

# LAW AS PLAN AND ARTIFACT

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Abstract: Scott Shapiro's theory that law is a social plan is helpful in seeing law essentially as a tool of human creation and as such is sympathetic to understanding law in terms of the social functions it performs, a method I argue for elsewhere. I focus here on two problems with the theory as presented. The planning theory does not adequately explain the persistence of law beyond the utility of those who implement it. Generally, plans can cease to exist as soon as those engaged in them have no more use for them. Laws however, must usually be declared invalid or otherwise nullified for them to have no further effect. Shapiro's use of self-certification to explain how law is differentiated from other forms of social planning is ad hoc and threatens circularity when he admits it to be a matter of degree. Both of these issues can be better solved by seeing law as an institutionalized abstract artifact, with a greater emphasis upon the nature of institutions doing much of the work done by the idea of planning.

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There is much to appreciate about Scott Shapiro's theory that law is a social plan. It is helpful in seeing law essentially as a tool of human creation and as such is sympathetic to understanding law in terms of the social functions it performs, a method I argue for elsewhere. According to the planning theory, legal activity is 'social planning [that] is shared, official, institutional, compulsory, self-certifying [and] whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering.'<sup>1</sup> Here I will focus on two problems with the theory as presented, not to deny that law is a species of social planning, but in aid of the point that the planning idea still needs some augmentation if it is to solve important jurisprudential quandaries.

The first is an older jurisprudential problem that I think is not adequately solved by the planning theory as it stands. That is the problem of the persistence of the law, the fact that the validity and normativity of a law tends to extend beyond the tenure of the authority that created it. Shapiro's focus on plans leads him to say that the law persists only so long as the relevant community members share the plan, which answers how it can extend beyond the creating authority. Yet we should be uneasy with our sense that the law is not quite as ephemeral as suggested by considering it nothing more than a shared social plan. Of course the law is an instance of social planning and we can learn a lot about it by focusing on that. But it is also something more that makes it take on a life beyond the plan itself. This problem can be solved by a re-emphasis on, and greater understanding of, what it means to say that the plan is an institutional one.

The other is a new problem raised by Shapiro's focus on self-certification. Self-certification is the fact that a legal system gets a presumption of validity from any superior jurisdictions and is supposed to help him solve the 'Identity Question:' how to differentiate law from other forms of social

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<sup>1</sup> Scott J. Shapiro, *Legality* (Harvard University Press 2011) 225.

planning.<sup>2</sup> Hence, adding self-certification to the other aspects of the planning theory is supposed to allow the elements of the theory to be jointly sufficient conditions for law, rather than merely necessary conditions. The problem I see with self-sufficiency is that it is an arbitrary solution to the identity problem that threatens circularity. This is especially true when we see that Shapiro himself gives hints at its weakness by mentioning the fact that self-certification is a matter of degree. Beyond that, however, we can imagine legal systems that do not self-certify at all (for example a municipality that must obtain certification for any new legislation from its superior jurisdiction, perhaps after an insurrection), and self-certifying institutions that are not legal systems (certain contractual arrangements).

My suggestion to help solve these problems is essentially to add a little Berkeley to the Stanford, that is, a little Searle to the Bratman. I will suggest that we see laws as institutionalized abstract artifacts,<sup>3</sup> which is not to deny that they are plans. As a plan, law is a tool for solving certain kinds of social problems.<sup>4</sup> But its institutionalization gives it a greater permanence and identity beyond the plan itself. This is not in opposition to Shapiro's theory since he embraces the institutional nature of

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<sup>2</sup> *Ibid*

<sup>3</sup> Others have recently been pursuing similar ideas. See, eg, Corrado Roversi, 'Acceptance Is Not Enough, but Texts Alone Achieve Nothing' (2012) 43 *Rechtstheorie* 1-30, 23; 'Legal metaphoric artifacts' in B. Brozek and J. Stelmach (eds.), *The Emergence of Normative Orders* (Krakow: Copernicus Center Press, 2015); Corrado Roversi, Anna M. Borghi and Luca Tummolini, 'A Marriage Is an Artifact and Not a Walk That We Take Together: An Experimental Study on the Categorization of Artifacts' (2013) 4 *Review of Philosophy and Psychology* 527-542, investigating the perceived distinction between institutional artifacts and other social object; Luka Burazin, 'Can There Be an Artifact Theory of Law?' (forthcoming 2016) *Ratio Juris*; Zsófia Zvolenszky, 'Abstract Artifact Theory About Fictional Characters Defended' (2013) 5 *Proceedings of the European Society for Aesthetics* 597-612, 608, using the law in an analogical argument. This claim is one that I develop at length in a forthcoming monograph.

<sup>4</sup> Shapiro, *Legality* 173.

law as mentioned above, and to look at plans as kinds of tools is mainly to embrace the idea they are artifacts. (He explicitly refers to shared plans as ‘abstract entities’.<sup>5</sup>) Rather, it is meant to flesh out that element a bit more to show how it can help with these problems. John Searle’s use of status functions in explaining institutions can solve the identity problem without the need to rely on self-certification. Law is differentiated from other social institutions and shared plans because it is given that status as distinctive in its creation and conceptualization. I will start by giving a sketch of Searle’s theory of institutions. Then I will turn to the problem of persistence and end with the problem of self-certification.

### **Institutionality**

Shapiro points out that what is special about institutions is that institutionalized plans can operate independently of the intentions of the participants.<sup>6</sup> It is therefore the institutionality of a plan that can help contribute to its permanence and existence beyond the mental states of those who create and use them. But what makes an institution, and how are facts about it different from other social facts?

Searle begins by distinguishing social facts, which are mind dependent, from brute facts, which are not. That a given object is made of wood and metal is a brute fact; that it is a hammer is a social fact, dependent on collective intention at some level. Now since institutional facts (which are usually facts about or created by institutions, although it is possible to have institutional facts without pre-existing institutions<sup>7</sup>) are a subset of social facts, and since one of the important advantages of

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<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

<sup>7</sup> Searle’s example of this is a line of stones, the remnant of an ancient wall that comes to be treated as a boundary. John R. Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010) 94.

institutions as Shapiro mentions, is that they allow for relations, rights, and duties among people that do not depend directly upon the intentions of those people, it might seem there is a misfit between Shapiro's notion of institutions and Searle's. As will become important in the next section, however, Shapiro is quick to admit that 'the institutionality of law is ultimately grounded in intentions'<sup>8</sup> as the normativity of law depends on master plans that are endorsed by officials. So intentionality is important, just not the particular intentions of the immediate participants.

What distinguishes institutional facts from other social facts is that there is a collectively intended assignment of a status that carries deontic powers to something such as a person, event, practice, object, or other social phenomenon, via a constitutive rule.<sup>9</sup> One key feature of institutions, which is brought out in the conveyance of deontic powers with the assignment of status, is the fact that institutions can create desire-independent reasons for action.<sup>10</sup> That is, one key purpose of institutions generally is the creation of new rights and obligations where they did not exist previously.<sup>11</sup> This clearly echoes Shapiro's catalog of the advantages of institutions. There is one more piece to the picture: the constitutive rules are generally 'codified' allowing for the conferral of status upon a *type* of object rather than a *token* object.<sup>12</sup> This provides for the possibility of iteration, many different people can hold the same office, many pieces of specially described paper can be the same unit of currency, many different actions can constitute the same crime, many different ceremonies can create a legal marriage. Each of these examples requires only one rule to create the

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<sup>8</sup> Shapiro, *Legality* 211.

<sup>9</sup> John R. Searle, *The Construction of Social Reality* (Free Press 1995) 23-26, 40-45.

<sup>10</sup> Searle, *Making the Social World* 23.

<sup>11</sup> *Ibid*

<sup>12</sup> Searle, *The Construction of Social Reality* 53; *Making the Social World* 91.

status rather than conferring the status on token events, entities, or practices. ‘Codification specifies the features a token must have in order to be an instance of the type....’<sup>13</sup>

While Searle is never very explicit about what must take place for codification, it is clear that legal codification is one paradigm example. But we should not limit his notion to the legal one as there are clearly non-legal institutions that provide for some kind of official application of statuses to types. Nor should we expect a ‘sharp dividing line between social facts in general and the special subclass of institutional facts.’<sup>14</sup> There are informal institutions which are not codified, where status is conferred on tokens only. The advantages of leaving the institution informal, of not codifying, are that the application of the status it conveys can remain ‘flexible, spontaneous, and informal.’<sup>15</sup> But, as Shapiro notes, these aspects can be serious disadvantages in contexts in which coordination of action is at a premium, or there are other disagreements that must be solved for the community to function.<sup>16</sup> So the very situations that call for a common general plan are those that call for some kind of codified institution.

It seems fairly straightforward that the planning theory and Searle’s theory of institutions are broadly compatible. The planning aspects are captured by the collectively intended assignment of status and the purposes for which that assignment is made. While I won’t delve into this in any detail here, it seems that the planning theory can even help close a loophole in Searle’s theory that he has been at pains to address. The general formula for the assignment of a status function is ‘X counts as Y in context C,’ the characteristic form of a constitutive rule.<sup>17</sup> We can immediately see that much, if

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<sup>13</sup> Searle, *The Construction of Social Reality* 53.

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*

<sup>16</sup> Shapiro, *Legality* 173.

<sup>17</sup> Searle, *Making the Social World* 10.

not most, legislation takes this form, as do administrative regulations. Even court decisions can frequently be reinterpreted this way if they are not explicitly formulated to follow the formula. But one issue that bedeviled Searle for a while was the issue of ‘freestanding Y terms,’ instances in which status appears to be conveyed without a pre-existing entity that receives the status.<sup>18</sup> Examples of this are seen in the creation of corporations and in electronic money. (An outstanding example of the latter was seen in the bank bailout in the U.S. Troubled Asset Relief Program of 2008-09, in which no new currency was actually printed in order to provide the banks with \$70 billion in additional capital to cover their bad loans.)

Searle’s answer to the problem of the freestanding Y term is to say that a person that fits a given, institutionally set description can create a status by declaration.<sup>19</sup> This operation is Searle’s paradigm of law: ‘The law is a Declaration that authorizes other Declarations.’<sup>20</sup> But any who are left with a bit of metaphysical doubt about this solution can turn to Shapiro (and Bratman) and say that the X term in the case of the apparently freestanding Y term is actually the social plan that sets the function that the new status is to fulfill. In effect, the Declaration sets out the plan. So a declaration of the form ‘We make it the case by declaration that the XYZ corporation exists’ can be reinterpreted as ‘The social plan to create the XYZ corporation counts as the creation of the XYZ corporation when the specified legal conditions are met to interpret the plan as a legally effective declaration.’

This is also my aim in characterizing law as an institutionalized abstract artifact: Its institutional nature is captured by Searle’s theory; its abstract nature is captured by Shapiro’s claim that law is a

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<sup>18</sup> *Ibid*, citing Barry Smith, ‘John Searle: From Speech Acts to Social Reality’ in Barry Smith (ed), *John Searle* (Cambridge 2003).

<sup>19</sup> Searle, *Making the Social World* 99.

<sup>20</sup> *Ibid* Searle capitalizes ‘Declaration’ to note that it is a specific speech act, but doesn’t require actual vocalization or written recording as it can be accomplished using any system of symbols. *Ibid*

plan and hence an abstract entity; and seeing it as an artifact is meant to call up more clearly the notion that the law is a tool created by human beings to address specific tasks, that it has a set of functions.<sup>21</sup> This also captures the sense that the law has a life of its own beyond those who create and use it. (Another advantage to it is in showing why legal positivists should embrace analyzing the law in terms of its functionality, a point endorsed by Shapiro.<sup>22</sup>) So perhaps the theories can help each other out, but let us return to focus on Shapiro's theory.

### **Persistence and Endurance**

Shapiro mentions one of the great advances of Hart over the previous forms of legal positivism is that Hart provides for the persistence of law, while theorists such as Austin, who analyze legal obligation as 'a habit of obedience' to a sovereign, could not give a satisfactory account of why law persists beyond the lives of individual sovereigns or the habits of their subjects.<sup>23</sup> Hart's advance was to analyze the law in terms of rules rather than habits.<sup>24</sup> Rules of change and of recognition provide for the continuity of the law-making power from sovereign to sovereign and the validity of laws

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<sup>21</sup> My understanding of the nature of artifacts follows generally that of Amie Thomasson. See 'Realism and Human Kinds' (2003) 67 *Philosophy and Phenomenological Research* 580-69, 'Artifacts and Human Concepts' in Eric Margolis and Stephen Laurence (eds); *Creations of the Mind: Theories of Artifacts and Their Representation*. (Oxford University Press 2007); 'Artifacts in Metaphysics' in Anthonie Meijers (ed), *Philosophy of Technology and Engineering Sciences* (Elsevier 2009), 'Public Artifacts, Intentions and Norms' in Maarten Franssen and others (eds), *Artifact Kinds: Ontology and the Human-Made World* (Springer 2013). In the last of these she downplays the role of artifact function to accommodate artworks, but has admitted in conversation that doing so would not be appropriate for law. See also, Kenneth M. Ehrenberg, 'Law's Artifactual Nature: How Legal Institutions Generate Normativity' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Reasons and Intentions in Law and Practical Agency* (Cambridge University Press 2015).

<sup>22</sup> Shapiro, *Legality* 213-214.

<sup>23</sup> *Ibid*

<sup>24</sup> *Ibid*

made by previous administrations.<sup>25</sup> The problem is that rules of change and recognition, as fundamental rules, are described by Hart as social practices, which Shapiro claims shows Hart committed a category mistake in their characterization. Rules are a different kind of thing from practices.<sup>26</sup> What's more, by focusing on practices rather than habits, we have not advanced from the psychological dependence of the habit theory, further jeopardizing Hart's advances in explaining persistence. While one of Hart's key theoretical advantages was to focus on the distinction between the normative state of being under an obligation and the psychological state of being obliged, by explaining legal obligation in a way that ultimately rests on practice theory rules, we are still left with a psychological state at the bottom: the disposition to engage in the practice.<sup>27</sup> This is further magnified by Hart's insistence that officials internally accept the law as reason-giving, a view which Shapiro shares.<sup>28</sup> So while we have an advancement over the notion of habits in that we can explain the persistence and presence of law where people have not yet developed any habits, the law is still no more permanent or stable than any other social practice (some of which, admittedly, can last for quite while).

Instead for Shapiro, the fundamental rules of a legal system are plans, and this is supposed to solve (among other things) the problem of persistence.<sup>29</sup> The solution comes in the form of a master

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<sup>25</sup> *Ibid*, citing HLA Hart, *The Concept of Law* (Penelope A. Bulloch and Joseph Raz eds., 2nd edn., Clarendon Press 1994 (1961)) 57-61.

<sup>26</sup> Shapiro, *Legality* 103-104, emphasizing that rules are abstract objects.

<sup>27</sup> See generally Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 *Fordham L.R.* 1171-1210.

<sup>28</sup> Hart, *The Concept of Law* 89; Shapiro, *Legality* 183. For a critical examination of this facet of the theories see Kenneth M. Ehrenberg, 'The Anarchist Official: A Problem for Legal Positivism' (2011) 36 *Australian Journal of Legal Philosophy* 89-113.

<sup>29</sup> Shapiro, *Legality* 119.

plan that is adopted and gives certain people the authority to create sub-plans that provide solutions to particular problems. Once a hierarchical arrangement is accepted by community members, then there is a shared plan for further social planning.<sup>30</sup> This is a master plan for those tasked with social planning, authorizing them to make further plans. When the right person makes a determination of right or obligation under the master plan, her determination is binding simply because it is an aspect of the master plan.<sup>31</sup> Persistence is supposed to arise from these facets. ‘As long as they are approved in accordance with the requirements of the shared plan, the [sub-]plans will be deemed binding, both by the planners and the [subjects] generally, and followed accordingly.’<sup>32</sup> Since the shared master plan and various sub-plans dictate that ‘the planning of past inhabitants’ continue to be valid, those plans persist though time, perhaps even beyond the lives of original planners and community members.<sup>33</sup>

It still must be the case, however, that the group members accept at least the basic plan. Notice in the quotation above that Shapiro is focusing on the fact that the sub-plans ‘will be *deemed* binding’ and ‘followed.’ We are still in the realm of seeing the persistence of law as strongly psychologically dependent. While shared plans are not practices in that they are abstract entities, as plans they still must be accepted and be the objects of the intentions of the group members.<sup>34</sup> Of course, there is a social practice at the base of law in what the officials will deem to be valid, but that practice is

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<sup>30</sup> *Ibid*

<sup>31</sup> *Ibid*

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

‘structured by a shared plan.’ That shared plan ‘must be practiced by that group if it is to exist. They must accept it and it must dispose them to act accordingly.’<sup>35</sup>

There are strong reasons for a legal positivist to emphasize the dependence of law on the acceptance of the community. We do not believe that the law is mandated by something outside of the practices and beliefs of the community. Furthermore, there are good reasons for sharing the intuition that if everyone wakes up tomorrow believing themselves no longer bound by the legal system, it has ceased to exist. On the other hand, I would argue that institutions don’t just cease to exist quite so easily. We usually think they must be *dismantled*. If everyone woke up tomorrow with that belief, we would still want some form of official declaration that the legal system has ceased to have effect, notwithstanding the problem that we would no longer believe the officials had any official capacity. This isn’t just because of worries about enforcement. (Imagine we know that everyone, including the police, shares this new belief.) Rather, it must be that we think our institution has changed the world in some way, even as we no longer believe that change to be holding its characteristic impositions upon us. We would likely want a declaration, another institutional act, to unmake the institution.

It may be that there is something irrational in this desire. If we do not think the institution holds any further deontic power, then it is hard to see any sense in a further institutional act or its power to alter reality. But we can also see this problem arise on the level of sub-plans, individual laws. This is the issue of laws ‘on the books’ that are no longer enforced or of which we may not even be aware. Shapiro would say that these laws can still be valid if they would be picked out as valid by officials following the master plan dictating their determinations of validity. However, take some law that would be deemed obviously absurd and invalidated on that basis by an empowered official whose

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<sup>35</sup> *Ibid*

interpretive theory includes a prohibition on seeing absurd laws as remaining valid. On that basis, there is little difference between this as yet unattended-to antediluvian law and the law of a foreign jurisdiction. Once considered, it would be deemed not to be a valid member of this particular legal system. Yet there is a difference between the two. Foreign laws don't have the right pedigree to be considered members of this legal system, while this law clearly has the correct pedigree. Before it is actually pronounced invalid, it is still a member of this legal system (with the potential for being at the root of jurisprudential conflicts).

Again, Shapiro might explain this with the notion of it being a sub-plan of a master plan that we do accept. But without denying the notion of it being a plan, I want to suggest that it makes more sense to explain this facet of legal systems as owing to their institutionality rather than to their nature as plans. That institutionality confers a greater endurance on these plans than is the case with more simple social plans. (Although they are synonyms, I switch here to referring to the 'endurance' of the law rather than its 'persistence' to highlight that we are no longer dealing with the exact problems raised with the habit theory: persistence between sovereigns and beyond subjects' habits. Rather, we are now worried instead about the endurance of the law beyond its utility to community members.) If you'll forgive a metaphor, they have become stitched into the fabric of social reality, rather than simply ironed on.

There is no doubt that law is dependent on intentionality for its existence as a creation of human beings. But it is not quite so dependent on human psychological states for its endurance. Searle's theory helps to capture this. Since the deontic powers conveyed in the creation of institutions are something that parties to those institutions come to expect and rely upon, there needs to be an equally formal way of altering them, even if those with them and subject to them no longer see any utility in them. That is, they have become part of the way in which members of the relevant

community conceptualize and carve up the world, part of the background assumptions with which they deal with each other. This is still true where the particular rights and duties no longer have any use. When we encounter someone with whom we have a contract, even where we both know that neither of us has any further use for the contract, we also know that the other person *could* choose to exercise her rights under it until we dissolve it.

This aspect of institutionality also helps to respond to a worry that Shapiro has raised about these thoughts.<sup>36</sup> His reply was that if a nuclear bomb exploded over a small country such as Belgium, wiping out all its inhabitants, we wouldn't think there was a continuing need to dismantle its legal system. While I do wonder about the possibility that Belgians happening to be abroad at the time might need some sort of official procedure, it is nonetheless clear that an institution still depends upon the people involved with it and their beliefs for its continuing existence. If the people of Belgium woke up tomorrow having amnesia about their own legal system and believing themselves instead to be a province of Luxembourg, there would be no need for any dismantling of the Belgian legal system so long as the Luxembourgiens and the rest of the world are willing to go along with these beliefs. So I cannot claim to have completely eliminated the psychological dependence of the legal system. Rather, the claim is that the existence of the institution (which is still psychologically dependent) can be separated from some of the beliefs in the norms and other deontic powers that it represents. I say 'some' of those beliefs since there is still a strong sense in which the institution is identical with the deontic powers that are conveyed with its creation. When we stop seeing the utility of that particular system of deontic powers, we still have the worry that others *could* claim their right to employ them (even if we know that those others also currently see no

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<sup>36</sup> These replies were made verbally by Shapiro at the Second Jurisprudence Workshop at the University of Antwerp, May 31, 2012.

utility in them). This is likely why we still need an official reassurance that the institution has ceased to exist in the form of a new declaration to that effect.

It's not that Shapiro's theory cannot accommodate the endurance of law. Rather, I suggest that the focus on the planning nature of law rather than its institutional nature can tend to distract us from this fact. This is especially true when Shapiro discusses legal authority. For Shapiro, being granted authority by a master plan is necessary but not sufficient to obtain that authority.<sup>37</sup> As plans for others, the subjects must also be disposed to follow the directives of those putative authorities.<sup>38</sup> Hence general acceptance of the ability of the putative authorities to plan for others is another necessary condition for legitimate authority (which, when combined with the condition that they are authorized by the master plan to plan for others, makes them jointly sufficient). This is needed to avoid situations where, for example, a splinter group declares independence and jurisdiction over a given community. The group shares a plan authorizing them to issue directives for the community, but they can't dispose the rest of the community to comply.

However, just as we might want to prevent cases like the splinter group from being considered instances of legitimate authority, we might want to look at aspects that suggest the continuation of authority where the same hallmarks are present. Recognizing that the distinction between these kinds of cases is murky, take Raz's example of the legitimate government of Poland, in exile in London during World War II.<sup>39</sup> The authorities were authorized by a shared plan that then lapsed as a result of military conflict. Let us imagine a general collaboration of the Poles still resident in

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<sup>37</sup> Shapiro, *Legality* 179.

<sup>38</sup> *Ibid*

<sup>39</sup> Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 128.

Poland with the Nazis such that the exiled government is no longer able to dispose its subjects to comply with its directives (assuming they can still communicate those directives). To say that this government in exile is still the legitimate government of Poland is to call into doubt Shapiro's 'general acceptance' condition. Of course, it is possible to analyze this situation as an interregnum, or to say that there was a gap in the legitimacy of the planning authority for Poland from the time the Nazis invaded until the time the government was reinstated. But that would be to say that nothing they did while in London had any legal effect until they later ratified those actions (admittedly complicated by the fact that they did not relinquish their claim to authority until the fall of the communist government in 1990). Granted, these are not the 'normal conditions' to which Shapiro points as part of his condition that subjects be motivated to comply. But they exemplify the problem I am highlighting: that institutionality gives more endurance to the plans than its makers and subjects psychologically need to accept.

All this is not to say that laws or legal systems live on forever, beyond the communities that use them. Clearly, entire systems are rendered invalid with something as simple as a declaration by an official of a superseding system. But the point is that it generally takes some institutional act, even if one not contemplated by the pre-existing legal institutions, to unmake a legal system. This is important for replying to another point Shapiro raised,<sup>40</sup> that the Articles of Confederation, the original constitution of the United States, were abrogated by official actions that would not have been deemed valid under the Articles' own terms. Since the Articles required unanimous consent of the states in order to abrogate them, there is a good case to be made that the current U.S. Constitution (which required only nine of thirteen states to ratify it before it became valid) was illegal and invalid at its inception, at least until Rhode Island ratified it in 1790. But the point I am

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<sup>40</sup> Also at the workshop in Antwerp.

making here is not that the official action altering or abrogating the institution must be one that is contemplated by that institution itself. Rather, it simply must be official and institutional, and come to be generally accepted. (Admittedly there may be a considerable period of doubt where it is not clear which system is governing, especially during revolutions, military conquests, coups d'état, or even the peaceful election of a party of radical reform.) Nor should we say that internal acceptance of the plan and the intentions and psychological states of officials and subjects are unimportant. Plans must be made; people must collectively intend the conveyance of deontic powers with the declaration of a constitutive rule that conveys status. But the advantage of seeing the law as an institutionalized abstract artifact is that it can help to explain better our sense that the law endures beyond the use of its officials and subjects. The law can still be a plan, but a special kind of plan that can continue to exist after participants cease to be willing participants.

### **Self-Certification**

Self-certification is a key step in Shapiro's solution to the 'Identity Question.' The Identity Question is the problem of how to differentiate law from other forms of social organization and guidance that share many of the same characteristics.<sup>41</sup> The law, for Shapiro, is unlike other 'shared, official, institutional, compulsory' instances of shared planning with moral aims in that it gets a presumption of validity from any hierarchically superior shared plan.<sup>42</sup> This seemed necessary to Shapiro in order to explain why other social organizations that have official, institutional, compulsory authorities with moral aims are not legal systems. His example is a condominium board that has the power to set rules for the behavior of residents.<sup>43</sup> The key difference between the condo board and a legal system

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<sup>41</sup> Shapiro, *Legality* 8.

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid*

is that *'federal law automatically presumes that state law complies with federal law,'*<sup>44</sup> while the condo board gets no such presumption: it cannot enforce its rules unless and until it convinces a superior legal official that its actions are valid. But subordinate legal officials generally need not make any such demonstration.

While this is certainly generally true in the U.S. and many other modern legal systems, it also seems like it might just be an arbitrary feature that happens to be common among legal systems at the moment. Furthermore, it is not so clear that non-legal institutions don't frequently share this property of self-certification. Let us start by looking more closely at Shapiro's example. He compares the situation where the state in which the condo is located passes a law outlawing 'skinny dipping in any pool, public or private,' with one in which the condo board passes a rule for their condo area that skinny dipping not be allowed in their pool.<sup>45</sup> What seems clear is that, in the first case, the police 'can simply yank the skinny-dipper out of the pool and charge him with the crime of skinny dipping.'<sup>46</sup> They don't need approval of a superior official to do so. On the other hand, in the latter case, the condo board cannot physically remove him without contacting the police.

For Florida, like many other legal systems, does not permit owners to enforce their property rights (as opposed to their right not to be physically harmed) through this form of self-help. Rather, they must call the police and hope that the police agree that the skinny dipper is trespassing on their property. Furthermore, they are not permitted to change the locks on the resident's condominium.<sup>47</sup>

Notice that this analysis depends on the fact that Florida law does not permit the owners to exercise self-help. But it could have done so. Of course, to that Shapiro might respond that the key is that the condo board would need legal authorization to exercise self-help, while the police do not need

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<sup>44</sup> *Ibid*, emphasis in original.

<sup>45</sup> *Ibid*

<sup>46</sup> *Ibid*

<sup>47</sup> *Ibid*

legal authorization for their actions to be presumed valid. But the police themselves are authorized by a general plan that sets out their duties and responsibilities in their official role. The law *happens* to give them a presumption of legal validity for their actions.

We could just as easily imagine the situation is reversed: Imagine we live in a hyper-libertarian state where property rights trump even rights over bodily integrity, but suspicion of government power runs deep. In such a state, the law could easily be that acts of forcible rejection from private property are presumed valid until proven otherwise, while police actions must all be pre-authorized by judicial review (as we do now with warrants for searches and arrests for those not red-handed). Even the case of the skinny dipper might not be typical for our system. Many actions of condo boards do get presumptions of validity; they are allowed to enforce their rules within certain legally prescribed limits. The reason it does not get a presumption of validity for forcible removals is simply that such cases involve the imposition upon a right we consider to be particularly precious: that of bodily integrity. If the condo board had a rule that specified the television in the common room could not be played after 11pm without special arrangement, they would not need prior legal approval to cut the power to the common room after 11pm when one of the residents' screening party has run long.

Shapiro defines self-certification as a planning organization's freedom 'to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid.'<sup>48</sup> But I worry that he is here limiting his conceptualization of enforcement to cases of interference with bodily integrity. (This would be uncharacteristic, since elsewhere he is mindful that there are many means of enforcement.) Since it is common, but by no means unique, for legal systems today to have a

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<sup>48</sup> *Ibid*

monopoly on the use of force,<sup>49</sup> conceptualizing enforcement in this way can easily be confused for self-certification. Shapiro himself notes that the power of enforcement does not need to be unlimited.<sup>50</sup> So some systems simply have even greater limits in that they may not use force. But when we realize that many rules don't require 'force' for enforcement and many planning organizations do not require any prior authorization for enforcement of their rules so long as they don't need to interfere with bodily integrity to do so, the self-certification of legal systems seems much less unique to them. Many, if not most, private contractual arrangements provide for enforcement by one party denying access to the benefits of the bargain to the breaching party. While such enforcements are subject to validation by the courts, the need to bring court action in order to challenge the validity of enforcement indicates that it carries the presumption of validity.<sup>51</sup> Furthermore it is not so clear that legal systems are quite so self-certifying. One example is the case of the hyper-libertarian system. For another, consider a municipality that had recently been in rebellion and is now required to pre-certify all of their legal activities by a state control board. This is common in cases today of financial mismanagement for any expenditures of financially strapped municipalities. The kind of oversight that undermines self-certification even seems built in (conceptually if not practically) to some Commonwealth countries' system of government, in which all acts of Parliament must be approved by the Governor General (as the representative of the monarch) before becoming law.

Shapiro has replied to these considerations<sup>52</sup> by suggesting that, in cases where the system does not enjoy the presumption of validity from a hierarchically superior jurisdiction, the system is simply

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<sup>49</sup> *Ibid*

<sup>50</sup> *Ibid*

<sup>51</sup> Shapiro himself cites a presumption that is rebuttable in the courts as evidence of self-certification. *Ibid*

<sup>52</sup> Verbally, at the discussion in Antwerp on May 31, 2012.

a subsidiary of that superior jurisdiction rather than a distinct legal system. Hence, where the Governor General's approval is simply pro-forma, we can call the former colony's legal system separate. But where the Governor General exercises real authority to withhold Crown approval, the system is simply a sub-part of the British legal system. (However, after the Balfour Declaration of 1926 and for those dominions it covered, the Governor General was to be seen as the representative of the Crown as head of state for that country, and in no way connected to the British government.) Putting aside these complexities, however, it is not clear what Shapiro sees as the defining mark of a sub-system as opposed to a distinct system. He clearly sees state law as a distinct system, while arguing that colonies with powerful Governors General are merely subsidiaries. When pressed, it appears that the only way to draw this distinction rests upon whether or not the system exhibits self-certification. But that is manifestly circular: non-self-certifying systems are not counterexamples because they are merely subsidiary systems. Yet the only thing we can point to showing that they are subsidiary rather than independent systems is that they are not self-certifying.

By way of a better reply, Shapiro might wish to remind us that self-certification is a matter of degree and hence legality itself may also be.<sup>53</sup> The condo board that can turn off the power to the television room has less self-certification than the state police, which has less than the state legislature, which has less than the federal government. As long as the organization is '*almost*' always free to enforce without certification, we should feel comfortable in calling it a legal system.<sup>54</sup> There are two problems with this move, however. One is exemplified by the hyper-libertarian example, in which it begins to appear that the condo board is more of a legal system than the municipality with its limited police force. The other comes with a reminder of what work this aspect of legality was

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<sup>53</sup> Shapiro, *Legality* 224.

<sup>54</sup> *Ibid*, *emphasis in original*

supposed to do: answer the Identity Question. If the point of including this characteristic in our analysis of legality was to differentiate law from other forms of social planning, then the more it is open to matters of degree, the less it can accomplish this task. Since Shapiro is adding self-certification in order to answer the Identity Question, it is not clear that he can fall back upon the fact that self-certification is a matter of degree and still have it be enough of a necessary and jointly sufficient condition to meet the task.

In support of the claim that legality might be a matter of degree, Shapiro cites this passage from Raz:

The attempt to characterize legal systems by the spheres of activity which they regulate or claim authority to regulate cannot be a very precise one. The general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees. ... It would be arbitrary and pointless to try and fix a precise borderline between normative systems which are legal systems and those which are not. When faced with borderline cases it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to the typical cases, and leave it at that.<sup>55</sup>

Notice that the context of this passage from Raz is where we are attempting to answer what Shapiro calls the Identity Question by investigating characteristic ‘spheres of activity’ that legal systems regulate. This is not the project that Shapiro is engaged in. We are leaving the spheres of activity wide open and instead engaged in characterizing legality as a specific sub-type of a common human activity, that of planning. Notice also that Raz claims it is ‘arbitrary and pointless’ to seek a fixed borderline between legal and other normative systems. But by trying to answer the Identity Question, Shapiro has given us a point. Given that many facets of legal systems are shared by other planning systems, it will certainly seem a bit arbitrary to fix a clearer line between the legal and the non-legal. But the point is to be able to answer the Identity Question, to see what puts the law apart from those other systems. Self-certification doesn’t seem to fit the bill, even admitting it is a matter of

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<sup>55</sup> Joseph Raz, *Practical Reason and Norms* (2d edn., Princeton University Press 1990 (1975)) 150.

degree. We simply cannot say that systems which exhibit a lower degree of self-certification are borderline cases and leave it at that because many of those systems are paradigmatic cases of law. And there are too many possible systems with a high degree of self-certification that appear to be similarly far from the borderline, into the space of systems that are clearly non-legal.

Rather than throw up our hands at the possibility of answering the Identity Question, I suggest again that we turn to the notion that the particular kind of plan that law represents is an institutionalized abstract artifact. Let's start with the artifact aspect. Consider what it is that makes a hammer what it is, while a rock you use for driving nails is not a hammer. Both are used to perform the same task, yet the hammer was designed and developed to perform that task. It is a tool created by a human being to perform a function, while the rock is only accidentally performing that function as a result of the human's usage. So a hammer is something that gains that identity as a tool designed and created for that purpose. It is differentiated from other things that can be used to drive nails merely because of the fact that it has an artifactual nature that was self-consciously designed. If all we have is the rock when we need to drive a nail, we might be tempted to call the rock 'my hammer.' But the use of the possessive pronoun in this context marks it as a hammer in a merely nominal way. I couldn't ask a friend who has just arrived to 'hand me the hammer' (and even asking for 'my hammer' would require explaining the special context).

Instead, the inventor of the hammer created a tool with the function of driving nails, and subsequent manufacturers of hammers have followed a pattern and improved upon it based on an understanding of that function and that the tool they were making was designed for that purpose. In this way we developed the concept HAMMER as referring to tools created for this purpose and distinguishing them from other objects that happen to be useful for the same purpose. If someone asks us the Identity Question about hammers: what separates them from other objects that can be

used for the same purpose, we simply give the answer that it is a tool expressly created for that purpose and designed to be identified as that particular type of artifact.

It is clear that whatever functions law performs, other social arrangements can also perform some or even all of them. Shapiro focuses on solving the moral problems associated with the conditions of legality. Other normative systems can solve many of those problems, although many often not as completely or as well. Rocks also frequently won't do as good a job hammering as a hammer, although sometimes they will admittedly do better. Sometimes customs, religion, or etiquette can do a better job than law. What sets law apart from those other systems of social planning is that it is expressly designed for the purpose of solving those problems and designed to be recognized as such. Those other systems might not be expressly designed at all, or might be designed primarily for some other purpose and only happen to also be useful for solving some of the same problems, or might not be a planning system.

Put in Searlean terms, law is a specifically created status that provides for the institutional creation and assignment of other statuses. So there is some truth to the statement that something is law because we call it 'law.' It is a creation of fiat, via Searle's 'Declaration'. This is the arbitrary aspect of what is suggested by Raz in the quote above. Any attempt to draw a sharp line among borderline examples of legal systems will be arbitrary because distinctions on the border will come down simply to what participants tend to consider to be legal activity. But like the hammer, there is some limitation on what kinds of social plans are candidates for legal plans, set both by the methods by which they are created and adopted, and the purposes to which they are put.

The upshot of this is that legality is not really a matter of degree, even though the aspects of law that demarcate it from other normative systems and institutions are themselves matters of degree. This is necessary in order to see that the Identity Question is still answerable despite the fact that

aspects of the answer are matters of degree. Otherwise, once we admit that the facets of law that demarcate it from other institutions and systems are matters of degree, we would have to give up on answering the Identity Question with a reasonable amount of specificity.

Once we see that the law is an expressly designed social institution for solving those pesky social problems, we should be less worried about the Identity Question. What sets the law apart is that we make it special when we make it. We make it special by making it an institution with a special status, conferred when appropriately sourced norms are used to solve for the conditions of legality. When we realize this, we should see that we don't need to focus on self-certification as a hallmark of legality because that is not what makes it special.

## **Conclusion**

This has not been to deny that law is a form of social planning. Rather, my point was to show that it is not *just* a form of social planning, that its institutionality, properly considered, can enhance the planning theory to provide a better answer to law's endurance and help avoid the temptation to see local contingencies like self-certification as essential to law.