

LAW AS AN ARTIFACT KIND

JONATHAN CROWE*

It is commonly stated that law is an artifact, but this claim is rarely explicitly defended. This article submits this statement to closer examination. I argue that law is not straightforwardly covered by the standard philosophical account of artifacts, since not all laws have authors. However, it is possible to extend the account to include it. I then develop an analysis of law as an artifact kind. I contend that law is best regarded as a special type of artifact, which I call an 'institutional artifact'. On this view, something qualifies as law only if, roughly, it is collectively recognised as law and is constitutively capable of fulfilling law's function as an artifact. I argue that law's function as an artifact is to serve as a deontic marker by creating a sense of social obligation. A putative law that is incapable of performing that function for reasons of form or content therefore fails as law, while a law that is not minimally adapted to that function is legally defective.

I INTRODUCTION

It is often stated that law is an artifact.¹ Many authors take this claim as obvious; it is rarely explicitly defended. Relatively little attention has been paid to its implications for our understanding of law. My aim in this article is to submit this idea to closer examination. I begin by asking whether law truly is an artifact, as that term is understood in the philosophical literature. I argue that law is not straightforwardly covered by the most common definition of an artifact, since not all laws have authors. However, it is possible to extend the definition to include it. This extended definition also has the benefit of covering other unintentionally created artifacts that fall outside the standard account.

I then develop an analysis of law as an artifact kind. I contend that law is best regarded as a special type of artifact, which I call an *institutional artifact*. On this view, something counts as law only if, roughly, it is collectively recognised as law and meets the success conditions for being law. The latter requirement entails that

* Associate Professor, T C Beirne School of Law, University of Queensland. I would like to thank Patrick Emerton, Jeff Goldsworthy, Hillary Nye, Dale Smith, Lael Weis and the anonymous referees for helpful comments. Earlier versions of this article were presented at a Legal Theory Workshop at Melbourne Law School and at the annual meetings of the Australian Society of Legal Philosophy and the Australasian Association of Philosophy. I am grateful to all who participated in the discussions.

1 See, eg, Jules L Coleman and Ori Simchen, "Law" (2003) 9 *Legal Theory* 1; Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 *Oxford Journal of Legal Studies* 663, 666; John Gardner, 'The Legality of Law' (2004) 17 *Ratio Juris* 168; Roger A Shiner, 'Law and Its Normativity' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 417, 424; Timothy Macklem, 'Ideas of Easy Virtue' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 346.

the putative law must be constitutively capable of fulfilling law's function as an artifact. I argue that law's function as an artifact is to serve as a deontic marker by creating a sense of social obligation. A putative law that lacks the basic qualities necessary to perform that function therefore fails as law, while a law that is not minimally adapted to that function is legally defective. A positive law may fail these standards due to either its form or its content.

II THE PROBLEM OF AUTHORSHIP

There are two views of artifacts in the philosophical literature. The orthodox position is that artifact categories like *chair* and *boat*, unlike natural kinds such as *water* and *gold*, have no essential properties.² Rather, they are purely conventional groupings based on family resemblances. However, this orthodox view has recently been challenged by a series of authors who argue that artifact categories are real kinds possessing essential attributes.³ The growing philosophical support for essentialism about artifacts has been mirrored in psychology. A number of cognitive psychologists have recently suggested that artifact categories are better explained as reflecting judgments about the essential or defining properties of objects, rather than as employing cluster concepts.⁴

How might an attempt to capture the essential properties of artifact kinds proceed? The obvious starting point for a philosophical analysis of artifact kinds is the idea that classes of artifacts are related by their function.⁵ However, the

- 2 For the orthodox view, see David Wiggins, *Sameness and Substance* (Blackwell, 1980); David Wiggins, *Sameness and Substance Renewed* (Cambridge University Press, 2001); Peter van Inwagen, *Material Beings* (Cornell University Press, 1990). See also Leiter, above n 1, 666–7.
- 3 See, eg, Lynne Rudder Baker, 'The Ontology of Artifacts' (2004) 7 *Philosophical Explorations* 99; Lynne Rudder Baker, *The Metaphysics of Everyday Life: An Essay in Practical Realism* (Cambridge University Press, 2007); Crawford L Elder, *Real Natures and Familiar Objects* (MIT Press, 2004) ch 7; Crawford L Elder, 'On the Place of Artifacts in Ontology' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 33; Risto Hilpinen, 'Authors and Artifacts' (1993) 93 *Proceedings of the Aristotelian Society* 155; Jerrold Levinson, 'Defining Art Historically' (1979) 19 *British Journal of Aesthetics* 232; Jerrold Levinson, 'Artworks as Artifacts' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 74; Ruth Garrett Millikan, *Language, Thought, and Other Biological Categories: New Foundations for Realism* (MIT Press, 1984); Amie L Thomasson, 'Realism and Human Kinds' (2003) 67 *Philosophy and Phenomenological Research* 580; Amie L Thomasson, 'Metaphysical Arguments against Ordinary Objects' (2006) 56 *The Philosophical Quarterly* 340; Amie L Thomasson, 'Artifacts and Human Concepts' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 52; Amie L Thomasson, *Ordinary Objects* (Oxford University Press, 2007).
- 4 Paul Bloom, 'Intention, History, and Artifact Concepts' (1996) 60 *Cognition* 1; Michelle E Barton and Lloyd K Komatsu, 'Defining Features of Natural Kinds and Artifacts' (1989) 18 *Journal of Psycholinguistic Research* 433. Cf Steven A Sloman and Barbara C Malt, 'Artifacts Are Not Ascribed Essences, nor Are They Treated as Belonging to Kinds' (2003) 18 *Language and Cognitive Processes* 563.
- 5 Cf Hilary Kornblith, 'Referring to Artifacts' (1980) 89 *The Philosophical Review* 109, 112. See also Kenneth M Ehrenberg, 'Defending the Possibility of a Neutral Functional Theory of Law' (2009) 29 *Oxford Journal of Legal Studies* 91; Kenneth Ehrenberg, 'Functions in Jurisprudential Methodology' (2013) 8 *Philosophy Compass* 447.

essential features of an artifact kind cannot be identified simply by reference to either its causal role or its functional capacities. The function of a chair is to support those who sit, but there are many objects that have the role or capacity of supporting those who sit, but which are not chairs. Tables, floors and car bonnets are just a few examples. Furthermore, such an analysis would entail that defective or broken chairs are not members of the kind.

The philosophical literature has therefore moved away from the actual functions of artifact kinds to their *intended* functions. On this view, something is a chair not because people do or can sit on it, but rather because it was created with that function in mind. This yields the claim that, roughly, something counts as an artifact of kind K only if it is successfully created with the intention that it be a K.⁶ Let us call this the *intention theory* of artifact kinds. I will argue in this article for a refined and expanded version of this theory. It will be useful, though, to look first at its applicability to the case of law.

The proposition that law is an artifact strikes many authors as beyond dispute. Brian Leiter goes so far as to say that anyone who wishes to deny that law is an artifact would invite psychological investigation.⁷ There is, however, good reason to wonder whether law satisfies the definition of an artifact typically used by philosophers. Risto Hilpinen, for example, applies the term to ‘the intentional (or intended) products of an agent’s actions’.⁸ He then argues that the concepts of author and artifact are correlative, in the sense that an object is an artifact if and only if it has an author.⁹ This type of definition is widely accepted.¹⁰ Leiter’s own definition of an artifact as ‘something that necessarily owes its existence to human activities intended to create that artefact’ is along similar lines.¹¹

There is, however, an obvious problem in fitting law within this definition. Laws do not always have an author. Legislation and judicial decisions have authors, but customary law does not. Customary law is, rather, the product of human actions without necessarily reflecting human intentions and designs. It arises because certain social conventions are accepted by the community as normatively binding. Any theory that wishes to treat customary law as a species of law therefore has reason to balk at treating law as an artifact. A theory that characterises law as an artifact while also holding that customary law counts as law would have to accept that some artifacts are unintentionally created.

The problem is not merely one of definitional stipulation. We have seen that the general consensus among philosophers who accept the existence of artifact kinds is that members of such kinds are defined in part by the intentions of their authors. Theories of this type are obviously poorly equipped to deal with unintentionally

6 For variations on this position, see Bloom, above n 4; Baker, *The Metaphysics of Everyday Life*, above n 3, ch 3; Levinson, ‘Artworks as Artifacts’, above n 3; Hilpinen, above n 3; Thomasson, ‘Realism and Human Kinds’, above n 3; Thomasson, ‘Artifacts and Human Concepts’, above n 3.

7 Leiter, above n 1, 666.

8 Hilpinen, above n 3, 156.

9 Ibid.

10 See, eg, Thomasson, ‘Realism and Human Kinds’, above n 3, 592–3; Baker, ‘The Ontology of Artifacts’, above n 3, 99; Baker, *The Metaphysics of Everyday Life*, above n 3, 49.

11 Leiter, above n 1, 666.

created artifacts. This limitation is reflected in the intention theory described above. If something counts as a law only if it is successfully created with the intention that it be a law, as the intention theory suggests, then customary law is apparently ruled out.

It is possible to get around this problem by maintaining that customary law only becomes law when reiterated by a legislature or judge. That was what John Austin claimed after defining law as the creation of a sovereign.¹² However, this response seems somewhat artificial. Customary law may play a central role in guiding social action even without clear endorsement by legal officials. It may be recognised as holding legal status by its subjects without ever coming before a formally constituted legal body. This point is perhaps most clearly borne out in the international sphere, where states and non-state organisations frequently refer to customary international law as based on state practice without presupposing its endorsement in a treaty or judicial decision.¹³ A theory of law that cannot accommodate customary law unless endorsed by officials therefore lacks explanatory power compared to one that recognises such norms based on their social standing.

Anyone who wishes to supply a comprehensive account of law as a class of artifact therefore has reason to ask whether unintentionally created artifacts can be included. There are also other reasons why an account of unintentionally created artifacts is philosophically desirable. It is not uncommon for unintentionally created objects to fall under artifact categories. Consider the following case:

Tree Bench: A tree falls down in the middle of a village. Workers in the village begin to regularly use the tree as a place to sit while they eat their lunch. They think and speak about the tree as they would a bench placed there for their use. They say things to each other like, 'I'll meet you on the bench at lunchtime.'

It seems at least plausible that the fallen tree in this example has become a bench.¹⁴ However, its membership of the artifact kind *bench* cannot be traced to an authorial intention. It would be good if we could develop a theory of artifact kinds that is capable of accommodating these sorts of unintentionally created phenomena.

III AUTHORIAL INTENTION

I wish to argue for a theory of artifact kinds that accommodates both intentionally and unintentionally created artifacts. I begin, however, by looking more closely at the role of authorial intention. I said above that, on the leading view of artifact kinds, something counts as an artifact of kind K only if, roughly, it is successfully created with the intention that it be a K. We might unpack this view as follows:

12 John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995) 35.

13 See, eg. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, xxv–li.

14 Cf John R Searle, *The Construction of Social Reality* (Free Press, 1995) 39.

Intention Theory: Something counts as an artifact of kind K only if: (1) it is created with the intention that it be a K (the *Intention Condition*); and (2) it meets the success conditions for being a K (the *Success Condition*).

It bears noting that the intention theory, as set out above, only purports to describe some of the necessary conditions for membership of an artifact kind. The conditions might turn out not to be sufficient.¹⁵ My focus in this Part will mainly fall on the intention condition. I will return to the success condition in due course.

The first question that arises in relation to the intention condition concerns the content of the required intention. What does it mean for an author to create something with the intention that it be, say, a chair? Does it mean that the author must be thinking of other chairs and intending to make something of the same kind? There is some support for this view.¹⁶ However, it would mean that every author of an artifact would be required to have a previous example in mind.¹⁷ This produces a vicious regress. The first person to make, for example, a pavlova was not intending to make something of the same kind as other pavlovas, but the first pavlova is nonetheless a member of that kind.¹⁸ Furthermore, many artifacts were developed independently in different cultures, but are nonetheless the same type of thing. Early chairs in Egypt, Greece and China are members of the same kind.

An intention to copy a previous example is, then, not what is required. The better view seems to be that the author must have some concept of a chair and intend to produce something that conforms to that concept. The intention necessary to make a chair, in other words, should be understood as reflecting the intension of the term ‘chair’, rather than its extension. It follows that the successful creator of an artifact must have some level of understanding of the kind to which her creation belongs. However, it would be wrong to apply this condition too strictly. A person may successfully create a particular type of artifact without being able to supply an exhaustive list of defining properties.

It seems more appropriate to frame the condition in terms of a list of characteristic features. The creator must have in mind a sufficient list of such features to count as a concept of the artifact and intend her creation largely to comply with it. There is reason to think that not all characteristic features of artifacts are equally salient. We saw previously that functional properties seem to be particularly important. This intuition is borne out by psychological evidence. A recent study showed that functional attributes are viewed as far more salient than physical and structural features in classifying objects as members of artifact categories, while the opposite holds for natural kinds.¹⁹

15 Cf Thomasson, ‘Realism and Human Kinds’, above n 3, 601–2.

16 Bloom, above n 4, 23–4.

17 Cf Thomasson, ‘Realism and Human Kinds’, above n 3, 595–6.

18 The pavlova is an Antipodean dessert consisting of cream and fruit served on a very large meringue. The inventor of the pavlova is a matter of some controversy between Australia and New Zealand. I will not enter into that debate here.

19 See Barton and Komatsu, above n 4.

We might therefore frame the intention required to successfully create an artifact in terms of what has been called a ‘function+’ concept of an artifact²⁰ — that is, a concept comprising the characteristic function of the artifact plus other features salient to that kind. These other features might include characteristic properties related to matters such as appearance, structure, method of creation and mode of operation. The creator of a chair, then, must have in mind a list of salient features of a chair that includes both its characteristic function (providing support for one or two people to sit) and other characteristic properties such as structure (having a seat and raised back) and appearance. She must then intend to create something that substantially complies with this concept.

The correspondence between concept and intention must be substantial, but not necessarily complete. For example, the manufacturer of a novelty chair may intend to make something that fulfils the function of a chair, but does not look like a typical chair. Likewise, the creator of a purely decorative chair may intend to make an object that has the structure and appearance of a chair, but is not designed to support a seated person. These intentions would each be sufficient to satisfy the intention condition for ‘chairhood’. This analysis extends readily to the first makers of chairs. They did not necessarily model their creations on existing chairs, but they intended to make items that largely corresponded to a list of what we would now recognise as salient features of a chair.

The version of the intention theory presented above has explanatory advantages over the traditional view of artifact kinds as cluster concepts. A cluster concept view of artifact categories suggests that something will be classed as a chair if it has a sufficient number of a cluster of properties associated with the concept. However, we saw above that functional properties are more important than other properties in classifying artifacts. An object that performs the function of a particular type of artifact while lacking most of its other characteristic properties may nonetheless count as a clear and obvious example of that class. More generally, the cluster concept view has a problem explaining our ability to classify highly innovative members of artifact classes. There are many clear and obvious members of artifact categories that nonetheless lack important features of paradigmatic examples. These innovative examples are more readily connected to other members of the class by reference to authorial intention than through a criterial concept.

Many hotels nowadays, for example, have rooms that open by inserting an encoded plastic card in a slot in the door.²¹ These cards are commonly described and regarded as keys. However, their membership of the artifact class *key* cannot be readily explained by reference to a corresponding cluster concept. They lack most of the usual aesthetic and structural features of keys. Nonetheless, their identity as keys is obvious and uncontroversial; they are not borderline or defective examples. The intention theory explains this. The makers of key cards had in mind a list

20 Massimiliano Carrara and Pieter E Vermaas, ‘The Fine-Grained Metaphysics of Artifactual and Biological Functional Kinds’ (2009) 169 *Synthese* 125, 131–2.

21 See Bloom, above n 4, 14.

of salient features of keys including both their function and other characteristic features. They intended to make something that substantially corresponded to that concept. They therefore had the right intention for creating keys, even though the items they produced bore little resemblance to existing keys.

An appropriate authorial intention is a necessary condition for artifact kind membership on the intention theory. However, it is not sufficient. A person may have the intention to successfully produce a chair, but nonetheless fail to do so. Something may go badly wrong. This is where the success condition enters the picture. The success condition is not meant to rule out the possibility of defective examples of a kind. However, it allows for the possibility that a person might have the right kind of intention to create a particular sort of artifact, but nonetheless ultimately fail to do so.

I will examine the success condition in detail later in this article. I will argue in that Part that a putative member of an artifact kind fails the success condition if it is constitutively incapable of performing the characteristic function of members of that kind. The success condition must allow for defective members of a kind; it is therefore only meant to rule out fundamental failures, as opposed to flawed examples. There will be good and bad examples of any artifact kind, but some things are not even in the ballpark. They are not even the right type of thing to be a member of that kind.

Consider the following example:

Air Chair: I decide to invent a new type of chair. My plan is to create a small but powerful fan that will produce a cushion of air sufficiently stable to support a seated person. After a great deal of effort, I make a device I believe will function as planned. However, when I switch it on, the air stream is nowhere near stable enough to support somebody's weight.

It seems right to say here that I had the appropriate intention for creating a chair. If I had succeeded in my plan, my invention would have counted as a chair, even though it would have borne little resemblance to most existing chairs. However, I failed so badly that I did not even produce a defective chair. My device turned out to be not even the right kind of thing to count as a chair. I therefore produced no chair at all.

IV SOCIAL ACCEPTANCE

The previous Part advanced a version of the intention theory of artifact kinds that fleshes out the intention and success conditions. However, the account still only covers intentionally created artifacts. Customary law, which is not deliberately created or planned, cannot satisfy the intention condition. The same applies to the fallen tree that comes to be used as a bench. Nonetheless, these unintentionally created phenomena seem to be members of the same kinds as intentionally created laws and benches. It would be good if our theory of artifact kinds could accommodate these types of examples.

I wish to suggest a possible way of extending the intention theory to cover unintentionally created artifacts. My suggestion draws on the theory of institutional facts proposed by John Searle.²² Institutional facts, for Searle, arise ‘when we collectively impose a function on a phenomenon whose physical composition is insufficient to guarantee the performance of the function’.²³ Money, for example, owes its existence to collective acceptance of its function as a medium of economic exchange. If this collective acceptance did not exist, ten-dollar notes, for example, would just be pieces of paper.

Searle views institutional facts as created by the collective acceptance of constitutive rules of the form ‘X counts as Y in context C’.²⁴ The institutional facts exist only in virtue of these rules. The rules are manifested by a kind of collective intention towards the relevant phenomena. Searle says this collective intention involves the ‘acknowledgement of a new *status* to which a *function* is assigned’.²⁵ The constitutive rules of money, for example, assign to notes and coins a status (money) associated with a function (serving as a medium of exchange). Searle calls this combination ‘*status functions*’.²⁶

Some status functions are conferred upon individual entities, while others are conferred on classes.²⁷ Suppose Keziah is recognised as chairperson of a meeting. She holds that post as an individual and not because she fulfils certain criteria. The constitutive rule will then be ‘Keziah counts as chairperson in this meeting’. Money, by contrast, receives its status function as a class. It is not that every bank note is individually recognised as money. Rather, notes belong to a class of thing that is collectively accepted as having that status. This explains why a note that falls from the presses into a crack in the floor is still money.²⁸ It lies within a rule of the type ‘items of a certain sort count as money in Australia’.

Searle’s theory of institutional facts allows us to explain how something can count as a particular type of artifact without being intentionally created as a member of that kind. It does not, however, provide a complete account of unintentionally created artifacts. A tree that becomes a bench, as in the example discussed previously, does not strictly fall within Searle’s theory of institutional facts. This is because the tree is capable of performing the function of a bench by virtue of its physical form alone.²⁹

22 See especially Searle, *The Construction of Social Reality*, above n 14; John R Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press, 2010). For discussion of the relevance of Searle’s theory to law, see Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Reidel, 1986) 21–4; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 11–12; Massimo La Torre, *Law as Institution* (Springer, 2010) ch 4.

23 Searle, *The Construction of Social Reality*, above n 14, 124.

24 *Ibid* 28.

25 *Ibid* 40 (emphasis in original).

26 *Ibid* 41 (emphasis in original).

27 *Ibid* 32–3.

28 *Ibid* 32.

29 *Ibid* 41.

Nonetheless, it seems plausible that what makes the tree a bench is not merely its physical form or even the fact that people may sit on it from time to time. It is not the case that anything people choose to sit on becomes a bench, even if it possesses many of the salient features normally attributed to benches. Rather, its membership of the artifact kind *bench* arises when it is collectively accepted as a member of that kind. Its status as a bench is a matter of social fact involving the collective assignment of a status (bench) associated with a function (serving as a seat for multiple people).

The fallen tree in this example therefore owes its status as a bench to collective acceptance. It does not, however, owe its function to collective acceptance in the same way as money. If the tree were not recognised as a bench, people would still be able to sit on it. Nonetheless, the collective acceptance of the tree as a bench gives it a new *status function* — it means that the item's status and function are now linked. It is no longer just a tree that people happen to sit on at lunchtime. Rather, it is collectively recognised as the *kind of thing* that characteristically performs that role.

We can therefore build on Searle's theory to recognise two different classes of unintentionally created artifacts. Let us say that an *institutional artifact*, such as money, owes both its status and its function to collective acceptance. It could not perform its function if it were not collectively recognised as a member of the relevant artifact kind. A *social artifact*, on the other hand, owes its status but not its function to collective acceptance. If it were not collectively viewed as a member of the kind, it could still play its functional role, but it would not possess the associated status.

The case of law raises a further complication. Searle's theory of institutional facts is mainly concerned with the imposition of new status functions upon existing material objects.³⁰ Money, for example, is created by imposing a status function on bits of paper and metal.³¹ Some artifacts, however, do not fit neatly within this framework. Laws, for example, are not typically created by imposing a new status function upon existing objects. Rather, the performance of particular actions and utterances generates norms that are collectively accepted as law. The norms are not identical to the actions and utterances that produced them. It may therefore appear that laws do not fit Searle's model.³²

The problem, however, turns out to be illusory. Searle's account treats institutional artifacts, such as money, as arising from collective attitudes towards material phenomena. The material phenomena in question are often objects. A piece of paper, for example, is interpreted as money. However, they can just as well be events. We can therefore say that particular sorts of actions and utterances are collectively understood as giving rise to legal norms. These norms are not

30 Ibid 57.

31 Searle also discusses the example of electronic money, but he treats this as the imposition of a status function on electronically stored information: *ibid* 34–5.

32 For an argument to this effect, see Thomasson, 'Realism and Human Kinds', above n 3, 587.

identical to the actions and utterances, but they are interpretations of them.³³ They are the product of collective attitudes towards material phenomena in much the same way as the institutional artifacts such as money.

This analysis enables us to treat customary law as an institutional artifact. Customary law, as we noted previously, is not created with the intention that it be law. It is, however, collectively accepted as law by virtue of a constitutive rule. This constitutive rule interprets particular social practices as generating norms and assigns those norms both the status of law and the function of guiding community action. The social practices would not generate norms and therefore could not guide action in the absence of collective recognition. This shows that customary law is an institutional artifact, in the sense described above. It depends on collective attitudes for both its status and its function.

The content of the collective acceptance that is necessary to make something a member of an artifact kind plausibly mirrors the content of the intention required by the intention theory discussed above. Let us say that something counts as an institutional or social artifact of kind K only if: (a) members of a social group have in mind a function+ concept of K that includes both its characteristic function and a range of other salient features; and (b) the item in question is collectively accepted as largely complying with that concept. The salient features included in the concept may cover such matters as typical form, structure, origins and operation. A fallen tree, then, becomes a bench only if a social group has an appropriate concept of a bench and accepts the tree as largely meeting it.

Collective acceptance, on this view, can transform an appropriate phenomenon into a member of an artifact kind. However, it cannot make just anything into a member of a kind. We saw previously that success conditions are a necessary part of the intentional account. This is because mere authorial intention cannot transform a seriously flawed attempt to create a particular type of artifact into a success. The author must succeed in producing the right basic type of thing to be a member of the kind. A similar point applies to collective acceptance. Something that is constitutively incapable of being a bench cannot become a bench through collective recognition. It does not matter if everyone thinks something is a bench, if it is the wrong basic type of thing to be one.

V THE INTENTION-ACCEPTANCE THEORY

We have now identified two categories of unintentionally created artifacts that fall outside the intention theory: institutional artifacts and social artifacts. The preceding analysis of these notions can be summarised as follows:

Acceptance Theory: Something counts as an institutional or social artifact of kind K only if: (1) it is collectively accepted as a K (the *Acceptance Condition*); and (2) it meets the success conditions for being a K (the *Success Condition*).

33 Cf Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) 5–10.

The acceptance theory accommodates unintentionally created artifacts. It is not, however, a complete theory of artifact kinds. The intention theory still provides a better explanation for the kind membership of intentionally created artifacts. Recall, for example, my quest to invent an air chair. Suppose I rework my design and, this time, succeed in creating a working prototype. The prototype is in my garage and nobody else has seen it. The prototype seems to count as a chair. However, the best explanation for this is not that it is collectively accepted as a chair, either individually or as part of a class, but that it was successfully constructed with the intention that it be a chair. It was not assigned its status and function by social consensus, but by me as its creator.

It seems plausible that we recognise intentionally created artifacts as members of kinds primarily by reconstructing the intentions behind them. We make an assessment, either intuitively or reflectively, of what type of artifact the item is intended to be and, provided that it is the right kind of thing to fall within that category, we count it as a member of the relevant kind.³⁴ We do not typically rely on social acceptance to mediate this process, which explains why we are often able to accurately and quickly classify new or unconventional members of a kind (such as the air chair or hotel key cards discussed previously). Unintentionally created artifacts are an exception to this usual account. In such cases, we rely on a type of collective intention to assign the object's status.

It therefore makes sense to combine the intention and acceptance theories of artifact kinds. This produces the following view:

Intention-Acceptance Theory: Something counts as an artifact of kind K only if: (1A) it is created with the intention that it be a K (the *Intention Condition*); or (1B) it is collectively accepted as a K (the *Acceptance Condition*); and (2) it meets the success conditions for being a K (the *Success Condition*).

The intention-acceptance theory, unlike the intention theory considered alone, applies to both intentionally and unintentionally created artifacts. It therefore enables us to state without equivocation that law is an artifact.

It is worth noting here a distinctive feature of institutional artifacts, such as law and money. Institutional artifacts can be either intentionally or unintentionally created. In both cases, however, their existence depends on collective acceptance. We saw above that, on Searle's account of institutional facts, an intentionally created ten-dollar note owes its existence as money to collective acceptance of its function as a medium of economic exchange. Otherwise, it would just be a piece of paper. Similarly, a legal norm stated in legislation or a judicial opinion owes its existence as law to collective acceptance of a constitutive rule assigning it both the status of law and the function of guiding action.

It is therefore a success condition of intentionally created institutional artifacts that they be collectively accepted as members of the relevant kind. In the case

34 For an outline of how this classification process might operate at an intuitive level, see Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 103.

of institutional artifacts, in other words, the intention and acceptance theories effectively converge. An object that is created with the intention that it be an institutional artifact of kind K must be collectively accepted as a K to count as a member of that kind. On the other hand, an object that is not intended to be a K may become an unintentionally created K through collective acceptance. The acceptance and success conditions are therefore sufficient to capture the basic requirements for an entity to count as an institutional artifact.

VI SUCCESS CONDITIONS

I have emphasised throughout this article that both intentionally and unintentionally created objects must satisfy the success condition in order to count as members of a particular artifact kind. Authorial intention or collective acceptance alone is not enough.³⁵ I said before that the success condition reflects the idea that something counts as an artifact of kind K only if it is the right type of thing to be a K. Somebody who intends to create a K, but produces the wrong kind of thing to be a K, will end up with something that is no K at all. This analysis raises the following important question: how do we assess whether something is the right kind of thing to count as a member of an artifact kind?

Proper constitution has long been viewed as relevant to kind membership. Aristotle, for example, has this to say:

no hand of bronze or wood or constituted in any but the appropriate way can possibly be a hand in more than name. For like a physician in a painting, or like a flute in a sculpture, in spite of its name it will be unable to do the office which that name implies ... If a piece of wood is to be split with an axe, the axe must of necessity be hard; and, if hard, must of necessity be made of bronze or iron. Now exactly in the same way the body, which like the axe is an instrument ... if it is to do its work, must of necessity be of such and such a character, and made of such and such materials.³⁶

It is not my intention to offer an interpretation or defence of Aristotle's reasoning here.³⁷ However, the central idea seems similar to the account of the success condition offered above. Aristotle argues that a 'hand of bronze or wood' will be the wrong type of thing to be a hand. This is presumably because it cannot perform a hand's function of grasping objects. A failure to meet this condition would result in something that is a hand in name only. It would be like a flute in

35 The role of success conditions has been largely neglected in previous discussions of law as a social institution. Authors such as MacCormick, Weinberger and La Torre recognise that law derives its existence and content from collective acceptance of institutional facts. However, they fail to consider the analogies between normative social institutions, such as law, and other classes of human artifacts. As a result, they provide no detailed account of the role of functional attributes in constraining the composition of social kinds. See MacCormick and Weinberger, above n 22, chs 1–2; MacCormick, above n 22, chs 1–2; La Torre, above n 22, ch 4.

36 Aristotle, 'Parts of Animals' (William Ogle trans) in Richard McKeon (ed), *The Basic Works of Aristotle* (Random House, 1941) 643, 647–50 [Bk 1, Pt 1, 640b35–641a2, 642a10–14].

37 I will not go so far as to say 'I do not care what Aristotle thought', but precisely what he thought is not relevant here. Cf Germain Grisez, 'Natural Law and Natural Inclinations: Some Comments and Clarifications' (1987) 61 *New Scholasticism* 307, 308.

a sculpture — it would resemble a hand without actually being one. Similarly, an object that is not hard will be the wrong kind of thing to be an axe. This is because it cannot perform an axe's function of splitting wood. Aristotle therefore links the existence conditions of artifact kinds with their characteristic functions.³⁸

Aristotle's analysis suggests that something fails to count as a member of artifact kind K if it is constitutively incapable of performing the characteristic function of members of that kind. We might unpack this idea as follows. Let us call K's function as an artifact the *K-function*. An item that is capable of performing the K-function is K-apt. K-aptness is a necessary but not sufficient condition for something to be a K. An entity that is K-apt will then count as a K if it fulfils the intention or the acceptance condition. It is worth emphasising that, on this account, it is neither a necessary nor a sufficient condition for K-hood that something plays the K-function or, indeed, is intended to play the K-function.³⁹ It is only necessary that it be constitutively capable of performing the K-function. The precise criteria entailed by this requirement will depend upon the function in question.

It will be useful at this point to look more closely at the concept of a function as applied to artifact kinds. The K-function can be understood as a *characteristic causal attribute* of members of the kind. It is part of the concept of a function that an artifact of a given kind typically plays a certain causal role. However, not all the causal attributes of an artifact relate to its function. Some of them are merely incidental. It is tempting to say that the function of an intentionally created artifact reflects the causal role its creator *intends* it to play, but a more subtle account is needed to distinguish the function of an artifact from foreseen or intended side effects. The designer of a pistol foresees that it will expel spent bullet casings, but the expulsion of spent shells is not part of the function of the pistol. The function of a pistol is, rather, to project bullets towards a target. The expulsion of spent shells is merely incidental to that function (notwithstanding that pistol designers may expend significant effort to ensure shells are ejected in an optimal manner).

The function of an artifact, then, does not simply reflect the item's actual or intended causal role.⁴⁰ It seems more illuminating to say that an artifact's function itself plays a particular causal role in both our *explanations* of the artifact's kind membership and our *evaluations* of its success or failure as an example of its kind. We have seen in the previous Parts of this article how functions play a central role in explaining membership of artifact kinds. I argued above that something counts as an artifact of kind K only if its creator or members of the relevant social group both hold a function+ concept of K and accept the item as largely fulfilling that concept. The type of intention or social acceptance that is necessary to give rise to a K is therefore partly defined by reference to the K-function.

Artifact functions also play an evaluative role. They are not, of course, the only standards by which artifacts are evaluated. The function of a pistol is to direct

38 For present purposes, we can set aside his treatment of non-artifact kinds, such as hands.

39 For discussion of the problems faced by theories of law and other artifacts that treat functions as necessary or sufficient conditions for kind membership, see Ehrenberg, 'Functions in Jurisprudential Methodology', above n 5, 452.

40 Cf Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 165.

bullets towards a target, but a pistol that shoots accurately is nonetheless deficient if it discharges spent shell casings directly into the shooter's face. Artifact functions, however, play a particularly *fundamental* evaluative role, insofar as they enable artifacts to be placed on a continuum ranging all the way from complete failures to paradigmatic examples. Furthermore, evaluations of artifacts based on their functions tend to play a particularly *salient* role in conditional evaluative descriptions such as 'an excellent chair', 'a poor pistol' and so forth. A pistol that is wildly inaccurate over ten yards is a poor pistol, even if it has many other desirable attributes. However, a pistol that ejects spent shells directly into the shooter's face, but is nonetheless extremely accurate at fifty yards seems to be a good pistol with a flaw.

The function of an artifact of kind K, then, is a characteristic causal attribute of Ks which is both: (a) an essential component of any adequate explanation of why a K counts as a member of the kind; and (b) a fundamental evaluative standard for judging a K as a more or less successful example of the kind. The function of a chair, for example, is to be sat upon. This is a characteristic causal feature of chairs that plays a fundamental role in both explaining why something is a chair (as we saw in relation to the air chair example discussed above) and evaluating something as a good or bad chair.

It is not a necessary condition of 'chairhood' that something either plays or is intended to play the chair-function. We saw previously that a decorative chair, which is not intended to be sat upon, is still a chair. It counts as a chair because its creator had in mind an appropriate function+ concept of a chair and intended to create something that largely complied with that concept. However, even a decorative chair must meet the minimum constitutive conditions for 'chairhood'. It must be constitutively capable of performing the chair-function. An item with the appearance of a chair that is so fragile it would collapse if sat upon by even the lightest person is not a chair. Rather, we would call it a model chair. The word *model* in this context is an alienans. A model chair is really no chair at all.

Similarly, an object such as a tree stump could become a chair if it is collectively accepted as being the right kind of thing to be a chair and having some of the characteristics of a chair. A tree stump that everyone habitually regarded as a chair might come to count as a chair even if nobody ever actually sat on it. Imagine that it is one of a large group of appropriately shaped tree stumps that workers sit on at lunchtime, but by coincidence nobody ever sits on that one. However, a tree stump can only count as a chair if it is, in fact, constitutively capable of performing the chair-function. Imagine a tree stump that appears at first glance to be solid, but in fact is completely hollow. If everyone regarded it as a chair, that would not make it a chair. It is not the right kind of thing to be one.

VII LEGAL FAILURES

We are now in a position to begin applying the preceding discussion to law. The intention-acceptance theory, as applied to institutional artifacts, suggests that something counts as law only if: (a) members of the relevant social group have in mind a concept of law that includes its characteristic function and a range of other

salient features; and (b) the thing in question is collectively accepted as largely complying with that concept. The concept of law in a particular community, on this view, will be like other artifact concepts in comprising a characteristic function and a range of other typical (but not necessary or sufficient) qualities. The typical features incorporated into the concept of law might cover such diverse matters as form and structure, origins and sources, normative weight, scope of application, claims to authority and modes of promulgation and enforcement.

I wish to focus particularly at this point on law's function as an artifact. The function of law, on the general account of artifact functions outlined above, is a characteristic causal attribute of laws that both helps to explain why laws are socially accepted as members of the kind and plays a fundamental role in evaluating good and bad examples. I argued above that law, like money, can be understood as a kind of institutional artifact. The primary function of money is to serve as a medium of exchange.⁴¹ Money is able to fulfil this function primarily by virtue of social acceptance. We can analyse the function of law in a similar way. The function of law is to serve as a deontic marker — it marks the boundaries of permissible social conduct. Law is able to fulfil this function by virtue of social acceptance. It is generally regarded by members of the community as conferring obligations.

Searle discusses the example of a boundary marked by signposts.⁴² He invites us to imagine a tribe that builds a wall around its territory. The wall initially serves as a boundary by imposing a physical barrier to movement. However, over time the wall erodes until all that is left is a line of stones. Nonetheless, local inhabitants continue to treat the stones as marking a boundary and modify their behaviour accordingly. The wall, Searle notes, has evolved from a physical barrier to a symbolic barrier. However, it is still able to play its original function, provided that it is socially recognised. The wall was an intentionally created artifact, but the boundary markers are an institutional artifact.

Searle's example illustrates two ways that law might mark the boundaries of acceptable social conduct. One way is through coercion or threats. Law, understood on this model, would be like wall constructed by the tribe. It would serve as a physical barrier to transgressive conduct. This model of law resembles that found in the work of Austin. However, it was famously criticised by H L A Hart. Hart identifies 'the primary function of the law' as 'guiding the conduct of its subjects'.⁴³ However, he notes that law fulfils this function not primarily through threats of force, but rather by creating a sense of obligation.⁴⁴ This point has important implications for the mechanisms by which law guides behaviour. Laws aim not only to set boundaries on human conduct, but also to serve as 'standards of criticism of such conduct'.⁴⁵ People view laws as giving them

41 See, eg, Ludwig von Mises, *The Theory of Money and Credit* (H E Batson trans, Jonathan Cape, 1934) ch 1.

42 Searle, *The Construction of Social Reality*, above n 14, 39–40.

43 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 249.

44 *Ibid* 57.

45 *Ibid* 249.

genuine obligations to act in specific ways, not merely as forcing or manipulating them to do so.⁴⁶

A similar idea is expressed in Joseph Raz's argument that law claims legitimate authority.⁴⁷ Raz sees law's claim to authority as involving the claim that 'legal requirements are morally binding, that is that legal obligations are real (moral) obligations arising out of the law'.⁴⁸ Law is presented by legal officials not merely as guiding people's conduct, but as holding genuine normative force. Furthermore, people tend to accept standards as having the status of law not merely because they are actually followed, but on the assumption that they *ought* to be followed. The formation of a norm of customary international law therefore requires not only state practice, but also a sense of obligation.⁴⁹ This is what distinguishes law and other normative standards from mere habits.⁵⁰

I therefore propose that law's function as an artifact is to serve as a deontic marker by creating a sense of social obligation. The view that law's function is to serve as a deontic marker helps to explain the social understanding of law as presenting obligations. We evaluate something as a law based partly on whether it is generally accepted as placing restrictions on conduct. This analysis also provides a plausible standard for evaluating good and bad examples of law. A law that is generally accepted as a guide for conduct is, *ipso facto*, a better law than one that does not. The concept of law, then, contains an internal standard by which we can evaluate specific examples as better or worse at fulfilling their function. The preceding analysis of law's function also enables us to identify the success conditions for law. A putative law will be constitutively incapable of fulfilling its function if it is incapable of being generally accepted as binding by members of the community.

What sorts of features might render a putative law incapable of being generally accepted as binding? We can begin by focusing on the formal attributes of law. Consider a putative legal enactment that is incomprehensible, imposes contradictory requirements or is otherwise impossible to follow.⁵¹ An enactment of this type indicates no clear course of action and therefore cannot create a sense of social obligation. Imagine that the boundary markers in Searle's example decayed to such an extent that they could not be identified. They would then be incapable of shaping social behaviour by serving as a symbolic boundary. A similar analysis applies to standards that are incapable of being followed. They will be unable to

46 Ibid 82–3.

47 See Raz, *The Authority of Law*, above n 40, ch 2. For a discussion of Raz, see Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775, 785–6.

48 J Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 *Oxford Journal of Legal Studies* 123, 131. See also Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281, 287–8; Robert Alexy, 'The Dual Nature of Law' (2010) 23 *Ratio Juris* 167, 177.

49 See generally James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2013) 23–30; Henckaerts and Doswald-Beck, above n 13, xxxix–xliv.

50 Hart, above n 43, 89–90.

51 Cf Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) ch 2.

impose deontic restrictions on social behaviour. A putative law of this kind cannot play the law-function and is therefore incapable of counting as law.⁵²

A putative law could also be incapable of creating a general sense of social obligation due to its content. Consider this example:

Eldest Child Act. The legislature passes an enactment that requires all parents to immediately kill their eldest child or pay a nominal fine.

The people to whom this legislation is directed will have strong independent reasons (both moral and prudential) not to comply with it. It seems plausible that a law of this kind is so contrary to ordinary human motivations that it would be incapable of gaining the status of a social rule in the sense described by Hart. A law that is so unjust or unreasonable that it is incapable of engaging human motivations to the extent necessary to become generally accepted as binding will therefore be incapable of performing law's function as an artifact. It will be the wrong type of thing to qualify as law.

There are, of course, many examples in human history where heinous and repugnant laws have nonetheless succeeded in gaining widespread acceptance within the community. The category of putative laws covered by the above analysis may not therefore be very extensive. The capacity of a standard to be generally viewed as binding will, however, depend upon both the content of the standard and the nature of the community in question. A flourishing human community that values and respects its most vulnerable members will be less likely to produce an environment where a deeply unjust law can gain social acceptance. A community of this kind will raise the bar for putative laws to fulfil their function and thereby increase the likelihood of unjust standards failing to qualify as law.

VIII LEGAL DEFECTS

I argued above that a putative member of an artifact kind K that is not constitutively capable of performing the K-function is no K at all. However, this is still a fairly minimal requirement. There are plenty of artifacts that perform their functions only poorly, but which still qualify as members of the relevant kind. A broken alarm clock is still an alarm clock; a book that is very hard to decipher is still a book.⁵³ Any account of the minimum conditions for artifact kind membership needs to leave room for defective cases, as well as examples along the continuum between defectiveness and excellence.

52 The argument advanced here therefore vindicates Lon Fuller's well known claim that a putative law that fails to respect certain minimal procedural standards is unable to play the function of subjecting human conduct to rules and should therefore be regarded as legally invalid. See *ibid* 38–40. For further discussion, see Jonathan Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' (2014) 5 *Jurisprudence* 109.

53 See, eg, Georg Wilhelm Friedrich Hegel, *Phenomenology of Spirit* (A V Miller trans, Oxford University Press, 1977).

Let us say that an artifact is defective if it is *not minimally adapted* to performing its function. Artifacts can be defective in at least two different ways. Some artifacts are defective because they perform their functions only inconsistently, as in the case of an alarm clock that only goes off about half the time or a tennis racquet that is so misshapen that it often fails to produce an accurate shot. Other artifacts are defective because they perform their functions consistently, but do so in a manner that calls into question their fitness for the purpose. Compare a bucket with holes in the bottom or a book where the print is so blurred that it is almost impossible to read. These kinds of artifacts are flawed in such a fundamental way that their basic suitability is undermined.

This account of defectiveness is neutral between intentionally and unintentionally created artifacts. It is tempting to say in the case of intentionally created artifacts that an artifact is defective if it does not function as designed. However, this is both too wide and too narrow. An artifact is not defective just because it does not work exactly as intended. Consider an artifact that succeeds in fulfilling its intended function by operating in a way its designer did not envisage. Furthermore, an artifact built according to a cheap and unambitious design may still be defective, even though it functions precisely as intended. Finally, it seems that unintentionally created artifacts can be defective in at least some cases. Consider a fallen tree that comes to be recognised as a bench by local workers, notwithstanding the fact that it is uncomfortable to sit upon. This seems to be a defect in the bench, although it does not represent a deviation from any intentional plan.

Artifacts, then, can be viewed as lying along a continuum in terms of how reliably and effectively they play their function. At one extreme, there are putative artifacts that are not even the right kind of thing to fulfil their role. I have argued that these fail to qualify as members of the relevant kind. Next, there are artifacts that qualify as members of the kind, but are not minimally adapted to performing their function, because they are unreliable or otherwise badly deficient. These are defective examples of the kind in question. Once we move beyond the category of defective artifacts, there are a variety of cases that fulfil their function more or less well. Some are poor examples, others are good and some are excellent. Finally, there are paradigmatic cases of artifact kinds, which fulfil their function in an exemplary fashion. These are held up as setting a standard by which other examples of the kind may be judged and which future creators should seek to emulate.⁵⁴

How does this account of defectiveness in artifacts apply to the case of law? I argued above that a putative law that is not capable of being generally accepted as binding is not the right kind of thing to play the law-function. It is therefore

54 John Finnis argues that an enquiry into the nature of law should begin with the paradigmatic case of law and laws that depart from this model are defective. See John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) ch 1. However, artifacts such as law are not defective merely because they diverge from the paradigmatic case. Defectiveness is a more demanding concept than Finnis recognises. Cf Mark C Murphy, 'Defect and Deviance in Natural Law Jurisprudence' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, 2012) 45, 50–1.

no law at all. Some laws may fulfil this requirement, but are nonetheless poorly adapted to creating a sense of social obligation. This may be for reasons of form. Consider, for example, a law that is so badly drafted that it is extremely difficult to follow. It may also be for reasons of content. I argued previously that a deeply unjust standard, such as the hypothetical *Eldest Child Act*, may be incapable of gaining acceptance and is therefore the wrong kind of thing to count as law. Moderately or mildly unjust laws, by contrast, may not be incapable of creating a sense of obligation, but their level of injustice will nonetheless be salient in evaluating their suitability for that role.

Some laws give their subjects positive reasons to comply with them. Let us say these laws are *backed by reasons*. A normative standard may come to be backed by reasons in two distinct ways. A normative standard is *supported by* reasons if it instructs people to do something they have independent reason to do. Suppose, for example, that you are extremely hungry and I tell you to have something to eat. I am telling you to do something you have reason to do anyway. A standard *supplies* reasons, by contrast, if it gives you reasons that you would not otherwise have. Suppose you are not hungry at all, but I tell you to have something to eat, otherwise I will beat you up. My threat gives you a new reason to act in the prescribed way. Laws will generally be better suited to perform their function as artifacts if they are backed by reasons in one or both of these ways, since this will assist them in gaining a sense of obligation. There is, then, a sense in which a law backed by reasons is a better law than one that is not. This is an evaluative standard internal to the concept of law.

Some laws, on the other hand, present their subjects with positive reasons *not* to comply with them. Let us say these laws are *opposed by reasons*. This, too, might happen in two distinct ways, mirroring the categories outlined above. A normative standard is *undermined by* reasons if it instructs people to do something they have independent reason not to do. This is true of all laws to some extent, insofar as they require people to temper their self-interest, but some laws have more weighty reasons opposing them than others. Alternatively, a standard might *supply* its own internal reasons for non-compliance, in the sense examined previously (for example, by imposing a heavy administrative burden). Laws will generally be less well suited to perform their function if they are opposed by strong reasons of one or both kinds, since this will hinder them in gaining a sense of obligation. There is, then, a sense in which a law opposed by weighty reasons is a worse law than one that is not.

The overall suitability of a law to become generally accepted as binding will depend in part on the balance of reasons for and against compliance. We saw above that some laws, like the hypothetical *Eldest Child Act*, have such strong reasons opposing them that they are incapable of creating a sense of social obligation. The same could be true of a law that perversely supplies its own very weighty reasons for non-compliance. These types of standards, I argued above, will fail to count as law at all. There might, however, be other cases where a law can still create a sense of obligation, despite being opposed by the balance of reasons. It might do this, for example, by trading on the image of legal institutions as a source of binding rules. Such a law is nonetheless poorly suited to serve as a

deontic marker, since in order to become accepted it must overcome the reasons people have not to comply with it. Its effectiveness essentially depends on its capacity to systematically deceive its subjects.

Let us say a law is *unreasonable* when the balance of reasons favours non-compliance. An unreasonable law, thus defined, is not necessarily incapable of creating a general sense of obligation. It is, however, poorly adapted to do so. The fact that it requires people to act contrary to reason is an inbuilt barrier to fulfilling its role. Compare a bucket with large holes in the bottom, which are covered over with duct tape. The bucket may carry water, but it does so in spite of a structural defect that undermines its suitability for the purpose. An unreasonable law is flawed in an analogous way. A law of this kind may ultimately succeed in fulfilling its function as an artifact, but it will do so in spite of being fundamentally maladapted to that role. It is, in this sense, a defective example of law.

IX CONCLUSION

I have argued in this article for what we might call the *artifact theory of law*. It yields the following claim about the nature of law:

Artifact Theory of Law: Something counts as a law only if: (1) it is collectively accepted as a law by a social group with an appropriate concept of law incorporating its function and a range of other salient features (the *Acceptance Condition*); and (2) it is constitutively capable of performing its function (the *Success Condition*).

I further argued that the function of law is to serve as a deontic marker by creating a sense of social obligation. The success condition for law described in (2) therefore entails that law is necessarily capable of performing this role. A law that is incapable of giving rise to a sense of obligation, due to either its form or its content, therefore fails as law. Finally, I claimed that an analysis of defectiveness as applied to artifacts suggests law is defective if it is not minimally adapted to creating a general sense of social obligation. Poorly drafted or unreasonable laws count as defective under this standard.

Law, on this account, can only be adequately defined by making reference to its function. The argument offered in this article therefore bears some affinity to a class of arguments that occupy a prominent position in contemporary jurisprudence. These arguments contend that law is a functional concept or kind — its distinctive function is to direct human action through a particular method or towards a specific end, so anything that fails in that function is invalid or defective as law.⁵⁵ My argument, however, does not suggest that a putative law

⁵⁵ See, eg, Fuller, above n 51, 38–40; Finnis, above n 54, ch 1; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 29–36; Michael S Moore, ‘Law as a Functional Kind’ in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 188, 198–200. For further discussion, see Jonathan Crowe, ‘Clarifying the Natural Law Thesis’ (2012) 37 *Australian Journal of Legal Philosophy* 159, 170–6; Ehrenberg, ‘Defending the Possibility of a Neutral Functional Theory of Law’, above n 5; Ehrenberg, ‘Functions in Jurisprudential Methodology’, above n 5.

is invalid or defective just because it fails in its function. Rather, I have argued for the following weaker claims: a putative law that is *not capable* of fulfilling its function is invalid, while a law that is *not minimally adapted* to its function is defective. A putative law may fail these minimum standards due to either its form or its content.