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The Problems with Artifact Legal Theory

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Contemporary legal philosophers theorize law on two distinct tracks: social artifacts and social constructions (italicized below). On the former track, Jonathan Crowe stated, "It is often stated that law is an artifact" (Crowe 2014: 737). Brian Leiter considers it incontestable that "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" (Leiter 2011: 666). On the latter track, Leslie Green observed, "We might say [laws and legal systems] are social constructions" (Green 2012: xvii). "Contemporary philosophy of law is often characterized in terms of its central debates, yet such debates have not prevented an apparent consensus from emerging: law is a social construction," Giudice remarked (Giudice 2020: 1; Priel 2019). These assertions prompt the question: Which theoretical framework is best suited for law? They are not interchangeable: all artifacts are social constructions, but social constructionism is far more expansive and multidimensional than artifact theory.

This essay critically examines artifact theories of law by its main proponents, Jonathan Crowe, Kenneth Ehrenberg, Luka Burazin, and Corrado Roversi. I show that artifact legal theory suffers from multiple problems and distorts legal phenomena in order to meet the strictures of the theory. The objections I raise to artifact legal theory are analytical and sociological. As philosopher Dave Elder-Vass observed, "any plausible social ontology must

also be consistent with a plausible complex of sociological theory," and "with empirical evidence" (Elder-Voss 2012: 20).

Artifact theory has been a hot topic in philosophy in the past couple of decades. "An artifact may be defined as an object that has been intentionally made or produced for a certain purpose" (Hilpinen 2011; Preston 2018). The builder of a chair, for instance, intentionally constructs it with the appropriate material and structure so that people can use it to sit on. Amie Thomasson, a leading artifact theorist, summarizes: "Artifacts are standardly treated as mind-dependent entities, since for an artifact to be created, there must be fairly structured intentional states, involving an individual intending to make a thing of a certain sort, with certain intended properties—and also, of course, being relatively successful at executing those intentions" (Thomassen 2014: 54). Philosophical accounts of artifacts typically identify three requirements: artifacts are 1) intentionally created 2) functional objects, and 3) the intended function determines what kind of artifact it is (46). To encompass art as an artifact, Thomasson drops the necessity to show an intended function, instead requiring that it be "intentionally created and successfully endowed with certain intended features—intended features that may, but need not, include an intended function" (57). Artifact kinds, then, can be categorized through the intended features/functions.

The assertion that law is an artifact is odd in several respects. Legal rules, institutions, and systems are not obviously *intentionally* constructed *objects* by *authors or creators* with a *particular purpose or function or set of features*. To make this framework fit, artifact legal theorists must loosen the meanings of, and the connections between, authors, intentions, objects, features, and functions. Luka Burazin writes, "Since in principle no one person creates a legal system from scratch, since usually a legal system has no precisely identifiably authors, and since

it seems that many people with different roles over a long period of time contribute to the emergence of and continuous existence of a legal system, it seems that the artifact theory of law should adopt a very broad concept of authorship" (Burazin 2016: 399). Corrado Roversi acknowledges, "Now, to be sure, these solutions require to a certain degree that the concept of artifact be 'stretched'—something that some may not be ready to accept" (Roversi 2019: 58). An obvious conclusion from these difficulties is that the artifact framework is ill-suited for law, but artifact legal theorists nonetheless strive to make it work.

The first move by artifact legal theorists is to shift from material objects to abstract institutions, enlisting John Searle's social ontology, particularly his notion of collective recognition. Searle reduces the logical structure of society to three core ideas (Searle 2006). First, *assignment of function*: humans assign functions to objects. For example, pieces of paper with certain markings are used for buying, selling, and storing value (the functions of money). Second, c*ollective intentionality*: we-intentionality involves a cooperative sense of doing something together (unlike the self-focus of I-intentionality). In a game of football or an orchestra, each player understands that their part connects with others to create a whole (a football play, a symphony). And third, *constitutive rules*: constitutive rules create certain activities, institutions, and institutional facts (regulative rules only regulate activities but do not create them), usually in the form *"X counts as Y in context C"* (Searle 2010; 2006). X is an object, person, or entity; "counts as" involves collective acceptance; Y is a status with deontic powers carrying "rights, duties, obligations, requirements, permissions, authorizations, entitlements, and so on" (8-9); C is the situation in which these collectively recognized powers attach. A cut of paper with certain dyed markings (X) counts as money (Y) when it is printed by the Bureau of Engraving and Printing and circulated (C). Searle adds a fourth idea to

supplement these three, what he calls the Background for intentional action, which I elaborate later.

This account has clear applications to law. A particular set of words in rule form (X) is legally binding (Y) when duly enacted by the legislature, signed by the executive, and officially registered (C). Legislatures and courts are organizations comprised of people holding offices with collectively accepted statuses carrying legal deontic powers. Certain individual people (X) are collectively recognized as possessing legal authority (as legislators, judges, prosecutors, police, etc.) (Y) when duly appointed and acting in their official capacities (C). People recognize that the police have the power to arrest, prosecutors to prosecute, legislators to legislate, judges to judge, and jailors to jail. This collective recognition (which at least involves going along with) exists within the community as well as among the legal officials themselves. (This general account will be modified later.)

Artifact legal theorists use Searle's theory in various way to demonstrate that law is an artifact. To account for customary law, Jonathan Crowe drops the intention requirement for artifacts, relying on collective acceptance, arguing that customary law is an unintentional artifact (Crowe 2014: 743-48; Priel 2018). To his credit, Crowe does not stretch the notion of intentionally, acknowledging that it does not work for customary law. Standing in the way of his approach, however, is the strong consensus among philosophers that intention is a defining feature of artifacts. Moreover, once intention is dropped, there is no conceptual reason to retain artifact theory rather than social constructionism, which incorporates but is not strictly wedded to intentional creation, as the following Part explains.

Ehrenberg, Roversi, and Burazin present law as an intentionally created artifact in relation to different legal "objects": specific laws, legal doctrines and legal institutions, and legal

systems (law as such). Their analysis also applies to legal organizations, which artifact legal theorists have largely ignored, though I draw out for critical purposes. At the outset, it bears emphasis that artifact legal theory squeezes an extraordinarily diverse range of phenomena within the same artifact box. Artifact legal theory, according to Ehrenberg, postulates "seeing law as an artifact type, albeit an abstract one, in the say way we think of shoes, hammers, hospitals, universities, and corporations" (47). This statement is unintentionally revealing. Any theory that lumps together such radically diverse phenomena must be exceedingly thin, with little content and information value.

The easiest case for artifact theorists is *individual laws* declared by courts and legislatures, although this application faces daunting difficulties. When enacting a law, legislators may have no single or shared intention about the meaning or purposes of the law they enact. Trial and appellate courts, furthermore, may issue interpretations of a law that differ from the intentions of the legislators. Appellate courts regularly issue plurality decisions in which individual judges on a panel articulate separate, inconsistent justifications for supporting the outcome (see Tollefsen 2002); and appellate courts regularly disagree among themselves on the interpretation of the same law (called circuit splits in the US). On top of that, court interpretations can change over time owing to changing views of judges or to changing circumstances. All of these scenarios can occur with respect to a single law: legislators voting for it may have differing yet coinciding intentions; members of an appellate panel with differing yet coinciding intentions may interpret it in ways that were not intended by the majority of legislators; and different appellate courts may interpret said law in different ways concurrently and over time.

So what (or which) is the intentionally created law artifact and who are its creators? It is not clear whether *the* intentional artifact is the words in the statute understood through the original purpose (assuming *arguendo* a single purpose exists), or whether new artifacts are created each time judges subsequently give it new meaning and new purposes (while the words of the statute remain unchanged). Keep in mind, moreover, American jurists who adhere to textual interpretation of statutes and original public meaning interpretation of the US Constitution deny that the intentions of those who enact the law controls how it should be interpreted—what matters is the meaning conveyed by of the terms of the law.

Consider the US Constitution. Who are the creators/authors of the Constitution: the individual drafters who wrote specific provisions, the delegates who voted for it at the constitutional convention, the state voters who ratified it, or all of them in the aggregate? There are manifold inconsistencies among these various creators/authors about the intended meanings and purposes of the constitutional provisions they enacted. Is the Commerce Clause—which authorizes federal legal powers—a single artifact? The meaning and scope of this provision have changed enormously over time through court interpretations in connection with social, economic, political, technological, and legal changes across two-plus centuries. Does each interpretation that alters its meaning create a new Commerce Clause artifact?

Artifact legal theory faces formidable problems identifying author(s), object(s), and intended purposes or features(s) with respect to particular laws. For these troubles, no evident conceptual illumination or advance is achieved by characterizing individual laws as artifacts. The sole insight artifact theory produces is that people with legal powers intended to create, interpret, and apply a given law with some purpose in mind. Not only is this obvious, but also,

even worse, it is misleading because it obscures the multiplicity of intentions and purposes, and changes, in connection with individual laws.

Laws and doctrines that constitute *legal institutions*, like property or marriage, are far more complicated than individual laws. There are two senses of property: type and token. Property is a legal institution constructed by legal doctrines (an institutional type); John Smith's ownership of Blackacre is a specific instance of property (an institutional fact or token). Anglo-American land law (setting aside personal property and intellectual property) involves a broad array of rules. These property rules evolved over centuries, influenced by origins in feudalism and customary law, as well as by changing economic and political circumstances and clashes between contesting interests—involving barons, the landed gentry, the merchant class, farmers and ranchers, miners, serfs and renters, city dwellers, etc. (see Simpson 1986). Land law has been shaped by power, ideology, changing technology, the industrial revolution, and the rise of urbanization. In addition, land law interacts with and has been shaped by past and present chattel law, tort law on trespass and nuisance, contract law on leases, succession law, trust law, mortgage law, zoning law, modern aviation (which altered air rights over land), mining and water rights, and sanitation and environmental regulations. Innovations in property doctrine, furthermore, are often created by lawyers in the service of clients, with the intention to seize and control assets, secure income streams, and engage in rent seeking (Pistor 2019). Particular instances of property disputes—should a delinquent tenant be evicted during a pandemic?—are subject to a variety of legal and policy considerations. A continuously evolving assortment of rules by innumerable creators with no single, joint, or characteristic intention or purpose, Anglo-American land law is not a single abstract institutional type. Incrementally changing over time

through statutes, judicial modifications, and creative lawyering, landed property is a multiplicity, as reflected in competing positions in the philosophy of property (Katz 2018).

Corrado Roversi's historical-intentional model of legal institutions purports to account for this "by tracing artifactuality to a historical property rooted in an original 'creative process' consisting of authorial intentions and in a series of further modification, reinterpretation, and development processes;" so legal institutions are "the outcome not just of an original authorial intention but also, and more significantly, of a history of intentions" (Roversi 2019: 51). This presents legal institutions like property as *singular* "objects" formed originally, and at each moment thereafter, by a purportedly determinative intention, washing away the continuous process of conflicting intentions, clashes over the contours of property, fluid shifts, and inconsistent property doctrines. Property is a contested patchwork of internal heterogeneity with aspects intentionally created and other aspects incidentally (unintentional by-products) resulting from interaction with other bodies of law and surrounding factors (economic, ecological, etc.). Roversi analogizes legal institutions like property to a Gothic church constructed on the remains of a Roman temple that consists of contradictory design plans (Roversi: 2018: 104; 2019: 58); but the church is still a singular fixed object, whereas property (and other legal institutions) is more akin to a shape-shifting bricolage multiplicity.

The contention that *law* or *legal system* is an artifact is the most problematic of all. The objections raised above apply to legal systems as well, but here I focus on the inability of artifact legal theorists to establish that creators *intentionally* create legal systems as *objects* with specified *features/functions*.

Ken Ehrenberg claims law (as a genre or type) is an artifact kind, which includes as subsets legal enactments, legal decisions, and legal systems. It is "correct to think of legal

system as an exemplar of law as a genre" (Ehrenberg 2016: 5 n.11). To identify the intended function of law, he asserts, one must identify the intended functions of individual laws, from which he generalizes to identify the function of law as a genre. Ehrenberg explains: "[B]y seeing law as a kind of artifact, we are imagining that those who create individual enactments do so with an intention in mind about what the enactment is to accomplish. We then hope to gather those functions together and characterize them in a general way as much as possible in order to understand law as an institution" (27, 138, 144).

Identifying the intention behind legal enactments is not the same as the intention behind legal systems. Here is how Ehrenberg ties them together: "legal systems are often self-consciously designed to be frameworks for the creation of individual laws," (17) or alternatively, evolved legal systems emerge as a byproduct of making laws. Since the intended function of laws is coordination and to generate institutions, he asserts, and legal systems produce and apply laws, the *intended function of legal systems is coordination and the generation of institutions*. Thus, Ehrenberg reasons parasitically from the fact that legal systems create laws, to generalize that their function is identical to the function of the aggregate of individual enactments.

When discussing legal rules, legal organizations, and legal systems, one must be careful to avoid either of two fallacies that involve the relationship between parts and wholes. A fallacy of composition is committed if one assumes that, since the function of legal rules is to coordinate behavior, therefore, the function of legal organizations or legal systems is to coordinate behavior; a fallacy of division is committed if one assumes that, since the function of legal systems is to coordinate behavior, therefore, the function of individual legal rules is to coordinate behavior. Wholes and parts can have the same function, but this must be established with respect to each, not simply extrapolated from one direction or the other.

Legal enactments and legal systems are distinct, each (according to artifact legal theory) with its own intentional set of features and/or functions (cf Burazin 2019a: 230-31, 234). A critical difference is that specific legal enactments occur pursuant to concrete intentions (albeit mixed), whereas many existing legal systems evolve over centuries in connection with surrounding factors with no overall constitutive intention. That was Searle's position: "[E]xcept for special cases where legislation is passed or the authorities change the rules of a game, the creation of institutional facts is typically a matter of natural evolution, and there need be no explicit conscious imposition of function" (Searle 1995: 125).

The fact that several different levels of purported legal "artifacts" are involved, with different respective intentions, can be drawn out via Ehrenberg's repeated references to "institutions like hospitals, universities, and legal systems" (2016: 184, 190; 2016: 47, 75). Notice that the items on this list are not parallel: a legal system is not like a hospital or university. Legal system is parallel to health care system and higher education system. A hospital is a particular bureaucratic *organization* with the purpose of providing medical treatment to sick and injured people. Parallels within law to a hospital as an organization is a courthouse, a legislature, a prosecutor's office, a police department, a law firm, etc., each of which has its own orientation, purposes, and constitutive rules, manifested in the intentions and actions of the people who comprise them. *Legal systems* are *not organizations*. Legal system is an abstraction, a label used to encompass many differentiated organizations, each with its own characteristic knowledge, practices, intentions and purposes.

To put the differences in sociological terms, specific laws and judicial decisions are created at the *micro* level (particular situations of action); courts and legislatures operate at the *meso* level (organizations); legal systems are at the *macro* level (large scale phenomena). Micro

phenomena are the easiest to link to constitutive intentions, and meso phenomena are often undergirded by intentional actions, but many macro phenomena are not intentionally created as such. Artifact legal theorists must keep each distinct, tying purported intentional creation to each, because in artifact theory intentions determine the features/functions of artifacts. Burazin offers a direct account of the intentional creation of legal systems, which I take up in a moment.

First, let us examine the function of law identified by Ehrenberg. His book extensively analyzes various theories of law and accounts by legal theorists, including Dworkin, natural law, legal positivism, etc. (though it bears mention here that legal theorists are not intentional creators of laws or legal systems)(Ehrenberg 2017: 180-91). Drawing on these theoretical accounts, he presents two functions. "[O]ne primary function of law is to solve coordination problems" (Ehrenberg 2016: 197). Artifact theory reveals the second function: "The contribution of seeing law as a kind of institutionalized abstract artifact adds to the list the function of setting a framework for the specification, recognition, and protection of contextually bound rights and duties within the widest possible social setting (setting them apart for a particular kind of emphasis), that is, the generation and validation of other institutions" (197). Put more simply, the function of law is to generate other institutions (36). The two functions are compatible, he says, in that creating institutions is an aspect of law's coordination function. (197).

Ehrenberg's identification of law's function departs from artifact theory and does not follow his own proposed method of generalizing law's function from individual legal enactments. Instead, he builds on accounts of the function of law *by theorists*, accounts which were not themselves based on generalizing from *actual* intentions ("in mind") of those who create individual laws. This is a crucial deviation. Since the creator's intention about function is causally tied to the artifact created, "we generally expect that it is the *intention of a creator that*

assigns artifacts their function" (Ehrenberg 2016: 51)(emphasis added). "The imposition or assignment of function is simply the use of an object to fulfill a purpose" (Ehrenberg 2020: 282, describing Searle's account). Makers of chairs know people must be able to sit on what they make and build them to serve this function.

When engaged in making law, judges and legislators typically do not consciously intend to solve coordination problems. Instead, they focus on the content of the law and its various implications and consequences (political, legal, economic, cultural, etc.)—*that* is "the intention in mind about what the enactment is to accomplish." (Ehrenberg 2016: 27). When enacting the Affordable Care Act the expressed intention of legislators was to expand medical insurance coverage—not to solve coordination problems. When deciding whether the liability of manufacturers for injuries to consumers caused by their products should be based on strict liability or negligence, judges' intentions aimed at what they viewed as the correct outcome considering social, economic, fairness, and legal factors and consequences—not at solving coordination problems. Legislators engage in negotiations with other legislators and consult powerful constituencies, while the legislative staff actually draft the legislation (legislators in the US regularly do not actually read the full bills they enact into law, which can run to many hundreds of pages). Judges process cases, hold hearings, decide particular motions that apply law to the facts, and so on, work they divide up with law clerks. While engaging in legal activities, rarely do legal actors consciously think about creating the legal system or its features and functions. Legal officials and actors are immersed in and occupied with immediate legal tasks. Solving coordination problems is the intended purpose of law where coordination is the primary concern (like traffic laws), but modern courts and legislatures issue a limitless array of laws and decisions for a multitude of purposes, the vast bulk of which are designed to achieve

particular objectives at hand. The coordination function of law is a *generalization of legal theorists*, who Ehrenberg relies on for his account, but is not what legal officials actually intend when they create and apply laws.

Here is the main objection in a nutshell: artifact theory for objects invokes genuine intentions, whereas artifact legal theorists project non-existent, or unknown, or unknowable intentions with respect to law in order to satisfy the requirements of artifact theory. They speak of the intentions of the creators of each law, legal institution, and legal system past and present, including evolved versions that originated before memory and records, akin to a fictitious original state of nature. Writing about collective intentionality, philosopher Deborah Tollefsen pertinently observes: "both the summative and nonsummative accounts of group intentionality overlook the fact that our attributions of intentional states to group members are often made in ignorance of the actual intentional states of the members." (Tollefsen 2002: 29). Although Ehrenberg rejects latent functions as inconsistent with artifact theory, it turns out that his attribution of coordination and the creation of institutions as the intended function smacks of latent functions, since these particular purposes are not in the minds of law makers when creating laws (more about latent functions later).

Luka Burazin differs from Ehrenberg in linking intention specifically to the creation of the legal system. "According to the artifact theory of law, legal systems are abstract institutional artifacts. They are artifacts since they are created by authors who have a *particular intention to create the institutional artifact 'legal system*'" (Burazin 2016: 397)(emphasis added). Burazin adds that the community addressed by the legal system must collectively recognize their legal authority and largely comply with the norms (Burazin 2016; 2018). (Contra his second

requirement, I later demonstrate that general obedience is not necessary for a legal system to exist.)

A threshold problem for Burazin's assertion is that legal systems are not unified entities in the sense conveyed by the notion of an artifact. A legal system is an abstraction encompassing congeries of courts, legislatures, prosecutor's offices, defender's offices, legal aid offices, police departments, police unions, public and private prisons, private lawyers and firms, law schools, bar associations, paralegals, case reports, law journals, and more (stenographers, clerks, etc.). The claim that all of the various activities, practices, organizations, and institutions comprising a legal system can be wrapped together as an intentionally created *entity* begs credulity. A courthouse is an organizational entity; a hierarchically organized judicial system is an entity encompassing the courts contained within it; but a legal system is a theoretical projection on many differentiated organizations that comprise complexes of heterarchical networks. (Tamanaha 2021: Chapter 4).

Artifact legal theorists might protest that my portrayal of "legal system" is too broad. Analytical jurisprudents commonly reduce law to a basic positivist account of legal officials following a shared set of rules for determining valid law within a territory (see Ehrenberg 2016: 16-18; Burazin 2016: 397-99; Roversi 2019: 53, 60). With respect to modern state legal systems, however, this account is too narrow. Since legal rules and enactments have meaning within a historically developed corpus of technical legal knowledge and concepts (Philips et. al. 2004) and lawyers must be trained in this body of knowledge, jurists who develop and systematize legal knowledge and law professors who teach law must be included, although often they are not legal officials. In addition, private lawyers serve citizens and entities, although often not themselves legal officials. Without jurists, law professors, and private lawyers, the legal system

is not functional, but adding these participants vastly multiplies and diversifies the intentions within legal systems.

The artifact account fails even if we focus only on legal officials because the specific intentions in their legal activities are oriented toward the *wrong object*. To repeat, for artifact theory, creators have in mind intentions about features and functions that determine the object they are making—with a direct *causal* connection between their intentions and the features of the object created. However, as described above, intentional states of legal actors are oriented toward and engaged in their immediate tasks. Legislators and judges work within *pre-existing institutional structures* contemplating issues at hand based on the balance of considerations, engaging in routine legal actions. The propositional content of their intentions is not about creating the legal system, nor about the coordination function of law. This does not satisfy Burazin's stated "particular intention" to create the legal system.

To answer this objection artifact legal theorists might point to Searle's notion of collective intentionality, described earlier. People engaging in collective actions characteristically have we-intentions oriented to the group activity. When participating in orchestras (a symphony) and football teams (a set play), each player carries out a designated role, knowing that their actions mesh with the roles played by other members, combining in a coordinated we-intended whole. Each person does not need to know in detail what the others are doing (although a quarterback and conductor must). "All one needs to believe is that they share one's collective goal and intend to do their part in achieving that goal" (Searle 2010: 45).

Legal systems are not like a football team or a specific play and not like an orchestra or a particular symphony. A crucial difference (among many) is that the actions of legal officials do not mesh together, and they do not share a collective goal of creating the legal system, whereas

football teams have diagrammed plays and orchestras have symphony scores. Legal officials understand that their actions are connected in various ways: legislators know that the laws they enact are supposed to be enforced and applied by other legal officials; judges are supposed to apply the law enacted by the legislature; the executive, prosecutors, and police, etc., are supposed to carry out and enforce the law. Superficially, perhaps, this resembles we-intention, except that this highly idealized picture masks the reality of disagreement and contestation within, among, and between these groups of legal officials at every level (federal, state, municipal). Various legal officials have different roles, responsibilities, and agendas (including personal and ideological) that generate conflicts. Judges regularly interpret laws in ways different from what legislators intended; prosecutors and police regularly do not enforce legislation as written, and sometimes defy or circumvent judicial orders; state and federal legal officials regularly clash; and so on. The often-mentioned gap between law in books and law in action recognizes that divergences are endemic (Pound 1910). Any football team or orchestra that operates in this fashion would fall apart. Perhaps the best evidence of shared intention is the oath of office that many legal officials swear to uphold the law and perform the duties of their office—but the goal reflected in this oath is a commitment to be bound by the law. A legal system—in the sense of tying together all official legal institutions in a unified whole—is a theoretical abstraction.

To surmount the difficulties with showing intentional creation, several artifact legal theorists either abandon intention or dilute it to the point of meaninglessness. Crowe (2014) and (Burazin 2019a) encompass customary law by dropping intention and shifting to Searle's collective recognition (aside from we-intention) in the community; Roversi (2018: 95-96, 103-06; 2019: 51-2, 58) applies "the term 'intention-rooted' referring to a broad variety of

phenomena, ranging from a specific creative intention to a simple regularity of behavior recognized afterwards as having constituted a legal institution." (Burazin 2019b: 233). Roversi writes, "their nature and content [legal institutions] may not be entirely transparent to us or immediately fixed by actual intentional states in the legal community." (2019: 52). These moves, however, are counter to the thrust of artifact theory that intentional creation causally determines the features/functions of the artifact. Stretching to account for law, they have *de facto* discarded artifact theory, *sub silentio* shifting to social constructionism, discussed in the next Part.

As this critical engagement shows, the required connections between creators, intentions, objects, features, and functions in artifact theory are too narrow and demanding to meet for laws, legal institutions, and legal systems. The necessity for intentional creation, in particular, exhibits a systematic mismatch. There is a reason for this. Although Searle emphasized collective intentionality, he did not mean intentionality in the conscious sense. People operate within institutions that they take for granted, frequently acting in habitual routines, with their intentions not focused on the institutions themselves or on constitutive rules. As Searle observed, "They do not think of private property, and the institutions for allocating among private property, or human rights, or governments as human creations. They tend to think of them as part of the natural order of things, to be taken for granted in the same way they take for granted the weather or the force of gravity" (Searle 2010: 107). Individual actions occur within a pre-intentional, largely un-self-conscious, socially-infused backdrop: "the Background consists of the set of capabilities, dispositions, tendencies, practices, and so on that enable the intentionality to function, and the Network of intentionality consists of the set of beliefs, attitudes, desires, and so on to enable specific intentional states to function, that is, to determine their conditions of satisfaction."

(2010: 155, 31-32; 1995: 127-147). Searle thus offloaded a substantial part of intentionality to the Background of "nonintentional or preintentional capacities that enable intentional states of function" (Searle 1995: 129), which he identified with Wittgenstein on rule following and sociologist Pierre Bourdieu's *habitus* (132). (Habitus is the notion that society is structured through systems of correlated schemes of perceptions, ideas, values, dispositions, and action that are incorporated, practiced, reinforced, and embodied within people. (Marcoulatos 2003: 72-73).) Artifact legal theorists, however, omit this Background.

By centering on intentionality, furthermore, artifact legal theory as well as Searle's collective intentionality cannot account for unintentional consequences or unintended emergent phenomena. Many social phenomena are not specifically collectively intended, though the product of intentional action. The division of labor in society formed as a result of innumerable individual decisions over time (Mead 2002: 106), though it was not intentionally created as such. People do not intentionally create "runs on banks" or business cycles. These are "non-intentional properties," but "they are both systemic and pervasive in social life and history." (Friedman 2006: 75). Unintentional aspects and consequences pervade law. Legal officials and lawyers do not intentionally create barriers to access to law, though it nonetheless exists in many societies owing to the high cost of legal services and limited resources of the poor. Police in the US who detain, search, arrest, and kill black suspects in disproportionately high numbers do not intend to create a discriminatory criminal justice system, though it exists nonetheless. Systematic aspects of law exist that are not intentional, though they have features or functions (discussed later as latent functions).

Artifact legal theory obfuscates important aspects of law. Five problems with this theoretical frame stand out: First, presenting laws, legal institutions, and legal systems as *entities*

(connoting a unified thing) conceptually obscures continuous clashes, disjunctions, disagreements, inconsistencies, variations, multiplicities, and changes within and among them. Second, the object framing eliminates the processual aspects of law: enacting, applying, enforcing, and interpreting law are *processes* involving people doing law stuff within legal practices while influenced by surrounding factors (ideology, social pressure, etc.). Third, the focus on intentionally created features/functions of law analytically imposes a singular intention and function that often does not actually exist as such, while leaving out out unintended aspects, functions, and consequences of law. Fourth, the intentional-creation-object focus of artifact theory does not pick up the socially encrusted sedimentation of law as a tradition interconnected within society with self-perpetuating, path dependent features that enable, shape, and constrain legal actions and change, comprising the pre-existing institutional contexts within which legal officials operate. Finally, construing law itself as an artifact distracts attention from the ways in which actual artifacts—offices, courtrooms, computers, files, memoranda, funding, etc.—constitute the material dimensions of legal activities that help render them socially stable and enduring (Gorski 2016).

Artifact theory is a poor fit for law. This should not be surprising. A theory which holds that legislative acts, judicial decisions, property, legal systems, and so on are artifacts must squeeze complex, heterogeneous, contested, and ever-changing legal phenomena into the same theoretical box as shoes and chairs. Artifact legal theory produces no insights about law that cannot be obtained more immediately from social constructionism. In response to an objection along these lines, Roversi asserts, "An artifact theory of law does not claim to *replace* a socio-ontological, institutional theory of law, but rather proposes to *specify* such a theory, by stating that crucial to an understanding of the nature of law is the process by which abstract artifacts are

constructed on the basis of collective recognition—a process through which legal institutions are hypostatized as abstract artifactual objects." (Roversi 2019: 59). But his response misses the point. Artifact theory is not an edifying specification. Social ontology and social constructionism address the entire social realm, of which artifacts are a subpart but not the whole. The stretching of artifact theory to include legal phenomena takes it outside the domain the theory is best suited to address while also distorting legal phenomena. This move is uncalled for because social ontology and social constructionism already naturally encompass legal institutions with no stretching of the theory or distortions of law.

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