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Not All Law Is an Artifact: Jurisprudence Meets the Common Law

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Law as an Artifact

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Not All Law Is an Artifact

Jurisprudence Meets the Common Law

*Dan Priel**

1. Introduction

Brian Leiter has recently suggested that anyone who denied law's artifactuality, "the extravagance of their metaphysical commitments would ... be a subject for psychological, not philosophical investigation."[1] There is a sense in which he is unquestionably right. If by artifact we mean the product of human effort, the claim is obviously true, indeed so obviously true that I do not know anyone who denies it. After some light interrogation it turns out that even some of the usual suspects have to be released without charges. It is accepted by John Finnis, who described law as "a cultural object, constructed, or ... posited by creative human choices, [which] is an instrument, a technique adopted for a moral purpose, and adopted because there is no other available way of agreeing over significant spans of time about precisely how to pursue the moral project well."[2] Lon Fuller is not guilty either: he spoke of the lawyer as an "architect of social structures" and gave a central role in his writings, far more than his critics have, to the importance of institutional

* I thank Luka Burazin and two anonymous referees for their detailed comments on earlier drafts. Space limitations have forced me to cut more than a third of the original manuscript. The excised part provided a far more detailed demonstration of the way attempts to explain the common law within the law-as-artifact ideological framework lead to artificial and unconvincing accounts of the common law. The longer version is available upon request.

[1] Brian Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Skepticism" in Jordi Ferrer Beltrán et al. (eds.), *Neutrality and Theory of Law* (Springer 2013) 161, 164.

[2] John Finnis, "Natural Law and Legal Reasoning" in Robert P. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992) 134, 141.

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design to the traditional questions of jurisprudence.[3] Even everyone's favorite punching bag, Ronald Dworkin, can plead innocence.[4] Unless one is willing to argue that Finnis, Fuller, and Dworkin were all deeply confused about their own views, their examples show that the artifactuality of law, if understood as the claim that law is the product of human efforts, is an uncontentious claim.

I think there is a different way of understanding law's artifactuality. It is (roughly) that law is the product of purposive action, that it is the product of design. Understood in this way, the claim that law (in general) is an artifact is, I think, by no means trivial. In fact, I will argue that with respect to one familiar form of law it is false. Before proceeding to defend my claim, let me assure the tough-minded reader that my claim that not all law is an artifact in no way depends on any commitment to the idea that some law exists as a brooding omnipresence in the sky waiting patiently through the eons for humans to first evolve and then, several millennia later, to discover it. I can be spared psychological examination because the view I present is meant to convince even the most hardened of jurisprudential naturalists. I consider the uber-naturalist Jeremy Bentham an ally in the argument I present below.

To say that not all law is an artifact may be controversial enough; to make things worse I will further argue that the claim that all law is an artifact is not a neutral, hard-headed description of what law really is, arrived at after we rid ourselves of metaphysical excesses, aspirations, idealizations, and confusions. Rather, the claim that law is an artifact is an ideological claim. It is an ideology that many contemporary legal theorists, of very different stripes, consider so obvious that they elevate it to the level of a conceptual truth about what they call "the nature of law." I will not challenge this ideology for no other reason that I am sympathetic to it. Nevertheless, I recognize it for what it is: not a universal truth about law wherever and whenever we find it, but a normative stance.

As should be obvious from this chapter's title, my example of non-artifactual law is the common law. To demonstrate this conclusion I begin by explaining what I mean by artifact. I argue that artifacts are functional

[3] See Lon L. Fuller, "The Lawyer as an Architect of Social Structures" in *The Principles of Social Order* (rev. edn., Hart Publishing 2001) 285; Lon L. Fuller, *The Morality of Law* (rev. edn., Yale University Press 1969) 178 (talking about the "architectural design of legal institutions").

[4] Dworkin's analogy between law and the chain novel, where each participant has a creative role, is one indication. Contrary to popular belief, Dworkin did not think that law pre-exists humans who discover it. He ridiculed the idea in no uncertain terms. See Ronald Dworkin, *Taking Rights Seriously* (rev. edn., Harvard University Press 1978) 216, 337. As he also said, the sense of interpretation central to his conception of law is "creative." See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 50.

designed objects. On the basis of this definition I argue in Section 3 that the common law, or at least some of its central manifestations, is not an artifact. In Section 4 I turn to explaining the broader jurisprudential significance of this point. I argue that the dominant view today that all law is an artifact is not a conceptual truth, but an ideological claim. It reflects a particular view of law as a tool for improving society. This view ignores a competing ideology (on which much common law thinking is based) which rejects this conception of law. I briefly conclude by suggesting that recognizing the ideological nature of this view, together with the particular view of law as a tool should help reorient jurisprudence in a new direction—away from description and understanding, and toward construction and engineering.

2. Design, Function, and Artifactuality

In this section I present the analytical framework that will serve me for the jurisprudential argument that follows. This is not an exercise in conceptual analysis in the sense of trying to capture what artifactuality really is. It is meant to help clarify and define the terms I will use in the remainder of the chapter. Though I cannot prove it, I think it reflects prevailing linguistic usage, but as I explain below, my argument is not affected in a significant way even if it does not.

2.1 Physical Artifacts

Artifacts, as I understand them, are *functional* objects, which are *purposely designed*. This definition has three elements. *Designed* objects are non-randomly organized. Part of the explanation of a designed object calls for identifying a *design mechanism* that explains how the object's design came about. The most obvious design mechanism is a conscious, intentional being—a designer—that is responsible for the non-random organization. For a long time it was thought that a designer is the only design mechanism (hence, for example, the argument from design to the existence of God), but we now know of design mechanisms that dispense with a designer: Adam Smith's invisible hand and natural selection are probably the best-known ones, but there are others as well. To use a well-known example, a path can come into existence without any purposeful design.[5] In this example, a non-randomly organized object

[5] T.E. Holland, *The Elements of Jurisprudence* (12th edn., Oxford University Press 1917) 57, which also draws the analogy between the formation of a path and the emergence of custom.

(path) can emerge without a designer because of the advantage, however slight, conferred on any individual in following on the footsteps of others. Notice that in this case even though the design depends on the intentional actions of individuals, none of them may have any intention to create a path. Other design mechanisms (for example, natural selection) are less intuitive, because they show how order can emerge in the absence of any intentional action.

Within the domain of designed objects, then, we can distinguish between those that are purposely and those that are non-purposely designed. Within the category of purposely designed objects we can further distinguish between functional and non-functional objects. On my definition, works of art are artifacts only if they are functional. That may be controversial, but it seems to me a plausible distinction, allowing us to distinguish between so-called "decorative arts" and crafts, which are artifacts, and other artistic creations (for instance, symphonies) which are not. However, this distinction ultimately depends on a question I will not address, whether some or even all art has a function (improving morals, increasing happiness, or whatever). Depending on one's answer to this question, some (or even all) works of art may count as artifacts.

Function is normative in the sense that it is (or provides) an evaluable standard of success. Given a function, some artifacts will perform it better than others. In some cases, an object will be so poor at performing the function it was intended to perform, that we will not consider it a specimen of an artifact type. One may genuinely intend to build an airplane, but the object he produces is so spectacularly incapable of flying that it will not be an airplane. This standard of success may seem straightforward, but there is a twist. In my classification crafts and other decorative objects are artifacts, but they are a special kind of artifact, because their function is aesthetic, and as such it is determined by contingent cultural standards. The success of a decorative item is assessed against certain aesthetic standards of a particular community, or of objects of that type. To be sure, even in the case of other artifacts, there is a particular cultural context in which the function of the artifact makes sense (a screwdriver can perform its function only in an environment where screws exist), but one can give a description of the way the design serves the function without invoking the cultural context. By contrast, with cultural artifacts their description of the way they perform their function must include this context. Neckties, for example, perform a decorative function but also signal seriousness or respectability on the part of their wearer. That they perform this function is a purely conventional signal understood within a particular culture. The very idea that wearing a necktie has this meaning, as well as the particular designs that convey that meaning, cannot be understood without invoking neckties' cultural context. When this is the case, we can call the function in question "cultural function" to distinguish such a function from the function performed by other artifacts, which I will call "teleological function."

Obviously, there are many artifacts with both cultural and teleological functions, and the balancing of the two elements is a familiar design problem (think of watches), one that may be exacerbated by the fact that there may be disagreement over whether a given function is teleological or cultural. The important point for the discussion that follows is that the two kinds of function are normatively different. They employ different notions of success and employ different methods for achieving their respective modes of success.

Table 12.1 gives a rough guide of what I take to be the scope of artifactuality.

In my definition artifacts are objects that are functional and purposely designed. I don't treat this definition as an attempt to capture "the" concept of an artifact, because I do not think such a thing exists. The definition aims to capture a useful category. I do not consider debates over the scope of artifactuality—whether it includes all works of art, whether it includes humans (or "designer dogs," humans who underwent plastic surgery, genetically modified foods, reproductions of original paintings, or rocks that are being used as door stops)—to be particularly important, for there is no nature of artifactuality to identify and demarcate. Some may think that some of these objects are artifacts and others will not. There is no way of showing one person is correct on such matters while someone else is wrong (unless by "correct" we mean more prevalent among people). What exists is human language, used to communicate thought and guide action. Humans apparently succeed in doing that with imperfectly regimented, and somewhat differently regimented concepts. The view that behind this linguistic diversity there is a single category is not warranted; and even if such categories exist, it is not explained how the methods of philosophers (wholly conducted within the language they are supposed to transcend) are useful, or even relevant, to discover such categories.

Table 12.1 Identifying artifacts

	Design	Conscious design	Function	Artifact
Rock	No	No	No	No
Tiger	Yes	No	No	No
Heart	Yes	No	Teleological	No
Kandinsky's *Composition VII*	Yes	Yes	Controversial	Depends on functionality
Necktie	Yes	Yes	Cultural	Yes
Tea kettle	Yes	Yes	Teleological	Yes

Reflection or debate on category-boundaries may lead some people to change their mind, but this is not because one categorization is correct while others are not; it is because one becomes convinced that a particular categorization is more useful.[6] *The study of categories and classifications should not be understood as an attempt to find "real" categories; it is valuable for what it reveals about those who categorize the world in this way.* This is the central assumption that underlies the argument in the remainder of this chapter.

With all this in mind, I can state that I believe my definition roughly corresponds to prevailing usage, but it is unlikely that there will be perfect agreement on such matters. I already mentioned that on my definition not all art is necessarily an artifact, a claim that others are likely to contest. For another example of possible disagreement, consider Daniel Dennett's provocative suggestion that organisms and organs are artifacts.[7] He did this in order to emphasize the fact that the *mechanism* of design does not matter for the end-product being designed. Dennett did not commit a "conceptual" or "category" error when he said that humans are artifacts. Nevertheless, Dennett's usage is probably unusual, as the typical contrast is between artifacts and natural objects, and in this contrast humans (together with the rest of the biological world) belong firmly in the "natural." Nevertheless, it is perfectly legitimate for him to define artifactuality the way he did to stress the sense in which humans are designed objects, even if they had no designer.

2.2 Intellectual Artifacts

It is not obvious that in everyday usage "artifact" includes purely intellectual objects, but we can extend the scope of the term to such objects if we understand intellectual artifacts as the creation or organization of objects with meaningful semantic content. Intellectual artifacts can thus refer to the creation or organization of propositions (information) or of prescriptions (algorithms). The value of limiting artifactuality to products of conscious design is even more evident in the domain of intellectual objects than in the domain of physical objects. If we use the word "artifact" to refer to all human creations, then every thought, every idea, every sentence, perhaps even grunts and hums,

[6] All this is, of course, controversial, and within legal philosophy, a minority view. For a defense of these views see Dan Priel, "The Misguided Search for the Nature of Law," available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642461> accessed June 15, 2017.

[7] See Daniel C. Dennett, "The Interpretation of Texts, People, and Other Artifacts" (1990) 50 *Philosophy and Phenomenological Research* (Supplement) 177, 187. Contrast this with Risto Hilpinen, "Authors and Artifacts" (1993) 93 *Proceedings of the Aristotelian Society* 155, 156–7, adopting the opposite view.

would count as artifacts. More significantly for the argument below, such a definition of artifactuality will also include many social norms. Even if they are not the product of any conscious design, they are still human creations.

Limiting artifactuality to functional *conscious* design helps identify a narrower and more useful category of intellectual artifactuality, one according to which thoughts and spoken sentences are not artifacts, but academic papers and legislation are.[8] Legislation is the product of conscious design and it is typically functional in the same way that physical artifacts are, to achieve a particular goal: "Why do we allow people to deduct their charitable donations?" "Because we want to encourage such donations." Unlike legislation, social norms (customs) are also a kind of order (design), but it is not typically conscious. Such norms typically emerge without any conscious decision by any single person to adopt them. The norm that putting one's belongings on a table in a cafeteria designates that table as "taken" even before one sits down need not be pronounced by anyone, indeed need not even be consciously noticed by those who adhere to it. For all we know there was never a moment in which such a norm was "authored."

As mentioned, the element of function in artifactuality is normative: it both explains actions and can be used to justify or criticize them. "Why does the airplane's wing look the way it does?" "Because this shape reduces drag." "But if that is the aim, a somewhat different design would have served that goal better." The same is true of intellectual artifacts: "Why was the advertisement written in this way?" "Because our studies have shown that it is an effective way of getting people to buy the new product." "It would have been even more effective if it had been written differently."

The distinction between teleological and cultural function encountered in the discussion of physical artifacts is significant in relation to intellectual objects as well. Teleological justification is a familiar form of explaining legislation: "Why does the Affordable Care Act contain an individual mandate?" "Because without one healthy people will not sign up in sufficient numbers and that would lead to adverse selection." "In that case, the law should have included a public option, as that would have pushed down premiums even

[8] In the text I treat academic papers and legislation as purely intellectual artifacts. In reality, they have physical existence in addition to their meaningful content. This may seem a contingent fact, for their content could be memorized. While strictly speaking this is true, given the limitations of human cognition, I believe the physical instantiation of intellectual artifacts is important for understanding their "nature." Some of what I say below about the difference between common law and legislation relates to this issue, but it deserves a much more focused discussion than is possible here. If I am right, then attempts to provide a timeless account of the nature of law are flawed to the extent that they ignore the extent to which technological change has changed the physical boundaries of law.

further." Customary norms, however, are often justified differently. As many have noted, when talking about custom, we do not just talk about a convergence of behavior; we talk about a *justified* convergence of behavior, with the justification primarily being that others behave in the same way. More people go to the beach on warm, sunny days than on cold, rainy ones. That convergence, however, does not in itself establish a custom. Each person may individually think it more enjoyable to be out on a warm day, regardless of others' behavior. By contrast, what counts as appropriate attire on the beach is (partly) determined by the changing of customs known as "fashion." Here, the justification for the design of items to make them fashionable, as well as acting according to the prevailing custom, are explicable from within a particular culture and not for the sake of promoting a goal.

Obviously, here too there are often cases of mixed functions. There are often good teleological reasons for the existence of a custom over no custom; and there are many illuminating studies dedicated to showing how a seemingly pointless custom in fact does promote a goal. For example, there may be good reasons for preferring the norm according to which the order of boarding a bus will be based on the order of arrival at the bus station (rather than, say, on the basis of passenger height, age, or by drawing lots). What is interesting about such explanations is that they are often made with scant reference to the attitudes of those who engage in the custom. They assume a non-conscious design mechanism that has led people to adopt a certain norm with little awareness of whatever goal the norm serves. This is an important facet of such norms. It is the existence, and strength, of cultural function that explains why customs may persist even when they cannot be shown to serve a teleological function (anymore), or even in the face of evidently bad consequences. Indeed, in some cases, the lack of a point becomes one of a custom's defining characteristics. Defenders of a custom will then criticize those who argue for abandoning it for lack of a point, for missing the custom's (lack of) point.

Gathering these points, Table 12.2 provides a rough summary of the way my definition of artifactuality relates to two types of intellectual objects:

Table 12.2 Identifying intellectual artifacts

	Design	Conscious design	Functional	Artifact
Legislation	Yes	Yes	Teleological	Yes
Social norms	Yes	No	Cultural	No

This is the basic analytic framework for my argument below regarding the common law. Before proceeding, three important clarifications are due. First, I presented paradigmatic cases of legislation and customary norms in order to draw a sharp contrast between intellectual artifacts with non-artifacts. Reality is often more complex. Dress norms are often customary, but some people ("fashion gurus") may acquire a quasi-authoritative role that may shape norms in a conscious way. Similarly, rules of etiquette may emerge as purely customary, non-consciously designed norms, but at some point certain individuals may attain such authoritative status on etiquette that their say-so may be able to change behavior. Therefore, it is fair to say that the status of a norm as customary is not binary, but a matter of degree. Second, my argument below will be that the common law is custom, but it is worth stressing in advance that it is a special kind of custom. This will require some further refinement of some of the points made so far. Third, the jurisprudential argument that follows does not depend on linguistic (or "conceptual") niceties. As mentioned, I think the definition I adopted corresponds to prevailing linguistic usage, but nothing changes from the argument below if it turns out my usage is unusual, or even deemed wrong. Instead of an argument about whether the common law is an artifact, my argument can be recast in terms of two different kinds of artifact. The rest of the argument can then proceed in roughly the same way. Instead of my critique of legal theorists who all think of law as an artifact when some of it is not, the argument can be restated as a critique of the view that law is made up of one kind of artifact when in fact it consists of (at least) two. What matters is that these two categories, however labeled, correspond to two different (political) ideologies.[9]

3. The Common Law Is Not an Artifact

On the basis of the definition of artifactuality in the previous section, in this section I consider whether the common law is an artifact. My argument will be that on a prominent understanding of the common law it is not. I will argue that the common law's design level is low, whatever design it has is not conscious, and a teleological function does not often play a

[9] Jonathan Crowe, "Law as an Artifact Kind" (2015) 40 *Monash University Law Review* 737 recognizes that customary law poses a difficulty to most accounts of the artifactuality of law. He addresses it by offering a disjunctive definition of artifact (ibid. 747), in which artifacts are either the products of human design or natural objects "adopted" by humans. Customary law for him belongs to the latter category, and so by his definition it is an artifact roughly as a rock "becomes" an artifact when someone decides to use it as a door stop. With respect to the common law, all Crowe says is that it is an artifact, because "judicial decisions have authors" (ibid. 739). Even if accepting Crowe's classification of artifacts, my argument seeks to show that (a) the common law is closer to customary law, and (b) that the distinction between his two kinds of artifact is normatively significant.

significant role in its design and development. All these points call for a detailed explanation.

3.1 The Common Law Is Custom

To begin the discussion, consider the following argument outline:

(1) The common law is law.
(2) The common law is custom.
(3) Custom is not an artifact.
Hence, (4) Not all law is an artifact.

I will take (1) for granted,[10] and in the previous section I argued for (3). Custom is undoubtedly the product of human intentional actions (even if some of them may have their origins in innate psychological traits), even though it is not an artifact in the narrower sense I specified above. That leaves defending (2) to complete the argument. It is tempting to add that the truth of (2) is similarly uncontroversial for there is a long history of analyzing the common law as custom.[11] This seems to lead straightforwardly to the conclusion that not all law is an artifact.

An argument along these lines should be appealing to anyone who accepts that the path formed by the unplanned, uncoordinated actions of many individuals is not an artifact, even though it is unquestionably human made. While something like this is the conclusion I ultimately reach, I think the argument outlined above requires further defense, for what is meant by saying that the common law is custom is unclear. In particular, the argument will have to address the following objections: First, one might argue that despite the long provenance of claims about the customary nature of the common law, it is not in fact a custom. It is far too elaborate, or far too organized, to be similar in any important sense to customary norms like table etiquette. Second, even if the common law is in some sense customary, it might be argued that the word "custom" in (2) and (3) has a different meaning. If this is the case, the argument outlined above is invalid, for it rests on the fallacy of equivocation.

Discussions on the common law as custom often confuse two related but distinct issues: the adoption of customs into the common law, and common-law practice *itself* as custom. The two issues are not always easy to disentangle, but they must be kept apart for I am interested here in the second. The first

[10] Bentham on occasion denied (1). He was not wrong to do so, because he was not making a conceptual claim, or was not trying to capture prevailing attitudes. See the discussion in the concluding paragraphs of Section 4.3.

[11] See Gerald J. Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1986) 3–14, 63–80; C.K. Allen, *Law in the Making* (7th edn., Clarendon Press 1964) chs. 1–2, especially at 71–9.

question is of particular interest to legal historians writing on medieval and early modern English common law and debating the extent to which it relied on local custom. My argument focuses on the different question of the way common law norms are designed and justified. It takes as its object common-law practice itself, as it exists up to this day, even when the adoption of customary norms by common-law judges has become a relatively rare occurrence.

With respect to the latter question, to say that the common law is not an artifact is to say that it fails to exhibit at least one of the three features of artifactuality. The common law satisfies, to a limited degree, the requirement of design. The common law is a non-random organization of intellectual content, but because of its relative complexity compared with social norms, its design level is quite low. There are several mechanisms that help make it more organized, but even with those in place, there are countless examples, familiar to anyone who studied any common law area, of obscurity, confusion, and contradiction within the common law.[12] The more significant sense in which common-law practice is customary, and as such non-artifactual, relates to the two other elements of artifactuality, *conscious* design and *functionality*, as the common law is lacking in both. This statement may seem odd: the common law may not be an example of great design, but whatever design we find in it looks like it is arrived at through the conscious decisions of judges. Isn't reasoned justification a staple of common-law adjudication? These days it is (although this is, significantly, much less true of its past), but what matters is the *kind* of explanation we find of common law decisions.

To understand this point we must have a clearer sense of what we mean by the common law. At the most basic level when we talk about the common law, we talk about law constructed in some way from judicial pronouncements made in the context of the resolution of disputes. That requires having a *theory of authority* explaining in virtue of what these pronouncements are in some way binding, and a *theory of content* explaining how these discrete pronouncements are taken together to generate legal norms. To say that the common law is custom implies certain answers to both questions that can be derived from its practice. Now, it is important to stress that it is wrong to expect "the common law" to speak with a unitary voice on these issues. For the same reasons the common law is often messy at the level of particular legal doctrines, it is messy also at the level of its own working theory. The product of a multitude of largely uncoordinated individuals working at different

[12] See, e.g., the critical comments (made by both commentators and judges) on the English law of defamation collected in Simon Deakin et al., *Markesinis and Deakin's Tort Law* (7th edn., Oxford University Press 2013) 696. Likewise, the state of the economic torts in twentieth-century English law has been described as a "mess and [a] muddle" in Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 *Law Quarterly Review* 641, 644.

periods and in different places is unlikely to produce a perfectly coherent legal doctrine; similarly, such product is unlikely to be grounded in identical views on authority and content. What I say below is therefore not the whole truth in the sense that not all common-law practice fits it, but it reflects a prominent theory underlying much of that practice.[13] If the rest of my argument is successful, that is enough to show that not all law is an artifact.

Perhaps the most notable aspect of the common law is that in constructing an answer to novel questions the common lawyer is primarily looking to existing practice: "this case should be resolved in such-and-such a way, *because* this is how we decided similar cases in the past." Typically these past cases are relatively recent, but even when the cases cited and discussed are old, it is their present understanding (often quite different from the original one) that matters. It is this understanding that is "the law." More significantly, judges follow precedents not just in "settled" cases, but also in "novel" ones where there is (supposedly) no law governing them. Even in these cases, judges do not search for some metaphysically right answer, one that is true before or outside of the law. There are, in fact, often more citations to past cases in appellate cases (which presumably deal with matters on which there is no settled law) than in trial cases. The reason is that even in such cases, judges seek an answer constructed from an understanding of an existing practice. On many occasions there is some attempt to justify the decision in terms of certain goals the law seeks to promote: "Policy" arguments, as such arguments are typically called, have a long history in the common law, but they remain controversial and are typically conducted without much information or expert knowledge on the issues. Moreover, such arguments are rarely the only kind of argument used. In short, there is rarely an attempt to construct answers to outstanding questions by examining directly some goal to be achieved; the typical mode of justification in the common law is "we decide this case in this manner, because this answer fits the way we do things around here."

Other familiar features of common-law practice reinforce this point. One well-known aspect of the common law is that it develops incrementally. It is not incrementalism per se that undermines its artifactuality; historians of technology have demonstrated (and as anyone who has gone through several mobile phones in the last decade will attest), that technological advance is also incremental.[14] The evolution of physical artifacts is typically the result of an

[13] Elsewhere I identify four different conceptions of common law authority. See Dan Priel, "Conceptions of Authority and the Anglo-American Common Law Divide" (2017) 65 *American Journal of Comparative Law* 609.

[14] See George Basalla, *The Evolution of Technology* (Cambridge University Press 1988); Henry Petroski, *The Evolution of Useful Things* (Knopf 1992).

attempt to improve an existing artifact by measuring it against its purported teleological function. By contrast, because common-law justification is often "internal"—cultural rather than teleological—the kind of incrementalism we find in the common law is different. It develops by way of fitting a current answer within a pattern created by an existing practice. The difference between the two may be put this way: artifact design is often based on attempts to identify problems with past design and solve them; common-law justification typically involves the opposite approach of acting in a particular way because of past practice. In the former, past design is relevant in that it may limit one's design space, it is an unfortunate constraint. In the latter, on the other hand, the past may be a reason in itself to do certain things in a particular way. The difference is that only in the latter the fact that things have been done in a certain way confers normative value on them.

This point can be further explicated in relation to the adage that the common law "works itself pure." This phrase can be (and has been) rendered more modern as the idea that common-law practice aims at internal coherence. Coherence is, at best, a puzzling moral ideal for the law when one thinks that law exists to help maintain and promote some external goal and is to be evaluated by its success in doing so.[15] But the common law's coherentism makes more sense against an internal mode of justification in which particular instantiations of the practice are measured against some evaluation of the practice as a whole. This involves a constant movement between particular instantiations (called "cases" in the common law) to a broader picture of the whole practice (called "principles"), which are then used to re-evaluate cases. Thus, cases are not evaluated for their success in promoting some goal, but for their fit into an existing pattern of past cases or some aims extracted from them. Within this conception of law, the correctness of a decision, no matter how novel, cannot be determined independently of an existing practice.

The fact that the common law is culturally rather than teleologically functional is still consistent with it being an artifact. (The significance of the distinction will become clearer later.) But the common law is particularly lacking with respect to the element of conscious design. There are numerous statements from commentators (and often judges as well) who complain about the messiness, confusion, contradictoriness, and obscurity of many of their constituent parts.[16] This is true not just of the common law

[15] For a clear example of this puzzlement see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev. edn., Clarendon Press 1994) ch. 13, especially at 299–301.

[16] Here are two examples: Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press 1983) 51 ("The historical legacy of public tort remedies is a jerry-built structure, a patchwork, a doctrinal stew. It is a pastiche of policies, precedents, and perspectives

today: commentators fail to identify a clear plan in the common law even in the days when it was the product of a tiny bench and bar all concentrated in London.[17] Given the craft that goes into the writing of judicial opinions, such statements may seem too strong, but as I have argued above, intentional individual actions can co-exist with no overall conscious design. That the common law is not the result of a plan should be no more difficult to accept than the fact that a path can be created without conscious design, even though individual actions leading to its creation are intentional.

3.2 Two Objections Answered

We can now return to the idea that the common law is a kind of custom and, in turn, that it is not an artifact. When I argue that common-law practice is best understood as a kind of custom, what I meant, and arguably what can be gleaned from the writings of the classical exponents of the common law, is that its mode of development and especially its mode of justification is customary. A central feature of custom is that its primary mode of justification is cultural rather than teleological. We see the same distinction in common-law thinking, except that instead of the contrast between "cultural" and "teleological" functions, we find a distinction between "internal" and "external" justification.

If true, the argument outlined in the beginning of this section appears sound. To substantiate this conclusion let me respond here to the two objections mentioned above. The first was that the well-known claims by classical exponents of the common law to its customary nature were mistaken. To further explain, it might be argued that though the likes of Matthew Hale or William Blackstone were involved in the development of the common law, they do not enjoy any privileged understanding on what they were doing.

drawn primarily from three distinctive legal realms and overlaid with features of its own."). Anon. [Nicholas St. John Green], "Slander and Libel" (1871) 6 *American Law Review* 593, 597 ("As the English law upon any subject was never constructed upon a plan, it cannot be resolved into one. It is a mass which has grown by aggregation, and special and peculiar circumstances have, from time to time, shaped its varying surfaces and angles.").

[17] S.F.C. Milsom, "Reason in the Development of the Common Law" (1965) 81 *Law Quarterly Review* 496, 497–8 ("There has been no plan in the development of the common law, even less ... than legal historians have sometimes thought"); Roscoe Pound, "The Development of American Law and Its Deviation from English Law" (1951) 67 *Law Quarterly Review* 49, 50 ("the common law is little systematized .... The law books of Anglo-American common law are typically alphabetical abridgements, digests, and cyclopedias."). More generally see Michael Lobban, "Mapping the Common Law: Some Lessons from History" [2011] *New Zealand Law Review* 21; Geoffrey Samuel, "Can the Common Law Be Mapped?" (2005) 55 *University of Toronto Law Journal* 271.

On this question (so the argument goes), it is legal theorists with their greater analytical skills, who can provide a better understanding of the practice.

The problem with this argument is that it treats all claims by common-law practitioners as external observations on the practice, made in a purely theoretical mood. In fact, however, these views should be understood as an attitude that these practitioners brought to the practice, and hence helped define it. As Joseph Raz put it, "the way a culture understands its own practices and institutions is not separate from what they are ... [T]hey ... are in part shaped by the way they are understood by the people whose practices and institutions they are."[18]

Raz's claim needs to be carefully parsed. A judge may genuinely think that he is being impartial, treating all defendants in the same way regardless of their ethnic backgrounds or gender, but research can reveal him to be unconsciously biased. The belief that one is unbiased is not itself part of the practice of adjudication; it is an evaluation of one's actions, and such evaluations are many times incorrect.[19] The belief that common-law justification is customary in nature is different to the extent that it shapes the practice itself. As the illustrations above show, to conceive of the common law as custom affects how it is actually practiced, the kind of arguments deemed acceptable within it, and the way it develops. To argue that despite all this common-law practice is not custom requires showing that there exists a certain mythology that is entirely divorced from the practice. This is possible, but for such an argument to be convincing, it has to be the case, first, that the practice is completely different from the way its practitioners understand it. In the case of unconscious bias, such a claim will not be convincing without empirical evidence; in the case of the common law, it will require providing an alternative explanation for the customary features of common-law practice. The discussion above was meant to show that familiar features of the practice fit its theoretical understanding. Second, to the extent that such explanations differ from the way practitioners understand the practice, it calls for an explanation of the difference, one that is likely to involve either global delusion or massive fraud.

A further problem with this challenge in this context is that it is self-defeating. The question under consideration is the possibility of countering

[18] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 96–7.

[19] See generally Timothy D. Wilson, *Strangers to Ourselves* (Harvard University Press 2002). The full implications of this view have not been adequately acknowledged in much contemporary legal philosophy. See further Dan Priel, "Action, Politics, and the Normativity of Law" (2017) 8 *Jurisprudence* 118.

my view that the common law is not an artifact. Its ultimate goal is therefore to show that the common law is an artifact in the sense that it is a *conscious* attempt at law-making. But it is inconsistent to argue for this conclusion with the arguments that those who think of law as custom are actually mistaken about what they are doing. *Even if they are mistaken*, the element of conscious, purposive, creation remains lacking.

The second objection was that the common law may be a kind of custom, but it is an unusual kind of custom. If so, it is wrong to draw from the fact that the common law is custom and that custom is not an artifact the conclusion that the common law is not an artifact. I think this objection is correct in that the common law does indeed have some features that set it apart from most customs. It is more complex than other customs; and it is a custom backed by the power of the state, something that is not true of most customs. Most notably, the common law today is written and analyzed ("theorized") in a way that other customs are not, and it is often analyzed in terms of its ability to protect certain "external" goals. All this may imply that the common law is such an unusual custom that the argument presented above is invalid.

Though there are real differences between the common law and other customs, they do not set the common law apart from other customs in any sense relevant for the argument made above. As mentioned earlier, other customs sometimes have quasi-authoritative guides; and though not typically enforced by the state, other customs often have very powerful enforcement mechanisms behind them. A powerful social taboo can be far more effective than a weakly enforced legal norm. It must also be remembered that those who seek to provide a general theory of law must account not just for contemporary common law, one that has been much affected and to some extent shaped by the dominance of legislative design (more on this below). They must also be able to account for the common law as it existed for much of its history, including in those times when it was, as common-law historians insist, almost entirely lacking in theoretical literature and its most common organizing principle was the alphabetical ordering of cases.

4. Law-as-Artifact as Ideology

The reader may wonder why the conclusion of the last section is significant. Indeed, she may even consider it rather obvious. After some toing and froing its conclusion was that the common law is custom; and that is not exactly news. The purpose of this section is to explain the broader jurisprudential significance of this conclusion. I contend that the view that law is an artifact is not a conceptual truth about law (in general), but an ideological one. And

though common-law practice is not ideologically uniform,[20] a very central strand in it rejects the ideology to which the law-as-artifact view belongs. The result is unconvincing accounts that attempt to explain the common law as something it is not.

To suggest jurisprudence is "ideological" may seem not just obviously false but inflammatory. To call a view "ideological" is sometimes a form of criticism: "His opposition to the new plan had nothing to do with its merits, it was purely ideological." Used in this way, ideology is seen as an irrelevant consideration, a prejudice. This is not the way I use the term. As I use it, it is a set of organizing ideas that individuals use to make sense of the world, a way of organizing brute facts, of giving particular events meaning within a larger conceptual scheme. Ideology, to use Clifford Geertz's term, is a "cultural system."[21] My claim is that the law-as-artifact is part of a broader, evaluative, worldview. Still, even in this sense my claim will likely be resisted. General jurisprudence is said by many of its champions to be "conceptual," "descriptive," "universal," "morally neutral"—all designations suggesting it is non-ideological even in the non-pejorative sense. It is an attempt to provide a description of the nature or essence of law wherever and whenever it is found. In the prevailing view the claim that law is an artifact may be true or false, but it is not right or wrong.

I have no doubt that those who make these claims believe that they are a morally neutral description of law as it is. What I attempt to explain is why such views are mistaken and why such views make more sense when their hidden ideological assumptions are made explicit. Does this show that there is no conceptual part to jurisprudence? It does not, though the argument still casts doubt on this project.[22] What it purports to show is that even if there are some purely conceptual truths about law, there is value in showing that their scope is narrow and that certain features of law currently accepted as conceptually true, are not.

4.1 The Dominant Ideology in Contemporary Jurisprudence

What I take to be a dominant ideology in contemporary jurisprudence consists of two components, both of which are often taken for granted as

[20] See Priel, "Conceptions of Authority and the Anglo-American Common Law Divide" (n. 13).

[21] See Clifford Geertz, "Ideology as a Cultural System" in *The Interpretation of Cultures* (Basic Books 1973) ch. 8.

[22] Elsewhere I do argue that there is no conceptual part to jurisprudence. See Dan Priel, "The Scientific Model of Jurisprudence" in Beltrán et al. (eds.), *Neutrality and Theory of Law* (n. 1) 239; Priel, "The Misguided Search for the Nature of Law" (n. 6).

conceptual truths about law. The first, one which by now should be familiar, is the thought that law is an instrument consciously designed to solve problems. It treats law having a teleological function as a conceptual truth about it, and that an important measure of law's success is the extent to which it fulfills that function. The second component is a more concrete view about the *kind* of problems that law is designed to solve, and correspondingly the primary aim of law. On the view in question the primary aim of the law is to solve *moral* problems, when morality is understood as a kind of fixed set of norms for lawyers to match. It follows from putting these two views together that law has to match this pre-existing, eternally unchanging set of norms, and that law fulfills its (teleological) function when it matches these moral norms, thereby serving as an instrument for the better enforcement of morality. Notice that this instrumental view of law is consistent with thinking that the morality law exists to promote is non-consequentialist.

To illustrate this point consider the views of three contemporary legal theorists. Their views differ in fundamental respects, and yet all three endorse both points. John Gardner says that "[n]atural law is the same thing as morality. It is the higher thing to which human law answers."[23] This view depends on the claim, that "[b]eing subject to morality is an inescapable part of being rational .... And being rational ... is part of being human."[24] The link between law and morality is thus established in this way: "[morality] binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality,"[25] and in that "[l]aw answers to all moral norms in proportion to their ordinary moral importance."[26]

Morality is the fixed star, something that any human being, in virtue of being a rational animal, can discover; it is something that in virtue of the normative demands of rationality all humans ought to follow; and it is the standard against which we measure law. In Gardner's view laws are artifacts[27] one of whose measures of success is their ability to guide people: "Whatever other purposes law may have, it clearly has the purpose of providing

[23] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 175. Strictly, these words are attributed to natural lawyers, but as far as I can tell, Gardner accepts it, as long as the term "natural law" is replaced with "morality." Gardner's problem with the natural law view seems to be that they mistakenly think of morality as a kind of law, not with other aspects of this view. See ibid.

[24] Ibid. 150. [25] Ibid. 175. [26] Ibid. 192.

[27] Ibid. 193. Gardner does not define artifact, but it seems he takes artifacts to include all products of human action. He explicitly includes in the definition works of art (ibid. 182). Since he considers all law an artifact, and considers some laws to be the product of accidents (ibid. 70–1), it follows that he thinks artifacts include also the accidental products of intentional action. That suggests he considers the wood shavings created in the process of creating a wood carving an artifact. (This example is taken from Hilpinen, "Authors and Artifacts" (n. 7) 159–60.)

law-subjects, including the government, with normative guidance; that is to say, of subjecting their conduct to the governance of norms."[28] But, crucially, law is not about any kind of guidance: the "morally successful law" is one that helps us resolve "moral problems."[29]

Scott Shapiro's central idea of law as a plan is, of course, a straightforward endorsement of the first aspect of the ideology in question: law, just like all planning, "seeks to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize, and monitor the behavior of individuals and groups."[30] But law for Shapiro is not just any kind of plan. It is, he says, a conceptual truth that law is a plan with the aim "to remedy the moral deficiencies of the circumstances of legality."[31] Although "the sheer diversity of political objectives that actual legal systems have attempted to secure throughout human history suggests that the law often fails in its primary mission,"[32] Shapiro still maintains that "it is part of the identity of law to have a moral mission."[33] Shapiro is less direct on the second component of the ideology I consider, but it is quite clear he accepts it as well. When he talks about morality, Shapiro reflects the view of morality as an unchanging pre-existing entity when he states that "it makes no sense to talk about incrementally developing ... morality."[34] In a similar vein Shapiro writes that "moral norms are not able to solve coordination problems because morality concerns itself with principled action and coordination problems arise because of their arbitrary nature."[35]

These claims are unconvincing as conceptual claims supposedly true of all law whenever and wherever we find it. There are many things unquestionably considered as laws that are difficult to reconcile with the idea that they are there to address the kind of situations Shapiro talks about. One need not be committed to everything said by public choice theorists to acknowledge that many laws are enacted with different aims. Such cases are not instances of an unfortunate failure (due to a miscalculation, lack of foresight, etc.) to fulfill law's purported conceptual aim, but cases in which the

[28] Gardner, *Law as a Leap of Faith* (n. 23) 209.

[29] Ibid. 163. If being moral is akin to being rational, what counts as a "moral problem" is not entirely clear.

[30] Scott J. Shapiro, *Legality* (Harvard University Press 2011) 200. [31] Ibid. 213.

[32] Ibid. 213–14. [33] Ibid. 215. [34] Ibid. 128.

[35] Ibid. 201. These claims are by no means obvious. See, e.g., Philip Kitcher, *The Ethical Project* (Harvard University Press 2011) 2, *passim* ("Ethics emerges as a human phenomenon, permanently unfinished. We, collectively, made it up, and have developed, refined, and distorted it, generation by generation."). The view that at least parts of morality have emerged as responses to coordination problems is also familiar. See, e.g., Robert Sugden, *The Economics of Rights, Co-Operation and Welfare* (2nd edn., Palgrave Macmillan 2004).

conscious aim motivating the legislation is not moral. The puzzle is not just empirical: surprisingly for a project intended to defend a version of legal positivism, Shapiro seems committed to the view that a duly enacted statute that was adopted with an immoral aim is *thereby* not law. This sounds like an affirmation of a variant of natural law theory rather than a challenge to it: it is the view that while a putative law that is in fact unjust remains valid law, a law designed to be unjust (thereby lacking in moral aim) is not law, perhaps even if it is in fact just.

At the other end of the positivist/natural law divide, Allan Beever is similarly committed to the two ideas that dominate contemporary jurisprudence. In an attempt to explain the declaratory theory of the common law, he distinguishes between positive law and some kind of higher, "enduring," law. The latter for him is simply a different name for interpersonal morality. It is not a human creation, it is unchanging, and it can be discovered by reason. Beever also states that it is the aim of human law to match the natural law and help enforce it. The two elements of the prevailing ideology are captured by his claim that "the law that remains unaltered is not positive law but something more abstract and enduring. Fulfilling the law is a matter of making the positive law more accurately reflect this abstract and enduring law."[36] It follows, as Beever also says, that the common law is merely the public record of successive human efforts to discover this unchanging law.[37] Reflecting on this higher law aims to "provide principles capable of guiding (not determining) deliberations" on novel cases.[38] Once we separate a functional conception of law from consequentialist morality, it is easy to see that Beever too is committed to the idea that law should match, and is ultimately necessary in order to maintain, this unchanging law.

4.2 The Ideological Space

Perhaps the single most important aspect of this dominant contemporary ideology is that law is about guidance. The view of law as an artifact fits

[36] Allan Beever, "The Declaratory Theory of Law" (2013) 33 *Oxford Journal of Legal Studies* 421, 428–9.

[37] See Allan Beever, "How to Have a Common Private Law: The Presuppositions of Legal Conversation" in Andrew Robertson and Michael Tilbury (eds.), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing 2016) 215, 227; but see Dan Priel, "The Philosophies of the Common Law and their Implications: Common Law Divergences, Public Authority Liability, and the Future of a Common Law World" in ibid. 233, for casting doubt on this view.

[38] Beever, "The Declaratory Theory of Law" (n. 36) 442.

right into this view, as it presents law as a kind of signpost for confused humans to follow. It is a view of law as a tool designed by humans to ultimately attain a better life. In legal philosophers' discourse (and this may reflect the influence of natural-law thinking) as far as the law is concerned, a "better life" means a more moral life. This is why law's success is measured by its correspondence to, and ability to maintain and promote, morality. Of course, different scholars may have different views about morality and what it requires, but in the way the boundaries between legal and moral philosophy are drawn, this debate is not part of jurisprudence. Disagreement on this latter question (a question of political philosophy) is consistent with agreement that law is (primarily, essentially) a tool for maintaining and promoting morality. Against this agreement, the remaining jurisprudential disputes between legal positivism and natural law theory are concerned with fairly marginal points. The questions whether morally faulty specimens of putative law are not law or merely are a "perversion of law," or the question whether the unchanging norms that law should match are to be considered a kind of law ("natural law") or something else ("morality"), are fairly insignificant against a backdrop of vast agreement.[39] What matters for the present discussion is that because so much is shared across the supposedly wide chasm that separates legal positivism and natural law theory, it is natural to think of it as "conceptual" truths.

I identified two components that make up the dominant law-as-artifact, on the basis of which we can identify four theoretical possibilities (only three of them are realized).

Table 12.3 The ideological space around law-as-artifact

	Law as non-artifact	*Law as artifact*
The ideal for law is the imitation of morality	N/A	Contemporary legal positivism, contemporary natural law theory
Constructivism	Common law theory, Ronald Dworkin	Classical legal positivism: Thomas Hobbes, Jeremy Bentham

[39] Gardner is thus correct to call his position "nearly natural law" in Gardner, *Law as a Leap of Faith* (n. 23) ch. 6.

Table 12.3 identifies two alternatives to the law-as-artifact view. As this chapter is concerned with the common law, I will say little about one of them, the one I call "classical legal positivism," except to note that unlike contemporary legal positivism, this view is a real alternative to natural law theory.[40] There are many important differences between classical and contemporary legal positivism, but they share the Enlightenment idea of the possibility of progress through human endeavor. Law fits into this picture as a tool ("artifact"), perhaps the primary tool by which such progress is to be attained.[41]

Once identified, this idea can also be seen in Hart's account of the change from the prelegal to the legal society, explained in terms of the gains in efficiency it provides. Hart insists that for law to exist, there has to be a legal *system*, which comes into being when some institutional mechanisms are introduced, almost inevitably by design, to improve the pre-legal norms' efficiency at providing guidance. The same commitment is even more evident in the Razian "service conception" of authority. On the basis of this view Raz presented law's authority as grounded in its "superior knowledge" and likened the law to a "knowledgeable friend."[42] At other times, the law co-ordinates the actions of different individuals. Either way, this is an instrumental conception of law in which the law's raison d'être is its ability to direct people's action in a way that will help people comply with reasons that exist regardless of the law. It is for this reason that the ability to guide conduct is so central to his view of law and has also been central to his well-known argument in support of exclusive legal positivism.

Raz made the link between this view and the ideology of improvement clear when he said: "We take legislation as the base [of an account of law] because of its centrality to the understanding of law and of the governance of human affairs by deliberate decisions of human institutions appointed to control and give direction to human conduct and to social change."[43] This view, which sees conscious acts of legislation as the paradigmatic case for law *because* they are human devices to "control and give direction to human conduct" inevitably treats customary law and the common law as less central cases of law.

Not only does this view make legislation a more central case of law, it is quite difficult to account for the common law within it, because the

[40] See Dan Priel, "Toward Classical Legal Positivism" (2015) 101 *Virginia Law Review* 987. See also the remark on Bentham in the concluding paragraph of this section.

[41] Recent years have seen the proliferation of so many "Enlightenments" that the term almost lost all meaning. Even thinkers like Edmund Burke and Adam Ferguson, which I posit in opposition to the Enlightenment idea I discuss in the text, have been described by some as adherents to a more "moderate" or "pragmatic" Enlightenment, in contrast to a more "radical" or "rigid" Enlightenment. The labels matter less than the difference in ideas.

[42] Raz, *Ethics in the Public Domain* (n. 15) 348.

[43] Ibid. 301; cf. Raz, *Between Authority and Interpretation* (n. 18) 320.

suggestion that judges are some kind of moral experts, or experts in solving co-ordination problems, is implausible. It is hard to think of any judge, including the acknowledged "great judges" of the common law (Mansfield, Holmes, Cardozo, Atkin) as a moral expert, and it is hard to think of any of their decisions as great essays in moral philosophy. The suggestion that they possessed any special knowledge or insight on coordination problems is, if anything, even less plausible. Now, it is true that Raz's view is consistent with the possibility that the common law claims such authority but is uniformly failing at actually having it. While theoretically possible, I think such a conclusion suggests an alternative, one in which the authority of the common law is best explained as a rejection of this ideology of improvement, rather than a failed embrace of it.

4.3 The Common Law as Tradition

One prominent strand in common-law thought is best understood as reflecting an ideology that fundamentally rejects the idea of rational design as a guiding principle for the improvement of civil society. Correspondingly, it is also based on a competing theory of authority. Hayek challenged the Enlightenment idea of the organization of society, which he associated with Hobbes and Bentham; he contrasted it with a view he found reflected, among other places, in "a tradition rooted in the jurisprudence of the common law," and he quoted Scottish philosopher Adam Ferguson for the idea that human institutions are "the result of human action but not the execution of human design."[44] This remark parallels the distinction between the broad (and trivial) sense of law's artifactuality (law is the product of human action) and the non-trivial sense of its artifactuality (law is the product of conscious design). Hayek thus contrasted legal design with "rules [that] have never been deliberately invented but have grown through a gradual process of trial and error .... In most instances ... [of such law-making] nobody knows or has ever known all the reasons and considerations that have led to a rule being given a particular form."[45]

According to another statement of this view, coming from Michael Oakeshott,

> [t]he laws of civil association ... are not imposed upon an already shaped and articulated engagement, they relate to the miscellaneous, unforeseeable choices and transactions of agents each concerned to live the life of a 'man like me', who are

[44] F.A. Hayek, *The Constitution of Liberty* (Routlege & Kegan Paul 1960) 56, 57, quoting Adam Ferguson, *An Essay on the History of Civil Society* (A. Kincaid and J. Bell 1767) 187. Ferguson also wrote: "No constitution is formed by concert, no government copied from a plan." Ibid. 188.

[45] Hayek, *The Constitution of Liberty* (n. 44) 157.

joined in no common purpose or engagement, who may be strangers to one another .... Nor do they [i.e., these laws] impose any such common purpose upon those who fall within their jurisdiction: they are not devices for engineering the promotion of a common interest.[46]

How do we explain the contrast between this view and the law-as-artifact view? One possibility is to say that this is a competing conceptual claim about law, but one that happens to be false. If that was indeed Oakeshott and Hayek's aim, then they are equally guilty of confusing the ideological with the conceptual. But I think this is an implausible reading of these thinkers. Oakeshott presented his view of law as part of a broader avowedly "conservative" political theory. In his writings Oakeshott repeatedly chastised what he called—always in scare quotes—"rationalism," the view that perceives of politics as a science in which external goals are defined and then uses various means (including, prominently, laws) to pursue them.[47] The idea of law as an artifact designed to match pre-existing morality or natural law is the jurisprudential manifestation of the rationalistic worldview that he rejected.

Common-law practice fits this view. To put this bluntly, most common-law practice does not look like lawyers and judges care much whether universal moral truths exist; and even if they exist, there is rarely a suggestion that to find them is relevant, let alone decisive, to solving "novel" cases. Lord Justice Scrutton emphasized this point almost a century ago when he said that, "justice is not what we strive after in the Courts, paradoxical as it may seem .... We are not trying to do justice, if you mean by justice some moral standard which is not the law of England."[48] Of course, the statement of a single judge, influential though he may have been, is not proof of my argument, but I contend that what Scrutton said is a fair representation of common law practice, definitely in England at the time he was writing.

Beyond such exegetical matters, to dismiss this view as a misunderstanding of the authority of the common law is theoretically problematic. It is true that one may consistently hold that some people believe that tradition is a source of legitimate authority and that such beliefs are mistaken. But if people hold such a view they are likely to shape their practices accordingly. Thus,

[46] Michael Oakeshott, *On Human Conduct* (Clarendon Press 1975) 129. See also Michael Oakeshott, "The Rule of Law" in *On History and Other Essays* (Blackwell 1983) 119, 136: "The expression, 'the rule of law', taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of self-chosen actions of all who fall within their jurisdiction."

[47] This is a recurring theme in Michael Oakeshott, *Rationalism in Politics and Other Essays* (expanded edn., Liberty Fund 1991).

[48] T.E. Scrutton, "The Work of the Commercial Courts" (1921) 1 *Cambridge Law Journal* 6, 8.

even if one believes that a traditionary view of authority can *never* provide a successful basis for legitimate authority, the fact that people believe that it is, is important for understanding a practice that involves people who do. This point was implicitly accepted by Raz when he said that,

> since our own concept is liable to be forever in flux, since legal theory is itself part of the culture to which 'our' concept of law belongs, it is inevitable that legal theory is no mere passive mirror of the concepts of that culture. To the extent that legal theorists acquire influence their views tend to be self-verifying. This led some post-modernists to identify theory with advocacy. This is a misleading view. Theory aims at understanding. By and large, only bad theory can lead to change. *If its wrong conclusions are accepted their acceptance may lead to a change in the self-understanding of the culture which will make the bad theory true.* But such bad theories succeed only by not trying, i.e. by claiming—however erroneously—that they state how things are, and not that they advocate change. Once they avow that they advocate change they lose the claim they have on our attention, they join reformers in an activity to be judged by different standards altogether.[49]

Raz is almost correct here. He is right that when people offer certain understandings of the practice they can alter the practice and with it its underlying philosophy. But he is wrong to say that this is true only in the case of "bad theory," one that is mistaken. All accounts of the practice have potential to influence it, even when they do so by affirming a prevailing understanding of it. This is particularly clear when we remember that there is never a single account of a practice. What always exists are competing views presented more-or-less simultaneously. "Correct" and "incorrect" accounts thus compete in the marketplace of ideas; and since these competing views are held by practitioners, they constantly push the practice in different directions. In any case, even if one accepts Raz's view that only "bad theory" can change the practice, it follows from what he says that if a bad theory becomes sufficiently influential, it can change the practice to such a degree that it eventually will become the "good theory" of the practice. This means that the prevalence of traditionary ideas about the common law can influence (and as a historical matter, has influenced) the practice of law. If it is shown that much common-law practice has in fact been based on this traditionary ideology, to maintain the view that all law is an artifact implies that much of the common law is not law. While possible, that would be a radically revisionist view of law, not one that supposedly captures (roughly) all phenomena humans have identified as law throughout history.

[49] Raz, *Between Authority and Interpretation* (n. 18) 98–9 (emphasis added).

So this way of responding to this view fails. A second response might be that the traditionary view is based on a particular political ideology, and as such it comes into play only after the non-ideological, conceptual analysis of law has been completed.[50] This response will thus argue that this clearly ideological view of the common law rests on a universal conceptual basis. But this second response is also implausible. One way of demonstrating this is by pointing out that Raz's words quoted earlier about legislation as central to understanding law are correct when read against the background of the Enlightenment ideology of improvement through law. But this view is not a neutral basis on which conservative political thinkers then added a second, political layer. For some, legislation is not the paradigm of law, but a degenerate, perverse, example of it.[51]

Similarly, Hayek and Oakeshott did not think that their favored conception of law (in which it is not an object designed for guidance) is a politically motivated layer added onto a conceptual, morally neutral truth that law is about guidance. They rejected the idea of law-as-artifact designed to guide altogether. On the traditionary view, law is not a solution to a problem that can be identified in advance and then acted upon when the right time comes. Rather, it is a standard that reflects, as Oakeshott put it, "current moral activity" within a particular community. To use his example, what counts as "reasonable care" is "not something that can be known in advance" (thus ruling out the idea of guidance); instead it reflects "knowledge of how to behave well which belongs to our way of living."[52] This view is not political disagreement added to a layer of conceptual agreement; it is a challenge to the "conceptual" foundation. Law on this view is not put in place where custom fails; it is a continuation of, a manifestation of, custom. It is thus not a way of guiding people for the sake of attaining some teleological ("external") function, but a cultural ("internal") one.

I think the most plausible way of understanding this disagreement is also the most straightforward one, namely as reflecting two conflicting views about law, both of which are derived from conflicting ideologies. This claim, if accepted, raises another set of questions. When Oakeshott made these claims, they were by no means novel. The association of the common law with the

[50] Cf. Julie Dickson, "Ours Is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry" (2015) 6 *Jurisprudence* 207, 215, 229.

[51] See, e.g., James C. Carter, *The Proposed Codification of our Common Law* (Evening Post Job Printing Office 1884) 51 ("The decadence [of Rome] was marked by a corresponding decline in jurisprudence, and the extension of the province of legislation over the proper domain of the unwritten law.").

[52] Oakeshott, *Rationalism in Politics and Other Essays* (n. 47) 130, also 117. Oakeshott explicitly rejects the idea that law should match natural law. Ibid. 51, 67, 423.

political theory of tradition is at least as old as Edmund Burke, if not older.[53] Given this long historical provenance, it is a good question why it has been largely ignored by legal philosophers. To the little extent that they even paid attention to proponents of this view, they apparently did not see them as having any bearing on their own work. I think there are three main reasons that together go a long way toward an explanation. The first is the prevailing (albeit mistaken) view that jurisprudence is a value-neutral search for the nature of law. This attitude has blinded many contemporary writers to the ideological basis of contemporary jurisprudence. As a result, writings that were perceived as clearly ideological could be ignored as irrelevant to the enterprise of general jurisprudence. The second is the relative lack of interest among contemporary legal philosophers in legal practice (and the occasional denigration of legal theorists who took an interest in it as not really legal philosophers), as well as their lack of interest in the history of law and jurisprudence. This allowed jurisprudential debates to be conducted at a level of abstraction at which realities about the practice did not adequately inform the theories that were supposed to describe it. Insufficient attention to legal history has led to the elevation of familiar features of contemporary western law to the level of conceptual truths about all law. Even the most fervent admirer of the common law will admit that it is far less significant today than it once was,[54] and the dominance of statutes has influenced thinking on the common law as well. But these are contingent facts about the present-day regulatory state, not timeless verities.

The third reason has more to do with the fact that the traditionary ideology is relatively unpopular among legal academics. For all their differences (jurisprudential as well as, I suspect, political), Gardner, Shapiro, and Beever, whose work I briefly discussed earlier, share the view that morality is an unchanging set of norms, which law should match. They may disagree on what this independent unchanging morality requires, but not on its "nature." A view that depended on a fundamentally different understanding of morality could thus be ignored, or when not ignored, misunderstood.

This is enough to show that even if contemporary legal philosophy is ethically neutral, it is not metaethically neutral. For the sake of my argument,

[53] For various formulations of the idea see J.G.A. Pocock, "Burke and the Ancient Constitution: A Problem in the History of Ideas" (1960) 3 *Historical Journal* 125; Anthony T. Kronman, "Precedent and Tradition" (1990) 99 *Yale Law Journal* 1029; Gerald J. Postema, "Philosophy of the Common Law" in Jules L. Coleman and Scott J. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002) 588; David Strauss, *The Living Constitution* (Oxford University Press 2010); cf. Martin Krygier, "Law as Tradition" (1986) 5 *Law and Philosophy* 237.

[54] Cf. Dan Priel, "The Political Origins of English Private Law" (2015) 40 *Journal of Law and Society* 481, 501–2.

it does not matter whether this metaethical view is correct; it matters, however, whether it was accepted by important practitioners of the common law. I have attempted to demonstrate that it was; my subsequent discussion was meant to show that this approach goes beyond mere difference in law-making technique (some laws happen to be made by legislatures, others by courts). It reflects a different view about the nature of political authority, and arguably also the nature of morality.

These last remarks put Bentham's views on the common law in clearer light. Bentham had many bad things to say about Blackstone, and he characteristically spelled those out in exhaustive detail over hundreds of pages. But he did not think that Blackstone's definition of law was conceptually wrong. Blackstone, he said, "has a right to put into his idea of [municipal Law] what he pleases."[55] This explains why Bentham did not contradict himself when he said that the common law is not real law.[56] When he said this, he was not making a conceptual claim, but a normative one. Bentham was openly dismissive of the authority of tradition, calling it the "wisdom of the cradle,"[57] and based his entire corpus on an overriding commitment to the Enlightenment ideal of social improvement through the rational application of the scientific method to human affairs. Not being able to fit the common law within this, patently normative view, he rejected it. But it is not that his dislike for the common law was political, while his dismissal of it as non-law was conceptual. Both were part of the same ideological view.

5. The Implications of Thinking about Law as an Artifact

I began this chapter by drawing a distinction between two possible definitions of artifactuality. On the broader definition, something is an artifact if it is the product of human efforts. I said that this view is trivial and not contested by any present-day legal theorist. But it does have an interesting implication: if law is an artifact even in this broad sense, it makes as much sense to think that there is a philosophical task of discovering its nature as there is a philosophical task of discovering the nature of cars. It is not (just) that such a task seems utterly pointless, it is that the answer to it is one to which philosophers

[55] Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government* (Clarendon Press 1977) 38.

[56] See, e.g., Jeremy Bentham, *"Legislator of the World": Writings on Codification, Law, and Education* (Oxford University Press 1998) 193, where he talks about the "unreal, not really-existing, imaginary, fictitious, spurious judge-made law ... [known by the] unexpressive, uncharacteristic and unappropriate names of common law and unwritten law."

[57] Jeremy Bentham, *The Book of Fallacies* (Oxford University Press 2015) 173.

have little to contribute. Cars, and humans' attitudes about them, have a history, a sociology, a technology, not self-evident "truisms" to be discovered by philosophical reflection. If law is an artifact, it is hard to see why it should be any different.

This chapter has attempted to show one way in which thinking about law as an artifact changes the way we should analyze it. More generally, I think openness to law's artifactuality should lead legal philosophers to realize that science, essential nature, and discovery are not the right models for jurisprudence. As with other artifacts, it is engineering, development, and construction.