

Legal Metaphoric Artifacts*

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1. Introduction

I take it for granted that legal institutions are artifacts. In general, this can very well be considered a trivial thesis in legal philosophy. As Brian Leiter writes:

The concept of law is the concept of an artefact, that is, something that necessarily owes its existence to human activities intended to create that artefact. Even John Finnis, our leading natural law theorist, does not deny this point. I certainly do not understand Kelsen, Hart, Raz, Dickson or Shapiro to deny this claim. Those who might want to deny that law is an artefact concept are not my concern here; the extravagance of their metaphysical commitments would, I suspect, be a subject for psychological, not philosophical investigation. (Leiter 2011, 666).

As trivial as this thesis may be, however, to my knowledge no legal philosopher has attempted an analysis of the peculiar reality of legal phenomena in terms of the reality of artifacts, and this is particularly striking because there has been much

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discussion about artifacts in general philosophy (specifically analytic metaphysics) over the last twenty years.¹ Artifacts are regarded by most philosophers as objects which have been created by one or more authors with a certain intention in mind. It has certainly been Risto Hilpinen (1993) who has described the content of such a creative intentional state in the most accurate way (he appeals to the concept of a sortal, thus identifying artifacts of a given kind in terms of their criteria of identity), but even Amie Thomasson has insisted on authorial intentions as the crucial aspect at the root of artifactual objects (see for example (Thomasson 2003) and (Thomasson 2007)). Other authors, such as Lynne Rudder Baker (2004), have maintained that the content of this authorial intention should be described in terms of essential functions: An artifact, in this view, is not simply an object which is intentionally created, but it is so for a given essential purpose. Both Hilpinen's purely intentionalistic and Baker's functionalistic theories of artifacts have been critically discussed by Wybo Houkes and Pieter Vermaas (2010) in terms of plans, use plans which characterize artifactual kinds and are the content of authorial intentions: In this case, the idea of intention and function is supplemented by that of plans for action. Moreover, Randall Dipert (1993) has stressed that the intentions which ground artifacts should be seen in their historical development, and thus he has traced artifacts to a given "deliberative" history consisting in the process of their creation and subsequent modifications.

The concepts of intention, function, plan of action, and history are thus in competition to explain the ontology of artifacts. But, quite strikingly, a similar competition can be found at the core of legal theory. In general jurisprudence, the concepts of the legislator's intention, the purpose of a norm, legislative history, and social plan have been attempting for a long time, either taken in isolation or in different combinations, to account both for the peculiar reality of legal institutions and for the way they must be interpreted. Many legal institutions trace back to an authoritative act which is intentional, whose content is often reconstructed in some form to interpret the most problematic aspects of that institution's concrete application. But intention is not all: The idea that law cannot simply be the legislator's invention and that it must be anchored in social life, thus pursuing definite social interests and purposes, is one of the crucial aspects of European and American anti-formalism and is at the root of all kinds of teleological reasoning in legal interpretation. And, finally, just as Dipert has maintained that the intentions at the basis of artifacts should be seen dynamically, namely, as a sort of history whose reconstruction is complex and requires a certain amount of contextual considerations, similarly it is commonplace in legal theory to say that a given legal norm cannot be interpreted in isolation, and that every legal institution must be seen in light of the entire legal system or even in light of its "legislative history." Such a striking parallelism between the domain of artifacts and that of legal institutions is a clue for legal ontology that deserves further attention. I will offer

¹ Something along these lines is currently being attempted also by Luka Burazin (2013) and Kenneth Ehrenberg (2014, forthcoming).

my own interpretation of this parallelism in the first part of this paper (Sections 2 and 3).

In providing a theory of legal institutions as artifacts, one could be led to the conclusion that law is essentially an artificial phenomenon, something which does not bear any significant relationship to the natural domain. However, I think that such a conclusion would be mistaken. In fact, this is the second thesis I want to explore in this paper: not only that legal institutions are artifacts, but also that they can be artifacts which in some sense “mirror,” or imitate, some descriptions of the natural, pre-social reality we live in. Thus, the relationship between the artifactuality of law, on the one hand, and whatever we call “natural” or also “factual” as opposed to “normative,” on the other hand, is much more complex than may seem at first sight. What I would like to show is not that legal institutions are “natural” in the sense that they have some feature which is not human-dependent, as some natural law theorists would say, but rather that their conceptual content can depend on our conceptualization of the natural domain despite being entirely artificial. This is what I will call the “institutional mimesis” behind several important instances of legal artifacts, and I will deal with it in the second part of this paper (Sections 4 and 5).

2. *Legal Institutions as Immaterial Artifacts*

In what follows I will adopt a historicist-intentional theory of artifacts similar to that conceived by Randall Dipert in his work *Artifacts, Art Works, and Agency*, of 1993 (Dipert 1993). My characterization of an artifact is defined by the following “formula,” which for reasons of simplicity I will be calling “ART”:

ARTIFACT → History {Intention-rooted creation process [Interaction plan (Mechanism)]}

Let me explain the content of this brief statement. First, the ART formula states that being an artifact is a historical property, namely, that it consists in having a distinctive *history*: The history of artifacts traces back to a creation process rooted in human intentions. The expression “process” is aimed at capturing the fact that creating an artifact can very well be something which is extended over time and involves several acts of different persons: Clearly, in most cases involving the creation of artifacts there is no single act of creation made by this or that individual person, and it is important to keep distinct, in this regard, those persons who *design* the artifact from those who instead materially *realize* the design. This is why the expression “intention-rooted” is used here in distinction from “intended”: In assembly lines, for example, a creative intention to produce according to a design plan guides the whole process, but this intention may very well differ from the real content of the workers’ intentional actions.

It is very important to stress that, according to ART, the intention that determines the existence of an artifact can be different from an explicit creative intention, which is to say that the meaning of the expression “intention-rooted creative process” is purposely broad. For this expression must cover a great variety of

phenomena, ranging from an artisan's creation, to assembly lines, to simple repetition of a given behavior recognized ex-post as having constituted an artifact. In my view, in other words, artifacts can also be the outcome of creative acts which do not have that specific artifact as their content, as well as of non-creative acts which unintentionally create something artifactual. In fact, I think it is important to resist the temptation of over-intellectualizing our assessment of the origins of artifacts, as a purely intentionalistic theory of artifact tends to do. Many artifacts come out of habitual actions lacking an explicit and conscious intentional creative content. Think, for example, of products of expert craftsmen and artists, who "often work at great speed and with remarkably little conscious thought (apparently) at the time of creation" (Dipert 1993, 49). Further, many phenomena that we would call artifactual exist which do not straightforwardly meet the "conscious authorship" criterion. Consider a trail through a forest. Trails are followed in forests in order to have a clear path and not get lost. Walking in the forest without getting lost was certainly part of the intentions of those who created the trail, and they may have done so simply by taking that path. But it may be that none of the people who have taken that path fact intended explicitly to create a trail. But would we not say that the trail is artifactual even so? Or consider a wall surrounding a village as a defense perimeter which is simply the result of a juxtaposition of walls built by villagers in order to defend their houses. Here, nobody intended to create a wall surrounding the entire village, but everybody wanted to create something to defend their houses. Hence, the wall surrounding the village indeed resulted from creative intentions having as their content a sortal description as walls, but that sortal description did not, strictly speaking, refer to the wall serving as a defence perimeter for the entire village: It referred to the walls simply *surrounding* the houses. Artifacts, in other words, can be both the result of human intentions which are in some sense related to them but which were not explicit creative human intentions (as in the case of trails), or they can be the result of human intentions which were creative but did not have as their contents a sortal description strictly referring to that specific artifact (as with the wall obtained by juxtaposition).

Hilpinen and Thomasson explicitly restrict the concept of artifact so as to exclude phenomena of this kind (see for example (Thomasson 2003, 592-593). In my view, we should instead formulate a theory of artifacts able to *include* these phenomena, because they are not borderline examples of artifacts. Consider cities, villages, and towns, for example. They are certainly artifactual byproducts of creative human intentions. But it is safe to say that nobody wanted to create a city when building, for example, their own house. And yet a city resulted from successive creative enterprises. Now, a city is certainly a place in which to find shelter and services, and certainly the people who built houses and shops and administrative offices in that location wanted to create places for shelter and services. But they did not intend to create the overall structure of shelters and services which is the city. So here, too, we have to do with artifacts whose corresponding sortal is related to constructive human intentions without being the specific creative content of those intentions. Now, I think that trails, walls, and cities are things whose artifactual nature cannot be ruled out by a stipulative definition. They are certainly different from core examples of artifacts, such as screwdrivers, in that they are not explicitly

and intentionally created but instead result from repetition of intentional actions related to them but not explicitly creative of them.

I will call artifacts of this latter kind *recurrence* artifacts, as distinct from *intended* artifacts. Intended artifacts are created through intentional actions which have as their content an intention to produce an artifact of that kind: This is Hilpinen's and Thomasson's concept of an artifact, and we can trace to this concept all instances of authored objects. Recurrence artifacts are instead created through intentional actions whose content is in some sense related to the artifact but is not an intention to create an artifact of that kind. Now, what is crucial when focusing on recurrence artifacts is that, for a certain period of time (say, until time t), individuals simply behave and make things while not realizing that they are concurring in creating an artifact, and after t they progressively become aware of the artifact's existence and of its purpose and role. Let us illustrate by going back to the example of trails. Many people may have crossed the forest without knowing that in so doing they were tracing a trail. But in time the trail becomes apparent and begins to be used as such, that is, as an artifactual means to cross the forest without getting lost, and in this process it also makes its appearance in standard discourse. People start referring to the trail, to its purpose and possible use—as by saying, “There's a trail there: use it to go home”—and in this way the trail acquires the same kind of objectuality that other authored artifactual objects had from the outset, namely, from the moment of their creation. Clearly, human discourse is crucial in this process by which recurrence artifacts emerge. In fact, the artifact could not even have an independent standing if people did not take to referring to it as an independent object with a distinctive purpose. And this progressive linguistic emergence mirrors a fundamental change in the content of intentional states that accompany actions done with that artifact. Suddenly, the content of intentional behaviour on the part of humans in a given community shifts from “I intend to do Y ” to something like “I intend to make use of this artifact, whose purpose is to allow me to do Y .” People do not simply cross the forest anymore: They start to make use of *the trail* as a way to cross the forest. And by that time the trail will have fully emerged as a new artifact in that community.²

This process of progressive emergence of recurrence artifacts in common consciousness (and discourse) I will call “artifactual apperception.” This expression is obviously drawn from the common philosophical meaning of the term *apperception* as “consciousness of (or reflection on) our own perceptions.” Indeed, this process of reflection on the content of our own intentional states is similar to what happens with recurrence artifacts. From time t onward, people are conscious that they are making use of something specifically meant for a given purpose, whereas before that time they were simply behaving in whatever way happened to enable them to achieve the same purpose. From the appearance of

² The role of language (and of history) in the progressive objectivization of institutions has been stressed in particular by Peter Berger and Thomas Luckmann (1966, 72ff., 85ff.).

that artifact in people's intentional states derives the full emergence of the artifact in its relational essence, but that appearance is determined by the peculiar history the artifact has had in a given community.

Artifactual apperception is particularly relevant when it comes to dealing with the artifactuality of law. Indeed, very often legal institutions are not conventionally and intentionally created but rather "emerge," so to speak, in the manner of customs. People simply behave in a certain way and then, after some time has passed, begin to refer to this habit of behaviour as a custom: The custom then becomes an institution and is referred to as such. This is a typical case of an intention-rooted creation process in which the original intentions did not include the artifact's sortal as part of their conceptual content. That sortal is a byproduct of a given community's legal discourse, and in order to account for the reality of the institutional artifact we must consider the whole creative process.

A final remark is in order with regard to the expression *creative process*. I do not intend to maintain that, when the original creative process ends, an artifact is settled once and for all. When I speak of the "history" at the root of artifacts, I want to specifically point out that artifacts can be reinterpreted and modified: They can acquire new functions and lose their old ones; to a considerable extent they can change the way in which they acquire their new functions and still be the same kind of artifacts. So the history of intentions which forms the basis of an artifact's reality is not confined to the original creative process: It is a sequence of intention-rooted processes of creation, reinterpretation, and modification. For this reason, in what follows, I will often speak not only of an artifact's creation process but also of its processes of further development.

Let me now come back to the other elements of the ART Formula. The intention-rooted creative process has a more or less definite content which I am calling an "interaction plan." My concept of interaction plan is a modified version of Houkes and Vermaas' concept of use plan, a concept which (as mentioned above) they adopt to avoid purely functionalistic explanations of technical artifacts. For Houkes and Vermaas, a use plan is a goal-directed ordering of actions in which an artifact is involved, and in this sense it consists of three elements: an aim, the objects used, and an ordering of actions. Artifacts are, from this perspective, objects explicitly designed with a use plan in mind, so that, by fulfilling the ordering of actions determined by the use plan when manipulating the artifact, we obtain results that otherwise we would not have been able to obtain (see Houkes and Vermaas 2010, 20–21). I prefer to use the expression *interaction plan* instead of *use plan* because Houkes and Vermaas' use plans are typical of *enabling* artifacts, namely, artifacts that make it possible for us to obtain new results if manipulated in some way, as we do with radios, laptops, fridges, and pens, for example. However, it seems to me that enabling artifacts do not exhaust the domain of artifacts: Consider, for example, essentially disabling artifacts such as walls. Even though walls are not something we "use," they nevertheless are objects with which we must *interact*. In fact, they are built *for* interaction—though not necessarily the kind of enabling interaction we have to do with when considering tools and other enabling artifacts. Humans interact with walls in the sense that the existence of a wall makes it

impossible for humans to pass through. Hence, among other things, the wall can be seen as a defence against unwanted intrusions.

While Houkes and Vermaas' use plan consists of an ordered set of actions towards a given goal, an interaction plan in my sense consists of a conditional statement connecting an interaction between humans and an artifact, on the one hand, and a typical result relevant for those humans, on the other. Three elements are therefore essential for interaction plans: (a) a conditional structure, (b) a description of the interaction between humans and the artifact (or some part of it) in the protasis, and (c) a description of some results for those humans in the apodosis. This connection between interaction and results, which is described in the interaction plan, sums up what an artifact is for. For example, while there is no definite use plan for a wall, an interaction plan for a wall can be stated as follows:

If there is this wall at a given place, and if a person arrives at that place in front of this wall, then that person will not be able to move across that place.

Notice, moreover, that interaction plans can be combined and nested. Hence a laptop, for example, is obviously connected with a lot of different interaction plans for different purposes, and these interaction plans cannot but refer to nested interaction plans of the artifacts which are the components of the laptop. Thus, in order to carry out the laptop's "e-mail service" interaction plan, which is only one of that artifact's many different interaction plans, several interaction plans must be carried out with the laptop's keyboard and monitor, and before that with its "power" button. All these interaction plans are included as subplans in the overall interaction plan that makes it possible to send an e-mail.

The last element of the ART formula is the *mechanism*, representing the objective grounds of an artifact's interaction plan. I am deliberately using the term in a broad sense here, even though it is borrowed from the domain of technical artifacts. Hence, I will be speaking of the mechanism of legal artifacts, but obviously I do not consider these artifacts to be objects that have a mechanism in the ordinary sense of this word. We will shortly see what I mean. Clearly, in most cases, the authors of artifacts do not have access to the objective features of the world that can constitute a mechanism: They can only access their beliefs about how the world can back up the artifact's intended interaction plan. Simple subjective beliefs are not sufficient for a mechanism to exist, however. If these beliefs are not grounded in some way, the interaction plan will not be able to achieve its results. Hence, in building an interaction plan, there must be *reasons* to believe that the artifact's mechanism in fact exist and can support the plan.

This shows that artifacts are essentially *reason-based objects*. As Randall Dipert says, "artifacts are entities that are by their very nature disposed to yielding answers to 'why' questions" (Dipert 1993, 13). This rationality can be analyzed in two different ways. Artifacts are built for a reason, on the one hand, and there must be reasons for believing that results can follow from the envisaged interaction with them, on the other. I will call the first kind of rationality *teleological* and the second *technical*. An artifact's teleological rationality has to do with the objective reasons for believing that the artifact's interaction plan answers our social needs or is

appropriately embedded in our practices. For example, with some effort we could perhaps build an artifact having the ability to count the number of leaves that fall from a tree in autumn, but in normal situations there is no reason for engaging in such an enterprise. An artifact's technical rationality instead has to do with the reasons for believing that its interaction plan can in fact achieve the intended results, independently of our evaluation of the relevance of those results. Apart from its being totally pleonastic and useless, the artifact that counts fallen leaves can obviously also fail in the sense of not working well, or not being able to effectively count the number of leaves that have fallen from a tree. This is a matter of coherence between the intended interaction plan and its objective mechanism.

Now, if the ART formula is intended to account for all kinds of artifacts, and if I assume that legal institutions are artifacts, I should give a description of how ART can be applied to the latter. As Benoît Dubreuil has explained in his 2010 book *Human Evolution and the Origins of Hierarchies*, legal institutions began to emerge at a specific moment in the evolutionary history of humankind in the Middle Stone Age, that is, a moment in which the temporal lobe of human brains grew larger and became sufficiently developed to use recursive "meta-representations" representing the meaning of other representations (see Dubreuil 2010, 123–125). Among these meta-representations were the rules defining proto-legal roles necessary to organize social sanctions and regulate other kinds of social exchanges in the context of enlarged traditional human communities (see Dubreuil 2010, 166–175). A crucial aspect of this "behavioural modernization" typical of *Homo sapiens* (as compared to *Homo neanderthalensis*), in parallel with the development of proto-legal institutions, was the construction of symbolic artifacts, namely, artifacts explicitly constructed to signal a given social status (see Dubreuil 2010, 110–112, 131). Those symbolic artifacts, which can be conceived as simple objects used to signal a given social role, clearly had sense only in the broader context of the meta-representations that defined those roles.

Dubreuil describes the meta-representations at the root of proto-legal institutions as "secondary rules" in Hart's sense (see Dubreuil 2010, 166–167), namely, power-conferring rules connected with a given social role. I instead prefer to use John Searle's broader concept of "constitutive rule" to designate the same phenomena (see (Searle 1996 (1995), 27ff.)). In Searle's view, a constitutive rule defines a given kind of social fact by imposing on it a "status function" defined in normative terms (and hence in terms of powers, rights, and duties or, in Searle's own terms, "deontic powers": see (Searle 1996 (1995), 100ff.)), and this seems equivalent to Dubreuil's "meta-representations" defining the meaning of other representations (statuses, roles) by appealing to powers and duties connected with them. An institution, in Searle's terms, is a system of constitutive rules that can be reconstructed as follows:

X counts as Y, and Y has status function (powers and duties) Z.³

Let me return now to the ART formula. Given that, from an evolutionary point of view, legal institutions seem to have emerged when meta-representations in the form of constitutive rules became possible and symbolic artifacts were developed, I submit that the best way to conceive them in terms of the ART formula is as follows:

LEGAL INSTITUTIONS as IMMATERIAL RULE-BASED ARTIFACTS

History {Intention-rooted Linguistic Creation Process [Interaction Plan (Mechanism: System of Constitutive Rules Recognized and Followed)]}

According to this explanation, legal institutions in the first place have an immaterial, semantic aspect: They consist in a set of concepts specifically created to organize, define, empower, and limit human behaviour in a complex social setting. These concepts are defined through meta-representations in the form of constitutive rules and entail interaction plans that allow individuals to cope with the relevant organization and social structure by means of a normative framework that empowers or limits them. But this division, definition, empowerment, or limitation cannot gain any strength in concrete social life if there is no mechanism that makes it possible for them to obtain such strength. This mechanism is nothing other than actual, shared recognition and abidance within the relevant community with the system of constitutive rules which the institution consists of. Hence, legal institutions are (1) immaterial, rule-based artifacts which (2) consist of meta-representations in the form of constitutive rules, (3) entail interaction plans whose outcome is a set of normative effects (powers, rights, and duties), and (4) are based on actual recognition and rule-following within a given social community. Symbolic artifacts, such as ornaments or signs meant to signify social status, are concrete artifacts that find their meaning within this conceptual structure, and in this sense their interaction plan is nested within a broader immaterial artifact (just as a keyboard is in a laptop in the previous example of nested artifacts).

An empiricist reader could find this appeal to “immaterial” artifacts problematic. What does *immaterial* mean here, after all? The answer should be quite clear at this point: By *immaterial artifact* I mean an artifact which primarily consists in semantic or conceptual content. Legal institutions are not alone in this regard: Another important example of an immaterial artifact is that of literary works. Although works of literature are typically set down in writing and thus in a sense correspond to a material object (a manuscript), literature is clearly not a collection of manuscripts. The first consequence of this approach is that an immaterial artifact can exist in different material forms and still be the same. We can have an audio book of Dante’s *Inferno* or we can have it stored in a digital file. We have

³ Searle has partially modified his account of social institutions in terms of constitutive rules: see in this regard Searle 2010, 97, 99–102.

translations of it, and these are possible as long as they are related to Dante's original creation process and mirror the syntactic, semantic, and stylistic structure of the work in a sufficiently accurate way. And, in the extreme, the work can live only in persons' minds, as long as one can remember all the words that constitute the text as well as their precise ordering—consider here the several examples of oral literature. If the artifact is preserved by oral tradition, then the need to maintain syntactic structures will typically be less strict. This is the case with traditional stories and fictions, for example, where the crucial features are the basic plot and characters of the story and its general meaning and message, but not the exact words through which these plots, characters, and messages are described. And, in this case, no material substratum exists: the artifact simply consists of meanings recognized and preserved by humans. The same goes for law. Legal institutions primarily have an immaterial nature, that is, they consist of rules which must be understood and followed in order for the institution to function. These rules can be written or not, but certainly legal institutions are not simply texts enacted by an authority: Wherever legal institutions come with texts, they consist in the semantic content of those texts as recognized and internalized by humans.

The distinction between legal institutions as immaterial artifacts consisting of concepts defined by constitutive rules, on the one hand, and concrete artifacts created to symbolize the elements of those institutions, on the other hand, seems to be extremely relevant in explaining several aspects of legal experience. Consider banknotes and money, for example. On the one hand, my possession of a banknote means that I have a certain amount of money, and this in its own turn means that I have a transferable social power to acquire goods. On the other hand, however, I can have that amount of money without being in possession of any banknote: I just need to be able to demonstrate that I have that amount in some abstract way; for example, the amount could be recorded in an account set up in my name. Hence, a banknote is not strictly speaking money, but it concretely symbolizes the fact that I have money in the abstract: A dollar is an abstraction (its nature is immaterial) that can be symbolized in concrete objects such as banknotes. Now consider contracts. Two contracts having different concrete features—they might be written in different languages—can nevertheless be the same contract: This is because the criteria by which the contract is identified lie not in any concrete physical feature but in its semantic content. Even though we are used to taking a written document in our hand and saying, "This is a contract," that text is not strictly speaking a contract but rather *symbolizes* in a concrete way the abstract fact that we have an agreement with a specific content. Thus, by characterizing legal institutions as immaterial artifacts but allowing for the presence of material artifacts nested in the material one, the ART formula seems able to shed some light on the interaction between abstract and concrete objects in the legal domain.

Another advantage of the ART formula for an analysis of legal ontology can be found in the above-mentioned distinction between two kinds of rationality at the root of artifacts: technical and teleological. In fact, the same kind of distinction can be found at the core of legal institutions. If, for example, a new kind of tax scheme

is introduced to make it less advantageous for employers to hire on flexible employment contracts—a measure designed to encourage employers to offer permanent positions—the newly introduced institution can be evaluated both technically and teleologically; that is, we can ask both whether the purpose of incentivizing permanent positions is economically reasonable and sustainable and, if we determine that it is, whether the tax is appropriately designed for that purpose. Mark Greenberg (2004, 160) has shown how the constitution of legal content on the basis of practices is a sort of “rational determination,” and Leslie Green (1998, 121–122) has clarified how, in judging the functionality of law, we must distinguish the internal problem of how legal institutions perform a given function from the external problem of the social (and moral) value of that function. This is exactly the lesson we draw from considering legal institutions as artifacts according to the ART formula.

Consider, too, the concept of interaction plan in legal terms. Institutions have both enabling and disabling interaction plans. If, for example, you have signed a contract, you have a right to have that contract performed and to obtain what you have agreed to. But, on the other hand, if you are approaching a national border, you cannot cross that line without customs inspections by public officials. Very often enabling and disabling plans are interconnected and nested within one another. For example, you can graduate from the University of Bologna and thus gain the right to participate in an open competition for public employment, among other things. But if you want to earn a law degree at the same university, you must take an exam in legal philosophy, and this exam entails specific obligations in its own turn. Institutions are therefore something that produce normative effects when people interact with them in the same way as other kinds of artifacts produce other kinds of effects. Alf Ross (1957 (1951)) has famously maintained that the connection between the conditions for the subsistence of legal institutions and the normative effects of those institutions can account for all legal conceptual content. Even though I do not agree with Ross’s reductionism, I think that the centrality of conditions and consequences in the explanation of legal concepts is entailed by the fact that legal institutions are artifacts, and artifacts entail interaction plans which are structured precisely in this way.⁴

Finally, the ART formula can perhaps add a few elements to some discussions in legal philosophy on the relationship between law and social function. Consider, for example, these two passages by Brian Leiter:

The concept of law is the concept of an artefact, that is, something that necessarily owes its

⁴ I present my criticism of Ross’s theory of legal concepts in Roversi 2012. It is important to note that the fact that a legal institution must have an interaction plan does not entail that it must *be* a plan, namely, an instance of social planning with a specific purpose in mind, as Scott Shapiro (2011, chap. 6) defines them. The relationship between Shapiro’s “planning theory of law” and the artifact theory of legal institutions presented here is complex and multifaceted and falls outside the scope of this paper.

existence to human activities intended to create that artefact. [...] Artefact concepts, even simple ones like “chair,” are notoriously resistant to analyses in terms of their essential attributes, both because they are hostage to changing human ends and purposes, and because they cannot be individuated by their natural properties—unlike say natural phenomena like “water,” which just is H₂O. (Leiter 2011, 666)

Often, for artifacts that have identifiable human creators, we appeal to the intentions of the creator, and that works well as long as we have other theoretical reasons for treating the creator’s intention as metaphysically decisive. [...] Such considerations will not help, in any case, with law, at least for positivists, since law need not have a creator who intended to create it (think of custom as a source of law, among many other examples). But when we untether artifacts from creators, functions seem hostage to rather variable interests in that artifact. [...] I am not aware of a single, widely accepted analysis of the essential properties of any artifact that does not rely on appeal to intentions of the creator in a context where it seems we should defer to those. If there is one, I would like to hear it. (Leiter 2013, 5–6)

Combine these two passages, and it seems that Leiter’s argument can be stated as follows: (1) law is an artifact, and (2) artifacts are accounted for in terms of their author’s intention; given that (3) several legal phenomena do not have an author, and that (4) when the function of an artifact is detached from an author’s intentions, it can never be seen as essential and varies depending on context, then (5) law cannot have an essential function. It seems to me that, by tracing the artifactual nature of legal institutions not to an author’s intention but to its (deliberative) history, the ART formula can both support this argument and cast it in a new light. In particular, it explains how legal institutions can have neither an author nor an essential function, while still being artifacts. They are artifacts because they have a specific kind of history which consists of intentions without necessarily requiring a specific author’s intention (recall the concept of “artifactual apperception” previously introduced). During this history, the function and structure of those institutions can change: the artifact can be reinterpreted and modified with respect to its original intention-rooted creation process. Thus, there is no essential function for the simple reason that the interpretation of a given institution’s social function can vary depending on the point in its history that we are considering: There is in the first place a diachronic variation. But a synchronic variation can also happen, because there is no need to suppose that, in different communities, the deliberative history of a given artifact proceeds in the same direction. And, given that the artifact’s ontology is accounted for in terms of its history, and not in terms of its function, the diachronic and synchronic variations it may undergo are perfectly consistent with its artifactual nature.

This does not mean that the ART Formula cannot provide any element for a functional analysis of law. In their work on this topic, both Leslie Green and Kenneth Ehrenberg distinguish between manifest, intended functions and latent, nonintended functions (a distinction which traces back to Robert K. Merton: see Merton 1968, 105). As Green writes,

We make functional claims about law that do not seem to presuppose any intentionalist thesis at all: that law promotes efficiency, or stabilizes the mode of production, for example. Law is thought to do these things whether or not it is meant to, and indeed even whether or not people are even aware that it does. (Green 1998, 117; cf. also Ehrenberg 2009, 92)

Intended functions are typically connected with authored artifacts. But how can we identify latent functions, if any exist to begin with? I agree with Green that latent functions are isolated with reference to a given system, in the sense that the function must have “an important explanatory role in understanding the political and economic system as a whole,” and I also agree that “it is sometimes hard to identify the relevant ‘system’ and it is often artificial to do so” (Green 1998, 118). But if any latent function must be discovered, it seems evident that in order for it to be isolated, the relevant legal institution must be considered in its historical development: This we do by comparing its deliberative history with the chosen system of reference. This kind of comparison can lead to a sort of evolutionary explanation of the legal artifact, and indeed artifacts have been selected for centuries in virtue of their practical success (see several examples in (Petroski 1993)). Obviously, the question remains whether such an evolutionary history of legal institutions can be framed without engaging in moral evaluation, but this is not a question I will address here. All that matters for my purposes is to show how, by framing the artifactual nature of legal institutions in terms of deliberative history, we can account for several ontological issues in legal philosophy in greater detail and in a new light.

3. *Kinds of Legal Artifacts*

I have thus far explained in what sense I consider legal institutions to be artifacts: They are immaterial, semantic artifacts whose interaction plan is based on constitutive rules. I will now make a tentative distinction among four kinds of legal artifacts: legal organizations, legal roles, legal transactions, and legal procedures. This distinction is necessarily sketchy and its discussion will be short because for the most part it is functional to the analysis that follows. So it is not meant to be exhaustive of all legal entities, but it should nevertheless cover several different cases.

Legal organizations are internally structured entities with a given purpose. They are structured in the sense that they typically include artifacts of the other kinds in specific relations: internal roles connected with powers, rights and duties; procedures and transactions whose outcome lies in normative effects which are meaningful within the organization itself. A legal organization’s interaction plan therefore depends strictly on how it is internally structured, and so on the interaction plans of its components. Dealing with a legal organization entails an ability to understand its structure and interact with its internal elements. In this sense, a legal organization is above all an artifactual context embedding a set of other legal artifacts nested in that context and having mutual relations. A very general ART formula for legal organizations can be stated as follows:

LEGAL ORGANIZATIONS

History {Intention-rooted Linguistic Creation Process [Interaction plan → Set of interaction plans corresponding to a system of nested artifacts having mutual relations: Roles, Procedures, Transactions (Mechanism: System of constitutive rules recognized and

followed)}}}

The most obvious example of a legal organization is that of the state. We know from constitutional law that the state is characterized by some very formal features, such as predominance and permanence, but apart from this the state is defined by its components, namely, territory and an authoritative structure which in its own turn is composed by a set of rule-defined legal organizations, roles, and procedures (for the sake of simplicity, I am referring to the traditional constitutional doctrine of the state). Another example of a legal organization is that of legal corporations, namely, structured “collective entities” which have a capacity to act under the law, are endowed with rights, and can be assigned specific duties.

Organizations first of all entail legal roles. People have a given set of powers, rights, and duties connected with specific functions that they must serve within an organization. A role, in this sense, is connected with two different sets of procedures, namely, the procedures that must be followed to fulfill the role, and those a person in that role must follow in order to produce normative effects if the role is connected (as is usually the case) with powers. Often, roles are also connected to kinds of legal transactions, in the sense that some transactions can be carried out only by individuals who fulfill a certain role. This is more evident if we include in the concept of a legal role what is usually called a legal status, namely, positions under the law that a person will hold under certain conditions and that in their own turn entail a set of powers, rights, and duties. The main difference between a role and a status under the law is that fulfilling a role is something persons achieve by following certain procedures, and usually entails powers, while being in a status can simply depend on meeting certain conditions without following any procedure. An example of this distinction is that between being a king and being a legal person. Being a king is a role we can fulfill only after having followed a given procedure: It is connected to a specific function within a given organization, namely, the state, and has a definite set of powers that must be exercised within a more or less strictly regulated setting. By contrast, being a legal person (that is, being a subject of rights and duties under a legal system) is a status, in the sense that it just “happens” under certain conditions without necessarily following any procedure—but like all roles it entails a given set of powers, rights, and duties under the law and can be connected to a capacity to perform certain legal transactions (in fact, being a legal person is a *conditio sine qua non* of performing legal transactions in general). Thus, in the end, roles very broadly considered are legal artifacts which can nest procedures, can be connected to transactions, and can be nested within organizations. A very general ART formula for legal roles can thus be stated as follows:

LEGAL ROLES

History {Intention-rooted Linguistic Creation Process [Interaction plan: If you carry out a certain procedure or meet a certain condition (X), you can fulfill role Y and hence have powers, rights, and duties Z; powers can usually be exercised under certain procedures W and can include the power to perform some legal transaction (Mechanism: Shared recognition and abidance by a constitutive rule in the form “An individual carrying out procedure X counts as fulfilling role Y and so as having powers, rights, and duties Z under

procedures W”]]}

While organizations can live “in thin air,” so to speak, namely, as purely immaterial artifacts, roles are immaterial artifacts that must be performed by concrete individuals: In this sense they are essentially “unsaturated.” Legal transactions, too, are unsaturated immaterial artifacts. Just as roles are legal artifacts that require someone to enact them, transactions are legal artifacts that must be performed in order to obtain specific normative effects. Transactions are usually connected to organizations, roles, and procedures, and as such they mostly find their meaning within a broader institutional context: The powers, rights, and duties acquired through transactions typically depend on other legal artifacts. This makes them in a sense conceptually subordinate in the legal domain, but this also means that transactions are very often the basic elements of legal institutions: From a categorial point of view, legal ontology is essentially act-oriented. Transactions for the most part involve procedures: In order to obtain normative effects, they must be performed in a given way. A very general ART formula for legal transactions can thus be stated as follows:

LEGAL TRANSACTIONS

History {Intention-rooted Linguistic Creation Process [Interaction plan: If you carry out a certain procedure (X), you can perform transaction Y and hence obtain normative effects Z, which usually entails altering the set of powers, rights, and duties conferred on you or on another individual (Mechanism: Shared recognition of, and abidance by, a constitutive rule in the form “An act under procedure X counts as Y and entails normative effects Z”)]}

Typical examples of legal transactions are a marriage and a contract (I am assuming they are different things, as in the Italian legal system): They are formalized kinds of bilateral acts that must be performed under certain procedures and that alter the set of powers, rights, and duties of the persons who perform them.

Finally, we come to legal procedures. On the one hand, legal procedures can be understood simply as conditions or requirements that must be met in order to fulfill a role, exercise a power or right, or perform a transaction. On the other hand, legal procedures can be clustered together and become full-fledged legal institutions conceived as a structured sequence of actions that must be performed to serve a specific legal function. Hence, there is a certain ambiguity in the way I have been using the concept of a procedure, because not all kinds of procedures necessary to perform a transaction or fulfill a role are procedures in the full-fledged sense of a ritualized way to serve a specific function within the legal system. A classic example of a procedure in this second sense is that of trials, conceived as ritualized ways of adjudication in a legal setting. A very general ART formula for legal procedures in this second, full-fledged sense can thus be stated as follows:

LEGAL PROCEDURES

History {Intention-rooted Linguistic Creation Process [Interaction plan: If you carry out a

certain ordered sequence of actions (X), you are part of procedure Y and hence subject to its normative outcome Z (Mechanism: Shared recognition of, and abidance by, a constitutive rule in the form “A certain ordered sequence of actions X counts as procedure Y and entails normative effects Z”)]}

A final consideration must be made, having presented these kinds of legal artifacts. It is apparent that, apart from the peculiarities of their interaction plans and the different ways in which they can interact among themselves, all these artifacts share a common normative “grammar,” so to speak: They are all constituted through rules and all in some way entail powers, rights, and duties. Thus these concepts—those of norm, power, duty, and rights, as well as others connected with them, such as the concept of validity—form the background against which all legal institutions, conceived as immaterial semantic artifacts and so as concepts in their own turn, are defined. In this sense, these concepts are “meta-institutional,” because they are not constituted by the rules of any given legal institution but are inevitably presupposed by them (see (Miller 1981, 188)).

This means that legal artifacts, being essentially semantic and immaterial objects, presuppose a more fundamental semantics: The creation of these artifacts can happen only within a social practice which is already in some sense meaningful and which comes with its own set of meta-institutional concepts. This means that the social practice we call law must at a minimum be an organization of powers, rights, and duties based on rules. Legal artifacts are necessarily inscribed within this general social practice, and thus they are constituted by rules which determine their effects in terms of the relevant meta-institutional concepts. John Gardner has clarified as follows the distinction between legal institutions as artifacts and law as a social practice:

The abstract noun “law” can be used to refer to a practice as well as genre of artefacts. The abstract nouns “poetry” and “sculpture” have the same ambiguity. Sculpture is the genre to which sculptures belong but it is also (differently) what sculptors do. Law, likewise, is the genre to which legal systems and legal norms belong but it is also (differently) what lawyers and legal officials do. [...] It is an important difference. A practice is made up not of artefacts, but of actions and activities. Many practices are practices of engaging with a certain, often eponymous, genre of artefacts. (Gardner 2004, 174)

Gardner maintains that law is a genre of artifact other than a social practice: This is perfectly consistent with the idea that legal institutions are artifacts embedded in a general concept of law and are thus constituted by reference to a specific set of meta-institutional concepts. This general concept of law, if it is an artifact (as Leiter, for one, maintains), must in this sense be a “deeper” artifact than legal institutions.⁵

⁵ I have dealt with the necessary dependence of constitutive rules on the concept of a general social practice and thus on meta-institutional concepts in (Roversi 2010). On the concept of deepness, but in relation to conventions and not artifacts, see (Marmor 2009, 58ff.).

4. *Institutional Mimesis*

Thus far I have explained my view that legal institutions are artifacts and I have shown how this view can have a significant explanatory power in working out several legal-philosophical questions. I turn now to the second part of this paper, where I show how law, despite its artifactual character, can also be “natural”—but only in the sense of not being easily detachable from our conception of nature. To this end, I will consider the examples so far given when discussing my tentative distinction among four different kinds of legal artifacts, namely:

Legal organizations → states, corporations

Legal roles → king, legal person

Legal transactions → contracts, marriages

Legal procedures → trials

Let me start with states, or rather, with what is usually called the “modern” concept of the state. It is a quite traditional view in legal and political history that the state in this sense emerged in the 17th century in Europe, progressively transforming the multi-centered, pluralistic legal settings typical of the Middle Ages into a single, hierarchical organization governed by its own logic, a logic which subsequently (after the French Revolution) concretized into the legal discipline we now call “administrative law” (a classical statement of this view can be found in (Weber 1978, chap. XI); see also (Fioravanti 1990, sec. 2) for a critical assessment, and (Mannori and Sordi 2009, 234ff.) on the rise of administrative law after the French Revolution). Now, according to Stephen Toulmin in his famous 1990 book *Cosmopolis*, the rise of such a new and unified political framework, organized according to an internal rationality and in a sense universal, should be viewed as inextricably intertwined with a specific conception of the natural world: the conception encapsulated in by the new, mathematical science which emerged in the same period and whose foremost champion was Isaac Newton. Writes Toulmin:

Between 1660 and 1720, few thinkers were only interested in accounting for mechanical phenomena in the physical world. For most people, just as much intellectual underpinnings was required for the new patterns of social practice, and associated ideas about the *polis*. As a result, enticing new analogies entered social and political thought: if, from now on, “stability” was the chief virtue of social organization, was it not possible to organize political ideas about *Society* along the same lines as scientific ideas about *Nature*? (Toulmin 1992, 107)

Elsewhere in the same work he adds:

From 1700 on, social relations within the nation-state were defined in *horizontal* terms of *superordination* and *subordination*, based on class affiliation: the “lower orders” as a whole were seen as subordinate and inferior to the “better sort” as a whole. Each class had its place in the horizontal system that constituted a nation-state, and at the summit of the structure was the King. Social place was typically defined by the status of the men involved, and was

applied to their wives and children by association. As a by-product of the nation-state, class distinction became, as never before, the crucial organizing principle of all society. In France especially, the key force in society was the monarch's "solar" power to control (and illuminate) the state's activities. [...] Here, the planetary model of society was explicitly *cosmopolitical*. Without such a justification, the imposition of hierarchy on "the lower orders" by "the better sort" of people would be arbitrary and self-serving. To the extent that this hierarchy *mirrored the structure of nature*, its authority was self-explanatory, self-justifying, and seemingly rational. (Toulmin 1992, 133; italics mine in the last occurrence)

In the final part of this second passage, Toulmin's idea is put in remarkably clear terms: Since the beginning of the 18th century, the hierarchical structure connected with the modern state could be seen as "mirroring" the structure of nature and thus could be justified by this analogy. But, conversely, the scientific conception of nature that underpinned this analogy was in its own turn strengthened *from its very birth* by its justificatory power: "[T]he world view of modern science—as it actually came into existence—won public support around 1700 for the legitimacy it apparently gave to the political system of nation-states as much as for its power to explain the motion of planets" (Toulmin 1992, 128). We thus have to do with two possible "directions of mirroring," namely, from the modern conception of nature to the way we build the modern state's institutional structures and, conversely, from the latter to the former. Interestingly enough, Hans Kelsen also had argued for a relation of dependence of the second type—from institutions to science—in his 1934 book *Society and Nature*. He did so, however, not in regard to modern science but to the concept of *archē* in pre-Socratic thought. This is how he explains his thesis:

If Thales of Miletus, with whom Greek philosophy begins, if Anaximander and Anaximenes, seek a fundamental principle, *archē*, by which the universe may be uniformly explained, they are thinking of something that rules the world like a monarch. [...] The law of the *archē* establishes here a *mon-archia* and means not only "beginning" but also "government" or "rule." (Kelsen 1943, 234; the words in ancient Greek are not transliterated in the original)

The fundamental point of that book by Kelsen is indeed the idea that the basic categories of our conception of nature can be drawn from our political framework. I, however, am interested in the other phenomenon described by Toulmin, namely, the situation in which the fundamental structure of our social setting, and in particular of legal artifacts, can "mirror" (in Toulmin's words) some shared description of the natural world. I will call this phenomenon "institutional mimesis." More specifically, I will trace to institutional mimesis all those cases in which one or more constitutive rules of a legal artifact imitate or are at least structurally homologous to some descriptions of a natural reality which is supposed to exist before and independently of the construction of that artifact. Thus, Toulmin's idea that the modern conception of the state mirrored the modern conception of nature is precisely an example of institutional mimesis in this sense, at least because the constitutive rules defining the mutual relations of hierarchy among roles within the state's structure, and hence the corresponding interaction plans connected with those roles, imitated relations of dependence among natural entities described through nomological scientific statements.

One should distinguish between those cases in which institutional mimesis is only a way to legitimize or interpret that institution *ex post*, hence without having any role in its creation, on the one hand, and those cases in which we can at least hypothesize that institutional mimesis actually played a role in the intention-rooted creative process that eventually produced the artifact, on the other hand. Let me express this distinction by means of the dichotomy between hermeneutic and genetic institutional mimesis.⁶ It is difficult to say whether, in *Cosmopolis*, Toulmin had in mind an example of hermeneutic or genetic mimesis. Certainly, one could argue that the modern conception of the state had arisen in virtue of its own political factors, first among which the struggle between absolute monarchy and the medieval landscape of scattered decision-making powers. Thus, proceeding in this direction, it would be easy to say that the modern conception of science simply justified a preexisting institutional artifact that was emerging for its own reasons. But it cannot be excluded that this ideology played a role in the subsequent moulding, modification, and development of the institution “state,” and indeed I think this is something that Toulmin had in mind when he wrote of organizing “political ideas about *Society* along the same lines as scientific ideas about *Nature*,” as in the passage quoted above.

An example of how institutional mimesis can have guided the development of legal conceptions about the state and thus become a truly genetic mimesis can again be found in Kelsen. Kelsen devotes some attention to a variant of the kind of institutional mimesis I am considering in regard to the state, namely, the idea typical of organicism, traceable to Thomas Hobbes and later defended by Otto von Guericke, that the state can be seen as a “macro-anthropos,” or natural organism. In Kelsen’s view, this idea was “ideological” and highly problematic, because its primary effect was to bring about the conception, common in public law, that the state is something which precedes law and can be “justified” through law. As Kelsen writes in the first edition of his 1934 *Reine Rechtslehre*,

the theory of public law assumes that the state, as a collective unity that is originally the subject of will and of action, exists independently of, and even prior to, the law. But the state goes on to fulfil its historic mission, so theory has it, by creating law, ‘its’ law, the objective legal system [...]. Thus, the state—essentially metalegal in character, some kind of powerful macro-anthropos or social organism—is a presupposition of the law and is at the same time a legal subject presupposing the law because beholden to the law, because obligated and granted rights by the law. (Kelsen 1992, 97)

In my terms, Kelsen is arguing here that institutional mimesis had a genetic role in the development of public law doctrines during the 19th century, becoming an

⁶ Finn Makela (2011, 402-404) has drawn a distinction between metaphors *of* law and metaphors *about* law which seems to be related to my distinction between genetic and hermeneutic institutional mimesis. In particular, according to Makela, it is necessary to keep distinct those cases in which legal concepts are inherently metaphoric from those in which metaphors are models imposed on law for explanatory purposes (see Makela 2011, 410ff.).

ideology which he strongly rejects. Although this case of institutional mimesis is not exactly equivalent to that advocated by Toulmin (the state is described by Kelsen to be mimetic of an organism, and not of cosmic order), it is interesting to note that, in doing so, Kelsen tacitly presupposes precisely the kind of institutional mimesis indicated by Toulmin, namely, that of the state as a hierarchic order in which everything “has its place,” as Toulmin says. In this passage from the *Reine Rechtslehre*, the idea is icastically formulated in terms of the “division of labour”:

The state, then, is a legal system. Not every legal system, however, is characterized as a state; this characterization is used only where the legal system establishes certain organs—whose respective functions reflect a division of labour—for creating and applying the norms forming the legal system. When the legal system has achieved a certain degree of centralization, it is characterized as a state. (Kelsen 1992, 99)

In the *General Theory of Law and State*, of 1949, Kelsen also equates a social community to a regulated order:

However, this dualism is theoretically indefensible. The State as a legal community is not something apart from its legal order [...]. A number of individuals form a community only because a normative order regulates their mutual behaviour. The community [...] consists in nothing but the normative order regulating their mutual behaviour. (Kelsen 2006, 182)

Kelsen’s example should show how it is difficult to sharply distinguish cases of *hermeneutic* institutional mimesis from cases of *genetic* institutional mimesis. This is because ideological justification of a given legal artifact in terms of mimesis can play a role (either explicit, as in the case of social organicism, or tacit, as in the case of Kelsen’s theory) in the artifact’s subsequent intention-rooted processes of modification, development, and interpretation. In this way, at the root of legal artifacts, hermeneutic and genetic institutional mimesis can be mutually entailing.

One could say that these examples of mimetic legal organizations are simply a curiosity, something which may be significant for the concept of the state but not for law in general. But I want to put forward the conjecture that this kind of institutional mimesis is not a byproduct of simple contingencies: It is rather something which has had a more profound impact on the creation of legal organizations. Consider the very genesis of this concept in Western legal thought, namely, the Roman idea that a *universitas* can be endowed with a legal personality separate from that of its members, as in the famous passage by Ulpian, “If a debt is owed to the *universitas*, it is not owed to the individual members, and what is owed by the *universitas* is not owed by the individual members” (*Digest* 3, 4, 7, 1). As Karl Olivecrona reminds us in the 1928 essay “*Corporations as universitates*,”

The Romans had, of course, no counterpart to the countless economic organizations which abound in our modern industrial community; but there existed a multitude of *collegia* or societies of many kinds: burial societies, trade guilds and public bodies such as the *municipia* (towns) with their governing *curiae* or *decuriae*. For these various organizations the Roman jurists laid down rules that have become fundamental in the modern law of corporations. (Olivecrona 1949, 5)

In this essay Olivecrona maintains that, in Roman legal thought, the very idea of a

corporation having a legal personality separate from that of its individual members depended on its being considered a separate entity, something which can exist not simply as a mere collection of parts. This was possible in light of a specific distinction between three kinds of natural *corpora*, a distinction that can be found in the Stoic philosophers and that was accepted by the Roman jurists. According to this distinction, which is clearly formulated by Pomponius in a famous passage (*Digest*, 41, 3, 30, pr.) and can be found in Seneca as well, there are three kinds of *corpora* to be found in nature: homogeneous objects of a given species whose parts are melted together and have no separate standing, for example, a statue; objects of a given species whose parts have their own separate species but are connected in a coherent way, for example, a ship (*corpus ex cohaerentibus*); and, finally, objects of a given species whose parts have their own separate species and are also physically independent, for example, a herd of sheep (*corpus ex distantibus*). According to Olivecrona, the *universitates* discussed by the Roman jurists were to be conceived as *corpora ex distantibus*:

As *corpora* of the third class corporations were similar in nature to other *corpora* belonging to this class. The fundamental rules concerning their rights and duties are only applications of the general theory of *corpora*. The essential thing is that the entity is a *corpus*, distinct from the parts, with an individuality that remains unchanged despite changes in the parts. The rules are inferences drawn from these assumptions. (Olivecrona 1949, 35)⁷

As in the case of Toulmin's hypothesis on the rise of the modern state, here a legal organization is created in such a way that it mirrors natural reality according to a common—we would say “scientific,” according to the standards of the period—conception of it:

The classification of *corpora* refers to their objective nature; it is founded on natural science without consideration of social convenience. In their arguments the jurists assume that the classification is scientifically correct; this is the reason why they use it in their interpretation of law. (Olivecrona 1949, 29)

This is therefore another example of institutional mimesis—and of genetic institutional mimesis, too, because it is not possible to deny the impact that the Roman jurists' doctrines and conceptions has had on the subsequent intention-rooted creative and development process of the legal artifact “corporation” in the European context. Hence, if Olivecrona's and Toulmin's theses are correct, institutional mimesis has played a role both in the emergence of the very concept of a legal organization in ancient Western legal thought and in the development of the paradigmatic case of a legal organization in Western public law of the modern era. It seems safe to assume that if these were contingencies, they were

⁷ In Question XIII of his *Specimen quaestionum philosophicarum ex jure collectarum*, of 1664, Leibniz deals with a related question when treating the problem of identity, quoting “a famous passage from Alphenus [*Digest*, 5, 1, 76] where it is asked: Does changing individual judges change a court? The answer is that, even if all had been changed, the court would remain the same; and also a legion, a people, a boat” (Leibniz 2013, 32).

nevertheless of crucial importance for the history of legal thought.

But institutional mimesis is relevant to other kinds of legal artifacts as well. I have stated above that the fundamental elements of legal organizations are roles connected with a form of empowerment. Now consider kingship, conceived as the highest power within a given political organization. It has been observed in the anthropological literature that in many cultures the normative powers of a king—in essence, his authority—were originally connected with that king's actual ability to produce effects in nature. James George Frazer provides us with many examples of this connection in the chapters of *The Golden Bough* devoted to “magicians as kings.” Consider the case of kings as “rainmakers” in African culture:

[T]he evidence for the evolution of the chief out of the magician, and especially out of the rain-maker, is comparatively plentiful. Thus among the Wambugwe, a Bantu people of East Africa, the original form of government was a family republic, but the enormous power of the sorcerers, transmitted by inheritance, soon raised them to the rank of petty lords or chiefs. Of the three chiefs living in the country in 1894 two were much dreaded as magicians, and the wealth of cattle they possessed came to them almost wholly in the shape of presents bestowed for their services in that capacity. Their principal art was that of rain-making. The chiefs of the Wataturu, another people of East Africa, are said to be nothing but sorcerers destitute of any direct political influence. Again, among the Wagogo of East Africa the main power of the chiefs, we are told, is derived from their art of rain-making. If a chief cannot make rain himself, he must procure it from some one who can. Again, among the tribes of the Upper Nile the medicine-men are generally the chiefs. Their authority rests above all upon their supposed power of making rain, for “rain is the one thing which matters to the people in those districts, as if it does not come down at the right time it means untold hardships for the community. It is therefore small wonder that men more cunning than their fellows should arrogate to themselves the power of producing it, or that having gained such a reputation, they should trade on the credulity of their simpler neighbours.” Hence “most of the chiefs of these tribes are rain-makers, and enjoy a popularity in proportion to their powers to give rain to their people at the proper season [...]” The Banyoro also have a great respect for the dispensers of rain, whom they load with a profusion of gifts. The great dispenser, he who has absolute and uncontrollable power over the rain, is the king [...]. In Ussukuma, a great district on the southern bank of the Victoria Nyanza, “the rain and locust question is part and parcel of the Sultan's government. He, too, must know how to make rain and drive away the locusts. If he and his medicine-men are unable to accomplish this, his whole existence is at stake in times of distress. On a certain occasion, when the rain so greatly desired by the people did not come, the Sultan was simply driven out (in Ututwa, near Nassa). The people, in fact, hold that rulers must have power over Nature and her phenomena [...]” (Frazer 2009, 204–209)

Now, even though Frazer regards these examples as cases of magic transmuted into normative authority, it is clear that what we call “magic” amounts to nothing else than a specific conception of the natural world shared within those cultures. So here, too, we are looking at an example of institutional mimesis, because rainmakers are individuals whose normative powers (their capacity to produce binding obligations on individuals, for example) derive from, and thus mirror, their effective ability to produce actual effects in the natural world. This mimetic connection between a king's normative powers and his effective capacities can be found at the root of European culture as well. In *Le vocabulaire des institutions indo-européennes*, of 1969, Émile Benveniste notes, for example, that the verb most used in Greek Homeric tragedy for “rule,” namely, *kraínō* (in the Homeric form), is

connected with the idea of executing and realizing and signifies an actual effect in the world (see Benveniste 1969, 35).⁸ Moreover, Pietro De Francisci (1959, 361ff.) has described in great detail, and with specific reference to ancient Roman culture, the passage from the recognition of different kinds of actual abilities (among which technical abilities, brute force, and courage) to the attribution of normative powers. Clearly, such an ability to produce effects in the natural world is ultimately connected with the idea that kings must be able to bring about natural effects which are in some sense “good” for their people: An example would be a plentiful harvest. This idea is almost ubiquitous. It can be found in Asian culture:

Thus the ancient Hindoo law-book called *The Laws of Manu* describes as follows the effects of a good king’s reign: “In that country where the king avoids taking the property of mortal sinners, men are born in due time and are long-lived. And the crops of the husbandmen spring up, each as it was sown, and the children die not, and no misshaped offspring is born.” (Frazer 2009, 215)

But the same connection can be found in the *Odyssey*, XIX, 110ff. (“Your fame rises to high heaven, like the fame of a peerless king, who, fearing the gods, rules many brave men and upholds the law. The people prosper under his leadership, and the dark soil yields wheat and barley, the trees are heavy with fruit, the ewes never fail to bear, and the sea is full of fish”) and, again according to Benveniste, at the etymological roots of the English word *lord*, which is thought to derive from the ancient compound *hlāford*, whose first element is *hlaf*, namely, “bread.” Hence, the lord would be “he who can bring bread to his people” (see Benveniste 1969, 26–27). Moreover, as Marc Bloch writes in his 1924 *Les Rois Thaumaturges*, this connection eventually produced the idea, widely shared in the Middle Ages and instrumental to the construction of kingly authority in Europe, that “real” kings must have thaumaturgical powers. Bloch provides us with an accurate description of the birth and death of this idea. In particular, he shows in detail how the supposed thaumaturgical power attributed to the kings of the Capetian dynasty is a result of a conceptual blending between the ancient German conception according to which kings must have an effective ability to manipulate nature and the Christian translation of this idea in terms of the king’s “holy powers,” akin to those of king-priests such as Melchisedec in *Genesis* (see Bloch 1961, 57ff.).

Kings have powers over the world; hence they have powers over people: They can control the natural world; hence they have the normative power to rule. Institutional mimesis seems to lie at the core of the conceptual genesis of legal and

⁸ I am leaving aside here the question of how the concept of authority in Western legal thought has been intertwined with that of force, namely, with the concept of a physical quality of a given person. The reader can find some interesting remarks in this regard in Fittipaldi 2012, 259–260. Moreover, it is worth noting that in many Nordic languages, even the term for the judge is etymologically related with the idea of “doing something”: This is so in the Swedish *domare*, the Icelandic *dómari*, the Danish and Norwegian *dommer*, and in the Finnish *tuomari* (see in this regard Conte 2009, 90–91).

political authority in many cultures. In claiming that this is a kind of institutional mimesis, however, I am using the term *nature* in a slightly different sense from the one used above when speaking of a possible mimesis between institutional organizations and the natural order of things: There I was speaking of a parallelism between institutional structures defined through constitutive rules and nomological generalizations about nature; here the parallelism is rather between normative powers connected to a given role and the ability to control nature. *Nature* in the former sense is nothing other than the cosmic order and its law: It is nature in a “cosmological” sense. In the latter sense, *nature* is instead conceived as the context of existence of human beings: It focuses on these beings’ actual abilities to interact with their context. This second conception I will call “ecological.”

Despite this distinction, human beings can be regarded in institutional mimesis not only as bearers of natural abilities but also as part of a natural order: They can thus be regarded in a sense that is closer to the cosmological sense of nature. Consider the general concept of a legal person, previously introduced as the second example of a legal role. We saw how Olivecrona argues that the Roman concept of the legal personality of corporations depends on these corporations’ being conceived as a specific kind of existent natural entity, namely, as *corpora ex distantibus*. In a strikingly similar way, Kelsen argues that the very concept of person in the general theory of law has suffered considerably from its parallelism with a human being in the natural sense. In particular, it has produced the traditional distinction between physical and legal persons, a distinction that in Kelsen’s view has no reason to exist. The following passage from the *General Theory of Law and State* explains his view:

In juristic considerations we are concerned with man only insofar as his conduct enters into the contents of the legal order. Only those actions and forbearances of a human being which are qualified as duties or rights in the legal order are thus relevant to the concept of the legal person. The person exists only insofar as he “has” duties and rights; apart from them the person has no existence whatsoever. To define the physical (natural) person as a human being is incorrect, because man and person are not only two different concepts but also the results of two entirely different kinds of consideration. Man is a concept of biology and physiology, in short of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms. (Kelsen 2006, 94)

Here Kelsen is again rejecting a sort of institutional mimesis he considers ideological and mistaken, just as he did in the previously discussed case of organicist conceptions of the state in public law. But again, he is doing this because he thinks that this mimetic ideology is deeply rooted in legal thinking and had moulded the way in which the legal artifact “person” has been reinterpreted and modified in the traditional civil law doctrine. This means that if we are to agree with Kelsen, institutional mimesis has assumed a genetic role not only in the concept of the legal personality of corporations (as Olivecrona argues) but also in that of the physical personality of human beings, a “legal role” in its most fundamental sense. And this mimesis has to do more with the way human beings are, with their biological makeup, so to speak, than with their abilities within a given natural context: Even though the sense of *nature* at issue here takes humans as its focus, it is cosmological, not ecological.

It is worth noting that institutional mimesis can influence not only the way we define the normative effects connected with a legal artifact but also the way we formulate the conditions under which that artifact can produce those effects, and so not only the elements Z but also the elements X of legal artifacts as defined in Sections 2 and 3. The first kind of institutional mimesis I will call “normative”; the second, “performative.” The reason behind the term *normative* is quite straightforward, for in this case, institutional mimesis is connected with the normative duties, rights, and powers that are the normal outcome of a legal artifact’s interaction plan. I have instead chosen the term *performative* for the second case under consideration because, in this case, institutional mimesis has to do not with an artifact’s normative effects but with the actual interaction we must have (what we must “perform,” in a very broad sense of this term) with the artifact in order for it to produce those effects. Performative mimesis is of course strictly intertwined with normative mimesis. For example, legal anthropology shows not only that in many cultures the normative powers of kings mirror their factual powers over nature, but also that as a consequence of this fact kings *had to be* chosen just by evaluating their actual abilities. According to Frazer, Latin kings were originally chosen on an annual basis by way of a race or a fight, this in order to ensure that the candidate did in fact have the actual natural abilities required for the normative powers of a king. This original procedure survived in symbolic form in later ceremonies:

A relic of that test perhaps survived in the ceremony known as the Flight of the King (*regifugium*), which continued to be annually observed at Rome down to imperial times. On the twenty-fourth day of February a sacrifice used to be offered in the Comitium, and when it was over the King of the Sacred Rites fled from the Forum. We may conjecture that the Flight of the King was originally a race for an annual kingship, which may have been awarded as a prize to the fleetest runner. At the end of the year the king might run again for a second term of office; and so on, until he was defeated and deposed or perhaps slain. In this way what had once been a race would tend to assume the character of a flight and a pursuit. The king would be given a start; he ran and his competitors ran after him, and if he were overtaken he had to yield the crown and perhaps his life to the lightest of foot among them. In time a man of masterful character might succeed in seating himself permanently on the throne and reducing the annual race or flight to the empty form which it seems always to have been within historical times. (Frazer 2009, 375–376)

Frazer’s example makes it possible to connect institutional mimesis regarding legal roles with that regarding legal transactions. In fact, he notes that the Latin selection of kings on the basis of actual abilities very likely had a precise parallelism with the way in which marriages were celebrated, namely, by selecting candidates on the basis of their ability to actually reach their bride in a sort of race. As Frazer notes, this custom was common to many cultures:

These traditions may very well reflect a real custom of racing for a bride, for such a custom appears to have prevailed among various peoples, though in practice it has degenerated into a mere form or pretence. Thus “there is one race, called the ‘Love Chase,’ which may be considered a part of the form of marriage among the Kirghiz. In this the bride, armed with a formidable whip, mounts a fleet horse, and is pursued by all the young men who make any pretensions to her hand. She will be given as a prize to the one who catches her, but she has the right, besides urging on her horse to the utmost, to use her whip, often with no mean

force, to keep off those lovers who are unwelcome to her, and she will probably favour the one whom she has already chosen in her heart." The race for the bride is found also among the Koryaks of North-eastern Asia. It takes place in a large tent, round which many separate compartments called *pologs* are arranged in a continuous circle. The girl gets a start and is clear of the marriage if she can run through all the compartments without being caught by the bridegroom. The women of the encampment place every obstacle in the man's way, tripping him up, belabouring him with switches, and so forth, so that he has little chance of succeeding unless the girl wishes it and waits for him. Similar customs appear to have been practised by all the Teutonic peoples; for the German, Anglo- Saxon, and Norse languages possess in common a word for marriage which means simply bride-race. Moreover, traces of the custom survived into modern times. (Frazer 2009, 372–373)

A curious confirmation of this practice can be found in the Greek myth of Atalanta (who agreed to marry only the man who could outrun her in a footrace), as well as in Willem Van Rubruk's *Itinerarium* in the lands of the Mongols, a report written in the 13th century. In this last description, it is quite clear that the procedure through which marriage was celebrated in the Mongolian culture at that time mirrored some sort of brutal act similar to kidnapping:

Once a marriage has been arranged, the bride's father organizes a banquet and she flees, hiding with her parents. At which point the father will say: "My daughter is yours—find her and take her." And so the bridegroom sets out to search for her with his friends until he finds her. He must then take her by force and bring her home, pretending that he is forcing her to do so. (Willem Van Rubruk, *Itinerarium*, VII, 5; my translation)

These forms of marriage are examples of institutional mimesis. The idea is that the way in which a woman "binds herself" from a normative point of view, thus entering into a relationship of mutual rights and duties with a man, had to mirror the way in which a woman can be bound in a brutal, merely factual sense. This is in particular an example of performative mimesis, because it concerns not so much the normative effects of marriage as its conditions of performance: the way in which you can marry someone, not the outcome of this procedure. Such a mimetic relation between marriage and kidnap, though also traceable to the roots of European legal culture, is particularly unacceptable from a modern legal perspective, and indeed we could debate about how much of the original "capture model" still lingers in contemporary theories of marriage. But even if we concluded that this kind of mimesis plays no such role any longer in contemporary Western legal culture, the mimetic relation here described can become relevant when comparing our legal conceptions with that of other cultures. In the quite famous case *People v. Moua* (Fresno County California Super. Ct. Feb. 7, 1985), for example, institutional mimesis is fundamental in understanding how something which is seen as abduction and rape from our legal perspective can become a marriage from another, and clearly this can have a direct impact on the way we interpret the intentional element of illicit behaviour. In a 2002 work on "cultural defense," Martin Golding shows how, in this case,

cultural evidence was used to reduce a charge of kidnapping and rape to the lesser offense of false imprisonment. Moua belonged to a Hmong tribe from Laos which practices marriage-by-capture. In this ritual a man abducts a woman to his family's home, where the marriage is consummated. The practice calls for the woman to show her virtuousness by protesting the

man's advances. Defendant Moua abducted a woman of Laotian descent from the Fresno City College campus, where she was employed, and had sexual relations with her despite her protests. She filed a criminal complaint, charging Moua with kidnapping and rape. At trial, Moua maintained that he did not force sexual relations on the victim because he believed that her protests were in line with the marriage-by-capture ritual. The judge accepted Moua's claim but he also held that the victim had not genuinely consented. Moua's mistake of fact defense was successful in overcoming the kidnapping and rape charges, but he was held guilty of the lesser offense of false imprisonment. (Golding 2002, 148)⁹

What sense of *nature* is at work in this example of institutional mimesis? I previously introduced a distinction between institutional mimesis grounded in nature in both a cosmological and an ecological sense. The example of marriage, however, does not quite fit either of those two categories. On the one hand, the meaning of *nature* I am using here cannot be traced to the cosmological sense, because in this case institutional mimesis derives a normative entitlement to marry a woman from a man's actual ability to reach and kidnap her: It is not simply a matter of cosmic order, but of what humans can and cannot do in a brute factual sense. On the other hand, the ecological sense is too broad to capture the specific features of this example, because nature is conceived here not simply as the context in which human beings interact with natural phenomena—the conception at work in the case of kings—but as the context where they interact with other human beings in brutal, non-normative interactions: This is, in other words, a sort of presocial situation in which human beings are conceived as animals governed by relations of brute force. Let me call this sense of *nature* “ethological.”

In considering that institutional mimesis can be grounded in nature conceived in these three different senses—cosmological, ecological, and ethological—we should not make the mistake of thinking that all mimetic legal transactions, because they involve relationships among humans, are thereby mimetic in the ethological sense. An important counterexample to this thesis can be found in the Roman concept of *promissio*, an ancestor of our concept of contract. A *promissio* in Roman law was a legal transaction through which persons could undertake an obligation under *ius gentium*, that is, even if they were not Roman citizens (the corresponding transaction for Roman citizens was instead the *sponsio*, as described, for example, by Gaius in *Digest* 1, 3, 93). Now, in the second volume of his 1941 *Der Römische Obligationsbegriff* (the first volume was written in 1927), Axel Hägerström argues that a *promissio* could take place only by offering (literally “putting forward,” *promittere*) the right hand, which had to be accepted by the promisee in order for the transaction to be validly performed. In his view, however, such a contact between right hands was necessary for the transaction to happen because some sort of “fluid” or “force” was thought to be transmitted in nature upon contact, and this force in a sense entailed a communion framed in normative terms. Writes Hägerström:

⁹ The same question is considered under a legal-anthropological point of view for example in Donovan 2008, Chap. 18.

In the *dextra* there is a particular internal force through which a person's objectives can be achieved. By way of a *dextrarum iunctio*, the respective forces are supernaturally merged [*vereinigt*], and in this way a mystic community is created in what concerns the sources of those forces. Compare this idea with the primitive conceptions about forces enclosed in external objects mystically transmitted by physical contact or more generally by external contiguity [*äusseres Zusammensein*]. These forces are conceived as *fluida*, which are transmitted from one object to another. If the original connection has been organic, a supernatural communion of destinies also arises. (Hägerström 1941, 162; my translation)¹⁰

As already noted with regard to Frazer, what Hägerström is calling *supernatural* and *mystic* here was instead clearly part of the primitive conception of the natural world he is describing, a conception governed by animism. Thus, if Hägerström's interpretation is correct, the transmission of rights and duties entailed by a *promissio* mirrored the actual transmission of forces which was thought to happen in nature upon contact. That is another example of institutional mimesis. But this mimesis is based on a specific dynamic of forces conceived as part of the natural order. Thus, *promissio* as a mimetic legal transaction presupposes a cosmological and not an ethological sense of *nature*, despite the fact that what is involved in a *promissio* is a relation between two human beings.

Let us finally turn to legal procedures, the last kind of legal artifacts previously introduced. The example I gave for this category is that of trials. The legal artifact "trial" can be interpreted as a mimetic institution from the beginning of its development in Western legal culture. More to the point, at the origin of Roman law some trial procedures seem to mirror brutal fights decided by the gods. Consider in this regard the role of force in the *legis actiones*, by which the defendant who was unwilling to go to court had to be forced by the plaintiff for the trial to begin (see in this regard (Dalla and Lambertini 1996, 144ff.)). What seems striking, however—and indeed this is another clue to the relevance that institutional mimesis can have not only in legal history but also in legal theory—is that trials can be interpreted as mimetic even in the contemporary legal setting. Here I will make an example drawn from the current debate on constitutional law in the United States, namely, the idea of one's "standing" before a court. This idea, which incidentally many parallels in other legal cultures (*l'interesse ad agire* in Italy and *die Klagebefugnis* in Germany, among others), means that the plaintiff in a lawsuit must be able to demonstrate that he or she has a sufficiently concrete and personal interest in a dispute as a formal condition for being entitled to have the courts decide the merits of that dispute. Now, according to Steven Winter in his pioneering 1988 article "The Metaphor of Standing and the Problem of Self-Governance," this idea is essentially metaphoric: It basically evokes the several common meanings of "standing" by which we can describe an individual's ordinary behaviour:

The metaphor of "standing" is a myth that has become "the literal truth" and shaped—or

¹⁰ A presentation of Hägerström's Romanistic studies in English can be found in Faralli 1986.

misshaped—our thinking about adjudication. It has shaped our thinking about adjudication to conform to two separate “truths” embedded in the metaphor, and to think about them as one. The first is the “truth” of individualism: One stands alone; one stands up; one stands apart; one stands out; one stands head and shoulders above the crowd. [...] The second “truth” embodied in the metaphor is that the individual must have a particular kind of relationship to the court whose power he or she is seeking to invoke: A court will only consider what a party has to say if he or she is standing (read: has “standing”). (Winter 1988, 1387-8)

This is, again, a sort of institutional mimesis—and a performative one in particular. Indeed, on this interpretation, one of the conditions for accessing the legal artifact “trial” in the United States tacitly mirrors the way in which we can “stand” in ordinary life. And this gives rise to what Winter calls a “private-rights” model of procedural justice, which in its own turn is metaphoric:

Modern standing law defines this relationship between the individual and the process in terms of a particular cognitive model: the private rights model. We structure this model by means of two metaphors premised on the source-path-goal schema: a causal source-path-goal metaphor and a remedial source-path-goal metaphor. We identify the subject matter of a lawsuit through the elements of the causal schema. The defendant’s act is the source, the causal chain is the path, and the plaintiff’s injury is the goal. The remedial source-path-goal metaphor is virtually a mirror image of the causal one: The individual’s injury is the source of a process that has as its goal an order from the court redressing that injury; the path that connects them is the plaintiff’s proof that the acts of the defendant caused the injury. The mirror image quality of these two source-path-goal metaphors gives rise to the conception of damages and other forms of legal redress as designed “to put the plaintiff back in the position he occupied” (or as near as possible) before occurrence of the legal wrong. (Winter 1988, 1388)

Another metaphor thus emerges here: the idea that a legal trial mimics a causal chain having a source, a path, and a goal.¹¹ While the previous mimesis, that of standing, was performative in the sense that it involved only the conditions under which a case could be decided by a given court, according to this “private-rights” model the whole structure of the legal artifact is conceived as being essentially mimetic, thus involving both performative and normative mimesis. And while the metaphor of “standing” mirrored a person’s actual ability (the ability to stand up or stand apart) by means of a normative entitlement (the right to have his or her case decided by a court), thus presupposing an ecological sense of nature, the “private rights” model is described here to mirror the very structure of causal connections in nature or in human behaviour oriented toward a goal, thus presupposing a cosmological conception: In Winter’s words, “[o]ur use of the causal source-path-goal metaphor to conceptualize the subject matter of a lawsuit overlaps with our use of source-path-goal metaphors to structure our view of both purposes and causation” (Winter 1988, 1390). And this complex example of institutional mimesis has far-reaching consequences on the way in which the scope of the

¹¹ In this sense, it is no coincidence that, for example, the Italian word for a lawsuit—namely, *causa*—also means “cause.”

judicial process is thought of and described in current American legal doctrine.

With the “standing” metaphor I have concluded my presentation of examples of institutional mimesis.¹² All the kinds of legal artifacts introduced in Section 3—legal organizations, roles, transactions, and procedures—have been discussed with reference to some of examples. Let me now provide some conjectures on how I think these phenomena can be explained.

5. Institutional Mimesis as Metaphoric Conceptual Blending

Winter’s example of “standing” discussed in the last section is not so different from the examples of the state and of legal personality critically discussed by Kelsen. In both cases we face a crucial problem in legal doctrine, and in both cases the interpretation of a crucial legal artifact is mediated by an underlying description of the factual world, namely, it is an instance of institutional mimesis. Despite this similarity, however, Winter makes an important statement that Kelsen does not make, at least not explicitly. He writes: “My view is premised on the recognition that the use of a particular cognitive model has *ontological effects* in the real world” (Winter 1987, 1389; emphasis added). And in another passage he adds:

New metaphors, like conventional metaphors, can have *the power to define reality*. They do this through a coherent network of entailments that highlight some features of reality and hide others. The acceptance of the metaphor, which leads us to focus only on those aspects of our experience that it highlights, forces us to view the entailments of the metaphor as being true. (Winter 1987, 1458; emphasis added)

But how can that be so? How can a cognitive model have an ontological bearing? Even if it is true that a metaphor “selects,” as it were, what we see as relevant and what we dismiss as irrelevant, we need another premise to show that this feature of our thinking can become a feature of legal reality. This premise is precisely that legal institutions are artifacts.¹³ Since in the artifactual domain the history relevant in assessing an artifact’s reality is a deliberative history (see Section 2 above), all development processes have an inherently interpretive nature: You have to possess a concept of what the artifact is *for* in order to reproduce that artifact, and

¹² Other examples I have found that I will not discuss here are the following: the concept of organization as a physical structure and the analysis of property in Johnson 2007, 861, 865ff.; the concept of property in Bjerre 1999, 357ff.; the whole discussion about the detachability of debts in Fittipaldi 2012, sec. 4.6; the concept of abrogation as material destruction in Fittipaldi 2013, 187ff.; the concept of contract as an idealized “meeting of minds” in Lipshaw 2012, 1003ff.; the idea of a legal system as a tree in Prémont 2003, 26; the ancient Roman concept of borders as delimitating the locations of *numina* in De Francisci 1959, 253ff.; and the concept of equity as an example of “deontic iconism” in Conte 2009, 77–79.

¹³ Winter himself elsewhere uses the term *mental artifact*, which bears an interesting relation to my concept of immaterial artifact (see Winter 2001, 339).

very often the possession of such a concept is the outcome of an interpretive enterprise. This is even more so with legal artifacts. In this case, legal interpretation and reinterpretation clearly dictates how the artifact is reproduced, just as it dictates the development of its interaction plan and of its underlying constitutive rules. In moulding the way in which human beings conceive a given legal artifact by way of a mimetic relation with an underlying conception of nature, institutional mimesis therefore has an ontological bearing. Given that an artifact's ontology traces back to an intention-rooted process of creation and development, if institutional mimesis can influence that process, it eventually dictates that artifact's peculiar reality. The artifact is created having that model in mind and thus takes on the features of that model.

The main consequence of this argument is that legal artifacts can have a mimetic ontology, namely, that if we conceptualize them in mimetic terms, then they are mimetic objects. And this in turn implies that, in several important cases, the construction of our legal normative artifacts is inherently linked to the way we describe our factual world, be it the order of nature in general or the way in which human beings can manipulate their natural context (including other human beings: recall the distinction previously made between three different conceptions of nature). This seems to be a very counterintuitive conclusion. After all, highly conventional and formalized legal artifacts are commonly introduced in a given legal system by way of legislation and can hardly be described as having any relationship with our pre-normative conception of nature and of brute facts. We tend to think about the law in terms of a solution to social problems, and there is nothing in this concept that dictates a more or less strict connection to the natural setting we live in. We are so accustomed to thinking of law as something artificial that we do not see how that artifact could be natural in any sense. In contrast to this ordinary conception, I maintain that although not every legal institution is necessarily an outcome of institutional mimesis, this phenomenon nevertheless plays a very important role in law, and this for reasons having to do with the way we conceptualize immaterial artifacts.

We have seen that, when Winter discusses the concept of "standing" in the current American debate on procedural justice, he speaks of metaphor. Metaphor is a sort of symbolic relation which links something to something entirely different. And indeed institutional mimesis is a sort of metaphoric relation between the constitutive rules of a given legal artifact and some general statement about natural or factual regularities. Hence, for example, the connection between a king's normative powers, on the one hand, and the corresponding human being's actual abilities, on the other hand, can indeed be seen as metaphoric. In this view, what I am *normatively* empowered to do is made to depend metaphorically on what I can *in fact* do: The abstract, normative dimension of power is conceived as a metaphor for the more basic, concrete dimension of our ordinary abilities.

According to influential theories in contemporary cognitive psychology and linguistics, conceptual metaphors of this kind are a fundamental way in which we build abstract concepts. In fact, theories about "conceptual metaphors," which are quite important in the current psychological debate, show how we ordinarily

conceptualize abstract things in a given domain by means of other, less abstract things in other domains. Writes George Lakoff in his 1996 *Moral Politics*:

A conceptual metaphor is a correspondence between concepts across conceptual domains, allowing forms of reasoning and words from one domain [...] to be used in the other [...]. It is extremely common for such metaphors to be fixed in our conceptual systems, and thousands of such metaphors contribute to our everyday modes of thought. For the most part, we use them without effort or conscious awareness. Yet, as we shall see, they play an enormous role in characterizing our worldviews. (Lakoff 1996, chap. 4)

In the 1980 *Metaphors We Live By*, George Lakoff and Mark Johnson draw on the theory of the “embodied mind” to argue that this mechanism of conceptualization through metaphors proceeds from the concrete to the abstract, from the domain of the physical to that of immaterial things. This typical direction of metaphorization they call “grounding”: “what we are claiming about grounding is that we typically conceptualize the nonphysical in terms of the physical—that is, we conceptualize the less clearly delineated in terms of the more clearly delineated” (Lakoff and Johnson 2003, 59). As Johnson writes in another work:

There is a logic of our bodily experience that is imaginatively appropriated in defining our abstract concepts and reasoning with them. Imaginative processes of this sort depend on the nature of our bodies, our brains, and the patterns of our interactions with our environment. (Johnson 2007, 846)

This concept of grounding is clearly crucial to institutional mimesis, particularly in those cases where the underlying concept of nature is ecological or ethological. But it is striking to note that grounding can be relevant not only in connection with specific institutional legal structures but also with the meta-institutional concepts which are essential to the practice of law in general: the concepts of power, rights, duty, and rule (recall the distinction between institutional and meta-institutional concepts made in Section 2). In the 1988 article *Force Dynamics in Language and Cognition*, Leonard Talmy proposes an analysis of basic deontic terms in English (terms such as *may*, *must*, and *can*, corresponding to deontic permission, duty, and power) on the basis of what he calls a “force dynamics,” namely, a question of “how entities interact with respect to force”:

Included here is the exertion of force, resistance to such a force, the overcoming of such a resistance, blockage of the expression of force, removal of such blockage, and the like. [...] Though modals have been investigated from many perspectives, there has been general inattention to what appears to lie at the core of their meanings, namely, force opposition. (Talmy 1988, 49, 77)

Some of Talmy’s ideas are quite effectively discussed and summarized in chapter 3 of Eve Sweetser’s 1990 book *From Etymology to Pragmatics: Metaphorical and Cultural Aspects of Semantic Structure*. Here are some passages in her discussion which are quite relevant for my purposes:

May and *must* are perhaps the most clearly force-dynamic of the modals. Talmy’s understanding of *may* in terms of a potential but absent barrier seems to me very reasonable, and can be viewed as a restatement of the standard analysis (e.g. “not require

not”) in terms of the more general concepts of forces and barriers. *Must* is equally readily understood as a compelling force directing the subject towards an act. [...] The closest physical analogy to *can* would be *potential* force or energy [...] and perhaps the best force-dynamic characterization I can give for ability is to say that it is the human and social modality in terms of which we view potential energy in physics. (Sweetser 1990, 52–53)

Here we are looking at meta-institutional mimesis as distinguished from institutional mimesis, and it seems that there is a sort of logical priority of the former over the latter. In this light, some the specific examples of mimesis previously discussed—the power of kings as mimetic of their actual abilities, the obligations connected with marriage as mimetic of brutal kidnap—must be viewed as specific formulations of a general metaphoric dependence of the modals *can* and *must* on factual barriers, that is, we have to do with removed or imposed constraints on actions and motions.¹⁴

The relevant question now becomes whether, in providing an account of these phenomena in terms of conceptual metaphors, it is possible to connect institutional and meta-institutional mimesis in a convincing way, so as to provide a unified cognitive model grounding the theory of legal institutions as mimetic artifacts. My conjecture is that this can be done in terms of another concept widely used in contemporary cognitive psychology, that of “conceptual blending” or “conceptual integration.” In their *The Way We Think: Conceptual Blending and the Mind’s Hidden Complexities*, of 2002, Gilles Fauconnier and Mark Turner elaborate on the idea of conceptual metaphors by showing more in general how conceptual structures can result from a “blend” between different conceptual domains. In conceptual blending, two or more input “mental spaces” that contain elements and are structured in frames can, in virtue of a structural similarity between these frames, be connected by way of a more or less arbitrary correspondence relation.

¹⁴ A metaphoric reading in terms of constraints on actions and motions has also been proposed for the meta-institutional concept of a rule: see Winter 2001, 206–207. Consider as well Hans Kelsen’s thesis that the regulative connection between illicit behaviour and a sanction in a legal norm must be interpreted in parallel with the law of causality (see, for example, Kelsen 1992, 23–24). But, as Kelsen argues at length in *Society and Nature* (Kelsen 1943), in his view the concept of physical causation historically derives from that of normative imputation, and not the other way around; so this connection cannot be an example of grounding in Lakoff and Johnson’s sense. Indeed, the relation between the concept of a legal rule and that of a scientific law is a crucial historical problem, particularly in connection with the Scientific Revolution and the birth of modernity: see in this regard Daston and Stolleis 2008 and in particular Wilson 2008. Conte (2009, 127–129) interestingly notes that a single term is used to denote both legal and scientific laws in Italian (*legge*), German (*Gesetz*), English (*law*), Polish (*prawo*), and Modern Greek (*nómos*), but not in Chinese. It is also relevant in this regard that there is an etymological affinity between the Latin term *norma* and the Greek verb *gignōskō* (to know) (see Conte 2009, 132–133). Finally, another metaphoric reading of meta-institutional concepts can be found in Fittipaldi 2012, 71–72, where the idea of the bindingness or validity of a statute is discussed in terms of physical location.

This relation gives place to an integration network in which elements are connected by way of their common features and in which these features are projected onto a new, integrated conceptual construct (see Fauconnier and Turner 2002, chap. 3). The crucial feature of the conceptual blend so obtained is that it has an “emergent structure,” that is, it presents new features that were not present as such in the original input mental spaces:

Emergent structure [...] is generated in three ways: through *composition* of projections from the inputs, through *completion* based on independently recruited frames and scenarios, and through *elaboration* [...]. *Composition*. Blendings can compose elements from the input spaces to provide relations that do not exist in the separate inputs. [...] *Completion*. [...] Pattern completion is the most basic kind of recruitment: We see some parts of a familiar frame of meaning, and much more of the frame is recruited silently but effectively to the blend. [...] *Elaboration*. We elaborate blends by treating them as simulations and running them imaginatively according to the principles that have been established for the blend. (Fauconnier and Turner 2002, chap. 3)

Conceptual blends can be the outcome of different kinds of integration networks. I will focus here on those Fauconnier and Turner term “double-scope networks,” that is, networks in which the input mental spaces from which the conceptual blend is derived are different in nature, in such a way that the projection and merging of some of their features creates a sort of conceptual “hybrid” which is the outcome of metaphoric connection:

A double scope network has inputs with different (and often clashing) organizing frames as well as an organizing frame for the blend that includes parts of each of those frames and has emergent structure of its own. In such networks, both organizing frames make central contributions to the blend, and their sharp differences offer the possibility of rich clashes. Far from blocking the construction of the network, such clashes offer challenges to the imagination; indeed, the resulting blend can be highly creative. (Fauconnier and Turner 2002, chap. 7)

Institutional mimesis can be explained in terms of double-scope integration networks between, on the one hand, a mental space consisting of some description concerning natural regularities and, on the other, a mental space including the meta-institutional concepts relevant to law, among which the concepts of a power, a right, a duty, and a rule. Here, the selective projection which is typical of conceptual blending metaphorically connects factual features with normative concepts, and the emergent structure of the blend organizes the normative import of the meta-institutional concepts under conditions similar to those present in the original, factual mental space. In this way, the single mimetic institution is produced essentially by projecting features of the factual world onto a normative framework, and the clash between facts and norms becomes one of those clashes typical of a double-scope integration network: a clash which is far from being destructive, and which instead gives rise to “highly creative,” metaphorical conceptual structures. Let me give a few examples of this general process by recalling some of our examples of institutional mimesis. Consider, again, the case of a king’s powers as mimetic of actual abilities. This is how that example can be reconstructed according to my hypothesis about conceptual integration:

(Mental space 1: Natural facts) Man – Ability – To influence the coming into existence and development of natural phenomena.

(Mental space 2: Meta-institutional concepts) Legal Powers – Legal Norms

(Cross-space mapping relation) Actual abilities are mapped onto legal powers; natural phenomena are mapped onto legal rules.

(Conceptual Blend: Mimetic legal artifact “King”) Kings are selected under certain actual abilities and have the legal power to bind individuals and determine the coming into existence of binding norms.

Consider now the example of legal corporations as *corpora ex distantibus* according to Olivecrona:

(Mental space 1: Natural facts) *Corpora ex distantibus* – Ability – Exist and act.

(Mental space 2: Meta-institutional concepts) Legal Powers – Legal Rights,

(Cross-space mapping relation) Actual ability to exist and act is mapped onto legal powers and rights.

(Conceptual Blend: Mimetic legal artifact “legal corporation”) Corporations are abstract objects consisting of separate material elements, and yet they have legal powers and rights.

This is how it is possible to reconstruct Frazer’s example of marriage:

(Mental space 1: Natural facts) Men – Ability – To kidnap and force women to a certain behaviour,

(Mental space 2: Meta-institutional concepts) Legal Powers – Legal Rights,

(Cross-space mapping relation) Actual ability to force and kidnap women is mapped onto legal powers and rights,

(Conceptual Blend: Mimetic legal artifact “marriage”) If a man can reach a woman in a race and force her to go with him, then he acquires legal powers and rights over her.

Finally, this is how I would reconstruct Hägerström’s example of *promissio*:

(Mental space 1: Natural facts) Contact between objects – Communion of forces.

(Mental space 2: Meta-institutional concepts) Legal Duties – Legal Rights.

(Cross-space mapping relation) Communion of forces is mapped onto legal duties and rights.

(Conceptual Blend: Mimetic legal artifact “*promissio*”) A person can perform a *promissio* with another person only if he or she offers his or her right hand and the other person accepts it, thus establishing a contact with him or her. A *promissio* entails a shared set of mutual legal duties and rights.

I leave it to the reader to reconstruct the other examples.¹⁵

6. *Final Remarks*

I would summarize the conclusion of this paper as follows: Legal institutions are artifacts, but they can seem to a certain extent “natural” when they are the outcome of metaphoric conceptual blending between some description of natural reality and a set of meta-institutional concepts which are in their own turn metaphoric of facts. Indeed, several legal artifacts of crucial importance to Western legal thought have been or are still mimetic in this sense. Thus, a theory of legal institutions as artifacts connected to a theory of institutional mimesis can shed some light on the problem of the relation between what is natural and what is artificial in law, a problem which is among the most traditional and longstanding in legal philosophy.

Indeed, one of the curious effects of institutional mimesis is that it forces us to consider law in a new light precisely because we have become accustomed to thinking of law as something separate from our conception of nature. Even contemporary natural law theory does not ground natural law in any description of nature, at least not in the cosmological, ecological, or ethological senses of *nature* previously considered. As mentioned, we tend to view law as a conventional way to deal with social problems or as a social custom that has a strictly regulative purpose, not as something that can mirror the way in which we think about the nonsocial, or presocial, world. But if it is true that many longstanding legal institutions have a mimetic origin and that mimetic assumptions can be found even at the heart of contemporary legal doctrine, we cannot still consider the relation between the structure of legal institutions and that of natural regularities as irrelevant. It rather becomes a fundamental question whether the common conceptualization of a given legal artifact, and hence its ontology, is based on mimetic grounds. That question is fundamental because this kind of institutional mimesis can form hidden, tacit assumptions in the way an artifact is interpreted and reproduced: It can lie at the very core of legal reality.

This does not mean that what I am advocating here is a revival of a natural law theory. Certainly, my conclusion should be of interest to natural law theorists, even though the assumption that all legal institutions are artifacts seems to lie at the other end of the legal-philosophical spectrum, opposite to natural law theory. It is important to stress, however, that I am not drawing any prescriptive conclusion from phenomena of institutional mimesis. In other words, I am not maintaining that on the premise that several crucial legal institutions can be conceptualized by reference to some description of natural regularities, then we can conclude that

¹⁵ Fauconnier and Turner have offered at least two other examples of institutional phenomena analyzed in terms of conceptual blending, namely, money and same-sex marriage: see Fauconnier and Turner 2002, chaps 7, 10.

these institutions are in some sense morally justified. An inference of that sort would require a further, axiological assumption about the inherent “goodness” of nature. Rather, I am taking the descriptive assumption at the core of some versions of natural law theory (think of the cosmic order conceived as *logos* in ancient Stoicism); I am casting it in a weaker form (I speak not of “nature in itself” but of our a culturally shaped description of natural regularities); and I am reframing this assumption within a theory of law as an artifact. Thus, in a sense, institutional mimesis could be said to lie at the core of a descriptive natural law theory, but only in a very weak sense.

Conversely, one could argue that my insistence on conceptualization as a fundamental ground for the construction of mimetic legal artifacts leads me to essentially embrace a sort of psychologistic legal realism. Indeed, I would not be alone on this path. As we have seen, several metaphoric phenomena at the core of fundamental legal concepts have been pointed out by legal realists like Axel Hägerström and Karl Olivecrona, and the same has been done more recently by Edoardo Fittipaldi in his 2012 *Everyday Legal Ontology*, a book which takes Leon Petrazycki’s psychologistic theory of law as its fundamental framework.¹⁶ Fittipaldi reconstructs several assumptions behind what he calls “naïve legal ontology” in terms of the following “general conjecture”: “a belief in the existence of a certain legal reality emerges when a certain legal experience resembles in a salient way the clusters of experiences that make us believe in the existence of naïve realities” (Fittipaldi 2012, 28). This relation of “resemblance” is analogous to what I have called institutional mimesis, and indeed Fittipaldi describes it in great detail. When, for example, Fittipaldi explains how the bilaterality of debts can create the illusion that these have a sort of location (Fittipaldi 2012, 216) or when he says that “in naïve legal ontology the transformation of an obligatory *facere* into another obligatory *facere* is experienced much as the transformation of some milk into a piece of cheese, or of some wood into a chair” (Fittipaldi 2012, 232), it is quite clear that he has in mind metaphoric phenomena very similar to those discussed in this paper. But the conclusion he draws in a distinctively Petrazyckian way—that this psychological rooting shows that these entities are merely illusory, nothing other than a sort of mental projection—seems to me inconsistent with the theory of legal institutions as artifacts presented here. According to this theory, institutions are not illusory because rooted in concepts. Rather, they are real as other artifacts are, but they are immaterial, just like other artifacts consisting of semantic contents. They have been created and have been historically developed, and they play a fundamental role in our life. They have a history—a deliberative history consisting of intentional states and other mental and behavioural phenomena—and the same is true of works of art, works of literature, games, the Internet, differential equations, etc. As Fauconnier and Turner eloquently write:

¹⁶ Another important work in which the topic of conceptual metaphors is treated in connection with law’s normativity under a (broadly conceived) legal-realistic framework is Brozek 2013.

Double-scope conceptual integration is crucial to the activities that make us what we are. Around 50,000 years ago, this level of blending was achieved, presumably through neurological evolution, although that final evolutionary step need not have been a great biological leap. The biological evolution of conceptual blending took evolutionary time, but once double-scope blending was achieved, culture as we know it emerged. Cultures could create specific double-scope integration networks that then quickly showed up in languages, number systems, rituals and sacraments, art forms, representation systems, technologies (from advanced stone scrapers to computer interfaces), table manners, games, money, and sexual fantasies. (Fauconnier and Turner 2002, chap. 18)

Thus, if I had to locate the theory of mimetic artifacts presented here within a legal-realistic framework, I would say that it could find a place only within a non-demystifying, historically oriented kind of legal realism. It is in the first place a historical, and not psychological, ontology of law (on historical ontology, see Hacking 2002).

Finally, one could say that this theory of legal institutions as artifacts is inevitably connected to the idea that law is an essentially *created* phenomenon tracing back to an authority, thus implying a sort of legal-positivistic stance. Such a conclusion would be mistaken, at least on the theory of artifacts here proposed. As I stressed in Section 2, the ART formula I used does not imply that every artifact has an author who explicitly had its concept in mind and created it accordingly. For this reason I have used the expression “intention-rooted creative process,” rather than “creative intention,” and I have distinguished between recurrence and intended artifacts. Artifactual entities can be the outcome of intentional behaviour, and even of creative intentions, without necessarily being the content of those intentions. The ontology of legal institution presented here is therefore not necessarily connected with an authoritative fiat, an original creative act of some kind. As pointed out, even legal custom can generate legal artifacts if these artifacts are explicitly conceptualized as such after a period of tacit rule-following (what I have called “artifactual apperception”). Thus, this theory is consistent with a “social source thesis,” but it does not necessarily entail the idea of power, might, or authority as the unavoidable source of law.

Natural law theory without prescriptive conclusions, legal realism without demystification, legal positivism without authority or artificiality: One might say that I am irreverently playing with well-established and influential legal-philosophical conceptions. Be that as it may, the idea that legal institutions can be metaphoric, mimetic artifacts as described above shows that something important can slip past those conceptions. In this regard, I certainly subscribe to Steven Winter’s conception when he writes:

Law [...] is a complex cognitive and social artifact. The traditional jurisprudential accounts such as natural law theory (including its contemporary successors) and legal positivism (including its contemporary variants) [and, let me add, legal realism] simply do not do justice to the deeper psychological resonance of our core conceptions of law. We might say that each is a pale, deracinated reflection of a richer, more vibrant cognitive reality. (Winter 2001, 341)

And this complex, cognitive rooting of legal artifacts shows not only that the

traditional legal-philosophical conceptions, but also our ideas of the relationship between nature and law, facts and norms, can be enlightened by a full-fledged theory of institutional mimesis. Consider this simple example of normative deduction concerning a contract:

- (1) If two parties have a definite intention (X) and make an agreement, write it down, and sign the document, then they have formed a contract (Y) and thus are bound by a set of mutual rights and obligations.
- (2) John intends to sell his house, and Luke intends to buy it.
- (3) John and Luke write a contract of sale, and they sign it.
- (4) John is entitled to receive payment. Luke must pay. After the payment is made, Luke is entitled to come into possession of John's house: John must act so as to ensure Luke's right.

As I have argued, the contract is a legal artifact defined by constitutive rules, compliance with which is the artifact's mechanism. Concluding (4) from (2) and (3) does not raise problems for the is/ought question, because (1) is the further, already normative assumption that ensures that the conclusion is valid. Thus, in this normal case, every deduction of a normative conclusion from factual assumptions is ensured by a normative assumption connecting the latter with the former. Suppose now that John and Luke's contract is an instance of *promissio* as discussed by Hägerström. The deduction could then be reframed as follows:

- (1) If two parties have a definite intention (X) and make an agreement, and one party offers his or her right hand and the other accepts it, then they have formed a *promissio* (Y) and thus are bound by a set of mutual rights and obligations.
- (2) John says he will do a certain thing for Luke, and he offers his right hand.
- (3) Luke accepts John's right hand.
- (4) John must do what he has promised. Luke is entitled to receive from John what he has promised.

Here, too, there is no problem for the is/ought question, because (4) is derived from (2) and (3) under constitutive rule (1). But what if a further premise occurred which on a factual, non-normative level contrasted the transmission of forces in that particular case even if Luke and John shook hands? Suppose for example that under the moonlight the transmission of fluids upon contact were contrasted by force of gravity, and that Luke and John performed that *promissio* in the moonlight. Now the deduction would become as follows:

- (1) If two parties have a definite intention (X) and make an agreement, and one party offers his or her right hand and the other accepts it, then they have formed a *promissio* (Y) and are thus bound by a set of mutual rights and obligations.
- (2) John says he will do a certain thing for Luke, and he offers his right hand.
- (3) Luke accepts John's right hand.

(4) John must do what he has promised. Luke is entitled to receive from John what he has promised.

(5) But they are under the moonlight.

(6) Under the moonlight, the transmission of fluids upon contact is contrasted by force of gravity.

What happens here? What conclusion would Luke and John draw? On the one hand, if we just go by the constitutive rules of a *promissio*, that institution has strictly speaking been correctly performed. But, on the other hand, if we look at the mimetic grounds of that institution, something significant has happened that can hinder the derivation of normative conclusion (4) without being part of the institution's constitutive rule (1). In this case, a normative conclusion—that John is not obligated to do anything, and Luke is not entitled to receive anything from John—would be derivable from the factual statements (5) and (6) without any constitutive rule ensuring this derivation under normative assumptions, because as we have seen, institutional mimesis is very often an underlying, tacit presupposition. The problem, here, is how much Luke and John are aware of the mimetic character of their concept of *promissio* and how much they can detach themselves from the institution's supposed “naturalness” by simply considering a *promissio* a normative artifact. This problem was certainly not unknown to Roman jurists. In fact, they developed Roman law exactly in that direction. The question is whether we are still aware of it.

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