

**Shapiro's Planning Theory of Law (a review of Scott Shapiro, *Legality* (Harvard University Press, 2010))**

(References to *Great Debates in Jurisprudence* are written as 'GDJ, x')

In his recent book, *Legality*, Scott Shapiro offers a new<sup>1</sup> theory of law's nature. His basic claim is this: laws are plans for living together and legal systems are institutions that create certain kinds of plan for societies to follow. He also makes a further claim: the kind of planning which legal systems do has a particular *moral* aim: the aim of solving moral problems which cannot be solved without law. So laws are plans created by planning institutions with a specific moral aim.

To explain all of this, it will be helpful first to consider what Shapiro means by a 'plan', then to look at his arguments for the view that laws are plans, and finally we'll consider his claim that law is a planning system with a particular moral aim.

## I. PLANS

What does Shapiro mean by a 'plan'? The basic notion of a plan, for him, is the same as the ordinary, everyday, one: the one we have in mind when we say things like 'I plan to have lunch at 1pm' or 'I plan to travel the world'. More formally, however, he states that plans are things that 'require, permit, or authorize agents to act, or not act in certain ways under certain conditions' which we create by adopting, settling upon, or accepting them.<sup>2</sup> So plans are guides to conduct which are created by us through our adopting them.

Shapiro draws attention to a variety of features of plans and planning. Each of these plays some role in his argument that laws are plans and legal systems planning organisations:

- (a) *Partiality*. Planning typically involves creating *partial* or *incomplete* plans. If I plan to go to the cinema tonight, my plan might not specify which film I will see.<sup>3</sup>
- (b) *Nested structure*. Because plans are often partial and incomplete, we often make 'sub-plans' to fill in the details of our bigger overall plan. So if I plan to go to the cinema tonight, this might give rise to a sub-plan to take a taxi to the cinema or to meet my friend there. So abstract plans can rise to lots of more

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<sup>1</sup> Not entirely new, however. John Finnis has also written that laws are plans: 'Law is a kind of ongoing plan for the common good, and to take seriously the moral reality that the bulk of the law consists of determinations – because true moral principles under-determine what individuals and societies should choose and do – is to accept that a law's initial and presumptively decisive existence is as an adopted plan in the mind, the expressed intention, of the law-maker': Finnis, *Collected Essays, Volume IV: Philosophy of Law*, 12.

<sup>2</sup> *Legality*, 127. See below for a query as to whether this really does represent the ordinary notion of what a plan is.

<sup>3</sup> *Legality*, 120-121.

detailed sub-plans. In this way, plans often have a nested structure: abstract plans at the top of the structure, more detailed ones further down.<sup>4</sup>

- (c) *Planning has its own inner rationality (or ‘rational constraints’)*. Suppose I settle on the plan of going to the cinema tonight, but I think about it no further, I make no sub-plans about how I am going to get to the cinema or when I will leave etc. There is, Shapiro says, something irrational about this. If I commit myself to some plan, rationality demands that I ‘flesh out’ this plan (or get someone else to help me do so). In fact, there are a number of these ‘rules’ or ‘rational constraints’ involved once you engage in planning:<sup>5</sup>
- a. *Plans need to be fleshed out.* As described, if you plan, rationality requires you to think about the means by which you could fulfil your plans.
  - b. *Plans need to be consistent.* According Shapiro, ‘[d]esires may conflict, but plans must not’. There is nothing irrational about *wanting* to lose weight *and wanting* chocolate cake, but there is something irrational about *planning* to go on a no-dessert diet and *planning* to order desert.
  - c. *Plans must be reasonably resistant to reconsideration.* If we constantly reconsidered our plans, there would be little point in planning. If I settle on the plan to go the cinema tonight, having thought about the pros and cons of going tonight, and then a second later, ‘re-open’ the planning process, there was little point in my earlier planning. This doesn’t mean that our plans must be set in stone. It just means that when we settle on a plan, the fact that we have gives us *some* reason to stick to it.<sup>6</sup>
- (d) *Plans are created to guide conduct.*<sup>7</sup> Two points here. First, plans are guides to conduct which are *created*. Unlike, say, the rules of logic, plans are things we adopt, settle on, create. They don’t just ‘exist’ regardless. Second, plans are created specifically to guide conduct: they are created with the purpose of guiding conduct. Some guides to conduct are not like this. Consider the custom that people should make a wish before blowing out the candles on their birthday cake. This guide to conduct was not created specifically to guide conduct. It probably just emerged spontaneously over time.
- (e) *The content of a plan can be determined independently of the reasons for and against adopting the plan.* Plans purport to *settle* questions about how to act and guide our conduct. Part of the point of plans is to allow us a mental space, if you like, where we are not constantly deliberating and re-deliberating about what to do (for human beings with finite lives endless deliberation is excessively costly): the matter is settled. But this point would be frustrated if

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<sup>4</sup> *Legality*, 121-122.

<sup>5</sup> *Legality*, 122-124.

<sup>6</sup> *Legality*, 124.

<sup>7</sup> *Legality*, 128.

we had to re-open, and deliberate over, our reasons for adopting the plan in the first place in order to know what the plan is.<sup>8</sup>

- (f) *Plans can be used as guides to conduct by different people.* If I say to you that I plan to go the cinema tonight and take the number 2 bus to get there, it would be apt for you to point out that the number 2 bus does not go past the cinema. Here you have used my plan to guide my conduct. So plans can be used by different people (not simply those who create the plans) to guide conduct.
- (g) *Planning can be bottom-up or top-down.* Top-down planning, the planner starts with some overall goal in mind, and breaks that goal down into smaller component tasks (sub-plans), and then refines each of those tasks into more concrete details. By contrast, bottom-up planning begins with a vague sense of some goals to be achieved, but the plans focus upon lower-level tasks first, before then forming larger-plans once the details of those tasks have been worked. Suppose I plan to build a house. I might find a picture on the internet of my ideal home, employ an architect to design a similar one, then employ various other people – builders, engineers, lawyers – to assist with the building process. That is a top-down mode of planning. By contrast, I might have a plan to build a house but only have a very rough idea of what sort of house I would like. Perhaps I focus upon choosing the kind of bricks first, then plan a time-frame for the building process, and only then begin to think about larger questions about the house such as its location, architectural style and so on.
- (h) *Plans can be shared by groups.* Quite straightforwardly, people can *share* a plan. If you and I agree to go the cinema together tonight, we share a plan to do so.
- (i) *Shared plans coordinate behaviour more efficiently than improvisation, especially where ‘complex, contentious, and arbitrary’ problems are encountered.* If we are doing some activity as a group, it will sometimes be the case that we want to allow complete, or almost complete, *improvisation* – having no plans – in order to achieve the activity’s goals. So most jazz allows considerable room for improvisation – arguably one would not be playing jazz in a core sense if one did not allow for some amount of improvisation. But in other contexts, improvisation would be deeply inefficient, and potentially chaotic. Shapiro suggests that we are likely to face considerable problems in coordinating our behaviour effectively on a purely improvised basis in three types of situation:
- a. *Complex activities.* Where a group activity is complex, it demands significant knowledge and skill and is mentally taxing. Without a shared plan for the activity, participants are likely to (1) distrust their own judgments or (ii) distrust the judgments of other participants.

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<sup>8</sup> *Legality*, 128-129.

Plans ‘compensate for this lack of trust by greatly simplifying the decision-making procedure’.<sup>9</sup>

- b. *Contentious activities*. An activity might be contentious because of its complexity or because members of the group have different preferences or values. Disputes are likely to arise unless these points of contention have been resolved (at least, in part) in advance.
  - c. *Arbitrary aspects of activities*. The choice of whether to drive on the left or the right is an arbitrary one. All that matters is that some rule – or plan – is adopted so that people know how others will behave. Where we are faced with such arbitrary choices, the behaviour of others will be difficult to predict. Hence the particular need for some plan to settle the matter.
- (j) *The costs of planning can be reduced by adopting policies, customs, hierarchies*. The circumstances which give rise to the need for planning – complexity, contentiousness, and arbitrariness – can also make plans costly to produce. In contentious contexts, it is likely that it will be expensive to create plans through deliberation and negotiation in advance. However, these costs can be reduced in various ways:
- a. *Policies*. Policies are ‘general plans’.<sup>10</sup> Suppose that we run a cooking club (this is Shapiro’s example) which cooks different recipes every week. We might agree to follow the recipes set out in Wednesday edition of the *New York Times*. By adopting this ‘policy’, we would avoid time-consuming deliberations each week as to what recipe to cook.
  - b. *Customs*. The development of customs reduces planning costs. If our cooking club has met at a different member’s house each week for the past year, a custom might develop according to which the members treat this pattern as a guide to what should happen. Again, this reduces the costs of deliberations. Shapiro does not, it should be noted, designate ‘customs’ as *plans*. This is because customs are not created *for the purpose* of settling questions about proper conduct, but rather emerge ‘spontaneously’. They are, however, ‘plan-like’ in so far as they perform similar tasks to plans – economizing on deliberation costs in complex/contentious/arbitrary contexts.
  - c. *Hierarchies*. It may be that the meetings of our cooking club still give rise to too many controversies about how the recipes are to be cooked each week. It may be that too many cooks are spoiling the broth. If so, it may be advantageous to appoint a ‘head chef’, who is ‘able to plan the shared activity without having to worry about winning an argument, striking a deal, or forging a consensus’. If we do this, we have adopted a plan whereby another person creates plans for us to follow. In this way, plans can be what Shapiro calls ‘self-regulating’ – they can regulate the manner of their creation and application.
- (k) *Plans come in different kinds*. Some plans directly require action. Suppose a company adopts a policy requiring employees to wear gloves when handling

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<sup>9</sup> *Legality*, 133.

<sup>10</sup> *Legality*, 139.

chemicals. Shapiro calls these ‘directives’. Some plans, however, regulate *plans*. For example, we might have a plan which entrusts certain individuals to modify, supplement or apply our original plan – we might set up a company which allows a particular director to create new codes of conduct for company officers or we might grant powers to managers in a company to determine whether the company’s code of conduct has been breached by an employee. So there can be *plans about plans*. Shapiro calls plans which specify *who* is to plan ‘authorisations’ and plans which specify *how* to plan as ‘instructions, stipulations and factorisations’.<sup>11</sup> *Instructions* specify the procedure which people who authorised to exercise planning powers must use – for example, a company manager must give an employee an opportunity to respond to allegations of misconduct before determining whether misconduct has taken place. *Stipulations* require people to treat certain things as true for the purpose of applying a plan. For example, employees might be required to take the view that the customer is always right for the purposes of carrying out the company’s customer service plan. Finally, *factorisations* specify the factors that should be taken into account when planning how to act. Company directors might issue a factorisation which requires managers to be cost-conscious when adopting new policies.

- (1) *Plans are created by processes that dispose people to conform to them.* The point here is that if I plan to go the cinema tonight, I am *disposed* to go the cinema, which means that – under normal circumstances, I will go. By contrast, if a madman ‘plans’ that the US army will be removed from Iraq, Shapiro says that there is no plan that the US army will be removed from Iraq, because ‘the madman’s decisions have absolutely no effect on troop movements’.<sup>12</sup> The US army is not generally disposed to conform to whatever a madman settles on. (Arguably.)

## II. LAWS AS PLANS AND LEGAL SYSTEMS AS PLANNING INSTITUTIONS

So much for plans. Why think of laws and legal systems as plans and planning institutions, respectively? (Note that Shapiro’s thesis is not that laws are *like* plans, but that they *are* (or, almost all of them, are) plans).<sup>13</sup>

Before we can examine Shapiro’s arguments for this ‘planning theory of law’, we need to consider in slightly more detail what that theory says.

The planning theory seeks to answer the question: what is it that makes something a *law*? (Shapiro calls this the Identity Question about law.)

The planning theory says what makes a law a *law* is that:

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<sup>11</sup> *Legality*, 147-148.

<sup>12</sup> *Legality*, 129.

<sup>13</sup> Cf, in this respect, Hart’s analysis of law as in certain respects *like* games: *GDJ*, 2-4.

- (a) it is part of a ‘master plan’ adopted by a certain group of officials *or*
- (b) it is a plan which has been created in accordance with, and whose application is required by, such a master plan *or*
- (c) it is a plan-like norm whose application is required by such a master plan.

The ‘master plan’ is a plan shared by officials, which identifies procedures by which further plans can be adopted for the community and identifies which officials must apply those plans. The plan is a ‘master’ plan in that everything which counts as law counts as such by virtue of this plan. The master plan is what grounds all law.

Something will count as law, then, if it is (a) actually part of the master plan – for example, an authorisation granting power to a certain class of people to adjudicate would count as ‘law’ or if it is (b) created in accordance with a procedure mentioned in the master plan – for example, a procedure stating that certain judicial decisions will count as authoritative. (c) is intended to capture customary rules which we class as law. Recall that customary rules are only ‘plan-like’, for Shapiro, because they are not created by a process which is supposed or intended to create rules for the guidance of conduct (see above, at page 2, (d)).

In identifying what norms are to be applied by officials, the ‘master plan’ is clearly similar in nature and function to Hart’s concept of a rule of recognition. Here are two other similarities to Hart’s rule of recognition. First, like a rule of recognition, a shared plan only exists if officials have certain attitudes towards it. Hart described this attitude as one of ‘acceptance’ of the rule of recognition. For Shapiro, the attitude is somewhat more complex: it is the attitude of ‘adopting the plan’. Second, officials are open to criticism if they depart from master plan. Shapiro explains this by reference to the ‘inner rationality of planning’, described above at (c): ‘Since acceptance of the fundamental legal rules involves the adoption of plans, the distinctive norms of rationality that attend the activity of planning necessarily come into play’. If an official departs from the plan without offering a ‘compelling’ reason to do so, they will violate these norms.<sup>14</sup>

The master plan is a plan shared by a certain group of planners. Who is this group? Clearly it would be insufficient to say that a society has law when there is *some* group of people who engage in shared planning. Parents plan for the future of their children. But parents plans’ are not the law (even if children see them that way).

A first feature of the relevant group of planners is that they are *office-holders*. One reason why parents are not ‘the law’ is that they are not officials. An office is a set of rights and responsibilities attaching to a position independently of the identity of the person. The master plan thus is a shared plan which both describes and constitutes certain people as the holders of offices (e.g. judges).

A second feature of the relevant group is that the authority it claims under the master plan is *compulsory*.<sup>15</sup> It claims that people are bound by the norms created by the master plan even if they do not consent to them. In this way, the group is similar to

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<sup>14</sup> *Legality*, 183.

<sup>15</sup> *Legality*, 211-212.

parents, but different to, say, some instructions to employees given under employment contracts.

A third feature of the relevant group is that it is what Shapiro calls ‘self-certifying’.<sup>16</sup> This is a complex idea. It is introduced in Shapiro’s theory in order to distinguish between genuine legal systems and private entities such as a residents’ association in an apartment block which makes plans about how residents should live. Such an association might appoint office-holders and claim compulsory authority. Consider two suggestions as to how a legal system might be distinguished from a residents’ association. First, it might be said that the residents’ association is not a *supreme* authority in a territory (or that it does not claim to be supreme). Shapiro rejects this on the basis that it would mean that Florida or any American State could not be said to have a legal system, since federal law is supreme over state law. Second, it might be said that the residents’ association does not claim authority to regulate *any kind of behaviour*, in contrast to a legal system which claims wide-ranging and comprehensive authority. Shapiro reject this, too. One reason is that we could imagine residents granting the association a comprehensive power, authorising them to enact any regulation they saw fit. Shapiro claims that this still would not amount to a legal system. Another reason is that some pre-modern legal systems did not enjoy universal scope: ‘In thirteenth century England...many legal systems coexisted alongside one another, each having limited subject matter jurisdiction. Manorial law governed feudal estates; mercantile law regulated commercial interactions among merchants’ ecclesiastical law concerned church matters...; and the common law and equity regulated everything else’.<sup>17</sup>

What really distinguishes a legal system from entities like residents’ associations is that the former’s plans enjoy a ‘presumption of validity’ from any superior organisation, whilst the latter’s do not. So Florida law is presumed valid by federal law. More precisely, Florida enjoys a presumption of validity in so far as it can *enforce* its rules without first demonstrating their validity under federal law. So suppose that Florida enacts legislation forbidding skinny-dipping (Shapiro’s example) in public and private places. If someone is caught skinny-dipping in the residents’ shared swimming pool, Florida state police ‘need not file suit in federal court to receive permission to pull the naked offender out the pool. Nor must the state police contact the FBI. They can simply yank the skinny-dipper out of the pool and charge him with the crime of skinny-dipping’.<sup>18</sup> By contrast, if the residents’ association creates a policy forbidding skinny-dipping, Florida law does not assume that enforcement measures taken by the association are valid; the association must show that their actions fall within Florida law.

A fourth feature of the group sharing the master plan is that the officials sharing the plan must at least *claim* to have moral aims in engaging in the planning activity. We discuss this in section III, below. One reason for this requirement is that Shapiro doesn’t want to say that mafia syndicates or the Yakuza have legal systems.

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<sup>16</sup> *Legality*, 221-223.

<sup>17</sup> *Legality*, 219.

<sup>18</sup> *Legality*, 220.

In short, then, according to the planning theory, something counts as law because it is part of, follows from, or is mentioned by, a master plan shared by self-certifying officials, claiming compulsory authority in order to achieve a moral aim.

*Arguments for the planning theory*

Shapiro concedes that the connection between laws and plans and legal systems and planning institutions is not a self-evident one.<sup>19</sup> What arguments, then, does he offer for the planning theory? (It might be helpful to bear in mind here that (1) Shapiro needs to establish that law is not *simply* an amalgam of primary and secondary rules and (2) that Shapiro claims that all laws are either plans or *plan-like* norms). Here, then, are his arguments:

(a) *Legal regulation, like plans, is rarely created all at once.* Recall that a feature of plans is that they are often partial, needing the details to be filled in at a later stage. Legal regulation is ‘typically assembled piece by piece, starting off either as broad standards that are refined over time, detailed regulations that are unified by the development of general standards, or a hodgepodge of rules that are supplemented bit by bit as new problems arise’.<sup>20</sup> In short, law has an incremental nature, like plans.

(b) *Legislation and common law as top-down and bottom-up planning.* Some (though not all) forms of legislation match the structure of top-down planning, where some specific goal is defined in advance, and highly detailed steps are set out for the achievement of this goal. By contrast, the common law – law created through judicial decisions about concrete cases – exemplifies bottom-up planning. Shapiro gives the example of the common law of negligence. Negligence liability, for most of its history, was recognised only to exist in specific ‘duty-situations’, with such situations being classified in highly concrete ways. It was only later, in the twentieth century that the courts began to formulate general standards of liability.<sup>21</sup>

(c) *Positivity of planning explains the positivity of law.* Plans are ‘positive’ in the sense that they are things which can be adopted, settled upon, ‘posited’. As such, they can have virtually any content. We can adopt a plan with virtually any content. The plan can be immoral and wicked or virtuous and good. To the extent one believes that *laws* can also have virtually any content – moral or immoral, the planning theory can explain this feature of laws.

(d) *Laws have the same functions as plans: guidance of conduct in complex, contentious, arbitrary environments by reducing deliberation/negotiation/bargaining costs, increasing predictability, compensating for ignorance and bad character and providing methods of accountability.* Plans, recall, assist in guiding conduct especially in complex, contentious and arbitrary environments. To make the comparison with laws, Shapiro mentions the example of laws regulating motorists. Rules about driving

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<sup>19</sup> *Legality*, 120.

<sup>20</sup> *Legality*, 195.

<sup>21</sup> Shapiro describes the modern law (in the US) as recognizing that ‘everyone owes everyone else a duty of reasonable care’; this is incorrect, but the point that the common law often moves from decisions in specific cases to general principles is correct.

licences, minimum ages, car inspections, stopping at red lights, car insurance, speed limits all aim to achieve a ‘very complex and contentious goal, which is safe, fast, and fair driving, in an arbitrary environment’.<sup>22</sup>

(e) *Laws can achieve their goals because they have the structure of plans.* Moreover, Shapiro claims, laws can achieve these goals because the content of laws can be determined without reference to (contentious) moral arguments. This is also true of plans: plans can guide conduct effectively because their content can be determined independently of moral arguments. To determine the content of the plan, you just need to know what plan has been adopted.

(f) *Laws purport to settle how to act, are dispositive, and purposive like plans.* Laws, like plans, claim to settle how to act – the law doesn’t say – ‘it would be a good idea for you to drive on the right’, it says ‘Drive on the right!’ or ‘you must drive on the right’. Legal systems are dispositive, like plans (see (l) above, page 2) in that they only exist if they are generally obeyed by their subjects. A group who have secret, shared, settled intentions for the rest of the community is not a legal system. Finally, legal activity is ‘purposive’ like plans. It is not an accident when the legislative process results in a law. The purpose of the process is to create laws. Similarly plans are created in order to guide conduct.<sup>23</sup>

(g) *Planning’s inner rationality explains law’s normativity.* When officials depart from the law, they are generally open to criticism. The planning theory explains why. The reason is based upon planning’s inner rationality (see above, page 2). If I adopt a plan, then the fact of its adoption gives me some reason to stick to it, which is then subject to revision should some other compelling reason come along. So officials who adopt the master plan can be criticised for departing from it simply on the basis that adoption of that plan gives them some reason to stick to it.

(h) *The planning theory solves the chicken and egg problem about law.* The chicken and egg problem about law is a puzzle about how law could possibly come into existence (see *GDJ*, 40-41). In order to have power to make law (to have legal authority), you have to have been given that authority by some existing law (‘the egg’: the legal authority has to have its source in an already existing law). But, a law conferring that authority could exist only if some body already possessing legal authority created it (‘chicken’). In other words, in order to have legal authority, you already need law, but in order to have law, you already need to have legal authority. So how can law get off the ground? The solution, for Shapiro, is to show that legal authority is not necessarily conferred by some prior law. Rather, the authority to make law is just the authority to make a social plan. Where does the authority to plan come from? Well, simply by being human agents, we have the rational authority to plan. If enough people are disposed to follow these plans (see (f) above) then those who make them will have the capacity to make plans for the persons so disposed. In Shapiro’s words: ‘...shared plans are able to authorize legal officials to plan for others because human beings are planning agents are capable of guiding and organizing their actions

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<sup>22</sup> *Legality*, 200.

<sup>23</sup> *Legality*, 201-202.

both over time and across persons...In other words, we are able to create law because we are able to create and share plans'.<sup>24</sup>

### III. LAW'S MORAL AIM

In Chapter 1 of *Great Debates in Jurisprudence*, we divided theories of law's nature into *modal kind* and *functional kind* theories. It seems that Shapiro believes that some of the conceptual features of law, which distinguish it from other phenomena, are *modal*, whilst at least one is *functional*. Consequently, it may be best to describe Shapiro as offering a '*mixed kind*' theory of law. The modal features of law in Shapiro's account have already been discussed. These include: the fact that law operates by means of a master plan containing different forms of plan and the fact that law operates by means of a presumption of validity from superior planning organisations – it is self-certifying. This section is about the *function* that Shapiro claims is unique to law.

Shapiro describes this function as follows:

When a community faces moral problems that are numerous and serious, and whose solutions are complex, contentious, or arbitrary, certain modes of planning such as improvisation, spontaneous ordering, private bargaining, communal consensus, or personalized hierarchies will be costly to engage in, sometimes prohibitively so. Unless the community has a way of reducing the costs and risks of planning, resolving these moral problems will be, at best, expensive and, at worst, impossible. On the Planning Theory, the fundamental aim of the law is to meet this moral demand in an efficient manner. By providing a highly nimble and durable method of social planning, the law enables communities to solve the numerous and serious problems that would otherwise be too costly or risky to resolve.<sup>25</sup>

Shapiro calls the circumstances in which communities face numerous complex, contentious, arbitrary problems, 'the circumstances of legality'. So another way of stating his 'moral aim thesis' is that the primary aim of the law is 'to remedy the moral deficiencies of the circumstances of legality'.<sup>26</sup> The specific moral problems which Shapiro says arise in these circumstances include: 'questions about ownership, contractual obligations, duties of care to one another, proper levels of taxation, limitations on public power, legitimacy of state coercion'.<sup>27</sup>

Why believe that, conceptually, it is part of law's very nature that it has this moral aim? Shapiro gives four reasons.<sup>28</sup>

First, law's having this aim explains why we think (according to Shapiro, anyway) that law is valuable in modern societies, but not among, say, hunter-gatherers. In other words, law is not valuable in extremely simple societies which do not face complex, contentious, arbitrary problems. Law is only considered valuable in the circumstances of legality.

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<sup>24</sup> *Legality*, 181.

<sup>25</sup> *Legality*, 213.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Legality*, 170.

<sup>28</sup> *Legality*, 213-215.

Secondly, law's having this aim explains why legal systems that are unable to solve serious moral problems are criticisable. No one blames the game of golf for failing to solve moral problems in societies. But it is particularly appropriate to blame a society's legal system which is in force if it fails in this.

Thirdly, law's having this moral aim explains why crime syndicates like the Yakuza or Mafia are not legal systems: they do hold themselves out as aiming to solve moral problems arising from the complexity of society.

Fourthly, when the law produces moral benefits for a society, this is not considered to be a serendipitous outcome in the sense of being a 'happy accident'. By contrast, if a Mafia syndicate produced moral benefits, we would say this was an accidental by-product of its activities. Law's having a moral aim explains why we consider moral benefits it produces as part of its proper functioning, rather than mere accidental by-products.

#### IV. Assessing the planning theory

Shapiro's theory can be attacked in two broad ways. Either the basic idea that laws are plans can be criticised. Or criticism can be directed at the claim that law has a distinctive moral aim. Even if the claim about law's moral aim were false, Shapiro's central theory that laws are plans could still be true and important. Conversely, if the central claim of the planning theory – that laws are plans – were false, this would be a devastating objection to the planning theory. In our view, the more serious objection can successfully be made against the planning theory.

Various objections may be made to the planning theory's central claim:

(a) *The absence of plans from law's self-understanding*

A simple point is that the idea of a 'plan' rarely seems to feature in legal discourse. This is not true of the concept of a rule, which is extremely common.<sup>29</sup> If we think that theories of law should reflect, at least in part, the self-understanding of (certain) participants to the legal system, then this is some reason to doubt whether the idea of a plan is central to the concept of law. Hart's view that law is a system of different kinds of rule hews more closely to the internal point of view of legal officials.

(b) *Customary master 'plans'*

Recall that for Shapiro customary rules are not plans. The reason is that customs are not created by procedures whose intention is to create rules/norms for the guidance of conduct. This creates a problem for Shapiro in relation to legal systems whose master 'plan' – the fundamental rules setting out who has powers and duties of adjudication and how rules can be created – is wholly customary. If such legal systems exist, then Shapiro's theory cannot account for them: such systems simply do not have a master plan. At most, they have Hartian *rules* of recognition, adjudication, and change. As

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<sup>29</sup> See, eg, Occupiers' Liability Act 1957, s 1(1): 'The rules enacted by the two next following sections shall have effect, in place of the rules of the common law...'

Gardner and Macklem point out in their review of *Legality*, this is a serious problem for Shapiro since there are such systems whose master rules are largely, if not entirely, customary:

[The example of] England and other countries with a common law constitution...call into question the thesis that there is any such thing as a master plan, a thesis that Shapiro could at that point sustain only by calling into question whether England has a legal system.<sup>30</sup>

(c) *Inability to explain law's normativity*

Shapiro wants to explain what he claims to be a feature our thought about law – namely that legal officials who depart from the law without ‘compelling’ reason are open to criticism – by reference to the fact that the officials have adopted a master plan. It is the fact of adopting the plan which gives officials ‘compelling’ reason to adhere to the law and thus which opens them to criticism in the event of their departing from it. It is far from clear, however, that the mere *adoption* of a plan always provides a reason – even a reason which could be outweighed by other reasons – to adhere to it. If Harry adopts a plan to commit genocide and then doesn’t follow through on the plan, it’s not clear that he had *any* reason at all at any point to commit genocide.

(d) *The disposition condition on plans*

Shapiro claims that a plan does not *exist* unless it was created in such a way as to dispose the subjects of the plan (the persons whom the plan seeks to guide) to adhere to it. This seems false. If I plan to order the removal of the US army from Iraq, the existence of the plan simply does not depend upon the disposition of army to adhere to the plan. It might be a mad plan, but it exists all the same. To make a plan for others, it only seems to be necessary that I have some degree of belief that my plan will influence their conduct. That belief need not, however, be warranted for the plan to exist.

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<sup>30</sup> See: <http://ndpr.nd.edu/news/27609-legality/>.