Law and Philosophy Workshop
December 1, 2008
Questions to Scott Shapiro

1. On massively shared agency and the law:

In your description of shared agency you emphasize that shared agency is possible even if some of the participants are alienated, namely, do not share the aims of the enterprise or care about its success, as long as the participants “accept” the plan and play their part. (p. 154).

We have three questions about this argument and its relation to law:

(a). We were wondering what exactly is the difference between “accepting a plan” and non-alienation, and why would this difference be so crucial?

(b) We were not entirely sure what role the idea of shared agency plays in your argument that law is basically about planning; can we not have an activity of planning, and carrying out plans, without shared agency?

(c.) If we take into account that law is not just a case of alienated participants, but may comprise participants who do not participate voluntarily, would you still call it a shared agency? It might seem doubtful that subjects of a legal system necessarily accept the law as planning for them; so it would seem to follow that we can have planning agencies without acceptance. Another way to put our concern here: if law is a form of massively shared agency, what kind of institutions would not be?

2. On the distinction between functioning as a plan and emerging as a plan:

It seems to be part of your argument about the law that it not just functions as massive plan but also results from planning (p. 156).

(a) Would you agree that not every social practice that functions like a plan actually resulted from planning? (Natural language might be a case in point, or structured games, the practice of courtesy, etc.)

(b.) If this is so, we were wondering what is the theoretical justification for relying on the hypothetical example of Cook’s Island? Traditional “state of nature” arguments are using a hypothetical because the question they pose is about the moral legitimacy of institutions; your question here is not about moral legitimacy, it
seems to be about the emergence of law as a planning enterprise. But if the question is about the emergence of law, would we not need to have an historical account, one that is empirically supported?

3. On the relations between planning and normativity:

By way of clarification, can you elaborate on the way in which, according to your account, norms become binding? You begin by relying on Bratman’s insight that planning is essentially subject to some norms of rationality. But then you seem to gradually shift from norms of instrumental rationality to norms that parties to massively shared agencies are bound by, because they are committed to the plan. Are these still norms of instrumental rationality? And how would such norms be binding on parties who do not care about the success of the enterprise or even participate in it voluntarily?

4. On the role of sanctions [p. 151]:

Would you agree that if members of Cook’s Island face Prisoners Dilemma situations, they would need various sanction mechanisms to solve them? In other words, if PD situations are among the type of problems law is often there to solve, then sanctions would be needed even if it is true, as you claim, that law is not there to resolve the bad moral character problem.

5. On the distinct nature of legal planning (p. 152ff):

(a.) What is it that makes a planning mechanism or organization distinctly legal?

(b.) You say that “law aims to compensate for deficiencies of non-legal forms of planning by planning in the “right” way, namely, by adopting and applying morally appropriate plans in morally legitimate manner.” Do you claim here that it is an essential aspect of law that it aims to apply “morally appropriate” planning? What is argument for this claim?

6. On the idea that law is a universal means (p. 154):

We were not quite sure what the argument for this strictly instrumentalist conception of law is; that law is a plan does not necessarily entail that it is only a plan. So even if law is a plan, and plans are only means, it does not necessarily follow that law is only means. One would have to show that law does not have other essential features (that is, in addition to being a plan,) which are more closely tied to
some unique or characteristic ends that law (and laws) may have. Is there anything in your argument to preclude this possibility?

7. On the relation between planning and legal positivism (p. 157):

It seems to us that there are two main arguments you advance here:

First, you seem to argue that the planning theory shows why law is basically a matter of social facts: since “fundamental rules of a legal system constitute a shared plan”, and a plan is a matter of social fact, law is a matter of social fact. Critics of legal positivism do not have to deny that law is basically a matter of social facts. They claim, however, that the facts that constitute the practice do not necessarily settle the question of what counts as legal validity or legally binding norms. How does your argument answer such claims?

Second, you argue that the planning theory supports something like the exclusive version of positivism because “the logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to solve.” This argument is reminiscent of Raz’s argument about authority. It is arguable, however, that unlike the logic of following an authority, the logic of following a massive plan does not necessarily entail regarding the various sub-plans as providing exclusionary reasons for action. On the contrary, it may well be the case that the best way to implement a massive plan is by way of re-examining the soundness of the sub-plans as one goes along, adjusting them to the major plan. In other words, we were not quite sure that Raz’s argument applies with equal plausibility to the rationale of following massive or complex plans. Can you elaborate on this?