Intentions in Artefactual Understandings of Law

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

Abstract

The primary aim of this chapter is to show that several missteps made by others in in their thinking about law as an artefact are due to misconceptions about the role of intentions in understanding law as an artefact. I first briefly recap my own contention that law is a genre of institutionalized abstract artefacts (put forth in *The Functions of Law* (OUP 2016) and subsequent papers), mostly following Searle’s understanding of institutions and Thomasson’s understanding of public artefacts. I highlight the central place that this theory affords law’s functions, without requiring the theorist to say that possession or performance of the function is either necessary or sufficient for inclusion in the class of law. Some of the most common misunderstandings are exemplified in Brian Leiter’s paper ‘Legal Positivism about the Artifact Law’. He thinks that holding an intentionalist view of artefacts commits the theorist to privileging drafters’ intentions when interpreting law. (It doesn’t.) He also has confusions about the differences between artefact tokens and artefact types leading him to a problematically broad understanding of artefacts. Another problem can be seen in thinking that functional understandings of artefacts are vulnerable to the same problems that arise in functional explanations for biological systems. I go on to consider the work of Luka Burazin and Corrado Roversi, addressing worries that making intentionality central to artefacts implies too much conscious thought is required to make one, noting that several theories of intentionality do not require conscious thought in the execution of intentional action. While those who think a central place for intentionality threatens to leave us unable to explain customary law, this can be dealt with by noting the important distinction between customary rules and customary laws (where the latter requires a decision to enlist public aid in redressing violations). I claim that authors’ intentions are communicated requests for the artefacts’ audiences to see the artefacts as members of their putative kinds. Finally, I address the question of whether or not legal systems are themselves artefacts and institutions, given that they may or may not have been intentionally created. An early lawgiver might have created a legal system by accident in the process of handing down the first laws. I raise the possibility that we might want to impute intentionality to necessary by-products of artefact creation, seeing those by-products as artefacts as well.

Keywords: aretfacts, functions, intentionality, institutions, legal interpretation, social ontology of law

The past few years has seen a welcome refocusing of attention on the social ontology of law within general jurisprudence. This is welcome in that the dominant paradigm of legal positivism holds law to be a thoroughgoing human creation, and even anti-positivists will say as much about positive law. A primary way of explaining the idea of law as a human creation is to see it as an artefact. Hence getting straight the metaphysical and normative implications of understanding law to be a species of artefact is important to a more complete picture of law. A recent volume of papers[[2]](#footnote-2) collected a variety of ideas on that subject and I was honoured to have mine included, having previously advocated for an artefactual view of law.[[3]](#footnote-3) This second collection provides a welcome chance for further reflection, in particular attending to the differences in approaches exemplified in that earlier volume. Some differences reflect deeper philosophical divisions, while others I fear are examples of rare missteps by otherwise subtle thinkers. Many of these differences or missteps are centred on the role of the intentions of artefact creators in understanding artefacts and how that is to be applied to law. In considering these, I will be advocating for my view that the intentions of artefact creators are important for fixing the initial identity of the artefact, but this does not require us to privilege those intentions in interpreting or applying the law.

# How Law is an Artefact: Functions, Norms, and Creators’ Intentions

Let me begin with a brief overview of my understanding of what it means to say that law is an artefact. I believe that law is a genre of institutionalized abstract artefact. Law is a type that includes many sub-types as well as tokens. When I loosely say law is an artefact, I really mean that its tokens and possibly some of its sub-types are artefacts (whether the genre itself is an artefact will be addressed below). I understand artefacts to be tools that communicate their usage to an audience of potential users.[[4]](#footnote-4) This suggests that artefacts are generally understood in terms of the functions that they are to serve, although an exception is made for artworks, which are artefacts that are not necessarily understood functionally.[[5]](#footnote-5)

When we are talking about the products of human purposive activity that are themselves envisioned to accomplish certain further ends, it is hard not to think of functions as fundamental to an adequate understanding of what we are investigating. However, to say that we need to understand something’s function in order to have an adequate explanation of it is to say *neither* that its performance (or an attempt at performance) of that function is necessary *nor* that successful performance (or an attempt) is sufficient for its membership in the kind of thing that is being explained with that function. Other things can perform the same function, and members of that kind can fail spectacularly and still retain their membership in the class of things we are explaining by using that function.[[6]](#footnote-6) What’s more, when we are attempting to understand a genre of artefacts in terms of the functions that members of the genre have in common, we are not saying that each member must attempt to perform those functions in order to be a member of the kind. Hence, I can create a door that I know will go on display in a museum and never be used to close an opening.

We cannot fully understand those products of human purposive activity without understanding the reasons they were made or what they were thought to achieve.[[7]](#footnote-7) To explain those things the people are making in terms of their functions is to display at least partially the reasons they were made (although it is also possible that the reasons they were made were not the people’s motivations and for them to have functions that extend beyond the reasons for their fabrication).

Recall that artefacts are tools that communicate their usage. This suggests two kinds of normativity that are usually closely related. The communication is supposed to tell the audience two things that are generally interdependent: what the artefact is, and what it is for (or how to use it).[[8]](#footnote-8) The interdependence comes from the fact that the identity of the vast majority of artefacts is determined by their function. Nevertheless, since, as mentioned just above, the identity of a token artefact isn’t strictly dependent upon its suitability to perform the functions that explain the genre to which it belongs, there is still a distinction between what I call the norm of usage and the norm of identification: The norm of usage (or treatment) is how and for what purpose the artefact was supposed to be used; the norm of identification (or recognition) is the communicated intent that the artefact be recognized as a member of a given type.[[9]](#footnote-9) The norm of usage is generally very weak in the sense that it is easy to justify departures from it. If I use a screwdriver as a doorstop, I am violating the norm of usage but am justified in doing so because I need a doorstop. (I say ‘generally’ because there are situations in which or some kinds of artifacts for which the norm of usage is stronger, making it harder to justify using it other than for its intended purpose.) The norm of identification is much stronger in the sense that it is harder to justify departures, but this norm doesn’t require very much of its audience. All I must do in order to adhere to the norm of identification is to recognize the token screwdriver as still belonging to the class of screwdrivers, even as I use it as a doorstop. (One way of saying this is that the screwdriver doesn’t stop being a screwdriver, even if I use it as a doorstop.) My favourite example to illustrate this point is flag-burning. National flags have much stronger norms of usage (sometimes set down in law). But when I violate even these much stronger norms by burning a country’s flag (believing myself justified in my protest against that country’s current government or policies), I am purposely and emphatically not violating the norm of identification, since the symbolism of my action depends heavily upon myself and everyone else continuing to identify the object I’m burning as the flag of the country I’m protesting.[[10]](#footnote-10)

# The Norms of Usage and Identification do not Imply a Legal Interpretation Strategy

The fact that the intentions of creators are relevant to the (initial) norms of usage and identification in no way endorses or encourages an ‘original intent’ interpretive strategy for courts. The usual weakness of the norm of usage implies we are generally free to use the artifact as we need to, while not questioning its identity or membership in the class.[[11]](#footnote-11) This means that it is entirely appropriate for a given law to be interpretated and applied in accord with the needs of the community,[[12]](#footnote-12) just as I am free to use the screwdriver as a doorstop. Hence interpretations need not privilege authors’ intents or understandings about the particular and specific purposes the legislation is to serve, so long as we still recognize that the object of interpretation has legal status, i.e., that it is legally valid. To adopt a flexible interpretive strategy while respecting the legal validity of the object of interpretation is to accord with the stronger but less demanding norm of identification, while possibly violating the weaker norm of usage, departures from which are easy to justify.[[13]](#footnote-13)

That particular laws can be designed with a wide variety of purposes without losing their membership in the genre of law is explained by the phenomenon of ‘reproduction with variation’ we commonly see with artefacts.[[14]](#footnote-14) We uphold the norm of identification as long as we still recognize the legislation as being a member of the class of law. In an institutional setting (as all law is), this puts an additional requirement upon the creator to follow the institutionally specified procedure to afford the creation the official status of law,[[15]](#footnote-15) but it also explains why the criteria for the membership in the class of law includes the requirement to meet the criteria of legal validity in some legal system.

I have somewhat misleadingly elsewhere suggested that it is the possibility of use functions coming to dominate over design functions in the identity of an artefact that explains why my view doesn’t privilege any kind of original intent interpretive strategy.[[16]](#footnote-16) Use functions are the purposes to which artefacts are put by their end users. Design functions are the purposes to which creators envisioned their artefacts would be used. I think that creators have a privilege in setting their artefacts’ initial identity (type membership) via the design functions, but that end users’ repurposing of an artefact can come to dominate people’s conception of that artefact such that its identity can change from one artefact type to another. To the extent that we are identifying laws by the particular purposes they serve, this fact does offer some explanation as to why my theory doesn’t privilege authors’ intent in interpretation. The fact that artefacts can change their identities when users’ understanding of them comes to depend more on the use function than the design function is one reason not to put too much weight on the creator’s intention in interpreting an artefact that can be variously applied (unless there are additional reasons for privileging creators’ intentions). But generally, we are more concerned with the identity of laws *qua* law, i.e., legal validity, and not with their identity in terms of their particular purposes. Take the example of *Bond v US*, in which the defendant was charged with violating the Chemical Weapons Convention Implementation Act for attempting to poison her husband’s lover with toxic chemicals.[[17]](#footnote-17) While in that case the US Supreme Court invalidated the use of the Act for a criminal prosecution of this sort based on authors’ intent (given the Act was meant simply to ratify the international Chemical Weapons Convention), we can just as easily imagine another Supreme Court reaching the opposite conclusion, holding authors’ intent to be irrelevant. In such cases we are generally not as concerned with classifying the law as either a criminal statute or an international treaty ratification as we are with the more pressing question of whether the application of the law to these facts is legally justified. That question assumes the law is legally valid, which is to comply with the stronger norm of identification for law more widely. My remarks here about the relative strengths of the norms of usage and identification are therefore a better explanation of why this kind of artefact theory holds no implications for interpretive strategies.[[18]](#footnote-18) Of course, the weakness of the norm of usage is the main factor that contributes to the ease of repurposing by users, which is what sometimes results in shifts in the artefact’s identity. That is, the ease of justifying repurposing a law explains why authors’ intentions about how the law is to be applied are not necessarily relevant to interpreting it. But we need not cite the possibility of changing the law’s identity via repurposing when we are content to treat it as legally valid even as we apply it in ways its authors didn’t envision. Hence, understanding the relative strengths of the norms of usage and of identification is enough to show that an artefact theory giving a role to the author in setting the artefact’s initial identity and the norms governing it does not entail any particular interpretive strategy.

# Leiter’s Missteps

In his paper on the subject, Brian Leiter begins his discussion of artefactual views of law by attacking Luka Bruazin’s claim that legal officials must have a substantive concept of the legal system in order to create it. I think Leiter is right to criticize Burazin on this point, but the basis for his criticism is misguided, as are some of the particular conclusions he draws. He bases the criticism on the fact that Burazin is following Risto Hilpinen in thinking that an artefact is ‘an object that has been intentionally made for a certain purpose’.[[19]](#footnote-19) The problem, Leiter notes, is that, while particular laws may be made intentionally and thus, ‘for a certain purpose’, identifying that purpose isn’t quite so straightforward. He mentions the frequently made criticism that legislators may have quite a few purposes in mind when they adopt legislation, and different legislators may have different purposes when they vote on it. Hence, the thinking goes, law cannot be the kind of artefact that requires officials to have a conception of the legal system since they are all working with different conceptions and purposes.

The beginnings of a reply to this can be found by remembering that the legislation itself is often drafted by an aide, who is trying to match some central purposes of her employer, tackling some perceived social need or problem. Even where the legislation is drafted by the legislator herself, her motivations may not be identical to the perceived social need or problem the legislation is designed to address. The fact that other legislators (or even the sponsoring ones) have some other reasons in mind when voting on the legislation doesn’t detract from the *legislation’s* purpose.[[20]](#footnote-20) This is admittedly confusing because we sometimes will speak of those psychologically motivating reasons as an actor’s ‘purposes’ in acting. But those psychologically motivating reasons are not the purposes we are talking about when investigating an artefact. The purpose or ‘proper function’ of the artefact is the characteristic ends that it is supposed to yield when used in its envisioned way.[[21]](#footnote-21) This is much the same for any complex artefact made by multiple actors. When a car is created on an assembly line, the designers and line workers may have many different personal reasons for doing what they do. But the purpose of the *car* is still the function it was designed to perform.[[22]](#footnote-22) Hence, the author’s personal reasons are not identical to the purposes for which the artefact was created, and the fact that there are multiple authors, each with her own reasons for contributing, is neither here nor there. For Hilpinen and Burazin to say that the artefact is intentionally made for a certain purpose does not suggest that the purpose for which it was made must be the creator’s primary motivation for creating it; authors need not be motivated directly by the value they place on the artefact’s purpose.

An even bigger issue is with Leiter’s criticism of Burazin’s move from token to type, which we all make in reasoning from facts about particular laws to facts about law in general. Leiter mistakenly seems to think that if we analyse the tokens as artefacts, that they are created to serve a certain purpose, we must also be claiming the type serves the same purpose.[[23]](#footnote-23) This, of course, would be problematic since, as Leiter notes, it is not clear that anyone ever intentionally created the *type* law. But neither Burazin, nor anyone else I know who thinks law is best understood as a kind of artefact, is saying that the type itself must be understood as an artefact with the same purposes we assign to the tokens. Leiter seems to be confusing the notion of something being a type of artefacts with it being an artefact itself, or at least assuming that someone making claims about the tokens must be making the same claims of the type. To be an artefact type is not necessarily to be an artefact or to have all of the properties of artefacts. Some types might be created intentionally, but not all are. Even where we do wish to say that the type (as distinct from its tokens) was created intentionally to serve a purpose, it’s not clear that the type can communicate that purpose and it certainly seems wrong to say that it shares the purposes of its tokens. The purposes of types are generally to organize and classify their tokens, to help us carve up and understand the world. The purposes of the tokens are (initially) to accomplish whatever they were made to do.

Where we are dealing with a kind whose members have a diversity of purposes, to speak of the function of the kind will require us to generalize or aggregate those diverse purposes. I am simply taking a group of artefacts with some similarity among them and trying to characterize that similarity among their functions. You might have thought it impossible to talk of an artefact kind whose members have diverse purposes since we are understanding artefacts in terms of their proper functions. But it is important to remember that not all (and likely very few) artefacts are functional kinds, for which performance of the function is sufficient for membership in the class. Hence we can have artefact kinds that are understood in terms of the functions of their members, where the members may not have precisely the same functions. Usually however, we would expect there to be some similarity or general description of the diverse functions in order to motivate grouping them together in a single kind.

His dispute with Hilpinen and Burazin leads Leiter to say that law is an artefact without an intentional creator, thinking of etiquette as another example.[[24]](#footnote-24) He is led to this claim because humans produce etiquette and care about it. Hence, he thinks, we should broaden the concept of artefacts to include anything humans produce as a result of their actions and is responsive to our interests. But this is far too broad to capture what is useful about artefacts for law. Consider the metal shavings that are created as a by-product of making round metal implements. They are produced as a result of human action and are responsive to our interests. I submit that a conception of artefacts that extends this far dilutes the usefulness of the idea for explanatory purposes. Instead, we should follow Dipert in thinking of them as tools that communicate their usage and limit our use of the idea to what Amie Thomasson calls ‘public artifacts’, which are ‘intended to be recognizable … by a certain intended audience’.[[25]](#footnote-25)

The problem is in thinking of just about all human creations as artefacts, regardless of intentionality, simply because some artefacts appear at first blush to be created without intention. However, closer inspection can reveal the intentions that are the heart of all artefacts understood in Dipert’s and Thomasson’s sense. Let’s look again at etiquette (assuming we are going to follow Leiter in thinking of etiquette as an artefact, an assumption with which I’m not entirely comfortable). Take the example of where we are to put the fork when setting the table. I imagine putting it to the left-hand side of the plate started out as a habit, with people tending to put the fork there (perhaps because most people are right-handed and need that hand to use the knife to cut[[26]](#footnote-26)). The habit itself is not an artefact (although it is already a phenomenon that results from human action and is responsive to our interests); it is a mere regularity of behaviour that is getting shared more widely. At a certain point someone decided to start thinking of this habit as a reason in favour of conformity and for criticizing others for failures to conform. That person was inventing something new, a new rule from what before was merely a habit. (The same rule could have been invented multiple times in different places by different people.) The person invented the new rule in order to serve a purpose, a standard of behaviour in an attempt to gain greater conformity with the behavioural pattern (at least when that person imagined getting others to follow this rule). As with many such rules, however, the new rule could have been simply a private tool for the inventor until communicated to a second person, who decided also to recognize its normativity (accepting it from the internal point of view). This is why the artefacts that are most of use to us in understanding social entities like law are *public* artefacts, designed to be used by an audience wider than simply that of the initial inventor. But the main point is that, if we do think of etiquette as an artefact, we can imagine the intention of a creator, even if the identity of the creator(s) is lost to us. The creator’s identity and motivations are not generally going to be as important as the fact that the artefact is communicating its purpose to us. The fact of its creation and the communication it represents suggests the existence of the author and her intentionality.

Leiter goes on to note that, since functional ascriptions are complicated in biology, so much more we would expect them to be problematic with artefacts.[[27]](#footnote-27) But one primary reason that functions are problematic in biology is precisely that functional talk is mind-dependent in the sense that it involves understanding something in terms of its (extrinsic or intrinsic) good-making characteristics. We must *assume* that survival and reproduction are good at a species (or genetic) level in order to license understanding biological entities in terms of their functions. But, as human creations, artefacts present no problems in associating them with their good-making characteristics since those are generally the reasons initial creators fashioned them in the way that they did. Contrary to the problems in biology, functional talk with artefacts is actually much more straightforward.[[28]](#footnote-28) It is only the mistaken worry about a lack of intentionality with some artefacts that leads Leiter to his conclusion that functional understandings of (most) artefacts are more problematic. The fact that we don’t know precisely who an author or inventor is, or which person’s intentions are most relevant, or that the intentional moment behind an artefact is obscured in the mists of history does not mean that the artefact is not an intentional creation.

Leiter then makes another misstep in thinking that to assign a function to something is to say that performance of the function is either necessary or sufficient to be a member of that kind.[[29]](#footnote-29) As discussed above, lots of different kinds of things can share the same function, without that function ceasing to be the way we understand each kind: hospitals and clinics, chairs and couches, hammers and nail-guns, law and advertising. Furthermore, the fact that you can use something else to perform the same function that an artefact was designed to do doesn’t detract from the need to understand that artefact in terms of its function. Nor does an artefact ever even need to perform its function to be a member of its kind. Decorative chairs are still chairs,[[30]](#footnote-30) regardless of the fact that no one will ever sit on them, because they are designed to signal their membership in the type. The decorative chair is a public artefact and its creator has communicated an intention that we understand it to belong to the class of chairs, even if we are never to sit on it.

By creating an artefact, the author invites the audience of potential users to see it for the kind of thing it is by understanding it in terms of what it is for. As alluded to above, they may ultimately use it for other purposes than that envisioned by the author,[[31]](#footnote-31) but that doesn’t initially threaten its identity so long as the wider audience shares the author’s understanding of the artefact’s proper function. Over time, the audience’s use of the artefact in ways other than those for which it was designed by the author may come to dominate their understanding of the artefact. At that point there is a shift in the artefact’s identity as a result of the conceptual shift that has taken place among its users.[[32]](#footnote-32) This is not something that would generally happen overnight and there is likely to be a protracted period where the identity of the artefact is hovering between the two notions. It may be that nail-guns become ubiquitous and people’s only use for hammers is as doorstops. At a certain ill-defined point, when people generally start thinking of hammers as doorstops, they become doorstops. Before that point, they were hammers used as doorstops and now they have become doorstops. That includes the tokens that were created when people were still using them to drive nails, and the tokens that are now created only to be doorstops (in that their characteristic shape now suggests ‘doorstop’ to their audience of users).

Some might be troubled by the apparent dependence of the object’s ontological identity upon our shifting conceptions of the object. But that that shouldn’t be problematic for anything whose identity is a social fact about it. The whole project of social ontology is premised on the idea that the reality of the social world is something that is responsive to what human beings do and what they think about what they are doing (to at least some extent).

# Burazin’s Systems

The main worry I have with Luka Burazin’s thoughts, the vast majority with which I agree, is how fully-formed officials’ conceptions of a ‘legal system’ must be for them to have such a system. He distinguishes the officials’ notions of a legal system from those of the citizens, whose idea of a legal system can be more ‘rudimentary’. Officials’ notions of a legal system must include both that it is a system (‘of valid legal rules’), and that its structure is that of ‘a union of primary and secondary legal rules’.[[33]](#footnote-33) It seems possible, however, in some kinds of early legal systems, for the lawgiver to be unaware of one or both of these facets without thereby calling into question whether it is indeed a legal system. An early lawgiver might have just started issuing directives that we would now classify as legal rules. Those rules would still be in a legal system in the sense that they were organized within a system under a basic validity rule (the rule of recognition). There could also already be rules of change and adjudication (‘any problems, ask the Law-giver’).[[34]](#footnote-34) But the lawgiver might not yet be aware of any of these secondary rules, or even the need for secondary rules, even though they are present. All the hallmarks of a legal system are present except for the self-awareness on the part of officials that they are within a legal system. So it seems possible to have a legal system where officials conceive of the rules as valid (in the sense of authoritatively binding on their addressees) but not that they are legal rules as such, and for them to be unaware that the structure of the system is a union of primary and secondary legal rules (in that secondary rules are followed and applied, without those doing so being aware that they are rules of the system). Outsiders would call it a legal system, but insiders just think of them as the rules by which they live.

I agree with Burazin that it is sufficient for most people to have an awareness of the functional roles played by the system, its legal norms, or its officials and that they need not have a conceptualization of those things beyond that awareness.[[35]](#footnote-35) But when it comes to the officials themselves, Burazin tells us that more is needed for a legal system to be present than just an awareness of the functional and deontic roles that everything is playing. His reason for saying that officials must have more fleshed out conceptions of the legal system is that it ‘follows naturally from the fact that officials are the so-called operative members of a relevant community authorized by the non-operative members to fulfil their official role.’[[36]](#footnote-36) It is not at all clear why the different functional roles played by the operative members (officials) naturally require them to have an awareness of the *legality* of the system they administer (either in terms of its legal validity or in terms of the presence of secondary rules). A system can have a rule of recognition without anyone even being aware of that fact.[[37]](#footnote-37) Indeed, I suspect that if you ask most American officials about the most basic validity rule, they will simply point to the Constitution, without realizing they were following a more fundamental rule in doing so. (In the UK, most judges seem to have read Hart.) Similarly, a system could have secondary rules without anyone realizing that they were secondary, even in terms of their functionality. If it is your primary duty to follow the directives of the lawgiver, and the lawgiver starts issuing edicts about the rules themselves: modifying, interpreting, applying them, perhaps even appointing others to carry some of the burden in doing so, the lawgiver and everyone else might not realize that these rules about rules are different in kind from the original rules.[[38]](#footnote-38) As such, it seems possible to have systematicity without anyone realizing it.

This claim on the part of Buzarin is difficult given that, just a few pages earlier, he acknowledged that officials can come to exist as a result of their performing a functional role, without the more robust self-awareness he later claims is necessary:

One might [] imagine, in the case of law, for example, over time, the practice of complying with norms created and applied by certain people becoming so entrenched that these people come to be counted as legal officials in and for a relevant community. They acquire their states of legal officials against the context which is created by the collective practice of members of a relevant community….[[39]](#footnote-39)

This has to be squared, not only with the claim that legal officials need a robust understanding of the legal system for such a system to exist, but with the underlying thought that motivates it: ‘Institutional artifacts … exist only if represented as existing’ which requires ‘at least some degree of (conceptual) understanding of that which is being represented as existing’.[[40]](#footnote-40) The solution for the regular population is that it is enough that they have an understanding of the functional role the officials and the system serves. But it is not clear why this more rudimentary understanding isn’t also sufficient for the officials themselves. They may have a lot more to do in the system, but much of what they are doing might still be done without an awareness of the conceptual structure of the legal system.

Burazin goes on to suggest a distinction between the ‘intended character (or nature)’ of an artefact, and its ‘actual character (or nature)’.[[41]](#footnote-41) While he does not explain what is meant by ‘character (or nature)’, it appears that he is thinking of the artefact’s membership in a given kind. Hence he appears here to be tracking the way that a design function comes to set the identity of the artefact. He claims to follow Hilpinin and Thomasson in saying that the author’s intention about how the artefact is to operate must have ‘some degree of success’ and be ‘largely successfully realized’ lest the artefact amount only to ‘scrap’.[[42]](#footnote-42) He then states, ‘[t]hus, in order for an ordinary artifact to be said to exist, it is *necessary* that its intended character (i.e., the content of the mental states of its author) be realized.’[[43]](#footnote-43) We have moved from ‘some degree of success’ to ‘largely successfully realized’ to ‘it is *necessary* that [the] intended character… be realized’, without any argument for the augmentation of this success condition. But this augmentation also suggests a misunderstanding of what Hilpinin and Thomsasson understand to be required. Both are fully cognizant of the possibility of artefacts having magical or fictional functions.[[44]](#footnote-44) So it cannot be the case that the degree of success (be it large or small) that is required to avoid the artefact amounting to ‘scrap’ must be success in the performance of the artefact’s intended function. By distinguishing in this way between the artefact’s ‘intended character’ and its ‘actual character’, Burazin introduces a performative success condition: ‘in order for something to be an artefact, it has to fulfil its function at least to a certain degree.’[[45]](#footnote-45) But Hilpinin and Thomasson were only thinking of substantial success in the author’s intentions to create an artefact with that particular function, not that the artefact must be capable of performing the function.

Imagine you have in front of you all of the attempts to create a flying machine up to and including the Wright brothers’ successful creation. They are in a line, starting from the crudest attempts by the most unsophisticated inventors at one end, and improving until you have the Wright Flyer. It is certainly not correct to say that only the Wright Flyer is an artefact. The others are clearly artefacts on any reasonable understanding of the notion. We might have some reluctance in including the crudest attempts in the class of *flying machines*, but we also would not exclude those that only just failed to fly because of a slightly misaligned aerofoil, even though those near-misses fail to fulfil their function to any degree. The near-misses are still examples in which there was substantial success of the author’s intention to create an artefact with the proper function of flying, even though most of them will never leave the ground under their own power. For Hilpinen and Thomasson, what is important is that the author has made something that can be included in the class of artefacts understood in terms of that function, even if his creation cannot perform it. Hence Buzarin’s success condition is simply too strong and would exclude too many artefacts, including laws and legal systems that have little or no chances of success.

# Roversi’s Intentions and Custom

Let us return to the questions of the relevance of intention to the ontology of artefacts. Corrado Roversi wants to augment Hilpinen’s conditions for the dependence of artefacts on the intentions of their makers.[[46]](#footnote-46) He worries about expert craftspeople who work with ‘little conscious thought’.[[47]](#footnote-47) But this shouldn’t have been too much of a worry. One thing we learn from Anscombe is that we may not need much conscious thought for intentional action.[[48]](#footnote-48) Indeed, we frequently ascribe intentionality, even where we are fairly sure there isn’t quite the content we imagine for the intention. This is especially true where we know about by-products or side-effects before we act with other purposes in mind. An expert craftsperson can undertake to create a certain number of artefacts and then begin the process, ‘shutting off’ the conscious thought of what she is doing after beginning. We don’t say that the artefacts she created were not created intentionally as a result of that. A widget-making machine that is controlled by a computer programme in order to time the making of widgets to the adequacy of the supply of raw materials doesn’t somehow undermine the intentionality in making each widget we attribute to the person who initially throws the switch.

Roversi also mentions the town wall that is built as a result of townspeople each building the walls of his individual house and the fact that the houses bunched together in a certain way.[[49]](#footnote-49) In this case, it would be a bit more difficult to say that the wall around the city is the direct result of intentional action directed at its creation, even though it is still a result of intentional action. But especially if the houses forming the perimeter of the town subsequently deteriorate such that what is left is the wall around the town, we would be hard pressed to deny that the wall is a public artefact. So, some by-products of intentional artefact production can also be artefacts, even when no one’s intention is focused on that by-product, as long as it is a necessary result of other intentional artefactual production. But I suspect that this is a process similar to the one in which the use function of the artefact comes to dominate the design function in fixing the artefact’s identity. In the case of the accidental town wall, there was no design function, but there is still a use function that comes to treat the remains of the buildings as a town wall. This is important for understanding how it might be possible to call a legal system an artefact, even if the lawgiver of a community didn’t intend to create a legal system. This is likely the solution to some of the problems with Burazin’s claims about legal systems, as it shows how the systems can be artefacts even when no one is self-consciously aware of their systematicity. I don’t think that it necessarily threatens the focus on intentionality, although it does suggest Roversi is correct in extending Hilpinen’s conditions.[[50]](#footnote-50)

Customary law, however, is not the reason for this extension. I have distinguished between customary rules and customary laws.[[51]](#footnote-51) I suppose some customary rules may have arisen in a way that precludes them from being artefacts (although not necessarily, as the example of fork placement shows). At some point, a habit or practice came to be seen as normative, perhaps without anyone making a clear and conscious decision to treat it as such. Perhaps the rule arose when someone merely mistook the habit for a rule and started treating it as normative without making a decision to do so. But even if the rule could have arisen without intention, there is still a distinction between a customary *rule* and a customary *law*, which would require wider communal recognition and (likely) disposition for official or at least communal response. A customary law is therefore a customary rule that comes to have a legal recognition of some kind. That legal recognition is the moment of institutional creation, and hence is its artefactual creation as well (*qua* law). That transformation is the result of a decision on the part of one or more people. While it might be possible to imagine how a habit or practice becomes a rule accidentally (by someone mistaking it for a rule), it is much harder to imagine how a customary rule becomes a customary law accidentally. Where there wasn’t any prior disposition for a communal response to violations, someone had to make a decision to agitate for that communal response. And if the line between customary rule and customary law is marked by a response on the part of officials, all the more reason to say that such a move must be made self-consciously. Hence it is likely that customary law can still be accommodated on the more basic artefactual models.

Roversi next considers some problems with how functions are to be determined for artefactual identity. The worry is that by placing too much authority in the author’s intentions about the artefact, we would be letting in all sorts of crazy intentions by crazy authors, or that a single artefact can have multiple intended functions.[[52]](#footnote-52) From this problem, Roversi concludes that intended functions are not sufficient for fixing the identity of artefacts and we must add the unfortunately now familiar stipulation that artefacts be capable of performing those functions to some extent.[[53]](#footnote-53) But, as discussed above, the fact that something cannot perform its function doesn’t exclude it from being an artefact, since so many artefacts have functions that are magical or otherwise fictional.[[54]](#footnote-54) Also, we can’t really understand something in terms of its functions at all unless we admit the possibility of failure. In order to conceive of an entity in terms of its ends and means, as would be needed in order to understand it in terms of its functions, it would have to be conceptually possible for it to fail to achieve those ends, or we wouldn’t have distinguished between ends and means. So, adding a success criterion to the intentionality component cannot be the right way to go.

Let us remember what exactly is at stake here. We should not be worried about including lots of crazy inventions in our catalogue of artefacts because we are not thereby saying that they are fit for purpose in the slightest. To be an artefact is to be *created* to serve a purpose. It can’t be a requirement that artefacts of a given kind be able to serve their intended function or purpose, or too many things that are clearly artefacts would be excluded. Roversi gives the example of Italian labour regulations that fail to reform the labour market (and, one might imagine, actually make things worse).[[55]](#footnote-55) But if there were a success condition such that performance of the intended purpose is necessary for membership in the class of artefacts so understood, we would have to say that these regulations, though perhaps legally valid in the Italian legal system, are not actually labour laws because they don’t succeed in what they are supposed to do.

Recall the example of all the flying machines prior to the Wright Flyer. There must be some kind of feedback between the inventor’s intentions for the artefact and the recognition on the part of others that it fits within the class to which the inventor intended it to belong. The author’s intentions amount to a kind of communicated request for us to recognize the artefact as belonging to the class. This is the norm of identification mentioned above. For us to accede to that request we have at least to understand the request by being able to recognize some properties of the artefact as suggesting that membership. Where those properties are absent, the author has failed to create a member of the kind she intended to make. The norm of identification has failed to bind. It is not about whether the token is capable of serving its function; it’s about whether an intended audience can perceive it as a member of the putative class, where that class is understood in terms of that function.

Roversi develops his ideas further into a four-part requirement for artefacts that includes ‘an *interaction plan* that works only if … its *mechanism* actually exists’.[[56]](#footnote-56) The problem with this model is that it would exclude artificial objects that don’t necessarily have any interaction plan, as well as objects with phantom functions. Consider artefacts that are not designed for further usage after their initial creation. For example, I create and release a balloon that is designed to disintegrate upon reaching a certain altitude and hence has no interaction plan. I might also have an interaction plan, but one that is based on no existing mechanism, such as for a magic wand.

Roversi appears momentarily to see the problems here when he qualifies his claim that the interaction plan be essential: ‘It is an *essential* property of an artifact that it is indeed able to carry out its interaction plan: an object X cannot be an artifact A, or at least it is a defective instance of A, if it cannot carry out the interaction plan typical of As.’[[57]](#footnote-57) Saying that objects which cannot carry out their interaction plans are defective instances is an attempt to weaken the success requirement. But since he is here giving us the ‘essential’ characteristics of artefacts, he is thereby giving us the membership conditions for inclusion in the class of artefacts. Under his theory, an object that cannot carry out its interaction plan cannot be simply a defective member of the class; it must be excluded from the class entirely (otherwise we cannot call it an essential characteristic). And that’s a problem. We need an account of artefacts that will allow for defective members not to be excluded even if they are not able to carry out their interaction plans at all. Chairs that break when you sit on them are not able to carry out their interaction plans, but they don’t stop being chairs just because of that.

# Conclusion

What we have seen is that several deep thinkers get into trouble when they try to avoid giving a central role to the intentions of artefact creators, without realizing that doing so need not threaten the flexibility of the artefact’s identity or usage, nor does it risk over-inclusiveness. Authorial intent is necessary for imparting normativity to what would otherwise be an inert social fact of history. But that normativity need not be seen as a straitjacket for future subjects and officials, who can still adapt the artefact to serve their contemporary purposes.

1. \* ORCID 0000-0001-6875-8385. Reader in Public Law and Legal Theory, University of Surrey. I would like to thank Paweł Banaś, Luka Burazin, Jonathan Crowe, Michael Giudice, Corrado Roversi and Alex Sarch for comments on earlier drafts or conversations that were helpful in developing the ideas here. [↑](#footnote-ref-1)
2. Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press 2018). [↑](#footnote-ref-2)
3. Most completely in Kenneth M Ehrenberg, *The Functions of Law* (Oxford University Press 2016). [↑](#footnote-ref-3)
4. Randall R Dipert, ‘Some Issues in the Theory of Artifacts: Defining 'Artifact' and Related Notions’ (1995) 78 Monist 119, 121-29. [↑](#footnote-ref-4)
5. Amie L Thomasson, ‘Public Artifacts, Intentions and Norms’ in Maarten Franssen and others (eds), *Artefact Kinds: Ontology and the Human-Made World* (Springer 2013), 46-48. See also Ehrenberg, *Functions* (n 2), 132-34. [↑](#footnote-ref-5)
6. If I begin a process of utterly destroying the artefact, it will eventually cease to be a member of the kind. But that loss of identity will likely happen long after I’ve rendered it ‘constitutionally’ or ‘constitutively’ incapable of performing its function. See ibid, 80 n 41, responding to Mark C Murphy, ‘The Explanatory Role of the Weak Natural Law Thesis’ in WJ Waluchow and S. Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (Oxford 2013), 12-13, and Kenneth M Ehrenberg, ‘Replies to Comments on *the Functions of Law*’ (2019) 10 Jurisprudence 255, 272-74, responding to Jonathan Crowe, ‘Functions, Validity and the Strong Natural Law Thesis’ (2019) 10 Jurisprudence 237, 240-43. [↑](#footnote-ref-6)
7. Of course we can achieve a *partial* understanding of some things people make without understanding their functions or reasons for creation. My point is that these understandings will be incomplete without accounting for their functions or reasons for creation. [↑](#footnote-ref-7)
8. I understand the communication to be a communicated intention from the artefact creator, akin to a request. See Ehrenberg, *Functions* (n 2) 159-60 (applying Enoch’s communicated-intention account of reason-giving to artefacts (citing David Enoch, ‘Authority and Reason-Giving’ (2014) 89 Philosophy and Phenomenological Research 296, 307-10)), 175-79. [↑](#footnote-ref-8)
9. This communicated intent to bestow on the token a given type or genre membership could also be an attempt to introduce a new type, though for artefacts this would generally be done via species and differentia. Beth Preston alludes to this, calling it ‘reproduction with variation’. ‘Philosophical Theories of Artifact Function’ in Anthonie Meijers (ed), *Philosophy of Technology and Engineering Sciences* (Elsevier 2009), 216-17. [↑](#footnote-ref-9)
10. See Kenneth M Ehrenberg, ‘Law Is an Institution, an Artifact, and a Practice’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press 2018), 186 n 25. The norm of usage is constituted by what the artefact is made for (at least initially). Where there is a legal requirement to use the artefact in a certain way, that legal norm is distinct from the artefact’s norm of usage (though it could reproduce it). If a token flag of a given country is made in order to be burned, that still violates the norm of usage since the norms of usage and identification for artefacts are generally fixed by type and not token. Thanks to Paweł Banaś for pointing out the need for these clarifications. [↑](#footnote-ref-10)
11. I call this ‘repurposing’ *Functions* (n 2) 24. Preston prefers ‘recycling’ Preston (n 8) 215-16. Eventually, this can lead to a change in the identity of the artefact, where people shift their conception of it so that it becomes more understood in terms of the new use function. I will describe this in greater detail shortly. [↑](#footnote-ref-11)
12. The needs of the community might require an interpretive strategy that elevates drafters’ intentions, or they might require an interpretive strategy that allows for more flexibility than that; this is of course a political question. [↑](#footnote-ref-12)
13. One might wonder about even considering this to be a norm, since it is so easy to justify violations. As mentioned, this is not always the case. But also, it still makes sense for someone to say, ‘This is how you’re *supposed* to use a screwdriver’ (while turning a screw), which is normative even though it need not be a criticism of your using it to prop open a door. [↑](#footnote-ref-13)
14. Preston (n 8) 216-17. [↑](#footnote-ref-14)
15. With screwdrivers and chairs, artefacts that are not generally institutionalized, successful invocation of the norm of identification is a simple matter of making something that looks like it belongs in the class by communicating its function. But even these more mundane artifacts often have sub-types that are institutionalized. If you want the screwdriver you are making to be a genuine Stanley™ brand screwdriver, or the chair to be a genuine Herman Miller™ chair, you will need to make sure that the product you are making meets a much longer list of criteria, which includes specifications for the properties of the object, the procedures by which it was made, and your role within the institution as an official maker of such things. Artefacts like law are *always* institutionalized, meaning they can *only* be made by officials (or those with powers delegated to them by the officials) and according to the institution’s rules for doing so. Hence invocation of the norm of identification for law requires meeting the criteria of legal validity for the particular legal system in which the law is made. [↑](#footnote-ref-15)
16. See Ehrenberg, ‘Replies’ (n 5) 260. [↑](#footnote-ref-16)
17. *Bond v US,* 572 US 844 (2014). [↑](#footnote-ref-17)
18. To avoid confusion, I should emphasize the distinction between the use function and the norm of usage. The use function is the use to which the artefact is actually put by its users. So when I use a screwdriver as a doorstop, the doorstop is the use function. The norm of usage is the way the artefact is supposed to be used, which usually attaches to it in virtue of its identity. Once I know it’s a screwdriver, I know it’s supposed to be used to turn screws, even though I can easily justify not using it in this way. Thanks again to Paweł Banaś for pointing out the need for this clarification. [↑](#footnote-ref-18)
19. Brian Leiter, ‘Legal Positivism About the Artifact Law: A Retrospective Assessment’ in Luka Burazin, Kenneth Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford Unviersity Press 2018), 9, quoting Luka Burazin, ‘Can There Be an Artifact Theory of Law?’ (2016) 29 Ratio Juris 385, 388, quoting Risto Hilpinen, ‘Artifact’ (*Stanford Encyclopedia of Philosophy,* E Zalta, ed, 2011) <http://plato.stanford.edu/archives/win2011/entries/artifact/>. [↑](#footnote-ref-19)
20. The legislation’s purpose could itself be multi-faceted and even internally contradictory, where sponsors and authors identify different social needs and/or means for supplying them with the same piece of legislation. This is yet another reason for the weakness of the norm of usage. [↑](#footnote-ref-20)
21. See Ehrenberg, *Functions* (n 2) 21, citing Karen Neander, ‘The Teleological Notion of 'Function'’ (1991) 69 Australasian Journal of Philosophy 454, 454 and Ruth Garrett Millikan, *Language, Thought, and Other Biological Categories : New Foundations for Realism* (MIT Press 1984), 17 coining the term ‘proper function’. The vagueness about who is doing the envisioning of the way the artefact is to be used is a feature rather than a bug. As discussed above, generally the proper function will start out as the design function, but it is possible (over time) for users’ conception of the artefact to change such that the proper function comes to match the use function rather than the design function. In such cases, it is now the users’ vision of how the artefact is to be used that becomes more relevant to setting the artefact’s identity. The norm of identification, originally communicated via elements of the artefact from the creator to its audience of users, is now neglected in favour of a new norm of identification set by the community of users. [↑](#footnote-ref-21)
22. Of course, a token car could be used or even designed for a different purpose. And as explained in the previous note, at some point in the future, when there are no more roads and cars are no longer used for transportation, some new use function may overpower the design function such that the proper function by and with which we identify cars is that new use to which they are put. [↑](#footnote-ref-22)
23. But the positivist theory of law is not a theory about *particular laws*, it is rather a theory about why “particular laws” are tokens of a type “law.” And the type law is a social phenomenon that is only implicit and inchoate in the actual practice of judges, lawyers, and ordinary citizens familiar with “modern municipal legal systems,” as Hart put it. This is a crucial problem for the traditional way of thinking of artifacts due to Hilpinen, and which Burazin follows. For it is not the case that the *type law*—the phenomenon of law captured by our concept of it—was “intentionally made for a certain purpose.”
Leiter (n 18) 10 (emphasis in original, internal citations omitted). [↑](#footnote-ref-23)
24. Leiter (n 18) 10-11. [↑](#footnote-ref-24)
25. Thomasson (n 4) 50. See also Ehrenberg, *Functions* (n 2) 31. [↑](#footnote-ref-25)
26. This point calls into question the distinction Kevin Toh makes between the artificial and the non-artificial norms in ‘Law, Morality, Art, the Works’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford 2018), 72. [↑](#footnote-ref-26)
27. Leiter (n 18) 13. [↑](#footnote-ref-27)
28. See Ehrenberg, *Functions* (n 2) 25. [↑](#footnote-ref-28)
29. Leiter (n 18) 13-14. [↑](#footnote-ref-29)
30. ibid 13. [↑](#footnote-ref-30)
31. A point also raised by Andrei Marmor, ‘Law, Fiction, and Reality’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press 2018), 45. [↑](#footnote-ref-31)
32. Another point made by Marmor, ibid 46-47. [↑](#footnote-ref-32)
33. Luka Burazin, ‘Legal Systems as Abstract Institutional Artifacts’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford 2018), 128. [↑](#footnote-ref-33)
34. The rules of recognition, change, and adjudication are the fundamental secondary rules of a legal system according to Hart, though found in the practices of officials rather than explicitly recorded in law. H L A Hart, *The Concept of Law* (3d edn, first published 1961, Oxford University Press 2012), 94-99. [↑](#footnote-ref-34)
35. Burazin, ‘Legal Systems’ (n 32) 125-27. [↑](#footnote-ref-35)
36. ibid, 128-29. ‘Authorized’ is a bit misleading here as I don’t think he is limiting this to democratic authorization, but rather means to include any system in which there is a collective recognition of the officials by the non-officials. [↑](#footnote-ref-36)
37. This fact may present a difficulty in harmonizing Hart’s theory with John Searle’s picture of institutions, a problem to which I suggest a solution in Kenneth M Ehrenberg, ‘The Institutionality of Legal Validity’ (2020) 100 Philosophy and Phenomenological Research 277. [↑](#footnote-ref-37)
38. Note that this is possible even within what Burazin describes as ‘structured (or institutionalized), “more-than-one-tier,” “mature,” or “developed” legal systems’, which he makes his primary focus, Burazin, ‘Legal Systems’ (n 32) 114 (citation omitted). [↑](#footnote-ref-38)
39. ibid 125. [↑](#footnote-ref-39)
40. ibid 126, noting that this does not require having a word for it. [↑](#footnote-ref-40)
41. ibid 129. [↑](#footnote-ref-41)
42. ibid 129-30, citing Risto Hilpinen, ‘Authors and Artefacts’ (1993) 93 Proceedings of the Aristotelian Society 155, 160-61; Amie L Thomasson, ‘Realism and Human Kinds’ (2003) 67 Philosophy and Phenomenological Research 580, 598; 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), 59. Why can’t the scrap still be an artefact? As long as we can understand it to have a proper function, we can understand it to be defective member of the kind identified by that function. [↑](#footnote-ref-42)
43. Burazin, ‘Legal Systems’ (n 32) 130, emphasis added. [↑](#footnote-ref-43)
44. What Preston (n 8) 217 calls ‘phantom functions’. See also Peter Achinstein, ‘Function Statements’ (1977) 44 Philosophy of Science 341, 349. [↑](#footnote-ref-44)
45. Burazin, ‘Legal Systems’ (n 32) 131. [↑](#footnote-ref-45)
46. Corrado Roversi, ‘On the Artifactual -- and Natural -- Character of Legal Institutions’ in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press 2018), 91, citing Hilpinen, ‘Authors and Artefacts’ (n 41) 156ff. [↑](#footnote-ref-46)
47. Roversi (n 45) 91, quoting Randall R Dipert, *Artifacts, Art Works, and Agency* (Temple University Press 1993), 49. [↑](#footnote-ref-47)
48. G E M Anscombe, *Intention* (2d edn., first published 1957, Harvard University Press 1963), 17-18. [↑](#footnote-ref-48)
49. Roversi (n 45) 91. [↑](#footnote-ref-49)
50. Amie Thomasson actually treats what are basically Hilpenen’s conditions as setting forth the conditions for membership in what she calls ‘essentially artefactual kinds’. Thomasson, ‘Public Artifacts’ (n 4) 48-49; Thomasson, ‘Realism’ (n 41) 599-600. This leaves open the possibility of artefacts that are members of kinds in which not all members are necessarily artefacts. However, it is not clear what separates those that are necessarily artefacts from those that are either only contingently artefacts or fail to be artefacts at all. [↑](#footnote-ref-50)
51. Ehrenberg, *Functions* (n 2) 122. [↑](#footnote-ref-51)
52. Roversi (n 45) 92, citing Wybo Houkes and Pieter E Vermaas, *Technical Functions: On the Use and Design of Artefacts* (Springer 2010) 51. [↑](#footnote-ref-52)
53. Roversi (n 45) 92. [↑](#footnote-ref-53)
54. Ehrenberg, *Functions* (n 2) 127 citing Preston (n 8) 217; Achinstein (n 42) 349. [↑](#footnote-ref-54)
55. Roversi (n 45) 92. [↑](#footnote-ref-55)
56. ibid 96, emphasis in original. [↑](#footnote-ref-56)
57. ibid, emphasis in original. [↑](#footnote-ref-57)