**An Artefactual Theory of Precedent**

Kenneth M Ehrenberg[[1]](#footnote-1)\*

1. **Introduction**

Across the jurisprudential spectrum, there is wide agreement that law is best understood as some kind of artefact. Where there is doubt or criticism of the notion that law is a kind of artefact, it is usually in the context of explaining the role of precedent that the critics say they find reasons to pause. One example of this is a paper by Dan Priel claiming that common law cannot be understood as an artefact (though he admits that other aspects of law can be).[[2]](#footnote-2) As someone who has developed an explanation of how law is to be understood as an artefact,[[3]](#footnote-3) I here develop and defend the claim that the understanding still applies to precedent. Since the issues with understanding the role of precedent in common law systems pose the greatest challenge to an artefactual understanding of law in general, I will focus more on those arguments with the expectation that my solutions and replies can be used *mutatis mutandis* to apply to any issues with precedent in civil law systems.

While I will use Priel’s paper as a foil against which to develop my ideas of the artefactual nature of precedent, his paper is just one example applied directly against the artefactual understanding of law of an old problem for legal positivists, that of customary law.[[4]](#footnote-4) The problem is that whether we say that law is the command of a sovereign[[5]](#footnote-5) or a union of primary and secondary rules validated by a rule of recognition,[[6]](#footnote-6) it is hard to deny that custom can be a source of law. Yet it does not appear to be entirely captured by these descriptions. With customary law, it is hard to identify a commanding moment of creation, even if we could overcome the hurdle of trying to identify its creation with the act of a sovereign. And although the customary rule may be primary or secondary, the usual criteria of validity we expect to see in a rule of recognition must be stretched beyond recognition to accommodate the murky sources of custom.

While we might be tempted initially to leave custom aside as a problematic addendum, once we start thinking clearly about precedent, custom seems to have an outsized role. Many early decisions, especially in common law jurisdictions, cite custom directly. Those decisions then form the basis of further decisions that maintain the authority of that custom, even as the later decisions now cite the precedent rather than the custom directly. Furthermore, the weight afforded to precedent and justification for doing so can themselves be seen as aspects of custom and so resistant to artefactual analysis.[[7]](#footnote-7)

I will begin by giving a thumbnail sketch of my understanding of how law is an artefact, focusing on those elements that are of most relevance to addressing the issues with precedent. Then I will address the concerns that Priel raises, showing that the theory is robust enough to accommodate his concerns and precedent more generally.

1. **Law is a Genre of Artefact**

When we say that law is a kind of artefact, in order for this claim to be explanatorily useful, we must be saying something more than simply that it is product of human behaviour, even if we limit this to say that it is responsive to our interests.[[8]](#footnote-8) In this Priel and I agree.[[9]](#footnote-9) For it to be explanatorily useful (and apparently controversial), he says that the claim must be ‘(roughly) that law is the product of purposive action, that it is the product of design.’[[10]](#footnote-10) While I think it is a mistake to equate purposive action with design,[[11]](#footnote-11) I agree that artefacts are generally designed to serve a purpose.

More specifically, the notion of artefact that I employ in explaining law is that of a ‘public artefact’. Amie Thomasson explains public artefacts are ‘intended to be recognizable as artifacts of that kind by a certain intended audience.’[[12]](#footnote-12) While I might invent some new artefact for my own personal use (knowing how to use it simply because I invented it), a public artefact must be designed to be recognizable to others so that they understand its use by understanding what kind of artefact it is. She and I therefore follow Randall Dipert in understanding artefacts generally to be tools that signal their identity by communicating their purpose and how they are to be used.[[13]](#footnote-13) (Of course that communication could fail. When we dig up an ancient artefact, we try to identify it by trying to figure out what its purpose was by examining its form and other clues from the context in which it was found.) Artefacts are therefore a subclass of tools, which according to Dipert are instruments that have been adapted to serve some purpose. Instruments are simply objects that are used to serve some purpose.[[14]](#footnote-14)

I believe law is a genre of institutionalized abstract (public) artefact. I say it is a genre of artefact in order to respect the type/token distinction;[[15]](#footnote-15) it is not clear that the most general type itself has all the properties of an artefact, even though its token legal enactments, judicial decisions, and even entire legal systems do.[[16]](#footnote-16) It’s abstract because it isn’t to be equated with any particular recording and we could imagine legal norms that are never recorded (for example in verbal contracts). Explaining what it means to say that it is institutionalized is a bit more complicated and carries much more of the weight of the theory, showing more of what makes law special. Institutions are a subclass of artefacts that operate primarily by creating and assigning artificial statuses where those statuses purport to carry deontic powers to change people’s rights and responsibilities (giving new reasons for action), enabling them to perform specified functions within that institutional context.[[17]](#footnote-17) Institutions are therefore themselves abstract artefacts[[18]](#footnote-18) that aid people in the attainment of certain goals by manipulating their reasons for action. Putting this discussion together with the typography we started with from Dipert, we can say that each of the of the following (except the first) is a sub-class of the previous: Instrument – Tool – Artefact – Institution – Law.

Take the example of a hospital as an institution. It is not identical to the building that houses it since a given hospital can move or have the building torn down and rebuilt. It is not identical to the doctors, patients, and administrators that populate it, as those are constantly in flux. Rather, it is an organization of elements with rules for assigning statuses to people, places, and perhaps even objects and events (like ‘doctor’, ‘nurse’, ‘orderly’, ‘patient’, ‘administrator’, ‘visitor’, ‘operating theatre’, ‘waiting room’, ‘emergency room’, ‘nurses’ station’, ‘doctors’ rounds’, etc). In order to facilitate the healing of the sick and injured, those statuses alter the rights and responsibilities of people who interact with the institution. I use the verbal adjective ‘institutionalized’ to emphasize that the establishment of institutions is something that must be done (and can be done to a pre-existing artefact). As might be guessed from the example of the hospital (though hospitals could be developed prior to or outside legal systems), law is somewhat special in that it is quintessentially an institution for generating other institutions, potentially giving their purported changes to people’s reasons for action greater social weight. An administrator ordering all visitors to leave the hospital has likely given those visitors a strong reason to leave, even if we imagine the hospital in an area with no law. But if we imagine it as organized under the rules of a legal system, that order might carry even more weight and the potential backing of wider social norms or enforcement.

Given this analysis, there is one sense in which an artefactual understanding of precedent should be relatively uncontroversial. That is in the basic sense of precedent as a prior judicial decision used by a later decision-maker to guide or control the later decision. That is an artefactual understanding since it sees the precedent as a human creation that serves the purpose of guiding or controlling those later decisions (and was likely at least partially written in order to serve that purpose).[[19]](#footnote-19) It is institutional since its ability to serve that purpose depends upon its membership in the legal system as a valid decision. This sense of precedent can be contrasted with *stare decisis* (a principle of using precedents as generally controlling, rather than merely guiding) and common law (a body of law or kind of legal system characterized partially by a use of *stare decisis*, building up legal norms over time from precedent).[[20]](#footnote-20) The problems tend to arise when we consider the role or strength of precedent within a legal system (which may be customary) and whether we can still think of them as artefacts when seen in that light. I will therefore focus on the role of precedent in common law as raising the most potential problems for the artefactual analysis.

1. **Artefacts and Customs**

If artefacts are generally intentionally designed to serve a purpose, it might seem that customs cannot be artefacts. After all, we usually don’t think of customs as being designed consciously. This is precisely the argument Priel makes against seeing customs as artefacts. ‘Unlike legislation, social norms (customs) are also a kind of order (design), but it is not typically conscious. Such norms typically emerge without any conscious decision by any single person to adopt them.’[[21]](#footnote-21) He goes on to give the example of the norm of putting one’s property on a table in a cafeteria-style eatery to signal that the table is ‘taken’. Perhaps no one ever ‘authored’ this norm, and others may follow it without even realizing it.

The problem with this line of reasoning is that it views custom monolithically, suggesting all customs have a very narrow and circumscribed set of properties. Even if we admit that some customs are developed without conscious intention or design, it is far from clear that this is true of all customs. To understand this, we have to delve more deeply into the development of customs, particularly how they acquire their normative character. With the reserved table custom, there are several possibilities for its development. It is entirely reasonable to believe that, prior to the development of the custom, someone first put their property on the table to signal to others that the table was taken, and others recognized this signal and that someone was thereby requesting them not to sit at it. Even if there were several people who independently developed this signal, such an explanation would easily be in keeping with an artefactual understanding of this norm. The custom was invented by the people who first devised the signal, even if they did not realize they were inventing a custom by doing so. The key for designers and inventors is to develop something that signals its purpose; they need not be self-aware that they are thereby creating an artefact of a given type. Hence, one can start a new custom without realizing that what they are doing is authoring a custom. Now, of course, in this story a lot of work is done by the people who receive and understand the communicated request and are the first to respect it. As with many social norms, the first followers might in some ways be even more important to the story than the inventors. They had to recognize the presence of the property on the table as a signal for the wishes of its owner, understand that the wish was being communicated to them, and therefore to be giving them a reason to comply. But so far this story is in perfect step with the development of other public artefacts: an inventor develops a new kind of tool (possibly by modifying existing designs), something about which communicates to the audience of potential users what the tool is for and how to use it.[[22]](#footnote-22) In this case the property on the table carries the clear signal that the table is occupied and if the recipients of the signal wish to respect that request, they do so by not occupying the table themselves. Of course, this is a very easy tool to replicate; once people see that it is effective, they easily adopt it for reserving their own tables and the custom spreads.

Now Priel might complain that this is a very self-conscious kind of story to tell about the development of a custom and it might have developed in a much less self-conscious fashion. Of course he’s right, but it’s important to see that the self-conscious method is one way for custom to develop and hence it is not enough to say simply that common law is custom. There are at least two other possibilities Priel might suggest: that it developed from a more inadvertent action, and that it developed from a habit. To understand the inadvertent action possibility, let’s imagine another scenario. Someone puts her belongings down on a table in the eatery because it was a convenient place to put them. Perhaps she did intend to sit there after getting her food, but she didn’t have any intention to signal this to anyone. (We are again imagining this taking place in an area where the custom is not yet established.) Perhaps when she first arrived at the eatery there weren’t many customers and so there was no need to give any thought to ‘reserving’ the table. As she was getting her food, however, more customers came in and she noticed that they were avoiding the table on which she placed her belongings. To respect the analysis of artefacts preferred by Priel (and myself), perhaps we should say that the norm is not yet an artefact. But after noticing the effect it has on others, she (or someone else) begins to use the reserve-table-with-property technique intentionally. This would now be the first time someone uses it to send a signally intentionally and we could then call the custom an artefact, since the technique is being adopted and refined to send that signal.[[23]](#footnote-23)

Finally, let’s imagine that there is a widespread habit that people have of placing their belongings on tables when they come into an eatery and then they return to those tables to eat. No one thinks of this behaviour as normative yet; it’s just a habit that lots of people share, like tying one’s shoes in a certain order. At some point, however, someone starts to express some kind of negative judgment when others take a table with someone else’s property on it. A similar story likely explains the development of the norms about where to put the silverware when setting the table. At first, it was likely just widespread regularity of behaviour. But at some point one or more people started seeing departures from this behaviour as justifying negative judgments about such departures. Once those judgments are expressed, some might ignore or reject them. But others see those judgments as reasons for conformity to the behavioural pattern, changing the understanding of the behaviour from habit to norm. Again, the person or people who first begin to use the pattern of behaviour as the basis for negative judgments about departures from the pattern can be understood to be developing a new artefact out of the pattern.

Admittedly, the reserving table norm may have developed in any of these ways, and possibly in multiple ways in different places. And I also admit that the final two ways do not sit quite as comfortably with an artefactual understanding as the first one (though not entirely uncomfortably either). But the key elements for Priel’s attack on an artefactual explanation of custom are that customs are not the product of ‘functional conscious design’.[[24]](#footnote-24) However, once we realize that these three elements can come apart in time or person, yet we would still be confronting an artefact,[[25]](#footnote-25) then custom need not always present a serious challenge to artefactual analysis. Designers frequently adapt and repurpose what they find to make those findings fit new functions or perform their original functions better. The fact that the original item that the designer is adapting was not the result of functional conscious design does not change the fact that the new item the designer creates is now the result of functional conscious design. The fact that the designer may not be the same person as the one who first consciously uses the item to serve that function is similarly of no consequence (though we might prefer to think of the first conscious user as the designer in that case), as is the fact that the identities of the first designers or users are lost in the mists of history.

1. **From Custom to Precedent**

As noted above, there are at least two aspects of common law precedent that are understood to be customary: the use of customs by early common law judges as sources for their decisions, and the weight or bindingness afforded to precedent (and the justification for doing so) in common law countries. While Priel is mainly concerned with the latter,[[26]](#footnote-26) it pays to take a moment to discuss the first.

Even if we do not think that the customary norms employed by early judges as the basis for some of their decisions are ripe for artefactual analysis, it is unproblematic to give an artefactual analysis for these norms once they are used as the basis for a legal judgment. Something has changed once the norm is incorporated into law via the judicial decision: it has been institutionalized. Whereas before the decision, there may have been strong social pressure behind the norm, once it is the basis of a legal decision it now has an official imprimatur. Whereas before, sanctions for violations of the norm were mainly meted out by self-help among members of the community, now there will likely be officially specified sanctions to be given by people filling official roles. Where the norm violation involved a personal dispute, the incorporation into case law now means there is an official venue and means for redressing it. The judge who cites custom directly as the basis for a legal judgment is simply akin to a designer who is adapting an instrument or tool found ‘in the wild’, improving its functionality or giving it a new one.

Priel’s focus is more on the common law itself or, as we might understand it, the practice of affording precedent a certain weight or authority in the making of current legal decisions. About this aspect of common law, his argument is that it resists artefactual analysis because its ‘design level is low, whatever design it has is not conscious, and a teleological function does not often play a significant role in its design and development.’[[27]](#footnote-27) He also argues that the incrementalism associated with artefact development is not of the same kind as that associated with the development of the common law.[[28]](#footnote-28) I will address these points in the order he does: 1. low design; 2. lack of teleological functionality; 3. incrementalism; and 4. lack of consciousness in design.

Priel admits that the common law does have enough design to provide an artefactual analysis with regard to that element (if the other elements had been met), but that ‘its design level is quite low.’[[29]](#footnote-29) Since he admits there is a design element (even if it’s low), we don’t have to spend too much time with this step of the argument. But it pays to note that his evidence for the low design level is the ‘obscurity, confusion, and contradiction within the common law.’[[30]](#footnote-30) Of course, this refers to the *content* of the common law rather than its justification, weight, or authority and hence in citing it Priel is failing to maintain the focus he promised on the common law as a whole rather than the particular customs that might have been the basis of its content.[[31]](#footnote-31) More importantly, as anyone who has confronted a buggy software programme or attempted to muddle through the overly complex rules of certain board games can attest, many artefacts are regretfully designed with lots of obscurity, confusion, and contradiction. Those failures are not themselves evidence of a low design level if we understand that to mean ‘not much design went into it’. Heavily and perhaps especially over-designed artefacts can exhibit the same failures. And if we understand ‘low design level’ to mean instead simply ‘poorly designed’, then it would no longer be a point in favour of claiming that the explanans resists artefactual analysis.

Priel’s next argument is that the common law lacks (the right kind of) ‘*functionality*’.[[32]](#footnote-32) To begin with, Priel notes that a central element of common law is the use of existing or prior practices to settle novel questions with similar elements. Even where direct goal-oriented policy considerations are used in judicial decisions, they tend to be trumped by any persuasive arguments that the instant case is sufficiently similar to an existing practice noted in a prior decision.[[33]](#footnote-33) That appears to put functionality lower on the list and to privilege a given outcome because it was done that way in the past. This privilege itself is then a ‘tradition’ or ‘custom’ and the attendant rejection of functionality in judicial decision-making suggests to Priel that common law is resistant to artefactual analysis. But the mere fact that direct policy arguments are fewer and further between masks a more fundamental truth that the law is structured to value those traditional practices in order to enable it to fulfil a wider function relating to stability, settled expectations, and other values we associate with the rule of law.[[34]](#footnote-34) That is, the weight given by common law as a whole to precedent enables the legal system to perform a function that would otherwise be difficult to meet, or would need other mechanisms to meet. Achieving that end might often be more important (to those tasked or faced with making such decisions, and even to those feeling the result of those decisions) than getting the best outcome for policy purposes in the instant case.[[35]](#footnote-35)

Hence the reliance upon practice over policy is not a rejection of functionality, but rather in pursuit of a wider functionality. This is true both of common law when considered as a whole, and of individual judicial decisions. Each decision contributes to the legal system’s ability to pursue the goals of regularity, upholding settled expectations, and other values of legality (though some might uphold certain values at the expense of others). While individual judges may not be crafting their decisions with the conscious goal of upholding stability and settled expectations (though nothing prevents that either), we have seen that they need not have a self-aware conscious intention to design something with a specific wider function for the result to be ripe for artefactual analysis using that wider function.[[36]](#footnote-36)

One might wonder why in cases of first impression there would be a need for stability and settled expectations.Yet it seems like the cases that are most open to success by either side are the ones in which the judges are most keen to cite precedent (a point Priel notes).[[37]](#footnote-37) This is perhaps due to ‘the threat of novelty’ that striking out on one’s own holds for judges who are systematically induced to hand-wringing at the slightest hint that they are straying into the domain of legislation. For our purposes, it suffices to note that it is precisely in the most novel cases that we would expect to see the most citation to precedent in order to shore up the system’s ability to promote stability and uphold settled expectations. The more distinct the case is from what has come before, the less the result will be something that fits the pattern set by past decisions. But if continuity is of high value to those who design and use the institution, then they will do more to discover and emphasize any elements of continuity they can uncover. Hence, against Priel’s claim to the contrary, this incorporation of prior decisions into novel cases in order to emphasize and uphold continuity is even greater evidence of the artefactual nature of common law since judges are using prior decisions as tools to perform the function of upholding continuity and settled expectations in the legal system.

Priel also claims that the incrementalism seen in common law is distinct, and even in opposition to, the incrementalism that is seen in artefact development:

[A]rtifact design is often based on attempts to identify problems with past design and solve them; common-law justification typically involves the opposite approach of acting in a particular way because of past practice. In the former, past design is relevant in that it may limit one’s design space, it is an unfortunate constraint. In the latter, on the other hand, the past may be a reason in itself to do certain things in a particular way. The difference is that only in the latter the fact that things have been done in a certain way confers normative value on them.[[38]](#footnote-38)

But seeing the past only as a constraint to be loosened and overcome is a very narrow and limiting view of artifact design, and certainly not something essential to the nature of artefacts. Corrado Roversi suggests the helpful example of a Gothic cathedral, which takes generations to build and undergoes many incremental changes in design.[[39]](#footnote-39) Any definition of artefact that would exclude such a building would clearly be misguided.

Very often inventors and designers of even more mundane artefacts will view the history of an artifact with appreciation for the ways in which previous designers overcame challenges, seeing those innovations as valuable elements to be maintained and guides in the move forward, refining the design already laid down. What’s more, once we are confronting the institutional dimension of an artefact that has been institutionalized, we see the use of prior practice to justify the retention of certain design elements is quite common and for good reason. When developing a new kind of chair, some designers might feel past choices as constraints to overcome if doing so will enhance the value of the new chair. But when designing the new line of Herman Miller brand chairs, previous design choices provide strong reasons *against* their rejection in order to maintain the recognizable design elements associated with the brand. This kind of ‘internal’ or ‘cultural’ justification for the retention of design elements merely because of an existing practice is antithetical neither to an artefactual analysis, nor to understanding institutionalized artefacts in terms of their design functions. In general, institutions will place a strong emphasis on continuity and recognizability in the properties of their members and instances in order to succeed better in the performance of the functions for which they were developed. Since the developers of the particular institution believed that those functions are best served by creating and assigning statuses that carry deontic powers (to change some reasons for action of people interacting with the institution), there is generally good reason for stability and predictability in what people and things carry those statuses and what is expected of people encountering them.

Priel’s final argument is short but perhaps the most intuitively appealing. The final element of artefacts that he believes common law lacks is *conscious* design. The evidence for this lack is the ‘messiness, confusion, contradictoriness, and obscurity of many of [its] constituent parts’, indicating the absence of a clear plan.[[40]](#footnote-40) But once again, these deficiencies are found in the *content* of the common law, rather than in its weight or authority.[[41]](#footnote-41) And again, absence of evidence of a good plan is not evidence of the absence of a plan altogether. Notwithstanding these considerations, however, when we think about the common law it’s hard to imagine a conscious designer for something that has developed over centuries, with the contributions of countless judges along the way.

We must be careful, however, not to misunderstand the distributed nature of the common law’s development for the lack of any conscious design whatsoever. To adapt Dworkin’s metaphor of the chain novel (in which each chapter is written by a different author, seriatim)[[42]](#footnote-42) to a use of which he would likely not approve, we would not say of the resulting manuscript (or indeed of the very book you read at this moment) that it was not an artefact merely because many authors contributed to it. Even as all the authors have their individual plans and purposes for their contributions, they are aware of contributing to something larger, with a purpose somewhat distinct from their own individual ones. Of course, all those authors are contributing to the content of the book with their individual choices. But whether they are buying into a shared vision of the volume articulated by editors or understanding that they are each contributing to the development of that vision by trying to make their chapter fit with what has come before, they are also jointly in control of how the volume communicates its significance. When we say that our relevant notion of artefact must include conscious design, we cannot mean to exclude those artefacts that are designed by a group, even where group members are all working on separate design tasks that contribute to the whole.

To apply this analysis back to the common law, perhaps there was some early judge who first considered himself bound by the decisions of prior judges he consulted in making his decision. He then communicated his sense of the bindingness of those earlier decisions in his decision and other judges followed. This would be akin to the first story we told about the custom to use one’s property to reserve a table at the eatery. There is much less doubt in this story that the bindingness and authority of precedent in common law are the product of conscious design. Once again, the designer need not have consciously understood that he was undertaking a new practice that would be emulated by others for the result to be an artefact. And again, those who first internalize and follow the norm may be as important to the story as those who develop it.[[43]](#footnote-43)

It is more difficult to imagine an application of the inadvertent action story to the development of the common law. One would have to say that a judge somehow accidentally relied upon prior decisions and that this was then emulated by other judges. This is difficult to imagine in that the prior decisions need to play the role of justifications for the judge’s decision in the instant case. An only slightly more plausible story would be that the practice was originally a mistake, with one judge somehow mistakenly believing himself bound by prior decisions. Then other, subsequent judges might initially mistakenly follow the lead of that original judge, but some eventually come to see that there is actually great value in the practice and adopt it intentionally.

That an initial design was the result of a mistake does not necessarily defeat the presence of conscious design. As with all institutions, the normative structure of a given legal system is a web of interdependent recognitions of validity, and *stare decisis* in a common law system is an aspect of that system’s criteria of legal validity. Where a mistaken understanding of the system’s legal validity is introduced by a given official, one of two things will happen. Either other officials will decline to recognize the validity of the mistaken holding and the norms that follow from it will not be considered valid members of the system, or other officials will recognize the validity of the holding, propagating the ‘mistake’ and incorporating it into the legal system. Where the mistake has implications for the criteria of validity themselves, these will have been adjusted when the mistake is incorporated. What this shows is that individual decision makers, making conscious decisions but not aware of their mistakes, can introduce design changes to institutionalized artefactual systems. Those design changes are the result of conscious choices even if the choices are not aimed at effecting a change in design, but this does nothing to undermine the artefactual nature of the system.[[44]](#footnote-44)

The final possibility we considered about the table reservation custom was where it is more akin to a habit that gains normative significance. At first blush, this is not applicable to the common law in that the citation of earlier decisions must perform a justificatory function for the instant decision. That normativity is inherent in the behaviour itself in its need to serve as a justification means that it cannot be something that is habitual in the sense of a mere regularity of behaviour. The closest we can come might be to imagine some lazy early judge developing a habit of relying on the arguments in similar earlier decisions rather than developing his own based only on the circumstances of the instant case. He would still be treating the earlier decisions as justificatory (of his own decisions), but he would not be implying anything normative (for others) about the practice of doing so. Once again, however, the practice itself begins to be seen as normative and instances of departure from it as deserving censure. We could analyse this similarly to that of an accident in that the original developer didn’t intend the practice to be normative, or we could say that those who first treated the practice as normative are to be understood as the designers. Either way, it doesn’t undermine seeing common law precedent as a kind of artefact.

1. **Concluding Musings about Precedent’s Institutionality**

The role of judges in developing precedent could suggest a possible tension in seeing law as both an institution and an artefact. They appear to be simultaneously developing and using the artefact. As noted above, I generally think of institutions as a subset of artefacts.[[45]](#footnote-45) Hence if there is a tension in seeing law both as an institution and as an artefact, that would strongly suggest either that it is neither or that I am wrong in thinking of institutions as kinds of artefacts.

Artefacts clearly have histories of development and adaptation. (Beth Preston calls it ‘reproduction with variation’).[[46]](#footnote-46) They are adapted and developed in response to circumstances that change; their functions may be refined or revised over time. That suggests a flexibility that is not overly constrained by a set of rules for alteration of the artefact. There may be norms of usage and identification that the creator communicates with the artifact to her intended audience.[[47]](#footnote-47) But as Priel noted above, in altering existing artefacts and developing new ones, authors generally have a free hand. Common law precedent seems cut against that as it is a way for the law to fix its application and usage over time. Since we generally say of most artefacts that their norms of usage are quite weak, we think of their users as having a relatively free hand to use them in whatever way they need, but precedent binds the judge to a much more specific usage.[[48]](#footnote-48) So, in a non-common law system, the role of precedent may be more in line with what would be expected from a system of artefacts: prior applications of law would be like prior uses of the artefact in that they would be helpful guides to current usage, but not necessarily binding. But in common law systems, prior applications of law are understood to be more binding than we would expect with artefacts more generally. It’s not that this is necessarily a problem as we could likely imagine artefacts for which the norm of usage is more stringent: items of symbolic or ritual value come to mind. But given that elsewhere I rely upon the weakness of the norm of usage in the law to allow for flexibility in interpretive strategies,[[49]](#footnote-49) this could be somewhat troubling.

The solution is in the institutionality of law, which explains the greater constraints that we see in it. Institutions constrain their members to uses of the institution in keeping with its rules for which actions or instances are to be considered bona fide. The rules of institutions generally tell us what counts and what doesn’t, the proper way to confer the status that carries deontic powers and how to deploy those powers. So, the greater constraints on future decisions that precedent imposes (especially in common law jurisdictions) can be understood as one facet of the way the institution of law deploys its institutional rules about what counts.

The problem is that while the norms that underlie the legal doctrines that are being applied in judicial decisions are subject to the constitutive rules that specify their validity conditions and functional uses, the decisions themselves are more easily understood as applications of the surface-level legal rules. To employ an over-worked analogy to games, the decisions of judges are more like moves in the game rather than setting forth the constitutive rules by which the game is supposed to be played. If the decisions are moves in the game, then it makes sense to say that those moves are constrained by the rules of the institution, but it is again harder to see those moves as imposing further constraints on future decisions.

Unlike moves in a boardgame, however, every judicial decision that carries precedential value is *also* a validity determination. In every case that has at least two sides to the issue at hand, the judicial determination that sets a precedent for future decisions about how to avoid running afoul of the law, and how to apply it when someone is thought (publicly, privately, or tortiously) to have run afoul of it, is impliedly or explicitly stating that the losing sides’ argument (or action) is legally invalid. More precisely, the decision (except where the decision is merely one of criminal guilt)[[50]](#footnote-50) is that the losing sides’ argument is not a correct application of the law and hence not a valid ‘move’ in the legal system. Hence if the law is like a game, it is more like the game ‘Nomic’, in which players make moves in the game by making or changing rules of the game (which renders the analogy unhelpful in that Nomic was designed to model or mimic legal systems).[[51]](#footnote-51) It’s not quite that the judges are changing the basic rules by making validity determinations. But each determination does purport to set forth a pattern by which future actions or arguments can be measured for legal validity (which could certainly be described as a rule).

Each precedential decision does seem then to be an institutionalized abstract artefact. Each precedent is a tool that is intended by its author to perform a function and to communicate that function to an audience of users (lay people who may find themselves in similar situations, lawyers who are advising clients in similar situations, and judges who adjudicate similar situations). It is very much institutional as it is a decision partially about assigning a status (legally valid or not) to each side of the issue applying pre-existing standards of validity, and those statuses carry deontic powers or responsibilities within the context of the wider institution.

Beyond each decision, however, the fact that each one is both a validity determination and a potentially new application of legal norms to facts helps to show how the common law of a given legal system itself is an artefact, perhaps an iteration of the original or the development of the original, built and honed (not without setbacks) over generations.

1. \* Surrey Centre for Law & Philosophy, University of Surrey School of Law. Particular thanks are owed to Corrado Roversi, Luka Burazin, and Sebastian Lewis, though constraints of space did not allow me to employ all of their suggestions. Further thanks are given to the audience members who heard a very early version of this paper at the International Conference on Collective Intentionality 2021. [↑](#footnote-ref-1)
2. Dan Priel, ‘Not All Law Is an Artifact: Jurisprudence Meets the Common Law’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press 2018). [↑](#footnote-ref-2)
3. Most completely in Kenneth M Ehrenberg, *The Functions of Law* (Oxford University Press 2016). [↑](#footnote-ref-3)
4. Another use of the customary nature of common law to attack legal positivism is Brian Simpson, ‘The Common Law and Legal Theory’ in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell 1986), with thanks to Sebastian Lewis for pointing out the reference. [↑](#footnote-ref-4)
5. John Austin, *The Province of Jurisprudence Determined; and, the Uses of the Study of Jurisprudence* (HLA Hart ed, first published 1832, Hackett 1998) 32. [↑](#footnote-ref-5)
6. HLA Hart, *The Concept of Law* (3rd edn, first published 1961, Oxford University Press 2012) 79ff. [↑](#footnote-ref-6)
7. Priel, ‘Not All Law Is an Artifact’ (n 1) 245. See also Simpson, ‘Common Law and Legal Theory’ (n 3), 20, defining common law as ‘a customary system of law’ in the sense of ‘a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts’ (n.b. the functional element in the definition). [↑](#footnote-ref-7)
8. *Contra* Brian Leiter, ‘Legal Positivism About the Artifact Law: A Retrospective Assessment’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), Law as an Artifact (Oxford University Press 2018) 10-11. [↑](#footnote-ref-8)
9. Dan Priel, ‘Not All Law Is an Artifact (n 1) 239-40. [↑](#footnote-ref-9)
10. Ibid, 240. [↑](#footnote-ref-10)
11. Priel himself mentions the path created by many different hikers, which seems to be a result of purposive action (though not directed at the result) but not design. Ibid, 248. The hikers are each purposely choosing a given route, which happens to be the same as the others. This results in a path, though no hiker designed the path. [↑](#footnote-ref-11)
12. Amie L Thomasson, ‘Public Artifacts, Intentions and Norms’ in Maarten Franssen and others (eds), *Artefact Kinds: Ontology and the Human-Made World* (Springer 2013) 50. [↑](#footnote-ref-12)
13. Randall R Dipert, ‘Some Issues in the Theory of Artifacts: Defining 'Artifact' and Related Notions’ (1995) 78 Monist 119, 127-29. [↑](#footnote-ref-13)
14. Ibid, 121-23. See also Ehrenberg, *The Functions of Law* (n 2) 29-32. [↑](#footnote-ref-14)
15. This is the distinction between a general sortal and its instances. See Linda Wetzel, ‘Types and Tokens’ (Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, 2014) <<http://plato.stanford.edu/archives/spr2014/entries/types-tokens/>> accessed 20 Jun 2015 . [↑](#footnote-ref-15)
16. One might wonder if any type *qua* type can be an artefact, as types are perhaps merely conceptual groupings. While taking a position on that is not necessary for this chapter, it does appear that concepts can have the properties of public artefacts (to the extent that they are capable of being shared), having the function of organizing our experience of the world. But most amenable to this analysis are concepts developed as a result of conceptual engineering, or by an inventor designing a new class of thing, and it is not clear that law falls into those categories. [↑](#footnote-ref-16)
17. Ehrenberg, *The Functions of Law* (n 2) 32-36, citing Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D Reidel 1986); Neil MacCormick, ‘Norms, Institutions, and Institutional Facts’ (1998) 17 Law & Philosophy 301; Seumas Miller, ‘Social Institutions’ (2007) <http://plato.stanford.edu/archives/fall2012/entries/social-institutions/> accessed 2 December 2021; Dick W P Ruiter, ‘Structuring Legal Institutions’ (1998) 17 Law & Philosophy 215; John R Searle, *The Construction of Social Reality* (Free Press 1995); *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010); and Amie L Thomasson, ‘Realism and Human Kinds’ (2003) 67 Philosophy and Phenomenological Research 580, among others. [↑](#footnote-ref-17)
18. Admittedly, this makes calling law an ‘institutionalized *abstract* artefact’ somewhat redundant, but it helps for people accustomed to thinking of artefacts only as physical objects. [↑](#footnote-ref-18)
19. It’s possible that the very earliest precedents were not written partially to guide or control future decisions on similar cases. But we can then treat the earliest decisions as tools used by those who later used them to guide or control their decisions, who in turn began crafting their decisions with the likely intention that they guide or control others, and the artefactual analysis can begin there. [↑](#footnote-ref-19)
20. I do realize that the principle of *stare decisis* and the particular weight now given to precedent within common law are comparatively recent developments when considering the history of the common law as a whole. But as that weight is itself an integral part of arguments against the common law’s artefactual nature and our focus is on precedent in its most binding form as presenting the greatest potential challenge to its artefactual analysis, we can leave this consideration aside. [↑](#footnote-ref-20)
21. Priel, ‘Not All Law Is an Artifact’ (n 1) 245. I believe a charitable interpretation here is not to think Priel is attempting to equate all social norms with customs by his use of the parenthetical, but rather to understand the parenthetical to indicate he is attempting only to capture the subset of social norms that are also customary. [↑](#footnote-ref-21)
22. The fact that audience members may then use it in a different way than the one envisaged by the inventor doesn’t detract from this picture, nor does it (immediately) change the identity of the artefact (though it may do so eventually if enough people consistently use it in a specific different way). See Kenneth M Ehrenberg, ‘Law Is an Institution, an Artifact, and a Practice’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), Law as an Artifact (Oxford University Press 2018) 184-86. [↑](#footnote-ref-22)
23. That there may be a period where people are respecting a norm (by avoiding tables occupied by personal property) without anyone signalling them to do so does not prevent the norm from being ripe for artefactual analysis once the signal is intentional. We might also prefer to say that the first person to use the signal intentionally is adapting something found, rather than creating something new, and therefore the norm is more akin to a tool in Dipert’s taxonomy, rather than an artefact. But since it is precisely this tool’s signalling function that makes it useful, it would still seem to be a borderline case between a tool and an artefact. Richard Grandy makes it clear that where a subsequent user recognizes a function for an artefact that was not intended by the original inventor and that later function comes to be closely associated with the artefact, we simply analyse it as an artefact with multiple designers. Richard E Grandy, ‘Artifacts: Parts and Principles’ in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind* (Oxford University Press 2007) 28. [↑](#footnote-ref-23)
24. Priel, ‘Not All Law Is an Artifact’ (n 1) 245. Priel further distinguishes between ‘teleological’ functions and ‘cultural’ functions, ibid, 243-44, 245-46, in order to claim that the different functions justify their explanans differently and have ‘different notions of success’. But it is not clear to me why cultural functions are not simply one subclass of teleological functions, ones with the end of providing some cultural value or something analogous. The fact that the cultural value it provides may be conventional or culture-dependent is neither here nor there. I have been unable to find this distinction elsewhere in the analytic literature on functional explanations. Dan Sperber would agree with my suggestion that what Priel calls cultural functions are merely a subclass of teleological functions, which Sperber calls ‘cultural teleofunctions.’ Dan Sperber, ‘Seedless Grapes: Nature and Culture’ in Eric Margolis and Stephen Laurence (eds), Creations of the Mind (Oxford University Press 2007) 128. [↑](#footnote-ref-24)
25. See, e.g., Richard E Grandy (n 22) 28. [↑](#footnote-ref-25)
26. Priel, ‘Not All Law Is an Artifact’ (n 1) 248. [↑](#footnote-ref-26)
27. Ibid, 247-48. [↑](#footnote-ref-27)
28. Ibid, 251. [↑](#footnote-ref-28)
29. Ibid, 249. [↑](#footnote-ref-29)
30. Ibid. [↑](#footnote-ref-30)
31. While many of these problems likely arise as a result of the inadequacies of the judicial decisions that form the common law, some not insignificant part of those inadequacies can themselves be traced to the customs that early decisions used as source material. [↑](#footnote-ref-31)
32. Priel, ‘Not All Law Is an Artifact’ (n 1) 249, emphasis in original. [↑](#footnote-ref-32)
33. Ibid, 250. [↑](#footnote-ref-33)
34. The fact that the common law enables the pursuit or attainment of rule of law values via *stare decisis* is not meant to suggest that there are no other effective methods for doing so. Civil law countries pursue the same values (though possibly giving slightly different relative weights to them) without the same emphasis on precedential weight. [↑](#footnote-ref-34)
35. Simpson himself notes ‘a customary system of law [such as the common law] can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy’. Simpson, ‘The Common Law and Legal Theory’ (n 3) 21. [↑](#footnote-ref-35)
36. On the other hand, the role their decisions have in systemically upholding or pursuing certain rule of law principles provides strong reasons for judges to consider carefully the messages they are sending to future readers who will rely upon their decisions. Frederick Schauer, ‘Precedent’ (1987) 39 Stan L R 571, 572-73; Jeremy Waldron, ‘Stare Decisis and the Rule of Law: A Layered Approach’ (2012) 111 Mich L R 1, *passim*. [↑](#footnote-ref-36)
37. Priel, ‘Not All Law Is an Artifact’ (n 1) 250, noting that appellate cases have more citations to prior decisions. [↑](#footnote-ref-37)
38. Ibid, 251. [↑](#footnote-ref-38)
39. Corrado Roversi, ‘On the Artifactual -- and Natural -- Character of Legal Institutions’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), Law as an Artifact (Oxford University Press 2018) 94-95. [↑](#footnote-ref-39)
40. Dan Priel, ‘Not All Law Is an Artifact’ (n 1) 251-52. [↑](#footnote-ref-40)
41. One might be tempted to argue that these deficiencies are found in the justifications offered for that weight or authority, but that claim isn’t borne out by the cases themselves. To the extent that judicial decisions offer any justifications for the practice of *stare decisis* and the authority of precedent, they are fairly uniform and consistent, though usually little more than a presumption. The complaints of confusion, obscurity, and contradiction, even when made by the judges themselves, are mainly focused on the content of decisions rather than on the practice of giving weight to precedents. Even where there is inconsistency in how much weight is given to precedent, that tends to be in contexts where there are competing precedents such that giving more weight to one line of decisions is to give less to another (which is therefore still a complaint about content). [↑](#footnote-ref-41)
42. Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 229. [↑](#footnote-ref-42)
43. These considerations help to defeat Simpson’s dismissive attitude toward the idea that common law can be understood on the ‘legislative’ model of early decisions setting down principles and rules that are then followed by later judges. Simpson (n 3), 14. The institutionalized artifact model accommodates Simpson’s concerns perfectly (notwithstanding his refusal to countenance ‘judicial legislation’) by explaining the rule’s inception artifactually and its continued reception institutionally. [↑](#footnote-ref-43)
44. This helps to undermine Priel’s argument that the claim practitioners are mistaken in their understanding of common law as custom is self-defeating. Priel, ‘Not All Law Is an Artifact’ (n 1) 253-54. I am not claiming that practitioners are mistaken in saying common law is custom. But it is not self-defeating to do so because the conscious intention of the original designer need not be focused on the actual function that the artefact will eventually serve for it to be meaningfully understood as an artefact. Later, Priel reformulates this consideration in a dig at John Gardner’s claim that laws are artefacts but that some laws can also be a result of accidents. Priel cites Hilpinen’s counterexample that the wood shavings formed in the process of making a wood carving would then be artefacts on Gardner’s view. Priel, ‘Not All Law Is an Artifact’ (n 1) 256 n 27, citing John Gardner, *Law as a Leap of Faith : Essays on Law in General* (Oxford University Press 2012) 70-71, 193 and Risto Hilpinen, ‘Authors and Artefacts’ (1993) 93 Proceedings of the Aristotelian Society 155, 159-60. The problem with his reply is that it again misses the possibility that the original (mistaken) designer can be distinct from the first person to identify the function the artefact will eventually come to be identified with. The wood shavings are not artefacts because they have no function and were not designed at all. They are a by-product. But *some* (though not all) ‘accidental products of intentional action’ can become artefacts when a use-function comes to be associated with them. On the distinction between design-functions and use-functions, and how use-functions can change the identity of artefacts even when intentionally designed to serve a different function see Ehrenberg, *The Functions of Law* (n 2) 12 n 24, 24, citing Peter Achinstein, ‘Function Statements’ (1977) 44 Philosophy of Science 341, 349; Peter McLaughlin, *What Functions Explain : Functional Explanation and Self-Reproducing Systems* (Cambridge University Press 2001) 54; and Karen Neander, ‘The Teleological Notion of 'Function'’ (1991) 69 Australasian Journal of Philosophy 454, 462. [↑](#footnote-ref-44)
45. So it is actually a bit redundant to say law is a genre of institutionalized abstract artefacts but there is utility in focusing separately on the properties of institutions and on the properties of artefacts, so this redundancy is justified. [↑](#footnote-ref-45)
46. Beth Preston, ‘Philosophical Theories of Artifact Function’ in Anthonie Meijers (ed), *Philosophy of Technology and Engineering Sciences* (Elsevier 2009), 216-17. See also Lynne Rudder Baker, ‘The Metaphysics of Malfunction’ (2009) 13 Techne 82, 84. [↑](#footnote-ref-46)
47. Since an artefact is a tool that communicates its usage, I have elsewhere (Ehrenberg, ‘Law Is an Institution, an Artifact, and a Practice’ (n 21) 185-86) distinguished between a norm of usage (or treatment) and a norm of identification (or recognition), which are understood to be communicated requests from the artefact author (communicated via the artefact). The norm of usage is usually very weak in that it is easy to justify departures from it whenever I need the artefact to perform a function other than the one for which it was designed (though this can be stronger for certain artefacts – like national flags). The norm of identification (that the artefact be recognized as belonging to the class of artefacts of which the creator intended to create an example) is stronger in that it is harder to justify departures from it, but requires very little to comply with it other than recognizing the artefact to be a member of the class (even if I’m using it for something else). [↑](#footnote-ref-47)
48. Nevertheless, Raz argues that judges are less bound by precedent than they are by statutory law since they have more ability to distinguish the case in front of them from the precedents. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 183-89. [↑](#footnote-ref-48)
49. This is why the theory does not imply an originalist interpretive strategy. See Ehrenberg, ‘Law Is an Institution, an Artifact, and a Practice’ (n 21) 187 n 27, and Kenneth M Ehrenberg, ‘Intentions in Artefactual Understandings of Law’ in Luka Burazin and others (eds), *The Artifactual Nature of Law* (Edward Elgar forthcoming 2022). [↑](#footnote-ref-49)
50. If we are keeping the status-conferral notion of law’s institutionality, the need for criminal acts to be defined by law suggests that legal validity encompasses the attachment of criminal status. So, if the determination at issue is simply one of legal guilt for a criminal act, then we would not be able to say that the determination is itself also a validity determination. Of course, appellate cases are not usually simply about legal guilt for a criminal charge (though there are jurisdictions in which appellate courts must ratify guilty verdicts in serious cases). [↑](#footnote-ref-50)
51. Douglas R Hofstadter, ‘Metamagical Themas: About Nomic: A Heroic Game That Explores the Reflexivity of the Law’ (1982) 246 Scientific American 16; Peter Suber, *The Paradox of Self-Amendment : A Study of Logic, Law, Omnipotence, and Change* (P Lang 1990). [↑](#footnote-ref-51)