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FROM SHARED AGENCY TO THE NORMATIVITY OF LAW: SHAPIRO'S AND COLEMAN'S DEFENCE OF HART'S PRACTICE THEORY OF RULES RECONSIDERED

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I. INTRODUCTION

Joseph Raz[1] formulates three main criticisms of H.L.A Hart's practice theory of rules. First, according to Raz, the practice theory of rules does not explain rules that are not practiced. Second, it fails to distinguish between social rules and widely accepted reasons; and thirdly it deprives rules of their normative character. The latter criticism is the most important. Raz believes that Hart's analysis of rules such as 'it is a rule that x ought to p' is equivalent to the statement 'x ought to p'. According to Hart, one can use the first statement 'it is a rule.' only if a practice exists. In this way if one says 'x ought to p' one means that there is a practice and, consequently, from the internal viewpoint the fact that x ought to p is justified. According to Hart, Raz tells us, these sentences are used to make normative statements. However, Raz objects, the fact that there is a rule is irrelevant to the normative import of a statement. In other words, the fact that that there is a rule and it is practiced is irrelevant to the point of view of practical reason. Raz tells us that the only function of rules from the practical reason point of view is to emphasise that the speaker is not alone and therefore they are an important rhetorical device. For example, a friend tells me that I ought not to lie and when I ask him why, he says that it is a rule and, furthermore, a rule that is widely practiced. Obviously, the normative statement

[1] Raz, J., *Practical Reason and Norms* (Oxford: Oxford University Press, 1999, Originally published in 1975).

'I ought not to lie' cannot have any binding force on me if the grounds of such a normative statement presupposes a practiced rule. In other words, rules that are such because they are grounded in practices, cannot constitute reasons for actions. Mere practices cannot bind us.

Both Coleman and Shapiro aim to defend Hart's practice theory of rules and reconcile it with the idea of the normativity of law as advanced by Hart. Coleman has initially advanced the view that the complex structure of preferences and beliefs is a basis for conventions[2] that enable coordination among different legal participants. The conventionalist view is refined and developed by both Postema[3] and Coleman following Lewis's notion of conventions. It is argued that Hart's rule of recognition as a Lewisian convention provides the basis for bridging the gap between social facts and the normativity of law; i.e., the idea that legal rules provide reasons for actions and, in some circumstances, both create and impose duties and obligations. Postema argues that a convention is both a social fact and a framework of reasons for actions and he endeavours to provide a satisfactory account of the rule of recognition as a Lewisian convention. Shapiro has criticized this view and Coleman[4] has also recognised the weaknesses of this position. Shapiro argues that conventions as solutions to coordination problems do not extend over time and therefore parties' preferences can change arbitrarily. "*If everyone prefers that everyone act on some combination of choices (because everyone acts this way), everyone would prefer that everyone act on some different combination under the supposition that almost everyone acted in this different way instead. For example, preferences for everyone riding on the right can always be changed to the left if it were*

[2] Cfr. Leslie Green, 'Positivism and Conventionalism'. In: 12 *The Canadian Journal of Law and Jurisprudence*, (1999).

[3] Postema, G., 'Coordination and Convention at the Foundations of Law'. In: *Journal of Legal Studies*, vol. XI (January 1982): 165–203; Coleman, J., 'Negative and Positive Positivism'. In: *Markets, Morals and the Laws* (1985).

[4] Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001).

supposed that almost everyone rides on the left instead.''[5] But one cannot say that participants of a legal system follow the changes of the law in this way.

Coleman[6] and Shapiro[7] have recently advanced a second attempt to reconcile Hart's practice theory of rules and the idea of the normativity of law; i.e., the idea that legal rules *qua* social rules give reasons for actions and, in some circumstances create and impose duties and obligations. Their argumentative strategy is to resort to elements in Bratman's work on shared agency and planning, though they introduce important and substantive modifications to Bratman's own explanation.[8] Bratman describes his own theory as a modest theory of the will where the notion of planning plays a fundamental role. Both Shapiro's and Coleman's application of Bratman's planning theory of agency to an authority structure such as law is impressive, but a number of objections can be levelled, with the intention of grasping both the nature of authority structures and the normativity of law. Although I have referred to Shapiro's and Coleman's applications as being similar to one another, the differences are substantive and important. I will scrutinise both Shapiro's and Coleman's explanations of 'shared agency' and discuss the objections that can be raised against each application.

Bratman's planning theory of agency is attractive to the objectives of *legal* positivism. Like Hart's legal theory, Bratman's theory of agency does not assume a strong metaphysical background. On the contrary, it resorts to psychological features of action. One might argue that Bratman's theory is modest in a twofold sense. First, it provides a modest explanation of the will,[9] which aims to be complementary to other

[5] Shapiro, 'Law, Plans, and Practical Reasons'. In: 8 *Legal Theory* (2002): 387–441, at p. 393.

[6] Coleman (2001, pp. 84–102).

[7] Shapiro (2002) and Coleman (1999, pp. 77–78 and 84–102).

[8] Bratman, *Faces of Intention* (Cambridge: Cambridge University Press, 1999) and ''Shared Intentions''. In: *104 Ethics*, pp. 97–113, 'Shared Valuing and Framework for practical Reasoning'. In: *Reason and Value*, Wallace, J., Pettit, Scheffler and Smith (eds.). (Oxford: Oxford University Press, 2004a).

[9] Bratman 'Planning Agency, Autonomous Agency'. In: *Personal Autonomy* (Cambridge: Cambridge University Press, 2004b): 33–57, at 33–41.

theories of the will such as Frankfurt's theory of the will.[10] Second, it is end-neutral[11] since it does not need a prior conception of the good. Hart's legal theory also aims to be end-neutral, in the sense that it aims to escape the strong commitment of natural law theories on identifying specific values or goods.

The aim of Shapiro's account is to explain law as an authority structure and to show that the legal positivist response is a better explanation of the authority of law than natural law theories. The strategy is indirect, since he does not directly criticize the natural law idea that the authority of law is grounded in moral facts, but he advances arguments to show how social facts broadly construed (incorporating psychological facts) can ground the authority of law.[12] Shapiro also aims to show that his explanation of the authority of law can explain *how* coordination problems can be solved and *how* law provides reasons for actions and, in some circumstances, creates and imposes duties and obligations. In other words, Shapiro aims to explain the normativity of law. In this way, the legal positivist premise that a vital function of the authority of law is to solve coordination problems[13] is examined and subsequently justified. Coleman, inspired by Shapiro, also aims to use Bratman's notion of shared cooperative activity to show that the rule of recognition can be a duty-imposing rule.[14]

The problem begins, however, when one realises that Bratman's planning theory of agency neither purports to explain obligations nor to be applicable to social or collective aims or to hierarchical authority structures. Bratman points out:

> Sometimes we speak of the intentions of structured social groups: the Philosophy Department, for example, intends to strengthen its undergraduate program. But some shared intentions are not embedded in such institutional

[10] Bratman (1999, p. 36) and Frankfurt, H., *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988) and *Necessity, Volition and Love* (New York: Cambridge University Press, 1999). See also Sarah Buss (ed.) *The Contours of Agency* (Cambridge: MIT Press, 2002).

[11] Bratman (1999, p. 6).

[12] Shapiro (2002, pp. 387–388).

[13] Shapiro (2002, p. 389).

[14] Coleman (2001, pp. 95–102).

structures. These will be my main concerns here: *I will focus on cases of shared intention that involve only a pair of agents and do not depend on such institutional structures and authority relations*.[15] Supposing, for example, that you and I have a shared intention to paint the house together, I want to know in what that shared intentions consists.[16]

Shapiro, therefore, is forced to introduce important modifications to Bratman's planning theory of agency that result in the abandonment of fundamental insights such as the idea of planning and self-governance. Shapiro, at the end of his paper, claims that plans do not play a significant explanatory role and thus he renders redundant Bratman's planning theory.[17] I will raise six main objections to Shapiro's proposal and one core objection to Coleman's application of the Bratmanian model. The corollary of these criticisms is that the tension between Hart's practice theory of rules and Hart's insight that legal rules provide reasons for actions and, in some circumstances, both create and impose duties and obligations, is dissolved neither by Coleman's nor by Shapiro's application of Bratman's theory of shared agency and planning. In other words, the tension between Hart's practice theory of rules and the normativity of law remains intact. Shapiro fails in his insight because his account does not explain how the intentions of authorities can be shareable. He uses Bratman's notion of 'meshing' intentions, but (a) the account is contingent upon the subjects having the relevant intentions, (b) the account fails to explain the way in which 'meshing' intentions can become 'shared' intentions, and therefore he cannot explain how the intentions of authorities and the intentions of the subjects become 'shared agency'. Lastly, both Coleman's and Shapiro's explanations fail because their accounts fail to explain how, without resorting to additional principles of obligations, shared intentions generate duties and obligations. However, Shapiro's and Coleman's insight can be modified if we use the idea of reasons. It is arguable that reasons rather than intentions should be the

[15] The emphasis is mine.

[16] Bratman (1999, p. 110).

[17] Shapiro (1999, p. 441). For a criticism of Shapiro's conception of plans as conventions see Bratman, 'Shapiro on Legal Positivism and Jointly Intentional Activity'. In: *Legal Theory*, 8(2002): 511–517, at p. 516.

central concept in an explanation of normativity and therefore what is required is to provide an explanation of the shareability of reasons as the ground of rules. The present paper, however, deals only with a criticism of both Shapiro's and Coleman's application of Bratman's notion of shared intentions and leaves unexplored the possibility of the shareability of reasons.

II. BRATMAN ON 'SHARED INTENTIONS' AND 'SHARED COOPERATIVE ACTIONS'

Bratman defends the view that we are planning agents and that this fact is key to a philosophical understanding of (1) the idea of intention, (2) basic features of our agency, (3) important forms of shared agency and (4) forms of responsible agency.[18] Planning agency is therefore used to understand intention and more specifically, joint intentions. Plans are prior to social commitments and have a strong individualistic character. They are a characteristic commitment for the future and presuppose the Lockean view of self-understanding as extended over time.[19] Partial plans provide a background framework within which deliberation takes place. Plans conceived as reasonable and stable commitment to the future enable us to explain self-governance; i.e., the fact that the agent has rational control at the time of execution. Bratman also argues that one cannot derive interpersonal commitments and obligation directly from structures of planning agency, we would need rather, further principles of obligation. The explanation is familiar: one cannot derive normative facts; i.e., obligations and commitments from *mere* social facts; i.e., planning agency.[20] In other words, to derive normative facts one needs premises whose content might be either further normative facts together with social facts, or just normative facts.

Bratman distinguishes between two kinds of shared agency: mere shared intentions and shared cooperative activity. Both involve a joint activity in terms of (1) commitment to the joint

[18] Bratman (1999, p. 1).
[19] *Ibid.*, pp. 2, 86–87.
[20] Bratman (1999, p. 8).

activity and (2) mutual responsiveness, but a shared cooperative activity also involves (3) commitment to mutual support. Let us explain each condition.

A. Commitment to the Joint Activity

Bratman recognises that there are cases when participants can respond to each other's goals, but there is neither commitment to the joint activity nor mutual support. For example, two soldiers who are responsive to the personal goal of survival, but are neither committed to a joint activity nor are willing to support each other. In cases such as this there is not a shared cooperative activity (SCA). A commitment to a joint activity involves the idea that the parties have an intention in favor of the joint activity, though they might have the intention for different reasons. We have a joint commitment to sing a duet together, for example, though our reasons differ; i.e., you wish to become an opera singer and see our joint activity as an opportunity to practice your singing, whereas I wish to delight and entertain my friends. Bratman tells us that we should avoid circularity and that the notion of having an intention in favor of a joint activity might be cooperatively loaded. Since our aim, however, is to define shared cooperative agency as an intention in favor of the joint activity, one needs to provide a cooperative-neutral definition.[21]

B. Mutual Responsiveness

To ensure that there is commitment to a joint activity, one additionally needs to have 'meshing subplans'. For instance, our subplans with respect to our singing a duet together might be in conflict, i.e., you want to sing *only* Schuman's songs and I want to sing *only* medieval romantic songs. In this case our subplans do not mesh. They mesh if there is some way that we can carry out the activity that does not violate *either of our*

[21] Bratman (1999, pp. 96–97).

subplans but instead involves the successful execution of those subplans.[22] Let us suppose that your subplan is to invite as many people as possible to our concert and my subplan is to invite only my friends. In this case, in contrast to the first case, our subplans 'mesh'. Bratman suggests then that the intention of the agents is that the group perform the joint action in accordance with subplans. The meshing condition is part of the content of each individual's intention. This is a reasonable condition since otherwise I would try to bypass your subplans and this would indicate a lack of shareability. Furthermore, in order to have a joint commitment to an activity, I am obliged to bring into the content of my intention the efficacy of your intentions and subplans in addition to the efficacy of my intentions and subplans. You are obliged to do the same with my intentions and subplans. For example, if we intend to go to New York together but I belong to the Mafia and you are coerced, I violate this latter requirement.[23] Finally, we need to ensure that the interlocking of intentions and subplans is common knowledge between us. The interlocking of intentions presupposes, therefore, that the intentions of the other are end-providing for herself and that the agent is *reflexive*; he or she must have intentions concerning the efficacy of his or her own intentions.[24]

C. The Commitment to Mutual Support

Let us suppose that we are committed to singing a duet together, I expect that you will get your notes right and have no disposition at all to help you. The activity is a joint committed activity, since your intentions and subplans as well as my intentions and subplans are part of the content of my intention to sing a duet, and my intentions and subplans and your intentions and subplans are part of the content of your intention to sing a duet. Our intentions interlock. However, there is no shared *cooperative* activity, because there is no commitment to support each other. The last condition requires that a joint

[22] Bratman (1999, p. 99).
[23] Bratman (1999, p. 100).
[24] Bratman (1999, p. 102).

committed and mutually responsive activity also be mutually supportive. This means that agents need to be mutually responsive *not only in intention but also in action*. This ensures a distinction between pre-packaged cooperation and shared cooperative activity (SCA). In pre-packaged cooperation mutual responsiveness of intentions exists, but there is no further interaction between the parties because there is no mutual responsiveness *in action*. Let us suppose that we intend to sing together since we are mutually responsive in intention, however, we fail to sing together because we are not mutually responsive in action. You decide, therefore, to go and sing with the City Orchestra and I decide to go and sing with a chamber group. In a different scenario, let us suppose that we intend to sing together in the City Hall, but I am not willing to cooperate with you and do not help you to understand the music. We have failed, therefore, to have a cooperative activity.

III. SHARED AGENCY

Bratman remarks that one should distinguish between shared cooperative activity where the three conditions above are met (joint commitment activity, mutual responsiveness and mutual cooperation) and a mere jointly intentional activity. In the former there is a consistent meshing of subplans and therefore the activity is a fully shared cooperative one whereas in the latter case the meshing stops, like in the case of a chess game.[25] Bratman summarises his position as follows:

> Finally, SCA involves mutual responsiveness – of intention and in action.In the service of appropriately stable, interlocking, reflexive and mutually non-coerced intention in favor of the joint activity. This account of SCA is broadly individualistic in spirit; for it tries to understand what is distinctive about SCA in terms of the attitudes and actions of the individuals involved. And in restricting its analysans to joint-act-types that are cooperatively neutral, it aims at a non-circular account of SCA, one that is reductive in spirit and that emphasizes an important kind of interdependence of intention.[26]

[25] Bratman (1999, p. 107).
[26] Bratman (1999, p. 108).

Shared intentions, in opposition to a shared cooperative activity, presuppose the fulfillment of only two of the three criteria of shared cooperative activity: joint commitment to the activity and mutual responsivenes *in intention* only. The joint intentional activity is a kind of shared intention where the participants are not mutually responsive *in action*.

Bratman points out that shared intentions neither require an attitude in the mind of a superagent nor constitute explicit promises necessary for shared intentions.[27] In other words, a shared intention is not an internalized promise made between agents since both or one of the parties might be insincere. Bratman's core point is that shared intentions are a web of interlocking attitudes: "*my conjecture is that we should, instead, understand shared intention, in the basic case, as a state of affairs consisting primarily of appropriate attitudes of each individual participant and their interrelations*".[28] He goes on to add:

> What are shared intentions? My strategy here was two – pronged. I tried to specify roles distinctive of shared intention: roles such that it would be plausible to identify shared intention with what play those roles. I argued, in particular, that our shared intention to J plays three interrelated roles: It supports coordination of our intentional activities in the pursuit of J, it supports associated coordination of our planning. And it structures relevant bargaining. I then argued that a certain kind of public, interlocking web of intentions of each of us would play those roles. This supported my conjecture that shared intention could be identified with that web of intentions of the individuals.[29]

The formal definition of shared intentions given by Bratman is as follows:

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

[27] Bratman (1999, p. 111).
[28] Bratman (1999, p. 111).
[29] Bratman (1999, p. 143).

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.[30]

The interlocking of such intentions would play the basic roles characteristic of shared intention: coordination, planning and bargaining, in ways that track the goal of our doing j. Bratman's argumentative strategy is first the identification of the characteristic roles of shared intentions (coordination, planning and bargaining). Let us call these characteristic roles 'A'. Bratman proceeds to identify and analyse the structure of interlocking intentions, let us call this 'B', and he argues that whatever explains the performance of 'A' will be a satisfactory explanation of 'shared intentions'. 'B' explains the performance of 'A' and therefore 'B' is a satisfactory explanation of 'shared intentions'. Or, put differently, the interlocking structure of shared intentions enables us to coordinate, plan and make bargains about the intentional conduct.

IV. FURTHER PRINCIPLES OF OBLIGATION TO EXPLAIN THE WAY IN WHICH A SHARED COOPERATIVE ACTIVITY ENTAILS MUTUAL OBLIGATIONS AND DUTIES

According to Bratman, one cannot derive directly from shared intentions mutual obligations and duties, one needs further principles of obligation. He rejects a strong connection between mutual obligation and shared intentions.[31] He points out that *the normal etiology of a shared intention does bring with it relevant obligations and entitlements when the shared activity is itself permissible*.[32] Thus, one can have the case of shared intentions which are not shared cooperative intentions, but nevertheless generate duties and mutual obligations. However, in order to create duties and obligations the shared intention must involve a permissible activity.[33] In this way, both moral and evaluative judgements need to be considered. For example,

[30] *Ibid.*, p. 131; cfr. Shapiro, *op. cit.*, p. 397 see footnote 5 *supra*.
[31] Bratman (1999, p. 132).
[32] Bratman (1999, p. 132).
[33] Bratman (1999, p. 132).

there cannot be a mutual obligation that arises from the shared agency to commit an evil j, for instance to commit genocide.

According to Bratman, shared intentions can create mutual obligations if the agents have a purposive creation of expectations.[34] If there is, in other words, what Scanlon[35] calls an ''explicit and intentional expectation-creation''. Bratman relies on Scanlon's principle of fidelity (Principle F) to explain how shared intentions might involve mutual obligations:

> Principle F: If (1) A voluntarily and intentionally leads B to expect that A will do x (unless B consents to A's not doing x); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reasons to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then in the absence of some special justification, A must do x unless B consents to x's not being done.[36]

Bratman points out that the core of this argument is the 'value of assurance'; i.e., the value of a certain matter being settled. He argues that the principle of fidelity and the underlying value of assurance are present in a wide range of shared intentions. Thus, according to Bratman shared intentions *might* entail mutual obligations, but the idea of mutual obligation is not essential to shared intentions itself.[37] Bratman distinguishes between three different cases where there are shared intentions, though not mutual obligations: (1) cases where one of the parties is coerced. For example, I coerce you into satisfying your side of conditions (1)–(3) of the SI thesis. Thus, Bratman does not think that coercion affects the fact that the parties have a shared intention; it might be that they do not have a *shared cooperative activity*, but they do have a shared intention. Bratman points out:

> Nevertheless, the complex state we are in by way of coercion will tend to play the roles cited as characteristic of shared intention. That being so, I think we should say with the SI thesis, that case 1 (cases of coercion) is a

[34] Bratman (1999, p. 135).

[35] Scanlon 'Promises and Practices', *Philosophy and Public Affairs* 19 (1990): 199–226.

[36] Bratman (1999, p. 136).

[37] Bratman (1999, p. 132).

case of shared intention. Such a shared intention may well issue in shared intentional acitivity that is not shared cooperative activity.[38]

We might also have cases (2) where there is an explicit disavowal of an obligation. For example, you and I are committed to singing a duet together, but each of us qualifies the commitment by saying: "It is very likely that I will continue as I intend. But I reserve the right to change my mind at will and I recognise that you do too. Neither of us is obligated to the other to continue as we so intend".[39]

Shapiro introduces the notion of coercion to explain the way in which law imposes authority on those officials who do not have the relevant intentions.[40] However, Shapiro pays a high price by introducing coercion in as much at it jeopardizes any attempt to explain the normativity of law; i.e., the idea that rules provide reasons for actions. Hart's objections to the command theory of law advanced by Austin can be also raised, at least in part, against Shapiro. Shapiro might reply with the following argument: in paradigmatic cases there will be relevant intentions, but there might nevertheless be some cases in which coercion plays a fundamental role. But problems arise for Shapiro at the level of obligations. Bratman has pointed out that in order for there to be shared intentions that entail obligations an activity needs to be permissible and, more specifically in most cases, morally permissible. Shapiro denies this and consequently needs to show the way in which JIAA can entail obligations if the activity is not permissible. This point is discussed in detail in section X.C of this paper.

In the third type of cases (3), the parties fail to fulfill the principles of fidelity (F). It might be the case that the agents are not in direct contact, but that they know each other from past experience and believe they know each other's values and beliefs. A social setting, such as a baseball game, is an example of a situation where participants can become acquainted with each others's intentions. However, Bratman tells us that in such cases there cannot be mutual obligations since in these cases

[38] Bratman (1999, p. 13).
[39] Bratman (1999, p. 133).
[40] Shapiro (2002).

though each participant has the requisite knowledge of each others's intentions and plans, they are not *purposively assured* by the other.[41] The condition seems reasonable, otherwise there will be mutual obligations and expectations when others know our intentions and we know their intentions and we share such intentions. This will be too strong and is counterintuitive. For example, John and I practice piano together on Wednesdays and Fridays. But I am not obliged by our shared activity of practicing the piano two afternoons per week and can decide to stop our joint activity since I have not given any assurance to John regarding the future of our joint activity.

It is clear that case (3) *might* entail obligations, though not due to the fulfillment of the principles of fidelity. Bratman refers to other principles of duty or obligations, such as the principles of 'due care' or 'loss prevention', that might enable us to say that there are shared intentions with mutual obligations. Bratman has identified only one principle of obligation: the principle of fidelity, but he argues that there can be other principles that will warrant the entitlement of obligations and duties. The thrust of his argument is that for shared intentions to entail obligations and duties one needs to resort to principles of duty and obligations and the mere 'state of affairs' of complex interlocking intentions *cannot* generate obligations and duties.[42]

V. SHAPIRO ON JOINT INTENTIONAL ACTIVITY WITH AUTHORITY (JIAA) AND SHARED COOPERATIVE ACTIVITY WITH AUTHORITY (SCAA)

Shapiro faces the challenge of extending Bratman's model of shared agency to collectively authority structures such as legal systems and to an explanation of the normativity of law; i.e., that legal rules provide reasons for actions and, in some circumstances, both create duties and obligations. Shapiro argues that legal practice involves a shared intention and that participants in every legal system *claim* to conform to the model of

[41] Bratman (1999, p. 139).
[42] Cfr. Coleman (2001).

shared cooperative activity[43] although on *many occasions* they might fail to conform to such cooperative activity. Shapiro's defence of Joint Intentional Activity with Authority (JIAA) and Shared Cooperative Activity with Authority (SCAA) is an adaptation of Bratman's theory of agency to legal systems. Although Shapiro goes beyond Bratman's theory of action[44] he believes that the introduced modifications are still compatible with Bratman's notions of shared cooperative activity and shared intention. Shapiro points out:

> As I will argue, the conditions that Bratman imposes on joint intentional activity and shared cooperative activity are either consistent with the existence of joint intentional activities involving authority or shared cooperative activities involving authority (hereinafter "JIAA" and "SCAA"), respectively, or must be slightly modified in order to achieve the requisite fit. In addition to showing the adaptability of Bratman's general model, I will set out further conditions that will distinguish an ordinary JIA and SCA from one where authority relations are also present. This will pave the way for my proposal that the law is an instance of JIAA and holds itself out as an SCAA.[45]

First, Shapiro introduces a modification to conditions (2) and (3) of the shared intention thesis. He argues that legal practice is a joint intentional activity with authority (*JIAA*). The modifications of condition (2) and (3) are the following:

A. There is No Need for There to be a 'Common Knowledge' Between Participants About the Others' Subplans and Therefore Condition (3) of the Shared Intention Thesis (Si) is Modified

Shapiro argues that the commitment is both to find and implement the plans, but that the parties do not need to know the subplans:

> Participants can form intentions to perform the group activity in accordance with meshing subplans even though they have not identified the relevant subplans that are supposed to mesh. Their intentions simply amount to a commitment to finding and implementing such subplans. Moreover, as the

[43] Shapiro (2001, pp. 417–418).
[44] It is recognised as such by Bratman himself, see Bratman (2002).
[45] Shapiro (2002, p. 405).

last example demonstrated, participants can act cooperatively even if their subplans do not happen to mesh.[46]

In other words, the participants only need an *intention* to mesh subplans, whatever these subplans might be. Furthermore participants need an intention to mesh unknown subplans and they need to be committed to finding these unknown subplans. Let us suppose that you and I intend to sing a duet together, I do not know that you wish to sing *only* Schubert's songs and you do not know that I intend to sing *only* medieval romantic songs since I am planning a concert next year on Medieval Romantic songs and wish to practice some. You are committed, according to Shapiro, to finding out what my plans are and *vice versa* and I must have the intention to mesh my subplans with yours and *vice versa*. But according to Bratman, subplans do not mesh if we violate the other parties' subplans. Subplans mesh only if there is some way we can do the activity that does not violate *either of our subplans but which instead involves the successful execution of those subplans*. Shapiro recognises that subplans mesh if and only if: *there exists a way to engage in the joint activity that satisfies each of the individual subplans*.[47] In this case, one might say that we agree on singing *both* medieval romantic songs and Schubert's songs. Our subplans then 'mesh'. We will call this condition 'meshing subplans' (MSp) and when the parties are committed to find out the subplans and their subplans mesh ''finding meshing subplans''(FMSp).

B. Condition (2) of the Shared Intention Thesis (SI) is also Modified

We have pointed out that according to Bratman there is a meshing of subplans (MSp) as long as the activity does not violate the other's subplans. Shapiro differentiates between the authorities's subplans and the subjects's subplans. The latter can be meshed following Bratman's model; however, authorities do not need to 'mesh' subplans all the way down. Furthermore, they can limit their meshing of subplans and they are

[46] Shapiro (2002, p. 397).
[47] Shapiro (2002, p. 397).

not required to revise their subplans. For example, a group decides to sail to Nova Scotia and to give to one person the authority to coordinate their voyage, since on previous occasions they experienced difficulties in organizing their collective goal. Shapiro argues that the meshing of subplans in cases of authority might be like the one in his example:

> That the captain is committed to meshing subplans does not mean, however, that she is committed to revising *her* plans in case of conflict. To be sure, the captain *may* adjust her plans to mesh with those of the crew; she *may*[48] also negotiate and bargain with them in order to persuade them to revise their subplans, rather than *vice versa*. What is special about the captain's position, though, is that she possesses the tool for achieving a mesh that her crew does not have: she may order her crew to act as she intends. If the captain exercises her authority, her crew will be committed to revising their subplans so that they mesh with the captain's. Once orders are given, it will then be inappropriate for the crew to negotiate and bargain with the captain—to do so would be a slight to the captain's authority.[49]

We have, therefore, an asymmetry between subjects and authorities. The meshing of subplans operates in the former but not in the latter. We might argue that there is not 'shared intention' in the Bratmanian sense since for the authority the subject's subplans are not part of his or her intentions as her own intentions and subplans alone are the content of her intentions. Let us recall that to meet the condition of 'mutual responsiveness' in intention the parties need to make other parties's intentions and subplans part of their intentions. However, in Shapiro's model, authorities do not need to do this. Furthermore, an authority can revise the subject's subplans so that they mesh with the order and the subjects ought also to revise their subplans for meshing purposes. In this way, the authority can 'violate' or, we might say, cancel the subplans of the subjects. Paradoxically, Shapiro asserts that ''authorities are as responsive to the intentions and actions of their subjects as subjects are responsive to the intentions and actions of the authorities''.[50] According to Shapiro, when someone in authority issues an order, the authority intends the order to be

[48] The emphasis is mine.
[49] Shapiro (2002, p. 406).
[50] Shapiro (2002, p. 411).

a reason for the subject to adopt the content of the order as her or his subplan and to revise his or her subplans so that they mesh with the order. Similarly, the subject intends the authority's orders to be reasons to adopt the content of the orders as subplans as well as reasons to revise his or her subplans so that they mesh with the order.[51]

Shapiro on occasion, however, seems to dissolve any Bratmanian sense of 'shared intention':

> When an authority exists within a group, subjects may look towards the authority in order to coordinate their behaviour rather than taking their cues from each other. Moreover, when orders are issued, the directives may remove discretion from subject on how to proceed. Depending on the score of authoritative regulation, aspects of a joint intentional activity with authority (JIAA) or shared cooperative activity with authority (SCAA) may start to resemble pre-packaged cooperation, insofar as the subjects will be forced to respond to the rules laid down rather than to each other's intentions and actions.[52]

Shapiro's formulation of joint intentional activity with authority is as follows:

Our j-ing is as Joint Intentional Activity with Authority (*JIAA*) if and only if:

(1) J is a JIA.[53]
(2) If one of us has authority over the other in J, then:

(a) The authority intends his or her orders to be reasons for the subject to adopt the content of the order as a subplan as well as reasons to revise the subject's subplans so that they mesh with the others.
(b) The subject intends the authority's order to be reasons to adopt the content of the orders as subplans as well as reasons to revise his or her subplans so that they mesh with the others.
(c) (a) and (b) are common knowledge.

(3) Either I have authority over you in J or you have authority over me in J.

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[51] Shapiro (2002, pp. 406–407).
[52] Shapiro (2002, p. 411).
[53] A joint intentional activity (JIA) is equivalent to the 'Shared Intentional Thesis' (SIA).

VI. SHARED COOPERATIVE ACTIVITY WITH AUTHORITY

A. The Commitment to 'Mutual Compensation'

Shapiro introduces the following modification to condition (3) of the shared intention thesis (SI). Shapiro argues that legal practice is not only a joint intentional activity with authority but that it also *claims* to be a shared cooperative activity, though it might fail in this endeavour. In the example above, the captain might not be committed to helping the other members of the crew. He needs someone to rig the sails and if one of the crew cannot do it, he will find another one. He will not be committed to helping them to do their task. Shapiro aims to show that the commitment to mutual support in Bratman's shared cooperative activity (SCA) can be replaced by the 'commitment to mutual compensation'. Shapiro puts the following example to show that the conditions can be replaced and that doing so does not threaten the cooperative nature of the activity. Let us suppose that the captain is resentful about the excellence of the group and he neither tries to correct the mistakes of the crew nor to reassign the tasks to other member of the crew.[54] He prefers to see the crew failing. Shapiro argues that it is clear that the activity of sailing the boat is not cooperative because the captain is not committed to ensuring that the tasks assigned are performed correctly. Shapiro suggests the principle of mutual compensation which will enable shared intentions with authority to be cooperative.

1. *Commitment to mutual compensation (CMC)*

Each agent, unless otherwise directed, is committed to compensating for the lack of information or ability of the other in playing her role in the joint activity. This compensation may take the form of helping others complete their tasks, or in the case of an authority, reassigning tasks to others who are able to perform their tasks adequately.[55]

Let us suppose that a judge lacks the ability both to understand a case and apply the relevant rules and principles to reach a decision. Are other judges committed to compensating

[54] Shapiro (2002, p. 409).
[55] Shapiro (2002, p. 409).

for the lack of ability of such a judge in cases where they have not been appointed? They are committed, in Shapiro's model, to helping in different ways, unless an authority prohibits such help.[56] In this case the authority prohibits other judges from making decisions on cases unless the case has been specifically appointed to them. Let us consider a second case; a traffic warden who lacks the ability to identify vehicles that have been parked in a prohibited area. Another traffic warden passes by and notices that the first warden has not issued a fine to the offending vehicles. The second warden is not in charge of the area and ignores the mistake. Can one argue that this counter-example undermines Shapiro's condition of commitment to mutual compensation (CMC)? This possible objection misunderstands Shapiro's point. The core of his argument is that participants in a legal practice *claim* that they are committed to compensating for the lack of information or ability of the part of the others in a joint activity. However, can one say that legal participants only *claim* a commitment to mutual compensation? I think that the answer is positive and that authorities claim that they are committed to such a principle. Shapiro points out: "*Although it is often true that legal participants are uncoerced and committed to mutual compensatory behaviour, it is not necessarily true that they have such intentions. I will end the section by arguing that legal participants necessarily hold themselves out as though they were engaged in SCAA even if these amounts to mere pretense in some cases*".[57]

VII. COERCION

Shapiro correctly points out that for Bratman a shared cooperative activity cannot involve coercion, since it would undermine the principle of mutual responsiveness in action.[58] According to Shapiro, however, coercion can be reconciled with a cooperative activity. He believes that coercion is a back strategy to enforce the intentions and actions of those who have failed to fulfill their precious uncoerced commitments. Shapiro puts the example of a

[56] Shapiro (2002, p. 409).
[57] Shapiro (2002, p. 426).
[58] Shapiro (2002, p. 410).

university faculty meeting that decides to fine those professors who do not meet the deadlines for submitting grades. According to Shapiro, "*it would be unfair to the faculty to see the grant of penal authority to the dean, or his subsequent exercise of it, as being an essentially uncooperative act. If anything, these acts were intended to foster a spirit of cooperation. Everyone recognised that he or she had an obligation as a faculty member to hand in his or her grades on time*".[59]

Some confusion arises in Shapiro's paper. The source of the obligation that a faculty member has is due to his role as a member of such an institution. The coercive act of the faculty is justified by the obligation that faculty members have by virtue of their roles. The coercive act is not justified if it aims to repair or punish an uncooperatively shared intentional activity. Let us suppose that I intend to sing a duet with you and your subplan is that we will practice this afternoon. I fail to attend our appointment and you decide to threaten me by telling me that the next time I fail to turn up to an appointment, you will either beat me up or fine me £5 pounds. To the extent that there is no assurance on my behalf that I will commit myself to our joint activity,[60] one cannot say that there is mutual obligation. The condition of coercion undermines the possibility of obligations emerging from our shared intentions.

VIII. EXTENDING JIAA AND SCAA TO COLLECTIVE ACTION

The last modification proposed by Shapiro is the extension of JIAA and SCAA to collective actions. He introduces three fundamental changes. First, the idea that there cannot be common knowledge of the participants intentions.[61] In section V.A, the paper highlighted the fact that Shapiro requires the participants of a legal practice to be committed to finding the intentions and subplans of the authority and other subjects

[59] Shapiro (2002, pp. 410–411).

[60] See the discussion on mutual obligation and shared agency in section X.C of this paper.

[61] Cfr. Condition (C) of the JIAA thesis.

(FMSp). Shapiro adds that the intentions should be 'publicly accessible'. He points out:

> Accordingly, it will be best simply to require that the contents of each other's intentions be ''publicly accessible'', that is, that the contents of each others' intentions should be accessible in some way to each of the participants. This condition weeds out cases where the participants refuse to disclose to each other their intentions or are intentionally deceitful as to their content.[62]

Second, Shapiro introduces the idea that 'most' participants should be committed, and the 'most', according to Shapiro, should remain vague.[63] Third, Shapiro, following Kutz[64], distinguishes between 'participatory' intentions and full intentions. In the former the participant is not committed to the successful achievement of the goal, he only aims to participate, in the latter the participant is both committed to participate and to the successful achievement of the collective goal. Shapiro points out that the goal in every legal practice is to maintain a system of rules. However, if one follows Shapiro's distinction, one is puzzled by the fact that some participants might not be committed to the successful achievement of the goal of maintaining a system of rules, but only wish to 'participate'. One might say that in this case, the 'participatory' intention can neither be shared nor cooperative. We have shared intentions because we intend to do j; i.e., maintain a system of rules. It is puzzling the way we can say that we have a shared intention if I do not wish successfully to achieve successfully j or achieve j at all. We will follow this objection in section X.D.

IX. LEGAL PRACTICE AS A JOINT INTENTIONAL ACTIVITY WITH AUTHORITY (JIAA)[65] AND AS MAKING A *CLAIM* TO BEING A SHARED COOPERATIVE ACTIVITY WITH AUTHORITY (SCAA)

The next step in Shapiro's paper is to show that legal practice is a joint intentional activity with authority (JIAA) and *claims* to

[62] Shapiro (2002, p. 412).

[63] Shapiro (2002, p. 412).

[64] Kutz, *Complicity* (Cambridge: Cambridge University Press, 2000).

[65] I will assume, following Bratman, that the term 'joint intentional activity' is synonymous with the term 'shared intentions'.

be a shared cooperative activity with authority (SCAA). First, he argues that the class of participants is restricted to legal officials.[66] Second, he argues that the joint activity, and therefore the intention, of the legal participants, is either the creation, if there is no legal system, or maintenance of a unified system of rules.[67] According to Shapiro, this is a formal goal[68] since it does not assume any moral or political viewpoint. In other words, the joint intention of the legal participants is not to maintain a 'just' system of rules, but merely a system of rules. However, Shapiro points out, *legal participants engage in the practice with the hope of achieving certain substantive moral or political goals*.[69] This is consistent with Bratman's view, since we can intend j for different reasons. Therefore, one might say, in the legal practice participants intend to maintain a system of rules (j-ing) because of a plurality of moral and political reasons. Third, Shapiro argues that the intentions among legal participants are inlerlocked both vertically and horizontally. According to Shapiro, the legal participants are committed to resolving their disagreements and they are committed to meshing their subplans.[70] For example, if judge B disagrees on the rule that judge A has applied because he believes it is unconstitutional, then notwithstanding B's decision to disagree, the application of the controversial rule is ruled as correct by the appellate court, B needs to be prepared to 'mesh' his subplans and apply the rule, despite his belief in the unconstitutionality of the rule. However, we have pointed out that subplans mesh to the extent that the meshing does not violate the subplans of one or other of the parties. However, in this example given by Shapiro,[71] it is clear that judge B's subplan of applying a different rule has been violated. According to Shapiro condition 2 (b) of JIAA establishes that the subjects intend that the authorities' orders are reasons for them to adopt the content of the order as a subplan as well as reasons to revise

[66] Shapiro (2002, p. 418).
[67] Shapiro (2002, p. 419).
[68] Shapiro (2002, p. 421).
[69] Shapiro (2002).
[70] Shapiro (2002, p. 427).
[71] Shapiro (2002, p. 428).

their subplans so that they mesh with the orders. In the example above, the judge has the intention to adopt the content of the order as a subplan; i.e., the application of the rule confirmed by the appellate court, and to revise his or her subplan; i.e., the inapplicability of the rule because of its unconstitutionality. It is arguable that the need for constant revision of the subjects's subplans involves a violation of such subplans.

Shapiro argues that legal practice just *claims* to be a shared cooperative activity, but sometimes fails to uphold such a high standard. He observes that in many legal systems the non-coercion and mutual compensation conditions are frequently met: a judge who refuses to apply the law is generally impeached, not imprisoned.[72]

Shapiro argues that in some legal systems the non-coercion condition would fail since coercion is used to enforce coerced commitments. Equally, it is possible the mutual compensation condition could fail since subordinates might wish that their fellow officials fail. Shapiro puts the following example:

> Officials of the former Soviet system might have resembled the unhelpful subordinates. Many Soviet officials believed that the communist system was evil and would have preferred that a different system were in place. Yet the communist system was a fact of life, and participation within it was the only mode of social advancement available. Hence they joined the legal system and hope to benefit from it by performing their tasks competently. However, they also wished that others would not act competently and that the system would eventually collapse. It is possible that these officials were committed to the joint activity but not to mutual compensation. If an official were at risk of failing in his assigned task, his fellow compatriots might have stood and watched.[73]

Shapiro advances the view that legal participants might act as if a practice were a shared cooperative activity with authority. For example, they might use normative terms such as 'obligation', 'permission' and 'right' as if they endorse the normative meanings and implications of such terms, but they do not actually care about the goals of the system of which they are part.[74]

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[72] Shapiro (2002, p. 430).
[73] Shapiro (2002, p. 431).
[74] Shapiro (2002, p. 432).

The final argument in Shapiro's paper is the idea that if law is a JIIA, then legal positivism is a successful explanation of law. Shapiro points out that a main tenet of legal positivism is that conventions determine legal authority.[75] In other words, the choice of an authority structure is always a recurring coordination problem. Shapiro suggests the following modification of the legal positivist tenet: the choice of authority is a recurring *cooperation* problem and conventions should be conceived as Bratmanian plans. Shapiro summarises this view as follows:

> It would begin by showing that the choice of an authority structure is a recurring cooperation problem. After noting that legal participants solve their recurring cooperation problems, the positivists then argue that the only way to explain how participants are able to explain such games successfully is by using plans that map out the authority structure of their system. The defense would continue by showing that such plans are conventions and that they come into existence by being practiced, not in virtue of the principles of morality.[76]

Shapiro argues that in most legal systems where the great proportion of participants are committed to either the same substantive goals or the general formal goal of maintaining or creating a system of rules, the choice of an authority structure is a recurring cooperation problem. He says: ''*Legal participants have a common interest in deferring to the same authority structure*.''[77] Shapiro points out that like participants in a Bratmanian joint intentional activity, legal officials formulate, adopt and consult plans.[78] ''Rules of recognition'', ''rules of change'' and ''rules of adjudication'' are, according to Shapiro, plans. Furthermore, Shapiro argues that *it is very unlikely that anything other than general plans can solve recurring cooperation problems in such a context, so it follows that legal officials use general plans to identify the authority structure in every legal system*.[79] Hence Shapiro provides a defence of the view that plans are conventions. Yet a convention needs to meet two

[75] Shapiro (2002, p. 432).
[76] Shapiro (2002, p. 432).
[77] Shapiro (2002, p. 433).
[78] Shapiro (2002, p. 434).
[79] *Ibid*., p. 435.

criteria: shareability and acceptability. The latter depends on the general compliance of the parties. Shapiro aims to show that the acceptability of a plan as a convention depends on general compliance or conformity.

According to Shapiro, if officials accept the rules of the American Constitution in order to fulfill their commitment to the formal goal of maintaining a system of rules, then it follows, Shapiro tells us, that officials will not accept plans to heed an authority structure when most others do not heed the authority structure. This is unsound. Let us scrutinize the argument. Shapiro's argument relies on the following premise: if most participants do not heed an authority structure then no participant can satisfy her or his commitment to the joint activity by heeding the authority structure. Shapiro puts this as follows:

> Demonstrating the practical relevance of general conformity proceeds as follows: in every legal system, most participants are committed to the joint legal activity. This entails that most participants are committed to heeding the same authority structure. If most participants do not heed a particular structure (call it A), then no participant can satisfy his or her commitment to the joint legal activity by heeding A. Since participants accept the fundamental plans of a legal system in order to fulfill their commitment to the joint legal activity, it follows that participants will not accept plans to heed A when most others do not heed A. Hence general conformity to a particular authority structure must always be part of the reason why legal participants accept the fundamental plan of their legal system.[80]

Let us consider the following example. A group intends to sing together in an event. The group decides to appoint a manager who will coordinate the event. The manager makes plans that include singing in the City Hall and rehearsing twice a week. You and several others decide not to stick to the manager's plans. Nevertheless a small group does still intend to sing and follow the manager's subplans. Let us suppose that the majority subsequently decides to follow what you and your group are doing; i.e., not to follow the manager's plans. This only shows the truth of Shapiro's premise that if most participants do not heed an authority structure then no participant

[80] Shapiro (2002, p. 436).

can satisfy her or his commitment to the joint activity *by heeding the authority structure*, *but it does not show that participants will not accept plans to heed an authority structure when most others do not heed the authority structure*. True, if most of the members of the choir do not heed the manager's orders, then no participant can satisfy her or his commitment to sing and heed the manager's orders. However, it is not true that the acceptability of the plans depends on others conforming to the plans. The plans of the manager are reasonable and show sensitivity to the group's final goal and therefore for some members of the choir the plans are acceptable, not because the majority conform to them, but because they are *good or reasonable* plans. Similarly, officials might have the common intention to maintain a system of rules and decide to heed an authority structure. It might be that officials accept the plans of the authority, not because the majority conform to them, but because they give reasons for actions. Shapiro has not shown that plans are accepted because there is general conformity to them.

Finally Shapiro argues that plans generate duties and obligations. In this way Shapiro aims to explain the normativity of law; i.e., the idea that legal rules gives reasons for actions and, under some circumstances, impose duties and obligations. Shapiro asserts:

> Plans create and define roles within practices and generate the rights and duties that attach to such roles. Plans have this normative power in virtue of their capacity to organize the behaviour of participants. As I have argued, they are capable of guiding, reassuring, and coordinating participants so that each may contribute to the joint outcome in light of the cooperative relationship.[81]

On this point Shapiro is vulnerable to one criticism. Shapiro needs to explain how plans create and define roles within practices and generate duties and obligations for law-abiding citizens who are not officials. Let us recall, Shapiro argues that the participants of a joint intentional activity with authority are officials. Officials accept the authority's plans, but citizens do not need to 'mesh' their subplans with the authority's plans.

[81] Shapiro (2002, p. 438).

Therefore law-abiding citizens are not legal participants of a joint intentional activity with authority and therefore cannot be subject to duties and obligations.

X. CRITICISM OF SHAPIRO'S SCAA AND JIAA

In the previous sections we have explained Shapiro's modification of Bratman's theory of planning and self-governance, and we raised concerns relating to these modifications. In this section we will discuss systematically a number of objections to Shapiro's model and its explanatory pretence regarding both the normativity and the authority of law.

A. The Argument that an Authority Structure Cannot have Plans in the Bratmanian Sense Because Plans Presuppose Stability Over Time. The Temporal Stability of Plans, According to Bratman, is Provided by the Lockean Conception of Temporal Identity. However, It is Not Clear How Authority Structures can have Such Temporal Identity

Shapiro provides an account of plans as conventions. Bratman[82] raises a criticism against this conception. He argues that if plans are conventions, then one cannot justify the rejection of conventions in Lewisian terms as Shapiro does at the beginning of his paper. It is not clear, in other words, why plans as conventions are better than conventions in Lewisian terms from the explanatory viewpoint. It is arguable that the same limitations and constraints apply for both plans as conventions and conventions in Lewisian terms. Let us recall that the reason for the rejection of conventions in Lewisian terms is that conventions as solutions to coordination problems do not extend over time and therefore parties' preferences can change arbitrarily.

Bratman's criticism of Shapiro's notion of plans as conventions stops here. However, it is arguable that what makes Bratman's plans stable over time is not and cannot be available to Shapiro's notion of authority structures: the individual

[82] Bratman (2002).

Lockean identity extended over time. According to Bratman, planning agency supports the organisation of our practical thought and action by virtue of a conception of ourselves that extends over time.[83] As an individual my early actions and practical thoughts are connected to my later actions and thoughts due to a psychological connection and my understanding of these actions as resulting a unified conception of myself across time. I, the person that last month wished to sing a duet with a friend, is the same person that today wishes to sing a duet with a friend. This identity over time enables us to make plans as agents. However, at a collective level one has to imagine a super-agent or super-self that encompasses individual selves who have a collective identity over time. This involves strong metaphysical claims that require defence. In other words, in Bratman's model of shared agency what makes plans stable over time is the Lockean concept of identity. But it is unclear what the Lockean identity for authority structures amounts to. Shapiro is sensitive to Bratman's criticism and asserts:

> The 'conventionality' of general plans does little explanatory work. As I argued in section VIII, general conformity to a set of plans is merely a conceptual precondition for adoption. If participants have intentions to participate in a practice, that practice must first exist, and practices exist only when most members of a group follow the plans that structure such practices. General conformity to a set of plans, therefore, plays only a small, supporting role in the explanation of official action.[84]

This assertion is puzzling as it leaves the promise of establishing a connection between legal positivism and plans as conventions unfulfilled. Let us recall, Shapiro has argued that the only way to explain how participants are able to explain cooperative games successfully is by using plans that map out the authority structure of their system. The defence of this argument is completed by showing that such plans are conventions. Since Shapiro's version of legal positivism presupposes that choice of authority is determined by conventions, then a sophisticated account of conventions as plans vindicates

[83] Bratman (1999, p. 41).
[84] Shapiro (2002, p. 441).

Shapiro's version of legal positivism as the best possible explanation of what law is. But in Bratman's theory of agency, plans are individual and prior to any social commitment and practices. Shapiro, therefore, would need to construct plans within the social world and its practices. The idea of plans as conventions attempts to do precisely this. But Shapiro argues, as reflected in the intriguing and problematic paragraph above, the intention to participate in activity j presupposes both the practice of such an activity and plans as conventions. However, Shapiro asserts that such conventions do not play a *significant explanatory role*.

Shapiro fails to explain the way in which official participants will not accept plans to heed A when most others do not heed A. In other words, plans do not depend on general conformity because they are not *conventions*. Consequently, Shapiro fails to explain the idea that a JIAA is a legal positivist explanation, *if* conventions play a central role in legal positivism.

A closer examination of Bratman's objection takes us to a second objection: the issue that not only plans as conventions are unhelpful, but that plans cannot be *essentially* conventions. The grounds for Shapiro's initial position that plans *might* be conventions is a misleading understanding of Bratman's view. The following objection will explore this point.

B. Bratman's Argument is not that We can Coordinate Our Activities Because We have Plans, But Vice Versa. Thus, Shared Intentions Play a Fundamental Role: They Enable Us to have Plans. In Other Words, Shared Intentions Track Plans, Rather than the Other Way Round. Plans, Therefore, are Commitments to the Future and Cannot be (Essentially) Conventions

Shapiro explains coordinated activities in terms of plans. For example, we plan to use a certain ship to sail to New York under the command of a specific captain and this plan enables us to have a coordinated joint intentional activity. Shapiro[85]

[85] Cfr. Coleman (2001, p. 97). Unlike Shapiro, Coleman's formulation of the relationship between planning and shared activity is faithful to Bratman's formulation: shared intentions help us to coordinate our intentional actions and shared intentions are the background that enable bargaining.

points out "*they commit themselves to pursuing the goals of the system simply because, in the present circumstances, others are following them as well*."[86]

By contrast, Bratman's argument is that we first have a joint intentional activity to go to New York and because we have a commitment to a joint intentional activity, we can have plans such as sailing in a certain ship under the command of a specific captain. Plans, therefore, cannot be conventions, because plans are a commitment to the future whereas conventions are a commitment to the past. Bratman points out:

> Our shared intentions, then, perform at least three interrelated jobs: it helps coordinate our intentional actions; it helps coordinate our planning; and it can structure relevant bargaining. And it does all this in ways that track the goal of our painting the house together. Thus does our shared intention help to organize and to unify our intentional agency in ways to some extent analogous to the ways in which the intentions of an individual organize and unify her individual agency over time. An account of what shared intention is should explain how it does all this.[87]

Intentions shape plans[88] and therefore if intentions are oriented towards the future, then intentions shape plans with a commitment to the future. This does not mean, however, that necessarily plans *cannot* be conventions, but they are not *essentially* conventions. Bratman recognises that human agents are not only purposive agents but also planning agents. *Planning agency brings with it further basic capacities and forms of thought and action that are essential to our temporally extended and social lives. Indeed, our concept of intention, as it applies to adult human agents helps us track significant contours of these planning capacities*.[89] Bratman's conception of planning agency is *deep* and a conventionalist account of plans cannot satisfactorily explain all the relevant features of planning. True, plans *might* be conventions. For example, let us suppose that we have an intention to go to St. Malo from Dover and we have a plan to go by boat and make a stop at Calais, which is the conventional way of sailing to St. Malo. The plan is a

[86] Shapiro (2002, p. 426).
[87] Bratman (2002, p. 112).
[88] Bratman (2002, p. 113).
[89] Bratman (2004b).

convention, but we plan to stop in Calais not because it is *essentially* a convention and therefore others conform to it, but because we intend to go to St. Malo.

Furthermore, if plans were conventions, the argument of 'meshing' plans and subplans become superfluous. Thus, conventions are both widely recognised and shared by the participants of a practice and therefore we do not need to 'mesh' conventions.

C. Shapiro's Dilemma

If Shapiro's explanation is a satisfactory account of legitimate authority, given that he can show that his explanation of legitimate authority is a better explanation of other explanations of authority such as that of Raz,[90] then it fails to explain the normativity of law. If Shapiro modifies his conception in Bratmanian terms and argues that law is a JIAA and incorporates the 'permissibility' condition, then he fails to explain the authority of law, because the authority of morality rather than the authority of law would prevail. Shapiro can explain either the normativity of law or the authority of law, but cannot provide a satisfactory explanation of both.

Shapiro aims to explain legitimate authority in terms of 'the intention to submit to the authority's intentions'. Shapiro also introduces the notion of coercion which, according to Bratman, does not undermine the idea that there are shared intentions although it does undermine the idea that there is a shared cooperative activity. However, as Bratman has made explicit, cases of shared intentions with coercion cannot entail mutual obligations. In other words, Shapiro would succeed in explaining the authority of law, but cannot explain how law and legal rules provide reasons for actions and, in some circumstances, impose duties and obligations. However, Shapiro, in contrast to Bratman, aims to show that shared intentions can generate duties and obligations. Furthermore Shapiro believes,

[90] Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) and Raz (1999).

unlike Bratman,[91] that one does not need to introduce further principles of obligation such as the principle of fidelity[92] or the idea that parties can only have a shared intention that involves mutual obligations if and only if the activity is permissible. The burden of proof is on Shapiro to explain the way in which the notion of Joint Intentional Activity with Authority (JIIA) can explain both the authority of law and the normativity of law.

One possible position available to Shapiro is that the main goal of his study is not to explain the normativity of law, but rather the authority of law. Shapiro's view can be summarized as follows: one person A has authority over another person Y when Y intends to surrender or revise his or her subplans according to A's subplans and plans. Raz has argued that one of the paradoxes of authority is that authority cannot be legitimate since it clashes with the idea of personal autonomy.[93] The idea of authority necessarily means that a person has to surrender his own judgement to the authority and consequently is unable to decide according to his own judgement. Raz endeavours to provide a notion of authority that overcomes the conflict between authority and autonomy and that solves this paradox.[94] He advances the view that authorities give subjects exclusionary reasons for actions, whereby they can better comply with the reasons for actions that apply to them. However, in Shapiro's explanation of authority the paradox is unsuccessfully overcome and it remains for Shapiro[95] to show in what sense his account of authority solves the paradox and is a better explanation of authority than Raz's theory of authority.

Let us suppose, however, that Shapiro aims to explain the normativity of law incorporating the Bratmanian 'permissibil-

[91] Bratman (1999, p. 132).

[92] Bratman (1999, p. 136).

[93] Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

[94] Raz (1986).

[95] Bratman himself has been the target of attack on this front. Velleman has argued that any explanation of agency in terms of intentions requires an understanding in our freedom and autonomy. See Velleman.R, 'Review of Intentions, Plans and Practical Reason'. In: *Philosophical Review* (1991): 283; cfr. Bratman (2004b).

ity' condition, which ensures that if JIIA involves obligations, it needs to incorporate the condition that only permissible joint activities will create and impose duties and obligations. Permissible activities include morally permissible activities and this condition requires legal officials to examine the moral permissibility of their joint activity. This means that officials need to look at principles of morality to determine whether the joint intentions entail duties and obligations. The result might go against the spirit of legal positivism. The authority of law might be explained in terms of the authority of morality. Consequently, Shapiro would fail to explain the authority of law independently of the authority of morality.

D. The Objection that Shared or Joint Intentions to Do J Play No Role in the Explanation of Joint Intentional Activity with Authority (JIAA)

Let us suppose that we have the intention to go to Nova Scotia by boat and we have realized that we cannot achieve this goal unless we follow the orders of the captain of the boat and mesh our subplans with his. My intention is, therefore, to submit my subplans to the authority's; i.e., the captain's intentions. In what sense can this be said to be a 'shared agency'? Shared agency, in Bratmanian terms, requires mutual responsiveness in intentions and joint commitment to the activity. In this case, only the latter condition is met. The authority's intentions and subplans are part of my intentions and subplans in the same way as my own intentions and subplans are part of my intentions; however, my intentions and subplans are not part of the authority's intentions and subplans in the same way as his own intentions and subplans.

Let us recall, subplans mesh if there is a way to do the activity that does not violate *any of the parties' subplans but which instead involves the successful execution of those subplans*. But in the case of authorities if I have a subplan, this subplan needs to be violated in favour of the authority's subplans. Shapiro argues that sometimes coercion is required; however, in such cases there is no 'meshing' of subplans.

Not surprisingly, Bratman considers that Shapiro's 'mesh-creating mechanism' of legal authorities is reached not because of 'shared intentions' but because of unanimous consensus.[96] I think that this interpretation is correct. Shapiro proposes that *A and B are committed to acting according to meshing subplans because they accept the authority of these mesh-creating mechanisms*.[97] A and B, in this context, are judges who disagree on the application of a rule. However, A and B are committed to accepting the authorities' plans; i.e., conventions that enable legal participants to reach a unanimous consensus. Shared intentions, consequently, do not play any role. Furthermore, Shapiro argues that the intention of the participants might be merely 'contributory' and since the participant is indifferent to the successful achievement of the activity, his intention of j-ing', i.e., maintaining or creating a system of rules, plays no fundamental role. The only relevant intention is to accept the authorities' plans. Shapiro points out: "*By accepting the authority of this structure, officials are thus leaving open the possibility that they will change their subplans so that they mesh with their fellow officials whenever their superiors demand it*."[98] In this way, horizontal interlocking of subplans is an output of the vertical interlocking.[99] The unanimous *acceptance* of the authority involves a commitment to meshing subplans.[100] If this is so, then it is unanimous consensus on the conventions; i.e., authorities subplans, rather than shared intentions, that involves a commitment to meshing subplans. Shapiro has previously said: "*The authority intends his or her order to be reasons for the subject to adopt the content of the order as a subplan*".[101] Similarly, the authority believes that these orders will thereby be reasons for the subject because the subject intends them to be such. We have here an additional problem: how can the intention for something to be a reason be a reason?[102] There is

[96] Bratman (2002, p. 514).
[97] Bratman (2002, p. 428).
[98] Bratman (2002, p. 428).
[99] Bratman (2002, p. 428).
[100] Bratman (2002, p. 428).
[101] Bratman (2002, p. 407).
[102] This criticism has been raised by Bratman (2002, p. 517).

therefore a gap between intentions and reasons that is neither explained nor solved by Shapiro's arguments.

E. The Objection that Shared Intentions Cannot be Distinguished from Shared Cooperative Activity, Therefore Shared Intentions with Authority Cannot be Distinguished from Shared Cooperative Activity with Authority

It is arguable that Shapiro's motivation for the introduction of the commitment to mutual compensation is mistaken. Authorities might fail to be cooperative not because the principle of mutual responsiveness in action should be replaced by another principle more suitable for cases of authority, such as the principle of the commitment to mutual compensation, but because the *intentions are not shared*; since there are no shared intentions, there cannot be shared cooperative intentions. In other words, Shapiro's example does not show that sailing to Nova Scotia under a resentful captain is a shared activity that fails to be cooperative. Rather, one might say that it is an activity that fails to be *shared*, since the captain does not share the goal of the crew: to sail successfully to Nova Scotia. Therefore, if the activity is not shared it cannot even aspire to be cooperatively shared. In the case of legal systems if participants do not claim that they share intentions, they cannot claim that they have a shared cooperative activity. Let us look closely again at the case of the unhelpful traffic warden. According to Shapiro, legal participants have a common goal, i.e., to maintain a system of rules. The unhelpful warden share this goal and a common intention. In addition to which they also have meshing subplans: warden A will work in a certain area and warden B will work in another area; thereby neither will violate the other's subplans. Since warden A and B intend to maintain a system of rules, and both are responsive in intention to each other's intentions and subplans, they have shared intentions. A and B also have the intention that the authority's orders are reasons to adopt the content of the orders as subplans and they intend to revise their subplans to mesh with those of the authority. Let us follow Shapiro's modification and suppose that A and B are

committed to finding out and applying each other's subplans (FMSp). If warden B passes by and observes that warden A has overlooked a car that has been parked in a prohibited area, it will be contrary to his intention of maintaining a system of rules not to issue a fine. B has not been cooperative since his aim is not to support or help warden A, but to maintain a system of rules. Shapiro might reply to this objection by suggesting that officials might have only a *participatory* intention. They intend to contribute to the group's j-ing, but not to the successful achievement of j.

The objection is not serious, one might say, since there could be cases in which the participants have shared intentions, but do not cooperate with each other. In other words, one knows and can clearly distinguish cases in which there is responsiveness in action, but not in intention and *vice versa*. However, one might counter-argue and point out that shared intentions cannot be clearly distinguished from shared cooperative intentions, because responsiveness *in intention* is evidenced by responsiveness *in action*. Let us explain this point with the following example. Suppose that the players of an orchestra share the intention to play Beethoven's Seventh Symphony as beautifully and technically correct as possible. The player of the triangle feels dizzy and makes signs to the percussionist, who is sitting next to him, the percussionist quickly grabs the triangle and plays it at the right time. This shows both *responsiveness in intention and in action*. However, the percussionist in our example might also decide *not* to play the triangle. In this case, the percussionist and the triangle player, according to Bratman and Shapiro, are responsive only *in intention*, but not *in action* and therefore the shared activity is not cooperative. But the fact that the percussionist has decided *not* to play the triangle might be evidence that the percussionist is neither *responsive in intention*. In other words, the lack of responsiveness *in action* reflects the lack of responsiveness *in intention*. The consequence is that we cannot always clearly distinguish between shared intentions and shared cooperative activities since we only know intentions *through* actions and therefore can only infer that there is responsiveness *in intention because* there is responsiveness

in action. This objection challenges the distinction given by both Bratman and Shapiro between shared cooperative activity and shared intentions.

It is arguable that the commitment to mutual compensation is similar to the commitment to mutual support, but the commitment to mutual compensation adds two new restrictions: (1) authorities can reassign tasks and (2) there is mutual support unless the authority prohibits it. Let us suppose that a judge cannot decide on a specific case due to lack of expertise and knowledge. According to the principle of mutual compensation the authority can *claim* to reassign the task to another judge, though it might fail to do this since, according to Shapiro, legal participants only *claim* to have a shared cooperative activity and therefore only *claim* to be committed to mutual compensation. But this is not a true reflection of the nature of legal authorities. In this case, on the contrary, the authority has a *duty* to reassign the task.

This latter objection has other implications. Shapiro argues that participants of a legal system only *claim* to uphold a shared cooperative activity but have shared intentions. The commitment to mutual compensation, like the commitment to mutual support, plays a fundamental role in the distinction between shared intentions and shared cooperative activity, and shared intentions with authority and shared cooperative activity with authority, respectively. If our argument that in *most* cases responsiveness in action cannot be separated from responsiveness in intention is sound, then the *claims* of legal participants that they have a shared cooperative activity with authority, even though they sometimes fail to be cooperative, cannot be distinguished from the *claim* that they have shared intentions. In other words, if their intentions are not *truly* responsive *in action*, then they are not *truly* responsive in *intention*. Consequently, they do not share intentions. Let us recall our example of the unhelpful traffic warden. Warden B ignores the fact that warden A has made a mistake by not issuing a fine. Can we say that warden B shares the intention of maintaining a system of rules? Because of *his actions*, one can infer that he has no *such intention*.

F. The Objection that a Mere 'Participatory Intention' Cannot Ensure Condition 2 (b) of the JIAA Thesis; i.e., The Subject Intends the Authority's Order to be Reasons to Adopt the Content of the Order as Subplans as well as Reasons to Revise His or Her Subplans so that they Mesh with the Order

If the subject has a mere 'participatory' intention, then he is not committed to the successful achievement of our j-ing and there is no reason for him to have the relevant intention; i.e., to intend that the authority's order are reasons to adopt the content of the order as subplans and to revise his own subplans. The group's successful achievement of j-ing shapes and determines the subject's intention that the authority's orders are reasons to adopt the content of the order as a subplan. Let us suppose that traffic warden A has only a 'participatory' intention to maintaining a system of rules, and that he does not have the intention that the group successfully achieve the maintenance of a system of rules. Warden A knows that his fellow officials are efficient in issuing fines and that they claim to be cooperative in their behaviour. A's subplan is limited to issuing fines to cars which have parked in prohibited areas only if the parking time has exceeded 24 h. His intention is clearly merely participatory and he is indifferent to successfully maintaining a system of rules. There is no reason for A's revision of his subplans according to the authority's orders, because he does not intend to achieve successfully j, but only to participate in j-ing.

XI. COLEMAN'S APPLICATION OF BRATMAN'S MODEL OF SHARED INTENTIONS AND SOME CRITICISMS OF THIS VIEW

Coleman[103] argues that legal positivism needs to explain how mere social rules can impose duties. In other words, legal positivism in the spirit of Hart's *Concept of Law* needs to reconcile the idea that law is both normative and is a set of social rules that is practiced. Let us recall that the internal viewpoint towards rules, such as the rule of recognition, is the critical and

[103] Coleman (2001, pp. 95–102).

reflexive acceptance of such rules. But this acceptance from the internal point of view cannot ensure that rules are duty-imposing; it is merely an explanation of the subjective dimension of the duty-imposing character of rules. But duty-imposing rules also have an objective dimension; i.e., rules impose and create duties and obligations independently of our subjective acceptance; i.e., independently of the internal viewpoint towards such duties and obligations.[104]

Coleman considers that Hart's internal viewpoint needs to be complemented with a sophisticated explanation of social agency and he resorts, like Shapiro, to Bratman's theory of shared agency. Coleman argues that the practices of the legal officials meet the three conditions of Bratman's Shared Cooperative Activity (SCA): commitment to the joint activity, mutual responsiveness and commitment to mutual support.[105] He argues, furthermore, that the judicial practice of precedent can be explained by the model of SCA; however Coleman does not explain the way in which other officials, such as members of the executive and legislative authorities, also exemplify on SCA. Coleman quotes Himma to show the way in which a SCA can generate duties and obligations:

> While the point of Coleman's analysis of the rule of recognition as an SCA is not to make explicit the normative structure of the supportive social practice … the notion of an SCA might contribute to an explanation of how social practice can give rise to obligations. The notion of an SCA involves more than just a convergence of a unilateral acceptance of the rule of recognition. It involves a joint commitment on the part of the participants to the activity governed by the rule of recognition … And there is no mystery (at least not one that a legal theorist is obliged to solve) about how joint commitments can give rise to obligations; insofar as such commitments induce reliance and a justified set of expectations (whether explicity or not), they can give rise to obligations.[106]

[104] Coleman explains this feature as the view that a duty-imposing rule cannot normally be extinguished unilaterally. See Coleman (2001, p. 95).

[105] Coleman (2001, p. 36).

[106] Himma, Kenneth, 'Inclusive Legal Positivism'. In: *The Oxford Handbook of Jurisprudence and Legal Philosophy* Jules Coleman and Scott Shapiro (eds.) (Oxford: Oxford University Press, 2001).

But we have already pointed out in section X.C in relation to Shapiro's application of Bratman's model that one cannot derive from mere shared intentions obligations and duties without further principles of obligations and duties. Therefore, one needs to presuppose that each official is committed not only to j-ing, but also to fulfilling their part in the activity with the intention that others are entitled to claim that they perform their parts. Additionally, Coleman still needs to explain how from an official's personal obligation, one can infer that the rule of recognition imposes and creates obligations and duties for both citizens and officials. Furthermore, assurance is required for shared intentions to produce obligations and duties, but how can officials who do not know each other provide such assurance?

On the other hand, even if Coleman succeeds in explaining the normativity of law, he cannot explain the authority of law because a shared cooperative activity cannot involve authority. Let us recall that Coleman argues that officials are engaged in a shared cooperative activity. This means that the content of an officials' intentions include the plans and subplans of his fellow officials as well as his own intentions and subplans. Officials are committed to supporting each other, but authority structures do not always entail either commitment to mutual support or responsiveness in intention and action. Authorities, most of the time, need to ignore officials' subplans and intentions. Similarly, subjects' subplans are frequently not part of the authorities' intentions. Therefore, authorities violate the participants' intentions. Authority structures do not support the inabilities or incompetence of their subjects, they merely claim such support, as Shapiro has illustrated. One can conclude that if legal practice is a shared cooperative activity as Coleman has advanced, then it fails to be an authoritative structure.

XII. CONCLUSION

We have shown that both Shapiro's and Coleman's application of Bratman's shared agency cannot dissolve the tension between Hart's practice theory of rules and Hart's idea that legal rules are reason-giving, and in some circumstances

duty-imposing. We have explained Bratman's notion of shared cooperative activity in addition to Shapiro's and Coleman's extension of the Bratmanian model to social structures with authority such as law, and we have raised a number of criticisms that challenge both Coleman's and Shapiro's application of the Bratmanian model to law. However, Shapiro's and Coleman's discussions open the path to a possible solution on one fundamental question: how the sociability and the normativity of law can be reconciled.[107] The answer might dwell on a conception, not of shared intentions, but shared reasons, which relies less on the psychological make-up of the agents and more on the cognitive capacity of agents.

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[107] This question has explicitly been raised by scholars such as Nigel Simmonds 'Protestant Jurisprudence and Modern Doctrinal Scholarship'. In: *Cambridge Law Journal* (2001): 271–300; Gerald Postema 'Jurisprudence as Practical Philosophy'. In: 4 *Legal Theory* (1998): 329–357 and Jules Coleman (2001).