

Tulsa Law Review

Volume 47
Issue 1 *Book Review Issue*

Summer 2011

Whom Should You Trust: Plans, Pragmatism, and Legality

Thomas P. Crocker

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Thomas P. Crocker, *Whom Should You Trust: Plans, Pragmatism, and Legality*, 47 *Tulsa L. Rev.* 205 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol47/iss1/20>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

WHOM SHOULD YOU TRUST? PLANS, PRAGMATISM, AND LEGALITY

Thomas P. Crocker*

SCOTT J. SHAPIRO, *LEGALITY* (Harvard Univ. Press 2011). Pp. 472. Hardcover. \$39.95.

Plans are everywhere. We have a problem with budget allocation — we need a spending plan. We have a problem with climate change — we need an energy plan. Our business is struggling — we need a business plan. Job growth is not what we would like — we need an economic plan. In private and public life, shared activity relies on shared agency. We coordinate our activities, allocate tasks, and commit to achieving common goals through shared means. Plans about public matters require governance and governing requires law. In this way the pervasiveness of plans in everyday life is matched by the pervasiveness of law. With this connection at hand, Scott Shapiro argues in his new book, *Legality*,¹ that when we have a problem in law we also need a plan, and in so doing, opens up a new dimension to old jurisprudential questions.

The routes into a discussion of *Legality* are as varied as the topics within jurisprudence it addresses: a history and critique of prior work of legal positivism, a comparative critique of Ronald Dworkin's account of law as integrity, a new conceptual basis for legality in the social practice of planning rather than in practices of rule following, a defense of exclusive legal positivism, and an introduction of trust as a basis for interpreting laws within a legal system. Each of these topics within *Legality* both begins with and is motivated by the basic question—"What is Law?" Given the law's pervasiveness in modern society, this may appear to be an odd question. After all, if we want to know what the law is in a jurisdiction, can we not look to law books, or perhaps ask a lawyer or government official? The superficial simplicity of the question belies the underlying complexity, for the law books are full of indeterminacy and legal officials frequently disagree with each other about what the law is. Shapiro argues that "if one wants to demonstrate conclusively that the law is thus-and-so in any particular case, one must know certain philosophical truths about the nature of law in general."² To uncover these philosophical truths, Shapiro provides an account of law that is both positivist —

* Associate Professor of Law, University of South Carolina School of Law. J.D. Yale Law School; Ph.D. Vanderbilt University. I am grateful for the comments and suggestions I received from Sanford Levinson, Martin Stone, and Scott Shapiro, saving me from even greater misunderstandings and errors than those that remain.

1. SCOTT J. SHAPIRO, *LEGALITY* (2011).
2. *Id.* at 25.

grounded in social facts, not morality — and highly original — based on an account of law as plans, or “planlike norms.”³ *Legality* does more than add to the positivist repertoire of conceptual comparisons to such things as commands backed by threats,⁴ basic norms,⁵ or a system of rules.⁶ Shapiro also introduces the idea of an “economy of trust” as a way of understanding legal interpretation. This generates “a theory of law in which considerations of competence and character are central to the understanding of legal institutions and the structure of legal reasoning and argumentation.”⁷

The idea of plans as constituting “sophisticated tools for managing trust and distrust”⁸ within a legal system links how we think about the relationship between law and morality with the practice of legal interpretation. To grasp what is most interesting in this account, we must consider planning and trust alongside Ronald Dworkin’s account of legal interpretation. Doing so gives us new insights into the nature of law by grounding it in the social practice of planning aimed at resolving shared moral problems. Moreover, the comparison highlights the importance of Shapiro’s careful and comprehensive contribution to analytic jurisprudence.

I. SHARING A PLAN

“[L]egal activity,” for Shapiro, “is a form of social planning. Legal institutions plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are entitled to affect what others may or may not do.”⁹ If social groups led rather simple lives, they might be able to coordinate their activities in such a way as to avoid the complexities that require planning. But we know already that law exists to guide, constrain, and coordinate the activities of large numbers of people who may have diverse and conflicting interests and desires—a feature that Shapiro calls “massively shared agency.”¹⁰ For example, the Civil Rights Act of 1964 guides, constrains, and coordinates the activities of private individuals who engage in commerce to ensure racial equality for all citizens and the freedom to participate in the national economy free from stultifying discrimination. That Ollie’s Barbecue in Birmingham, Alabama,¹¹ would prefer to reject some patrons on the basis of their race presents both a moral problem and a problem of social coordination that law aims to resolve. Laws, as plans, “are all-purpose tools that enable agents with complex goals, conflicting values, and limited abilities to achieve ends that they would not be able to achieve, or achieve as well, without them.”¹²

Plans allow us to act together to achieve common goals of far more ambitious

3. *Id.* at 155.

4. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

5. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1946).

6. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

7. SHAPIRO, *supra* note 1, at 34.

8. *Id.* at 335.

9. *Id.* at 155.

10. *Id.* at 143.

11. See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

12. SHAPIRO, *supra* note 1, at 173.

scope than goals we might pursue individually or projects we might attempt through unfolding improvisation. A plan once adopted then binds those it guides, constituting a shared agency.¹³ To build a model of plans to account for what is distinctive about law, shared agency must be comprised of agents who knowingly accept the publicly accessible plan, intentionally play their assigned roles within the plan, and peacefully settle their disputes.¹⁴ None of these elements of planning rely on moral facts. But jointly they are capable of explaining the core features of a legal system, which “is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering” according to Shapiro.¹⁵

“Planning Theory” focuses our attention on law’s pragmatism; law, as a planning activity, enables us to solve complex social problems. When positivist theories treat laws merely as rules, or as commands backed by threats, they risk treating law independently of the purposes social practices instantiate.¹⁶ Plans, by contrast, capture how law helps us solve shared problems. Plans introduce their own problems of managing the “complexity, contentiousness, and arbitrariness of shared activities,”¹⁷ best addressed by assigning specific roles for individuals to play. When planning for shared activities of millions of persons, there must be a distribution of tasks and roles in order to achieve shared purposes.¹⁸ To implement the non-discrimination plan of the Civil Rights Act, for example, all merchants across state boundaries must comply with the non-discrimination mandate. Smaller numbers of officials are empowered to enforce the mandate and to sit in judgment over legal disputes arising from the Act’s plans. In this way, not all roles are alike within any complex plan, nor do all roles require the same form of commitment to the plan’s goals. Plans require agents to play their roles within the plan, even when they do not share the plan’s goals, and when they may in fact be alienated from them. Individual merchants or legal officials may continue to harbor racist beliefs and attitudes, but must now conform their conduct to the Act’s comprehensive plan, even though they do not share its aims or yearn for its success.

The fact of differential commitment to a plan’s aims and values creates a potential hazard. Does this theory then mean that plans are precariously dependent on the contingent commitments of many different people? It does, but plans are useful devices for managing this contingency by distributing tasks to different persons within the planned activity. According to Shapiro, plans are “powerful tools for managing the

13. Shapiro draws on work he has done with Michael Bratman on shared intentions. See, Scott J. Shapiro, *Law, Plans and Practical Reason*, 8 *LEGAL THEORY* 387 (2002); MICHAEL E. BRATMAN, *INTENTION, PLANS AND PRACTICAL REASON* (1987).

14. SHAPIRO, *supra* note 1, at 137-38, 149-50.

15. *Id.* at 225.

16. Consider the well-known example of the command “No vehicles in the park” and the tension it produces between “literal” and “purposive” interpretation. For the debate on the topic, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1957); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1957).

17. SHAPIRO, *supra* note 1, at 151.

18. Given that Shapiro illustrates his conception of shared planning on analogy with planning a meal, *id.* at 129-33, one is tempted to illustrate this point by reference to the cliché “too many cooks spoil the soup.” Not everyone can have the same role when plans call for coordinating individuals to contribute to a complex, shared activity.

distrust generated by alienation. For the task of institutional design in such circumstances is to create a practice that is *so thick with plans and adopters, affecters, applicers, and enforcers of plans that alienated participants end up acting in the same way as nonalienated ones.*¹⁹ Plans may cover those who do not share its goals, others who may be enticed to defect, and still others simply along for the ride. Because laws as plans not only create norms, but also provide procedures for adopting additional laws, “[p]lans can be adopted without the planners actually intending that the community act accordingly.”²⁰ A community need not know the planners psychology to know the valid rules of the plan, only that the planners have the appropriate authority and followed the right procedures.

Laws, like plans, require persons to have authority conferred by the appropriate norms. Confronting what he calls the “possibility puzzle,” Shapiro avoids the apparent foundational circularity of norms and authority (legal authority can only be conferred by norms, but binding norms can only be created with legal authority) by specifying the conditions of legal authority under the “Planning Theory.”²¹ These conditions require a “master plan” formulated by those chosen to adopt such a plan for society,²² which then authorizes a planning body to create further plans for others in the community who in turn normally follow them.

What gives such plans authority to impose legal obligations on others or to endow legal rights? First, part of having a plan includes the acceptance by those charged with carrying it out. Second, the moral obligations to obey the law are themselves explained from the legal point of view. These moral obligations can be criticized on their own terms as appropriate to the norms or not, but because legitimate laws satisfy the criteria of legality understood as plans, “the legal point of view will ascribe moral legitimacy to a body when its master plan authorizes that body to so act.”²³ In this way, no moral norms are necessary to account for the existence of law, because the master plan is based on social facts alone. “[T]hey exist just in case officials have exercised their rational planning capacity in the right sort of way.”²⁴

In a jurisprudential conversation rich in conceptual comparisons — laws as commands backed by threats or laws as rules, for example — adding “laws as plans” to our conceptual framework helps highlight the ways that laws form systems with characteristic aims. The reason each of these comparisons has held sway at one point or another is that each has a certain amount of explanatory power. Some laws *are* commands. Laws *are also* various kinds of rules. Thanks to Shapiro, we now understand how laws are plans as well. But why think identification with another concept will give a complete account of what is distinctive about law? Indeed, because not all laws clearly satisfy the mold for plans, Shapiro has to introduce the notion of “planlike norms”²⁵ to cover customary laws and the like—norms adopted outside of a planning process. Yet

19. *Id.* at 150.

20. *Id.* at 211.

21. *Id.* at 180-81.

22. SHAPIRO, *supra* note 1, at 166 (internal quotation marks omitted).

23. *Id.* at 187.

24. *Id.* at 188.

25. *Id.* at 120 (emphasis omitted).

many laws exist in isolation from comprehensive plans,²⁶ appearing more as episodic rules agreed upon by the appropriate officials. Our agreement in plan-following makes execution of the laws taken as a whole possible, but it is not clear how specific rules made into law by focused interests are always helpfully explained by Shapiro's planning theory. Moreover, plan acceptance simultaneously requires committing to "filling out the plan, to ensuring consistency with one's beliefs,"²⁷ while plan formation requires no specific commitments because plans arise "simply because the planners followed the right procedures."²⁸ It is unclear how plans can be a matter of indifference in formation but a matter of internal acceptance in practice. Under normal parlance, we might expect plans to require contingent commitment and acceptance in both formation and practice, in virtue of their aim to solve the problems to which we seek solutions, at least until practice reveals the need to revise the plans as we go. Without discounting the rich new conceptual understanding "laws as plans" might provide, one begins to suspect that Shapiro brings us further along towards an understanding of how laws form a family resemblance of the kind Wittgenstein first identified.²⁹ Each comparison has a certain amount of insight, but no one comparison captures the whole.

II. ECONOMIES OF TRUST

Laws come in many sizes and shapes, like the plans they more specifically instantiate. Some are simple prohibitions, others empower individuals to do particular things; some protect property, others empower officials to take property; some are set within comprehensive regulatory regimes, others are relatively free-standing; some can be changed or repealed with little effort because they stand on the periphery of a system, others would require tremendous effort and difficulty to change because of their central roles. These, and many other descriptions, characterize the complex ways laws fit within a legal system aimed at solving social problems. These complex legal systems are plans that assign different roles and tasks to various agents within the system, creating what Shapiro calls an "attitude" of trust or distrust towards these distributions. We could not provide the necessary coordination to achieve our practical goals if we did not make choices about roles and responsibilities, recognizing that competence and character matter for the potential success of our plans. Attempts to solve social problems are fraught with difficulty, for some members of the community cannot be trusted with discretion, while others may need careful guidance to realize their potential. With this thought in mind, Shapiro claims that "[the law] compensates for and capitalizes on the trust and distrust that its officials hold toward members of the community, as well as the trust and distrust that members of the community feel toward one another."³⁰ Law organizes what Shapiro calls an "economy of trust."

As a planning organization, legal systems aim "to rectify the moral deficiencies

26. Many laws fit within a plan only if stated at high levels of abstraction such as the "plans to provide for social order."

27. SHAPIRO, *supra* note 1, at 183.

28. *Id.* at 211.

29. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 2nd ed. 1958).

30. SHAPIRO, *supra* note 1, at 338.

associated with the circumstances of legality”³¹ that arise from a community’s confrontation with “serious moral problems whose solutions are complex, contentious, or arbitrary.”³² One of these circumstances includes the fact that problem solving requires participants to trust individuals to play their proper part. To summarize the overall account: “[W]hat makes the law, understood here as a legal institution, the law is that it is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering.”³³ But whether understood as rules or plans, the norms generated by legal activity inevitably will have a degree of indeterminacy. How do plans help us negotiate how to address problems of interpretation that arise from this indeterminacy? In order to interpret laws, we must employ a method. Do we read legal texts strictly, do we reconstruct original meanings, do we read the law in its best comprehensive light, or do we try to realize law’s instrumental purposes? No matter the answer we provide in a particular case, Shapiro’s central insight relates planning to interpretation: “attitudes of trust and distrust presupposed by the law are central to the determination of interpretive methodology.”³⁴ Because law is a planning activity, it must rely on competence and character in assigning tasks to actors in pursuit of the plan’s objectives.

Under conditions of indeterminacy, not only must we confront questions concerning the content of law, but also questions concerning the distribution of trust and distrust. Those agents who are deemed to act most competently and in good faith will be assigned greater discretion within the organization than those judged more likely to engage in self-dealing behaviors. Greater discretion comes from greater trust, while less discretion is a sign of increased distrust. For example, in U.S. administrative law, one factor that gives rise to judicial deference to administrative agency officials is the degree of expertise they are presumed to have based on the discretion Congress chooses to afford them.³⁵ When Congress aims to resolve complex shared problems — such as protecting clean air and water — Congress could choose to regulate in great detail, or could regulate more broadly, leaving to executive officials the task of filling in all the details. As planners, this is a choice the Constitution (read “master plan”) has assigned to Congress, warranting deference from the judiciary. Shapiro conceptualizes these kinds of task distributions as distributions of trust and distrust.

This insight — that law trades on trust — is one of the more interesting implications of Shapiro’s ambitious project. Even readers unconvinced by his defense of legal positivism, or skeptical of the planning theory’s ability to say what law is, should find considerations of trust and distrust an important new dimension to legal theory. Yet, of course, difficulties remain. One difficulty is in deciding what role trust will play in how we understand and interpret law. The other difficulty is that Shapiro presents the issue as an “economy of trust,” when what he really means is an “economy of distrust.” In a world of complete trust, we might find ourselves asking about character and

31. *Id.* at 213.

32. *Id.* at 170.

33. *Id.* at 225 (emphasis omitted).

34. *Id.* at 332.

35. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

competence in order to maximize planning effectiveness in a way more like “from each according to his abilities, to each according to his needs.”³⁶ But Shapiro’s real focus is on managing distrust — how we can succeed in accomplishing shared goals where we cannot trust others to play their proper part. This matters because as we will see, it creates frameworks more resistant to pragmatic revision as the plan unfolds (because we do not trust agents to revise appropriately).

On Shapiro’s account, for the law to achieve its aims, legal systems must allocate the right amount of (dis)trust to those roles best able to solve problems. For legal interpretation to reflect accurately the plans established in law, “the interpretation of the plans created by the law must be consistent with the legal system’s economy of trust.”³⁷ When deciding on a plan, planners allocate trust to institutional roles by assessing the character and competence each role requires. Legal interpretation should give effect to these decisions. Otherwise, they will frustrate the planners’ aims and therefore frustrate the purpose of planning. If an interpretive methodology reads deferentially where the plan is distrustful, or if the method reviews decisions strictly where the plan granted agents discretion, then the interpretation will fail to give effect to a plan’s attitudes of trust and distrust that are essential to its achievement. So how should the legal interpreter decide which interpretive methodology to adopt? The proper method for a legal interpreter to adopt depends on the “attitudes of trust of those who designed various aspects of the legal system in question.”³⁸ Once we understand that laws are plans, trust is central both to how plans coordinate shared agency and to how legal practice distributes institutional roles in light of character and competence. Underscoring the importance of this method to the overall project, Shapiro spends nearly a third of the book developing and defending his account of interpretation and trust.

III. PLANNING INTERPRETATION

Why is preserving the plan’s distribution of distrust so important? After all, if a later interpretive authority could reconsider the original plans to optimize present results, would not the superior consequences justify the effort? Shapiro derives the normative force of planning fidelity from what he calls the “logic of planning.” He defines the “general logic of planning” this way: “The interpretation of any member of a system of plans cannot be determined by facts whose existence any member of that system aims to settle.”³⁹ If laws are plans, then to reassess the original distribution of trust would violate the general logic of planning, because the reassessment would disrupt what the law purports to settle. To reengage with the basic plans is to undermine the purpose of planning. Moreover, the logic of planning cuts off further deliberation about the content of the plan so that subjects can fulfill the plan’s purpose.

Before an interpretation of the content of law is possible, then, we must first engage in what Shapiro calls “meta-interpretation”—we must specify the competence

36. KARL MARX, *Critique of the Gotha Programme*, in MARX: LATER POLITICAL WRITINGS 215 (Terrell Carver ed., Cambridge Univ. Press 1996) (1875).

37. SHAPIRO, *supra* note 1, at 339.

38. *Id.* at 346.

39. *Id.* at 311.

and character needed by legal officials, extract the planners attitudes about relative trust, and then evaluate the levels of deference and discretion to afford actors based on character, endowed trust, and the law's objective. Legal interpretation, for Shapiro, always presupposes a prior decision about how to "further[] the objectives actors are entrusted with advancing, on the supposition that the actors have the competence and character imputed to them by the designers of their system."⁴⁰ Interpretive authority depends on planning design.

This interpretive argument does more than provide a compelling account of the fundamental purpose of law in light of practical interpretive practices. If right, it also shows what is wrong with Ronald Dworkin's account of law's integrity as requiring constructive interpretation. Contesting the legal positivist's separation thesis, Dworkin argues that the indeterminacy intrinsic to law requires interpretation that does more than uncover basic social facts.⁴¹ Social facts run out, and when they do we can either think of the judge as making new law or discovering existing law. But if they are discovering law in situations when we agree that social facts have run out, they must be discovering moral facts relevant to the content of law, thereby showing that the legal positivist's central thesis is false. Moreover, because common law judges, in particular, never admit to legislating new law when faced with indeterminacy, we have embedded in legal practice acknowledgment of the truth of Dworkin's claim. Because their view is based upon rules accepted by officials despite situations in which acceptance breaks down and theoretical disagreement breaks out, legal positivists do not have a good alternative explanation.

On Dworkin's account, judges must also engage in a process of constructive interpretation⁴² requiring them to read the legal provision in the best possible light, considering past practice as well as the principles and policies imbedded within the legal system.⁴³ Dworkin's conception of "law as integrity" requires judges to engage in moral philosophy to construct the law in its best light by both fitting and justifying the content of the law in a better way than any other possible account.⁴⁴ As Shapiro notes, this is a demanding task for legal actors operating under practical constraints unknown to the moral philosopher. What is more, on the planning theory, we recognize that the legal system already has an economy of trust that Dworkin ignores. Here is where the general logic of planning creates a problem for Dworkin's constructive interpreter. In attempting to render the law in its best light, the legal interpreter ignores the original plan's economy of trust. And in so doing, the interpreter undermines the purpose of law as a system of social planning. "Having to answer a series of moral questions is precisely the *disease* that the law aims to cure. Dworkinian legal interpretation thus ends up

40. *Id.* at 359.

41. See RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter LAW'S EMPIRE]; Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

42. "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." LAW'S EMPIRE, *supra* note 41, at 52.

43. *Id.* at 90.

44. *Id.* at 296-300.

reinfecting the patient after the contagion has been neutralized.”⁴⁵ Whereas Dworkin seeks an interpretation of the law that places it in the best light, Shapiro extracts planners attitudes of trust that assign authority to persons who can best explain the texts that guide legal practice. What speaks in favor of one of these views over the other?

Turning to U.S. constitutional history may provide considerations helpful to resolving the differences between law as integrity and the planning theory. Shapiro traces a brief Whig history of the U.S. constitutional founding in order to show that considerations of distrust reside at the heart of the planning activity that gave rise to the American constitutional order.⁴⁶ Fearing abuse of power and deprivation of liberties, James Madison and others sought to harness competing interests, binding them in a constitutional structure that had significant distrust of individual offices unchecked by others.⁴⁷ Shapiro argues that this worldview is inconsistent with the assumptions on which Dworkin relies, because Madisonian constitutionalism is based on distrust.

Still, it remains unclear why the intentions (or ideologies) of the framers should matter so much. After all, they may have had particular views about trust, but even the best laid plans formed in advance of their implementation require adjustment in practice. Perhaps out of excessive distrust some officials will be disempowered from achieving the tasks they are assigned, requiring adjustments to those intentions, not as a matter of replacement planning, but as a matter of lived practice (on which later interpretive decisions might reside). Take, for example, the basic story of the Eleventh Amendment to illustrate my concern with Shapiro’s deference to planning’s original trust distributions.⁴⁸ The Eleventh Amendment overturned the Supreme Court’s decision in *Chisolm v. Georgia*,⁴⁹ which allowed a citizen of another state to sue the State of Georgia in federal court. Although the text of the Amendment addresses this case specifically—suits by citizens of other states—the Supreme Court has inferred a general principle of sovereign immunity to protect states against suits by their own citizens.⁵⁰ How do we assess the relative states of trust and deference here? The Eleventh Amendment is an act of additional planning, but subsequent decisions have given it effect in light of practical considerations, some of which include assessments of proper degrees of distrust between federal courts and state governments. Have subsequent interpreters usurped the planners’ intentions by reading the Amendment more broadly than its text strictly allows? Or, have they given effect to a belief in pervasive distrust of federal judicial power over state governments that may or may not be part of the plan? When the distributions of trust are ambiguous, how do legal practitioners decide how much deference to give the underlying decision maker?

To resolve these issues in terms of planners’ intentions, we must first know whose

45. SHAPIRO, *supra* note 1, at 310.

46. Shapiro relies on accounts provided in GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) and BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992).

47. See THE FEDERALIST NO. 51 (James Madison) (concentrated power could be avoided by “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others”).

48. U.S. CONST. amend. XI.

49. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

50. *Hans v. Louisiana*, 134 U.S. 1 (1890). See also *Alden v. Maine*, 527 U.S. 706 (1999).

intentions count. For Shapiro, planners are “those actors who have created, modified, or extinguished the institutions of a particular legal system, or affected the relationships between institutions.”⁵¹ But plans change or are modified by later persons with authority to plan for the community; thus, “the relevant set of planners for meta-interpretation is the current one, namely, those whose planning has not yet been modified or extinguished by subsequent planners.”⁵² Last in time planners get priority over prior planners. Compounding our task, to ascertain a system’s economy of trust, we must know what attitudes officials take in accepting their role within the system.⁵³ This itself will be contested.⁵⁴ Legal systems will have different economies of trust depending on participants’ attitudes. Does the economy of trust depend on the original planners’ attitudes about competence or current officials’ attitudes? In either case, the reasons officials have to act within the system depend on their acceptance of the plan’s design, and by implication, adherence to the logic of planning. Finally, laws, as plans, are not straightjackets — they are defeasible when “compelling reasons exist.”⁵⁵ Of course, what constitutes a “compelling reason” is another interpretive question itself. Moreover, defeasibility will still be subject to the trust economy to assign roles for revision.

Law is complex and never complete. It is sometimes inconsistent. These features of law are what make it so wonderfully an all too human practice. But the logic of planning is rigorous. We cannot re-do the reasoning that has already given rise to a plan. Yet plans are never complete, because like the rules they purport to replace, plan-following must inevitably apply to unforeseen circumstances. At this point, do judges, for example, make plans or follow them? When social plans run out, Shapiro answers, then judges “are engaged in further social planning” and may “rely on moral considerations in such instances.”⁵⁶ Morality enters into social planning, without undermining the central thesis of legal positivism, because plans aim to solve moral problems. In so doing, “legal systems are built and rebuilt over time,”⁵⁷ making it an equally complex task to construct the trust attitudes of planners. A legal interpreter cannot look simply to the framers or ratifiers of the American Constitution, for subsequent Amendments have greatly changed the distributions of trust, as well as legal meanings. Here, Shapiro offers some considerations from the philosophy of science. The legal interpreter should attempt to retain the core trust arrangements intact with the minimal revision necessary to account for subsequent planning inconsistent with the accepted original plan.⁵⁸ In this way, interpretive plan synthesis remains tethered to the plan’s origins.

Remaining faithful to the plan is even more complex than simply interpreting it.

51. SHAPIRO, *supra* note 1, at 356.

52. *Id.*

53. *Id.* at 350-52, 357.

54. Shapiro suggests that the United States constitutional system resembles what he calls an “authority system” of trust (deference to original planners’ attitudes), but does not rule out the possibility that it is an “opportunistic system” (attitudes of current officials have authority). *Id.* at 351.

55. *Id.* at 202.

56. *Id.* at 276.

57. *Id.* at 366.

58. SHAPIRO, *supra* note 1, at 367 (relying on IMRE LAKATOS, *THE METHODOLOGY OF SCIENTIFIC RESEARCH PROGRAMMES* (John Worrall and Gregory Currie eds., 1980)).

Consider the Fourteenth Amendment's Equal Protection Clause as applied to racial discrimination in schools. One can read the Amendment to protect individual persons against systemic group-based inequality — roughly the way *Brown*⁵⁹ made addressing group harm possible. Alternatively, one can emphasize equality of individual treatment without reference to systemic group-based considerations — roughly the way the more recent *Parents Involved*⁶⁰ case foreclosed reparative racial considerations. Each of these contrasting readings is possible, and the constitutional interpreter faces a difficult task defending either one. But the interpreter, under Shapiro's approach, must also now consider the economy of trust to ascertain the plan's distribution of decisional authority over this question. Should the legal interpreter allow courts broad discretion, defer to local legislative bodies, or perhaps look to national legislative enactments? Whichever roles are given high relative trust in the system should receive authority to interpret the law. On the planning theory, one cannot simply proceed to interpret the Amendment in its best light, as Dworkin advocates, without first knowing who the plan authorizes to provide the interpretation. Responding to Dworkin's challenge that legal positivism could not account for theoretical disagreements, Shapiro shows how such disagreements occur when matching interpretive method with distributions of trust, only to inadvertently highlight a potential problem with plans: their seeming rigidity.

"We have a plan, now let's stick to it." That is a way of viewing plans, but hardly a necessary one. The imperative itself belies the fact that a plan has no mechanism for its own fulfillment other than the commitments of those to whom it is addressed. But what is the nature of this imperative of commitment? If the agents decide not to stick to the plan, what do we have to say in response? Shapiro would respond by arguing that to alter the plan's distribution of trust would undermine the logic of planning (unless an official were authorized to engage in further planning). Plans are supposed to settle matters. What if, by contrast, all plans only receive contingent commitment, recognizing their inherent revisability in light of the practical problems they aim to solve? Law no doubt forms a relatively stable system. Legal systems are not always and everywhere open to easy revision. But within a legal system, the question is whether Shapiro's identification of law with plans, together with the entailed logic of planning, introduces unwarranted additional rigidity when other explanations — notably Dworkin's — do not.

W.V.O. Quine famously borrowed an example from Otto Neurath in describing the way language changes: "Neurath has likened science to a boat which, if we are to rebuild it, we must rebuild plank by plank while staying afloat in it,"⁶¹ raising a question of the boat's identity over time, yet "[o]ur boat stays afloat because at each alteration we keep the bulk of it intact as a going concern."⁶² If we liken law to the boat, it has narrative consistency over time, and indeed, some laws are stable throughout. Yet others change or fade and new ones emerge, with each addition or subtraction creating new dimensions to law. These new dimensions include changes in the balance of trust. The Fourteenth Amendment radically reconstructed the balance of trust between the federal and state

59. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

60. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 1*, 551 U.S. 701 (2007).

61. W.V.O. QUINE, *WORD AND OBJECT* 3 (1960).

62. *Id.* at 4.

governments, but so too did practical experience. Distributions of trust go together with the practice of fulfilling the aims of law — the pragmatic plans laid down to solve shared problems. Shapiro recognizes the fact that the economies of trust fluctuate over time, but treats the fluctuation as resolvable by attention to textually based synthetic construction of the plan's economy.⁶³ What remains unclear is why planning practitioners must be governed by reconstructed prior judgments of trust rather than the practical judgments found and contingently forged during a law's implementation.

Something like a rigid adherence to the plans laid down is in evidence elsewhere in the book. In the conclusion Shapiro writes: “[T]he Rule of Law is served only when those who engage in legal interpretation are faithful to the vision of the Rule of Law that the legal system presupposes and embodies.”⁶⁴ Here is where a Kafkaesque quality to planning sets in. It is present in Shapiro's claim that although law has a moral aim, legal officials need not be sincere in their representation of its aims and citizens need not internalize the law's normative focus.⁶⁵ Not only may officials and citizens be alienated from the law, but planning requires us to give effect to the “vision . . . the legal system presupposes and embodies,” further alienating us all at the open door of law.⁶⁶ It is a door for us, but somehow we need not enter — the plans having been laid, our task is to leave undisturbed what the plan has already settled. But how, then, can it be our plan? Part of what makes the American constitutional experience is the identity “We the People” have with our Constitution.⁶⁷ In addition to structuring an inter-generational conversation, the Constitution helps sustain the narrative identity of the American people. In so doing, it operates more as revisable rough guide than rigid plan.

With this distinction — rough guide versus rigid plan — we see an important unresolved problem for the planning theory. Plans are to remain undisturbed because the logic of planning requires that the purposes of plans not be undermined by revisiting them. This casts the social planning that explains the law in unduly rigid terms.⁶⁸ The law — like the plans it exemplifies — is revisable in light of practical experience. Trust placed in roles and characters are revisable in practice without reference to original intent. With their revisability in mind, why think that the laws are laid down with rigid certainty rather than pragmatic probability? That is, why are the plans that identify law not rough guides? Following plans as rough guides, we do not violate a supposed logic of planning when we revisit the plans on the fly. Sometimes that is precisely what plans,

63. In so doing, he may be committed to a form of constitutional formalism—the American constitution includes only what has undergone Article V procedures. Contrasting views recognize different procedures of constitutional change, and emphasize a more expansive view of constitutional content. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L. J.* 408 (2007).

64. SHAPIRO, *supra* note 1, at 398.

65. *Id.* at 217.

66. See FRANZ KAFKA, *THE TRIAL* (Breon Mitchell trans., Schocken Books 1998) (1925).

67. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737 (2007); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4 (2003).

68. To be clear, the planning theory does allow for revision. But the problem with the more comprehensive account of law as plans is that revision, whether by interpretation or other means, is rendered more complicated in light of the logic of planning and the economy of trust. Were the planning theory to become less rigid, however, it would become less distinctive as an account of law.

as guides, require.

Focusing on the economy of trust will undoubtedly enrich our ability to understand how legal systems function and will augment our capacity to resolve everyday legal problems. But attitudes of trust over roles can be just as indeterminate as the content of laws. Trust adds a new dimension to our analysis, but also adds to the indeterminacy answers to the question “what is law” are meant to explain.

IV. CONCLUSION: LAW AND MORALITY

Shapiro’s account vindicates the central thesis of legal positivism—that law’s existence does not depend on moral facts. Moreover, Shapiro excludes morality from the identification of law. Such a view will undoubtedly generate criticism from those who adhere to some version of inclusive legal positivism. Inclusive legal positivists roughly claim that when the social facts run out, the legal practitioner then includes additional moral facts in her account of law if warranted by the social facts.⁶⁹ Because of the planner’s logic, inclusion is not an option, for to consider moral facts in this fashion would be to reconsider the plan. The plan was meant to settle these facts, so to reopen them is to undermine the purpose of planning. This argument is likely to generate opposition, but it will be opposition of a kind that is somewhat ancillary to what is most interesting in Shapiro’s book. There is no space here to pursue questions about Shapiro’s exclusive positivist view, only to flag them for future discussion.

If the separation and identity theses are each true, and legal positivism is therefore vindicated, a typical jurisprudential conversation comes to an end. With law carefully demarcated on the basis of its social sources, to engage in further conversation about the morality of law is to engage in a conversation no longer, strictly speaking, about the nature of law. A virtue of Shapiro’s approach is that with the truth of legal positivism’s primary claims, Shapiro does not end the conversation. Morality matters, as does trust, which plays an important role in the morality of law. How morality matters remains to be seen.⁷⁰ Shapiro emphasizes the importance of morality within a system of plans by saying that the aim of law is a moral aim. He highlights the role of trust by making it central to the practice of interpretation. These relations between the aim of law, its implementation through plans, and the economies of trust that plans create are the most interesting and original aspects of the book. A project of this scope requires a more careful study than this brief review can provide. Because of its philosophical richness, *Legality* will undoubtedly structure many conversations in law and philosophy for years to come.

69. See sources cited *supra* note 67.

70. For example, see Martin Stone’s discussion of how “[a]t a time when philosophical questions concerning ‘the nature of law’ are thought to float free of political and moral philosophy, it may be a helpful corrective to consider that positivism is really, at its origins, a new idea about morality, and not, apart from that, any previously un contemplated thought about law and its sources.” Martin Stone, *Legal Positivism as an Idea About Morality*, 61 *TORONTO L. J.* 313, 341 (2011).

