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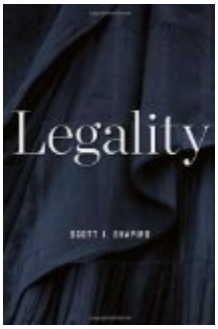
Scott Shapiro. *Legality.* Cambridge: Harvard University Press, 2011. 472 pp. $39.95 (cloth), ISBN 978-0-674-05566-7; ISBN 978-0-674-05891-0.



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Lawness: What Is It? Why Should I Care?

Scott Shapiro's new book *Legality* has re-ignited many of the jurisprudential debates initially kindled by H. L. A. Hart's *The Concept of Law* in 1961. For instance, Brian Tamanaha has described it as "a superb articulation and defense of exclusive legal positivism" offering the "novel idea … that every single law is a 'plan' (or 'plan like') and law in general is a planning system," while at the same time dismissing these controversies as "scholastic debates over arcane matters." [1] Rather than joining issue on any of these questions my goal here is to give the reader of this brief review a public law professor-practitioner's sense of what will be found in this scholarly dense and generous book, and why it is well worth the effort to follow Shapiro as he answers two questions: What is law? And why should we care?

Halfway through the book the first question, how does one distinguish law, legal norms, from all other laws and norms, is answered. "What makes laws law is that they are either (1) parts of the master plan of a self-certifying, compulsory planning organization with a moral aim; (2) plans that have been created in accordance with, and whose application is required by, such a master plan; or (3) plan-like norms whose application is required by such a master plan" (p. 225). And the aim of the master plan "is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering" (p. 225), e.g., "custom, tradition, persuasion, consensus, and promise" (p. 213).

This "identity question" is one of the three Shapiro addresses in the two-hundred-plus pages of "conceptual analysis" he begins his book with. Beneath the identity question is the "possibility puzzle" or the chicken-egg problem. Is law possible? How is it fixed or set? Is there a foundation; can it be grounded? To have the power to create law some norm must have conferred that power. But such a norm can exist only if somebody with such power already created it; and so on and so on. Shapiro argues that the puzzle is solved if law and legal systems are thought about in "circumstances of legality." Circumstances of legality are present when the community has numerous and serious moral problems (problems of right action) whose solutions are complex, contentious, and arbitrary. In explaining what is the core notion of the book (law as plan), Shapiro uses a dinner party and all that can be involved as an elaborate and extended analogy or metaphor. He explains how the organizer, cooks, hosts, and guests (the officials) commit to developing and then following the agreed-upon recipes, time, place, seating arrangements, etc. (the plan or law) in order to proceed with the right actions (solve the moral problem).

Finally, in answering the enigmatic "what is law? " question, Shapiro presents "Hume's Challenge" (pp. 45-49). Hume famously "proved" that one cannot derive an ought from an is. Failure to overcome this challenge "would be devastating for the Planning Theory" (p. 185). As was said at the beginning, Shapiro's theory is positivistic in that it requires that law, law as plan be based only on social facts. If officials have legal authority and legal authority entails moral authority then law and the

legal system are not based entirely on social facts. This interpretation is "devastating" to the Planning Theory. However, if the legal authority is merely a plan-like statement of perspective, a statement "from the legal point of view that the official has morally legitimate authority, it is descriptive (is) and not normative (not ought)" (p. 185). Challenge met!

The second general question Shapiro sets out to answer is why we should care, or the "implication question." If the answer to the first question is correct, that laws are best understood less as rules and more as plans, there are then "profound practical implications for determining who has legal authority and for how to interpret legal texts" (p. 25). This seems a good place to remind readers that H. L. A. Hart in his book likened the law and legal system to a chess game; and Ronald Dworkin brought up the analogy of a classic novel to explain how law evolved.

In developing the implications of law as plan, Shapiro devotes entire chapters to challenging each of several standard objections to legal positivism: that according to Lon Fuller, Robert Cover, and Gustav Radbusch it is committed to legal formalism; that according to Dworkin it has totally rejected formalism and legal determinancy; and, that also according to Dworkin it is ultimately incoherent, because its "criteria of legal validity are determined by convention and consensus" (p. 283) and in the real world of legal practice and judicial decision making disputes and disagreements are common. Shapiro rejects the first two criticisms but admits that this third critique, the frequent, even pervasive, disagreements among jurists as to the proper method of interpreting the law, "is extremely powerful" (p. 284). It is so powerful that Shapiro spends the rest of the book (115 pages) addressing it.

In addressing this third criticism Shapiro begins by devoting an entire very interesting but historiographically controversial chapter to the era of the American founding. Relying on the views of Bernard Bailyn and Gordon Wood, Shapiro sees "a rapid evolution of American political theory in the years between 1776 and the ratification of the Constitution in 1789. Traditional Whig theory, with its faith in the legislature as an antidote to executive overreaching, gave way to a radical Whig preference for direct popular involvement in government, which was in time eclipsed by the federalist perspective, immortalized in the Constitution, with its emphasis on separation of power" (p. 316). This concern, even "distrust," about competence and character, Shapiro concludes, requires rejection of Dworkin's meta-interpretive methodology (integrity, best fit, one coherent set of principles). Dworkin's core notion of a single right answer is inconsistent with the original understanding summarized in the above quote, and inconsistent with the logic of planning itself (flexible, adaptive, discretionary).

If law is best seen as a plan, how should one go about the task of interpretation? As Shapiro's dinner party scenario shows, people trust plans if the plans have been developed in an acceptably deliberative and inclusive manner. As law is a subset or form of plan, "trust" is also embedded in all phases of interpretation. It is at this point that Shapiro might be seen by some to have shifted from the philosopher's chair to a podium on the stage of today's political debates about the proper role of judges, ending up as a moderate textualist. He postulates two types of legal systems. One, the "authority" system, accepts the rules of the system because of their pedigree from superior moral authority. The other, the "opportunity" system, accepts the rules as morally good and furthering the fundamental aim of law. He goes on to write, "for what it's worth, I believe that the United States legal system strongly resembles an authority system" (p. 351). This view of the American legal system as an authority rather than opportunistic system seems to this reviewer to be inconsistent with what is implied in such common notions about the United States as "a city upon a hill," "manifest destiny," or "American exceptionalism." Shapiro continues, "[b]ut … this privileging of the attitudes of constitutional designers does not entail that originalism is the proper methodology for constitutional interpretation; nor does it mean that only the framers' attitudes matter" (p. 352).

After citing Edmund Plowden, Justice Reed, James Landis, Judge Easterbrook, Justice Scalia, Dworkin, Doug Laycock, John Manning, Akhil Amar, Jeremy Waldron, and Judge Posner, Shapiro reasons that "the more competitive the process of social planning, the greater the pull of textualism" (p. 378). This is for two reasons. One, any consensus supporting a norm in a highly competitive environment will not reach much beyond the text. And, two, the absence of agreement on objectives necessitates limiting the reach of the norm in time and space, to local, not more global, conflicts. This view is reinforced by the implicit mutual respect or trust required in and by plans.

This concludes Shapiro's proof that deciding the identity question about law should and does matter to judges, other officials, practitioners, and to people generally. The "proper interpretive methodology is established by de-

termining which methodology best harmonizes with the objectives set by the planners of the system in light of their judgments of competence and character" (p. 382).

Actually, Shapiro continues beyond this point and briefly describes a third kind of legal system in addition to authority and opportunistic systems–customary legal systems. He also very briefly describes the "economy of trust" implicit in the customary thought of Friedrich Hayek and Edmund Burke. Finally he ends the book defending the "value of legality" or the attribute of lawness by critiquing Lon Fuller's rule of law argument and John Finnis's natural law prioritizing of justice.

This review has accepted Shapiro on his own terms, those of analytic jurisprudence and positive law. Obviously, a review from the perspective of a naturalized jurisprudence (Brian Leiter) would be much different, as would one from either a globalized (William Twining) or a natural law (Finnis) perspective. That said, let me repeat that this book is most helpful in understanding legal positivism and its interpretive implications.

Note

[1]. Brian Tamanaha, "Legal Philosophers, Alien Civilizations, Monism versus Pluralism (Reflections on Shapiro's Legality)," `http://balkin.blogspot.com/2011/01/legal-philosophers-alien-civilizations.html`.

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