

*The Moral Puzzle of Legal Authority*  
*A Commentary on Shapiro's Planning Theory of Law*

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Doctor Ferreiro: 'But Captain, obedience for obedience's sake . . . that's something only people like you do' *Pan's Labyrinth*, Guillermo del Toro

I INTRODUCTION

THE CLAIMS OF authority are part of our everyday life. For example, parents demand certain conduct from their children and legal officials command or forbid us to act in specific ways. In all these cases we say that authority is practical because it changes the practical situation of the agent. For example, a child intends to run after a ball that has landed on the road, but the mother stops the child and demands that she do something else such as wait on the pavement until she can safely cross the road to rescue the ball. A lecturer, driving quickly to his first lecture of the morning, is asked by the police to pull over, and he obeys. At first sight – from the first person or the deliberative point of view – neither the child nor the lecturer has a reason to act.<sup>1</sup> The child does not

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<sup>1</sup> Reasons here are understood as good-making or desirability characteristics: see especially GEM Anscombe, *Intention*, 2nd edn (Oxford, Blackwell, 1963) paras 20–27; J Raz, 'Agency, Reason, and the Good' in his *Engaging Reason: On the Theory of Value and Action* (Oxford, Oxford University Press, 1999) 22–45; W Quinn, 'Rationality and the Human Good' in his *Morality and Action* (Cambridge, Cambridge University Press, 1993) 210–27; Aristotle, *Nicomachean Ethics* in T Irwin (trans), *Aristotle: Nicomachean Ethics*, n 10 below, 1094a1; T Scanlon, *What We Owe to Each Other* (Cambridge, MA, Harvard University Press, 1998) 18–19. For a criticism of the idea that a reason for action ought to be presented as a good-making characteristic, see R Hursthouse, 'Arational Actions' (1999) 87 *Journal of Philosophy* 57; M Stocker, 'Desiring the Bad: An Essay in Moral Psychology' (1979) 76 *Journal of Philosophy* 738 and K Setiya, *Reasons Without Rationalism* (Princeton, Princeton University Press, 2007) 62–67. cf Raz, 'Agency, Reason and the Good', above. For a helpful discussion of the idea of values as part of our actions see G Watson,

1 ‘have’ a reason to stop. As an answer to the question ‘why did you do that?’<sup>2</sup>  
 2 neither the child nor the lecturer is able to formulate a reason in terms of good-  
 3 making or desirability characteristics. However, if asked to reflect on it, they  
 4 might formulate such reason. Thus, the child might say that she obeyed her  
 5 mother because she loves her and the lecturer might say that he obeyed the police  
 6 because the law is good at enabling us to organise our lives, and pursue and realise  
 7 ends. The lecturer’s justification for obeying authority relies on the ‘special statu-  
 8 tus’<sup>3</sup> of the authority. Law has authority because it is good<sup>4</sup> and parents have  
 9 authority because children love their parents. Let us consider the latter reason. If  
 10 we ask a child ‘why do you love your mother?’, the child might reply that it is  
 11 because they purport to do good. Parents and law have authority because they  
 12 purport to do good. But is it the case that if I purport to do good, I also can have  
 13 authority rather than the law, for example? The ‘special status’ argument needs  
 14 refinement. This is provided by the idea that such authorities purport to do good  
 15 and they endeavour to do it in such a special way<sup>5</sup> as to guarantee the success of  
 16 the enterprise. In the case of parents, they have a special commitment to their  
 17 children, they love them and this provides a guarantee (in principle) that the  
 18 parent will act for the good of the child. Similarly in the case of the law, human  
 19 goods and human ends can only be achieved through the very special institutional  
 20 character of law.

21 A different strategy of argumentation to explain practical authority has been  
 22 adumbrated by some scholars, who appeal to a ‘constitutive argument’. This  
 23 argument takes the idea of ‘legitimate authority’ and aims to explain the condi-  
 24 tions that make possible the existence of practical authorities. For example, in  
 25 the political and legal domain, Raz<sup>6</sup> takes legitimate authority as given, which is  
 26 evidenced by the claims of legal authorities. The question that arises is how legiti-  
 27 mate authority might be possible. What are the conditions that make possible the  
 28 legitimate authority claimed by legal officials? Raz establishes two constitutive  
 29

30 ‘Free Agency’ (1975) 72 *Journal of Philosophy* 205, last reprinted in G Watson (ed), *Free Will* (Oxford,  
 31 Oxford University Press, 2003) 337–51.

32 <sup>2</sup> Anscombe in *Intention* (n 1 above) engages in the task of describing ‘an intentional action’. She  
 33 believes that to act intentionally is to act according to reasons for actions and affirms that if an act is done  
 34 with an intention then the question ‘why’ is applicable.

35 <sup>3</sup> The “special status” view might be interpreted as an extended notion of the inspirational conception  
 36 of authority discussed by Raz in the *Morality of Freedom*, n 6 below.

37 <sup>4</sup> I follow P Geach, ‘Good and Evil’ (1956) *Analysis* 32 on the view that the term ‘good’ is an attributive  
 38 adjective rather than a predicative adjective. cf CR Pidgeon, ‘Geach on Good’ (1990) *Philosophical*  
 39 *Quarterly* 129. Therefore, I will use the terms ‘good’ and ‘a good sort of thing’ as interchangeable.

40 <sup>5</sup> Arguably, the ‘special way’ of the law is through the rule of law. See N Simmonds, *Law as Moral Idea*  
 41 (Oxford, Oxford University Press, 2007).

42 <sup>6</sup> J Raz, *Practical Reason and Norms*, 3rd edn (Oxford, Oxford University Press, 1999); *The Morality of*  
 43 *Freedom* (Oxford, Clarendon Press, 1986); ‘The Problem of Authority: Revisiting the Service Conception’  
 44 (2006) 90 *Minnesota Law Review* 1003, reprinted in J Raz, *Between Authority and Interpretation: On the Theory of*  
*Law and Practical Reason* (Oxford, Oxford University Press, 2009) 126–65. For some early criticism of Raz  
 see D Regan, ‘Authority and Value: Reflections on Raz’s Morality of Freedom’ (1989) 62 *Southern*  
*California Law Review* 995; C Gans, ‘Mandatory Rules and Exclusionary Reasons’ (1986) *Philosophia* 373  
 and M Moore, ‘Law and Razian Reasons’ (1989) *Southern California Law Review* 827.

conditions for the possibility of legitimate authority: (1) the pre-emptive and (2) the dependence thesis. Arguably, from the deliberative viewpoint, the ‘constitutive argument’ is not independent of the ‘special status’ argument. The authority of law is possible because it purports to do good and is a good sort of thing. Therefore, from the deliberative viewpoint, the agent has reasons to follow the law. This is the role that Raz’s normal justification thesis is meant to play: it justifies the surrendering of our judgement. In other words, for Raz, authority is a good because if we follow the law, we are likely better to comply with reasons which apply to us rather than by trying to follow the reasons which apply to us directly. Shapiro’s planning theory of law, in common with Raz, offers a hybrid of ‘constitutive arguments’<sup>7</sup> and ‘special status arguments’ to explain legal authority. I will explain both arguments in the second section of this chapter. For now, I need to point out that the bridge between both arguments is the idea that we are planning agents. The background premise that connects the constitutive and the special status argument in Shapiro’s planning theory of law is the meta-principle: legal authority is a good because we are planning agents. From the deliberative viewpoint, law has authority because it is a good sort of thing and in the same way that a mother does, it performs its function in a specific way. In clear contrast to Raz’s normal justification thesis, Shapiro does not consider that a condition for a legitimate authority is to purport to do good. He asserts that there can be evil legitimate authorities with evil intentions. The fundamental question that arises is how Shapiro solves the ‘moral puzzle’ of legal authority.<sup>8</sup> The moral puzzle states that there is a conflict between the legal authority of the law – a heteronomous force on the agent – and the reasons for actions that the agent from the deliberative viewpoint has. Why should the agent surrender his/her judgement to an authority? There is a tension here between personal autonomy and authority. What Shapiro calls the ‘possibility puzzle’<sup>9</sup> of legal authority is a corollary of the ‘moral puzzle’. Authority seems impossible because norms are the outcome of the human will since they are a human creation and they cannot therefore confer legitimate power to obligate. If we assume that there is a basic authoritative norm that confers power to legitimate authorities, we enter an infinite regress, as it could similarly be assumed that there is a more basic norm that gives power to the basic norm. As Shapiro describes it, we get the chicken–egg paradox.

In our previous examples of both the child and the lecturer, the justification for their surrendering of judgement is the ‘special status’ of the authority. In both cases, the authority purports to do good and is, presumably, a good *sort of thing*. But then we might also ask, if law can be immoral and plans do not need to purport or aim to do good, how can we explain the moral legitimacy of legally

<sup>7</sup> See S Shapiro ‘Planning Agency and the Law’ (Chapter 1 of this book, from now onwards ‘PAL’), at xxx: ‘I am going to argue here that understanding fundamental laws as plans not only vindicates the positivist conception of law, but provides a compelling solution to our earlier question about how legal authority is possible’.

<sup>8</sup> Raz, ‘The Problem of Authority’, n 6 above, 1012, 1015; Raz, *The Morality of Freedom*, n 6 above, 38–41.

<sup>9</sup> S Shapiro, ‘PAL’ n 7 above, at xxx.

1 authoritative directives exemplified in ‘ought’ statements? Shapiro argues that we  
2 can do this from the legal point of view – a distance viewpoint that does not com-  
3 mit itself to action. I criticise this idea and advance arguments to show that the  
4 ‘legal point of view’ is not a deliberative or practical point of view, but merely a  
5 theoretical viewpoint. In other words, what we say from the ‘legal point of view’ is  
6 a mere report. If law moves us to action and guides us, it needs to have practical  
7 authority; it needs to change our practical situation. Should it not be that the  
8 deliberative viewpoint is primary over the theoretical?

9 Shapiro’s insight is significant and in my view, sound: law is necessarily con-  
10 nected to practical rationality. However, I attempt to show that the consequences  
11 of this important insight are not compatible with a middle way theory between  
12 legal positivism and natural law as he envisages it. But perhaps this is not impor-  
13 tant: we should be slaves to truth, not to theories about truth. The subject matter  
14 itself is our guiding star and it is palpable that this is what Shapiro is guided by.

15 This chapter is divided into three sections. The first section explains the role of  
16 the deliberative viewpoint and the transparency condition. The second evaluates  
17 Shapiro’s argument on solving the ‘moral puzzle’ of legal authority in terms of a  
18 ‘legal point of view’ and shows that the latter conflicts with the deliberative view-  
19 point. It is also shown that the ‘legal point of view’ is parasitic upon the delibera-  
20 tive viewpoint which should be at the core of the planning theory of law. The  
21 third part considers five possible objections to my criticism of Shapiro and exam-  
22 ines some tentative – hopefully convincing – replies to such objections.  
23  
24

## 25 II THE TRANSPARENCY CONDITION AND THE 26 DELIBERATIVE<sup>10</sup> VIEWPOINT

27  
28 The key to explaining legal authority and to solving the moral puzzle is to under-  
29 stand how we act for reasons in following practical authorities. This is substan-  
30 tially different from understanding how we act according to practical authorities.  
31 In the latter case, action takes place not for reasons, but rather because of threats,  
32 sanctions and so on. Legal positivism finds itself between the Scylla of coercion  
33 and the Charybdis of practical reason. A common strategy of contemporary legal  
34 positivism is to sail the boat so close to the Charybdis of practical reason that it  
35 possesses a plausible emaciated side that presents no real danger or threat to the  
36 main tenets of legal positivism. Shapiro’s planning theory aims to unmask the  
37 emaciated side of practical reason in law. Legal positivists have learned from  
38 Hart’s *Concept of Law* that the real threat lies in either the model of coercion or the  
39

40  
41 <sup>10</sup> For an explanation of the ‘deliberative point of view’ see J Finnis, ‘Law and What I Truly Should  
42 Decide’ (2003) 48 *American Journal of Jurisprudence* 107. Aristotle asserts: ‘A voluntary act would seem to be  
43 an act whose origin lies in the agent, who knows the particular circumstances in which he is acting’  
44 (Aristotle, *Nicomachean Ethics*, III i 20–21, (H Rackham (trans), Cambridge, MA Harvard University  
Press, 1934). ‘For a man stops enquiring how he shall act as soon as he has carried back the origin of  
action to himself, and to the dominant part of himself, for it is this part that chooses’ (NE, III iii 17–18).

crude empirical model of prediction. To understand action in the circumstances of legal authority as merely predictive or coercive action entails abandoning our self-understanding as agents in the circumstances of law. Furthermore, Hart has shown that both Austin's sanction theory of law and the Scandinavian Realists' predictive theory of law are not satisfactory accounts of the different orders, complexities and multiple functions of legal rules. In the 1970s, contemporary scholars, such as Raz and Finnis, recovering the Aristotelian classical view on reasons, began to develop a conception of law in continuity with practical reason.

We first need to understand the distinction between practical and theoretical knowledge. Let us take a modified version of the example provided by Anscombe in *Intention*.<sup>11</sup> A man is asked by his wife to go to the supermarket with a list of products to buy. A detective is following him and makes notes of his actions. The man reads in the list 'butter', but chooses margarine. The detective writes in his report that the man has bought margarine. The detective gives an account of the man's actions in terms of the evidence he himself has. By contrast, the man gives an account of his actions in terms of the reasons for actions that he himself has. However, the man knows his intentions or reasons for actions not on the basis of evidence that he has of himself. His reasons for actions or intentions are self-intimating or self-verifying. He acts from the deliberative or first person perspective. There is an action according to reasons or an intention in doing something if an answer to the question 'why' is applicable. It is in terms of his own description of his action that we can grasp the reasons for actions of the man. In reply to the question 'why did you buy margarine instead of butter', the man might answer that he did so because it is better for his health. This answer (following Aristotle's theory of action<sup>12</sup> and its contemporary interpretations advanced by Anscombe and Raz) *provides a reason for action as a desirability or good-making characteristic*. According to Anscombe, the answer is intelligible to us and inquiries as to why the action has been committed stops. However, in the case of the detective, when we ask 'why did you write in the report that the man bought margarine', the answer is that it is the truth about the man's actions. In the case of the detective, the knowledge is theoretical – the detective reports the man's actions in terms of the evidence he has of it. In the case of the man, the knowledge is practical. The

<sup>11</sup> Anscombe, n 1 above, paras 32–33.

<sup>12</sup> Aristotle, *Nicomachean Ethics*, n 10 above, I i 2; III V 18–21. See Thomas Aquinas, *Summa Theologiae* in Thomas Gilby (ed and trans), *Summa Theologiae*, vol 17, *Psychology of Human Acts* (London/New York, Blackfriars/Eyre & Spottiswoode/, McGraw-Hill, 1970) Ia2æ 12, I. See also A Kenny, *Aristotle's Theory of the Will* (London, Duckworth, 1979); R Pasnau, *Thomas Aquinas on Human Nature: A Philosophical Study of Summa Theologiae 1a, 75–89* (Cambridge, Cambridge University Press, 2002); J Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, Oxford University Press, 1998) 62–71 and 79–90. For contemporary formulations of the Aristotelian theory of intentional action see Raz, 'Agency, Reason and the Good', n 1 above; W Quinn, 'Putting Rationality in its Place' in his *Morality and Action* (Cambridge, Cambridge University Press, 1993) 228–55; C Korsgaard, 'Acting for a Reason' in her *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford, Oxford University Press, 2008) 207–29; R Moran and M Stone, 'Anscombe on the Expression of Intention' in C Sandis (ed), *New Essays on the Explanation of Action* (Basingstoke, Palgrave MacMillan, 2009) 132–68; M Thompson, *Life and Action: Elementary Structures of Practice and Practical Thought* (Cambridge, MA, Harvard University Press, 2008).

1 reasons for action are self-verifying for the agent. He or she does not need to have  
2 evidence of his own reasons for actions. This self-intimating or self-verifying  
3 understanding of our own actions from the deliberative or practical viewpoint is  
4 part of the general condition of access to our own mental states that is called the  
5 'transparency condition' (TC).<sup>13</sup> Its application to reasons for action can be for-  
6 mulated as follows:

7 (TC for reasons for actions) 'I can report on my own reasons for actions, not by consid-  
8 ering my own mental states or theoretical evidence about them, but by considering the  
9 reasons themselves which I am immediately aware of.'

10  
11 The direction of fit in theoretical and practical knowledge are also different. In  
12 the former case, my assertions need to fit the world, whereas in the latter, the  
13 world needs to fit my assertions. The detective needs to give an account of what  
14 the world looks like, including human actions in the world. He relies on the obser-  
15 vational evidence he has. The detective's description of the action is tested against  
16 the tribunal of empirical evidence. If he reports that the man bought butter  
17 instead of margarine, then his description is false. The man, by contrast, might  
18 say that he intended to buy butter and instead bought margarine. He changed his  
19 mind and asserts that margarine is healthier. There is no mistake here.

20 The Aristotle/Anscombe conception of intentional action is very different  
21 from the Humean and Neo-Humean approaches to intentional action which are  
22 the predominant views in moral psychology. Let me take a detour to clarify the  
23 differences. The standard view of intentional action advocated by Humeans, and  
24 in its more sophisticated form by Donald Davidson, presupposes an inward-  
25 looking approach to action as opposed to an outward-looking or 'transparent'  
26 approach. The latter examines intentional actions as a series of actions that *are*  
27 *justified in terms of other actions* and in view of the purpose or end of the intentional  
28 action as a *good-making characteristic*. Let me illustrate this position with an example.  
29 I intend to make tea and in order to make tea I need to focus on the kettle, the  
30 water, the plug and the cup. Thus, I put on the kettle *in order to* boil the water, *in*  
31 *order to* make tea *because* it is pleasant to drink tea. By contrast, the inward-looking

32  
33 <sup>13</sup> See G Evans, *The Varieties of Reference* (J McDowell (ed), Oxford, Oxford University Press, 1982) 225.  
34 The most extensive and careful contemporary treatment of the 'transparency condition' is in R Moran,  
35 *Authority and Estrangement: An Essay on Self-Knowledge* (Princeton, NJ, Princeton University Press, 2001). For  
36 discussions on Moran's notion of transparency, reflection and self-knowledge see B Reginster, 'Self-  
37 Knowledge, Responsibility and the Third Person' (2004) 69 *Philosophy and Phenomenological Research* 433;  
38 G Wilson 'Comments on Authority and Estrangement' (2004) 69 *Philosophy and Phenomenological Research* 440;  
39 J Heal, 'Moran's Authority and Estrangement' (2004) 69 *Philosophy and Phenomenological Research* 427;  
40 J Lear, 'Avowal and Unfreedom' (2004) 69 *Philosophy and Phenomenological Research* 448; R Moran, 'Replies  
41 to Heal, Reginster, Wilson and Lear' (2004) 69 *Philosophy and Phenomenological Research* 455; S Shoemaker,  
42 'Moran on Self-Knowledge' (2003) 11 *European Journal of Philosophy* 391; L O'Brien, 'Moran on  
43 Self-Knowledge' (2003) 11 *European Journal of Philosophy* 375; R Moran, 'Responses to O'Brien and  
44 Shoemaker' (2003) 11 *European Journal of Philosophy* 402; C Moya, 'Moran on Self-Knowledge, Agency  
and Responsibility' (2006) 38 *Crítica: Revista Hispanoamericana de Filosofía* 3; T Carman, 'First Persons:  
On Richard Moran's Authority and Estrangement' (2003) 46 *Inquiry* 395. For a critical view on the trans-  
parency condition see B Gertler, 'Do We Determine What We Believe By Looking Outward?' in  
A Hatzimoysis (ed), *Self-Knowledge* (Oxford, Oxford University Press, 2010).

approach examines the mental states that rationalise the actions; however, at the ontological level, it is argued that these mental states cause the actions. The mental states are the pair belief/pro-attitude towards the action. For Davidson, if someone does something for a reason he can be characterised as (a) having some sort of pro-attitude towards actions of a certain kind, ie desires, and (b) believing (or knowing, remembering, and so on) that this action is of that kind.<sup>14</sup> According to Davidson, I intend to make tea because I have the *desire* to make tea and the *belief* that the action of putting the kettle and boiling the water is of that kind. Let me exemplify this point with a more complex example. Let us suppose that a man drives his vehicle, stops it at a parking space and get out of his vehicle because he wants to go to the supermarket. On the way to the supermarket he meets a friend. What he has done for a reason and intentionally is only to park his vehicle and go to the supermarket; he did not intentionally meet his friend. His desire to go to the supermarket and his belief that driving his vehicle will get him to the supermarket constitute the reasons for his actions. The pair belief-desire is a mental state. *The presupposition that is operating here is that to understand the mental state of desiring and the mental state of believing is the same as to understand the content of the belief and the content of the desire.* In other words, to establish whether I believe that I am intentionally driving, I need to look introspectively at my mental state of desiring and believing.

The main criticism that has been raised against the pair belief/pro-attitude view is that this conception cannot explain deviations from the causal chain<sup>15</sup> between mental states and actions. The problem with this view is that it needs to specify the ‘appropriate causal route’. Let us suppose that the man who is driving to the supermarket intends to kill his enemy later on that day. Whilst he is driving his car, and by mere coincidence, he sees his enemy walking on the pavement and the man suffers a nervous spasm that causes him to turn the wheel of the vehicle and run over his enemy. Obviously, he did not kill his enemy intentionally. However, according to Davidson’s view, in order to have an intentional action we need two conditions: (a) a pro-attitude or a desire for the action, and (b) the belief that the action is of that kind. In our example, the man has the desire to kill his enemy and has the belief that driving his vehicle will result in the death of his enemy. Nevertheless, although in this case the conditions of intentional action as advanced by the pair belief/desire are met, the man did not act intentionally. There is clearly something wrong with this view of intentional action as it cannot explain cases where there is deviance from the causal chain. My argument is that we can only understand intentional actions if we examine the description of the action *as advanced by the agent, not in terms of his own mental states, but in terms of the ends of the action.* In this case, we will ask the man, why did he drive his vehicle, why did

<sup>14</sup> D Davidson, ‘Actions, Reasons and Events’ in *Essays on Actions and Events* (Oxford, Clarendon Press, 1980) 3–19. This analysis is modified in his essay ‘Intending’ which is published in the same collection. However, he still maintains the causal account of intentions. For an illuminating critique of introspection or the inward approach see R Hursthouse, ‘Intention’ in *Logic, Cause and Action* (R Teichman (ed), Cambridge, Cambridge University Press, 2000).

<sup>15</sup> The first to discuss deviant causal chains was R Chisholm in ‘Freedom and Action’ in K Lehrer (ed), *Freedom and Determinism* (New York, Random House, 1966) 28–44.

1 he turn the wheel and why did he run over his enemy. The answers respectively  
2 will be 'to go to the supermarket'; 'because I had a nervous spasm; and 'I did not  
3 intentionally run over my enemy'. These reasons are transparent, ie self-evident  
4 to him, and he does not need any evidence of his own mental state to understand  
5 *why* he accidentally killed his enemy. Because of his own description of the action  
6 we understand that it is not an intentional action and we can grasp the meaning  
7 of the action.

8 Davidson has made much effort in specifying the 'attitudes that cause the action  
9 if they are to rationalise the action':<sup>16</sup>

10 And here we see that Armstrong's analysis like the one I propose a few pages back, must  
11 cope with the question *how* beliefs and desires cause intentional actions. Beliefs and  
12 desires that would rationalize an action if they cause it in the right way – through a  
13 cause of practical reasoning, as we might try saying – may cause it in other ways. If so,  
14 the action was not performed with the intention that we could have read off from the  
15 attitudes that caused it. What I despair of spelling out is the way in which attitudes must  
16 cause actions if they are to rationalize the action.

17 In the following paragraph, Davidson seems to fear that the idea of attitudes  
18 causing action might lead to *infinite regress*:

19 A climber might want to rid himself of the weight and danger of holding another man  
20 on a rope, and he might know that by loosening his hold on the rope he could rid him-  
21 self of the weight and danger. This belief and want might so unnerve him as to cause  
22 him to lose his hold, and yet it might be the case that he never *chose* to loosen his hold,  
23 nor did he do it intentionally. It will not help, I think, to add that the belief and the want  
24 must combine to cause him to want to loosen his hold, for there will remain the *two*  
25 questions how the belief and the want caused the second want, and how wanting to  
26 loosen his hold caused him to loosen his hold.

27 Here we see Davidson struggling with his own proposal.<sup>17</sup> He asks *how attitudes*  
28 *must cause actions if they are to rationalise actions?* Davidson's model of intentional  
29 action does not help us to determine whether there is an intentional action, it only  
30 help us to determine the *conditions* that would explain the existence of an inten-  
31 tional action. The intentional action is already *given*.

### 32 33 34 35 III A CRITICISM OF SHAPIRO'S PLANNING THEORY ARGUMENTS IN 36 FAVOUR OF THE PRIMACY OF THE DELIBERATIVE VIEWPOINT

37 Let us now examine Shapiro's example of Cooks' Island. Let us suppose that the  
38 planners of the island – ie the authority of the island – ask a man to go to the near-  
39 est town by boat and buy some products, including butter. He buys butter as com-  
40 manded, though he believes that margarine is healthier. What are the conditions  
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43 <sup>16</sup> D Davidson, 'Freedom to Act' in *Essays on Actions and Events* (Oxford, Clarendon Press, 1980) 79.

44 <sup>17</sup> For an illuminating discussion of this point see C Vogler, 'Modern Moral Philosophy Again: Isolating the Promulgation Problem' in *Proceedings of the Aristotelian Society* (2007) 347–64.



that make this action an action according to reasons? The reasons for actions are not his. What does it mean that the reasons for actions are not his reasons? He can still describe his own actions, but not in terms of his own reasons – he could say that he bought some products in the supermarket, including butter, because the planners have asked him to do so. However, he thinks that he has better reasons to buy margarine instead of butter and therefore he acted contrary to his reasons. Raz calls this the ‘moral puzzle’ of legal authority. Any account of legitimate authority needs to justify the ‘surrendering of my own judgement’. How can we assert that the man acted for reasons? From the deliberative viewpoint, reasons for buying butter are not transparent for him. Nor can he answer the question ‘why did he buy butter’ by providing reasons in terms of good-making characteristics. He could, however, provide a justification in terms of the ‘special status’ of authority. He might intelligibly say that the planners purport to do good for the community and therefore such authority is good. This is why he bought butter instead of margarine. This is why he has surrendered his judgement to the planners. The fundamental premise in his reasoning is ‘authority is a good’ and it can be formulated as follows:

(I) Legitimate authority is a good thing.  
 I ought to obey the authority’s commands.  
 The planners have asked me to buy butter.  
 The planners are the authority.  
 I ought to obey the planners’ commands.  
 Conclusion: I ought to buy butter.

This answer is transparent to the agent and in terms of good-making characteristics. This is the answer that Raz provides. In normal cases – ie, central cases – authority is a good and purports to do good because if the agent obeys the law, she will be complying with the reasons that apply to her. However, if she decides to act following her own reasons, she will probably not succeed in complying with the reasons that apply to her – Raz’s normal justification thesis. Given that Shapiro argues that legal officials do not need to purport to do good to have legitimate authority, he cannot provide an answer along Raz’s lines, or so I will argue.

Notice that the previous reasoning is not different from the following:

(II) Vitamin C is good for *my* immune system.  
 I have a cold, therefore, I need to boost my immune system.  
 This orange contains Vitamin C.  
 Conclusion: I ought to eat this orange.

There is no difference between premises (I) and (II). If we follow Raz, legal authorities present a similar structure. In the normal case, authority is a good and Raz explains what it means to say that ‘legitimate authority is a good thing and purports to do good’.

Let us examine Shapiro’s answer to the moral puzzle of legal authority. For Shapiro’s planning theory we are asked to follow a plan; let us suppose that this

1 plan states that I ought to pay my taxes. This plan has been authorised by a master  
2 plan which has been designed as a shared plan by the planners. Shapiro  
3 advances an explanation of why we surrender our judgement to legal norms. He  
4 conceives such norms as plans that enable us to achieve our different goals or  
5 ends, though they are not necessarily good, intrinsically valuable or moral.<sup>18</sup> He  
6 engages in an explanation of authority as both 'special status' and 'constitutive  
7 argument'. On the former point he makes the following set of assertions:

- 8  
9 (a) The planning theory of law's central claim – that the law is first and foremost  
10 a social planning mechanism – is supported by two considerations. First, it  
11 explains why we consider law to be valuable. It is, for example, a widely  
12 shared assumption of political theories that agree on virtually nothing else  
13 that the law is an indispensable social institution in the modern world. Given  
14 the complexity, contentiousness and arbitrariness of modern life, the moral  
15 need for plans to guide, coordinate and monitor conduct are enormous.<sup>19</sup>
- 16 (b) As we will see, policies, customs and hierarchy are three ways in which shared  
17 plans can be forged without the members of the group having to engage in  
18 the time-consuming process of plan formulation and adoption.<sup>20</sup>
- 19 (c) There is no mystery about why plans are needed to regulate individuals'  
20 actions in communal settings. When people occupy the same space and share  
21 a common pool of resources, certain courses of action will result in clashes  
22 between individual pursuits, while others will avoid them. Planning is often  
23 necessary to ensure that those who live together do not undermine each other's  
24 ends.<sup>21</sup>
- 25 (d) Even when they knew what moral problems they ought to rectify, they could  
26 not figure out how to coordinate their behaviour so as to resolve these problems.  
27 Their sterling characters did not, in other words, diminish their need  
28 for law.<sup>22</sup>
- 29 (e) The essential point, however, is that whenever the law properly addresses a  
30 particular social problem, it does so because, given current social conditions,  
31 alternative methods of planning are somehow deficient.<sup>23</sup>

32  
33 <sup>18</sup> 'Everyone – even natural lawyers – accept that people can have morally bad plans. Terrorist plots,  
34 for example, exist even though they should not be carried out from the moral point of view; rather they  
35 exist just because terrorists share certain plans' (Shapiro, 'PAL', n 7 above, xxx). See also in the same text:  
36 'Even if the shared plan is morally odious and the citizens are as servile as sheep, the authorised individual  
37 will have legal authority within the existing system' ('PAL', at xxx).

38 <sup>19</sup> Shapiro, 'PAL' n 7 above, at xxx (emphasis added). Probably, what he means here is some kind of  
39 'Aristotelian necessity' in terms of human needs. See GEM Anscombe, 'Rules, Rights, and Promises'  
40 (1978) 3 *Midwest Studies in Philosophy* 318, reprinted in her *Ethics, Religion and Politics: Collected Philosophical  
41 Papers of G.E.M. Anscombe* (Oxford, Blackwell, 1981) 97–103; for the notion of 'Aristotelian necessity' as  
42 opposed to the internal necessity of rules such as chess, see Anscombe's account of authority qua practical  
43 necessity in her 'On the Source of the Authority of the State' (1978) 20 *Ratio* 1, reprinted in *Ethics,  
44 Religion and Politics: Collected Philosophical Papers of G.E.M. Anscombe*, above, 130–55.

<sup>20</sup> Shapiro, 'PAL', n 9 above, xxx.

<sup>21</sup> *ibid* xxx (emphasis added).

<sup>22</sup> *ibid* xxx.

<sup>23</sup> *ibid* xxx.

We can conclude that for Shapiro authority is a good. Additionally, Shapiro's 'constitutive' argument<sup>24</sup> establishes the conditions that make possible legal authority. Five conditions are identified: (a) plans are shareable by a group in the community, planners;<sup>25</sup> (b) plans are publicly accessible;<sup>26</sup> (c) plans are accepted;<sup>27</sup> (d) plans are hierarchical;<sup>28</sup> and (e) the existence conditions of plans and some legal norms (ie basic norms) are the same.

The bridge between the 'special status' argument and the 'constitutive' argument is made by the following meta-principle:

(M) Authority is a good because we are planning creatures.<sup>29</sup>

But, what does it mean that we are 'planning creatures'? Michael Bratman's work on practical reason and action might help us here. According to Bratman,<sup>30</sup> following the Lockean notion of personal identity, our personal identity is determined by our psychological experiences: in other words, loving our children and partner, memories with friends, parents, brothers, etc. For example, if there is another Veronica on planet X with the same memories and psychological experiences as Veronica on planet Earth we cannot differentiate between her and me. We are the same person, though we have different bodies.<sup>31</sup> These Lockean ties go over time and they are therefore continuities and connections between my past, present and future psychological experiences. How is this possible? Bratman advances the view that plans and policies play a crucial role in ensuring our identity over time. Shapiro aims to show that plans also play a significant role in our identity across persons. We need plans when we do things together. Plans, following Shapiro, enable us to coordinate the different goals that we have in the community. But we also need to stick to our plans to create a continuity of the things that we do together and their correlative experiences. We share goals and ends, and to ensure their realisation we need sophisticated planning. This can only be done if we accept the need for authority. Such authorities plan for us and help us to achieve our goals. The lurking idea here is our view as self-determining agents. We can rationally impose plans on ourselves to ensure our desired ends and goals. Shapiro tells us: 'Yet, according to the planning theory, the existence of the law actually depends on a normative fact as well, namely, the fact that planning agents have the rational authority to give themselves plans'.<sup>32</sup> We can then say that authority is a good, though according to Shapiro (in clear contrast to Raz) we do not need to say that authorities purport to do good.

<sup>24</sup> *ibid* xxx.

<sup>25</sup> *ibid* xxx.

<sup>26</sup> *ibid* xxx.

<sup>27</sup> *ibid*, xxx, xxx, xxx, xxx, xxx and xxx.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid* at xxx, xxx, xxx, xxx and xxx.

<sup>30</sup> M Bratman, *Structures of Agency: Essays* (Oxford, Oxford University Press, 2007) 28–32 and 118–120.

<sup>31</sup> See D Parfit, 'Why Our Identity is Not What Matters' in Raymond Martin and John Barresi (eds), *Personal Identity* (Malden, MA, Blackwell, 2003) 115–43.

<sup>32</sup> Shapiro, 'PAL', n 7 above, xxx.

1 In this way, Shapiro would tell us, the moral puzzle is solved. We surrender  
2 our judgement because we need plans in order to be who we are – in other  
3 words, persons with an identity over time and across persons. Planning is a  
4 complex activity, Shapiro argues, and it necessitates authority. Briefly, we sur-  
5 render our judgement to legal authority because it enables us to be creatures  
6 whose identity can survive over time as connected with the past and the future<sup>33</sup>  
7 (obviously, this is a very rough and bold sketch of the subtle background prem-  
8 ises of the planning theory of law advanced by Shapiro, but it will suffice for our  
9 discussion).

10 However, Shapiro emphasises that this does not mean that legal authority col-  
11 lapses into moral authority. On the contrary, he promptly points out that there is  
12 a 'legal point of view' that distances itself from any commitment to values or  
13 moral reasons.

14 Let us illustrate with an example how 'the legal point of view' might be applied.  
15 Let us go back to our example of the man who lives in Cooks' Island. Everyone on  
16 the island knows that the planners are corrupt and that they do not purport to do  
17 good. This is evidenced by their claims and their actions. They have designed a  
18 master plan that is considered the basic norm of the island. This plan imposes  
19 intensive labour work upon the elderly population and the children of the island,  
20 it authorises the rape of women and men, and the execution of people without fair  
21 trial. The master plan also authorises the planners to kill babies who have been  
22 born with physical or mental disabilities. It is customary that the planners do this  
23 with poisoned dairy products. A man is asked to go to the nearest town by boat  
24 and buy many kilograms of butter and milk. Is it intelligible to say that the plan-  
25 ners have legitimate authority and that, therefore, the man ought to buy the but-  
26 ter and surrender his judgement? Shapiro would say that 'from the legal point of  
27 view, he ought to buy the milk and the butter'. But this is not an answer to the  
28 moral puzzle of why the man ought to surrender his judgement. I think that  
29 Shapiro's legal point of view underestimates the parasitic relationship between  
30 the 'legal point of view' and the 'deliberative viewpoint'. This is my main objec-  
31 tion to Shapiro's planning theory of law. I will proceed to explain this objection.

32 What is the 'legal point of view'? Shapiro<sup>34</sup> asserts that when we refer to legal  
33 authority, the word legal is a qualifier. This means that it qualifies<sup>35</sup> our ascription of  
34 moral legitimacy. When we say 'X has legal authority' what we are truly saying is  
35 that 'from the legal point of view, X has morally legitimate authority'. It has a dis-

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<sup>33</sup> 'For the picture that emerges is one in which the creation and persistence of the fundamental rules  
of law is grounded in the authority that all individuals possess to adopt plans. As I attempt to show, this  
power is not conferred on us by morality. On the contrary, it follows from the fact that we are planning  
creatures' (Shapiro, 'PAL' at xxx, n 7 above).

<sup>34</sup> *ibid* xxx.

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<sup>35</sup> Raz rejects the 'qualified' view which he assimilates to Bentham's conception of law as sanction-  
based. See J Raz, *The Authority of Law* (Oxford, Oxford University Press, 1979) 154. Raz puts this as fol-  
lows: 'Thus qualified, they mean no more than that the rule or duty is recognised by a generally efficacious  
legal system. But this is essentially no more than a more sophisticated version of Bentham's view'. It  
seems, therefore, that Shapiro's legal point of view is different from Raz's legal point of view.

tancing function; it enables us to talk about the moral conception of a particular legal system without necessarily endorsing that conception.<sup>36</sup>

Let us go back to our previous imaginary example of Cooks' Island. The evil master plan is the basic norm that is shared by the planners. The man has been asked by the planner, the legal official Z, to buy butter and milk and the man is conscious of the evil purposes of this request. He asks for advice from his lawyer, who states: 'from the legal point of view, Z has moral authority' and will probably add: 'from the legal point of view, you ought to buy the milk and the butter'. If this proposition has any practical force on the man, it needs to be part of the practical reasoning of the agent – as in the case of the child or the speeding lecturer, it needs to change the practical situation of the agent. But how can a mere theoretical reason do this? Arguably, unlike the case of the man who is asked to buy butter but buys margarine because it is healthier, the second man of the Cooks' Island example has neither (a) a transparent reason nor (b) a reason in terms of good-making characteristics. The authoritative reasons of Z are presented to him as a theoretical reason. Let us think about the following analogy: when as an A-level student of physics you were given reasons for believing in the truth of classical mechanics, the reasons were presented on the evidence given. Some classical laboratory experiments were performed during that time and you came to have these reasons 'on observation'. Similarly, the lawyer provides reasons in terms of the evidence she has. She has read and carefully studied the master plan (ie the basic norm of the island's legal system) and knows that the order that has been given to her client is compatible with the master plan. She merely reports the reasons that she has learned by evidence. But the man does not 'have' these reasons as practical reasons because he simply cannot acquire reasons for actions by observation. For these reasons to make a change in the practical situation, he needs to 'have' them. Let us suppose that, after the consultation with his lawyer, he declares: 'I intend to buy the butter and the milk as ordered by Z'. If it is an act that follows a practical authority for reasons, then the question 'why' is applicable. We ask the man why and he responds: 'because it is the point of view of the law'. But he has now probably misunderstood the question. We are looking for a reason for action. We can continue our inquiry and ask why he intends to buy the butter and the milk and follow the 'point of view of the law' and his answer might be because 'authority is good'. The man can continue: 'Though the authority does not purport to do good, it is good'. We can now stop our inquiry. The reason provided is both (a) transparent and (b) it is presented by the agent as a good-making characteristic. But now we see that the only reason he can give is from the deliberative viewpoint. The phrase of the lawyer 'from the legal point of view' has no independent force in the deliberation. If I am asked whether 'X believes that p', I need to assess X's beliefs about p. However, if I am asked to do something because 'X believes that p', I do not assess X's beliefs and her mental states, I rather look outward and assess p. Similarly, if someone asks me whether a legal official

<sup>36</sup> Shapiro, 'PAL', n 7 above, xxx.

1 believes that the law has moral legitimate authority, I need to examine her mental  
 2 state. However, if I am asked by the legal official to do p, I need to look outward  
 3 and assess whether I should do p in terms of reasons for p. The phrase ‘according  
 4 to the law’ simply indicates who issues the alleged authoritative command, but to  
 5 solve the moral puzzle, the only authority is the agential authority. This means  
 6 that only the agent can justify the command and surrender his judgement. The  
 7 legal legitimacy of authority is primarily from the deliberative viewpoint. Of  
 8 course, the agent can be mistaken about his reasons, as in our example of Cooks’  
 9 Island it is not the case that this particular authority is good. Furthermore, how  
 10 can it be good? How can it coordinate the different goals and ends of the com-  
 11 munity in a good way, without purporting to do good?

12  
 13  
 14 IV. OBJECTIONS TO THE ARGUMENT THAT IN ORDER TO SOLVE  
 15 THE ‘MORAL PUZZLE’ OF LEGAL AUTHORITY THE DELIBERATIVE  
 16 POINT OF VIEW HAS PRIMACY OVER THE ‘LEGAL POINT OF VIEW’

17  
 18 (1) The ‘legal point of view’ is neither deliberative, nor theoretical, but rather a  
 19 ‘third point of view’. However, this ‘third point of view’ is, like the deliberative  
 20 one, a practical point of view; the difference lies in the fact that it is formulated  
 21 from a third person perspective.

22 The ‘legal point of view’, an objector might point out, is neither a deliberative  
 23 viewpoint (ie from the first person perspective) nor a theoretical viewpoint.  
 24 Statements made from the ‘legal point of view’ cannot be reduced to either.  
 25 Following Raz, an objector might say that I have presented a very narrow inter-  
 26 pretation of the practical point of view and have reduced the ‘legal point of view’  
 27 to the deliberative point of view. According to Raz, ‘the legal point of view’ has  
 28 two core features and should be characterised as follows.

29 First, statements are true or false according to whether there is, in the legal  
 30 system referred to, a norm which requires the action which is stated to be one  
 31 which ought to be done; secondly, if the statement is true and the norm in virtue  
 32 of which it is true is valid, then one ought to perform the action which according  
 33 to the statement ought legally to be performed. Such statements are widespread  
 34 in legal contexts. It should be emphasised again that statements from a point of  
 35 view or according to a set of values are used in all spheres of practical reason,  
 36 including morality. Their use is particularly widespread when discussing reasons  
 37 and norms which are widely believed in and followed by a community. There are  
 38 always people who accept the point of view and want to know what ought to be  
 39 done according to it in order to know what they ought to do.<sup>37</sup>

40 Let us first think about examples outside the law as suggested by Raz. When  
 41 you give advice to a friend who, for example, is vegetarian, you do not, according  
 42 to Raz, consider your reasons for actions, but rather her reasons. You probably  
 43

44  
 37 Raz, *Practical Reason and Norms*, n 6 above, 177.

love meat, but you give advice to your friend within the framework of her normative system, ie vegetarianism.

My reply to this objection is as follows: in the example used by Raz, being vegetarian is good and if you tell your friend when you go to a restaurant that she has to eat either the spinach or the cabbage (the only vegetables on the menu), both are good things to eat *qua* vegetarian and *qua* human being. In this example you can tell her ‘you’d better have the cabbage as you are vegetarian’. There is no further question why that advice has been given. The goodness of eating either cabbage or spinach is obvious in the context. Thus, it is given as a good-making characteristic and is transparent to you and her. It is, I argue, parasitic on the deliberative viewpoint. The reasoning is not different from (I) and (II):

(III) Cabbage is a good sort of thing for vegetarians.  
 You are vegetarian.  
 This is a cabbage.  
 Conclusion: You ought to eat cabbage.

The dependence or parasitic relationship of the ‘third point of view’ on the deliberative viewpoint is also apparent in examples very different from premises I, II and III. Franz Stangl<sup>38</sup> was the commander of Treblinka. When he first was appointed as head of a euthanasia clinic, he was morally repelled by the actions of the Nazis. But then he was afraid that he would lose his job and career. He began to think that euthanasia was a necessary evil and it was a favour to those killed. Let us suppose that Stangl was my friend in 1943 and that before he began his process of self-deception, he asked me for advice on what to do. According to Shapiro, I could have replied to Stangl ‘according to the normative system of National Socialism, you ought to continue being head of the clinic’. But, according to Raz,<sup>39</sup> like a vegetarian who has accepted the normative framework of being vegetarian, Stangl has already accepted the ‘normative point of view of National Socialism’. His question is like the question of a chess player: given the rules of chess, how ought I to play? He has already surrendered his judgement.

But let us suppose that Stangl wishes to know what he ought to do (according to the Nazi law, without surrendering his judgement to it yet). In response to my assertion ‘according to Nazi law, you ought to remain head of the euthanasia clinic’, Stangl would might sensibly have asked why. The ‘why’ is directed to the action that I have given as advice. He has asked for advice in terms of a reason for action, not just in terms of an action *simpliciter* (for example, a voluntary action that is done for no reasons) and my answer needs to be also in terms of reasons for actions. When people look for practical advice they are seeking for reasons. Children do this all the time. They ask parents, teachers, relatives, friends how to

<sup>38</sup> Example given by Eleonore Stump to explain the interrelation between intellect and will in Aquinas, see E Stump, *Aquinas* (London, Routledge, 2003) 355. See also G Sereny, *Into That Darkness: An Examination of Conscience* (New York, First Vintage Books Edition, 1983).

<sup>39</sup> My analysis is limited to Raz’s notion of a detached point of view and does not aim to establish any conclusion concerning Raz’s conception of legal authority as exclusionary reasons.

1 do this and this, why to do this and this. They learn that some ends are valuable  
 2 and worth pursuing and others not. To give advice to Frank Stangl in terms of  
 3 reasons for actions, as in the case of the vegetarian friend, I need a premise like  
 4 (III) – vegetables are good. What kind of premise can play this role? My argument  
 5 is that only a premise that (a) is transparent and (b) describes the action as a good-  
 6 making characteristic could play this role. In this case, the premise ‘legitimate  
 7 authority is a good sort of thing’ plays the role of III. The reasoning could be as  
 8 follows:

9 (IV) Legitimate authority is a good sort of thing.

10 Nazi law has legitimate authority.

11 A Nazi official has commanded that

12 ‘you ought to remain head of the euthanasia clinic’.

13 Conclusion: You ought to obey the command.  
 14

15 But here my advice is mistaken. I know that Nazi law has no authority because  
 16 it is not an instance of ‘authority as a good sort of thing’. The second premise is  
 17 false. It is similar to the case of vitamins and oranges, as follows:

18 Vitamin C is good for one’s immune system.

19 This synthetic orange without vitamins is good.

20 You have a cold, you ought to boost your immune system.

21 Conclusion: You ought to eat this synthetic orange.  
 22

23 As in the case of Nazi law, my advice is mistaken because my reasoning is  
 24 defective as the second premise is false. Stangl has no reason to surrender his  
 25 judgement. If my advice stops at the moment of expressing ‘from the legal point  
 26 of view, you ought to obey the law’, my advice is incomplete. He can legitimately  
 27 demand reasons for actions, namely, an answer to the question ‘why’. Then I  
 28 need a premise like I, II, III or IV.

29 (2) In extreme cases of injustice law has no legitimate authority; however, in less  
 30 extreme cases of injustice law has legitimate authority. In the latter case, the ‘legal  
 31 point of view’ can explain the normative or moral character of such authority.

32 Shapiro could make the following move: we have discussed *en passant* that we  
 33 can reconstruct his ‘special status’ argument in terms of a kind of ‘Aristotelian  
 34 necessity’.<sup>40</sup> Authority therefore is a necessity and the ‘legal ought’ is different  
 35 from the ‘ought’ of the rules of chess, because human good is involved. Therefore,  
 36 his fundamental premise is ‘authority is a good sort of thing’, but now in a  
 37 stronger sense: as an Aristotelian necessity. He could reject his initial view that in  
 38 cases of extreme injustice – Nazi law – law has legitimate authority. The conse-  
 39 quences of an unjust system trump any possible benefits obtained from authority.  
 40 It does not matter how much we try, there is no way we can describe the authority  
 41 embodied in Nazi law, for example, as good. However, Shapiro could continue  
 42 arguing that law in less extreme unjust cases is still legitimate as ‘authority is a  
 43

44 <sup>40</sup> See n 19 above.



good sort of thing'. But then the question is 'what is the threshold of "defectiveness" that law can tolerate and still be a good?'. Is it possible for law not to purport to do the good and still be good? Arguably, the case is different from the previous example of an orange. An orange does not purport to do the good. An orange is good because it provides Vitamin C or not because, for example, it is rotten, or because it is a synthetic orange without vitamins. *But the law is not a natural kind*. Law is created by officials exercising practical judgements and in many cases they get it wrong. If this is true, however, the problem with Shapiro's view is the denial that authorities purport to do the good. Imagine a mother who does not purport to do the good. Does she have legitimate authority over her child? Imagine a mathematician who does not purport to get it right. In most of the cases, he will not get it right. Does he have theoretical authority? Similarly with legal authorities. If they do not purport to do the good, it is very unlikely that they will be a good sort of thing. The law that purports to do the good and is good can be described as a paradigmatic example of authoritative law. Other kinds of law as authoritative but that do not purport to do good can be described, using the methodology of the central case advanced by Finnis<sup>41</sup> and Aristotle,<sup>42</sup> as authoritative in a secondary sense.

(3) The moral legitimacy of authority should be explained as belief-based and not as value-based.

There might still be a further worry. In the only and short sentence on this issue in the manuscript, Shapiro asserts: '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'(emphasis added).<sup>43</sup> This sentence might seem to rescue Shapiro from my objection. Shapiro might say that it is sufficient if the citizens *consider or believe* that the social planners are morally legitimate and that, therefore, they believe that the master plan is morally legitimate, even though in reality it is not. How might this work? Let us rethink our example of a man who is asked to buy butter and milk for evil purposes. The majority of the islanders believe and consider the planners to have legitimate authority. We might say that at one point they have examined their acts and evaluate them as desirable. In their reasonings, the islanders use this as evidence to place trust in the authorities' commands and attribute moral legitimacy to them. It is desirable (they might say) that disabled children are killed after birth as there are not sufficient resources on the island to support them; this is very similar to the process of self-deception suffered by Stangl, but what is involved here is collective self-deception. In the eyes of the islanders, the authority is a good sort of thing; it replaces their judgement with effective plans to coordinate the complexity of the plural and conflicting goals and ends of the islanders; it minimises the cost of deliberation, and so on. But at some point one can ask the man 'why did you surrender your judgement and obey the authority?' and the man could answer 'because authority is a good sort of thing

<sup>41</sup> J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) ch 1, 3–22.

<sup>42</sup> Aristotle, XIX, *Nicomachean Ethics*, n 10 above.

<sup>43</sup> Shapiro, 'PAL', n 9 above, xxx.

1 and purports to do the good'. But here, as in the case of false beliefs, we have a  
2 mistaken judgement. He had no reason to surrender his judgement. Similar mis-  
3 takes are made when we consider the information provided by theoretical authori-  
4 ties. Let us suppose that a friend, who is a mathematician but barely passed his  
5 final exams and actually failed his geometry exam, tells me that there are not  
6 non-Euclidean geometries. I have evidence that he is a good mathematician  
7 because he has helped me with some difficult equations. I believe that the results  
8 are correct, though in fact they are wrong. He is really an incompetent mathema-  
9 tician. In my view, however, he has shown that he is a skilful mathematician and  
10 I place my trust in him. I now believe that there are not non-Euclidean geome-  
11 tries, but, of course, I am mistaken. I had, therefore, no reasons to surrender my  
12 theoretical judgement to him.

13 (4) The 'legal point of view' is given to someone who has already accepted a  
14 specific normative system. But it is not merely this acceptance which explains the  
15 binding force of legal authorities; it is rather that we accept hierarchical plans, ie  
16 master plans, because we are planning creatures.

17 Shapiro could argue that I have overlooked his argument that as planning crea-  
18 tures, it is rational to accept hierarchical plans, and the 'legal point of view' might be  
19 advanced as a sound one. Shapiro could argue that once a normative system has  
20 been accepted,<sup>44</sup> the answer to the question what I ought to do should be given  
21 within the accepted normative framework. Consequently (the objection might contin-  
22 ue) the answer to the question of why to accept hierarchical – second-order –  
23 plans is because we are planning creatures. To achieve ends and first-order plans,  
24 we need to accept second-order plans, that is to say, master plans. We are human  
25 beings whose identities lie in psychological connections. The achieving ends can  
26 only be guaranteed by the temporal and interpersonal continuity of first- and sec-  
27 ond-order plans. This is (Shapiro might remind us) the basis of the meta-principle:  
28 'authority is a good because we are planning creatures'. The sense of 'good'  
29 (this objection might continue) is neither axiological nor moral. 'Good' here is a  
30 predicate attributed to the satisfaction of our ends and desires, whatever they are.  
31 Authority is good because it enables us to achieve our ends, desires and goals.  
32 Mistakenly (the objector might say) I have used a robust conception of 'good'.

33 So let us suppose that the objector is right and that we can conceive goodness  
34 in terms of degrees. The minimal level refers to the satisfaction of our desires and  
35 preferences. Let us examine the meta-principle: 'authority is good because we are  
36 planning creatures'. On Cooks' Island, islanders have the common preference  
37 that all their children will be educated. The planners of the island coordinate all  
38 the different activities to achieve such end. Their schools are inspiringly designed  
39 eco-buildings and provide all the required equipment. But the planners decide to  
40 segregate schools and separate the children between those who are left-handed  
41 and those who are right-handed. All preferences are satisfied since all the children  
42 receive an adequate education.

43  
44 <sup>44</sup> The term 'acceptance' here does not mean 'acceptance in terms of reasons for actions'.

Let us remember that, according to Shapiro, legal authorities can be good, without purporting to do the good. The planners of Cooks' Island do not aim to do the good. Organising and coordinating the different activities and conditions that will guarantee the satisfaction of the different preferences of the members of the community is their only aim. Indeed, in the example, the preferences are achieved. Let us suppose that I am a mother living in Cooks' Island and my right-handed daughter is ordered to attend school. I ask for your advice on what I ought to do. Following the objection, the answer should be: given that I have accepted the master plan and the hierarchical structure of the planners, 'from the legal point of view, you ought to obey the order'. In other words, 'from the legal point of view, the order has morally legitimate authority'. According to the proposed objection, my question is limited within the normative framework of what I have already accepted, but not because I have accepted it, but because of who I am, ie a planning creature. But let us think again about the argument of personal identity. If there is a twin Veronica on planet X with the same memories and psychological experiences as Veronica on planet Earth over time, then there is complete identity between the twin Veronica and me. However, let us suppose that the twin Veronica has slightly different values. For example, twin Veronica actually dislikes truth and knowledge, she could not care less about what is true and she only teaches and researches philosophy because she loves to be recognised and to be praised. Can we say that twin Veronica is the same as me? The answer is negative. We are not only a bundle of psychological experiences. We are not only planning creatures, but creatures who value values. Therefore, arguably, one can affirm that not only plans, but also values are constitutive of who we are. If I am also a planning and a valuing creature, why would I accept a plan that does not reflect my valuing – ie that laws should be designed according to principles of justice. If this is sound, then Shapiro's meta-principle should be formulated as follows: 'Authority is good because I am a valuing and planning creature'. This means that there are important connections between legitimate authority, values and conceptions of personhood. It is, unfortunately, not possible to fully develop these ideas here and thus what has been presented is merely an outline of how this objection might be refuted.

(5) We do not, and cannot, commit ourselves to all the different normative systems that coexist in our practical experience. In other words, we act following different norms that we do not fully endorse. A citizen of a state does not commit a contradiction in saying 'I ought to do what the legal official has commanded, but I do not believe they have legitimate authority'. The 'legal point of view' aims to explain the cogency of the latter statement.

The objection raises a sound point. True, there is no logical contradiction in such a sentence, but it nevertheless has a paradoxical nature. There is a parallel between Moore's paradox<sup>45</sup> types and the statement 'I ought to do what the legal

<sup>45</sup> For discussions on Moore's paradox, see R Sorensen, 'The All-Seeing Eye: A Blind Spot in the History of Ideas' in M Green and JN Williams (eds), *Moore's Paradox: New Essays on Belief, Rationality, and the First Person* (Oxford, Oxford University Press, 2007) 37–52; J Adler and B Armour-Garb, 'Moore's

1 officials have ordered, but I do not believe they have legitimate authority'.  
 2 Moore's paradox can be found in statements such as 'it is raining, but I do not  
 3 believe it'. The oddness is caused by an assertoric sentence and its negation such  
 4 as 'x, but I do not believe x', 'I ought to x, but I do not believe "I ought to x"'. To  
 5 believe or assert is to *look outward* to the world and determine whether the object of  
 6 your belief or assertion is true or not. Presumably, when a person says 'I ought to  
 7 do what the legal officials have ordered' she conveys, in the normal case, the idea  
 8 that she has surrendered her judgement on the basis of believing that the author-  
 9 ity is legitimate, otherwise she will use sentences such as 'I am obliged', 'I am  
 10 ordered', 'I am coerced', and so on. Then she adds, 'I do not believe they have  
 11 legitimate authority'. This clause can be replaced by 'I do not believe "I ought to  
 12 do what the legal officials have ordered"'. The paradox arises because proposi-  
 13 tional attitudes are outward looking and we are required to look at the object of  
 14 our beliefs. The paradox, arguably, might be explained because the person takes  
 15 a 'distance' or 'detached' viewpoint on herself. It is as if there were two subjects in  
 16 her<sup>46</sup> – the one who believes in the legitimacy of the 'ought' demanded by the  
 17 legal officials, and the one that denies that the 'ought' of the officials has any  
 18 legitimacy. This problematic arises only from the first person perspective, both  
 19 deliberative and theoretical viewpoint. There is no paradox in asserting 'she  
 20 ought to do what the legal officials have ordered, but she does not believe it'.

21 Arguably there is some kind of alienation when, from the deliberative view-  
 22 point, the citizen engages in such a thought as 'I ought to obey the law', but then  
 23 denies avowal or practical endorsement of his own thoughts by asserting 'I do not  
 24 believe that I really ought to obey the law, because it does not have legitimate  
 25 authority'.

26 (6) The possibility puzzle is not a corollary of the moral puzzle since the possi-  
 27 bility puzzle is about the *existence conditions* of a norm or rule whereas the moral  
 28 puzzle is about the *legitimacy conditions* of norms or rules.<sup>47</sup>

29 My reply to this objection might be as follows. When one explains the existence  
 30 conditions of an organ of the body – the heart, for example – one is also providing  
 31 an explanation of the existence conditions of its function – namely, it pumps the  
 32 blood. We can establish here an analogy between 'heart' and 'norm'. To explain  
 33 what a heart is without explaining what it is for, is to provide an incomplete  
 34 explanation of its existence conditions. Similarly, when one explains the existence  
 35 conditions of norms or rules, it seems to me that one also needs to explain the  
 36 existence conditions of their functions. A norm exists to guide our conduct – this  
 37 is one of its core function – but then the question that arises is why should my

38 Paradox and the Transparency of Belief' in *ibid* 146–64; A Gallois, 'Consciousness, Reasons and  
 39 Moore's Paradox' in *ibid* 165–88, and J Heal, 'Moore's Paradox: A Wittgensteinian Approach' (1994)  
 40 103 *Mind* 5.

41 <sup>46</sup> See S Shoemaker, 'Introspection and the Self', 'On Knowing One's Own Mind' and 'First-Person  
 42 Access' in his *The First-Person Perspective and Other Essays* (Cambridge, Cambridge University Press, 1996)  
 43 3–24, 25–49 and 50–73, respectively.

44 <sup>47</sup> Jules Coleman formulated this objection to me at the Conference where the paper on which this  
 chapter was based was presented.

conduct be guided by a norm or rule that is external to me? How is it that norms and rules are able to guide my behaviour, and how do they compel me to surrender my own judgements? A complete and satisfactory explanation of the existence conditions of norms needs also to explain how they perform their function; in other words, we need to provide an answer to the moral puzzle. One can say, therefore, in the terms of our previous example, that the existence conditions of a heart are a corollary of the existence conditions of its function. Similarly, the existence conditions of a norm are a corollary of the existence condition of its function. Consequently, puzzling features of the former are a corollary of the puzzling features of the latter. We can assert, then, that the possibility puzzle formulated by Shapiro is a corollary of the moral puzzle formulated by Raz.