Planning Ahead! (in Jurisprudence)

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Scott J. Shapiro, Legality (Belknap Press 2011).

Analytical jurisprudence has a peculiar status in American law schools to say nothing of philosophy departments. Most law professors find it an utterly inscrutable or arid project. More generous souls have the vague impression that it is important and like that one or two of their colleagues engage in it, but their gentle forbearance is not to be mistaken for interest. Even those steeped in the subject are often discouraged by the increasing narrowness of the "What is Law" question. It takes a good deal of squinting to see the live question surrounding the nuanced positions on the extent to which morality determines whether something can be considered law; that is, the "validity conditions of a legal system."

Against this rather gloomy landscape, Scott Shapiro has introduced an illuminating new book, *Legality*. Though there are few who are as knowledgeable about analytical jurisprudence as Shapiro, his book is admirable not for its attempt to dazzle with intricacies. Rather, Shapiro's work is laudable because it makes accessible decades of debate in modern jurisprudence while still providing a novel contribution. Most importantly, Shapiro revives the heartbeat of the debate, showing why it matters and synchronizing it with legal issues recognizable to those outside of the small world of analytical jurisprudence. This accessibility means that those who know this debate will find the preliminaries unnecessarily long, a quarter of an already rather long book. Yet, it is no small thing that Shapiro manages to explain half a century of thick debate in a way that interested audiences of lawyers, and perhaps more immediately relevant, undergraduates and law students can understand its contours. Speaking for the many professors who have shied away from teaching the subject, Shapiro's book makes one reconsider the profitability of reintroducing this debate in the classroom.

Quibbling about jurisprudence classics with Shapiro may be its own sort of fun, but it would distract from Shapiro's real accomplishment–breathing fresh air into the debate. Shapiro's novel contribution is to apply the insights in philosophy of action, particularly Michael Bratman's theories of intentions, to show how law can be seen as a model of social planning. Shapiro attempts to show why a planning theory leads to a positivist theory of law, excluding morality from determining what constitutes law and showing the practical effects for current legal questions.

The core claim of the book is illustrated in a simple and charming story of cooking dinner with a friend. From this, Shapiro spins a tale of the formation and organization of a cooking club to highlight the perfectly quotidian intuition that whether having dinner alone or organizing a cooking club, planning is necessary to achieve our basic goals. The more complicated our goals the more sophisticated our plans must become. Further, and this is crucial for Shapiro, in order to be useful a plan must possess a certain amount of stability. There is no point in painstakingly planning a gourmet meal if when you walk into the grocery store you wonder anew what to cook. Plans can be incomplete or revised in light of new information, but as a general matter plans must resist constant tinkering or reevaluation. Echoing Raz on authority, Shapiro concludes that plans must be accessible without re-evaluating the underlying merits on which the plan was originally based.

This telegraphs the plan of attack. Shapiro uses an analogy between law and the plans generally to

generate “a planning theory of law.” On Shapiro’s account, legal institutions are forms of planning which allow large groups to achieve that which they could not otherwise. Critically, just as evil plans are still plans allowing human beings to channel their agency, the plans that constitute law need not be moral to constitute valid law. The only “moral aim” of law is a minimal one; solving the problems that arise as social tasks and ambitions grow more complex. Arguing that law, like plans, must resist reevaluation of its underlying (moral) merits to be useful grounds Shapiro’s positivism on novel grounds.

Elsewhere, I have argued for positivism premised on a conceptual connection between law and coercion. I argued both that coercive norms distinguish the normative systems best described as law and that alternative models of positivism can not adequately defend positivism’s holy grail, the separation between law and morality. Even Shapiro’s thoughtful dinner model illustrates why. Plans can do a great deal to coordinate action and facilitate massive socially coordinated events without a commitment to excluding arguments grounded in morality. **“**My wife and I will move to Paris, find new jobs and raise our kids in the best way possible” is a plan, even if incomplete and certain to lead to revaluation and argument down the road. “Do not subject others to cruel and unusual punishment” is also “a plan” of sorts even if it leads to the same. Likewise, the 14th Amendment might rule out discrimination against African-Americans while leaving unspecified whether the elderly are protected against age discrimination. Nor is it dispositive, as Shapiro argues, that moral criteria will not only leave some plans undetermined but may, on occasion, unsettle plans that were once settled. One need only avoid plans that would be radically and uselessly undetermined.

Further, even if plans need to be relatively stable, it’s unclear that one would want this stability at the cost of excluding moral criteria. Plans are open to moral evaluations *from the inside*. We criticize, guide and correct our plans with moral reasons not simply evaluate the attractiveness of completed plans with a removed eye. This is especially true because, as Shapiro points out, the plans that constitute law are not an equally shared activity; for many people law represents a set of plans which are imposed upon them. It is this criticism which drives critical (race, feminist, class, etc…) legal views. (Notice Shapiro falls into a common habit of using examples that feature roughly democratic and morally innocuous circumstances.) Given his interest in the ways in which law places people in varying power roles depending on the extent to which they are trusted to properly fulfill those roles, it is strange that Shapiro spends so little time on this. Perhaps this is because for Shapiro, while there is a reason for many of us to adopt the plan in effect around here, he is agnostic about any general obligation to follow the law.

Of course, the point of the positivist project is to establish that the existence of laws are one thing and their morality another. Replying to those who argue that the moral criteria within law can generate legal rights in the same way that morality can guide plans by repeating that planning forecloses this leaves those seeking to engage jurisprudence exasperated or befuddled. Further, to ultimately conclude that the distinction between morally derived legal rights and “law” proper turns on Davidson’s model of the different ways in which obligations can be described will seem to many a terribly slender reed for such an important claim.

This brings us to the most global concern with Shapiro’s model. Why should one accept that law is perfectly analogous to the kind of positivistic planning Shapiro proposes? Many thoughtful judges, lawyers and scholars think quite the opposite. One of the things law allows is for us to frame deep practical moral disagreements of a certain kind and discuss, argue, and alter them while continuing to govern society. While Shapiro is not opposed to this objection, pointing to scholars such as Jeremy Waldron and Akhil Amar, he holds these claims exist outside the law. That claim, I have suggested, cannot come solely from describing law as a type of plan.

Lastly, Shapiro is to be much admired for an intricate discussion tying the core questions of legal

philosophy to the legal questions of our day. Shapiro proposes that the “planning model” of law can answer not only “retail” questions of law, but inform broader questions about the amount of discretion officials should wield, their interpretative methodology, etc. Despite lacking the space to discuss these claims, the attempt to link the debates in jurisprudence with live questions may be the most important spirit of the text. While the success of that claim ultimately turns on whether one is convinced by Shapiro’s model, it cannot be doubted that Shapiro’s book, which clarifies and advances analytical jurisprudence, is bound to be a classic text.

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