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The Planning Theory of Law I: The Nature of Legal Institutions[1]

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Abstract

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

1. Introduction

Imagine the following scenario. Maddy, a 29-year-old American citizen living in Chicago, has become increasingly outraged with what she perceives as the American government's failure to deal adequately with the threat of global warming. April 15, 2013 is approaching and Maddy knows that April 15 is the date by which she normally pays her annual taxes to the American government. In previous years, Maddy has always paid her taxes without thinking twice about it. But, this year, Maddy is wondering whether to pay her taxes or not. In particular, she is wondering if it could be a good act of civil disobedience to *not* pay her taxes. Somewhat more specifically, she is thinking of sending the government a letter explaining that she is withholding her taxes until the government starts spending more money to combat global warming than it does to fund the military.

In thinking about this issue, Maddy considers a range of different standards by which she might judge whether or not this potential action is a good one and/or whether it is the correct or right action for her to take. Among other things, she wonders how this potential action would be measured by the largely tacit cultural standards that are prevalent in her neighborhood in Chicago, the standards contained in the charter for the local environmentalist political group that she helps to run in Chicago, the standards she knows (or suspects) her family and friends will use to evaluate her action, the standards that stem from her own desires and wants, the standards of prudence, and, crucially, the standards of morality (which, like many people, Maddy views to be among the most important standards she can use in evaluating her actions). In thinking about what to do, Maddy also spends some time thinking about another set of standards as well: namely, the legal standards that currently comprise American law. Maddy is not a legal expert, but she is fairly confident that these legal standards by themselves do not cut in favor of her withholding her taxes. Indeed, she thinks that she is in fact *legally obligated* to pay her taxes regardless of her views about global warming. However, her belief that this is so is in fact part of the reason Maddy is even thinking about not paying her taxes in the first place – for, in broad terms, what she is thinking about doing is purposefully disobeying those standards as an act of defiance against the government that enforces those standards. Indeed, Maddy thinks that she is perhaps *morally* obligated to do just that.

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Stepping back from the practical question that Maddy is thinking about – namely, the question of whether or not to pay her taxes – there are a range of different questions that one might ask about the *nature* of those different standards that Maddy considers. Here is one thing that these standards have in common: all of them in some way purport to guide human activity such that one is capable of measuring (at least for a determinate range of cases) whether or not the human activity in question lives up to that guidance or not. In turn, if one wanted, one could therefore criticize or commend an action based on whether it does so live up to that guidance. Following one broad way of using the term ''norm,'' these features of the standards that Maddy considers are sufficient to make all of them count as norms. This broad use of the term ''norm'' is exemplified by the definition given by Scott Shapiro (2011) in *Legality*:

> In what follows, I will use the term ''norm'' to denote any standard – general, individualized, or particularized – that is supposed to guide conduct and serve as a basis for evaluation or criticism. Strict rules, rules of thumb, presumptions, principles, standards, guidelines, plans, recipes, orders, maxims, and recommendations can all be norms. Furthermore, moral, legal, religious, institutional, rational, logical, familial, and social standards are norms as well (Shapiro 41).

Given this definition of ''norm,'' it is clear that all of the standards that Maddy considers count as norms. Knowing that all of these standards that Maddy considers are norms, however, still leaves open a range of interesting questions one might ask about the nature of each separate group of norms that Maddy considers and their relationship to each other. Among these further questions, there is one such question that has (not surprisingly) particularly attracted the attention of many legal philosophers – namely, what is the nature of the specifically *legal* norms that Maddy considers?

In *Legality* and other recent work, Scott Shapiro has been developing a novel theory of law that aims to answer this question. He calls it the ''Planning Theory of Law'' (henceforth the ''Planing Theory''). The version of the Planning Theory that Shapiro develops in *Legality* incorporates a number of different elements – ranging from claims about metaphysics to those about epistemology and semantics. Many of these claims are highly complex and abstract. However, the Planning Theory's main claim about the metaphysics of legal norms is relatively straightforward. This is that legal norms are *plans* or, in some cases, *planlike* norms (roughly, norms that are the same as plans in every essential way except for the fact that they are not created by a process of planning in order to be norms). In advancing this claim, Shapiro does not mean to invoke an enitrely stipulative sense of ''plan'' developed solely for explanatory purposes within the philosophy of law. Rather, he is drawing on the largely intuitive sense of ''plan'' that most of us are familiar with from our everyday lives: such as the plan I have to see a movie tonight at the movie theater, or the shared plan that a group of friends has to drive together from Los Angeles to San Francisco the following weekend. In short, Shapiro thinks that laws are the very same sorts of norms that such plans are. More specifically, Shapiro draws heavily on Michael Bratman's theory of plans from the philosophy of action.[2] Shapiro's claim is that the understanding of plans that we get from Bratman – or, more precisely, a theory of plans in the philosophy of action that stems from core aspects of Bratman's work – illuminates the nature of legal norms as follows: using a Bratman-inspired theory of plans from the philosophy of action as a foundation, we can then see that legal norms simply *are* plans or planlike norms.

Shapiro argues for this claim about the nature of *legal norms* (one thing we use the term ''law'' to refer to – as in ''copyright law in Canada'' or ''the laws in Canada that regulate copyright'') in large part on the basis of a theory about the nature of *legal institutions*

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(another thing we use the term ''law'' to refer to – as in ''the law normally claims the right to use force to ensure compliance with its rules'' (Shapiro 5)). Shapiro argues in *Legality* that these two parts of the Planning Theory hang together in a fundamental way. In basic terms, Shapiro argues that what makes certain norms *legal* ones is that they are the norms applied and enforced by legal institutions, regardless of any facts about moral merit (including, importantly, regardless of any facts about the moral merits of those institutions or of the moral merits of those norms). According to Shapiro, the fundamental nature of legal institutions is that they are a particular type of institution of social planning. That is: they are a subset of institutions that, in short, are engaged in the activity of creating, carrying out, and enforcing social plans for guiding and coordinating the activity of agents. Shapiro holds that (1) the norms that are created, applied, and enforced by these institutions are plans and (2) the norms that are applied and enforced by these institutions – but not created by the activity of planning – are *planlike* norms. According to the Planning Theory, the legal norms that comprise legal content are the plans and planlike norms that are applied and enforced by legal institutions. In this first paper, I will discuss the Planning Theory's account of legal institutions. In the second paper, I will discuss the Planning Theory's account of legal norms.

In basic terms, Shapiro argues for the claim that legal institutions are a particular kind of institution of social planning as follows. To start with, he holds that the exercise of legal authority is the definitive activity of legal institutions, and that therefore the best way to understand the nature of legal institutions is to understand what they are doing when they exercise such authority. Shapiro then argues that the activity of social planning is the essence of the exercise of legal authority (an activity that he also calls ''legal activity'' (Shapiro 195)). Based on this, he holds that legal institutions are a particular kind of planning institution, and then puts forward a theory that aims to identify precisely what features legal institutions have that make them distinct from other planning institutions. The result is the Planning Theory's account of legal institutions.

2. Plans and Planning

In developing an account of legal activity as planning activity, and thereby of legal institutions as planning institutions, one needs to draw on a theory of what planning activity is. In *Legality*, Shapiro draws on the basic theory of planning and plans developed by Bratman, and then extends it and modifies it in certain ways. In this section, I will sketch the core of Shapiro's developed theory of planning and plans, with a particular focus on the sorts of everyday examples of planning that both Shapiro's and Bratman's work aims to understand.

All of us engage in the activity of planning throughout our everyday lives. To put it another way, all of us are creatures that not only can, but often do, make plans to guide our conduct. On the one hand, some of the plans a person makes are solely *intra*-personal ones that do not involve a plan for other people. For instance, I might plan to go to a specific ski store (call this shop ''Skinny Skis'') tomorrow to buy a new pair of skis. As part of this, I might make a further sub-plan to drive over to Skinny Skis leaving my house at roughly 5 o'clock in order to get there with time to browse the sale racks before the store closes at 6 o'clock. The plan might become more or less complicated given my desire to avoid traffic, my need to get money out of the ATM first, etc. But, crucially, the plan is only *for* me.

On the other hand, some of the plans we make involve other people. For instance, once I have bought my new skis, I might make the plan to go skiing with my friend

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Cheryl at a certain time and place – say meeting at 8 am the following Wednesday at the bagel shop where we usually meet before skiing. This is a plan not only for me, but also for Cheryl. It is a shared plan for a shared activity.

Some of the plans that we make that involve other people also have the feature of being made *with* them. For example, given the nature of the above plan to go skiing, and given my relationship with Cheryl, I will have to make the plan not only *for* her but *with* her if I want it to be at all effective. This is because, given the nature of my friendship with Cheryl, I don't get to simply tell her what to do. Rather, I have to make the plans with her also having a say in how to proceed. In contrast, some of the plans that one might adopt involving other people are made solely for them but *not* with them. For instance, suppose that Charlie is a car mechanic and that Brendan is his assistant. Suppose that Charlie knows that Brendan is good at fixing things once he has explicit instructions about how to do so. However, Charlie also knows that Brendan lacks the relevant knowledge that would allow him to figure out what needs fixing or how to fix things without such instructions. To put it bluntly: Brendan is an amateur with little ability to make effective decisions on his own about how to fix cars. In such a case, Charlie might make a plan about how to fix a car that involves planning for Brendan – planning, for instance, to have Brendan work on certain parts of the car at certain times given Charlie's expert assessment of what needs to be fixed – without including Brendan in the planning process itself. Such a plan is based fundamentally in Charlie's lack of trust in Brendan's abilities on certain fronts. In turn, if Brendan is committed to doing his job, then it is likely that he will follow through on the plans that Charlie has made for him, even though he himself did not create the plans.

As these examples illustrate, plans are a species of norm (in the broad sense we introduced at the start). One can, for instance, ask whether someone's behavior lives up to the standard for that behavior given by the plan and, if we think the plan is a good one, criticize that person for failing to live up to it. For instance, I will fail to meet the standard set by our plan if I am an hour late to meet Cheryl. In turn, she might then likely criticize me for being late – especially, for instance, if the reason for our plan had to do with how much time we needed in order to ski a certain part of the mountain together. As this example illustrates, plans have all of the essential features of norms that we introduced at the start. But not all norms are plans. For instance, the rules of chess are not plans and neither, says Shapiro, are the norms of morality or the norms of logic (Shapiro 128). This is because, or at least Bratman and Shapiro maintain, plans have distinctive features that make them compose an interesting subclass of norms.

Here are seven of the most important features of plans that Shapiro emphasizes. First, plans are "positive" (or "posited") entities in that they are "created via adoption and sustained through acceptance" (Shapiro 128). That is: plans are entities that agents create. Second, plans are "purposive" entities in that "they are norms that are not only created, but are created *to be norms*" (Shapiro 128). In other words, they are entities that have a *purpose*. Third, one of the core purposes of plans is to settle deliberative questions about what to do (by producing norms for what to do). Fourth, insofar as guiding action in that above way is part of the functional role of plans, plans place normative pressures on people who accept those plans, including pressures not to reconsider the plan without significant reason to do so. Fifth, plans are "dispositive" in the sense that they dispose agents to act in certain ways. For any given plan and any given agent, this is so when an agent bears a particular sort of relation to that plan. In the case of a one-person plan that an agent makes for herself, the plan will dispose that agent to act in certain ways insofar as she accepts that plan. In the case of shared plans,

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an agent might be disposed to follow the plan either because she accepts the plan or because of other forces that are in place that are used to enforce the plan (e.g., Brendan might follow the plans that Charlie has made not because he accepts those plans but rather because of fear of sanction from Charlie if he does not). Sixth, plans are capable of guiding activity in a particular way – namely, by breaking down a complex activity into different smaller parts. Thus, a single given plan might involve many different subplans as constituent parts (e.g., as in my plan to drive to Skinny Skis to buy a new pair of skis). Seventh, plans can be made in a variety of ways. For instance, some plans can be made such that the details of those plans are filled in at the time of their creation. In other cases, though, the plans are made incrementally, with the details of the plan being filled in over time – or, indeed, of the main goal of the plan itself being filled in over time.

The seven features of plans above that I just sketched are true of plans in general. There are also, importantly, crucial general features of shared plans in particular. Here are two of the most important ones that Shapiro emphasizes. The first feature concerns the sorts of mental content that different people involved in a shared plan have. In order to appreciate what this feature amounts to, we can, following Shapiro, understand intentions (a particular type of mental state) to take plans as their content in much the same way that we might understand beliefs (another type of mental state) to take propositions as their content (Shapiro 127). In cases of solely intra-personal planning, it is almost always the case that the agent will, at some point in her activity, have in mind the end goal that she is planning for. Thus, the end goal of a plan – e.g., buying skis, going skiing, making the car run again, etc. – is almost always the object of an agent's intention at some point in her activity. However, different people involved in a shared plan need not take the overall plan as their intention at any point whatsoever, even in cases where the plan is successfully executed. Return, for example, to the case of Charlie the car mechanic and his assistant Brendan. Suppose that Charlie comes up with a plan to fix the muffler on an old truck. Given his low estimation of Brendan's intelligence about cars, Charlie does not bother telling Brendan that this is what he intends. Instead, he simply lays out a plan for Brendan to go get tools at a certain time and hand them to him when asked. In such a case, Brendan might intend to carry out the plans in coordination with Charlie – e.g., to give him the tools at the appropriate time – without him ever having the intention to fix the truck's muffler. After all, Brendan does not even know that the muffler is the thing Charlie is trying to fix. He thus lacks the same end goal that Charlie has. They are involved in a shared activity – and there is a shared plan for how to carry it out – without everyone involved in the plan having an intention to meet the end goal of the plan.

A second feature of shared plans that Shapiro emphasizes is that people involved in a shared plan can be alienated from the shared plan. For instance, Brendan might resent Charlie for not including him more in the decision-making process about how to deal with broken cars. In turn, this might lead him to feel alienated from his job. Futhermore, it might lead him to not even really care about whether the overall plan succeeds or not. Nonetheless, given that the job pays well and that he needs the work, he might nonetheless follow the parts of the shared plan that Charlie tells him to follow.

As Bratman and Shapiro argue, plans are powerful tools. Among other things, they allow us to carry out complicated activities that would be difficult for us to carry out if we had to constantly deliberate at each turn about what to do. Furthermore, as the examples I have chosen are meant to give some basic flavor of, plans come in a wide variety: among other things, they can involve radically different goals, be created (and revised) in

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radically different ways, include more or fewer subplans as constituent parts, involve more or less openness to being overridden by new considerations that emerge, include more or less detail, and be viewed in radically different ways by the people who follow and/or make those plans. Thus, although they are unified as a kind, plans are nonetheless remarkably diverse in many different ways.

3. The Nature of Legal Institutions

Given this background understanding of the nature of plans and planning, let us now turn back to the question of the nature of legal institutions. As I have said, Shapiro's core thought here is that legal institutions are institutions of social planning. This stems from his claim that legal activity is planning activity.

Why take this idea seriously? Here is one general reason. Imagine that a small group of six friends decides to host a large party together for their entire neighborhood. They decide that they want to have multiple musical acts perform, hire both a magician and a clown, and order food from ten different restaurants. In order for such a party to happen – and especially for it to happen smoothly – a certain amount of planning will need to happen. Without a plan, for instance, it is hard to see how the magician will get hired – or, similarly, it might end up that six magicians are hired, each one by someone who did not bother to check with the other friends. As groups become larger in size, the tasks they want to accomplish become more complex, and the background disagreements among the group become more contentious and/or morally consequential, the need for planning (including the need for plans about how and when to plan) for certain situations (though certainly not all of them) does not go away. If anything, it increases. However, at the same time that the need for planning increases (at least for certain situations) so too does the difficulty of planning. This is because the sorts of mechanisms that a group of six friends might use to make effective plans for a party are, by themselves, clearly inadequate mechanisms to use in planning for large numbers of people (e.g., thousands or millions of people), especially when those people have deep disagreements and one wants to accomplish complex goals. If people want to plan in such circumstances, they therefore need to come up with more sophisticated tools for planning. Given that we know that we are creatures who are capable of planning – and given the basic understanding of the functional role of plans outlined in the last section – it is a reasonable thought that humans would therefore have developed *some* sort of large-scale planning institutions to cope with that need. Coupled with the fact that there are clear surface similarities between legal institutions and what a large-scale planning institutions would look like – e.g., both produce, carry out, and enforce norms for guiding activity among large numbers of people – it seems that we have at least some prima facie reason for thinking that perhaps legal institutions *are* a specific sort of institution engaged in the activity of shared planning.

Shapiro argues in *Legality* that one can make good on this basic suggestion. In particular, he proposes seven key theses about the nature of legal activity, and thereby about the nature of those legal institutions that are defined by engagement in that activity. In what follows, I will state each of these seven theses and briefly summarize them.

3.1. THE PLANNING THESIS

''Legal activity is an activity of social planning'' (Shapiro 195). For Shapiro, this means two things: (a) that legal activity is planning activity and (b) that this planning activity is specifically a form of *social* planning. For Shapiro, it is ''social'' in at least the following

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three ways: (i) ''the activity creates and administers norms that represent *communal standards of behavior*'' (Shapiro 203); (ii) ''the planning regulates most communal activity via *general policies*'' (Shapiro 203); and (iii) ''the planning regulates most communal activity via *publicly accessible standards*'' (Shapiro 203).

3.2. THE SHARED AGENCY THESIS

''Legal activity is a shared activity'' (Shapiro 204). For Shapiro, legal activity is *shared* in the following sense: those engaged in legal activity are engaged in carrying out a shared plan. It is important to note here that, as we saw in the last section with the case of Brendan and Charlie, people can be alienated from the overall shared plan that they are following. Moreover, the people carrying out a shared plan need not ever have the content of the overall plan as the exact object of their intention. Instead, they need only *carry out* the part of the overall plan that concerns them. This will be a particular subplan, or particular subplans, of the overall plan.

3.3. LEGAL ACTIVITY IS OFFICIAL ACTIVITY (SHAPIRO 209)

By this, Shapiro means that legal activity is planning activity in which certain people occupy *offices* – e.g., the office of the presidency or the office of the Chief Justice of the Supreme Court. As Shapiro emphasizes, one of the key features of offices is that ''the rights and responsibilities that attend the office do not depend on the identity of those who inhabit the office'' (Shapiro 209). Offices are generally created in order to deal with a set of recurring issues in a community, where those issues don't depend fundamentally on the identities of those who inhabit the offices. Thus, (a) offices are generally (though need not be) relatively stable and (b) the identities of those who occupy the office not only *can* change but, indeed, it is often expected that this will be so (e.g., we don't expect John Roberts to be Chief Justice of the Supreme Court forever) (Shapiro, 209–10). Shapiro uses the term *master plan* to refer to the plan that regulates the planning activity of those planners who plan for a group as a whole. In cases involving officials planning for the group as a whole, the master plan is therefore the plan that regulates the activity of social planning among officials who perform this activity. Importantly, this master plan is a shared plan for the planners, rather than for the group as a whole (Shapiro, 165–6).

3.4. LEGAL ACTIVITY IS INSTITUTIONAL ACTIVITY (SHAPIRO 210)

Shapiro's key thought here is this: ''legal relations may obtain between people independent of the particular intentions of those people'' (Shapiro 210). This is what, for him, makes ''the normativity of law 'institutional' in nature'' (Shapiro 210). This feature of law, claims Shapiro, stems from a fact about the structure of master plans in the law. As he puts it, ''master plans contain not only authorizations but instructions as well, namely, plans that specify how the authorized power should be exercised. These instructions will typically set out formal procedures that allow people to exercise power even without the intention to do so'' (Shapiro 210).

Shapiro claims that groups that engage in planning activity that is shared, official, and institutional make up an interesting subclass of groups engaged in planning. He therefore introduces a term – ''organization'' – to refer to such groups (Shapiro 211). Shapiro claims that legal institutions are organizations of a particular type. The next three theses aim to identify exactly what type.

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3.5. LEGAL ACTIVITY IS COMPULSORY ACTIVITY (SHAPIRO 211)

In some cases, the plans of an organization apply only to a given person if that person agrees to being governed by those plans. For instance, suppose that there is an organization called DISC that owns and regulates the use of certain Frisbee-golf courses in the greater Los Angeles area and requires that users abide by certain specific procedures when playing on their courses. DISC requires potential users to sign a form consenting to its rules before playing on one of the DISC-owned courses and does not enforce its rules on courses other than the ones it owns. Suppose that Dustin likes to play Frisbee-golf. Until Dustin decides he wants to play on one of DISC's courses, and until he then voluntarily signs the form that allows him to play on those courses, he has not consented to be governed by DISC's rules of conduct. Without such consent, DISC's plans will not directly apply to Dustin. This is different than with the law. Instead, in the case of law, ''consent is not a necessary condition for the applicability of its requirements'' (Shapiro 212). The planning activity of an organization is ''compulsory'' whenever consent is unnecessary in this way. It should be stressed that, for Shapiro, when the activity of an organization is compulsory, this does not entail that the moral legitimacy of that organization's plans can be established in the absence of consent. Whether or not that is the case is a separate topic for normative theory in moral and political philosophy. Shapiro's point here is descriptive: some organizations apply and enforce their plans on subjects regardless of facts about either the hypothetical or actual consent of those subjects. Legal institutions are such organizations.

3.6. THE MORAL AIM THESIS

Shapiro claims that legal activity has a moral aim. In particular, he claims that ''the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality'' (Shapiro 213). The foundation for this thesis is the following thought: ''the law is not simply a compulsory planning organization – it is a compulsory planning organization with a characteristic aim'' (Shapiro 213). For Shapiro, this aim is a fundamentally *moral* one: it is ''to rectify the moral deficiencies associated with the circumstances of legality'' (Shapiro 213). For Shapiro, the ''the circumstances of legality'' are roughly the ones I sketched at the start of this section, wherein I motivated the idea that social institutions are planning institutions. However, for Shapiro, the description of these circumstances involves a more specific claim about the distinctively *moral* problems faced by a community. For Shapiro, the circumstances of legality are ones in which a ''community faces moral problems that are numerous and serious, and whose solutions are complex, contentious, or arbitrary'' (Shapiro 213). In such a case, claims Shapiro, certain modes of planning will not be very efficacious, for instance, ''improvisation, spontaneous ordering, private bargaining, communal consensus, or personalized hierarchies will be costly to engage in, sometimes prohibitively so'' (Shapiro 213). The aim of legal activity, claims Shapiro, is to rectify this problem by instituting a form of planning that allows a society to effectively plan to deal with the serious moral problems it faces, such as problems about the distribution of material resources. For Shapiro, the claim that legal activity has such an aim does *not* mean that it always (or even generally or *ever*) succeeds in meeting that aim. Nor does it mean that most legal officials (or, indeed *any* legal officials) have morally good intentions, or even intentions that include specifically moral content. Furthermore, neither does it mean that the relevant legal organization itself can be somehow be said to have a

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morally good ''collective intention'' of some sort. As Shapiro emphasizes, there can be morally awful legal systems that in no meaningful sense are actually trying to bring about morally good aims. So what then does the Moral Aim Thesis amount to? As I read Shapiro, the thesis is meant as a claim about the *constitutive aim* of a particular type of object. Think of toasters. If one is comfortable speaking of the aims of objects, it is then a reasonable thought that part of what toasters *are* is that they are functional kinds with a certain aim: namely, the aim of toasting things. Similarly, one might hold that the constitutive aim of clocks is to tell time. As I read him, Shapiro's claim is that legal institutions are like toasters and clocks in that they are also defined by such an aim. Like broken toasters that fail to toast things effectively, legal institutions can fail to ''remedy the moral deficiencies of the circumstances of legality''. But, according to Shapiro, both things are objects that are defined in part by the fact that they have a certain constitutive aim.[3]

3.7. LEGAL ACTIVITY IS SELF-CERTIFYING ACTIVITY (SHAPIRO 220)

Shapiro's claim here stems from the following observation: some organizations (e.g., state legislatures in the USA) are free to enforce their plans without first gaining permission from a superior planning organization, whereas other planning organizations (e.g., the private board of a condominium complex) cannot do this. Shapiro introduces the phrase ''the general presumption of validity'' to capture this feature that state legislatures have but that private condo boards lack. He defines this notion as follows: ''X enjoys a general presumption of validity from a superior planning organization Y whenever Y does not require X to demonstrate the validity of its rules before they are enforced'' (Shapiro 221). In turn, Shapiro calls an organization a ''self-certifying'' one if it enjoys such a general presumption of validity. As he puts it, on this usage of ''self-certifying'', a planning organization is self-certifying ''whenever it is free to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid'' (Shapiro 221).

3.8. SUMMING UP

Putting these seven theses together, we get the following thesis about the nature of legal activity: legal activity is the shared, official, institutional, compulsory, self-certifying activity of social planning with a moral aim. Or, to put it in terms about the nature of legal institutions, the thesis is that legal institutions are compulsory self-certifying planning organizations with a moral aim. This thesis is a summary of the full theory of the nature of legal institutions in *Legality*.

3.9. A BRIEF NOTE ON THE NATURE OF LEGAL AUTHORITY

In the next paper, I will turn to how Shapiro uses this thesis about the nature of legal institutions to support his theory of legal norms. However, before concluding my discussion of the nature of legal institutions, I want to briefly note an important feature of how Shapiro understands the nature of legal authority involved in this account of legal institutions. On the theory of legal institutions that we have just sketched, whether or not a legal institution exists depends entirely on non-moral social facts – descriptive facts, in short, of the sort that we are familiar with from sociology, psychology, anthropology, and the like. The same is true with legal authority. According to Shapiro, ''a body has legal authority in a particular legal system when two conditions are met: (1)

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the system's master plan authorizes that body to plan for others, and (2) the members of the community normally heed all those who are so authorized'' (Shapiro 181). For Shapiro, the capacity for a person (or a group) to exercise legal authority thus rests on three basic things: (1) the general fact that we are planning creatures, (2) the content of a specific plan, and (3) sociological facts about how members of a community respond to the plans created, applied, and enforced by certain people. Thus, for Shapiro, legal authority is based only on social facts, and not on moral facts. Correspondingly, for Shapiro, when a person (or a group) has legal authority, this does not mean that the person (or group) has *legitimate* authority. Rather, it means only that certain descriptive social facts obtain.

Short Biography

David Plunkett is an Assistant Professor of Philosophy at Dartmouth College. Before coming to Dartmouth, he was a Postdoctoral Scholar in Law and Philosophy at UCLA. He holds an AB in Social Studies from Harvard College and a PhD in Philosophy from the University of Michigan, Ann Arbor.

Notes

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[2] See Bratman (1999).

[3] For more on my reading of Shapiro's Moral Aim Thesis, as well as an argument against it, see Plunkett (forthcoming).

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