

## PLAN B: A THEORY OF JUDICIAL REVIEW

Adam Perry<sup>★</sup>

*ABSTRACT - There is no general theory of the grounds of judicial review (e.g., the rule against bias, the doctrine of legitimate expectations, unreasonableness). Here I try to fill the gap. My theory draws on ideas from the philosophy of law and the philosophy of action, but it's a simple theory. Officials make decisions for the community. Their decisions are subject to requirements of instrumental rationality. Ideally, officials would figure out for themselves how to live up to these requirements. Because officials aren't perfect, the law also has "Plan B", which is for judges to ensure that officials do what rationality requires of them. The grounds of judicial review are simply the grounds on which it's rational for officials to reconsider, retain, suspend, or apply their decisions. The "Plan B theory", as I call it, doesn't account for every detail of judicial review. Even so, the theory is powerful, parsimonious, fruitful, and sharply at odds with almost everything else written about judicial review.*

### I. ENVY AND AMBITION

I'm an administrative law scholar, but I'm suffering from private law envy. In private law, I see an abundance of doctrinally-oriented theory. I don't mean theories of this or that doctrine (of course there are those, too). I mean theories of whole areas of law: tort law, contract law, and the law of unjust enrichment. I'm thinking of promissory theories of contract law, corrective justice-based theories of tort law, and the like. I'm not saying these theories succeed. For all I know, they don't. It's the ambition that impresses me, because in administrative law, things could hardly be more different. There are articles proposing theoretical accounts of specific administrative law doctrines: legitimate expectations, say, or error of law.<sup>1</sup> There is the endless, exhausted ultra vires debate, about the constitutional foundations of judicial review.<sup>2</sup>

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<sup>★</sup>Associate Professor, Faculty of Law, University of Oxford; Garrick Fellow and Tutor, Brasenose College. My thanks to Nick Barber and Alison Young, and to an excellent audience at the Jurisprudence Discussion Group. This is a draft, and some things are still missing, including some citations. Comments and suggestions, no matter how small, are welcome at adam.perry@law.ox.ac.uk.

<sup>1</sup> See, e.g., TAO Endicott, 'Questions of Law' (1998) 114 LQR 292; F Ahmed and A Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 CLJ 61.

<sup>2</sup> The major contributions to which are in CF Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Hart, 2000).

And that's about it, theory-wise.<sup>3</sup> I'm not sure why this is. Maybe it's that administrative law is a relatively young area.<sup>4</sup> Maybe public law scholars are preoccupied with constitutional issues.<sup>5</sup> In any case, there's a gap, and I want to help fill it.

I'll outline a theory of the most significant part of administrative law – the law of judicial review. My theory draws on ideas from the philosophy of action and the philosophy of law, but it's a simple theory. Officials make plans for the community. Their plans are subject to requirements of instrumental rationality. Ideally, officials would figure out for themselves how to live up to these requirements. Because officials aren't perfect, the law also has "Plan B", which is for judges to ensure that officials do what rationality requires of them. By executing Plan B, judges engage in judicial review. The grounds of judicial review are simply the grounds on which it's rational for officials to reconsider, retain, suspend, or apply their plans. The "Plan B theory", as I'll call it, doesn't account for every detail of judicial review. Even so, the theory is powerful, parsimonious, fruitful, and sharply at odds with almost everything else written about judicial review.

Three words of warning. Although I believe that parts of this theory can be extended to other jurisdictions, I'm concerned here only with the law of England and Wales. Also, my interest is the common law of judicial review and not, for example, judicial review under the Human Rights Act 1998. Finally, while I make use of various ideas from philosophy, I don't try to defend them here. There isn't the space. If you find yourself balking at some of my claims, I ask you to take my argument as an extended promissory note. Here's how to explain judicial review, I should be understood to say, provided we accept a certain vision of agency, rationality, and law, one which is plausible enough to take seriously, but which must await another occasion to be defended in full.

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<sup>3</sup> I simplify. There are exceptions, of course, most prominently the work of TRS Allan, as in *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013).

<sup>4</sup> Albeit an area of law with ancient foundations. See, e.g., E Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge, Mass.: Harvard University Press, 1963).

<sup>5</sup> These reasons might also explain the lack of comparative administrative law scholarship: J Boughey, 'Administrative Law: The Next Frontier for Comparative Law' (2013) 62 ICLQ 55.

## II. A PRIMER

What is judicial review? In a sense, that's the whole question. But I need to start somewhere, so I'll start with what judges, lawyers, and legal scholars tend to think of as judicial review.

Suppose the government does something you don't like, or doesn't do something you want it to. You go to court and make a claim for judicial review. You're trying to access a specific *court procedure*, which the law labels "judicial review". To access this procedure, you must seek to challenge a decision or action by a body 'in relation to the exercise of a public function'<sup>6</sup>. You'll require leave from the court to make your claim, which it will grant only if you have a decent case and you have a 'sufficient interest'<sup>7</sup> in the matter to which your claim relates, known as "standing". You can only ask for a prerogative remedy (a quashing, mandatory, or prohibiting order) or a declaration or injunction.<sup>8</sup> Even if your claim is successful, the court has discretion to refuse a remedy.

We also use "judicial review" to refer to a *body of substantive norms*, applicable to decision-makers and enforced by courts. These are the grounds on which judges will review decisions to see whether they're lawful or not. Hence they're known as the "grounds of judicial review". Here are the main grounds:

1. *Error of law*. If an official's decision is based on an interpretation of a legal rule, but that interpretation is wrong, then the decision is unlawful.<sup>9</sup>
2. *Proper purposes*. If an official doesn't act for a proper purpose, or acts for an improper purpose, then her decision is unlawful. Normally, what's proper and improper, purpose-wise, is determined with reference to the authorising statute.<sup>10</sup>
3. *Error of fact*. If an official's decision is based on a sufficiently serious and obvious error of fact, then that decision is unlawful.<sup>11</sup>

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<sup>6</sup> Civil Procedure Rules, part 54.1.

<sup>7</sup> Senior Courts Act 1981, s 31(3).

<sup>8</sup> Senior Courts Act 1981, s 31(1).

<sup>9</sup> *Anisimic v Foreign Compensation Commission* [1969] 2 AC 147 (HL); *R v Lord Chancellor, ex p Page* [1993] AC 682 (HL). There are various exceptions, including for interpretations which (a) are irrelevant (*Page* 702); (b) in relation to 'domestic' law (*Page* 702-3); (c) of a sufficiently vague term (*R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL)).

<sup>10</sup> *Padfield v Minister of Agriculture* [1968] AC 997 (HL).

<sup>11</sup> *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044. There are also 'jurisdictional' facts, which an official can't be mistaken about: *R v Home Secretary, ex p Khawaja* [1984] AC 74 (HL). There may also be 'objective' matters, which again an official can't be wrong about: *R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557..

4. *Relevancy*. If an official doesn't take into account a relevant consideration, or takes into account an irrelevant consideration, then her decision is unlawful.<sup>12</sup>
5. *Bias*. If a fair-minded and informed observer would think an administrator is biased, then her decision is unlawful.<sup>13</sup>
6. *Fair hearing*. If it was unfair for an official not to hear from someone (or to grant them a certain sort of hearing), then again the decision is unlawful.<sup>14</sup>
7. *Unreasonableness*. If an official makes a decision which is deeply or blatantly unreasonable, then it will be unlawful.<sup>15</sup>
8. *Legitimate expectations*. If an official has a policy of doing something, or a practice of doing so, and she acts otherwise absent good reason, then she will have acted unlawfully.<sup>16</sup>
9. *Consistency*. If an official has a policy of doing something, then it's unlawful for her to depart from that policy, absent good reason to the contrary.<sup>17</sup>
10. *Rigid policies*. An official may have a policy, but if she applies her policy rigidly, without considering the merits of a case, then she acts unlawfully.<sup>18</sup>

Listed this way, the grounds of review are a motley crew. It's also debatable whether all of these are separate grounds, or whether some ought to be combined. It would be nice to have a typology of the grounds of review, and that's one of the things I'll provide.<sup>19</sup>

So we use "judicial review" to mean a court procedure, and to mean a body of substantive rules. These two senses of judicial review are connected.

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<sup>12</sup> *Bromley LBC v GLC* [1983] 1 AC 768 (HL); *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407.

<sup>13</sup> *Porter v Magill* [2002] AC 357 (HL).

<sup>14</sup> *Ridge v Baldwin* [1964] AC 40 (HL); *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>15</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA). For contrasting glosses, see *CCSU v Minister for the Civil Service* [1985] AC 374 (HL) (Lord Diplock's speech), and *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 (HL) (Lord Cooke's speech).

<sup>16</sup> An awkward formulation, but one broad enough to include both procedural protections (e.g., *Attorney General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC)) and substantive protections (e.g., *R v Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622 (CA)).

<sup>17</sup> It's not settled whether the requirement of consistent application of policies is part of the doctrine of legitimate expectations, but *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 says that consistency is a 'free-standing' principle (at 4556).

<sup>18</sup> *British Oxygen Co. v Minister of Technology* [1971] AC 610 (HL).

<sup>19</sup> Probably the best known typology of the grounds of review is Lord Diplock's division between (1) irrationality, (2) procedural impropriety, and (3) illegality. *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 410. For an interesting recent attempt at a new typology, see S Nason, *Reconstructing Judicial Review* (Hart 2016).

In general, (a) the judicial review procedure is used to test whether the grounds of review are satisfied; and (b) the appropriate procedure to test whether the grounds of review are satisfied is judicial review. If you wanted to challenge a decision on some other basis (*i.e.*, *not* on the grounds of review), you shouldn't use the judicial review procedure. Conversely, judges don't look kindly on attempts to argue that public bodies have violated one of the grounds of review except by way of the judicial review procedure. There are exceptions to (b), meaning ways of getting *out* of the judicial review procedure, but I won't go into them here.<sup>20</sup>

I said I want to provide a theory of judicial review; but in which sense, procedural or substantive? Substantive, because it's by far the more complicated, controversial, and theoretically interesting aspect of judicial review. When I say I'm aiming at a theory of judicial review, I mean I'm aiming at a theory of the *grounds* of judicial review. That said, judicial review procedure and substance go together for a reason, and a good theory of the grounds of review would address their connection with judicial review procedure. That's something I'll do at the end.

### III. THE USUAL THEORY

I want to sketch a theory of the grounds of judicial review. I mean for it to sound familiar. It's taught to students, and I think it's assumed by most scholars. The "usual theory", as I'll call it, starts with a *division of responsibilities* between an official and a judge.<sup>21</sup> An official has been given (for example) a statutory power. It's her job to decide what to do with it. It's the judge's job to review the decision. The judge will have views about how the power should be used. She might be tempted to force the official to use the power as she, the judge, would like. However, were she to do so, she'd effectively be taking the decision – and that's the official's responsibility, not the judge's. So the judge must resist temptation and let the official do her job. By this route, we arrive at a central feature of judicial review: there is no ground of review equivalent to "what the judge would have decided overall". Sometimes, people make the same point by saying that there's no "merits review" or that "a review is not an appeal".

How does the usual theory explain what *is* a ground of review? Judges are entitled to enforce two sorts of limits. The first are *more-or-less explicit statutory limits*. It's no mystery why. Statutory limits are legal limits, and judges have a

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<sup>20</sup> See, *e.g.*, *Boddington v British Transport Police* [1999] 2 AC 143; [1998] 2 All ER 203.

<sup>21</sup> I mean for the "usual theory" to be a composite picture. If an example is needed, Mark Elliott seems to hold to something like the usual theory. See, *e.g.*, *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2001).

duty to uphold the law. But these more-or-less explicit statutory limits aren't the whole story. In addition, judges create or articulate limits based on *political and constitutional values*.<sup>22</sup> Here we encounter familiar characters like the rule of law, non-arbitrariness, comity, the separation of powers, democracy, accountability, the avoidance of the abuse of power, human dignity, fairness, good administration, justice, consistency, and equality. Judges try to protect or uphold these values, without taking over from officials.

That's the usual theory. I've always found it unsatisfying. Take another look at the list of political and constitutional values in the last paragraph. How do we get from that list (an item on the list, a set of items) to specific grounds of review? How do we get from that list to, for example, the rule against rigid policies, error of fact, and *Wednesbury* unreasonableness? These are hard questions. They're fair questions, though, because they're exactly the questions that a good theory of judicial review would answer. A list like the one in the last paragraph doesn't explain the grounds of review. It's only the first step, an invitation to a theory, nothing more.

To take that invitation up, you might isolate some value on the list, and argue that it explains the grounds of review. (A variant of this approach would be to argue that value *A* explains ground 1; value *B* explains ground 2; and so on.) You might propose that all of the grounds of review are explicable with reference to non-arbitrariness, for instance. That would be very interesting. I would like to read that argument. But it doesn't exist. Nor would developing it be easy, because at the moment, there is *no* well-worked out account of what arbitrariness is.<sup>23</sup> Or think of fairness. I'm sure that fairness does relate to some grounds of review. Yet there are many kinds of fairness: fairness as justice, fairness as equality, fairness as respect, fairness as not taking advantage of others, fairness as adherence to a rule, fair play, and so on.<sup>24</sup> Which of these sorts of fairness explains which grounds of review and how? An answer would be just the sort of theory I'm looking for. But there is no book or chapter or article that tries to provide a fairness-based theory of all the grounds of review. The challenges here are twofold: first, to give an account of a vague and contestable value; and, second, to bridge the gap between abstract claims about that value and specific legal doctrines.

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<sup>22</sup> Ultra vires theorists (orthodox or modified) will say that this authority is conferred on judges by the legislature, such that judges are engaged in a process of interpretation or elaboration of legislative intent. Common law theorists will say that the authority comes from the common law, so they will think these limits are full-blown judicial creations. The difference doesn't matter for my purposes.

<sup>23</sup> For some efforts in this direction, see F Lovett, 'What Counts as Arbitrary Power?' (2012) 5 *Journal of Political Power* 137; TAO Endicott, 'Arbitrariness' (2014) 27 *CJLJ* 49; C McCammon, 'On Domination' (2015) 125 *Ethics* 1028.

<sup>24</sup> See, e.g., C Carr, *On Fairness* (Aldershot: Ashgate, 2000).

To be clear, I accept that it might be possible to develop some version of the usual theory (say, a fairness-based theory). But that's my complaint: it would take work, which simply hasn't been done. In truth, the usual theory isn't much of a theory at all. It leaves the tough, interesting questions about judicial review not only unanswered, but unaddressed.

#### IV. THE DIFFERENCE THAT JUDGES (DON'T) MAKE

You can only complain about others' theories for so long before anyone would think: "Could you do any better?" No theory is perfect, and before abandoning an old theory, we should make sure we have a replacement. I'll try to propose something better in the sections that follow. It'll take me a while to construct my theory, though, so let me say now what the main difference will be.

The usual theory suggests that the grounds of review are shaped by the fact it is a *judge* doing the reviewing. Officials have jobs to do, as do judges. Judges mustn't trespass into officials' domains, unless they have a compelling reason to do so. In this way, we swiftly find ourselves committed to the view that the grounds of review are an elaborate working-out of what counts as a "compelling reason" to intrude on officials' business. Note the implication. Were officials to review their *own* decisions, they wouldn't be interfering in anyone else's domain. So, were officials to review their own decisions, they'd do so on different grounds than judges.

I don't want to start this way. Of course I grant that officials and judges are different people with different jobs. But I deny that this fact has the explanatory significance that the usual theory says it does. My approach is simpler. Officials are subject to various requirements of instrumental rationality. Judges enforce these requirements. The name we give to these requirements, when enforced by judges, is the "grounds of review". That's all. The grounds of review don't take their character from the difference between officials and judges. So, were officials to review their own decisions, they should do so on essentially the same grounds as judges do.

If I'm on the right track, then the key question is: on what grounds should officials review their own decisions? When officials make decisions, they make plans. Plans should be reconsidered, retained, suspended, and applied, on certain grounds. These are the grounds on which officials should review their own decisions. Or so I'll claim. But I need to work up to that claim, starting with plans generally in the next section, reconsideration of plans in Section VI, and general plans (or policies) in Section VII.

## V. PLANS

You and I and everyone else form intentions for the future. That is to say, we make *plans*. Today I plan to meet a colleague for lunch, finish some marking this afternoon, and go to York this evening. Later, I plan to train for a 10k race and buy a dog. Personal plans like these have been a topic of much discussion amongst philosophers. The pioneer was Michael Bratman, whose book *Intention, Plans, and Practical Reason*<sup>25</sup> set the agenda for the field.

Bratman starts by asking: why do we plan? ‘Why don’t we just cross our bridges when come to them?’<sup>26</sup> If I don’t plan, I’ll have to deliberate and decide at the moment of action. Deliberation typically involves identifying the actions open to me, noting and weighing the reasons for and against these options, and forming a conclusion about what the balance of reasons favours. Deliberating well takes time and energy. Deliberating well can be difficult, especially when I’m tired or rushed or the like. Also, relying on moment-to-moment decisions will make my actions are to predict. That will inhibit coordination, both of my own actions over time and of my actions with others’.

Plans dispense with much of the need for moment-to-moment deliberation, a feat they manage by virtue of two features. The first is *stability*. Take my plan to travel to York. At one time I was torn whether to make the trip. After I adopt my plan I’m disposed not to reconsider it, *i.e.*, not to deliberate as to whether to revise, replace, or abandon the plan. Plans are also *conduct-controlling*. When evening arrives, I won’t weigh my plan against the reasons for not going to York. That would be to treat my plan as just another consideration relevant to deliberation. Instead I’ll treat the matter as settled. I’ll simply execute the plan, provided it is possible to do so and the plan remains intact.

Given that plans are stable and conduct-controlling, I can usually be counted on to do as I plan. That makes it possible for me to better coordinate my own actions. It also encourages others to count on me, and helps me to coordinate my actions with theirs. And, because planning lets me exercise a degree of control over what I’ll do later, planning lets me choose what to do at a time which suits me. I can set the course of my conduct when I can think clearly and well, and when deliberative resources are relatively abundant. In all these ways, planning is instrumentally valuable.

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<sup>25</sup> M Bratman, *Intention, Plans, and Practical Reason* (CSLI Publications 1999; originally published Harvard University Press 1987). This section draws heavily on material from chapters 2-4.

<sup>26</sup> M Bratman, ‘Taking Plans Seriously’ in E Milgram (ed), *Varieties of Practical Reasoning* (MIT Press, 2001) 203.



Although plans make moment-to-moment deliberation less necessary, they also pose problems that require deliberation to solve. That's because plans are *partial* when first formed. They set out a general aim to be achieved at a later point. As time goes on, the plan needs to be 'filled in'<sup>27</sup> with more specific acts, means, and preliminary steps, all of which necessitate deliberation. As they are filled in, plans take on a *nested structure*. Plans about ends contain subplans about means and preliminary steps. Less specific plans contain more specific subplans. Thus, as evening approaches, I might supplement my plan to go to York with a plan to take the 18:02 train, to take a taxi to the station, to call a taxi in 10 minutes, and so on. These additions are subplans of my overall plan to travel to York.

Reasoning from an overall plan to subplans is driven by demands of rationality. One demand is *means-end coherence*. By filling in a plan, I ensure that if I execute my various subplans (the means), I'll execute my overall plan (the end). Another demand is *consistency*. Sub-plans, means, and preliminary steps should be consistent with the overall plan they're part of. Overall plans should be consistent with one another, in that they could all be executed, if the world cooperates. Also, my plans should be consistent with my beliefs: I shouldn't plan to do what I believe is impossible.

## VI. REASONABLE STABILITY

Coherence and consistency are two requirements of rational planning agency. A third concerns stability. It would be irrational for me to reconsider my plan to travel to York for no reason at all, on a whim. But it would also be irrational for me to stick to my plan come what may. Rationality favours a middle ground. Plans should be stable, but not too stable. Plans should be *reasonably stable*. Reasonable stability will be central to my account of judicial review, so I'll discuss it in some detail now.

Following Bratman, I'll distinguish between two sorts of case.<sup>28</sup> There are *wouldn't-change cases*: were I to reconsider my plan, I'd think the merits of the courses of conduct available to me favoured the plan I have, so I wouldn't change it. In *would-change cases*, were I to reconsider, I'd see that the merits favoured a different course, and I'd revise, replace, or abandon my plan. Reconsideration involves deliberation, and deliberation is costly. It takes time and effort, for one thing. It also risks the stability of a plan, which undermines coordination and predictability. So, within the category of would-change cases, there's a further distinction.<sup>29</sup> In *not-worth-it cases*, whatever I'd gain

<sup>27</sup> Bratman, 'Taking Plans Seriously' (n 26) 207.

<sup>28</sup> M Bratman, 'Planning and the Stability of Intention' (1992) 2 *Minds and Machines* 1, 6.

<sup>29</sup> Bratman (n 28) 6.

from changing my plan wouldn't be worth the associated costs. In *worth-it cases*, the gains from changing my plan would be worth the associated costs.

In a perfect world, I'd reconsider only in worth-it cases. Anything else would either lead me astray or fail to make up for the trouble involved. Unfortunately worth-it cases don't advertise themselves. How, then, should I best ensure that I reconsider only in worth-it cases? Deliberation about whether to reconsider isn't the answer. Thinking about the merits of reconsidering a plan slides too easily into thinking about the merits of the plan itself. In other words, deliberating about whether to deliberate is self-defeating. To know when to reconsider, I'll instead have to rely 'background habits, strategies, and policies'<sup>30</sup> – on heuristics, in short.

Which heuristics are pragmatically justified? There's no one-size-fits-all answer. It depends on the person, the plan, and the circumstances. Even so, there are some obvious candidates. Bratman himself gives two examples. First, I become aware of a 'new and attractive alternative'<sup>31</sup> to executing my plan, which I hadn't previously considered. Second, I become aware of a strong reason not to execute my plan, which I hadn't previously considered.<sup>32</sup> Richard Holton, whose work on intention parallels Bratman's, suggests a third heuristic: you become aware that you made an important mistake in the reasoning that led to the plan.<sup>33</sup> I planned to go to York to visit friends, but it turns out I had the dates wrong. On discovering my error, I'll think again about what to do.

So far I've been discussing a pragmatic, two-tier approach to rational reconsideration, such that reconsideration on a particular occasion is justified when it's recommended by a heuristic which is pragmatically justified.<sup>34</sup> But this approach does not 'exhaust the subject'.<sup>35</sup> Sometimes I'm 'straightaway obliged'<sup>36</sup> to reconsider a plan, whatever my pragmatically justified heuristics say. I might arrive at the station to discover that the 18:02 train to York has been cancelled. Executing my plan is impossible. I'm straightaway obliged to reconsider. Why? There's a pragmatic rationale, it's true. More fundamentally, though, I should reconsider because my plans should be consistent with my beliefs. Similarly, if I arrive at the station before I

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<sup>30</sup> Bratman (n 28) 7.

<sup>31</sup> Bratman (n 28) 5.

<sup>32</sup> Bratman (n 28) 5.

<sup>33</sup> R Holton, *Willing, Wanting, Waiting* (OUP, 2009) 75.

<sup>34</sup> For related two-tier accounts of rational reconsideration, see, *e.g.*, D Gauthier, 'Assure and Threaten' (1994) 104 *Ethics* 690, E McClennen, 'Constrained Maximization and Resolute Choice' (1988) 5 *Social Philosophy & Policy* 95, J Mintoff, 'Rational Cooperation, Intention, and Reconsideration' (1997) 107 *Ethics* 612.

<sup>35</sup> Bratman, 'Following Through on One's Plans' in P Danielson, *Modeling Rationality, Morality, and Evolution* (OUP 1998) 59.

<sup>36</sup> Bratman (n 28) 9.

expected, and see that I can catch the 17:38 train instead and arrive at York early, I should straightaway reconsider. That's because, in general, it 'being obvious to me that mine is a would-change/worth-it case, in the absence of a special reason to distrust my own judgment, straightaway obliges reconsideration'<sup>37</sup>.

In the cases in the last paragraph, I'm straightaway obliged to reconsider to preserve consistency between my plans and beliefs. Although Bratman doesn't mention the possibility, it seems to me that I'm also obliged to reconsider if it's necessary to preserve coherence or consistency between and within my plans. Suppose that I plan to go to York, that I plan to take the 18:02 train to York, and that I plan to catch a taxi to the station at 18:15. The taxi sub-plan is means-end incoherent with the overall plan. Reconsideration is plainly warranted. Or suppose that I plan to have dinner with a friend in London this evening – the same evening which I plan to be in York. These plans can't both be executed. I must revise or abandon at least one of them, if my plans are to be consistent. Again, reconsideration is called for straightaway.

To summarise: Plans are useful. We make them all the time, as best we can. They wouldn't be useful if we reconsidered them at the drop of a hat. Yet it would be disastrous if we never reconsidered them. Plans should be stable, without being rigid. As a result, it will be rational for me to reconsider a plan if and only if: (1) I'm straightaway obliged to do so, to preserve consistency and coherence between or within my plans, or between my plans and beliefs; or (2) my pragmatically justified heuristics tell me to reconsider.

## VII. POLICIES

I need to discuss one more aspect of planning agency. All the plans I've discussed so far are specific plans, that is, plans that can be executed only once. There's also a type of plan that can be executed on multiple occasions – a *policy*.<sup>38</sup> Like ordinary plans, policies are common in personal contexts. I have a personal policy not to mark late essays, and not to have more than one helping of dessert. And, like ordinary plans, policies are instrumentally valuable. They help with coordination, just as ordinary plans do. They're especially useful at saving time and energy, because they substitute for deliberation on multiple occasions.

Policies are subject to two special rational requirements. According to *policy-plan coherence*, policies must be supplemented by specific plans and

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<sup>37</sup> Bratman (n 28) 10. See also M Bratman, 'Planning and Temptation' in L May, M Friedman, and A Clark (eds), *Mind and Morals* (MIT Press 1998) 304-5.

<sup>38</sup> M Bratman, 'Intention and Personal Policies' (1989) 3 *Philosophical Perspectives* 443.

intentions to carry them out on appropriate occasions. On pain of irrationality, I'll need to supplement my plan not to mark late essays with a plan not to mark *this* late essay.

Policies must also be *reasonably defeasible*. I don't intend to refuse late essays no matter what. I'm not committed to refusing late essays when a student is very ill, when his or her relative has died, when there's an emergency at the university, and so on. I could 'try building all these qualifications into the specification of what I intend'<sup>39</sup>. The task is hopeless, though, as long as I avoid 'uninformative specifications'<sup>40</sup> like 'unless so acting is inappropriate'<sup>41</sup>. Better not to rely on such general escape clauses. Better to simply recognise that sometimes I should suspend a policy in a particular case, though I shouldn't revise or abandon the policy.<sup>42</sup> When a student doesn't submit an essay because her mother has died, I don't cast aside my policy as unfit for purpose. Rather, I reasonably suspend the policy in this case and accept the essay.

## VII. REX'S STORY

Back to judicial review. I think that, when officials exercise legal powers, they make plans. And I think that judicial review is the activity of judges ensuring that officials retain, reconsider, apply, and suspend their plans as rationality requires. That's the heart of my theory. I want to argue for it in two steps. First, I'll draw out the connection between the rational requirements of planning agency and the grounds of review, using a simplified example. In the next section, I'll show how to scale up the example to the level of the legal system.

Recall Rex, the benevolent but hapless ruler imagined by Lon Fuller.<sup>43</sup> Suppose that Rex finally manages to make law, and settles down to the practical business of administration. Because Rex's kingdom is small, Rex does all the administrative jobs himself. He is legislator, minister, and judge. He issues powers to himself one day, exercises them the next, and so forth.

Despite his best efforts, Rex often uses his powers in ways that displease his subjects. When this happens, they ask him to reconsider. Rex is a kind ruler, and he always obliges. After all, it matters so much to them, and by agreeing he doesn't commit himself to changing his mind. But it doesn't take long for problems to arise. Rex ends up spending all his time and energy deliberating

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<sup>39</sup> Bratman, 'Intention and Personal Policies' (n 38) 456.

<sup>40</sup> Bratman, 'Intention and Personal Policies' (n 38) 456.

<sup>41</sup> Bratman, 'Intention and Personal Policies' (n 38) 456.

<sup>42</sup> Bratman, 'Intention and Personal Policies' (n 38) 456.

<sup>43</sup> L Fuller, *The Morality of Law* (rev. edn., Yale University Press, 1969) 33-48.

about the same things, over and over again. Important issues are neglected as a result. Once it becomes clear that Rex is willing to reconsider any decision for any reason, or even for no reason, his subjects stop relying on his decisions. Even Rex doesn't treat his decisions as a basis for future planning. Chaos threatens.

Rex adapts. Henceforth, he says, his decisions will be irrevocable. He will literally write them in stone, so he can't undo them. The move is a success – in a sense. Rex doesn't deliberate *ad nauseum* anymore. Important matters are resolved quickly. No one doubts Rex's word, which helps with coordination. But now there are other problems. Rex is not smart enough, careful enough, or wise enough to always get things right the first time around. There's so much work to do, so many applications to get through, and never enough time. As his mistakes accumulate, Rex's subjects begin to complain. An infallible ruler could afford to never reconsider, they say, but Rex's failings are all too obvious.

#### *A. Impossibility*

Stung by these criticisms, Rex resolves to do better. It's at this point that Rex makes his crucial decision. Rex realises that, above all, he needs to go about things rationally. After Rex sees this, things get easier for him. Some things are just obvious. It's obvious to Rex that he shouldn't stick with decisions that he knows are impossible to execute. That has an important consequence, because in his kingdom, Rex can only do what he authorised himself to do under a previous plan.<sup>44</sup> So, if he decided to do what he isn't authorised to do, then he knows he'll need to think again. To remember, Rex starts a list of when he should reconsider. He puts this discovery as the first entry: he calls it *error of law*.

#### *B. Inconsistency and Incoherence*

Although Rex's kingdom is small, the problems it faces are complicated. As a result, Rex's approach is usually incremental. He first develops an overall plan (*e.g.*, cut down on dog fouling). Part of the overall plan is to give himself powers to help execute the plan (*e.g.*, to fine dog foulers). He'll then develop further plans about how to use those powers. Reflecting on this approach, Rex realizes it's crucial that his various subplans are designed to promote the overall plan. Otherwise, the overall plan will go unfulfilled. Rex accordingly

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<sup>44</sup> How, then, does Rex acquire the power to plan in the first place? This is a version of the 'chicken and egg' as applied to legal authority and legal norms. For the answer I adopt for the purposes of this article, see page 20-21.

settles on a second proposition. He'll reconsider a decision if it doesn't promote the relevant overall plan, or (even worse) the two are inconsistent. Rex puts this as the second item on the list, and calls it *the purposes doctrine*.

### C. Indirect Pragmatic Justification

So far, so good. But Rex knows he hasn't yet addressed cases in which he simply made a bad decision on the merits. He turns to his advisers. They tell Rex he should reconsider when, were he to do so, he would change his mind and it would be worth it. But, his advisers go on to say, there's no foolproof way to identify such worth-it cases, aside from full-scale deliberation, which would defeat the point. Instead, they tell Rex, he'll have to rely on rough-and-ready heuristics to know when to make a decision again.

Rex ultimately identifies four heuristics. He remembers a time when he planned to issue licenses to wine makers. Someone applied and he refused her because he didn't think she had a good business plan. Now, in hindsight, he sees that her business plan shouldn't have mattered.<sup>45</sup> In general, he resolves, if he knows that he failed to take into account an important relevant factor, or placed importance on something irrelevant, he'll reconsider. Rex titles this the *relevancy doctrine*, and adds it to his list.

Second, if Rex believes that he didn't understand an important fact which led to his decision, then he'll reconsider. For example, if he plans to eject someone from his kingdom, thinking he's a foreigner, but it turns out that he's one of Rex's citizens, then reconsideration will be appropriate.<sup>46</sup> Rex calls this doctrine *error of fact*.

Rex knows that he'll better determine what's relevant and what's not, and what's a mistake and what's not, if he consults widely before making a plan. If he neglected to do so, and adopted a plan without hearing from someone with something important to say, he'll reconsider. This is the third heuristic: the *fair hearing requirement*. Relatedly, Rex knows that he tends to make better decisions when he can think about the pros and cons impartially. That leads him to adopt a final heuristic: *the rule against bias*.

### D. Obvious error

Feeling satisfied with himself, Rex prepares to conclude his list-making. But before he can do so, he's approached by one of his subjects, Ms Wednesbury.

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<sup>45</sup> An example discussed by GDS Taylor, 'Judicial review of Improper Purposes and Irrelevant Considerations' (1976) 35 CLJ 272, 279 based on *Yukich v Sinclair* [1961] NZLR 752.

<sup>46</sup> *A v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin) (treating a German claimant as a Ghanaian national). I owe the example to Nason (n 19) 153.

She points out that there are certain to be worth-it cases that don't satisfy Rex's heuristics. Sometimes, she says, it'll be obvious that a plan is wrong on the merits – and deeply so. To refuse to reconsider in such cases would be “superstitious plan worship”.<sup>47</sup> Rex sees her point and agrees to reconsider when he makes an obviously bad plan that isn't covered by any other ground. In honour of his subject, he calls this ground *Wednesbury unreasonableness*.

Rex's advisers are aghast. No will be able to tell what's *Wednesbury* unreasonable and what's not, they fret. Surely it would be better to refine and revise the existing heuristics, or to add new ones. Perhaps, one adviser suggests, Rex would like to review his plans based on their proportionality?<sup>48</sup> Wouldn't that be just as good, yet more precise? But Rex, by now a convert to the new doctrine, has two responses ready. First, he says, the doctrine is not as vague as it seems. To be *Wednesbury* unreasonable, a plan must appear to be wrong on the merits to such a degree that reconsideration is worth it. Also, the plan must be strikingly wrong, such that no detailed examination of the merits is necessary.

Second, Rex adds, you're missing the point. It's impossible to anticipate every worth-it case. I can't do it, and no one else could either. It doesn't matter how precise the heuristics are, or how many of them there are. There will always be worth-it cases that aren't accounted for.<sup>49</sup> It's either a matter of sticking to my plans in such cases – intolerable! – or relying on the *Wednesbury* doctrine. Put it like this, Rex says: if I could say in advance what's *Wednesbury* unreasonable and what's not, then I wouldn't need the doctrine. It might sound paradoxical, but the doctrine is invaluable *because* it's indefinable.

### *E. Non-Reconsideration*

With this, Rex believes that his work is done. He draws a line under the list of the cases in which he'll reconsider, and begins to govern again. At first, things go well. Rex keeps his word: he does indeed reconsider in all the cases on his

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<sup>47</sup> Rule-consequentialists face a dilemma: a rule the adoption of which has the best consequences might prohibit an act which has the best consequences. If the act is right, then rule-consequentialism must be rejected. If the act is wrong, we seem to be engaged in ‘superstitious rule-worship’. JJC Smart, ‘Extreme and Restricted Utilitarianism’ in P Foot (ed), *Theories of Ethics* (OUP 1967), 177. See also Bratman, ‘Planning and Temptation’ (n 37) 304.

<sup>48</sup> See, e.g., P Craig, ‘The Nature of Reasonableness Review’ (2013) 66 *Current Legal Problems* 1.

<sup>49</sup> General norms, including general heuristics, are unavoidably over- and under-inclusive with respect to their underlying justifications. See, e.g., F Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (OUP 1991) ch 2; L Alexander and E Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke University Press 2001) ch 4.

list. As time goes on, though, it becomes clear that Rex is also reconsidering in cases that are *not* on his list. His subjects complain. “You’re only half done! We wanted you to reconsider when it’s rational to do so – and *only* when it’s rational to do so.” Chagrined, Rex takes out his list again, and makes a new entry. When he plans to do something – by making a promise, for example – and there’s no rational requirement to reconsider, then he’ll stick by his plan. Rex calls this the *legitimate expectations doctrine*, to the general confusion of his subjects.

#### F. Policy-Plan Coherence

As Rex’s reputation as a rational ruler spreads, people move to his kingdom. With more subjects, the demands on Rex grow. The pace of his planning can’t keep up. His subjects begin to bemoan the slow pace of government. Rex is hurt. “Don’t they know I’m planning for each little thing?”, he thinks to himself. “Don’t they know that quality takes time?” But then Rex realizes – he doesn’t have to plan for each occasion, if only he casts his plans in general terms. By creating policies he can settle what is to be done on multiple occasions at once. A new era of government is on the horizon. But, by now wise to the ways of planning, Rex knows that policies can’t stand on their own. To avoid incoherence, he must supplement policies with specific plans, a requirement he labels the *consistency doctrine*.

#### G. Reasonable Defeasibility

The introduction of policies is generally welcomed by Rex’s subjects. But it isn’t the panacea Rex had hoped for. If Rex is planning for lots of cases at once, then he can’t tailor his plans to the particulars of each case. A good policy will sometimes lead to a bad result. In such cases, the policy shouldn’t be applied, but it shouldn’t be reconsidered either. To get the best of both worlds, Rex decides to suspend a policy when it would clearly lead to a bad result. That way he’ll get a good policy *and* good results. Rex calls this requirement the *rule against rigid policies*.

#### H. Conclusion

At this point Rex has entries for when he should reconsider a plan and when he should retain it, and when he should suspend a policy and when he should apply it. (Rex’s list is produced on page 23.) Rex is mindful that the proper application of these grounds will depend on the context. Other things being equal: (a) the greater the stakes, the more willing Rex will be to reconsider a plan; (b) the greater the costs of deliberation, or the greater the disruption



from changing a plan, the less willing Rex will be to reconsider; and (c) the less reliable his present judgment is, the less willing Rex will be to reconsider. If Rex is very tired, for example, then he'll be less likely to reconsider a plan, even if he thinks it's obviously mistaken. If Rex knows that a huge amount depends on a decision, then he'll be more inclined to reconsider it, to make sure he gets it right.

Rex's work is finally done. Rex still makes mistakes, and he still reconsiders. But Rex knows his imperfections, and guards against them. While Rex's subjects continue to grumble, they admit that things in Rex's kingdom have gotten better. In these ways, Rex's kingdom is not so different from our own.

#### VIII. BRIDGING THE GAP

The moral of my just-so story is, of course, that there's a close fit between the grounds of review and the rational requirements of planning agency. I don't claim the fit is exact. There are differences, and I haven't tried to account for the internal details of the various grounds. Still, the similarity is striking.

Yet I want to demonstrate more than a similarity. I want to show that the nature of planning agency *explains* the grounds of review. If I'm going to do that, I'm going to have to bridge the gap between Rex and judicial review. In my telling of his story, Rex makes *plans* (or decisions, where a decision has a plan as its object). What's at issue in judicial review cases are specific and general *legal norms*. So I need for legal norms to be plans. Also, in his story, Rex plays all the parts – he makes an overall plan, fills it in, and reviews it. Judicial review isn't like that. Normally, the legislature makes a statute, which authorises officials to create rules and orders, which can be reviewed by a judge. There are three agents (or multi-agent bodies), not one. As a result, I need it to be true that plans can be developed by groups, and that the demands of planning agency apply to group-level plans. These two points have far-reaching implications. If legal norms are plans, and legal institutions produce plans, then we're committed to a certain way of thinking of law. Lastly, then, I need it to be the case that the law can be understood as an exercise in large-scale planning.

None of these points, especially the last one, are easy to show. If I had to argue for them myself, in the space I have here, my prospects would be very bleak. Fortunately the hard work has been done, by Scott Shapiro. Shapiro has drawn on Bratman's theory of individual planning to propose a "planning theory of law".<sup>50</sup> Shapiro's theory does everything I need it to. If the planning theory of law is on solid ground, then a planning theory of judicial review

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<sup>50</sup> S Shapiro, *Legality* (Harvard University Press 2011).

looks promising. I'll describe Shapiro's theory in the next section, before presenting my theory in Section X.

## IX. LAW

Shapiro develops his planning theory of law at length and in detail, and I can't summarise it fully here. For that reason, and because Shapiro's theory is well known, I'll focus on the points most relevant for my purposes, about massively shared agency and norms.<sup>51</sup>

### *A. Massively shared agency*

Bratman's theory of planning is about planning by individuals.<sup>52</sup> But it's not just individual who can have plans. Groups of individuals can share plans. Their plans play the same roles for the group as individual plans do for single agents: they control conduct, resist reconsideration, pose problems, filter other possible plans for consistency, and so on. If the members of a group share a plan, and follow through on it, then they act together and exercise "shared agency". If the group is very large, the result is "massively shared agency".

When does a group share a plan? Consider a plan to carry out activity *A*. According to Shapiro, a group shares that plan if two conditions are met. First, the plan was designed for the members of the group so that they can *A* by following it. It may have been the group as a whole which formulated the plan, a sub-group, or even a single individual. Second, most members of the group are committed to acting on the plan and engaging in *A* because they are so committed – in short, they accept the plan. To accept a plan, you needn't approve of the plan. You could accept it for selfish reasons, say, or because everyone else accepts it. Nor is it necessary to know the whole plan to accept it; it's enough to know your part, and to intend to let others do their parts.

Groups are subject to the requirements of "rational" planning agency, just as individuals are.<sup>53</sup> Shared plans should be coherent, consistent, and

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<sup>51</sup> In addition to *Legality* (n 50), this section draws heavily on two very helpful articles by D Plunkett: 'The Planning Theory of Law I' (2013) 8 *Philosophy Compass* 149 and 'The Planning Theory of Law II' (2013) 8 *Philosophy Compass* 159.

<sup>52</sup> Bratman later extended his theory to planning by small groups. See, especially, M Bratman, *Shared Agency* (OUP 2014). Bratman is clear that he is not making any claims about planning in large groups (at 8).

<sup>53</sup> Why the scare quotes? Rationality is about combinations of mental states (intentions, beliefs, etc.) of an agent. Groups are made up of multiple agents. So rationality doesn't speak

reasonably stable, so that the group can better achieve the ends of its plans, conserve deliberative resources, and avoid serious error. Who does the work of developing a shared plan, and of figuring out when it's rational to reconsider it? These are jobs for the members of the group. In large groups, the jobs will need to be divided amongst the members. The division of labour might itself be an element of the shared plan. The overall plan to *A* might task one member with the responsibility to develop subplans. It might task a different member with the responsibility to determine whether those subplans should be reconsidered. In such ways, an overall plan could govern its own supplementation and reconsideration.

### *B. Plans as Norms*

Massively shared agency is one building block of Shapiro's theory of law; another is the notion of plans as norms. A norm is a guide to conduct and a standard for evaluation of conduct.<sup>54</sup> Norms include rules, rules of thumb, principles, guidelines, recipes, orders, maxims, and so forth.<sup>55</sup> On this definition, plans are obviously norms. Plans guide conduct, by identifying 'courses of action that are required, permitted, or authorized under certain circumstances'<sup>56</sup>. We also use plans to assess conduct, for example, by criticising people for failing to do as they planned.

Plans have four distinctive features, which set them apart from other norms.<sup>57</sup> First, unlike norms of logic or morality, plans are positive. '[T]hey are created via adoption and sustained through acceptance'<sup>58</sup>. Second, unlike threats, plans typically have a partial, hierarchical, and nested structure. Third, also unlike threats, plans are conclusive. They settle what is to be done. They preempt deliberation on the merits. Finally, unlike customary norms, plans are purposive: they're produced by a process designed to create guides to conduct and standards for evaluation. These features of plans should be familiar – they're all spelled out, or implicit, in Bratman's theory of plans, as described in Section IV.

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to the combinations of the mental states across members of the group. The key issue for my purposes is whether a group which has a shared plan needs to live up to demands of coherence, consistency, and reasonable stability. And it does, for pragmatic reasons. So, for simplicity's sake, I'll use the term "rational requirements". If you object, feel free to substitute "pragmatically justified requirements".

<sup>54</sup> Shapiro (n 50) 41

<sup>55</sup> Shapiro (n 50) 41

<sup>56</sup> Shapiro (n 50) 127

<sup>57</sup> Shapiro (n 50) 128-9

<sup>58</sup> Shapiro (n 50) 128

### *C. The Planning Theory*

“Law” can refer to a set of institutions, as in “the law demands that you pay your taxes”. “Law” can also refer to a body of norms. Shapiro claims that legal institutions are planning institutions, and that legal norms are mostly plans. These claims together make up the core of the planning theory of law.

Greatly simplified, the theory goes like this. Groups want to do things together, and their shared life poses problems which must be overcome. These aims and obstacles necessitate norms for the group which are positive, conclusive, purposive, and structured – that is, they necessitate shared plans. When a group is small, shared plans might be developed informally, through consensus-building and the like. When a group becomes very large, planning becomes more difficult. Groups will need to resort to social planning institutions, meaning institutions which create, modify, and apply publicly accessible plans for the group.<sup>59</sup> When we look at our own societies, we see that the institutions we use to manage our lives together include legal institutions, like legislatures and courts. This fact provides a *prima facie* case for thinking of legal institutions as social planning institutions. Thus, it provides a *prima facie* case for thinking of law, in the institutional sense, as a planning body.<sup>60</sup>

If legal institutions are planning institutions, then it’s natural to think that they create and modify plans. No wonder, then, that legal norms share all of the distinctive features of plans.<sup>61</sup> Legal norms are created through adoption and sustained through acceptance. They purport to settle what is to be done. They tend to be produced in a process designed to create guides to conduct. In addition, legal norms often have a partial, hierarchical, nested structure. Think of a statute which introduces a regulatory scheme. The success of the scheme will depend on other norms: regulations and by-laws to fill in its details, and orders and decisions to implement its general provisions. The resulting mass of legal norms will be elaborate, layered, and densely interconnected – just like an overall plan and its accompanying subplans, means, and preliminary steps.

So legal institutions make plans. They are also the subject of a very special plan – the ‘master plan’ of the legal system.<sup>62</sup> The master plan is a plan shared amongst the officials of the system, which regulates planning for the community. One way the master plan regulates planning is by authorising legal institutions to create, change, apply, and enforce plans. The plans they produce are subplans of the system’s master plan. The master plan may also

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<sup>59</sup> Shapiro (n 50) 161ff.

<sup>60</sup> Plunkett, ‘The Planning Theory of Law I’ (n 51) 154.

<sup>61</sup> Shapiro (n 50) 195-202.

<sup>62</sup> Shapiro (n 50) 166, 177.

instruct officials to apply and enforce other sorts of norms, most importantly customary norms. Customary norms aren't created to guide conduct, as I said, but they have all of the other features of plans, so they're 'planlike'.<sup>63</sup> All of these norms together – the master plan, its subplans, and the planlike norms which officials apply and enforce pursuant to the master plan – are the law, in the sense of a body of norms.<sup>64</sup>

Drawing these points together, law in one sense is a planning institution, which develops and enforces plans for the community. Law in another sense is the complex set of plans produced and enforced by this institution. That's the planning theory, in outline. I haven't claimed that the planning theory is correct, and I've skipped past most of its claimed virtues over other theories of law. For my purposes it's enough that the planning theory is worth taking seriously.

## X. PLAN B

With the planning theory of law in place, let me set out my theory of judicial review. In the typical case, judicial review is review of a legal norm created by an official in the exercise of a statutory power. That's the sort of case I'll assume in what follows, but it's easy to extend what I say to other contexts.

Suppose Parliament wants to achieve some policy goal (*e.g.*, fewer dangerous dogs, cleaner canals and rivers). To that end, it sets out a new statutory scheme. Because Parliament is a large, deliberative body, it won't try to figure out all the details of the scheme. It lacks the time, resources, and expertise. Nor will it try to implement the scheme. It will leave both jobs to officials, whom it empowers for that purpose. Officials are given the responsibility to develop new, general norms (*e.g.*, regulations, by-laws). They're also tasked with making specific norms (*e.g.*, orders, decisions) to implement the general norms in the statute, regulations, etc. All of these legal norms are plans. Specifically, they are elements of an overall shared plan, designed to achieve a policy goal, to which Parliament and officials have both contributed.

There are good reasons for officials to plan for the community in these ways, and officials shouldn't abandon their plans for just any reason. It's often rational to retain a plan. But officials aren't perfect; they make mistakes; and it may be rational to reconsider a plan instead. Similarly, while it's often rational to apply a policy, suspension is sometimes called for. It's a question

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<sup>63</sup> Shapiro (n 50) 225

<sup>64</sup> Shapiro (n 50) 208.

of balance. Plans should be stable, but not *too* stable. Policies should be defeasible, but not *too* defeasible.

Who should review officials' plans to ensure their reasonable stability and defeasibility? This is a question *about* planning. It's also the subject of legal regulation and therefore the *subject of* planning. In practice, the law takes a cautious, two-track approach to the problem. It generally allows officials to reconsider or suspend a plan on their own initiative.<sup>65</sup> If a council refuses a license, but then realizes it made a mistake, it can change its mind, without needing prior approval. If the Home Office has a policy to refuse visa applications of a certain type, it can suspend that policy, of its own accord. Ideally officials would figure out for themselves how to live up to the requirements of planning agency. That's the law's "Plan A" for ensuring reasonable stability and defeasibility: officials are to determine when it is rational to reconsider, retain, suspend, or apply a plan.

However, just as officials aren't perfect planners, officials don't always know how to treat their plans after they've made them. The law therefore has a backup plan, a "Plan B", for ensuring reasonable stability and defeasibility: judges are to determine whether it's rational to reconsider, retain, suspend, or apply a plan, and to instruct officials accordingly. To execute the law's Plan B is to engage in judicial review. Thus:

*The Plan B Theory.* The grounds of judicial review are the grounds on which it is rational for an official to reconsider, retain, suspend, or apply a plan.

According to the Plan B theory, judicial review is a planned activity to supervise the planning of officials, in case they fail to do so adequately themselves. The grounds of review are the same grounds on which officials would, ideally, review their own decisions.

Why accept the Plan B theory? There are three reasons. The first and most important is its *explanatory power*. In Section II, I listed 10 major grounds of review. The Plan B theory can account for them all. If a plan involves an error of law (1), then it lacks legal authority, and it's impossible to execute. If a plan violates the purposes doctrine (2), then it is means-end incoherent. If an official made an error of fact (3), ignored a relevant factor (4), appeared to be biased (5), or did not hear from a person with something important to say (6), then thinking again might yield a much better plan. So, too, if a plan appears to be deeply unreasonable (7). In all these circumstances, reconsideration is rational. In any other circumstances, there is a legitimate expectation that the official will do as she planned, and retention is warranted (8). Meanwhile, if a policy isn't applied (9), it's normally an instance of policy-plan incoherence.

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<sup>65</sup> There are exceptions, of course, including for the doctrine of legitimate expectations.

On the other hand, rigid policies are also unacceptable (10): policies should be reasonably defeasible. The table below summarises these connections.

REX'S LIST

<i>Ground</i>	<i>Rationale</i>	<i>Category</i>
1. Error of law	Impossibility	Reconsideration
2. Purposes doctrine	Means-end coherence	
3. Error of fact 4. Relevancy 5. Bias 6. Fair hearing	Indirect pragmatic justification	
7. Wednesbury unreasonableness	Obvious “worth it” case	
8. Legitimate expectations	No rationale for reconsidering	Retention
9. Consistency doctrine	Policy-plan coherence	Application
10. Rule against rigid policies	Reasonable defeasibility	Suspension

The table is labelled “Rex’s List”, because it’s the list in Rex’s Story. His story explains in more detail the connections between the grounds of review and rationality.

The Plan B theory also helps explain what is *not* a ground of review. If I make a decision, then I shouldn’t choose whether to reconsider it by thinking about all the merits of the decision. That would pre-empt the choice whether to reconsider. As a general strategy, it would lead to uncertainty. Others wouldn’t be able to count on me, which would make it hard to coordinate with them. For the same pragmatic reasons – to reduce deliberation costs, avoid error, and promote finality – a judge shouldn’t decide whether an official should reconsider a plan by going over all of the merits of the plan. This has nothing to do with the fact that it’s a *judge* reviewing the decision. An official shouldn’t figure out whether to reconsider by mulling over all the merits of a plan either. No one in government should.

A good theory of judicial review would explain why judges treat judicial review as a legitimate activity. It needn’t justify the activity; there can be a good theory of a bad practice. But it does need to explain why judges sincerely

think judicial review is legitimate.<sup>66</sup> This is easy for the Plan B theory to do. There are reasons for officials to reconsider their plans, and reasons not to. Officials sometimes fail to conform to these reasons on their own. So, judges step in and ensure they do. Judicial review is a legitimate enterprise, because judges simply tell officials to do what they should have done anyway. Or so the thought goes. For judges to actually be useful in this way, they'd have to know what rationality requires. They'd need to be able to tell when a relevant consideration has been ignored, when an obvious error has occurred, and so on. I don't claim that judges are in fact able to do these things. It's plausible that judges *believe* they are, though, and that's enough for my purposes.

I said earlier that a good theory of the grounds of review would also have something to say about judicial review procedure. I'll focus on remedies, because they're one of the oldest parts of judicial review, long pre-dating most of the grounds of review. Suppose you apply for citizenship. The Home Office rejects your application. You make an application for judicial review – and win. What do you get? Suppose the answer is: citizenship. Then the Plan B theory would be in trouble. For I want to say that your success probably implies that the Home Office should reconsider your application. If a judge grants you citizenship (or orders the Home Office to do so), then the judge isn't allowing the Home Office to reconsider. There's no fit between the sort of unlawfulness (I say is) at issue and the remedy. But actually it's the other way around: remedies are one of the strongest points in favour of the Plan B theory. That's because you'd never get citizenship from a judge. What you'd get is almost certainly a quashing order, which would nullify the initial decision, and reopen the matter. The final decision will be made by the Home Office, not by a judge. None of this is special to citizenship applications, the Home Office, etc. It's all routine. '[T]he norm is for administrative action whose legality is successfully challenged to be the subject of a quashing order'<sup>67</sup>.

I said there were three reasons to accept the Plan B theory; the second is the theory's *parsimony*. The Plan B theory relies on just two big (albeit controversial) ideas: Bratman's general theory of planning agency, and Shapiro's planning theory of law. Indeed, parsimonious is something of an understatement. Since Section III, when I described the usual way of thinking about judicial review, I haven't mentioned the rule of law, the separation of

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<sup>66</sup> Here I'm adopting what Stephen Smith calls the 'moderate version' of the 'morality' desiderata for doctrinally-oriented theories: S Smith, *Contract Theory* (OUP, 2004) 18-24.

<sup>67</sup> M Elliott and J Varuhas, *Administrative Law: Text and Materials* (OUP 2016) 434. There are other remedies than quashing orders, of course. They, too, are consistent with the Plan B theory. Mandatory and prohibiting orders, for example, are excellent tools for ensuring that the circumstances necessitating reconsideration are corrected. They are also excellent ways of ensuring that, *e.g.*, policies are applied and plans are retained.



powers, comity, fairness, accountability, democracy, justice, dignity, or the abuse of power. If I'm right, then we don't need any of these principles or values to explain the general grounds of judicial review. There's a lot of slack to cut in the usual theory.

To be clear, these principles and values do still matter in judicial review. It's just that they matter to proper the application of the grounds of review in specific cases. For example, the *Wednesbury* doctrine says that a decision is unlawful if it's an obvious error. A decision might be obviously wrong if it's deeply at odds with the rule of law, say, or justice. The relevancy doctrine says that a decision is unlawful if the official ignored a relevant consideration. Democracy, dignity, and fairness are sources of relevant, important considerations, and potential triggers for the relevancy doctrine. It's not hard to think of other examples. These principles and values help explain the *application* of the grounds of review. What they don't explain is their *availability*.

The final virtue of the Plan B theory is its *fruitfulness*, meaning that it suggests new connections and new directions for research. I'll give three examples. First, as summarised in Rex's List, the Plan B theory includes a new typology of the grounds of review, and therefore a new way to understand the relations between the grounds. For example, bias, error of fact, and the fair hearing requirement aren't usually discussed together. As it turns out, they're all justified in broadly the same way. The relevancy and purposes doctrines are often treated together. However, it turns out they have quite different justifications. Indeed, the purposes doctrine is most closely related to the consistency doctrine, because both are based on a concern for coherence (with a statute, with a policy). My typology also identifies the outliers amongst the grounds. One outlier is legitimate expectations, which is the only ground about retention. That won't surprise anyone; the doctrine has attracted more attention than any other ground in recent years, partly because of its distinctiveness. But another outlier is the rule against rigid policies, which is the only ground about suspension. That is surprising, given the rule's almost complete neglect. It suggests the rule may be worth closer inspection.

Second, there is a long-running debate over whether to replace *Wednesbury* unreasonableness with proportionality, and the Plan B theory helps to explain the stakes of the debate. When constructing a theory of the grounds of review, we're looking for a theory that fits the facts. The closer the fit, the stronger the theory, other things being equal. *Wednesbury* is a pillar of the Plan B theory. By contrast, the Plan B theory can't easily explain proportionality. So, substituting proportionality for *Wednesbury* would doubly unsettle the basis for judicial review: it would remove a supporting fact, and introduce a discrepancy. Whether to swap *Wednesbury* for proportionality takes on an almost existential aspect. It forces to ask: what is judicial review for? What unites it? Why do we have it? Why *should* we have it? I don't claim that

defenders of *Wednesbury* assume the Plan B theory in full. Nor do I claim that we should retain *Wednesbury* and reject proportionality. My point is that the debate about *Wednesbury*'s future is heated partly because we can see that it's a proxy for a debate about the nature of judicial review.

The third implication, and the one that interests me most, is that a change in methodology in administrative law theory is in order. I haven't tried to explain administrative law with reference to constitutional law. I've looked instead to the nature of law and the nature of planning. Partly that's because I think that's where the answers are. But it's also because I wanted to show the potential for a wider-ranging approach to administrative law theory. Let's not return time and again to the rule of law or the separation of powers for inspiration. Let's not invoke amorphous concepts of abuse of power or good administration. Instead let's learn from the best thinking about agency, norms, rationality, collective action, social ontology, and institutional design, wherever they're found. I've sketched a theory of one part of judicial review based on ideas from philosophy. I hope it shows that a different kind of administrative law theory is worth doing. But all of the topics I've listed just now are studied and debated in political science, public policy, economics, psychology, and organisational theory, among other disciplines. They're all potential sources of insight for administrative law theorists.

In summary: Judges review decisions on grounds which closely track requirements of rational reconsideration, retention, application, and suspension. Judges don't review decisions on other grounds. The standard remedy in judicial review cases is an order returning a matter to an official. Judges seem to sincerely think that judicial review is a legitimate activity, which they would, if they were only asking officials to do what they should do anyway. We can explain all this using only two conceptual tools, already influential in the philosophy of action and the philosophy of law. And, once we do, we identify new relations among the grounds of review, and open up new lines of inquiry.