



The Planning Theory of Law II: The Nature of Legal Norms

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Abstract

This paper and its companion (“The Planning Theory of Law I: The Nature of Legal Institutions”) provide a general introduction to Scott Shapiro’s Planning Theory of Law as developed in his recent book *Legality*. The Planning Theory encompasses both an account of the nature of legal institutions and an account of the nature of legal norms. The first paper concerns the account of legal institutions. This paper concerns the account of legal norms.

1. Introduction

What is the nature of law? In the first article, “The Planning Theory of Law I: The Nature of Legal Institutions”, I explained the Planning Theory’s account of the nature of legal institutions (one thing that we mean by the word “law”). In broad terms, according to the Planning Theory, legal institutions are a particular type of group engaged in the activity of creating, applying, and enforcing social plans. In this paper, I will turn to the account of legal norms (another thing that we mean by the word “law”) that this account of legal institutions supports. Put together, these two accounts form the heart of the Planning Theory of Law’s account of the nature of law.

2. The Nature of Legal Norms

Shapiro (2011) argues that once one appreciates the force of the Planning Theory’s account of legal institutions, this supports (though does not strictly entail) the Planning Theory’s main thesis about the nature of legal norms. This thesis is that the legal norms in a given jurisdiction at a given time (what we will often refer to as the “laws” in a given jurisdiction at a given time) are those norms that are part of a shared plan that is applied and enforced by legal institutions, regardless of the moral merits of those norms and those institutions. If this is right, then given the Planning Theory’s account of what those institutions are – namely, planning organizations of a certain type – this suggests a fairly straightforward account of what those norms are.

To start with, planning organizations create, apply, and enforce *plans*. Thus, this suggests that many legal norms simply are plans. At the same time, however, a planning organization might apply and enforce norms that are not themselves created by the activity of planning, but which, nonetheless, allow that organization to accomplish the same sorts of things that plans allow it to accomplish. Consider, for instance, norms of custom. Shapiro argues that such norms are *like* plans in many important respects. These respects include the following: they are norms that “are sustained by human action” (Shapiro 140) and that “economize on deliberation costs, compensate for

cognitive incapacities, and organize behavior between participants” (Shapiro 140). In fact, Shapiro claims that norms of custom only differ from plans in one crucial respect: unlike plans, customs are not entities created through a process of planning in order to be norms that guide the activity of agents. As Shapiro puts it, “customs were not created *for the purpose* of settling questions about proper conduct but instead emerged spontaneously” (Shapiro 140). Shapiro uses the term *planlike* norms to refer to customs and other norms that, like plans, “are sustained by human action” (Shapiro 140) and that “economize on deliberation costs, compensate for cognitive incapacities, and organize behavior between participants” (Shapiro 140), but without being created by the activity of planning for the purpose of playing this role. In some cases, there simply is no need for a planning organization to create a new plan to accomplish a goal that it would normally need a plan to accomplish. Instead, when there are robust customary norms in place, the planning organization can simply plan to apply and enforce a customary norm that will allow it to accomplish its aims. As Shapiro puts it, shared plans “need not contain only plans but may incorporate planlike norms as well. These norms are part of a shared plan just in case they are accepted by the members of the group and are seen as specifying the means by which they are to engage in the shared activity” (Shapiro 140). Thus, insofar as a legal institution has a shared plan that incorporates planlike norms that are applied and enforced in much the same way that plans are, this suggests that some legal norms will be planlike norms (rather than plans).

Shapiro thinks that this theory of what legal norms are is not only suggestive but that it is in fact correct. Somewhat more precisely, his theory can be put as follows. To start with, Shapiro claims that “the fundamental rules of legal systems are plans” (Shapiro 119). The fundamental rules of any given legal system will include at least the following: a master plan that regulates the activity of social planning among officials. Such a master plan is a shared plan among the officials that allocates their rights, powers, and responsibilities in specific ways. Particular laws, such as laws against murder or specifying how to pay one’s taxes, are plans or planlike norms that these officials apply and enforce. When these laws are plans, these laws are essentially the subplans of the master plan made by an official (or group of officials) who that master plan authorizes to make plans of this sort. The total set of laws in a given legal system (at a given time) consists in the totality of the plans and planlike norms applied and enforced by those officials, regardless of any facts about moral merit.

3. *Why Accept the Planning Theory’s Account of Legal Norms?*

Why accept the Planning Theory’s account of legal norms? One important line of support stems from the deeply intuitive claim that whatever legal norms are, they are norms that bear an intimate link to legal institutions. To put it more precisely, we might try formulating that link as follows: legal norms are norms that are produced by or endorsed by legal institutions in a particular way (the “particular way” needs to be added to rule out accidental ways etc. in which those institutions produce norms).¹ Suppose that thesis is correct, and also that the Planning Theory’s account of legal institutions as planning institutions is correct. It then follows that we are under significant pressure to see legal norms as plans or planlike norms that are part of a shared plan.

This argument, however, is in no way decisive. Ultimately, the Planning Theory’s account of legal norms needs to rest on its overall explanatory power. In what follows, I will argue that there are a number of important features of legal norms (and intelligible ways that people can relate to them) that the Planning Theory does a good job of explaining. Many of these features are ones that other theories of law (e.g., H.L.A. Hart’s

account in *The Concept of Law* or Ronald Dworkin's account in *Law's Empire*)² can also do a good job of explaining. The strength of the Planning Theory rests on its ability to explain *all* of these features as part of a unified theory in a way that (at least arguably) is better than the competition. It is beyond the scope of this paper to address the relevant competing views with the care that they deserve, or to identify the full range of things that a theory of the nature of legal norms needs to be responsive to in the first place. Therefore, for my purposes here, I will simply attempt to demonstrate how this basic form of argument on behalf of the Planning Theory can be developed. I will do so by highlighting some of the most important features of legal norms (and our relationship to them) that I think the Planning Theory does a good job of explaining.

3.1. MORAL CRITICISM OF THE LAW

Recall the case of Maddy that I introduced at the start of the first article. In this case, Maddy, fueled by her frustration at the American government's inaction on issues surrounding global warming, is considering engaging in civil disobedience by not paying her taxes. Maddy's attitude here seems directly parallel to a set of attitudes that one might have to a plan: just as one can intelligibly think of not obeying a law based on moral reasons, so too can one intelligibly think of not following a plan based on moral reasons. Thus, thinking of laws in terms of plans smoothly explains the intelligibility of Maddy's thinking here – as well as the intelligibility of any actions she eventually takes that involve breaking the law. Furthermore, consider the fact that critical attitudes toward the law such as Maddy's seem not only intelligible, but often supported by the fact that certain laws *are* in fact immoral. Again, thinking of laws in terms of plans makes good sense of this: just as individual laws (or whole legal systems) can be deeply immoral, so too can plans (or whole systems of plans).

3.2. THE ACTION-GUIDING ROLE OF LAW

Although cases like Maddy's highlight that people can (and often do) intelligibly think of disobeying the law, it is also crucial to underscore that we often guide our activity by laws. More importantly, we often guide our actions by using the law without also thinking about whether the normative standards in the law are the right ones all-things-considered. Instead, we simply ask what is *legally* permitted, required, etc., and then guide our activity accordingly. In this way, laws are like plans. Once a plan is in place that we accept, or once a plan is in place that is enforced with threat of sanction, etc., we often simply ask about the content of the plan in order to guide our action. Indeed, as we saw in the first paper, it is a major part of why we adopt plans in the first place that they allow us to guide our action in this way. In turn, as we also saw in the first paper, this is what allows groups that engage in planning activity to accomplish complex ends (such as those ends pursued by modern governments) that would otherwise be quite difficult to accomplish.

3.3. THE IMPORTANCE OF LAWS MADE IN THE PAST

It is a crucial feature of the action-guiding role of law that people often care (to some degree) about laws in their legal system that were made in the past that appear to cover a current situation that they are in. So too do people often care (to some degree) about plans that they made in the past that seem to cover a current situation that they are in. In the case of plans, there is no great mystery about why this is so. This is because it follows

from one of the basic functions of plans, namely, to guide activity in future cases based on a plan that one adopts in the present.

3.4. NORMATIVE PRESSURE

People often feel a certain sort of normative (even if not moral) pressure to conform to laws that they accept. The same is true of plans. Given what plans are, there is a reason why this feeling of normative pressure in fact reflects a reality. As we saw in the first paper, it is a crucial feature of plans that plans *in fact* place normative pressures on those people that accept those plans, including pressures not to reconsider the plan without significant reason to do so. This is so even when the plans involved are immoral. For instance, suppose Henry has the immoral plan to steal money from his friend Josh by taking Josh's money in his wallet and then replacing the money with counterfeit bills. Once the plan is in place, Henry is under normative pressure (of a thin, minimal sort) to actually put the counterfeit bills in Josh's wallet in order to avoid getting caught, even though this is in the service of an immoral end.

3.5. DIFFERENT TYPES OF LEGAL NORMS

Some laws tell us what we must and must not do (e.g., much of criminal law). Other laws tell us what to do *if* we want to accomplish certain ends (some of which might not have been possible prior to the laws being in place).³ For instance, much of contract law and property law consists of such laws. Plans can come in both varieties as well. On the one hand, plans can tell us what to do or what not to do *regardless* of the aims we have. On the other hand, plans can tell us what to do *if* we want to accomplish certain ends.

3.6. DIFFERENT TYPES OF LEGAL SYSTEMS

Existing legal systems differ from each other in many ways. Many of the important differences here make good sense on the Planning Theory. For instance, laws can be created in very different ways in different legal systems (e.g., consider systems that fundamentally revolve around common law vs. those that do not). Plans can be created in many different ways as well, and, moreover, ways that closely resemble some of the different ways in which laws are created. For instance, a group can engage in what Shapiro calls "top-town planning" (Shapiro 124), wherein the group begins with an end goal that structures a plan and then fills out the subplans based on that goal. Alternatively, a group can engage in what Shapiro calls "bottom-up planning" (Shapiro 124), wherein a group begins with a bunch of different small plans and then works out how these plans might be integrated into one bigger plan as different subparts of that new plan. Or, to take another important example, consider that a legal system can be more or less determinate along a range of different dimensions. The same is true of plans. In some cases, a group will have plans that include highly specific instructions about what to do in a whole range of possible scenarios. In contrast, another group might only have a few plans that involve only a limited number of possible scenarios.

3.7. THE INCREMENTAL NATURE OF THE CREATION OF LAW

One of the crucial features of systems of legal norms is that, whether they are made using top-town planning or bottom-up planning, they are usually created incrementally. Some

plans are made all at once. Yet there are certain types of plans that we would naturally expect to be made incrementally, including, crucially, plans made for large groups of people confronting a range of different (and changing) problems that are often highly complex and contentious. Thus, thinking of laws in terms of plans offers a good explanation for the incremental nature of the creation of law.

3.8. THE DIVERSITY OF REASONS THAT PEOPLE FOLLOW THE LAW

Different people can follow the very same law based on very different rationales for doing so. We find these rationales intelligible, even when we recognize that many of them might be based on badly mistaken normative views or non-normative factual errors. Some might think that the reason to follow the law is because it is a good solution to a practical problem that the community faces, others because it is what follows from the truths of morality, others because of religious beliefs wherein that plan has come to take on religious significance, and others because of fear of being harmed by those that are enforcing the law. The same basic story holds in the case of plans. That is: different people can follow the very same plan based on very different rationales, rationales that are intelligible (even if badly mistaken).

3.9. THE DIVERSITY OF WAYS IN WHICH LEGAL OFFICIALS RELATE TO THE LAW

Legal officials whose job it is to enforce the law can (and do) view their job in very different ways. Some might be deeply alienated from their job or exhibit a high degree of skepticism about the value of the legal institution that they are a part of. Others in the very same legal institution might think of their job as stemming from a moral obligation to defend laws that they think of as fundamentally moral. Thus, legal officials can have very different attitudes to the same exact laws. The same is true of the attitudes different people can have to the same exact shared plan that they are participating in.

3.10. LEGAL REASONING AND LEGAL INTERPRETATION

When people engage in debates about what the law is (in a given jurisdiction at a given time), here are three sorts of facts that they often appeal to: (a) facts about what the purpose of the law in question is; (b) facts about what certain legal texts *mean*; and (c) facts about the relationships of trust and distrust that exist between legislatures, courts, citizens, etc. Suppose that a large group has a shared plan, and also that certain important members of that group have written down in a text part of what they take that plan to be. Suppose that one wants to figure out what that plan is, or what it requires for a certain case at hand. The sorts of facts that it would make sense for that person engaged in legal reasoning to consider include at least the following three things: (a) facts about the purpose of the overall plan (as well as a given subplan or subplans that are part of that overall plan); (b) facts about what the text means that was meant to encode part of what the group took the plan to be; and (c) facts about the relationships of trust and distrust that exist among the planners and the people they are planning for. Thus, the Planning Theory does a good job of accounting for why certain facts are appealed to in debates about what the law is (in a given jurisdiction at a given time). Moreover, the Planning Theory does a good job of accommodating the fact that judges (or other people) sometimes sharply disagree with each other about what the law is in a given jurisdiction (at a given time) in a way that seems conceptually coherent as debate about what the law *is* (and, hence, not just conceptually coherent as veiled debate

about what the law ought to be). People involved in a shared plan can sharply disagree with each other about what shared plan they have – and, moreover, they can do so for non-disingenuous reasons (i.e., not because they simply are trying to change the plan to something else). This follows from the fact that it is *not* a precondition on a group of agents having a plan with such-and-such specific content that those agents all share the same view of what the plan is. Many of those agents might be mistaken in their view about what the plan is, and, indeed, many of them might not have any view at all.

3.II. THE INDIVIDUATION OF LEGAL SYSTEMS

Some legal norms are part of the American legal system, others are part of the French legal system, etc. Any viable account of the nature of legal norms needs a way of explaining this fact. This means that any viable account of the nature of legal norms needs an account of the individuation of systems of legal norms. The Planning Theory provides such an account by starting with an explanation of what makes it the case that legal officials are participating in the same planning activity – namely, by following a master plan that regulates the activity of social planning among those officials. As we have seen, according to the Planning Theory, the laws of a given legal system are the plans or planlike norms that these officials apply and enforce. Thus, on the Planning Theory, there is a clean explanation of where one system of legal norms starts and stops: namely, this fact is explained by which norms are among the plans and planlike norms that are applied and enforced by a group of legal officials following a specific master plan.

4. *The Planning Theory as a Form of Legal Positivism*

One of Shapiro's central ambitions in *Legality* is to vindicate a form of *legal positivism*. Therefore, before concluding, it is worth briefly explaining what this means for Shapiro and why the Planning Theory arguably makes good on this ambition.

According to one group of theories in the philosophy of law, legal norms are a species of moral norms, or at least are partly grounded in moral norms. This thesis leads to *legal antipositivism*, which, for the purposes of this paper, we can take to be the thesis that the total set of legal norms that obtain in a given jurisdiction (at a given time) – what we can refer to as *the content of the law* or, equivalently, *legal content* – is ultimately grounded partly in moral facts.⁴ An example of an antipositivist view is Ronald Dworkin's theory in *Law's Empire*, according to which (roughly) the law consists in the set of moral principles that best justify the total set of legal practices in a society. Another example of an antipositivist view is that the law consists in social rules created by legal institutions (legislatures, courts, etc.) that meet a certain standard of justice, such that the only norms that count as *legal* ones are those that meet a given moral standard.⁵ In contrast to such views, according to another group of theories in the philosophy of law, legal norms are not identical to moral norms, nor are they ultimately grounded partly in moral norms. This thesis leads to *legal positivism*, which, for the purposes of this paper, we can take to be the thesis that the content of the law is not ultimately grounded in moral facts, but rather solely in social facts – roughly, descriptive facts about people's actions, utterances, and psychology of the sort that are the subject matter of the social sciences. An example of a positivist view is the claim that legal content consists in norms of convention, norms that are grounded in social facts about expectations of mutual compliance rather than in moral facts.⁶

Contemporary antipositivists and positivists agree that social facts are among the ultimate grounds of law. And it is hard to see how that could not be so – for instance, surely

part of the reason that Americans are legally required to pay annual taxes by April 15 (as opposed to say, February 18) has to do with facts about what certain agents within the legislature have said and done. The question that divides contemporary antipositivists and positivists is whether moral facts are *also* among the ultimate grounds of law.⁷

With this account of the contrast between legal antipositivism and legal positivism on the table, we can now see the basic reason why Shapiro takes the Planning Theory to be a vindication of legal positivism. According to legal positivism, the content of the law is ultimately grounded in social facts, and not in moral facts. On the Planning Theory, legal norms are plans or planlike norms. On the theory of plans (and planlike norms) that Shapiro thinks that we should accept – and, indeed, that he thinks almost all of us already accept – it is the case that which plans a given agent has does not depend on moral facts. Instead, it depends on facts about that agent's mental states, perhaps in combination with certain external facts about her environment and social setting (if certain forms of externalism about content are true) and/or certain non-moral normative facts (if certain views about the so-called “normativity of meaning” turn out to be true). On Shapiro's view of shared plans that I covered in the first paper, it is also the case that which plans (and planlike norms) a group has also depends only on such facts. For Shapiro, this claim holds true for all organizations (including legal institutions), just as much as it does for any other group that might engage in planning. Therefore, coupled with the further thesis that the legal norms are *all* of the plans and planlike norms applied and enforced by a legal institution (or at least some set of them that is not selected for based on moral facts), the Planning Theory delivers a positivist theory of legal content.

On this front about positivism, it is worth emphasizing an important feature of how Shapiro thinks that plans can be re-described using certain moral concepts. It is an intuitive thought that part of the content of the law includes such things as legal obligations, legal duties, legal rights, and legal permissions. We might put the thought like this: however the law guides conduct through the production of norms, we are fairly confident that the law includes such things as legal obligations, legal duties, legal rights, and legal permissions. It therefore seems like a relatively theoretically neutral way of putting things to hold that, as Mark Greenberg puts it, “the content of the law in a given legal system (at a given time) consists at least of all of the general legal obligations, rights, privileges, and powers that exist in the legal system (at that time)” (Greenberg 40). This sort of thought is echoed by Shapiro, who, for instance, claims that legal authority “entails the ability to impose legal obligations or confer legal rights” (Shapiro 182). But, how, one might ask, can this be true if the legal norms that compose legal content are *plans*? How can plans generate duties, rights, and obligations? On the face of it, such things look to be distinctively *moral* entities, whereas plans are not. Moreover, we can easily point to many instances where a group of people have a shared plan where this doesn't in fact generate any genuine obligations or rights. Shapiro's response to this issue – unlike certain positivist responses – grants that when people describe the law they can (and often do) employ distinctively moral concepts, where, for instance, the sense of “obligation” in “legal obligation” is the same as in “moral obligation.” But he denies that legal obligations are in fact actual obligations, which he thinks moral obligations are. This claim rests on a thesis about how plans can be re-described using certain concepts, a thesis which owes much to the work of Joseph Raz.⁸

To see roughly how Shapiro's theory here is supposed to work, start with the broadly Razian idea of the “legal point of view,” which is roughly the point of view according to which the law is actually fully morally legitimate. Shapiro's claim is that when we say that someone is “legally obligated to ϕ ” (in light of what they call a “legal obligation” to

ϕ) this “need not commit the asserter to affirming that one is really obligated to perform that action, that is, that one has a moral obligation to perform that action. The statement may be understood to mean only that from the legal point of view one is (morally) obligated to perform that action” (Shapiro 185). On this view of the meaning of the term “legal obligation,” talk of “legal obligation” is simply one particular way of re-describing the content of the shared plans of specific legal institutions. If this is right, then Shapiro is correct that the Planning Theory can show how legal obligations (as well as legal rights, duties, etc.) are grounded in social facts alone. This is because talk of “legal obligations” ultimately amounts to just a particular way of re-describing plans.

Before moving on, there is one final important point that should be emphasized about the relationship between the Planning Theory and legal positivism. This is that the Planning Theory (at least as Shapiro develops it) delivers not only a version of legal positivism, but, moreover, a form of what is known as *exclusive legal positivism*. All positivists agree that moral norms are never part of the ultimate grounds of legal content. In basic terms, the issue that divides inclusive and exclusive legal positivists is whether or not moral norms can be part of the content of the law in virtue of further social facts. In rough terms, according to so-called “inclusive legal positivists,” the content of the law can include moral norms when there is a further specific social fact that explains why those moral norms are part of the law. For instance, it would be an example of an inclusive legal positivist view to hold that the content of the law can include a moral norm about justice given the social fact that people have created a rule that includes certain statements about justice. In contrast, according to so-called “exclusive legal positivism,” the content of the law can never include moral norms. Shapiro argues that the Planning Theory yields a version of exclusive legal positivism due to what he calls the “General Logic of Planning” (Shapiro 311). This argument can be summed up as follows. It is part of the logic of what planning *is* that it is activity that is aimed at guiding the activity of agents in such a way that obviates the need to deliberate about the all-things-considered merits of a future activity when the time comes to perform that activity. If part of a plan consisted of moral norms, then, given a common understanding of what moral norms *are* (namely, norms that concern the all-things-considered merits of an action), then this sort of all-things-considered reasoning is precisely the sort of reasoning one would need to do in order to figure out what a plan is. That, however, would undercut the very reason for having a plan in the first place. Thus, claims Shapiro, plans (whether part of the law or not) cannot include moral norms as part of their content. Hence, a form of exclusive legal positivism is true.

It should be emphasized that this does not mean that the Planning Theory rules out the idea that plans can include plans to apply moral norms. For instance, consider the plan that Jeff might adopt on New Year’s Eve to be a good boyfriend to his girlfriend Julia over the next year. In such a case, Jeff has a plan that includes a plan to apply non-planlike norms – namely, moral norms that regulate relationships. Yet this does not mean that these moral norms are part of his plan – any more, for instance, than Tom’s plan to speak more grammatically next year includes all the norms of grammar.⁹ Of course, Jeff might flesh out his plan by coming up with a more specific understanding of things he could do to be a good boyfriend – e.g., taking Julia out to more Boston Celtics basketball games (Julia loves professional sports). However, if Jeff fleshes out his plan in this way, these things will be subplans of Jeff’s plan in virtue of a social fact about Jeff, rather than because of moral facts about what being a good boyfriend consists in. To see that this is so, suppose that Jeff is wrong about what it would be to be a good boyfriend to Julia. Suppose, for instance, that Jeff thinks it would be good to give Julia lots of Rolling Stones albums because he thinks that they are a great band. He therefore adopts a plan to

buy her ten new Rolling Stones albums. However, it turns out that Julia hates the Rolling Stones and resents Jeff when he tries to impose his musical tastes on her. In such a case, Jeff's plan would still include the subplan to buy Rolling Stones albums, despite the fact that it is not the thing that Jeff should do in order to be a good boyfriend.

5. Conclusion

In this paper and its companion ("The Planning Theory of Law I: The Nature of Legal Institutions"), I have sought to provide a general introduction to Scott Shapiro's Planning Theory of Law as developed in his recent book *Legality*. The first paper concerned the Planning Theory's account of the nature of legal institutions. This paper concerned the Planning Theory's account of legal norms. My aim in these papers has been to introduce the core claims of the Planning Theory in a systematic way that will help provide a solid foundation from which to argue about whether or not some version of the Planning Theory can be made to work. In order to help frame that downstream discussion about the merits of the Planning Theory, I now want to flag some of the most important issues that need to be addressed:

1. Shapiro's way of developing the Planning Theory in *Legality* rests heavily on a certain theory of plans. Much of the plausibility of the Planning Theory rests on certain aspects of that theory of plans: for instance, a view about what conditions are (and are not) necessary for a large group of people to be involved in carrying out a shared plan. Thus, it is crucial to ask: does the Planning Theory rest on the right theory of plans? Or that of shared plans in particular? Similarly, we can ask: does the Planning Theory rest on the right theory of those norms (such as norms of custom) that Shapiro calls "planlike norms"?
2. Can proponents of the Planning Theory deal with various well-known criticisms of legal positivism in general?
3. At least intuitively, domestic and international law look to be closely related things, even if they differ in very significant ways. Thus, it would be good if a theory of the nature of law such as the Planning Theory had something to say about international as well as domestic law. Unfortunately, when directly applied to the case of international law, the Planning Theory does not appear to work. Can the Planning Theory be developed as part of a broader theory that makes sense of the nature of both international and domestic law?
4. Shapiro's argument for The Planning Theory's account of the nature of legal institutions is centered around the claim that planning activity is the core of the exercise of legal authority (which Shapiro calls "legal activity" (Shapiro 195)). This raises two questions. The first is whether or not understanding what is involved in the exercise of legal authority is in fact a good way to understand the core of what legal institutions themselves are. Shapiro can argue that it is a platitude that defines his subject matter of investigation that the exercise of legal authority (whatever that amounts to) *is* central to what legal institutions do and hence are. But if one has substantive commitments about what authority in general is – and one also thinks that legal authority, whatever it is, is a species of genuine authority – then one might worry that Shapiro's claim here is either false or else an unhelpful way of identifying the subject matter of investigation. This leads to the second question. This is whether or not the account of legal authority that Shapiro develops sits well with our best overall account of what authority is, and what sort of authority the law (or legal officials) claim.
5. Are the philosophical methods, tools, and categories that Shapiro uses in developing the Planning Theory ones that we should accept? For instance, is the sort of method of conceptual analysis that Shapiro employs in *Legality* one that makes sense for studying the nature of social institutions such as legal institutions?

6. Does the Planning Theory really do a better job than competing proposals at explaining important legal phenomena? For instance, what sort of developed accounts of legal interpretation, legal argument, and legal disagreements can it give and how do these accounts compare to those developed by competing accounts?
7. Does the Planning Theory make legal activity appear more deliberate and intentional than it actually is in practice? Somewhat more specifically, can it adequately account for the accidental ways in which law is sometimes made?¹⁰
8. In endorsing the Moral Aim Thesis, Shapiro is making a significant departure from other leading legal positivists such as Hart and Raz. Shapiro claims that this departure is necessary to explain crucial features of how we think about and relate to the law. However, it is also not entirely clear what it means for the shared activity of agents to aim at a moral end if those agents themselves do not individually have intentions to achieve moral goals, and if the group itself cannot be said to have some sort of “collective intention” with a moral goal. Nor is it entirely clear how the Moral Aim Thesis fits with some of the core motivations that have led people to embrace legal positivism in the first place, including the idea that law is a morally neutral tool that can be used for a wide variety of human ends. Can Shapiro answer these concerns? Or is the Planning Theory perhaps best developed without the Moral Aim Thesis?¹¹

Almost all of these issues are ones that Shapiro has addressed to some degree in *Legality* or elsewhere. Indeed, Shapiro has a lot to say about many of these issues: for instance, much of the final chapters of *Legality* are devoted to developing systematic accounts of legal interpretation, legal argument, and legal disagreements. The Planning Theory is still, however, a relatively new theory with much room to be more fully explored and developed further, and many of these above issues are likely to only be pushed in a more critical fashion the more attention the theory gets. Whether the Planning Theory can be made to work therefore remains very much an open question. Even if it cannot, given the richness of Shapiro’s comparison of legal activity to planning activity, and of plans to laws, I think that it is likely that exploring exactly where the Planning Theory goes wrong is likely to illuminate many of the foundational issues in the philosophy of law. It is thus, I think, a systematic theory of the nature of law that deserves serious critical attention in the years to come.

Short Biography

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Notes

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¹ I discuss this thesis at greater length in Plunkett (2012).

² See Hart (1994) and Dworkin (1986).

³ This is essentially the distinction that Hart famously marks in *The Concept of Law* between “duty-imposing” and “power-conferring” rules. See Hart (1994).

⁴ I here draw heavily on the formulation given by Mark Greenberg. See Greenberg (2011). For discussion of Greenberg’s formulation, see Plunkett (2012).

⁵ This is a version of the so-called “Radbruch Formula,” named after Gustav Radbruch. See Radbruch (2006).

⁶ This idea is one way of developing H.L.A. Hart’s extremely influential positivist theory of law that he put forward in *The Concept of Law*. See Hart (1994). For an instance of this way of developing a Hartian theory, see Postema (1982).

⁷ For discussion of the nature of legal antipositivism and legal antipositivism – as well as some reservations about the way the debate between the two views is set up on this broadly Greenberg-style way of proceeding – see Plunkett (2012).

⁸ See Raz (2002).

⁹ See Raz (1972). Shapiro discusses this point in *Legality* at 272.

¹⁰ Thanks to Leslie Green for first suggesting this concern to me in conversation.

¹¹ I develop further thoughts on the relationship between legal positivism and Shapiro’s Moral Aim Thesis in Plunkett (forthcoming). I there argue that legal positivists are likely better off without The Moral Aim Thesis. I also propose a thesis to take the place of the Moral Aim Thesis. The result is an alternative vision for how best to develop the Planning Theory of Law.

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