looks like the main (if not only) aspect of his work that is appealing to Shapiro is the importance he places on plans and planning. But this is to put the cart before the horse in Shapiro's case – it makes it seem like he is not as interested in explaining massively shared agency as he is in showing that legal activity is social planning activity. Without this presupposition of the activity that legal organisations perform, it seems plausible to think that Shapiro would not be so concerned with Bratman's theory since, unlike some other views, it is limited in ways that Shapiro himself identifies as incompatible with MSA.

While the discussion so far has primarily been concerned with questioning why Shapiro would decide to follow Bratman's theory, I think it also partly addresses the other query as to whether we can really take Shapiro as offering a Bratmanian approach at all. As we have seen, a main element in each of their theories is planning. Once Shapiro has changed and supplemented Bratman's account of shared agency, this focus on planning is one of the few aspects that remains. It is in this sense that I think Shapiro's 'Bratmanian' account of shared agency is more superficial than substantial. Another reason in support of this is that Shapiro does not follow Bratman very closely when it comes to extending his account to massively shared agency: Bratman is clear about which part of his work may be extended to larger,

institutional groups with authority structures, “shared cooperative activities can involve large numbers of participating agents and can take place within a complex institutional framework” (ibid.: 94). However, at no point does Shapiro consider how Bratman’s account of SCA can be extended to massively shared agency. Rather, he chooses to focus on shared intention and the weaker SIA. That is to say, while Bratman thinks his account can explain the activities of groups of the sort that Shapiro is concerned with, he does not think that they engage in shared intentional activity, but rather his stronger SCA. Recall the difference as stated in §3.4.1, SIA “is activity suitably explainable by a shared intention and associated forms of mutual responsiveness” whereas SCA “requires, in addition, the absence of certain forms of coercion and commitments to mutual support in the pursuit of the joint activity" (ibid.: 9). So, instead of engaging with the stronger version of shared agency Bratman develops and takes to be the most promising to explain cases like MSA, Shapiro targets the weaker version and further waters it down by dropping the requirement that participants are mutually responsive, as well as revising Bratman’s notion of shared intention.

This has further implications concerning the project that Shapiro takes himself to be carrying out. Despite what he says, dropping mutual responsiveness is not a minor modification of Bratman’s theory of shared agency as SIA; in doing away with this condition, Shapiro is no longer engaging with the same phenomenon but is instead explaining what Bratman calls ‘prepackaged coordination’ which is a different project that he does not undertake. Thus, in formulating his account of shared agency, Shapiro also cannot claim that “shared intentional activity is activity guided by a shared plan” (2014: 277) since he is not in fact giving us an account of SIA but prepackaged coordination which is simply when participants respond to certain rules or plans rather than to the behaviour of the other participants. So, Shapiro’s project does not seem to be proposing changes to Bratman’s account of SIA; instead, it seems that he is offering an elaborated account of prepackaged coordination.

On a different note, it is actually unclear whether or not mutual responsiveness is required to make sense of one of the conditions of Shapiro’s revised characterisation of SIA. Recall the third condition that “[m]embers of G resolve their conflicts about J-ing in a peaceful and open manner” (ibid.). At first glance it seems as if resolving conflicts peacefully and openly requires mutual responsiveness between participants. Shapiro is likely to respond that MSA is activity involving authority structures and so conflicts would be settled peacefully and openly by appealing to the authority. Although it seems to me that this still requires some level of mutual responsiveness between participants, it may be that the condition simply needs to be better formulated so as to make clear that this is not the case.

So much for Shapiro's proposal that mutual responsiveness be dropped. The final objection I will raise against Shapiro's treatment of Bratman's work may give us reason to think that his resulting view has the potential to follow Bratman more closely. Here I am concerned with the other major modification he makes to Bratman's view in order to account for alienation in MSA: replacing the requirement that participants must be committed towards the joint activity with the requirement that they need only be committed towards a shared plan. The reason for this is that alienated participants do not care about the shared goal and so, according to Shapiro, are not committed towards the success of the joint activity. To see this, let me follow Shapiro's examples of employees who are completely indifferent to the goals of the company they work for. Shapiro says that due to their indifference, various mechanisms are in place to ensure they act in a way consistent with achieving the company's goals. One of these mechanisms is the 'vertical division of labor' (2011: 140-2; 146-50), i.e., appointing supervisors to make sure that staff members do their jobs properly, i.e., that they follow company policies which are specially designed to achieve company goals.

However, it is one thing to *care* about something and an entirely different thing to be *committed* to it. I might not care about your goal to lose weight, but in wanting to be a good friend to you, I commit myself to your goal, supporting you by making sure we have salad for lunch instead of pizza. Likewise, Shapiro's apathetic software engineer introduced in the previous subsection does not care (or perhaps even know) what Microsoft's goals are, but he is committed to doing his job (i.e., participating in the joint activity which amounts to a commitment towards the joint goals) successfully since he cares about being paid and retaining his employment. What these examples show is that a lack of care does not entail a lack of commitment. Yet, this is exactly what Shapiro seems to conflate: "[b]ecause the modern world is also characterized by diversity, it is extremely unlikely that large-scale ventures can be staffed with individuals who are all committed to the same goals" (ibid.: 149). But why is this unlikely? It is understandable that in such ventures not all individuals *care* about the same goals, but there is no reason to think that they are not committed to them. Commitment does not require care; rather, it requires acceptance. Consider Dilbert again: he might not care about Microsoft's goals, but he is committed to them via the joint activity which he accepted and committed himself to when signing his employment contract.

Therefore, while alienated participants do not care about the joint goals or activity, they are committed to them – this is what makes them *alienated participants*.[8] In fact, in most cases

[8] As Brian Leiter (2020: 8) points out, Shapiro's 'trusim' that there can be alienated legal officials is, in fact, highly controversial. Furthermore, he argues that the claim is false since there cannot be a legal system in which officials did not accept the secondary rules from an internal point of view. Leiter is following Hart's

of MSA, there is a mechanism which ensures that such participants are committed to the success of the joint activity: contracts. By formally agreeing to carry out certain tasks, employees commit themselves to the success of the company's joint activity (and, thus, goals). We can understand supervisors as another mechanism which is in place to remind participants of this commitment and enforce it.

Though, even if Shapiro resists this argument, he must admit that some participants are committed to the success of the joint activity – those who formulate the shared plan in accordance with certain goals. This may be shareholders or supervisors who share a goal and design a plan to achieve it. Since this is a shared intentional activity in the Bratmanian sense, Shapiro cannot so easily abandon Bratman's account of shared intention in favour of commitment to a shared plan since there is not a shared plan for such participants to be committed to. Thus, Shapiro has to solve the puzzle of how these participants engage in this shared activity.

3.6. Conclusions

In this chapter, I presented in detail Shapiro's *Planning Thesis* – that legal activity is social planning activity. After examining his account of planning activity along with how he extends this to analyse the nature of legal activity, I raised some objections to the effect that Shapiro essentially does not have an account of either.

A consequence of this is that the central thesis of Shapiro's Planning Theory of Law is completely unsupported. Worse still, his appeal to Bratman's Planning Theory of Intention in accounting for *how* legal organisations carry out the activities they do looks *ad hoc*. I showed in the previous section that despite Shapiro's attempt to justify his focus on Bratman's work, his claims that no other philosophers of action could accommodate cases of massively shared agency were simply untrue. By briefly mentioning Tuomela's complex body of work, and in particular his treatment of large-scale group action with authority relations, we were able to see that there was, in fact, a famous alternative already on offer which is significantly better placed to explain MSA than Bratman's account or Shapiro's proposed modifications of it. The upshot of all this was to extend and reinforce the point made in the previous chapter: that not only is Shapiro's analysis of legal organisations

famous thesis of the 'internal point of view' (cf. Hart 2012: 89). Roughly, this is the idea that legal officials bring legal systems into existence by adopting a critical reflective attitude of acceptance towards a system of rules. Since this acceptance attitude is necessary for the existence of the legal system, it is not possible to have alienated officials (understood in Shapiro's terms as uncommitted participants).

constrained by the kind of activity he takes them to perform; so, too, is his account of *how* they perform the activities that they do. It seems that Shapiro is more concerned with retaining the planning element of his view than really investigating the nature of either legal organisations or legal activity.

Unlike in the previous chapter, I did not try to help Shapiro by considering how else he might try to analyse legal activity in any detail. I simply mentioned Tuomela's work as a more promising way that one may go in developing such an account. The reasons for this are twofold. Firstly, unlike with legal organisations, Shapiro does in fact offer an account of the nature of legal activity along with the shared agency required in its performance. The problem here was not that there was a gap, but rather that his analysis of legal activity did not amount to much and his reliance on Bratman's account of shared agency is both unfounded and problematic for various reasons. As a result, I take it that Shapiro's *Planning Thesis* cannot be upheld – there are no convincing arguments that legal activity just is social planning activity nor an alternative account of shared agency that would allow such a strong claim. Secondly, I did not attempt here to supplement Shapiro's account by applying Tuomela's (or anyone else's) work to help him answer how legal organisations carry out legal activity since this would not be possible within the confines of his theory. Instead, it would be a separate project with the aim of investigating the agency of legal organisations which exceeds the scope of this discussion. Though, I have hinted at a good place to start such a project.

Given my rejection of Shapiro's main thesis, the *Planning Thesis*, which holds his entire Planning Theory of Law together, one might wonder why in the next chapter I continue scrutinising Shapiro's work by analysing his claim that legal rules or laws are plans. I do this for three reasons. First, despite my arguments, it may be that Shapiro can respond with more rigorous accounts of both planning activity and legal activity, showing how the latter is an instance of the former, thus reinstating his *Planning Thesis*. There may also be a way for him to weaken the *Planning Thesis* so that his Planning Theory of Law might remain intact. Second, while his claim about laws as plans follows from his *Planning Thesis*, I take it to be an interesting comparison nonetheless which is worth investigating. Lastly, I wish to present a thorough, comprehensive analysis and critique of Shapiro's Planning Theory of Law, and since possibly the strongest and most controversial claim in his theory is that laws are plans, no analysis of his account is complete without considering this claim.

Chapter 4

Are Laws Plans?

4.1. Introduction

In the previous two chapters, I have analysed two of what I suggested are the three main claims of Shapiro's Planning Theory of Law – the *group* and *activity* claims. It is in this chapter that I will investigate the third claim, that legal rules (or laws) are plans and plan-like norms. Out of Shapiro's three main claims, this *norm claim* has received the most attention and criticism from legal philosophers. Here, I will consider objections from Canale (2013), Poggi (2013), and Celano (2013) as well as to raise my own challenges throughout the chapter. With all this, I will argue that Shapiro does not succeed in showing that legal rules are plans and that, in fact, there are reasons to think that this implication does not hold. In an attempt to help Shapiro preserve his account, I will explore if a weaker version can survive scrutiny. I will conclude that it cannot, and as a result, I will reject both his *norm claim* and his Planning Theory of Law as providing a satisfactory analysis of the nature of law.

I structure the chapter as follows. In §4.2, I consider Shapiro's analysis of (shared) plans and plan-like norms along with some objections before examining in further detail their normative character in §4.3. In §4.4, I ask what makes some plans laws; that is to ask, what separates normal, 'garden-variety' plans from legal plans. Here I will maintain that, despite his best attempts, Shapiro fails to characterise legal rules as plans. Additionally, I will contend that there are further discrepancies between laws and plans which lead me to reject his *norm claim*. I review in §4.5 a way for Shapiro to hold on to a more limited version of his Planning Theory, though I argue that it does not fare any better than the stronger version. §4.6 will conclude.

4.2. What are plans and plan-like norms?

As we saw in the previous chapter, the central claim of Shapiro's Planning Theory of Law is his *Planning Thesis*, that legal activity is social planning activity. It follows from this that the products of legal activities, i.e., laws or legal rules, are social plans. This is what I call Shapiro's *norm claim*. In this section, I will begin unpacking this claim, starting in §4.2.1 by

considering Shapiro's answer to the question, *What are social plans and plan-like norms*? In §4.2.2, I will present some objections to his answers.

4.2.1 Shapiro's answer

A critical result of the Planning Theory, which has also been one of its main points of controversy, is the claim that legal rules are plans.[1] In order to appreciate the importance of this claim within Shapiro's account of the nature of law along with the objections it has received, I will here elaborate in some detail on the nature, features, and function of Shapiro's plans. I will save a discussion of the criticisms of Shapiro's account of plans for the following subsection.

As we saw in §1.2 - §1.4, Shapiro wants to provide an alternative positivistic account of law that does not fall victim to the same challenges that some other, prominent positivist theories have succumbed to. More specifically, he thinks that the way to do this "is to show that there is another realm whose norms can only be discovered through social, not moral observation, namely, the realm of *planning*" where "[t]he proper way to establish the existence of plans", he says, "is simply to point to the fact of their adoption and acceptance" (2011: 119). So, we can see clearly the motivation behind Shapiro's focus on planning activity and plans: if legal activity and their products can be characterised as social planning activity and social plans, then we have an alternative positivistic account of law, one that Shapiro claims can avoid Hume's Challenge and the Possibility Puzzle. I will return to this motivation along with The Planning Theory's answers to these problems in §4.5, once I have presented in detail Shapiro's analysis of laws as plans.

When it comes to characterising laws and legal activity as plans and social planning activity, respectively, Shapiro follows the same approach by beginning in each case with an analysis of the latter (i.e., social plans / social planning activity) in order to show that the former (i.e., laws / legal activity) possesses all of the same features, and thus, can be taken as an instance of it. We saw in the previous chapter that Shapiro's analysis of legal activity began with a characterisation of planning activity as settling, dispositive, purposive, and incremental, along with an explication of three senses which make a planning activity a *social* planning activity: (i) the activity creates and administers norms that represent communal standards of behavior", (ii) "the planning regulates most communal activities via general policies", and (iii) "the planning regulates most communal activity via publicly accessible standards" (ibid.: 203). Recall also in §3.2.2 where I argued that Shapiro conflates the properties of the

[1] In this chapter, I will follow Shapiro in using the terms 'legal rules', 'legal norms', and 'laws' synonymously.

products of the activity with the activity itself, resulting in a sparse analysis of both planning and legal activity. More specifically, I demonstrated that the settling, dispositive, and incremental features should, instead, be attributed to *plans*, not planning activity. Therefore, we can help Shapiro out with his analysis of plans by taking them to possess those three features.

But, what, according to Shapiro, are plans? What other properties do they have? And why do we need them? I will explore his answers to all these questions in the remainder of this subsection.

Individual plans

With the aim to make sense of the more complex shared plans that result from social planning activities, Shapiro begins by considering individual plans which result from one person planning their own activities. I will follow his lead by first presenting his account of individual plans in some detail before moving to his understanding of shared plans in order to highlight both what individual and shared plans have in common as well as what sets them apart. Though, since Shapiro argues that laws are shared plans, my chief interest will be in exploring his characterisation of shared plans.

Before beginning the discussion about plans and planning activity, Shapiro makes clear why he is interested in these phenomena and how they connect with his overarching project to answer the question, *What is law?* Following Bratman, Shapiro notes that "human beings have a special kind of psychology: we not only have desires to achieve complex goals, but we also have the capacity to settle on such goals and to organize our behavior over time and between persons to attain them" (ibid.: 119). That is to say that we are 'planning creatures' able to create and follow plans to achieve certain ends. Building further on Bratman's work, Shapiro aims "to show that understanding the law entails understanding our special psychology and the norms of rationality that regulate its proper functioning" (ibid.: 119-20). So, it is critical for understanding the nature of law that we understand the role of planning and plans. "For that reason", Shapiro states that he will spend "a significant amount of time describing the activity of planning, the structure of plans, and the motivation for creating plans, and the rationality constraints that attend this activity" (ibid.: 120). As I have already scrutinised Shapiro's account of planning activity in the previous chapter, all that is left here is to review the rest. In addition to the structure of plans and the motivation for creating them, I will also focus on what kind of entities Shapiro's plans are, as well as their features, and existence conditions. A discussion about plan rationality will be considered in §4.3.

Let me begin by saying something about the existence conditions of plans since this will help in clarifying further aspects of their nature below. Recall that for Shapiro and his positivistic programme, all that is required to establish the existence of plans is that they have been adopted and accepted. Whether or not a plan exists does not depend on any other conditions, such as desirability. For instance, the existence of my plan to pay my rent on time each month has been established by my adopting and accepting this plan and has nothing to do with how (un)appealing it is for me to pay my rent.

Although this is an important point in Shapiro's argument for a positivistic account of law, he never offers definitions for what it is to either adopt or accept a plan. Both are very similar intentional attitudes, so it is tricky to see the distinction that Shapiro has in mind. However, it seems that he understands adoption as 'prior to acceptance' and the latter in terms of 'not yet rejecting' (see Shapiro 2011: 119). I think a clearer way of stating this is to say that *adopting* a plan is akin to initial acceptance (e.g., an intentional attitude towards the plan) and *accepting* a plan is continued acceptance (e.g., an intentional attitude towards the adoption of the plan). On this view, adoption is what brings a plan into existence, and acceptance is what sustains the plan (i.e., keeps it in force).[2]

As we have seen, Shapiro borrows much from Bratman's planning theory of intention, taking himself to be building upon it. Yet, he departs from it in two important ways. I mentioned the first of these in the previous chapter: Shapiro is interested in explaining the agency of larger groups with a more complex, hierarchical structure rather than with Bratman's 'modest sociality'. By using Garcia-Godinez's (2020) distinction explored in Chapter 2, we can say that Bratman is concerned with organised social groups, whereas Shapiro is focused instead on institutional groups. The second departure that Shapiro takes from Bratman concerns his understanding of the *kind* of entities that plans are. For Bratman, "plans are intentions writ large" (Bratman 1987:8). Shapiro explicitly rejects this view by saying that "[b]y 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" (Shapiro 2011: 127). Here, Shapiro makes a distinction that Bratman does not; between "the mental state of "having a plan"" and the object of that mental state. Whereas for Bratman, plans are the former, and so are a kind of attitude, i.e., intentions, Shapiro takes plans to be the latter, i.e., the objects of intentions. More specifically, he suggests that "plans are abstract propositional entities that require,

[2] It might be more accurate to say that adoption is the existence condition of plans, while acceptance is the persistence condition. This understanding could justify why Shapiro suddenly drops talk of accepting plans, opting instead in his examples to mention the importance of adopting plans. If acceptance is the persistence condition, it depends on adoption, i.e., in order for a plan to be accepted, it must first be adopted.

permit, or authorize agents to act, or not act, in certain ways under certain conditions" (ibid.), or in other words, plans are norms. This idea will be discussed in more detail in §4.3, so for now I will continue by considering some other features that Shapiro takes plans to possess.

As was mentioned in the previous chapter, despite Shapiro presenting *planning activity* as settling, dispositive, purposive, and incremental, I argued that most of these properties belong, instead, to plans, with the only exception being that planning activity may be characterised as purposive as well since it has the function of producing norms. Here, I will briefly recount the settling, dispositive, purposive, and incremental features of plans before considering in more detail those extra properties identified by Shapiro.

Let us first recall what makes plans settling. As we observed in §3.2.1, Shapiro appears to identify both planning activity and plans as settling. Though, as I argued, this is a mistake as we do not look to any activities in order to settle the matter of how we should act. Rather, it is often the purpose of activities (planning being a particularly clear example) to produce a norm which we can look to in order to settle such matters. As Plunkett puts it in his summary of Shapiro's planning theory, plans "settle deliberative questions about what to do" (2013: 152). This is because, in the case of individual plans, we create them in order to help us achieve some goal when the actions required to do so are complex or unclear. That is, we engage in planning activity to deliberate on the best course of action to achieve a certain goal and identify the relevant steps to take, thus creating a plan. Given that the plan is the means to achieving our goal, it settles the matter of how we should act.

Another feature mistakenly attributed by Shapiro to planning activity rather than plans is that the latter, but not the former has a dispositive character. This is because when we adopt a plan, we place ourselves under a rational requirement to carry it out, and so, the plan disposes us to act in certain ways consistent with the plan (e.g., not to adopt any other plans that might conflict). As Shapiro explains it, "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" (2011: 128).

Similarly, Shapiro makes a mistake in characterising planning activity as incremental. Despite this being a paradigmatic characteristic of legal activity, according to Shapiro, and so representing a virtue of his theory in being able to explain where this feature comes from, I pointed out in §3.2.2, that planning is not something that can be incremental – rather, it is a steady process which sets out the different steps to be taken in order to achieve certain

ends. Given that a plan is the product of this activity, and so is filled in over time, it is thus only plans that can properly be described as incremental. Indeed, it is this incremental feature of plans that explains their distinctive structure, which I will shortly elaborate on. Though, before doing so, I will return to considering some further properties of plans.

While I did not cast any doubt in Chapter 3 on Shapiro's characterisation of planning activity as purposive, I did not mention there that this feature is also attributed by Shapiro to plans: "[p]lans are also purposive entities. They are norms that are not only created, but are created *to be norms*" (ibid.: 128). As Plunkett summarises this feature, plans "are entities that have a *purpose*" (2013: 152). Just as planning activity has the purpose of creating plans, plans have the purpose of achieving certain goals by guiding action. I will say more about this specific purpose of plans in the following section when I explore their normativity in detail. For now, I will consider some extra properties of plans as identified by Shapiro.

Perhaps given their purposive, dispositive, and settling nature, plans are also "fairly stable" (2011: 124). That is, "they must be reasonably resistant to reconsideration" (ibid.). While Shapiro concedes that plans may sometimes be revised, he maintains that they usually are not since it would be irrational to upend previous judgements without good reason. As he points out, it "would defeat the purpose of having plans if I were to review their wisdom without an otherwise compelling reason to do so" (ibid.).

On a similar note, Shapiro emphasises the *positive* nature of plans, i.e., they are posited entities created via adoption and acceptance as opposed to other norms like the laws of logic or principles of morality which "exist simply by virtue of their ultimate validity" (ibid.: 128). Or, to put it in Plunkett's words, "plans are entities that agents create" (2013: 152). I think a better way of drawing out this property of plans is in understanding them as artifacts, that is, intentionally created objects to fulfil some specific purpose.[3]

Following on from this point, another property of plans is that they have a lifespan. Since they are purposive entities, created to satisfy a certain goal, once this goal has been achieved, they are no longer required and cease to exist. The only acknowledgement Shapiro gives to this feature of plans is in elaborating on the incremental nature of legal regulation where he says "legal regulation differs from ordinary, nonlegal planning, where the shorter life span of plans renders repudiation and revision a less common, though not entirely unusual phenomenon" (2011: 197). As I hinted at in §3.2.2, I think this observation is problematic

[3] This would follow Ehrenberg's understanding of how his work on an artifact theory of law fits with Shapiro's planning theory, as elaborated in his (2016), which I briefly explored in §2.5.2.1.

for the implication Shapiro wants to make between plans and legal rules, and it is a point I will return to in the following subsection. For now, let us move on to consider the function of plans.

Now, it may not be clear from the outset how a plan's function differs from its purpose, so allow me to take a moment to clarify what each of these amount to. Though Shapiro makes use of both notions, an explication of this distinction cannot be found in his work. To add to the confusion, he often conflates the function of planning activity and plans, making it difficult to tease out his view on each. My suggestion is that when we are interested in the *function* of something, we want to know how it works, whereas when we are asking about its *purpose*, we want to know what it is meant to do. So, in the case of plans, I take their function to be to guide action and their purpose to be to achieve goals.[4] And the way they do this has something to do with their structure. Let me conclude my analysis of Shapiro's individual plans by considering what he says about their structure.

Shapiro cashes out the structure of plans by way of example. After deliberating about whether to eat out or to cook dinner at home, he settles on the latter, which he takes to be a general plan that he begins to fill out by asking some further questions about what to eat and which supermarket to go to in order to buy the ingredients. Once each of these questions has been answered, he takes himself to have formed further plans which are related to one another. More specifically, he takes these to be *sub-plans* of the original plan since settling on what to cook and buying the ingredients at a supermarket allow him to achieve his original plan of cooking dinner at home. In his words, "[w]hen one plan specifies a means for accomplishing, or a way of realizing, the end fixed by another plan, we will say that it is a "sub-plan" of the second. Thus, the plan to buy food at the supermarket is a sub-plan of the initial plan to cook dinner tonight" (2017: 2-3). He takes the combination of these plans to be yet another plan:

> [o]f course, by adopting these two plans, I have also created a third plan, namely, the plan to cook dinner tonight by buying food at the supermarket. This larger plan, we might say, has two parts to it: the first is the plan to cook dinner tonight and the second is the plan to buy food for dinner at the supermarket. These parts are related as means to end: the second part is a sub-plan of the first. (ibid.: 3)

[4] For completeness, I suggest the function of planning activity is to identify the means by which a certain goal can be achieved, and its purpose is to produce the means by which this goal can be achieved (e.g., a plan).

Shapiro credits Bratman as showing that planning usually involves the creation of these larger, more general plans, along with their *partiality*: "[t]hey begin as empty shells and, as more details are added, they become more comprehensive and useful" (ibid.). Shapiro also notes that plans are rarely exhaustive since there are many parts that do not need to be deliberated about or decided in advance. In fact, he makes a 'pragmatic argument' for leaving certain parts of plans open: in some cases, we require a certain amount of flexibility in our actions and so it is imprudent, or even risky, to decide on all aspects of the plan in advance (ibid.).

As plans are filled in, then, they "naturally assume a nested structure" (ibid.) with the original plan, its sub-plans, its sub-sub-plans and so on. He takes this *nested* structure of plans to play an important role in the function of *planning*, namely, it explains how past deliberation impacts on present planning: in constructing a plan, we identify certain ends and the means to achieve them, taking these as settled and not up for reconsideration when filling out their sub-plans and sub-sub-plans. As Shapiro puts it: "my present deliberation is confined solely to those options that are not ruled out by past decisions", which is to say that "plans not only organize our behavior, they also organize our thinking about how to organize our behavior" (ibid.).

Now that I have presented in detail Shapiro's individual plans, let us now take stock of exactly which parts of his investigation we are still to review. As we saw towards the beginning of this section, when Shapiro first introduces his Planning Theory of Law, he sets out the main themes that he will focus on while developing his account: the activity and rationality of planning, the structure of plans, and the motivation for creating them. A thorough analysis of his treatment of planning activity was the business of Chapter 3. So far in this chapter, I have elaborated on both the structure of plans and our motivation for creating them, where I take this latter point to reflect on both the function and purpose of plans – that is, we are motivated to create plans because we have a certain goal that we would like to achieve (which is the purpose of plans) by guiding our action in a way that will help us to achieve this goal (which is the function of plans). All that is left to consider from these main themes identified by Shapiro is the rationality of plans and planning, which will come in §4.3. For now, I will turn to how he extends his account of individual plans to shared plans.

Shared plans

Since shared plans largely resemble individual plans, here I will begin by elaborating in more detail on the differences between them before detailing some specific types of shared plans that will later play an important role for Shapiro in his attempt to show that laws are plans by mapping specific examples of legal rules to different types of shared plans.

Mirroring our discussion of individual plans, the first significant difference between them and shared plans comes with their existence conditions. As we have just seen, according to Shapiro, all that is required to establish the existence of an individual plan is that an individual adopts and accepts it. Though, as I suggested, the only existence condition here is the adoption, i.e., initial acceptance, of the plan, since continued acceptance is better understood as a persistence condition. So, we have it that in the case of an individual plan, all that is required to bring it into existence is that an individual has an intentional attitude of acceptance towards the plan. Thus, in extending Shapiro's view for shared plans, we can say that a shared plan is brought into existence when a group adopts it, i.e., when a group holds an intentional attitude of acceptance towards the plan. Another way of putting this is to say that a shared plan requires for its existence that a group has an appropriate collective intentional attitude of acceptance towards it.

While both a formulation of this existence condition for shared plans and a discussion of what collective acceptance is are missing from Shapiro's account, he comes some way towards both tasks. Instead of talking about a group's adoption of a shared plan, Shapiro elaborates on what it is for a group to share a plan: "[c]learly, when we speak of a group sharing a plan, we don't mean that the group has a collective mind that has adopted a plan. A plan is shared by a group only if each of the members of the group in some sense "accepts" the plan" (2011: 136). Realising that he needs to say more about the sense in which each of the members accepts the plan, Shapiro makes it clear that individual plan adoption is not enough: "[t]o say that a group has a plan to do A is to say more (and, as we will soon see, sometimes less) than that each member of the group plans to do A" (ibid.). As cryptic as this sounds, all Shapiro wants to say here is that acceptance is only one of three conditions that must be met in order for a group to share a plan. In addition, the plan must have been designed partly 'with the group in mind' (this is to prevent random individuals who intend to engage in the same generic activity qualifying as sharing a plan) and the plan must also be publicly accessible to participants (clearly, 'secret plans' that are unknown to group members cannot be accepted by them).

Though, this does not help us to make sense of the acceptance required to share a plan. Thankfully, Shapiro says more: ""acceptance" of a shared plan does not mean simply that each member accepts her particular part of the plan. To accept a plan entails a commitment to let other members do their parts as well" (ibid.). It seems to be for this reason that Shapiro takes shared plans as constitutive of shared agency: "[s]hared agency, that is, acting together, is distinguished from individual agency, that is, acting alone, by virtue of the plans of the agents… shared plans, we might say, bind groups together" (ibid.: 137). With this, Shapiro also hints towards what it is for the group to perform a collectively intentional action: "a group intentionally acts together only when all members of the group intentionally play their parts in the plan and the activity takes place because they did so" (ibid.: 138).

So much for the existence conditions of shared plans. Let us now briefly consider what *kind* of entities they are. Recall that Shapiro distinguishes between the mental state of having a plan and the object of that mental state, taking plans to be the latter, i.e., the objects of intentions. In the case of an individual plan, it is the object of the individual's intention, which means that in the case of a shared plan, it is the object of the group's intention. I will return to consider the complexity of this answer further in the following subsection. For now, let us continue by considering how some features of shared plans are different from those of individual plans.

Unlike with the existence conditions for shared plans, it is fairly straightforward to see how some of the features of individual plans are amended in the case of shared plans. While individual plans settle the matter of how individuals should act in a certain situation, shared plans settle the matter of how a group should act. That is to say that shared plans help to coordinate shared action. They are also dispositive: when a group collectively accepts a shared plan, they are rationally required to follow it. As for the purpose of shared plans, like individual plans which have the purpose to achieve goals by guiding action, they are meant to achieve shared goals by guiding shared action, where guiding shared action is the function of shared plans and is achieved due to the nested structure of plans. Let us now consider this in more detail.

As Shapiro notes,

> the structure of shared plans is similar to that of individual plans. Shared plans too are typically partial: they are developed over time, beginning with a settling of ends and a progressive divvying up of steps each member is to take. Shared plans are also normally composite: they have parts that are themselves plans... Finally, shared plans

> are usually nested: they identify the overall end to be achieved by the group and specify in their subplans the parts that everyone is to take. (ibid.: 130)

Despite all these similarities, the subtle differences in the structure of shared plans in being filled out with a group in mind and having subplans that are performed by different participants, in fact leads to one of the key distinctions between individual and shared plans: the latter, but not the former, come in a variety of types. This is a crucial result of Shapiro's theory as he uses it to make sense of how we can understand various legal rules based on these different types of plans (as will be explicated in §4.4.1). To conclude this subsection, let me briefly introduce each of these types.

Policies, customs, and hierarchies

Following Shapiro, before outlining the salient types of shared plans in shared activities, it will be instructive to consider how they come about. That is, how they are created and why we need them. Shapiro identifies *policies*, *customs*, and *hierarchies* as "three ways in which plans can be forged without the members having to engage in the time-consuming process of plan formulation and adoption" (ibid.: 138). Though, based on Shapiro's discussion of each, it seems more accurate to take policies as particular types of plans and customs as plan-like norms, rather than ways in which these are created. To see this, let us consider each in turn before moving to hierarchies.

Policies arise when a group performs a certain shared activity regularly. These are 'general plans' which are put in place to reduce 'deliberation and bargaining costs' for repeated shared activities. Think, for instance, of a book club which has to decide which book to read each month. Rather than members having to suggest, consider, and agree on this every time, they can instead decide to follow *The Sunday Times Book of the Month*. As a result of adopting this policy, each member of the book club knows which book to read each month, and also knows that the rest of the group will be reading the same book.

Customs, on the other hand, 'emerge spontaneously'. Unlike general plans, i.e., policies, which have been specifically agreed on and adopted by group members, customs are patterns which randomly emerge during repeated shared activities and are eventually treated as the norm. For instance, to return to our book club example, this could involve holding the sessions at a different member's house each week until each member has hosted one meeting, then beginning at the start of the list again. Though customs do not "arise through the process of planning, they are planlike because they do what plans are normally supposed to do: they economize on deliberation costs, compensate for cognitive incapacities, and organize

behavior between participants" (ibid.: 140). That is to say that customs, like plans, purport to settle action, but since they were not created for this purpose, they are themselves not the product of planning and are non-purposive. Yet, given their similarity to plans in almost every other respect, Shapiro characterises customs as plan-like norms and allows that shared plans can be partially constituted by them: "[t]hese norms are part of a shared plan just in case they are accepted by the members of the group and are seen as specifying the means by which they are to engage in the shared activity" (ibid.).

In contrast to policies and customs, hierarchies are not types of plans or plan-like norms, but result from shared plans and are also ways of creating special types of what Shapiro calls *self-regulating* shared plans. A hierarchy may be established by either a policy or custom and is a vertical division of labour where subordinate members accept a plan to defer to another member's planning.[5] The shared plans that result from this activity are *self-regulating* in that they "regulate the manner of their own creation and application" (ibid.: 142) by authorising certain members to extend the shared plan by filling it in with new subplans for the other group members to follow. In cases of hierarchy, since the group members have accepted the arrangement to defer to the plans of the authority, they are rationally committed to follow them, on pain of being in direct conflict with their own intentions should they disobey. Though, as Shapiro is careful to note, this does not entail any moral commitment.

Types of Shared Plans

When it comes to significantly larger groups and the (massively) shared activities they perform, Shapiro argues that vertical division of labour is not enough to successfully carry out these activities and suggests that labour must also be divided horizontally so that participants specialise in their particular roles and can be held responsible for any transgressions. In order to do this, Shapiro claims, special types of shared plans are required. The first are *stipulations* – general policies which do not depend on whether the individuals who carry them out believe them to be true. Rather, the individuals are "merely required to treat them as true for the purpose of applying certain plans" (ibid.: 145). Next, Shapiro introduces *factorisations* – specifications of "the factors that should be taken into account when planning how to act" (ibid.). Like stipulations, individuals need not value these factors,

[5] So, from Shapiro's discussion, it seems better to understand hierarchy as a group structure. It follows from this that shared activities involving hierarchy will be different from those that do not. It is not that a hierarchy is a different way of planning; it is a different kind of group structure, and so it's instantiation is a particular kind of group. As I have been arguing, the kind of group determines the kind of activity it performs (or is able to perform, i.e., the planning mechanisms available to groups depend partly on their group structures).

but must merely treat them as valuable in participating in the shared activity. The last type of plans that Shapiro requires for dividing labour horizontally are *permissions* – rather than direct planning as in the case of stipulations or action in the case of factorisations, permissions "[i]nform their addressees that they are *not* required to perform, or refrain from performing, some action" (ibid.: 146) and so are better described as 'anti-directives'. Each of these types of plans and plan-like norms, i.e., policies, customs, stipulations, factorisations, and permissions constitute subplans of the shared plan that are accessible to each member of the shared activity (ibid.).

However, despite developing all these different plans to help guide and organise the behaviour of the group, Shapiro claims that they are still not enough to ensure the success of the shared activity. More mechanisms must be put in place to make sure that participants are following their parts of the shared plan given the problem of indifference or alienation in larger shared activities. To overcome this issue, he argues, we need to decentralise planning by introducing a more elaborate vertical division of labour. This is done by way of specific types of shared plans which authorise certain members to oversee the performance of the shared activity. There are two specific types of plans that Shapiro requires here: authorisations and instructions. Authorisations are plans that empower certain participants ('supervisors') to adopt and apply plans for others, and instructions are "plans that specify how supervisors are to exercise their authorized powers" (ibid.: 147). That is, instructions outline the procedures that supervisors are to follow to 'validly exercise' their powers in specific circumstances and so validate or invalidate their actions. Although they only apply to supervisors, both authorisations and instructions are parts of the shared plan and so are publicly accessible to all participants.

Shapiro helps us to keep track of all these different types of plans by comparing and contrasting them. Authorisations, instructions, stipulations, and factorisations, he says, do not regulate *action* in the way policies and permissions do, but rather, they guide *planning*, where "[a]uthorizations specify *who* is to plan, while instructions, stipulations, and factorizations specify *how* to plan" (ibid.: 147-8). In this way, they are self-regulated 'plans for planning' that "specify the manner in which the shared plan is to be formulated, adopted, applied, and enforced" (ibid.: 148). For this reason, these types of plans are only present in shared activities involving hierarchy.

Now that we have seen the similarities and differences between Shapiro's individual and shared plans, let me now present some objections towards his understanding of each as well

as some problems with the more specific types of plans that come into play in larger shared activities.

4.2.2 Objections

I will begin in this subsection with a general concern about Shapiro's understanding of plans before challenging more specific aspects of his account of shared plans.

The main worry I have about Shapiro's theory of plans is that he does not distinguish them from goals. As a result, he unnecessarily multiplies plans, gets their structure wrong, and mischaracterises them. To see this, let us recall what Shapiro says about the structure of individual plans. As is characteristic of Shapiro, he develops this part of his account by way of example. In the previous subsection, we saw that the example he uses here is deliberating about whether to eat out or to cook dinner at home. Settling on the latter, he takes himself to have formed a general plan which he begins to fill out by asking some further questions about what to eat and which supermarket to go to in order to buy the ingredients. The answers to these questions are also taken to be further plans by Shapiro. However, none of these are plans, and in fact, it is dubious to even consider them as goals,[6] but let us be charitable for now and take it that 'to cook dinner at home tonight' expresses a goal and in asking these further questions about how to achieve the goal, Shapiro is engaging in planning activity. The answers to each of these questions will eventually form a plan, when he runs out of questions to ask. In fact, this is something that Shapiro seems to endorse after all when he says of the nested structure of plans that "[m]y plan to make dinner tonight specifies the overall goal I wish to achieve" (ibid.: 121).

Though, he soon makes another series of mistakes: "[m]y plan to buy food from a supermarket […] is a subplan of the overall plan of making dinner. My intention to buy chicken at the supermarket after work is, in turn, a subplan of the plan to buy food at the supermarket and, thus, a sub- subplan of the overall plan to cook dinner tonight" (ibid.). What this shows is that Shapiro still takes the goal 'to cook dinner at home tonight' to be a plan of which another goal (at best) to buy food from the supermarket is a sub-plan. Even worse, he takes his *intention* to buy chicken at the supermarket to be a *sub-plan* of his

[6] One might argue that they are better understood as activities. While you can plan to perform activities, this does not make the activity itself a plan, nor is forming a plan necessary for carrying out an activity. Moreover, in performing activities, you have to follow other sorts of rules which cannot be taken as part of any plan. E.g., in driving to the supermarket, you need to follow the rules of the road, but the rules of the road do not enter into any plan you might make in performing the activity of driving to the supermarket. You also need not plan this activity – you can realise that you need to go to the supermarket for milk and simply decide to go then and there, i.e., performing this activity does not require any prior deliberation or identifying a series of steps required for its success.

supposed plan to buy food from the supermarket and a *sub-sub-plan* of the main plan to cook dinner at home tonight. Again, not only are none of these plans, but Shapiro is contradicting himself when he clearly says that "intentions are not plans" (ibid.: 127). It is surprising then, in this example for him to say that a certain intention is not only a plan, but additionally a sub-sub plan. Unfortunately this is not the end of the confusion and most of the time when Shapiro is talking about plans, he is merely expressing, at best, a goal or perhaps simply only a step in the plan.

Clearly plans are not goals as we can have goals without having plans. For instance, I may formulate a plan to help me achieve my goal of losing weight, but decide to quit the plan as it is not working. I have not given up on my goal to lose weight, I just realise that I need to revise or perhaps scrap entirely my plan and devise a new one. This seems consistent with Shapiro's discussion of revising and repudiating plans, though, since he often conflates plans with what look to be more like goals, it is unclear.

This problem could be answered if Shapiro clarified exactly when a goal becomes a plan, that is, how many steps must be identified in order for their sum to qualify as a plan, rather than speaking of plans as 'empty shells' or goals. However, this is not something currently available in his view, and, in any case, would seem arbitrary (or, potentially even *ad hoc*).

Moving on to some worries that target shared plans specifically, first, a minor note: Shapiro takes social plans as governing the activities of the whole community – but do plans really *govern* activities? As noted, the function of shared plans is to guide group behaviour and their purpose is to achieve some goal. It sounds forced to say that plans of any kind are meant to govern behaviour, as opposed to merely direct behaviour by relating means to ends.

On a less minor note, there is a significant gap in Shapiro's explanation of the existence conditions for shared plans. As it turns out, the collective intentional attitude of acceptance is a crucial notion for Shapiro since it is required to bring shared plans into existence. Yet, it is not discussed in any kind of detail by Shapiro which undermines its importance for his account of shared plans. While Shapiro elaborates on what he means by the acceptance involved in a group sharing a plan, which I presented in the previous subsection, he does not say all too much, and as a result, we still do not know what collective acceptance is and how it works. In addition to these two questions, there are several others that are left unanswered, such as: *What holds this collective intentional attitude? What are the conditions for collective acceptance as opposed to individual acceptance? What is collective about this*

acceptance, that is, what makes it different from individuals individually accepting the same plan? How can we distinguish individual from collective attitudes?

Moreover, Shapiro's elaboration, albeit brief, of the acceptance condition for sharing a plan sounds fine until he mentions that "[a]t the same time, it should also be noted that plan sharing does not require that members of the group desire or intend the plan to work" (ibid.: 136). This is problematic since collective acceptance is a collective intentional attitude, so there must be some intention towards the success of the plan – otherwise, this acceptance would be irrational. There also cannot be acceptance without a belief amongst group members that they can achieve the goal by means of the plan, that is, that the success of the shared activity depends on them and so is not a matter of luck. It is exactly this belief in achieving the goal by way of the plan, combined with their desire or intention to achieve it, that leads to their acceptance of the plan. In fact, it seems that this is something Shapiro would agree with: "[o]ne should not adopt a plan that one believes cannot be successfully carried out" (ibid.: 124).

To add insult to injury, Shapiro says that "a group intentionally acts together only when all members of the group intentionally play their parts in the plan and the activity takes place because they did so" (ibid.: 138). Here, he is giving an explanation of group intentionality in terms of the members intentionally playing their parts in a shared plan, so it seems inconsistent to also say that plan sharing does not require intentions that the plan will work. Especially when it is sharing a plan (i.e., acceptance) that entails a commitment to let others successfully do their part so that the plan will work and the goal will be achieved.

Relatedly, when elaborating on the adoption and acceptance of shared plans, Shapiro makes clear that he takes cooperation to come from each member accepting the plan and concludes that it is the plan that binds groups together. Though, we can have cooperation and commitment towards some goal without having a plan. There are many views which would suggest that plans are not what bind groups together, but it is, instead, having certain commitments, goals, ethos, etc, which are not necessarily a matter of planning. For instance, Raimo Tuomela (2003) would say that it is the collective acceptance of a group ethos (i.e., a group reason) that binds groups; Margaret Gilbert (2003) instead takes it to be a joint commitment between the group members to perform an action together; and Philip Pettit (2003) would argue that it is rather a group mind that distributes tasks among members and builds corporate agency.

Shapiro faces a similar problem in extending his view of the nature of individual plans to shared plans. In the case of individual plans, we saw that he takes them to be the objects of intentions. Although in the individual case we may be happy to accept this without further discussion, when it comes to shared plans, this requires explication. While an individual plan is the object of an individual's intention (mental state), a shared plan is the object of a group's intention (mental state). Now, while it is clear that Shapiro does not believe in a group mind that holds these attitudes (2011: 136), he does not specify how individuals can share the same intentional object (whatever that is). This is required to make sense of what exactly plans are, on the one hand, to clarify the distinction between his view and Bratman's, and on the other, because it is an important aspect in understanding his thesis that laws are plans.

Likewise, when it comes to the dispositive feature of shared plans, due to Shapiro mistakenly attributing this property instead to planning activity, there is quite a jump in explaining the dispositive character of individual and shared plans, that, while subtle, is nevertheless important to highlight. In the case of individual plans, when an individual accepts a plan, they place themselves under a rational requirement to follow it, and thus, the plan disposes them to act in certain ways that are consistent with its successful completion. However, in the case of shared plans, it is not always the case that all the group members accept the plan; yet, Shapiro still needs to explain how the shared plans can dispose all members to follow it. Damiano Canale (2013) is doubtful that plans of any kind are as dispositive as Shapiro thinks. Though, he and Bruno Celano (2013) are particularly resistant to the idea that certain shared plans are always enough to motivate participants. Canale finds it "mysterious how plans can dispose individuals to comply when they operate as "external norms"" (2013: 14). These are norms that are not involved in an agent's own practical reasoning. Meanwhile, Celano distinguishes between plans in the first, second, and third-person. Plans in the first-person are simply individual plans; plans in the second-person are shared plans that are created by a group for themselves; and plans in the third-person are shared plans that are created by an agent for another agent. He argues that, while Shapiro's model may be able to explain the first and second-person cases, he illegitimately trades on this explanation when it comes to third-person cases. The result is that, for all Shapiro has shown us, ""plans" adopted for others are on a par with orders backed by threats and other incentive-based prescriptions" (2013: 135).[7] The problem with this is that not all shared plans are dispositive

[7] As a result, legal plans would not be able to create obligations in people to act in accordance with them, since they would instead merely oblige people to follow them (cf. Hart 2012: 82-3). This is a problem because "people who are forced by threat to do things are generally not held responsible for having done them; their will is overborne" (Green 2012: xxxii).

in the same sense – individuals that do not accept a shared plan cannot be said to be disposed to follow it because they do not recognise it as a justified standard of conduct that imposes on them a rational requirement to carry it out. Rather, in these kinds of cases, it is unclear that individuals would be disposed at all, rather than forced or coerced to follow the shared plans – in any case, this motivation to comply with the shared plan clearly does not originate in the shared plan itself, and so, not all shared plans are dispositive. I will return to a similar discussion in §4.5.

The final concern I have targets the specific types of shared plans that he suggests are required in large-scale shared activities. It seems a bit of a stretch to say that authorisations, stipulations, factorisations, and permissions are types of plans and subplans. For one, none of these seem to share the nested structure of plans, which, as we have seen, is one of the most important and salient features of plans that distinguishes them from other norms or rules. If I am correct about this worry, then this will bear greater problems for Shapiro's explanation of various examples of legal rules in terms of these types of plans. That is, if we cannot understand some of these as types of plans, then the legal rules that Shapiro identifies as corresponding to them cannot be plans either, but simply rules. I will return to this worry in §4.4.2.

4.3. What makes plans norms?

In the previous section, I gave a detailed exposition of Shapiro's characterisation of plans along with a few early worries regarding this understanding and pointed to some important gaps as well as a general concern about the plausibility of extending his view to explain the nature of legal norms in terms of plans. In this section, I will continue unpacking Shapiro's *norm claim* by focusing on the normative character of plans.

In order to understand what makes plans norms, according to Shapiro, we must first begin by analysing what he takes norms to be and see how he characterises plans as norms. Once we have this, the next step is to clarify how he accounts for the normativity of plans. This will be the job of the first subsection. The second subsection will point out some issues with Shapiro's treatment of norms, in particular, that he doesn't give us an account of norms, nor does he attempt to distinguish between different kinds of norms, which leads to the rise of a few early worries about where this might end up leading Shapiro.

4.3.1 Norms and the normativity of plans

Shapiro does not say much about the nature of norms. He briefly introduces them in order to identify plans as a "special kind of norm" (2011: 129). As a result, most of the discussion he gives around norms is in singling out plans and detailing their salient features which separate them from other norms (i.e., their positive, purposive, dispositive, and structural properties). When it comes to a general discussion about norms, all Shapiro has to say is that:

> In what follows, I will use the term "norm" to denote any standard – general, individualized, or particularized – that is supposed to guide conduct and serve as a basis for evaluation or criticism. Strict rules, rules of thumb, prescriptions, principles, standards, guidelines, plans, recipes, orders, maxims, and recommendations can all be norms. Furthermore, moral, legal, religious, institutional, rational, logical, familial, and social standards are norms as well. (ibid.: 41)

Along with this list are a few clarifications. First, norms are not to be mistaken for the sentences, utterances, texts, etc. that represent them – these are all descriptive and, "[a]s their name suggests, norms are "normative," not descriptive" (ibid.). This is to say that norms "don't purport to tell their subjects what they will or might do; rather, they purport to tell them what, in some sense, they are entitled to, ought to, or may do" (ibid.). Shapiro points out that it is for this reason that norms can be violated without cancelling their validity – if they merely described what people will or may do, then all it would take to invalidate them would be for someone to act contrary to what they prescribe. Yet, given their normative character, they survive such violations. Second, and on a similar note concerning validity, norms need not be valid according to Shapiro: "[n]orms 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" (ibid.: 41-2). The result of this is that an invalid norm, i.e., "[a] norm that tells you to do something that you shouldn't do… is a bad norm, not a nonnorm" (ibid.: 42).

When it comes to characterising plans as norms, Shapiro is similarly brief:

> I characterized a norm as an abstract object that functions as a guide for conduct and a standard for evaluation. In keeping with this characterization, plans too are norms. They are guides for conduct, insofar as their function is to pick out courses of action that are required, permitted, or authorized under certain circumstances. They are also standards for evaluation, insofar as they are supposed to be used as measures of

> correct conduct, if not by others then at least by the subjects of the plans themselves. (ibid.: 127)

This, in addition to his distinguishing plans from the other kinds of norms on his list by elaborating on their properties (as outlined in §4.2.1), comprises Shapiro's account of plans as norms. Let us now consider what he has to say about the source of the normativity of plans. I will follow Shapiro in explicating his view of the normative force of individual plans first before moving to shared plans. Though, as we will see, the explanation in each case is, at base, the same.

Starting with individual plans, it is straightforward to see that the source of normativity is the individual who adopts the plan. This is due to the "power of self-governance", i.e., "the rational capacity" that agents have "to subject themselves to norms" (ibid.). In other words, planning agents have the capacity to place themselves under the governance of a norm (e.g., their individual plan). They exercise this capacity when they adopt their plan, and in doing so, their actions become rationally constrained according to the plan (due to the "rational pressure to act accordingly" (ibid.)). As Shapiro puts it, "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" (ibid.: 128).

Similarly, in the case of shared plans whereby individuals "agree to surrender their exclusive power to plan and commit to follow the plans formulated and applied by authorized members" (ibid.: 142), the source of the normativity is the individual autonomy involved in accepting the authorising plan. By accepting a plan which authorises someone else to adopt plans for the rest of the group, individuals exercise their 'power of self-governance' to place themselves under the governance of the norms created by the authority. This works in the same way as individual, self-governing plans in exerting a normative pressure to act according to the plans formulated by the authority. As Shapiro puts it:

> if the subject has accepted the shared plan that 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 direct conflict with his intention to defer. (ibid.: 143)

Now that I have presented Shapiro's brief characterisation of norms and how he takes plans to be 'special kinds of norms' along with his explanation of the normativity of both

individual and shared plans, I will outline a few concerns that follow from all this in the following subsection.

4.3.2 Objections

Shapiro's treatment of norms and the normativity of plans gives rise to a few early worries, that is, some concerns that have the potential to make a greater impact on his view when he extends it to explain the nature and normativity of legal rules. I will begin by considering two such general worries before ending this subsection with a few more specific challenges.

The first issue with Shapiro's discussion of norms is that there is not much of a discussion at all. He does not have an account of norms, nor does he appeal to any other view, and so we do not know much about what they are and how they work as far as he is concerned. Instead of elaborating on norms, Shapiro shifts the discussion back to plans and their properties which are meant to separate them form other kinds of norms. So, since we do not have any detailed account of norms, it is difficult to see the distinction Shapiro is trying to make. This relates to the second issue: in his brief statement of norms, Shapiro simply lists all different kinds of things together that he understands as norms but does not attempt to distinguish between each of them. So, his discussion of plans as norms along with their normativity is based on a rough notion of norms.

In both cases, these issues point towards some potential worries that might arise when he extends his account of plans to explain legal rules. Following from the first issue, it might be argued that Shapiro takes for granted his later claim that legal norms are plans and that he perhaps helps himself to this claim too easily based on his limited presentation of plans as norms. Similarly, following more from the second issue, his failure to distinguish between the different norms he lists conceals the various sources, or ways of understanding, the workings of their normativity. Another way of putting this is to say that different kinds of norms work in different ways. More specifically, some norms may be more demanding than others in that to generate the required normativity to follow them, more conditions must be met. For instance, according to Shapiro, the normativity of plans can be explained purely in terms of rationality. However, moral norms, for example, seem to be amongst those more demanding norms in that rationality alone cannot account for their normativity. I will return to this point in §4.5.2 where I will argue that the normativity of legal rules is similarly more demanding than that of plans.

As for the more specific objections that arise out of the generality of Shapiro's discussion of norms, the first is that, despite his attempt to identify some salient properties of plans in

order to separate them from other norms, it is not clear that he achieves such a sharp distinction. In fact, it looks like most (if not all) of the features that make plans 'special kinds of norms' are likely also possessed by at least some of the other items in his list. Recipes, to take one straightforward example, have the same kind of partial, incremental structure as plans, and are also positive norms that purport to settle questions about what is to be done in a particular context and dispose individuals to act accordingly.

Following from Shapiro's exposition of the normativity of plans is another worry: by labelling the plans (or the steps therein) adopted by an authority as 'orders', he already seems to presuppose a stronger notion of authority as issuing directives (like legal authority) than that which is at play in regular planning activities. Even when the group has surrendered to an authority to plan for them, to describe the resulting plans as orders seems too loaded a notion, since plans motivate through acceptance whereas orders (i.e., directives) do not.

So far, this chapter has focused exclusively on explicating Shapiro's account of plans, and so, the objections that have been raised thus far have targeted his characterisation of plans, norms, and the normativity of plans. We have yet to analyse Shapiro's *norm claim* that legal rules are plans and plan-like norms. It is to this task that the rest of the chapter will be dedicated.

4.4. What makes some plans laws?

This section will consider Shapiro's claim that legal rules are plans and plan-like norms by evaluating how he extends his view of shared plans to make sense of laws. After presenting how Shapiro draws the comparison between plans and laws, it will argue that his attempt to show that legal rules are plans fails. Although Shapiro's *norm claim* is defeated, the section will end on a more optimistic note – if Shapiro can show that law is founded on a shared plan, then perhaps a version of his Planning Theory can be retained. This line will be taken up in the following section. This section proceeds as follows: in §4.4.1, I will begin by considering how Shapiro extends his account of plans to legal rules in order to show that the latter just are a species of the former, i.e., they possess the same properties, have the same structure, existence conditions, etc. Next, I will present Shapiro's attempt to show that specific legal rules correspond to different types of shared plans. In §4.4.2, I will object that, on the one hand, legal rules do not possess all the same features as plans, and on the other, not all legal rules are comparable with the types of shared plans Shapiro tries to identify them with. Despite these unsurmountable challenges to his account, I will close the section

by suggesting a way that Shapiro may be able to salvage his Planning Theory of Law, an option that I will explore in §4.5.

4.4.1 Shapiro's answer

As we have seen from §3.2 and §4.2.1, many of the properties that Shapiro identifies as belonging to planning activity are instead features of plans. It is partly for this reason that Shapiro does not spend much time in characterising legal norms as plans and plan-like norms. Rather, he focuses on trying to show that specific examples of legal norms are specific types of plans and plan-like norms. I will consider this comparison shortly, but before doing so, I will briefly recount how, according to Shapiro, the nature of legal rules mirrors that of plans.

Since the purpose of the next section is to present Shapiro's Master Plan (the shared plan which establishes the structure of legal systems and regulates the activity of legal officials), I will say more about the existence conditions for legal rules in §4.5.1 as well as what kind of entities they are. Here it is enough to say that, following Shapiro's characterisation of shared plans, legal rules are brought into existence by legal officials adopting them, i.e., legal rules require for their existence that legal officials collectively accept them, where legal rules are the objects of this collective intentional attitude. As he puts it, "[t]he existence conditions for law are the same as those for plans because the fundamental rules of legal systems are plans" (2011: 119). As for the features of legal rules, we saw in §3.2 that, although unclear, Shapiro should be seen as attributing the settling property to plans and legal rules rather than to planning activity and legal activity.

In a nutshell, legal rules settle the matter of how people should act in various situations and dispose them to do so in order to achieve their shared goal to encourage participants to "work together and thereby achieve goods and realize values that would otherwise be unattainable" (ibid.). This is the purpose of legal rules which function "to structure legal activity" (ibid.) as well as to "guide and organize the behavior of community members" (ibid.: 200). The way they do this is "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" (ibid.). Shapiro goes further to say that the reason legal rules can guide and organise the behaviour of community members in various ways is "for exactly the same reason that plans can, namely they are *positive* norms" (ibid.: 201). The idea is that, just as shared plans are created by group agents through adoption, legal rules are created by legal officials when those officials adopt plans. In both cases, the subjects of the

plan are rationally required to follow it, and so need not deliberate further on how to act. I will return to this point in §4.5.2 where I will give some reasons to doubt that this comparison is so straightforward exactly because it seems that rationality constraints are not enough to explain the normativity of legal norms.

Finally, legal rules have the same structure as plans in being partial and developed over time. Shapiro appeals here to 'schemes of legal regulation' which "are rarely created all at once" but "are typically assembled piece by piece, starting off either as broad standards that are refined over time, detailed regulations that are unified by the development of general standards, or a hodgepodge of rules that are supplemented bit by bit as new problems arise" (ibid.: 195). Presumably, this would also be the case for other kinds of legal rules, including those that set out the structure of legal systems and the roles of legal officials.

Now that we can see the ways in which legal rules are considered to possess the same features, function, and structure as plans, let me move to consider, perhaps more interestingly, how Shapiro further motivates his claim that legal rules are plans and plan-like norms by attempting to identify specific legal rules with specific types of shared plans.

Let me begin by briefly recapping the different types of shared plans that Shapiro introduces (as discussed in §4.2.1). Recall that in order to combat alienation in massively shared agency, Shapiro introduced the mechanisms of horizontal and vertical divisions of labour. The former introduces specialisation which has the benefit of assigning responsibility to those who do not follow their parts of the plan correctly, and the latter introduces hierarchy which ensures that a select group of trusted individuals apply and enforce the shared plan, which means monitoring the behaviour of the other, subordinately ranked participants to make sure they are following their parts of the shared plan correctly. In order to establish the division of labour horizontally, according to Shapiro, stipulations, factorisations and permissions are required, whereas in the case of dividing labour vertically, only authorisations and instructions are needed. Before briefly outlining each of these different types of plans, let me say something about policies and customs and their part in shared activities.

According to Shapiro, policies and customs (along with hierarchies) are *ways* of planning, though as I argued in §4.2.1, following Shapiro's discussion, policies are better understood as a type of *plan* and customs as plan-like norms, whereas hierarchy is a group structure. On this view, policies are general plans which arise when a group performs a certain shared activity regularly. Their purpose is to reduce planning costs by preventing participants from having to repeatedly suggest, consider, and agree on the same course of action whenever the

occasion arises. Customs also emerge from repeated shared activities, but unlike policies, they are not specifically agreed on, but are patterns which randomly appear and are eventually treated as the norm. For this reason, Shapiro concedes that customs are not plans, but given that they resemble plans in every other relevant sense, he sustains that they are plan-like norms.

As mentioned, in order to divide labour horizontally, stipulations, factorisations, and permissions are created. Stipulations are general policies; factorisations are specifications of certain factors that have to be taken into account when planning; and permissions are anti-directives in that they do not require participants to perform or to refrain from performing particular actions. When it comes to dividing labour vertically, authorisations and instructions are utilised. Authorisations are plans that empower certain participants ('supervisors') to adopt and apply plans for others, and instructions are plans that clarify how supervisors can exercise these powers.

Though, as Shapiro rightly points out, with this "we ought to be able to show how different laws can be classified as different kinds of plans or planlike norms" (2011: 225-6). Let me now turn to this task by presenting how Shapiro tries to match different examples of legal rules with the different types of shared plans recalled above. First, I should clarify that Shapiro does not try to categorise different *types* of legal rules with these different types of shared plans. Although this would present a stronger argument that legal rules of various types are certain types of plans, he instead discusses specific legal rules and matches them up with types of shared plans.[8] He begins by considering what he takes to be the most basic types of legal norms, namely, directives. Now, it is worth highlighting here that in his explication of different types of shared plans, Shapiro does not mention directives – this is a new type of shared plan he introduces into the discussion when trying to show that specific legal rules are specific types of plans. A directive, he explains, "enjoins a person, persons, or institutional body to do, or not do, some action, possibly under certain circumstances" (ibid.: 226). Given that directives prescribe agents either to do or to not do something, we can distinguish between two main kinds of directives: *requirements* in the case of the former, and *prohibitions* in the case of the latter. These are contrasted with permissions, or anti-directives, which, as we have seen, do not prescribe any actions either way. Shapiro briefly states some examples of legal requirements and prohibitions, as well as an example of a legal

[8] The only exception here is with criminal statutes – as we will see, he claims that this type of legal rules is usually composed of two types of shared plans. In any case, at best, Shapiro only advances a partial defence of his claim, one that I think is still open to various further objections, which I will present in the following subsection.

permission, though he does not elaborate on how we can understand any of these examples as plans nor on the plan-like nature of either broader type of legal norm more generally. Rather he takes it that the *examples* of the directives and permission he mentions "wear their planlike nature on their sleeve" since "[i]n each case, the laws in question either direct, or do not direct, some person, persons, or body to do, or not do, some action" (ibid.). While he concedes that not all legal rules are formulated in a way that highlights their plan-like nature, they can be reformulated in a way that makes it clear whether they are requirements, prohibitions, or permissions.

Though, Shapiro is still aware that one might object that "many laws cannot be seen as plans in disguise" (ibid.: 227). He considers here the 'Defense of Marriage Act (DOMA)' which "merely defines "marriage" for the purposes of federal law" (ibid.) and so is clearly not a requirement, prohibition, or permission. However, here Shapiro reminds us of *stipulations* which are general policies "that specify how to apply another plan or plans in particular contexts" (ibid.). So, while the DOMA is not a directive or an anti-directive, it is still a type of plan since it stipulates what counts as marriage for those involved in applying the 'marriage plan'.

Perhaps some of the most salient types of legal rules that come to mind also do not seem to be plans. As Shapiro concedes, "criminal statues are not usually formulated as directives" (ibid.: 227). Take, for instance, his example of a statute that forbids murder: 'A person is guilty of the offense of murder in the first degree when the person purposely and with premeditation causes the death of a human being'. While we expect that such a statute would be a prohibition, this is clearly not any kind of directive. In fact, following Shapiro, it looks to be more like a stipulation. Though this is a problem since a mere stipulation does not do the kind of job that is required to forbid murder and deter agents from committing such acts. Fortunately, Shapiro has an answer to this: "[o]n the Planning Theory, criminal statutes of this sort are composite plans, consisting of both behavioral directives and stipulations" (ibid.: 227) so that "the above definition of murder is a behavioral directive prohibiting acts of murder and a stipulation requiring that the former directive be applied to all acts of purposeful and premeditated killing" (ibid.: 227-8).

So far, we have seen how different legal rules are, according to Shapiro, different types of shared plans. More specifically, he has introduced requirements and prohibitions (directives) as additional types of shared plans and provided examples of legal norms which he takes to be instances of them. We have also seen, by way of example, that some legal rules are

permissions, while others are stipulations, which are two other types of shared plans that Shapiro previously identified. Now all that is left to complete the picture is to consider legal rules that are instances of the other three types of Shapiro's shared plans, namely factorisations, authorisations and instructions.

Of course, there are many examples of legal rules which confer powers on agents to act in certain ways (authorisations) and set out specifications for how to exercise those powers (instructions). Will statutes are a good example. Though, perhaps a better one that Shapiro develops in detail is the case of a jury entering a criminal verdict. With this, he is also able to show where factorisations come in. Let us consider this in more detail. A jury is a group (agent) which is authorised to enter verdicts and is instructed on how to do so. A jury is also under the requirement to deliberate on some matter, permitted to do so for as long as necessary, and prohibited against voting for certain (i.e., the wrong) reasons. In order to ensure that the jury vote for the correct reasons, according to Shapiro, there are factorisations in place which "require the giving of weight to some factors and not to others in deciding innocence" (ibid.: 230). Lastly, there is the stipulation that defendants are innocent until proven guilty.

This example is not only meant to demonstrate that legal rules are constituted by various different types of shared plans, but it is supposed to also show us that in the legal domain "actions are often regulated by more than one kind of legal plan" (ibid.) and as a result, "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" (ibid.).

So much for Shapiro's attempt to defend his *norm claim*. Here we have seen some reasons he has for motivating his view that legal rules are plans and plan-like norms independently of his commitment to this claim as following from his *Planning Thesis*. However, despite his best efforts, I do not think that Shapiro's characterisation of laws as shared plans stands up to scrutiny. Let me explain why in the following subsection.

4.4.2 Objections

Here I will argue that Shapiro's attempt to characterise legal rules as plans and plan-like norms fails for three reasons. First, legal rules do not have all the same features as plans nor do they work in the same way; second, not all legal rules are comparable with the types of shared plans Shapiro tries to identify them with; and third, even worse for Shapiro, these types of shared plans are not, in fact, plans at all. Let me begin with the first, more general claim, that legal rules do not possess all the features that plans do.

In the previous section, I mentioned that Shapiro's main focus in extending his account of shared plans to legal rules was in demonstrating how specific legal rules are particular types of shared plans. I noted that, perhaps because Shapiro mistakes many of the properties of plans with planning activity, he does not spend much time considering how the different features of plans along with their function and structure can be extended to legal rules. This marks a departure from his methodological approach both in his attempt to characterise legal organisations as social planning organisations and legal activity as social planning activity. In order to follow Shapiro's view closely, I suggested how his account of shared plans could be extended to legal rules in this same way. However, while some properties of the former can be seen in the latter, there are many features of plans that do not seem to be possessed by legal rules. I take there to be at least five ways in which shared plans and legal rules come apart: (i) shared plans have lifespans, legal rules do not; (ii) shared plans aim towards some attainable goal, legal rules do not; (iii) shared plans are necessarily consistent, legal rules are not; (iv) shared plans involve a personal dimension, legal rules do not; (v) following a shared plan is not the same as following a law. Let me elaborate on each of these dissimilarities.

First, plans have lifespans; they are brought into existence with the purpose to achieve a certain goal and cease to exist when the goal is achieved. Another way of putting this is to say that a plan is a means to some end where the end is achievable by following and completing the plan (i.e., the steps the planner identifies as necessary for attaining the goal). Once the end has been reached, the plan is no longer required and ceases to exist. However, if it turns out that the plan does not bring one any closer to achieving the corresponding goal, it needs to be modified or discarded. In such a case, we would say that the plan is a bad plan since it does not seem likely that in following it one will, in fact, reach the intended end. A plan is a good plan, on the other hand, when it is highly likely that in following it one will be able to efficiently achieve the intended end. All this is to say that plans are required only in order to achieve some goal and they disappear when that goal is accomplished. They do not persist indefinitely, i.e., they are not open-ended, otherwise they would not function properly and therefore could not achieve their purpose.

Legal rules do not seem to work in this same way. While Shapiro notes that regular plans have a shorter lifespan than legal rules (see §4.2.1), it rather seems that this is not a characteristic they share. Most (if not all) legal rules are open-ended and so do not have a lifespan at all. In fact, the persistence of legal rules through time and persons is one of their characteristic features and so is not something that any account should be willing to give up on, short of some other reason to do so. Legal rules are formulated to protect or create rights,

impose obligations, etc., and so are made to endure.[9] Since the behaviour that legal rules require or prohibit is not usually subject to change, there is no reason for laws to come with an expiry date.

The second dissimilarity I can see between (shared) plans and legal rules is closely related. Following Shapiro, the purpose of plans is to achieve some goal, yet, also following Shapiro, legal rules do not seem to aim towards any attainable goals and so cannot be purposive in the same way as regular plans: "there are no substantive goals or values that laws are supposed to achieve or realize" (2011: 173). This is clearly a problem for Shapiro's implication that legal rules are plans since the very motivation for formulating a plan is to achieve a goal. If there is no goal to be achieved, there is no plan to identify the steps required to realise it.[10]

If we accept this picture of legal rules as open-ended and without any clear goals, then they cannot be plans in the standard sense, or even in the way that Shapiro himself understands them. Not only do plans necessarily have a lifespan, but another necessary feature they possess is their purposive character, i.e., they are meant to achieve certain goals. These are two of the most crucial features that we can use to identify plans as opposed to other, non-plan-like norms, and so if some norm does not possess them, we have good reason to suspect that it is not a plan.

The third dissimilarity to note between plans and legal rules concerns consistency. Following from plan rationality, shared plans must be internally consistent, and consistent with each other. As Shapiro puts it, "consistency within plans is necessary if we are to achieve the ends of the plan; consistency between plans is necessary if we are to achieve the ends of all our plans" (ibid.: 124). The fact that plans cannot conflict due to rationality requirements may give us reason to think that legal rules are not plans, since it is possible for two legal rules to conflict without invalidating either of them. Consider, for example, a rule preventing vehicles from stopping outside any government building. Now, suppose that traffic lights are installed nearby a government building. Following road traffic rules, vehicles are

[9] One may argue that power-conferring rules seem to resemble plans in that they identify steps one must take in order to achieve some goal and once this goal is achieved, they are no longer required. Yet, the legal rules that establish the steps one must follow to achieve the corresponding end do not themselves expire – they remain in existence indefinitely and do not need to be brought into existence each time someone exercises their right to follow them. In any case, the point can be made differently: plans necessarily have a lifespan whereas legal rules do not.

[10] Celano (2013) has a different, but related concern. Even if we assume that there are some goals that laws are supposed to realise, Celano wonders *whose* goals these would be. He points out that it is "too irenic, and a purely contingent matter" to require "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" (ibid.: 136).

required to stop when the red light shows. However, it may be the case that, due to traffic conditions, some vehicles would be required to stop outside the government building, despite this breaking the rule which says that no vehicles are permitted to stop outside it. In such a case, we have two conflicting rules. Though, neither rule needs to be revised or dropped; both are valid rules which are to remain in place. Instead, in instances like this where rules conflict, a decision is made regarding which rule takes priority (i.e., which rule is given more weight in specific circumstances). This is not the case for shared plans – should they be discovered to be internally inconsistent or conflict with other shared plans of the group, they must be revised or dropped on pain of irrationality.

The fourth distinction that can be seen between plans and legal rules is that plans usually involve a personal dimension. In the case of individual plans, individuals create their own plans because they have some goal they want or need to achieve. Similarly, in the case of shared plans created by small, committed groups – the group wants or needs to achieve a certain goal which is why they create the specific shared plan that they do. Though, this personal dimension is lost when it comes to law since citizens have little to no control over legal content or goals (if any). This does not necessarily show that laws are not plans, but it might illuminate a difference in the normativity of plans and legal rules. I will return to this issue in the following section where I will argue that Shapiro's intuitive explanation of the former is relied on in explaining the latter, even though this personal dimension is not transferred.[11]

Finally, following a shared plan is not the same as following a law. Following a plan requires intentional action towards a certain content because of acceptance of that content. Whereas following the law does not. In fact, in some cases, following the law does not require doing anything at all. Much less because of acceptance of, or for the sake of, specific content. Following a plan, however, requires intentional participation and awareness of its content. This tracks an epistemic difference: following a plan requires one to know (or to be able to find out) the full content of the plan for reasons of consistency. In contrast, following a law does not always require that one knows the full content of that law since subjects are never required to ensure its consistency with other laws. Another way in which following a plan

[11] This point is very similar to one made by Celano (2013) who understands this personal element in terms of self-governance. I will say more about this in §4.5.2, though, roughly, he argues that Shapiro blurs an important distinction between plans and planning in the first and second-person on the one hand, with plans and planning in the third-person. He thinks the source of this problem is in Shapiro's move from Bratman's project, which is interested in explaining the former, to his project in developing the latter. Celano maintains that Shapiro illegitimately trades on Bratman's project, despite being importantly different in this way. The result is that the analogy Shapiro presents between plans and laws is unfounded and problematic in various ways.

and following a law come apart concerns the motivation behind each: in the case of the former, one is rationally required to follow a plan because they have committed to do so; whereas, in the case of the latter, one is obligated to follow a law because it is a directive issued by an authority.

If we accept that following a plan requires intentional participation and comes with a personal dimension, then this might come some way towards explaining the difference in the normative force of plans and laws: plans have normative force only over those who accept them, whereas legal rules claim authority regardless of acceptance. If I do not accept a shared plan involving my participation, I have no obligation to act in accordance with it and cannot be forced to do so. Yet, I am obligated to act in accordance with laws, even if I am not aware of their existence, or simply do not accept them. Another way of putting this is that plans tell us what to do *because* of our aims, whereas legal rules tell us what to do *regardless* of our aims.

Despite all these dissimilarities, Shapiro may push back in various ways. As I mentioned at the outset, I have tried to help Shapiro extend his account of plans to legal rules in a way that is methodologically consistent with the rest of his project, by explicating the features of plans and showing how legal rules may also be taken as possessing them. However, I argued that some of the features Shapiro identifies as properties of planning *activity* are really properties of plans. Of course, Shapiro may disagree and, as a result, resist some of the objections levelled at him above. As his implication that legal rules are plans was advanced by way of demonstrating how specific legal rules are particular types of shared plans, the challenges raised so far do not directly attack his claims. For this reason, it will be the purpose of the rest of the current subsection to scrutinise this comparison. I will argue, first, that it does not hold since not all legal rules are comparable with the types of shared plans Shapiro tries to identify them with; and second, that the types of shared plans he introduces are not, in fact, plans at all.

As for the first of these objections, criminal statutes are a prime example of those legal rules that do not look to resemble plans. Yet, Shapiro tries to show that they are by maintaining that they are what he calls "composite plans". These are "plans which have parts that are themselves plans" (2011: 130). Although he does not offer any further analysis of what exactly composite plans are, he understands criminal statutes as consisting in both behavioural directives and stipulations. That is, a criminal statute is a prohibition against acting in a particular way along with a definition of what this prohibited behaviour amounts to. I will shortly argue that neither prohibitions nor stipulations are types of plans, but for

now, I will simply contest criminal statutes as prohibitions in the way that Shapiro understands them. This is an issue that is actually highlighted by Shapiro himself, yet he seems to move on without resolving it.

When introducing criminal statutes, Shapiro concedes that they are not formulated as directives, but instead as definitions. Without any further discussion, he goes on to say that, on the Planning Theory, criminal statutes consist in both behavioural directives and stipulations (ibid.: 227). He does not offer any justification for this claim, despite having just stated that criminal statutes are formulated instead as stipulations alone. He then goes on to give two reasons why criminal statutes are not usually formulated *solely* as behavioural directives. Yet, the point is, following Shapiro's opening statement, that criminal statutes do not appear to be behavioural directives *at all* since they do not tell anyone to do or not to do anything. This is a gap that Shapiro has to explain, since, on the one hand, he goes from affirming that criminal statutes are formulated as definitions to offering two reasons why, on his account, they are not *only* behavioural directives *but also* stipulations. On the other hand, this gap leads to a bigger problem for his view: if he cannot show how criminal statutes are also behavioural directives (i.e., prohibitions), then they look to be no different in type to other stipulations, for instance, the Defense of Marriage Act (DOMA) that he presents as defining what marriage is for the sake of federal law. This certainly seems like the wrong result, especially for an account which is at pains to draw distinctions between different types of legal rules.[12] It is hard to see how Shapiro can explain this difference by way of his Planning Theory without appealing to prohibitions to classify criminal statutes as different types of plans. Though, as I will now argue, this strategy will not help him since, properly understood, prohibitions are not plans. Worse still, Shapiro does not show that any of the types of plans he introduces are plans. The upshot of this is that he cannot uphold *the norm claim* (that legal rules are plans and plan-like norms) in this way. Allow me to elaborate.

Recall in §4.2.2 that I noted a worry to the effect that the types of shared plans introduced by Shapiro as a means to divide labour and decentralise planning in large-scale activities did not look much like plans at all. Here I will go into detail as to why I do not think that these are types of plans by utilising some of Shapiro's examples of specific legal norms. The first thing to note is that Shapiro does not try to argue that authorisations, factorisations,

[12] It is also unclear whether this is a problem outwith Shapiro's Planning Theory since, for his view, he needs legal norms to be formulated in certain ways to match them to the types of plans he introduces. Yet, if we drop this idea that laws are plans, there is no need to ensure that legal rules are formulated in particular ways. Criminal statutes have done, and will continue to do, the job in deterring most people from committing an offence regardless of whether they are formulated as a particular type of plan or not.

stipulations, instructions, permissions, and directives are plans, that is, he does not analyse the nature, structure or features of any of these norms. Rather, he tries to motivate their plan-like nature by way of example. However, the examples are not used to illuminate the similarities between plans and these specific types of norms, but instead are simply used to clarify the latter and then simply state that they are different types of plans. For instance, in the case of permissions, Shapiro elucidates this type of norm by supposing that a restaurant neither requires staff to take or not to take any leftover food home with them. With this example, Shapiro takes himself to have shown that permissions are plans for planning, since "they do not direct the staff to do, or not do, any action: rather, they inform their addressees that they are not required to perform, or refrain from performing, some action" (ibid.: 146). Though, this does not show *how* permissions are plans – it is simply a definition of what a permission is. From this, it is hard to tell how a permission could be taken as a plan of any kind – there does not seem to be any goal, and as Shapiro says, permissions do not direct behaviour or action in any way, and so also cannot identify the steps one must take to satisfy any goal. This is totally inconsistent with Shapiro's analysis of plans as being purposive entities that are meant to create norms to guide action, to settle the matter of how one should act, and to dispose subjects to act in a particular way. That is, plans eliminate indeterminacy of action, they do not remain neutral as to whether an action should be performed or not. Lastly, and perhaps due to lacking all these other features, permissions also do not have the nested structure of plans. Since these are all taken to be necessary features of plans, permissions do not qualify as a type of plan.

Yet, this is not only a problem for permissions – authorisations in simply conferring powers to agents; factorisations in specifying factors one should take into account when performing certain actions; and stipulations in offering definitions of terms or clarifying the contexts to which certain norms apply, also do not possess all (or even most) of the properties that plans do. Consequently, it does not matter whether certain legal rules can be identified as any of these types of norms – since none of the latter can be correctly characterised as plans, none of the former can be either.

So, what about directives and instructions? On the face of it, these look to be more plan-like in nature. While I agree that instructions can be understood as plans (only if they are formulated to achieve a specific goal, are accepted, and are implemented), I disagree that directives can be characterised as such. Let me explain why. Directives, as Shapiro presents them, can either direct agents to perform some action (requirements) or direct agents not to perform some action (prohibitions). Again, Shapiro does not argue that requirements and

prohibitions are plans, but rather presents some examples of legal norms that he takes to be instances of each and concludes that "[t]he examples of directives and permissions I have cited wear their planlike nature on their sleeve. In each case, the laws in question either direct, or do not direct, some person, persons, or body to do, or not do, some action" (ibid.: 226). Yet, again, Shapiro merely clarifies both types of norms and does not give any reason to take them as plans. Moreover, intuitively, prohibitions just do not seem to be the type of norms that can be plans given that they forbid certain actions, whereas the purpose of plans is to identify specific actions that must be taken in order to achieve a particular goal – we do not plan to *not* do something. In any case, both requirements and prohibitions, like the other types of norms discussed above, lack many features that plans necessarily possess, most notably, they do not identify any steps that must be taken to achieve a specific goal and so lack the structure, purpose, and function of plans. Given this, they also have no life-span and remain open-ended. For all these reasons, while directives may dispose subjects to comply and settle the matter of how one should (or should not) act, the source of their normativity is not that of plans.

In sum, then, with the objections presented thus far throughout the chapter, I have argued that legal rules are not plans in the way that Shapiro understands them. However, there may still be a way for him to hold on to his view in a more limited sense if he can show that law is founded on a social plan. That is, perhaps legal rules are not plans, but if Shapiro can show that he is correct in positing that law itself is a shared plan, he can retain a narrower Planning Theory of Law which is still able to do the main jobs that he requires of it, i.e., to advance a positivistic account of the nature of law that can answer Hume's Challenge and the Possibility Puzzle in a way that highlights the importance of our planning agency. §4.5 will presently consider this option in more detail.

4.5. Shapiro's Master Plan and the normativity of law

While this chapter has shown that legal rules are not shared plans, it has not yet challenged Shapiro's thesis that law is based on a shared plan. In order to present a definitive objection towards his Planning Theory of Law, the first half of this section will explore this thesis by analysing Shapiro's Master Plan and how it generates legal authority. In doing so, it will also present Shapiro's answers to both the Possibility Puzzle and Hume's Challenge. The second half of the section will argue that problems with Shapiro's Master Plan, as well as his account

of legal authority and the normativity of law prevent him from being able to hold onto even this limited version of his Planning Theory of Law.

4.5.1 What is the Master Plan and what does it explain?

In this subsection, I will begin by outlining Shapiro's Master Plan and explain how he takes it to generate legal authority. I will then present an objection that Shapiro himself considers concerning how he can account for the normativity of legal authority since his response to this worry informs his answer to Hume's Challenge. I will end this subsection by recounting his answer to this puzzle along with his solution to the Possibility Puzzle of legal authority.

First, the Master Plan is the shared plan designed "to guide, organize, and monitor the shared activity of legal officials" (2011: 177). In constituting the "the fundamental rules of a legal system" (ibid.: 183), it "sets out the vertical and horizontal divisions of social labor, specifying who is authorized to formulate, adopt, repudiate, affect, apply, and enforce the plans and instructing them about how to engage in these various stages of social planning" (ibid.: 176). Crucially, since the Master Plan is a shared plan for legal officials, its existence depends on its being accepted by legal officials only – community members need not accept these fundamental rules, but they must be disposed to follow them.

In fact, according to Shapiro, it is this combination of the Master Plan and the community's disposition to follow the norms it sets out that explains how legal authority is generated. More specifically, there are two necessary and jointly sufficient conditions for legal authority to obtain in a legal system: (1) an agent is authorised by the system's Master Plan to plan for others; (2) the authorised agent motivates the community to heed their plans (ibid.: 179-81). Shapiro defends the first condition by claiming that "shared plans are able to authorize legal officials to plan for others because human agents are planning agents" (ibid.: 180). As for the second condition that authorised agents must be able to motivate subjects to comply, Shapiro considers two different kinds of cases in order to show how this condition can be met in either scenario. First is when "[m]embers of the group might all accept a general policy to obey the law or deem those in authority to be morally legitimate" (ibid.: 181). Explaining how subjects are motivated in these kinds of cases is straightforward – since the community accepts the legitimacy of the norms which establish authority (i.e., the Master Plan), they are under a rational requirement to accept the plans of the legal officials, and so this rationality explains their motivation to comply. The other kinds of cases Shapiro considers are those whereby the community are not 'predisposed' to comply with the norms created by the authority. Though, he claims that less cooperative subjects can be 'motivated'

to obey through "various forms of intimidation" (ibid.: 180) directed at them by legal officials. He explains this in terms of "the commitment of officials to carry out parts of the shared plan that direct punishment in case of disobedience" (ibid: 181). Basically, the idea is that those subjects who do not accept the Master Plan of the legal system and so are not motivated to act in accordance with the norms created by the legal authority, can be forced to comply by legal officials imposing sanctions on them, thus generating in them the required disposition to heed the plans of the authority.

Now that we have Shapiro's account of the Master Plan and his explanation of the normativity of legal authority, let us consider an important challenge to his view concerning exactly how the Master Plan authorises *legal* authority. That is to ask, how can the Master Plan authorise someone with the power to impose legal obligations and confer legal rights, as opposed to simply authorising someone to plan for others? The point here is that *obligation* and *right* are moral concepts, and so the power possessed by legal authorities must also be a moral power. Yet, since the Master Plan appears only to establish planning capacity, and so the normativity of legal authorities is based in norms of rationality, it cannot generate morally legitimate authorities with the moral power to impose legal obligations and confer legal rights. The upshot of all this, according to the objection, is that "the normative limitations of the master plan preclude its ability to ground claims of legal authority" (ibid.: 182).

In order to overcome this challenge, then, Shapiro has to elaborate on the normativity of the Master Plan and explain how it can establish *legal* authority. He begins this task by conceding two limitations of the Master Plan: first, while legal officials accept, and so are rationally required to follow, the Master Plan, "those who do not accept the law are not similarly bound"; and second, the Master Plan "may be morally illegitimate and hence not capable of imposing a moral obligation on anyone to obey" (ibid.). Yet, Shapiro does not think that these concessions impact on the ability of the Planning Theory to offer a satisfactory account of legal authority. Rather, what he aims to show is that the word 'legal' plays a distinctive role in legal discourse, such that "moral powers are not necessary to render legal statements true. Legal authority, rights, and obligations are possible", he says, "simply because highly impersonal shared practices of social planning are possible" (ibid.). Let us consider the details of his response.

As we know from Shapiro's discussion of plans, it is the acceptance of a plan which brings it into existence; so, the existence condition of the Master Plan is that legal officials accept it. Though, as we also know from Shapiro, accepting a plan involves not only committing to

do one's part, but also a commitment towards allowing others to do their parts as well. Moreover, the rationality of planning requires that individuals will flesh out their plans in a way that is consistent with the shared plan and the individual plans of other participants, as well as to refrain from reconsidering the shared plan without good reason to do so. Since the Master Plan is a shared plan, "these rationality requirements apply whenever legal systems exist" and so "we might say that they constitute the "inner rationality of law"" (2011: 183). Though, following Shapiro's first concession as noted above, the normativity of the Master Plan does not extend to those who do not accept it, and so it is a result of his view that the 'bad man' "cannot be rationally criticizable for failing to obey legal authorities" (ibid.). Yet, Shapiro reminds us that "since most officials do accept the master legal plan, they are criticizable for disobeying the law absent a compelling reason to do so" (ibid.), and so "rational requirements of obedience necessarily attend the existence of any legal system" (ibid.: 184).

However, following his second concession as mentioned above (that the Master Plan of a system may be morally illegitimate), Shapiro does not think that moral requirements play a necessary part in the existence of legal systems. This is because the existence and content of plans, and in this case the Master Plan, depends only on social facts, and so, it is unlikely that 'morally acceptable legal arrangements' will always be generated from them (ibid.). As Shapiro elaborates:

> if one has no moral reason to participate in or support a particular legal system, one has no moral reason to recognize its demands. As a result, the authorization of a master plan and the ability to dispose others to comply cannot by themselves confer moral legitimacy on the one authorized. Unless the master plan sets out a morally legitimate scheme of governance, those authorized will merely enjoy legal authority but will lack the ability to impose moral obligations to obey. (ibid.: 184)

That is to say that Shapiro wants to push back against the objection which claims that legal authority necessarily requires moral authority, and as such, denies that his Master Plan must confer moral normativity as opposed to rationality constraints alone. Instead, Shapiro wants to show how there can be legal authority regardless of the moral legitimacy of the Master Plan. Additionally, given what follows from his norms of plan rationality, he also needs to show how there can be legal authority absent rationality constraints as in the case of the 'bad man', i.e., how "one can be subject to legal authority even though no normative relation of any sort obtains between him and the alleged authority" (ibid.). The way he does this is to

introduce a distinction between the 'adjectival' and 'perspectival' interpretations of legal authority. Let us consider each of these in turn.

The adjectival interpretation of legal authority says that when we consider an agent as a legal authority, we attribute them with a kind of moral authority so that "the word "authority" means the same as it does in moral contexts… and the word "legal" functions as an adjective, identifying the kind of moral power" (ibid.: 185). As a result, the agent is attributed with moral power because they have been authorised as a legal authority. Shapiro argues that it is this adjectival interpretation of legal authority that is subject to the previous objection. For, if his view agrees that legal authority entails moral authority, then it is not possible to have morally illegitimate legal authorities. On his account, this means that an illegitimate Master Plan cannot confer legal authority, and so, Shapiro's 'plan positivism' fails since the Master Plan's legality would depend on its moral legitimacy, and so it would follow that law is grounded by a norm which is partly determined by moral facts. Though, as Shapiro argues, aside from its impact on his Planning Theory, this interpretation of legal authority cannot explain certain regimes which we understand as holding legal authority while being morally illegitimate (e.g., Nazi Germany). It is for this reason that he introduces an alternative interpretation of legal authority, which he calls the 'perspectival' interpretation.

The perspectival interpretation of legal authority says that when we consider an agent as a legal authority, we do so from a certain perspective so that we are not identifying them as holding a certain kind of moral power (as in the case of the adjectival interpretation), but are instead *qualifying* our ascription of them as holding a moral power 'from the legal point of view'. It follows from this that legal obligations and legal rights only carry moral currency from the legal point of view and so are not objectively moral requirements. For instance, one can be obligated from the legal point of view to perform some action that would otherwise be considered morally wrong. Consequently, this shows how the 'bad man' is legally obligated to comply despite not being rationally required to do so. It also allows Shapiro to retain his view that legal authority can be generated from morally illegitimate plans since legal authorities are not ascribed with moral power and so we do not need the Master Plan to contain any moral norms. As long as the Master Plan is accepted, the authority generated is morally legitimate from the legal point of view of the legal system it establishes, which is all that is required for a legal authority to have the power to impose legal obligations and confer legal rights in a legal system. In other words,

> legal claims interpreted perspectivally are not moral claims; they are descriptions of a perspective according to which the law is morally legitimate. On the perspectival

> reading, a body has legal authority in a system just in case it has moral authority from the legal point of view and it has moral authority from the legal point of view just in case it is authorized by the system's norms. (ibid.: 187)

Now that we have seen Shapiro's response to the problem concerning how the Master Plan can generate *legal* authority, we are in a position to see how he tackles the two puzzles he presents as necessary for any Legal Positivist account to answer: the Possibility Puzzle and Hume's Challenge. Let us begin with the former.

First, as we saw in §1.3, the Possibility Puzzle, or the 'Chicken-Egg Problem', claims that legal authority is impossible since it must be conferred by legal norms, but those legal norms must be created by a legal authority. So, we are left with the challenge of determining what comes first: legal norms or legal authority. If we go with the former, we end up in an infinite regress since the legal norm had to be created by a previous legal authority, which got its power from a legal norm created by another legal authority, and so on; or, if we opt instead for the latter, we end up with a vicious circle since the legal authority created the legal norm which authorised that legal authority with the power to create that legal norm). Though, Shapiro claims that his Planning Theory can answer this puzzle in a way that "is able to secure the existence of fundamental legal rules without generating vicious circles or infinite regresses" (ibid.: 181). Since I will return to his proposed solution in the following subsection, it is worth quoting in full here:

> [l]egal officials have the power to adopt the shared plan that 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. (ibid.)

In other words, legal authority comes first on Shapiro's view, though since it is not conferred by legal norms, but by non-legal norms of instrumental rationality, there is no circularity or infinite regress involved in accounting for it.

Second, also presented in §1.3 was Hume's Challenge, or Hume's Law, which as Shapiro puts it, asks "[h]ow can normative knowledge be derived exclusively from descriptive knowledge?" (ibid.: 47). As I mentioned there, this is a problem only for legal positivism since this view asserts that the content of the law is determined by social facts alone, which are descriptive facts about what legal officials do, and so it takes normative judgements (e.g., about legal rights and duties) to result from purely descriptive social facts. Legal Non-

Positivists do not fall victim to this challenge because they take social as well as moral facts (i.e., normative judgements) to determine the content of the law, and so legal non-positivism does not claim that normative conclusions are derived exclusively from descriptive premises. Shapiro takes himself to satisfy Hume's Law while retaining his Positivist account of law by utilising his perspectival reading of legal content. As he puts it "on the perspectival interpretation of the word "legal", statements of legal authority, legal rights, and legal obligations are *descriptive*, not normative. They describe the normative point of view of the law" (ibid.: 188). As a result, Shapiro argues that his view only derives descriptive conclusions from descriptive premises. Again, it is worth quoting his answer in full as I will consider it in more detail in the following subsection:

> From descriptive judgements about the existence of shared plans or the content of the legal point of view, other descriptive judgements about the legal point of view can be derived. The Planning Theory, in other words, conforms to Hume's Law because legal reasoning does not involve the derivation of an ought from an is, but rather an is from an is. (ibid.)

With all this, we can see how, if correct, Shapiro may be able to hold onto a limited version of his Planning Theory – while laws are not plans, if the fundamental rules of a legal system can be understood as a shared plan, then perhaps there is some sense in which law can be identified with plans and Shapiro is correct in highlighting the importance of our planning agency in understanding the nature of law and its normativity. Unfortunately, as I will now argue, this line is not open to Shapiro and he cannot retain even this limited Planning Theory of Law.

4.5.2 The normativity of plans ≠ the normativity of law

Here, I will present three challenges: the first will be against Shapiro's Master Plan; the second will target his account of legal authority, and as a result his solution to the Possibility Puzzle; and the third will concern his perspectival interpretation, and in turn, undermine his response to Hume's Challenge. Consequently, I will argue that, not only does Shapiro's *norm claim* fail, but so too does his project to explain the nature of legal systems, legal authority, and the normativity of law in terms of plans and plan rationality. This amounts to a final rejection of his Planning Theory of Law.

First, let me begin by considering the problem with Shapiro's Master Plan. As we saw in the previous subsection, the Master Plan sets out the fundamental rules of a legal system, which, when accepted by legal officials, brings a legal system into existence, and satisfies the first

condition for establishing legal authority. Since legal authorities create plans for the community to follow, and plans are norms, the second condition necessary for a legal system to have legal authority is for the plans of the legal authority to motivate the community to obey. As per Shapiro's view, in cases where community members are not predisposed to follow these norms (because they do not regard the legal authority as morally legitimate), they can be forced by the officials to comply through threats and sanctions. One issue with this picture is that because only the officials need accept the Master Plan (i.e., there is no general acceptance of these rules by the wider community), it makes the generation of legal authority, and thus legal systems too easy. Let us call this the *overgeneration problem*. On Shapiro's view, it seems that any group with a moral aim that can (i) accept a Master Plan which authorises them to govern over another group of people and (ii) 'motivate' (including force or threaten) this other group to comply with their orders, counts as a legal system. Though, surely this admits far too many groups. It seems plausible that this issue could be resolved by elaborating further on who creates the Master Plan and who decides which community members will count as officials. However, this is a matter on which Shapiro is silent, and so it would be difficult to supplement his account in this way, rather than proposing a novel view. In any case, this strategy will not work to save Shapiro's account, as his explanation of how the Master Plan establishes legal authority is defective. Let me move now to this second challenge.

In addition to the overgeneration problem of legal systems, Shapiro's story as presented above prevents him from being able to explain how legal authority is created in a way that avoids vicious circularity or infinite regress, and thus, fails to solve the Possibility Puzzle. As he makes clear, for a body (i.e., agent) to count as a legal authority, the first necessary condition that must be met is: "the system's master plan authorizes that body to plan for others" (2011: 180). Though, this is a rather loose way of talking: strictly speaking, plans do not authorise; people do. Since we do not know who are the creators of the Master Plan, the only way we can understand the source of this authorisation is through the acceptance of the Master Plan by legal officials. Yet, in doing so, we have another problem: if legal authority is brought into existence by the acceptance of the Master Plan by the proposed officials of the proposed legal system, this would amount to legal officials authorising themselves by way of accepting the Master Plan. In this case, there is no general acceptance by a community, but only acceptance by a minority of the community to authorise themselves with the required power. The result is exactly the kind of circularity in which Shapiro was trying to avoid in his answer to the Possibility Puzzle – the legal authority creates the legal norm which authorises that legal authority with the power to create that legal norm.

A proponent of the Planning Theory may try to argue that there is another alternative answer available. In his extensive *Cooks Island* example, Shapiro engages in constructive reasoning to try and identify some "features of the law that we might otherwise overlook" (ibid.: 156). Very briefly, the narrative he develops is of a group of successful executives that decide to abandon corporate life in favour of a peaceful retirement on their own private, uninhabited island, where they decide to start a new community. By relying on this 'state of nature' methodology, Shapiro reflects on some important elements involved in the creation of a legal system, including the acceptance by the social planners of the Master Plan for the community. Here, he says:

> 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 – 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. (ibid.: 166, emphasis added)

What this passage, merged with other statements of Shapiro's account, seems to support instead is that it is the subjects (either in accepting the moral legitimacy of the planners or in being otherwise motivated) that *plan* for the officials to plan for them. Yet, this suggestion does not fare any better. Contra Shapiro, this would mean that the power of the officials to plan for the community is not based in instrumental norms of rationality, but in the plans of the subjects, and so it is the subjects that have the authority to confer this authority on the officials by way of their plan (i.e., the norm which establishes the authority of the officials). While this answer to the Possibility Puzzle seems to escape circularity, it clearly leads to an infinite regress since the power of legal officials depends on the community's plan for the officials to plan for them, and so the authority of the community and their plan must now be explained (i.e., the legal norm had to be created by a previous legal authority, which got its power from a legal norm created by another legal authority, and so on). It seems then that Shapiro's insistence in characterising law as a shared plan is generating more questions and problems than it answers. Let us consider a final way in which his Planning Theory falls short of offering an adequate solution to one of the most salient challenges facing Positivist accounts of law: explaining its normativity.

Recall from the previous subsection the objection that the Master Plan cannot generate legitimate authority. The argument was that legal authority involves imposing legal

obligations and conferring legal rights, where *obligation* and *right* are moral concepts. As such, the power possessed by legal authorities must also be a moral power. Yet, the Master Plan only establishes planning capacity, and so the normativity of legal authorities is based in norms of rationality, meaning that the Master Plan cannot generate morally legitimate authorities with moral powers to impose legal obligations and confer legal rights. Since Shapiro wants to allow for legal systems with morally illegitimate Master Plans, he also needs to show how the 'bad man' can be criticisable for disobeying the law despite not being rationally required to follow it. As we saw, Shapiro's answer to this problem is to introduce a distinction between adjectival and perspectival interpretations of legal authority claims, and endorse the latter of these. According to the perspectival interpretation, when we ascribe legal authority to someone, "we are not necessarily imputing any kind of moral authority to her. To the contrary, we are qualifying our ascription of moral legitimacy. We are saying that *from the legal point of view*, the person in question has morally legitimate power" (ibid.: 185). As a result, perspectival legal claims "carry no moral implications" (ibid.: 186) and so the 'bad man' is not rationally required nor morally obligated to obey the law. Though he is still criticisable from the legal point of view since legal discourse "typically plays a *distancing* function. It enables us to talk about the moral conception of a particular legal system without necessarily endorsing that conception" (ibid.). Additionally, since legal authorities are not ascribed with moral power, they can be generated from a morally illegitimate Master Plan.

There are various issues with Shapiro's explanation of the normativity of the Master Plan in terms of the perspectival view, though, perhaps the most concerning is that he proves the point of the Non-Positivist who argues that legal authority must be morally legitimate. By introducing 'the legal point of view' and arguing that legal discourse 'typically plays a distancing function', Shapiro seems to be endorsing a form of legal fictionalism, whereby certain legal statements are true within the fiction, but not in the actual world. If the truth of legal statements can only obtain in light of the fictional operator 'from the legal point of view', then this entails that legal discourse is mere pretence. The upshot of this is that Shapiro inadvertently admits that there is no (real) legal authority which is not morally legitimate.

Even if Shapiro can find a way to respond to this objection, then at best, he simply eludes the original challenge: before he presents the perspectival interpretation of legal authority, he concedes that there can be legal authority without moral legitimacy – but this is exactly what is at issue, and is what he has to argue for, rather than simply try to show how his theory can accommodate this concession. That is, the objection invites Shapiro to show how he can

make sense of legal authority understood as a moral power that has been generated by a morally *illegitimate* plan. By appealing to the perspectival interpretation, Shapiro shifts the discussion in a way that avoids engaging with moral notions directly; he still does not explain where the legitimacy of the officials comes from, but instead just assumes that from the point of view of their legal system, those officials are morally legitimate. To answer the objection, then, he would need to explain how, from within a legal system, legal authorities are morally legitimate without the Master Plan of that system containing any moral norms.

As a result of Shapiro's perspectival interpretation, he also eludes Hume's Challenge. Rather than explaining *how* an ought is derived from an is (e.g., to make clear the source of normativity), Shapiro simply explains how he derives an is from an is. Worse still, if we consider legal reasoning from the point of view of a legal system, Hume's Challenge disappears since oughts are derived from oughts – that is normative premises generate normative conclusions, and we have a Non-Positivist view.

Let me end this section by presenting a few related challenges from other authors. In the 2013 book *The Planning Theory of Law: A Critical Reading*, Damiano Canale, Francesca Poggi, and Bruno Celano each individually arrive at the same general conclusion: plans are not normative in the same way that laws are and so they cannot do the job that an account of the nature of law requires of them. Let me briefly consider each of their points.

Canale opens the book by asking: "If legal norms were plans, would they do the job that legal norms actually do in everyday life?" (2013: 13). He answers in the negative by contesting Shapiro's understanding of the dispositional character of plans: "[a]ccording to Shapiro, plans dispose to comply in the sense that those who adopt a plan are rationally *obliged* to carry it out" (ibid.). Yet, Canale argues by way of example that "there is no straightforward reason for claiming that plans *entail an obligation* to adopt a certain means to a planned end" (ibid.). This is because "instrumental rationality is normative not in the sense that it obliges agents to adopt a means to their ends: It merely requires a particular coherence relationship to hold among agents' propositional attitudes (beliefs, desires, intentions, etc.)" (ibid.: 14). Given this lack of motivational force, the problem with relying on the normativity of instrumental rationality to explain law is even clearer when considering the shared plans created by authorities. Canale grants that even if we admit that individual plans generate genuine obligations for the agents that create them, "it is mysterious how plans can dispose individuals to comply when they operate as "external norms" that are not involved in the practical reasoning and deliberation of their addressees" (ibid.). In such cases, "plans are not *sufficient* for motivating individual conduct because they do not entail

any addressee's commitment to adopt a means to the planned end" (ibid.). Given this, in order to explain the normativity of law, "Shapiro should *add* something to plans or admit that plans supervene upon other, more fundamental normative entities" (ibid.: 15). However, if he takes Canale's advice, then this weakened Planning Theory of Law would, at best, make plans redundant in Shapiro's account of law since the important explanatory role would be taken by whatever is added; and, at worst, could end up inconsistent with the Positivistic view Shapiro wants to endorse.

On a related note, but instead targeting the Master Plan in particular, Poggi argues that "the norms of instrumental rationality are not *stricto sensu* norms: they are not guides for actions, they do not motivate behaviours" (2013: 45). Rather, they simply define what counts as rational and as a result, "[t]he fact that doing something is rational does not imply that I must do it, unless I want to be rational" (ibid.). Clearly, this result is in stark contrast with legal norms which do necessarily guide action (by imposing obligations and conferring rights). More specifically, Poggi argues that Shapiro "cannot explain the judicial legal duty to apply the master plan" even if the officials adopt it. This is because "rational duties are not normative legal duties" (ibid.). Attacking Shapiro's 'inner rationality of law', Poggi elaborates that "to be rationally criticizable does not mean to be legally criticizable: one is rationally criticizable if she violates the rules of rationality which, on one hand, are not legal rules and, on the other hand, are not *stricto sensu* norms" (ibid.).

Finally, Celano presents one of the most developed arguments against Shapiro's use of Bratmanian plans in explaining the nature of law. He emphasises that plans "are created and adopted by an agent for *her own* future action and deliberation. They are a device intended for the *self*-governance of agents" (2013: 130). Celano spots a discrepancy here with Shapiro's view of plans and laws; that "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" (ibid.: 131). This contrast leads Celano to question whether it is "helpful to think of the law on the model of self-governance" and if we are "dealing with the same notion" or are instead "equivocating on the word "plan"" (ibid.). Celano notes that it is, of course, possible to plan for others, but that this involves different issues than individual planning does, including "authority, binding force, power, coercion, etc." (ibid.) rather than mere rationality constraints. It is for this reason that Celano argues that

> Shapiro illegitimately trades on the normativity… 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) – that, namely, it is normative in such a way that its normativity does not consist in, nor derive from, its moral legitimacy. (ibid.)

More specifically, Celano criticises Shapiro for simply supposing that the norms of instrumental rationality that apply to individuals or groups as a result of their own planning activities also apply in cases whereby individuals or groups plan for others. Since planning is to do with self-governance, it does not follow that this rational capacity allows individuals to subject others to norms. Yet, Shapiro does not explain how we get from self-governance to the power to place someone else under a norm. Celano points out that "[t]he 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*" (ibid.: 133). That is to say, like Canale, that something is missing from this picture which plays a greater explanatory role than plans. Canale can be perhaps taken as suggesting that the missing puzzle piece here is coercion, along the lines that I suggested above. He says, "[f]or all Shapiro has shown [the creation and persistence of law] is, rather, grounded in our capacity to issue "threats" and other incentive-based prescriptions" (ibid.: 139).

Celano takes this problem to arise from the distance Shapiro places between his account of plans and Bratman's. As I mentioned in §4.2.1, Bratman takes plans as intentions whereas Shapiro rejects this and says that plans are, instead, the objects of intentions. Yet, despite this distinction, Shapiro helps himself to various notions and consequences of Bratman's planning theory of intention for his own planning theory of law, all the while, disregarding the fact that he understands laws as plans and denies that plans are intentions. Celano elaborates on this and details some other issues with Shapiro's account that lead him to conclude that "talk of plans can't do much for legal theory" (ibid.: 152). Like Canale and Poggi, Celano dismisses the Planning Theory of Law based on the inability of Shapiro to explain the normativity of law in terms of plans.

In fact, although a supporter of Shapiro's Planning Theory, Michael Bratman (2011) reinforces the point that the normativity of plans is not enough to explain the normativity of law. As a metric for his discussion, Bratman appeals to Postema's *Normativity Thesis*, which says that "[w]e understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting. Thus any general theory of law must give a satisfactory account of the normative (reason-giving) character of law" (1982: 165). In considering Shapiro's 'inner rationality of law', Bratman acknowledges that "these ideas do not yet get us to Postema's idea that the law provides normative reasons for

action" (2011: 75). Worse still, they do not show how the law has normative force even just for legal officials: "to support the claim that legal officials have, quite generally, normative reasons to make certain legal moves we cannot simply cite the inner rationality of law. To support this claim we would need some account of the reasons these officials have, quite generally, to continue to play the legal 'game'" (ibid.: 79). Roughly, Bratman's argument follows from Shapiro's talk of instrumental rationality 'binding' agents to heed the plans of authorities since they accept the plan which establishes this hierarchy, and so Shapiro thinks if an agent were to ignore the orders issued by the authority, an agent would be acting irrationally. Though, as Bratman points out, while rational agents are bound to have consistent plans, they are not bound by their plans. In other words, the consistency demands that follow from instrumental rationality do not necessitate conformance, rather, there is another option open to agents: they may simply give up on their prior intention (i.e., in accepting the hierarchy). In Bratman's words "solely by appeal to the inner rationality of law, we do not have a reason that favours [conformance with the plan rather than giving up on the prior intention accepting the hierarchy]", and thus, "it might be misleading to say simply that the agent in Shapiro's example is 'bound to heed the plan'" since this suggests the first route which "has not yet been supported" (ibid.). Ultimately, after trying to get Shapiro closer to satisfying Postema's *Normativity Thesis*, Bratman concedes that more work is to be done. Though he is unable to provide the missing explanatory ingredient, he appears more optimistic than Canale, Poggi, and Celano that there is one to find.

In any case, by advancing a series of objections against Shapiro's account of the fundamental rules of law and the normativity of legal authority being based in plans, I hope to have shown that there are various reasons to reject his account. With all these challenges, we are now in a position to conclude that Shapiro cannot retain even a weakened version of his Planning Theory of Law since plans do not enjoy such a central role in our analysis of the nature of law.

4.6. Conclusions

The purpose of this chapter has been to present and analyse what I call Shapiro's *norm claim* which says that legal rules are plans and plan-like norms. While this claim follows from Shapiro's *Planning Thesis* (i.e., legal activity is social planning activity; what I name *the activity claim*), it is an interesting claim in its own right which Shapiro tries to motivate independently by characterising legal rules as plans. Though, unlike in the case of both legal

organisations and legal activity, Shapiro does not offer as rigorous an analysis of legal rules in terms of plans. I suggested in §4.2.1 that this may be partly due to his mistakenly assigning various properties of plans instead to legal activity. There, I also elucidated both these extra properties possessed by plans and those identified by Shapiro along with a thorough analysis of the existence conditions, nature, structure, and function of both shared and individual plans. Before moving on to discuss the normativity of plans in §4.3, I outlined some different types of shared plans that play an important role in Shapiro's attempt to characterise specific legal rules in terms of those types of shared plans. I examined this comparison in §4.4, where I also tried to help Shapiro by elaborating on how he might further try to argue for *the norm claim* by demonstrating how legal rules may be taken to possess the same properties as shared plans. However, it was the result of all these considerations which led me to raise various objections to the effect that *the norm claim* fails and, on the one hand, that Shapiro does not succeed in showing that legal rules are plans and plan-like norms; and on the other hand, that this implication, in fact, looks to be false.

Yet, I suggested that all may not be lost for Shapiro – were he able to hold on to a narrower version of his view, namely, that while legal rules are not plans and plan-like norms, but that law is founded on a shared plan (i.e., the fundamental rules of a legal system constitute a shared plan), then perhaps he could retain a weaker account of his Planning Theory of Law. I explored this possibility in §4.5.1, where I presented in detail Shapiro's 'Master Plan' and how it is meant to generate legal authority as well as how Shapiro uses all these elements of his account to answer the two main puzzles he presents as crucial for any legal theory to solve: Hume's Challenge and the Chicken-Egg Problem of legal authority. However, I argued in §4.5.2 that Shapiro's Master Plan, as well as his account of legal authority and his explanation of the normativity of law were subject to various challenges that he could not so easily overcome, and that also prevent him from adequately answering both puzzles. There, I also presented similar objections made by Canale, Poggi, and Celano, as well as a related concern from Bratman, which, together, reinforce the conclusion that the Planning Theory of Law, even in its weaker version, fails, and that plans do not play such an important part in explaining the nature of law after all.

Chapter 5

Conclusions

My goal with this thesis has been to demonstrate the fruitfulness of applying work in social ontology to help uncover the nature of legal phenomena. I did this by presenting a thorough analysis and comprehensive critique of the most sophisticated attempt to develop research at the intersection of legal philosophy and social ontology: Scott Shapiro's Planning Theory of Law. In order to identify both its flaws and virtues in explaining law's institutional nature, I started by considering the motivation behind Shapiro's distinctive methodological approach to investigate the nature of law through the lens of shared action. Inspired by the 'organisational turn', Shapiro endeavours to shift the focus of traditional analytic jurisprudence from studying the nature of legal norms to the groups and shared activities that create them. To fully examine Shapiro's Planning Theory, I elucidated three main claims that follow from it: (1) *the group claim*: legal organisations are social planning organisations; (2) *the activity claim*: legal activity is social planning activity; and (3) *the norm claim*: legal rules are plans and plan-like norms. I dedicated one chapter to each of these claims where I reconstructed and critically assessed them, before utilising recent contributions in social ontology on the metaphysics of groups and group action to reveal important insights into the nature of legal organisations, legal activity, and legal norms.

I began in Chapter 2 by reviewing Shapiro's *group claim*, which says that legal organisations are social planning organisations. The first half of the chapter consisted in a detailed presentation of Shapiro's attempt to support this claim. I predicted that, following his methodological approach, Shapiro would start by investigating the nature of legal organisations by elaborating on the properties that all and only legal organisations possess in order to show that they can be understood as an instance of social planning organisations. However, while it seems that this is what Shapiro might have had in mind, it is not what he ended up delivering. Instead, he develops his characterisation of legal organisations as social planning organisations based on the kind of *activity* he takes legal organisations to perform. That is, his *group claim* follows from his *Planning Thesis* (what I call his *activity claim*), that legal activity is social planning activity (where social planning activity is the shared, official, and institutional activity of social planning). Since he presupposes that legal organisations are social planning organisations based on the activity the group performs, he puts the cart before the horse and presents a view that is inconsistent with his own methodological approach.

Despite this bad start, I continued unpacking Shapiro's *group claim* by considering how he distinguishes legal organisations from other kinds of non-legal social planning organisations. In order to do this, Shapiro compares legal organisations with other similar kinds of groups to tease out their salient properties. We saw that he looks first at parents, noticing that, while parents are not organisations, they share a different property with legal organisations: they are *compulsory*. That is, the validity of parental authority, like legal authority, does not require consent – children are subject to the rules of their parents just as citizens are subject to laws, whether they agree or not. Though, many other kinds of groups can also qualify as compulsory social planning organisations that certainly are not legal. Criminal organisations are a good example, and as I mentioned, are the second kind of group that Shapiro contrasts with legal organisations. In doing so, he notices that the important difference that holds between both kinds of groups is one of aim: only legal organisations can be said to necessarily have a moral aim. While he concedes that legal organisations might not always succeed in this aim, they cannot fail to have it. Yet, there can be compulsory social planning organisations with a moral aim which are still not legal organisations. To isolate legal organisations from other such groups, the final kind of group that Shapiro considers are housing boards. I briefly presented Shapiro's story of a Floridian retirement community's 'Condo Board' which he uses to identify the self-certifying property held by legal organisations. This property represents the general presumption of validity that legal organisations enjoy, but that condo boards do not.

Though I suggested that any one of these three extra features considered by Shapiro as salient properties of legal organisations might be challenged, I presented Kenneth Ehrenberg's objection which takes issue with the property of self-certification. He argues, on the one hand, that it is an arbitrary property of legal organisations, and on the other, that it is not clear that legal organisations are fully self-certifying. The upshot of his arguments is that this feature is not so unique to legal organisations after all.

I also advanced my own argument that the main problem with Shapiro's view is not to do with any of these features, but rather concern his conceptions of both *nature* and *identity*. It is an inaccurate notion of *nature* which leads to an incomplete notion of *identity* that prevents him from being able to distinguish between legal organisations and other similar kinds of groups.

However, as difficult as these challenges may be for Shapiro to answer, I asserted that they are not fatal for his Planning Theory. Rather, I suggested that there are simply some gaps in

his account that must be filled. I explored one way of supplementing his theory by refocusing his project to begin with an analysis of legal organisations, thus fitting with his own methodological aim. To do this, I briefly sketched the beginnings of such an analysis based on what little could be taken from Shapiro's view – that organisations are groups with a certain structure, i.e., networks of roles which bestow occupiers with specific normative powers and responsibilities. From there, I suggested we look at Katherine Ritchie's Structuralist account of groups, given its prominence in the literature as well as its fit with Shapiro's view.

I elaborated on the distinction Ritchie introduces between *feature* and *organised* social groups. Feature social groups are instantiations of social kinds, e.g., the instantiation of the social kind *woman* is the social group constituted by all those who possess or are taken to possess the property of *being a woman*. In contrast, organised groups are realisations of social structures, i.e., social roles and relations. For instance, sports teams, friends, committees are all kinds of organised groups given that these kinds of groups have certain roles related to each other in particular ways. With this, I noted that we need only focus further on Ritchie's organised groups, since these are the kinds of groups with which Shapiro is also concerned. I ended the discussion by clarifying some salient features of organised groups.

While this brings us closer to an account of legal organisations, I argued that it only works as the foundation for a deeper analysis of them. To provide a more accurate account of legal organisations, I turned to Miguel Garcia-Godinez's ontological account of institutional groups. Garcia-Godinez recognises a limitation with Ritchie's Structuralist account of groups: it cannot distinguish between organised and institutional groups. The way to do this, according to him, is to recognise that some organised groups have an informal group structure, while others have a formal group structure. For a group structure to be informal (or formal) it must be both informally (or formally) created and informally (or formally) instantiated. As Garcia-Godinez argues, only institutional groups are formally created and formally instantiated. I elaborated on all this to show that legal organisations are a clear example of institutional groups. I also used all the distinctions introduced by Garcia-Godinez to demonstrate how legal organisations can be contrasted with other similar kinds of groups, like parents and legal organisations. Though, I conceded that Garcia-Godinez's account is still not enough to separate legal organisations from some other institutional groups.

In the rest of the chapter, I considered two different routes that might take Shapiro to this narrower distinction. The first was Kenneth Ehrenberg's suggestion that instead of focusing on legal organisations, Shapiro should instead focus on the artifactual nature of law. After unpacking this alternative, I argued that Ehrenberg's view raises various questions that all seem to require as part of an answer an account of legal organisations, and so we are back to Shapiro's project after all. The second, and what I argued is the more promising route for Shapiro to follow, is Brian Epstein's metaphysical framework for understanding the nature of groups. I offered a detailed explication of Epstein's framework, which studies the features of specific kinds of groups against four complimentary 'profiles', these are: the *Construction* profile, the *Extra-Essentials* profile, the *Anchor* profile, and the *Accident* profile. The *Construction* profile sets out existence, persistence, constitution conditions and the criterion of identity; the *Extra-Essentials* profile includes any additional necessary properties possessed by certain groups and, in some circumstances, their individual members, which may not have been captured by the *Construction* profile, e.g., abilities, powers, responsibilities, norms, and limitations; the *Anchor* profile depicts how groups are designed or set-up, e.g., it uncovers the metaphysical basis for groups to have the properties that they do; and the *Accident* profile contains all the accidental or contingent properties of groups and their members.

With this presentation of Epstein's framework in hand, I then set out to match up with his profiles the properties I identified throughout the chapter as being possessed by legal organisations. In doing so, I aimed to demonstrate just how much room there is for an account of legal organisations which can separate them from other institutional groups as well as how incomplete Shapiro's notion of *identity* really is; and to clarify where to begin in completing the analysis of legal organisations.

Rather than take up this challenge, I opted to continue investigating Shapiro's Planning Theory by moving on to examine its main claim in Chapter 3. The *Planning Thesis* (or *activity claim*) says that legal activity is social planning activity. I began my analysis of this claim by presenting Shapiro's account of social planning activity as an incremental process which has the purpose of producing publicly accessible norms that apply to and regulate a whole community, where those norms settle questions about how to act and have dispositive force over the subjects. I followed Shapiro's next step in supporting his claim by considering how, according to him, all these features of social planning activity can also be attributed to legal activity. However, I argued that some of the properties he identifies planning activity as possessing are incorrectly attributed to it, and in fact, are features of plans. I demonstrated

this to be true for the apparent dispositive character of planning activity, as well as its supposedly paradigmatic incremental nature. Though, I conceded that all this objection shows is that Shapiro's characterisations of both planning activity and legal activity are lacking, but not that the latter is not an instance of the former. To advance this stronger challenge, I noted, we need to show that legal activity possesses some properties that planning activity does not, or *vice versa*.

I took up this task by considering Shapiro's comparison between legal regulation and non-legal planning. Although he uses this example to motivate his *activity claim*, he ends up drawing more of a contrast between legal activity and social planning activity by recognising that the former, and not the latter, is likely to take place over many decades and involve the participation of various different agents, resulting in a plan that has been revised and repudiated several times. This conflicts with his contention that plans are typically stable and not up for reconsideration given their settling nature. Moreover, I also disputed that the purpose of legal activity so closely mirrors the purpose of planning activity. While Shapiro mentions that one of the purposes of legal activity is to produce norms that *monitor* the behaviour of those who are subjects of the plan, it seems forced to say that this is also the purpose of planning activity. Rather, it seems that the reason to produce plans in regular planning activity is simply to achieve some goal. With all these objections, I argued that Shapiro's Planning Thesis is unsupported and requires further analysis since, on the one hand, most of the features he identifies as belonging to planning activity are, instead, features of plans; and on the other hand, legal activity seems to possess some properties that planning activity does not, and *vice versa*.

Despite these early problems with Shapiro's *activity claim*, I continued unpacking it by outlining what Shapiro thinks distinguishes legal activity from other, non-legal social planning activities, i.e., what makes legal activity *legal*. I presented his *Shared Agency Thesis*, which says that legal activity is a shared activity. Shapiro emphasises that, by this, he does not simply mean that some aspects of legal activity are shared, but that the whole process is. Combined with his *Planning Thesis*, we have that legal activity is the shared activity of social planning. Next, I considered two virtues of the *Shared Agency Thesis* that Shapiro highlights: its ability to explain group membership in a legal system (officials are members of the same legal system just in case they participate in the same shared activity), as well as how legal systems function (shared agency is essential to perform the collective actions required of legal activities). In addition to the *Shared Agency Thesis*, I briefly mentioned Shapiro's view that legal activity is institutional, by which he means that certain

formal procedures are established for officials or groups to perform certain actions. As a result, participants need not share intentions nor hold relevant intentions towards the shared activity for its success; they must simply follow the procedures set out.

While identifying legal activity as institutional shared social planning activity may help to distinguish it from other similar, but non-legal shared social planning activities, I argued that it is still not enough to explain what makes legal activity *legal*. As I demonstrated in Chapter 2, with Shapiro's attempt to separate legal organisations from non-legal social planning organisations, he considers the compulsory nature of legal authority, the moral aim of legal organisations, and their self-certifying power. However, these are all properties of the group, not the activity it performs. Thus, Shapiro is unable to distinguish the *activities* of legal organisations from those of criminal organisations and condo boards by his characterisation of legal activity alone. I conceded that this is not necessarily a problem for Shapiro since, if he can distinguish between the groups which perform the activities, then he can distinguish legal activity (as performed by legal organisations) from non-legal shared social planning (as performed by non-legal groups). Yet, this changes the question from *What kind of activity does this group perform?* to *How does this kind of group perform the activities that it does?*

Though, as I explained, this shift causes significant problems for the Planning Theory. The reason for this is that, as I concluded from Chapter 2, in refocusing Shapiro's project to begin with an account of legal organisations, we have no reason to think that they are social planning organisations. As a result of this, combined with Shapiro's inability to characterise legal activity as social planning activity, the central claim of his theory, his *Planning Thesis*, falls apart. Yet, I suggested that all may not be lost for Shapiro: if it turns out that planning plays a role in explaining how legal organisations carry out legal activities, then he can hold on to a revised *activity claim*. I explored this option by analysing Shapiro's account of the shared agency of legal organisations.

In order to do this, I first presented some necessary background. Since Shapiro's view is based on Michael Bratman's planning theory of intention, I began by giving a detailed exposition of this in terms of its three central phenomena: shared intention, shared intentional activity, and shared cooperative activity. I started with Bratman's account of shared intention, which he understands in terms of webs of interlocking individual intentions of the form 'I intend that we *J*'. These are required to explain both shared intentional and shared cooperative activities. As for the former, alongside shared intentions, this kind of activity involves mutual responsiveness between participants; whereas the latter is a shared intentional activity with two further conditions: the absence of coercion, and commitments

to mutual support. After explaining all these components, I reviewed some classical objections raised against Bratman's account, along with his responses. One important result from this exercise, I noted, is that in order to answer these challenges, Bratman relies on small groups where the participants are equally committed to the shared activity and know each other well enough to predict each other's behaviour. On the face of it, I suggested, this does not look to be compatible with the kind of shared action that Shapiro wishes to illuminate.

Though, before jumping to conclusions, a thorough investigation of Shapiro's Bratmanian account of the shared activity of legal organisations is needed. I dedicated the rest of the chapter to this task, starting with a brief look at Shapiro's motivation for following Bratman's work. According to him, there is a gap in theories of action in explaining *massively shared agency*, that is, the kind of agency required for larger, more complex groups, such as legal systems or corporations to perform shared activities. Taking Bratman's planning theory of intention to be the 'most interesting and plausible' account of shared agency available, Shapiro sets out to show how it can be extended to make room for cases of massively shared agency. Shapiro begins by conceding that Bratman's theory suffers from two major limitations that prevent it from explaining such cases: first, it cannot account for authority; second, it cannot make sense of alienated participants. I presented the modifications Shapiro makes to Bratman's view in order to overcome these issues.

In allowing for authority, Shapiro argues that Bratman's 'mutual responsiveness' condition be dropped. This is because authorities are able to mesh the group's subplans by ordering the other participants to act in accordance with their intentions. Thus, the participants no longer need to respond to each other's intentions and actions, but only to the rules (understood as plans) created by the authority. In making room for alienated participants (i.e., those who are not committed to the success of the joint activity), Shapiro replaces Bratman's shared intentions with his 'commitment to a shared plan' principle: instead of requiring participants to be committed to the shared activity by forming shared plural intentions, Shapiro thinks that participants need only be committed to a shared plan, and so can engage in the shared activity without forming any shared intentions.

After presenting these modifications in detail, I raised several challenges to them, as well as a more general objection regarding Shapiro's motivation for extending Bratman's account. As I mentioned, he claims that there is a gap in explaining massively shared agency and suggests that Bratman's theory is the most plausible way to fill it. However, I argued that this is simply untrue by referring to a famous theory of exactly the kind of group action that

Shapiro wants to explain, which was developed by Raimo Tuomela in various works prior to the publication of Shapiro's chapter on massively shared agency. I briefly introduced some aspects of Tuomela's work where he extends his already sophisticated account of group action to large-scale groups with authorities, distinguishing between two different types of authorities: internal and external authorities. Internal authorities are authorised by group members through collective acceptance, whereas external authorities are authorised by a source external to the group. With this, Tuomela can distinguish between the shared agency involved in corporate activity (where authorities are largely externally authorised) and the shared agency involved in legal activities (where authorities are largely internally authorised). In fact, to demonstrate this, Tuomela considers and develops detailed examples of authority and cooperation in both corporations and states. Moreover, I pointed out that Tuomela can also account for alienated participants through the different strengths of cooperation he makes room for in shared intentional activities, i.e., the different ways in which individuals function as group members, where he recognises that individuals can be committed to a shared goal for either private or group reasons. As a result, I concluded that not only is Tuomela's work a more plausible prospect for Shapiro's project, but that it also provides a much more sophisticated account of massively shared agency than Shapiro's modifications of Bratman can hope to achieve.

In light of this, I raised another methodological concern: as with his analysis of legal organisations and legal activity, his account of *how* legal organisations carry out legal activities (and worse still, his more general account of massively shared agency) is influenced by his *Planning Thesis*, that legal activity is social planning activity: that is, it seems to underscore his reason for taking Bratman's account of shared agency to be the most interesting and plausible given the centrality that Bratman gives to planning. I argued that if this is the case, then Shapiro's use of Bratman is *ad hoc*: he begins with the thesis that legal activity is social planning activity and so finds an account of group agency which fits that rather than with an investigation into the nature of legal organisations in order to then analyse how they perform shared activities. For this latter project (which is meant to follow from Shapiro's methodological approach), I demonstrated that Tuomela's account is a better alternative. However, it does not start with the thesis that shared activity is planning activity: Bratman is unique in this sense, which is likely why Shapiro finds his view more appealing. But, I maintained, this is to put the cart before the horse – it makes it seem like Shapiro is not as interested in explaining massively shared agency as he is in showing that legal activity is social planning activity. Without this presupposition of the activity that legal organisations perform, it seems plausible to think that Shapiro would not be so concerned with Bratman's

theory since, unlike some other views, it is limited in ways that Shapiro himself identifies as incompatible with massively shared agency.

Furthermore, and in spite of this, I objected that Shapiro's 'Bratmanian' account of shared agency is more superficial than substantial. Rather than focusing on the kind of shared activity that Bratman thinks can be extended in institutional contexts (i.e., shared cooperative activities), Shapiro appeals to the weaker version (i.e., shared intentional activity), which is shared activity explainable by shared intentions and mutual responsiveness in intention and action. Yet, Shapiro further waters this down by dropping the requirement that participants are mutually responsive, as well as revising Bratman's notion of shared intention. I contended that this has further implications concerning the project that Shapiro takes himself to be carrying out since he is not in fact giving us an account of shared intentional activity involving authority, but 'prepackaged coordination' which is simply when participants respond to certain rules or plans rather than to the behaviour of the other participants. I concluded that Shapiro's project does not propose changes to Bratman's account of shared intentional activity after all, but, instead, offers an elaborated account of prepackaged coordination.

I ended the chapter by presenting a few more objections, which, combined with the others, defeat Shapiro's *activity claim* that legal activity is social planning activity. Given that there are no convincing arguments that legal activity just is social planning activity nor an alternative account of shared agency that would allow such a strong claim, I concluded that the central thesis of Shapiro's Planning Theory of Law, his *Planning Thesis* is completely unsupported and cannot be upheld. While his *norm claim* that legal rules are plans and plan-like norms no longer follows from his *Planning Thesis*, I maintained that it is nonetheless an interesting claim in itself that is worth investigating and that, since it is possibly the strongest and most controversial claim in his theory, no analysis of his account is complete without considering it.

It is to this end of presenting a thorough, comprehensive analysis and critique of Shapiro's Planning Theory of Law that I dedicated Chapter 4 to analysing its third, and final main claim – the *norm claim*, which says that legal rules are plans and plan-like norms. In order to unpack this claim, I began the chapter by presenting a detailed reconstruction of Shapiro's characterisation of plans. I followed him in considering the nature, features, function, and existence conditions of individual plans before elaborating on how this analysis is extended in the case of shared plans. In doing so, I drew attention both to the similarities and distinctions between them. I ended my exposition of Shapiro's account of plans by outlining

the various types of shared plans that he identifies, focusing in particular on those that are produced by the shared planning of hierarchical groups.

Although this does not amount to a full explication of Shapiro's *norm claim*, I highlighted some worrisome gaps and potential problems with his analysis of plans. As for the former, I pointed out that while Shapiro relies on the notions of collective intentionality and collective acceptance to explain the existence conditions of shared plans, he does not have an account of either. This gives rise to several open questions which must be answered in order to understand how shared plans can come into existence. Similarly, when it comes to Shapiro's account of the nature of shared plans, there is a gap in explaining exactly what they are – an individual plan is the object of an individual's intention, whereas a shared plan is the object of a group's intention. But, with this, we are left wondering what exactly holds these attitudes and how we can understand shared plans as abstract propositional objects of a group's intention. Shapiro's analysis, I sustained, generates more questions than it answers.

I also argued that not all shared plans so closely resemble individual plans by suggesting that an important feature of plans that seems to be missing in some cases of shared plans is their dispositive character. To motivate this point, I presented Bruno Celano's distinction between first, second, and third-person plans as well as Damiano Canale's contrast between 'internal' and 'external' norms. Roughly, Celano and Canale can be taken as tracking the same kinds of cases: those whereby agents adopt their own plans, on the one hand, and those whereby agents adopt plans for other agents, on the other. While rationality constraints may be enough to explain the dispositive character of plans in the former kind of cases, it does not seem to explain what happens in the latter kind of cases. This is because the agent for whom the plan is adopted might not accept it and so, as follows from Shapiro's view, would not recognise it as a standard of conduct that imposes on them a rational requirement to carry it out. In such cases, the plan does not have a dispositive character. The alarming result of this objection is that for Shapiro to satisfy his condition that plans are dispositive in such cases, it seems that he has to appeal to coercion, and so it is this power of agents to force others to comply that does all the explanatory work, and not any property of the plan. Although I advance this as an early worry following from Shapiro's analysis of plans, its potential to undermine his implication that laws are plans is clear.

Another concern I raised follows from Shapiro's different types of shared plans. Despite the central role that these play in his implication that laws are plans, they look to be more like rules rather than plans, given that they lack a nested structure and perhaps several other salient features of plans.

Next, I moved on to examine Shapiro's account of the normativity of plans. I started by outlining Shapiro's brief discussion of norms in order to see what, according to him, makes plans norms. We saw that the source of normativity of both individual and shared plans on his account is the power of self-governance. This is the capacity that individuals have to place themselves under the governance of a norm, which they exercise when they adopt a plan. Shapiro explains that when they do this, they rationally constrain their actions in ways that are consistent with the success of the plan. As a result, the normativity of plans is explained purely in terms of instrumental rationality.

Though Shapiro's account of the normativity of plans is not itself objectionable (as he closely follows Bratman here), I suggested that some tension can already be detected in using it as a basis for understanding the normativity of law since the latter does not seem explainable in terms of rationality constraints alone. Moreover, since Shapiro does not give us an account of norms, we do not know much about what they are and how they work in his view. Instead, he shifts the discussion back to plans which makes it difficult to see any distinctions that might hold of different kinds of norms. This, I worried, may obscure how he arrives at his implication that, rather than a separate category of norms, legal norms are plans, since he seems to help himself to this claim rather than argue for it.

Nevertheless, in order to finish unpacking Shapiro's *norm claim*, I considered how his account of plans can be extended to legal rules. Although his typical methodological style is to analyse the planning phenomena (i.e., social planning organisations and social planning activity) and then show how the corresponding legal phenomena (i.e., legal organisations and legal activity) possess all the same features, in the case of plans and legal norms, Shapiro's approach is different. Instead, he focuses on trying to show that particular legal norms are specific types of plans and plan-like norms. Before presenting this discussion in detail, I elaborated on how he might characterise legal norms as plans, thus, filling a gap in his analysis. However, despite Shapiro's best attempt to motivate his claim that legal rules are plans, I argue that he fails to do so for three reasons. First, legal rules do not have all the same features as plans nor do they work in the same way; second, not all legal rules are comparable with the types of shared plans Shapiro tries to identify them with; and third, even worse for Shapiro, these types of shared plans are not, in fact, plans at all.

As to the first objection, I maintained that plans necessarily have lifespans and aim towards some goal, whereas legal rules do not. I also suggested that contra laws, plans have a personal dimension, or following Celano, that they are based in self-governance. Next, I noted that due to plan rationality, shared plans are necessarily consistent, while legal rules are not.

Finally, I pointed out that following a plan is not the same as following a law for various reasons.

My second objection against Shapiro's claim that laws are plans regarded his endeavour to identify particular legal norms with plans. Despite his best efforts to explain criminal statutes as composite plans constituted by behavioural directives (prohibitions) and stipulations, I highlighted some problems in Shapiro's attempt to demonstrate this. In any case, even if all legal norms can be matched to different combinations of the various types of shared plans explicated by Shapiro, my third objection argued that this strategy will not help him. This is because he does not, in fact, show that any of these types of shared plans are really plans at all, and even more damaging for his account, I maintained that, properly understood, they are not. Consequently, not only has Shapiro failed to motivate the *norm claim*, but we have independent reasons to reject the idea that laws are plans.

However, in spite of this, I granted that there might still be a way for Shapiro to hold on to a narrower Planning Theory of Law since none of the challenges so far targeted his view that the fundamental norms of a legal system constitute a shared plan. If this picture is correct, then Shapiro would be able to retain a limited version of his account that is able to do the main jobs that he requires of it, i.e., to advance a positivistic account of the nature of law that can answer some key jurisprudential puzzles in a way that highlights the importance of our planning agency. The rest of the chapter explored this option, beginning with a comprehensive overview of Shapiro's Master Plan and how it generates legal authority through its adoption by legal officials and their ability to motivate subjects to comply with their plans. I then considered an important objection that challenges Shapiro to explain how the Master Plan generates normativity in a way consistent with his Positivistic project. Roughly, the worry is that legal authority must have moral legitimacy in order to impose legal obligations and confer legal rights since *obligation* and *right* are moral notions.

I detailed Shapiro's attempt to meet this challenge, which is by distinguishing between two different ways of understanding legal authority claims: the adjectival and perspectival interpretations. On the former, legal authority is attributed a kind of moral authority and "legal" works as an adjective in describing what kind of moral authority is involved. This means that the agent is attributed with moral power because they have been authorised as a legal authority. Clearly, this will not do for Shapiro's defence. To counter this objection, Shapiro appeals instead to the perspectival interpretation which says that when we consider an agent as a legal authority, we do so from a certain perspective so that we are not identifying them as holding a certain kind of moral power (as in the case of the adjectival

interpretation), but are instead *qualifying* our ascription of them as holding a moral power 'from the legal point of view'. It follows from this that legal obligations and legal rights only carry moral currency from the legal point of view and so are not objectively moral requirements. This allows Shapiro to resist legal authorities as morally legitimate and to deny that any other moral notions enter into his account of the Master Plan, and so his explanation of the nature of legal systems and the normativity of law can remain based in social facts and instrumental rationality.

As I also noted, Shapiro uses all this to demonstrate how the Planning Theory solves both Hume's Challenge and the Possibility Puzzle. In the case of the former, following his perspectival interpretation, legal statements are descriptive (in describing the normative point of view of the law), and so the challenge disappears. As for the latter, legal authority comes first on Shapiro's view, though since it is not conferred by legal norms, but by non-legal norms of instrumental rationality, there is no circularity nor infinite regress involved in accounting for it.

Yet, despite the apparent success of the Planning Theory in answering all these problems, I advanced a series of objections that targeted Shapiro's Master Plan, his account of legal authority, and his perspectival interpretation. The problem with the Master Plan, I argued, is that it makes the generation of legal authority, and thus legal systems too easy. This is because, as far as Shapiro is concerned, only the officials need accept the Master Plan (no general acceptance is required by the wider community). As a result, any group with a moral aim that can (i) accept a Master Plan which authorises them to govern over another group of people and (ii) 'motivate' (including force or threaten) this other group to comply with their orders, counts as a legal system. Thus, it seems that his view leads to an overgeneration of legal systems.

It also makes apparent an issue with Shapiro's account of legal authority: he cannot explain how it is created in a way that avoids vicious circularity or infinite regress. I noted that as a result of this, Shapiro fails to solve the Possibility Puzzle. I presented two interpretations of how legal authority might be established by the Planning Theory in order to show that neither can successfully solve the puzzle. On the first, and perhaps more accurate interpretation, the source of authorisation of legal authority is the acceptance of the Master Plan by legal officials. However, this would amount to legal officials authorising themselves by way of accepting the Master Plan and is exactly the kind of circularity that Shapiro was trying to avoid – the legal authority creates the legal norm which authorises that legal authority with the power to create that legal norm. As an alternative interpretation, I considered if it is rather

the community that authorises the legal officials by planning for the officials to plan for them. Yet, I suggested that this option does not fare any better since it leads instead to an infinite regress - the power of legal officials depends on the community's plan for the officials to plan for them, and so the authority of the community and their plan must now be explained (i.e., the legal norm had to be created by a previous legal authority, which got its power from a legal norm created by another legal authority, and so on).

Finally, I contended that Shapiro's appeal to the perspectival interpretation in order to uphold his Positivistic explanation of the normativity of law does not answer the challenge presented by the Non-Positivist. By endorsing a form of legal fictionalism, whereby certain legal statements are true within the fiction, but not in the actual world, Shapiro inadvertently admits that there is no (real) legal authority which is not morally legitimate, thus proving the point of the Non-Positivist. As a result, he simply eludes Hume's Challenge: rather than explaining *how* an ought is derived from an is (e.g., to make clear the source of normativity), Shapiro simply explains how he derives an is from an is. Worse still, if we consider legal reasoning from the point of view of a legal system, Hume's Challenge disappears entirely since oughts are derived from oughts, and we have a Non-Positivist view.

Given the breadth and strength of this attack, I concluded that Shapiro's *norm claim* fails, even in its narrower form, since he cannot explain the nature of legal systems, legal authority, and the normativity of law in terms of plans. To reinforce this point, I presented similar challenges raised by Canale, Celano, and Francesca Poggi. All this amounted to a final rejection of Shapiro's Planning Theory of Law.

Yet, in spite of this result, I wish to end the thesis on a more positive note by considering the virtues of Shapiro's project. Though I argued that none of the Planning Theory's main claims survive scrutiny, they nonetheless help us to identify new lines of enquiry in social ontology that can advance our understanding of law's institutional nature. While the result of the investigation into *the group claim* in Chapter 2 revealed a methodological inconsistency which impacted on Shapiro's attempt to characterise legal organisations as social planning organisations, I demonstrated that his endeavour to begin with an analysis of organisations was a promising approach. In an effort to refocus Shapiro's project in this way, I briefly considered how he may develop an account of legal organisations based on various recent contributions in social ontology on the metaphysics of groups. In this process, it became evident that, although all this would bring Shapiro closer to providing such an account, there are still several gaps to fill and some way to go before being able to achieve this goal.

Nevertheless, I clarified where one may begin in undertaking such a task, while noting that this path most likely will not end at Shapiro's *group claim*.

Similarly, in Chapter 3, despite maintaining that *the activity claim* fails given Shapiro's inability to characterise legal activity as social planning activity, as well as the issues he faces in trying to explain the shared agency of legal organisations in terms of planning agency, the discussion it generated exposed a rich body of work able to shed light on the nature of legal organisations as group agents and their capacity to engage in legal activities. I gestured towards how such a project may be best placed to proceed by briefly introducing Raimo Tuomela's complex account of large-scale group action and the collective intentionality it involves. Though, as with the alternative path I suggested regarding an account of legal organisations, this option is likely not possible within the confines of the Planning Theory, and thus, would not lead back to support Shapiro's *activity claim*.

Lastly, and contrastingly, in Chapter 4 I did not explore the potential impact of any work in social ontology for analysing the nature of legal norms. My purpose there was simply to advance some final arguments against Shapiro's Planning Theory by defeating his *norm claim*. Yet, while there are many places to go for accounts of social and institutional norms which can shape a theory of legal norms, I wish instead to consider how Shapiro's work might inform some discussions in social ontology. By studying Bratmanian plans and the normativity they generate in an attempt to explain legal norms and the normativity of law, Shapiro contributes an interesting case study for social ontologists to test their theories. With all the objections I presented, we can extract the defects of plans in explaining the nature and normativity of other kinds of institutional phenomena. The evidenced limited explanatory role of plans makes way for others to investigate the role that other elements (and perhaps other kinds of norms) play in the construction of institutions, such as law.

In sum, perhaps the greatest contribution of Shapiro's Planning Theory of Law has been in laying the foundations for a more constructive dialogue between legal philosophers and social ontologists. Although unsuccessful in his attempt to provide an account of the nature of law which illuminates the importance of human planning agency, Shapiro makes significant progress in legal philosophy by calling for a fresh start that moves away from the deadlocked Hart-Dworkin debate of traditional analytic jurisprudence. This alone is an achievement that certainly should not be underestimated.

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