

The two chapters I will be presenting in the Colloquium are from my recently published book, *Legality* (Harvard University Press, 2011). Because these chapters occur near the end of the book, I thought it might be helpful to describe briefly the aims of *Legality* and show how these later chapters fit into the overall scheme. I will also define a few terms that were introduced earlier in the book which are used in these chapters.

The main argument of *Legality* is that the only way to resolve the “exciting” legal puzzles that lawyers confront—such as who has legal authority over us and how we should interpret constitutions, statutes, and cases—is first to answer the “boring” jurisprudential questions about the nature of law that lawyers (and some philosophers) tend to dismiss. One cannot conclusively know *what the law is*, in other words, until one knows *what law is*.

My answer to the jurisprudential questions about the nature of law I call the “Planning Theory.” According to the Planning Theory, legal institutions are highly sophisticated organizations for social planning. Legal institutions plan for the communities over whom they claim authority, both in the sense of instructing their members on what they may or may not do, as well as authorizing some of these members to plan for others. Legislatures, we might say, adopt plans for the community and courts apply these plans to those to whom they apply.

Planning, on this view, is not just activity that we do just for ourselves, but one we can do for others as well. For example, I plan my children’s lives, the law school administration plans the faculty’s lives and the New Haven City Council plans the lives of the residents of New Haven.

Because legal authorities are social planner, the laws they create are plans. Moreover, the fundamental laws of a legal system, i.e., its constitution, are plans as well. They are *plans for planning*. They regulate the process of law creation and application.

According to the Planning Theory, the fundamental aim of all legal systems is rectify the moral problems associated with what I call “the circumstances of legality.” In the circumstances of legality, a community faces moral problems that are numerous and serious and whose solutions are complex, contentious, or arbitrary. In these circumstances, simple modes of governance such as improvisation, spontaneous ordering, private bargaining and communal consensus are costly to engage in, sometimes prohibitively so. The fundamental aim of the law, on the Planning Theory, is to meet this demand in an efficient manner. By providing a highly nimble and durable method for creating and applying norms, the law enables communities to solve the numerous and serious problems that would otherwise be too costly or risky to resolve.

The law seeks to achieve its fundamental aim through the creation and application of plans. The function of these plans is to guide and organize the conduct of members of a community both over time and across persons. Laws guide conduct in the same way that plans do, namely, by cutting off deliberation and directing the subject to act in accordance with the plan. By settling matters in favor of the directed action, laws cuts down on deliberation and bargaining costs and compensates for cognitive incapacities and information asymmetries, thereby enabling

community members to achieve goals and realize values that would otherwise be beyond their grasp.

As I try to show in the latter part of the book, understanding legal systems as planning systems and laws as plans (or, in the case of custom, plan-like norms) has profound implications for legal theory. One of the main results – what I call the “Logic of Planning” argument – demonstrates that if law is to guide conduct in the manner of plans, then the existence of law cannot be determined by the moral merits of various courses of action. The reason is simple: the point of having plans is to obviate the need for deliberation on the merits. It would be self-defeating to have a plan to obviate deliberation if the only way to discover its existence or content is to deliberate.

Logic of Planning: The existence and content of a plan cannot be determined by facts whose existence the plan aims to settle.

For example, suppose I want to know whether I have a plan to go to Mexico for winter vacation. If I do have such a plan, then the right way to discover its existence cannot require me to first figure out whether I ought to go to Mexico this winter for vacation. After all, the whole point of having such a plan is to settle that very question. Deliberation on the merits would violate the logic of planning because I would be doing the activity that the plan is supposed to do for me. If I must deliberate in order to discover the plan, then I do not have the plan.

I argue in Chapters 9 and 10 that both H.L.A. Hart’s inclusive legal positivism and Ronald Dworkin’s theory of constructive interpretation violate the Logic of Planning. If the point of having law is to settle matters about what morality requires so that members of the community can realize certain goals and values, then it would be self-defeating if the way to determine the existence of these laws is to engage in moral reasoning. Legal norms that lack social sources are like can-openers that work only if the cans are first opened.

Lastly, I distinguish in Chapter 10 between “interpretive methodologies” and “meta-interpretive theories.” An interpretive methodology is a method for reading legal texts. Textualism, for example, is an interpretive methodology. It claims that legal texts ought to be read in accordance with their plain meaning. Law as integrity is another interpretive methodology. It states that legal texts should be read in accordance with the principles that portray them in their best moral light.

A “meta-interpretive theory,” on the other hand, does not set out a specific methodology for interpreting legal texts; rather, it specifies a methodology for determining which specific methodology is proper. It provides participants of particular systems, in other words, with the resources they need to figure out whether to endorse textualism, living constitutionalism, originalism, pragmatism, law as integrity and so on.

I very much look forward to the Colloquium.