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On the Artefactual—and Natural—Character of Legal Institutions

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1. Introduction

Are legal institutions artefacts? If we simply conceive artefacts as entities whose existence depends on human beings, yes, of course legal institutions are artefacts. But a theory of legal institutions in terms of artefacts assumes something more, namely, not simply that they are based on the intentional states of human beings but that they are an outcome of human creation, and also that this is essential to understanding their metaphysical structure. In this paper, I will try to show the consequences of such an approach. In particular, I will argue that understanding legal institutions in terms of artefacts makes it possible to explain an important feature of them, but not all. Hence, an artefact theory of law can be necessary on explanatory grounds, but not sufficient. At the same time—and contrary to what seems to follow from the artefactual character of legal institutions, namely, that they cannot be conceived as natural—I will be arguing that they in fact can, accordingly suggesting that there is a relevant legal-philosophical (and otherwise ruled out) sense in which a connection can be said to hold between legal artefacts and conceptions of nature.

2. Which Theory of Artefacts for an Artefact Theory of Law?

Obviously, connecting legal institutions with artefacts is not going to be a fruitful theoretical move if we do not have an acceptable theory of artefacts. Hence, we should ask: What is it that makes an object an artefact of a given kind? One could say that the laptop computer I have in front of me is what it is because it has certain physical features—a black-coloured case containing a definite set of pieces of hardware. Let me call this the physical model of artefacts and show why it cannot work. There is a problem in saying that this assemblage of piece of hardware is a laptop, at least in the identity sense of is. In fact, I can certainly substitute several pieces of my laptop’s hardware—in the long run I could even substitute all of them—and then build another personal computer with all the substituted pieces. But then, which one would be my laptop: The original, the new one, or the one obtained by putting all the substituted pieced together? This is the classic problem of the persistence conditions of artefacts, one that has been discussed in the history of philosophy through the puzzle of the “Ship of Theseus” (see, for example, Hume, De Corpore, II, 11). Another and similar puzzle can be drawn from Alan Gibbard’s famous discussion of the relation between the statue called Goliath, which is an artefact, and the piece of clay of which it is made, which Gibbard calls Lumpl. Gibbard notes that if we were to say that Goliath is identical with Lumpl—as the identity thesis states—then this identity could be seen as violating Leibniz’s law, in the sense that not all properties of Goliath can be attributed to Lumpl salva veritate. Here is Gibbard’s reasoning:
Suppose I had brought Lumpl in existence as Goliath, just as I actually did, but before the clay had a chance to dry, I squeezed it into a ball. At that point [...] the statue Goliath would have ceased to exist, but the piece of clay Lumpl would still exist in a new shape. Hence Lumpl would not be Goliath, even though both existed. (Gibbard 1997, 97)

Now consider how Lynne Rudder Baker discusses Gibbard’s puzzle of Goliath and Lumpl:

In this argument, the premise that carries the ball is this principle: “(7) If $y$ [namely, in Gibbard’s example, Goliath] is a paradigm $F$ [a statue] and $x$ [In Gibbard’s example, the piece of clay Lumpl] is intrinsically exactly like $y$, then $x$ is an $F$.” The argument is unsound, because (7) is false. No one who ever endorsed (7) could have been thinking about statues. For something is a statue in virtue of its relational properties. But it is obviously false that, if $x$ is an $F$, in virtue of its relational properties, and $y$ is intrinsically like $x$, then $y$ is an $F$. Anything defined in terms of relational properties—a planet, a U.S. dollar bill, a passport—provides counterexample to (7). Specifically, artworks like statues are counterexamples to (7). (Baker 1997, 603-4; italics added)

I have quoted this passage in full because I think it very well expresses how contemporary analytic metaphysics, in dealing with puzzles that involve artefacts, has come to significant conclusions regarding their concept. The most important of these conclusions is that artefacts are essentially relational objects, such that there is no intrinsic material structure they consist of that can also be an explanation of what they are. What an artefact is depends on its relation to us, and not simply on its physical features. This is true even of simple material artefacts such as screwdrivers: Screwdrivers are not simply metal objects shaped like screwdrivers. The physical model therefore does not work. It does not for artefacts in general, and of course it does not for law: No one would say that a parliament, for example, is simply the place where members of parliament meet—the building and its furnishings or its street address.

In what sense are artefacts relational objects? A simple answer could be that this relationality consists in their necessarily being the product of human action. This, however, would not be sufficient, because many things that depend on human action cannot properly be conceived as artefacts. Think, for example, of waste and pollution. One might then say that artefacts are only the intended results of human action. But, as Risto Hilpinen (1993, 159–60) explains, if I carve a sculpture out of a block of wood, I am intentionally producing something (a statue), and even though I know full well that many woodchips will fall off the block, I will now count them as artefacts even though they result from my productive intention. This means that if artefacts are supposed to depend on human productive intention, their relation to these intentions must be stricter than simple dependence, in the sense that the maker of an artefact must specifically intend to produce something of that kind.

Hilpinen (1993, 156ff.) identifies a set of conditions under which the existence of artefacts may be said to strictly depend on the intentions of their makers or authors. In a somewhat simplified version of his view, something is an artefact of a given kind iff (a) it has an author; (b) the author wants to produce something of that kind, namely, the author’s intentions include a sortal description corresponding to that kind of artefact; and (c) the artefact’s existence and features depend on the author’s intention to produce something of that kind. Let me call this the author model of artefacts. But even this view has its shortcomings, because if we apply it too narrowly, we will wind up with too restrictive a conception of artefacts. If we are to avoid that pitfall, it is in the first place essential that we resist the temptation of over-
intellectualizing our assessment of the origins of artefacts. Many artefacts come out of routine-like or habitual actions, that is, actions lacking an explicit and conscious intentional creative content. Think, for example, of the products of expert craftspersons and artists, who “often work at great speed and with remarkably little conscious thought (apparently) at the time of creation” (Dipert 1993, 49). Moreover, there are phenomena that do not straightforwardly meet the “conscious authorship” criterion that seems to be at least borderline cases of artefacts. Consider a trail through the forest. A trail in a forest makes it easier to walk across the forest and not get lost. This was certainly in the intentions of those who blazed the trail (its “authors”), and yet they may have created it simply by treading that path, so it can be that nobody who has taken that route on foot intended to create a trail. Or consider a wall surrounding a town and acting as a defensive perimeter that comes into being by accretion, simply as a result of the townspeople fortifying their own dwellings with walls that over time bunch up against one another. Here, nobody intended to build a wall around the entire town, but everybody wanted to create something to defend their houses. Hence, the wall surrounding the town did in fact come into shape through creative intentions having as their content a sortal description of walls, but that sortal description did not, strictly speaking, refer to the wall serving as a defence perimeter for the entire town: It referred to the walls surrounding the houses.

Some authors, such as Thomasson (2003, 592–93), explicitly restrict the concept of artefact so as to exclude phenomena of this kind. I think this is an over-simplification of artefacts in general, but when it comes to the law this kind of simplification becomes even more problematic. Of course there are many legal institutions that are created through a sort of authorial intention by an act of institutional design, but many others are customary in nature: They simply emerge out of human behaviour in a way that is more similar to trails than to screwdrivers. Custom therefore offers itself as a significant legal counterexample to an artefact theory of law based on the author model (see also, in this regard, Burazin 2016, 395; Crowe 2014, 739). But consider another problem with this model: If I intend to build a screwdriver and build an oddly shaped object which I consider a realization of my intention, does all of this suffice to qualify that object as a screwdriver? Of course not. As Hilpinen himself concedes, what is crucial in assessing the existence of an artefact is to determine which kind it belongs to, that is, whether it satisfies the sortal description the author has in mind. Now the question is: How should we describe the identity conditions for the sortal descriptions of artefacts? Hilpinen introduces here the concept of function:

The type-description which determines the identity of an artefact is normally associated with the intended function of the artefact (for example, a bridge) or it can be simply a description of its intended function (e.g., a hammer). (Hilpinen 1993, 161)

This functional element in determining the identity conditions for the sortal descriptions of artefacts is widely acknowledged. In addressing the puzzle of the Ship of Theseus, for example, Lowe (1983, 231) ends up saying that “with ordinary artefacts [...] we are likely to be [...] concerned with the object’s utility.” In the same vein, David Wiggins (2001, 87) states that “artefacts are collected up not by reference to a theoretically hypothesized common constitution but under functional descriptions.” In Hilpinen’s (1993, 161) model, however, the role of function in accounting for the ontology of artefacts is exclusively mediated by an author’s acceptance. This is where the problem comes in: The author model seems to give too much importance to the author’s arbitrary judgment. As Wybo Houkes and Pieter E. Vermaas have noted with regard to technical artefacts, this model is too
“intentionalistic” because, on the one hand, if all we need for something to be a technical artefact is the author’s acceptance, then all kinds of intended and imaginary artefacts should count as genuine technical artefacts, and on the other hand, the author’s acceptance could give place to a proliferation of intended functions for a single artefact (Houkes and Vermaas 2010, 51). With some qualifications, the same could be said of institutions that are legal by design: Italian legislatures are notorious for their intended reforms of the labour market that are unable to reform the labour market in any way.

Thus, it is not sufficient that the function and purposes intended and conceived by authors figure among the criteria for establishing the identity of an artefactual kind. It is also necessary that, at least to some extent, artefacts of that kind be able to actually serve the stated function and purpose, because the domain of artefacts is not simply the domain of their authors’ arbitrary attributions of functions. The importance of functional elements in the ontology of artefacts has led some authors to formulate a function model of artefacts. This model can be cast in purely evolutionary terms or in a way that also takes into account the insights of the author model. An example of the first approach is Beth Preston’s theory of artefacts. According to Preston (see esp. Preston 1998, 243ff.; 2009, 226–7), evolutionary success is the key criterion for ascribing functions to artefacts, while the designers’ intentions have no substantial role in this process. For an example of the “hybrid,” author-function approach we can instead turn to Lynne Rudder Baker’s (2004) theory, which she developed in working to solve the problem of material constitution: Objects have primary-kind properties, namely, properties they cannot lose without ceasing to exist as such, and there cannot be relations of identity between objects belonging to different primary kinds (Baker interprets Gibbard’s example above in the sense that Goliath and Lumpl have different primary-kind properties and thus are not identical). Artefacts, in this view, are objects whose primary-kind property is a function. This primary function—here is where the model becomes hybrid—is determined by the author’s intentions but also (so as to avoid the problem of “imaginary” functions) by the actual “execution of those intentions” (Baker 2004, 101–3).

Both the “pure” function model and the “hybrid” author-function model in turn have some problems. A counterexample to the pure function model are artefacts without an evolutionary history: artefacts of new design. This is the core of Ruth Millikan’s criticism of Preston’s model. Millikan distinguishes between direct proper functions and derived proper functions. Basically, a “device” $m$ has a direct proper function $F$ if it belongs to a “reproductively established family” whose members have a character $C$ that historically has correlated positively with $F$, and hence if this positive correlation explains why $m$ exists (see Millikan 1984, 25–28). A device instead has a derived proper function if it is an “adapted device,” namely, if it has no evolutionary history but is produced by a device with a direct proper function (see Millikan 1984, 39ff.). Now,
according to Millikan, artefacts can have both direct proper functions, if they have been selected and reproduced in virtue of their capacity to fulfil that function, or derived proper functions, in case they have simply been created and derive their function from the intentions of their designers (see Millikan 1984, 48–49). The main reason why Millikan thinks that Preston’s “pure” function model cannot work for artefacts is that she wants to account for the function of innovative artefacts which have no evolutionary history: These artefacts, to use her vocabulary, can have only derived proper functions. Of course Millikan’s criticism about artefacts of new design is relevant for law as well, because there can certainly be legal institutions built from scratch for a specific function, and hence institutions without an evolutionary history. But if history in a sort of “objective” sense, and hence as completely detached from authorial intentions, were the only background for the existence of legal institutions, experimental institutions of this kind—insitutions “on the drawing board,” so to speak—would come into being as nonexistent.

Even more significant for legal theory is a possible counterexample to a hybrid author-function model. This has to do with the phenomenon of repurposing, by which an artefact takes on new functions over the course of its history, or these functions are modified, in a process where old essential functions evolve into new ones (this kind of functional addition or modification applies, for example, to many technical artefacts). But if we follow Baker in considering functions to be ontologically essential to artefactual objects, then it seems that when functions change or stack, new objects arise, and it becomes difficult to assess the relation between the old artefacts and the newborn ones—among other reasons because the two can very well coincide spatially. Houkes and Vermaas explain the problem by referring to the example of Aspirin, having “recently attracted the attention of pharmacologists because of its beneficial properties other than alleviating pain and reducing fever” (Houkes and Vermaas 2010, 146–47).

Of course this repurposing phenomenon is crucial to understanding how legal institutions develop. To indulge in metaphor, legal institutions—particularly the most important ones, those entrenched in a legal community—are more similar to Gothic churches than to screwdrivers. They have been reinterpreted several times, their project has been modified and overlaid by other projects throughout their history,

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1 Others have noted that Preston’s “pure” function model can be circular, for on the one hand artefacts would be reproduced in virtue of the evolutionary success of their “ancestors,” but at the same time it seems impossible to identify those ancestors without already having a notion of the artefactual kind in question (cf. Thomasson 2009, 205). In this connection, it has been argued (Scheele 2006) that in selecting what qualify as “real” proper functions we may have to look at social institutions, leading not to the conclusion that social institutions are artefacts, as I am arguing here, but to the conclusion that artefacts require social institutions.
and in the end they can very well wind up being functionally incomplete. Hence, if we want to explain legal institutions as artefacts, we should certainly take account of authorial intentions set in functionalistic terms, just as we would on the author-function model, but we should also look to the “pure” function model, borrowing from it a specific focus on the artefact’s history, that is, on the way in which the artefact’s function and content has been intended and interpreted over time, and so how it has changed.

I think this can be achieved through a historico-intentional model, and here I am mainly thinking of Randall Dipert’s theory. Dipert can be seen to combine a history model and an author model into a unified perspective. On this perspective, an artefact is by definition an object with a deliberative history, that is, a history of conscious intentions and actions that traces back to an author with creative intentions having a corresponding sortal description as their content. We can also incorporate the role of function if we include it among the criteria of identity of the authorial sortal description, as on the author-function model. However, in Dipert’s view (1993, 121, 125) an artefact’s deliberative history includes not only the original authorial intention but also the modifications and interpretation made of that intention over time. Hence, for example, deliberative history is a relevant element of the artefact’s criteria of identity both synchronically and diachronically: Two ships are the same ship if they can be traced to the same deliberative history, that is, a history consisting in a “means-ends ordering of the relevant intentions,” but also consisting in “the other means considered for each end and rejected, beliefs about the means-ends connections, and the various other beliefs and cognitive processes that were used in any of the steps leading to an intention and the production of an artefactual feature” (Dipert 1993, 55).

A historico-intentional model seems to be well-suited for an explanation of legal institutions. It can account for institutions of new design by reconstructing their deliberative history in terms of purely authorial intentions. It can also account for institutions of long tradition, reinterpreted and repurposed several times over the course of their history, precisely by tracing the artefact’s criteria of identity to that history and not simply to a set of original authorial intentions. In a sense, it can also account for customs, because even though customs do not have authors, they may very well have a deliberative history of relevant intentions and actions. Hence, in what follows I will adopt this model. My characterization of an artefact is defined by the following “formula,” which for the sake of simplicity I will be calling “ART”: To be an artefact is to be the outcome of (1) a deliberative history tracing back to (2) an

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2 The expression “historico-intentional model” is being used here in a way that differs from Bloom’s (1996) “intentional-historical hypothesis,” which is instead concerned with the categorization of artefacts.
intention-rooted creation process whose content is (3) an interaction plan that works only if (4) its mechanism actually exists.

Let me expand on this brief statement. First, ART states that something’s being an artefact is a historical property, for it consists in having a distinctive kind of history that traces back to a creation process rooted in human intentions. The term process is meant to capture the fact that the creation of an artefact can very well extend over time and involve several acts of different persons. This is also why the expression intention-rooted is used here in distinction from intended. In an assembly line, for example, the entire process is guided by a creative intention to produce something according to a design plan, but this intention may very well differ from the real content of the workers’ intentional actions. And the same holds for the complex process of enacting laws—or, again, for the emergence of normative customs.

The intention-rooted creative process has a more or less definite content which I am calling an interaction plan. This is a modified version of Houkes and Vermaas’s (2010, 20–21) concept of a “use plan,” which they use as a substitute for the concept of function because, while it can be difficult to understand the “essential function” of some artefacts, and particularly of legal artefacts, it is usually clearer how the artefact is supposed to work, namely, how we are supposed to “interact” with it. While Houkes and Vermaas’s use plan consists of an ordered set of actions geared toward a given goal, an interaction plan in my sense consists of a conditional statement through which an interaction between humans and an artefact is connected to a typical result relevant to those humans (a result that may be either enabling or disabling). As should be clear, disabling artefacts, like defensive walls, are particularly important in an artefact theory of law.

It is an essential property of an artefact that it is indeed able to carry out its interaction plan: An object $X$ cannot be an artefact $A$, or at least it is a defective instance of $A$, if it cannot carry out the interaction plan typical of $A$s. This means that if $X$, for example, does not make it possible to turn screws after the correct kind of interaction, then $X$ is not really a screwdriver, or at least it is a defective screwdriver, despite its author’s intentions or its shape. Artefacts therefore have a dual ontological root: On the one hand is an intentional creative process, on the other is the actual ability of its interaction plan to be carried into execution. I will call the first root historical and the second permanent. An artefact with a historical root that does not also have a permanent root cannot fulfil its function and so is no longer a proper, non-defective artefact of that kind. This distinction, as we will see, is crucial in assessing the explanatory power of an artefact theory of law.

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3 The distinction between a historical and a permanent ontological root draws inspiration from Thomasson’s (1999, chap. 2) distinction between historical and constant dependence.
The last element of the ART formula is its mechanism, consisting of the actual grounds on which an artefact’s interaction plan rests. As we saw in criticizing the author model of artefacts, authors typically believe that the world backs up the artefact’s intended interaction plan, but their beliefs are not sufficient for a mechanism to exist: If these beliefs turn out to be ungrounded and the interaction plan cannot achieve its results, the created object will wind up being nothing but an arbitrary and idiosyncratic realization. This shows that artefacts are essentially reason-based objects. They are so in two different senses. For one thing, they are built for a reason, and for another there must be good reasons for believing that results can follow from the envisaged interaction with them. I will call the first kind of rationality teleological and the second technical: An artefact’s teleological rationality lies in the objective reasons for believing that the artefact’s interaction plan answers our real needs; its technical rationality lies in the objective reasons for believing that its interaction plan can in fact achieve the intended results, independently of how we evaluate their relevance.

I will now describe how ART can be applied to legal institutions. I assume here a specific description of their emergence: Legal institutions began to emerge in the Middle Stone Age, when the temporal lobe of human brains grew larger and became sufficiently developed to use recursive “meta-representations,” namely, representations about the meaning of other representations (Dubreuil 2010, 123–25). Among these meta-representations were the rules defining the proto-legal roles necessary to organize social sanctions and regulate other kinds of social exchanges: Here we had proto-legal institutions in the form of secondary rules in Hart’s sense, and hence basically power-conferring rules connected with a given social role (Dubreuil 2010, 166–67). Given that these representations were creative of other representations, these rules were constitutive: They defined a given kind of social fact by imposing on it a “status function” defined in normative terms (Searle 1996, 27ff., 100ff.).

Now, if from an evolutionary point of view legal institutions emerged when the human brain developed the ability to produce meta-representations in the form of constitutive rules, it seems reasonable to conclude that legal institutions consist in the first place of these meta-representations. This seems to be confirmed by empirical research that connects the emergence of institutional facts in the consciousness of children with an ability to play games of make-believe, namely, cooperative games based on the attribution of statuses and on principles under which fictional truths are generated in the form of constitutive rules (Rakoczy 2007, Rakoczy and Tomasello 2007). The central role that meta-representations have for legal artefacts has three consequences. First, legal institutions are to be conceived as abstract, immaterial.

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4 On the generation of “fictional truths” on the basis of principles of generation, see Walton 1990.
artefacts consisting of representations. Second, legal institutions are linguistic constructs, because they consist of meta-representations, and so consist in the semantic operation of giving meaning to other representations. Third, a legal institution’s interaction plan must be based precisely on the constitutive rules expressed in this semantic operation. This is therefore how the ART formula applies to legal institutions: What it is for something to be a legal institution is to be an immaterial rule-based artefact, that is, the outcome of (1) a deliberative history tracing back to (2) an intention-rooted linguistic creation process whose content is (3) a system of constitutive rules defining interaction plans that work only if (4) their mechanism, that of shared acceptance within the community, actually exists.

According to this description, legal institutions in the first place have an immaterial, semantic aspect: They consist of a set of concepts specifically created by linguistic declarations to organize, define, empower, and limit human behaviour in a complex social setting. These concepts are defined through meta-representations in the form of constitutive rules, and they entail interaction plans allowing individuals to deal with the relevant organizations and social structures by means of a normative framework that empowers or limits them. But this organization of social life cannot work if there is no supporting mechanism, and what this mechanism consists in comes down to the fact of shared acceptance and compliance, meaning that the system of constitutive rules the institution consists of is widely accepted and people actually abide by those rules.5

As mentioned, the concept of a creative process is framed in a deliberately broad way in the ART formula, and the same goes for the concept of a linguistic creative process. In the legal domain, the paradigmatic cases of linguistic creative processes are authoritative speech acts enacting the constitutive rules of a given institution. But it is important to note that even customs can be explained in these terms. Consider again the aforementioned example of a trail that cuts across a forest: Many wayfarers may have crossed the forest without knowing that in so doing they were blazing a trail. Eventually, however, the trail will become recognizable and begin to be used as such, that is, as an artefactual means by which to cross the forest without getting lost, and it will also come into use in standard discourse. People will start referring to the trail, pointing out its purpose and possible use—as by saying, “There’s a trail over there: Use it to get home”—and in this way the trail takes on the same kind of objectiveness that other authored artefactual objects have had from the outset, that is, from the moment of their creation. Now, a crucial role in this process by which artefacts can emerge is played by language, and of course this role becomes even more important when it comes to explaining immaterial artefacts. People simply behave in a certain

5 On shared acceptance as a part of a legal artefact’s mechanism, see also Jonathan Crowe’s (2014, 747ff.) conclusion that collective acceptance is part of an institutional artefact’s success conditions.
way; then, in time, they begin to refer to this habit of behaviour as a custom; the custom then becomes an institution and is referred to as such. This is a typical case of an intention-rooted creation process in which the original intentions did not include the artefact’s sortal as part of their conceptual content. That sortal is a byproduct of a given community’s legal discourse: Here we indeed have a linguistic creative process, but one that differs from the example of authoritative speech acts.\(^6\)

3. Why an Artefact Theory of Law?

I have thus provided a description of legal institutions in terms of artefacts. Now the question is: Can we really have any explanatory gain from it? I submit that we can, and in fact that the gain can be significant. In particular, an artefact theory of law can explain one of the peculiar tensions between legal positivism and legal realism and act as a bridge between them, thus accommodating some of their respective theoretical insights in a coherent way. However, I also submit that an artefact theory cannot encompass all these insights: From legal positivism and legal realism it must draw crucial elements that it cannot provide on its own. In this sense, an artefact theory of law can be a link in the chain of explanation, but it cannot form the substance of that chain.

Let me start with the explanatory gain. Among the main sources of conflict between legal realism and legal positivism is the question of legal objectivity, namely, the problem of how to understand the possibility of objective statements in a domain where shared acceptance seems to be crucial for the existence of the same relevant entities that should be the source of that objectivity. In a sense, it is trivial to say that shared acceptance within a community is necessary for the existence of legal institutions: If law is to regulate and coordinate human behaviour, clearly an institution cannot be realized without a significant degree of acceptance among those members. The problem, however, is whether shared acceptance is all that matters. This a point of strong conflict between legal realism and legal positivism. Legal positivism I define as the view that the content and existence of legal institutions depends entirely on the objective performance and semantic content of authoritative speech acts, where “authority” means the de facto capacity to elicit general acceptance and compliant behaviour among human beings within a given community. Legal realism, on the other hand, I define as the idea that law is nothing other than the content of collective intentional states—be they actual or dispositional, explicit or

\(^6\) It seems to me that this explanation of a legal artefact’s linguistic creation process is consistent both with Jonathan Crowe’s (2014, 740) explanation of customs proceeding from the example of a fallen tree used as a bench and with Luka Burazin’s (2016, 396) concept of informal institutional artefacts, where “the true authors [...] are the participants themselves.”
tacit and inerferable from behaviour—shared by all the members of a community or the bulk of them.\(^7\)

Legal positivism explains objectivity in the legal domain by insisting that neither the content nor existence of legal institutions is determined by shared acceptance within a legal community: This is something that only authoritative speech acts can do. However, this insistence on the objective performance of authoritative speech acts tends to dismiss the problem of acceptance and obedience, or, as the traditional critique goes, the problem of legal effectiveness in favour of legal validity. This is particularly clear with traditional, formalistic versions of legal positivism tracing back to the 19th century. Things become more complicated with 20th-century normativistic versions of legal positivism such as Kelsen’s and Hart’s. In Kelsen’s theory, for example, general acceptance is crucial because, according to the principle of effectiveness, a Grundnorm can be presupposed only at the root of a generally effective legal system. And, in Hart’s theory, the adoption of an internal point of view on the part of officials is constitutive of the existence of a rule of recognition. Both Kelsen and Hart, however, are very clear in asserting the objective existence of intra-systemic legal norms as distinguished from their effectiveness and general acceptance.

The example of Hart’s and Kelsen’s normativistic conceptions shows quite clearly what problems legal positivism comes up against in dealing with the relation between objectivity and shared acceptance in law. Indeed, on the one hand legal positivism aims to preserve the objectivity of legal reasons by tracing back to authoritative speech acts, but on the other hand the status of “authority” is ultimately explained in terms of shared acceptance. In Kelsen’s view, for example, the grounds of authority are explained in terms of normative qualification. But then it is necessary to give an account of objective legal normativity, and in this connection he appeals to the principle of effectiveness, according to which the general effectiveness of a legal system is a necessary condition for the legal validity of every legal norm. Hence, authority is based on a basic norm which in its own turn is still based (at least as a conditio sine qua non) on shared acceptance. How, then, can legal entities be objective? They vanish, as if they never existed, when the group calls the whole system into question. And, further, they cannot be objectively normative, because factual recognition cannot ground normative bindingness. Finally, they cannot ground genuine theoretical disagreements among those who are supposed to be the source of their objectivity: Rather than genuinely discussing legal matters, these persons should be waging dirty “undercover wars” simply to change the beliefs of their colleagues and of society in general—they should be hypnotists rather than jurists.

\(^7\) These are ideal-typical and inevitably simplified definitions of legal positivism and legal realism that of course cannot encompass all their possible variants and detail: The validity of my overall argument will therefore have to be judged by the extent to which these ideal-types are taken to be reasonable.
On the other hand, legal realism simply dissolves the idea of legal objectivity. On a realistic perspective, this idea is an illusion, for law is nothing but shared acceptance. In some versions of this conception, the significant part of the community whose acceptance is constitutive of law coincides with that of legal officials, while in other versions shared acceptance within the community determines whether an institution actually exists or is simply ink on paper: This is a way (though, admittedly, a very simplified way) to express the difference between American and Continental (Scandinavian and Polish-Russian) legal realism. On certain interpretations, Continental versions of legal realism can be compared to those versions of normativistic legal positivism that ground legal systems in the acceptance of officials (comparing Ross to Hart, for example). In any case, however, the focus of legal realism and legal positivism is different: Legal positivism insists on the objective content of the officials’ intentional stance and describes as objective the normative “game” that flows from it, whereas legal realism dismisses entirely the idea that norms can have an objective existence.

This leads legal realism to very extreme conclusions, among which the idea that the entire edifice of law is nothing but a hypostatization, an illusion, a sort of myth. Legal science as we know it is not science at all: It is for the most part ideology, even if it can be a useful ideology for the purpose of regulating social behaviour. Hence, what we consider to be “the law” is basically the outcome of a melting pot of disparate factors, among which politics, shared beliefs, brute force, and accidental events. On this extreme stance of legal realism, explanatory power runs into a sort of dead end. This is an extremely uncharitable interpretation of legal practices, and one that basically does away with the functional and coordinating role of legal institutions. Imagine, for example, that, in our legal community M, a vast majority of people M+ decided to accept property when protecting the goods acquired by members of M+ but framed property in an entirely different way when dealing with goods acquired by members of the minority M. If a significant degree of shared acceptance were constitutive of the ontology of property, what kind of objection could the members of any M- raise? None. But then, how could property coordinate behaviour among the members of M?

A legal realist could retort that this dynamic of majorities trying to impose their view in the legal domain is precisely one aspect of the typical political struggles that arise in political communities: the “struggle for law.” Even if groups within a political community struggle for the right, true, best definition of legal institutions, the content of legal institutions will be determined exclusively by the group whose shared acceptance proves to be dominant in a given context. There is a big difference—the legal realist would say—between holding that legal judgments claim to be based on objective reasons and holding that there exist criteria of objectivity for legal judgments: When dealing with the content of law, people take as objective something that cannot be objective. But is this statement reliable? I think it is not. It posits a universal necessity, one that cannot be verified inductively. It fails on abductive grounds, too, for it does not explain the practice of law but rather rejects it as a sort of collective illusion. Moreover, it requires two very strong additional assumptions, both unwarranted: First, that anyone seriously engaging in a legal practice as a context in which to make genuine assertions is simply irrational; second, and conversely, that theorists advancing the objection are speaking from a special epistemic vantage point, one that makes it possible for them to view the “real nature” above the illusion of mankind. So, as much as there is nothing to prevent the tension between objectivity and shared acceptance in the legal domain from being resolved simply by dismissing objectivity as an illusion, this solution seems to fall short on explanatory power. (Incidentally, it is also a stance that entails some devastating practical consequences:
Not rational discussion but open conflict or hidden manipulation is, in this view, the only "real" way to settle a legal question.)

As mentioned, I think an artefact theory of law framed along the lines described in the previous section can explain the tension between legal objectivity and shared acceptance, thus serving as a sort of bridge between legal positivism and legal realism. In fact, the ART formula applied to legal institutions explains that tension as the mutual ontological interdependence between the creative process of legal artefacts and their mechanism. As noted, artefacts have both a historical and a permanent ontological root: They must be created in accordance with a given intentional design, but they must also be able to fulfil the interaction plan envisaged in that design. In light of that fact, where legal institutions are concerned, the mechanism that enables them to fulfil the interaction plan is that of actual shared acceptance, without which the artefact ceases to be what it is meant to be—and here ART hews to legal realism, because it implies that every legal institution needs shared acceptance if it is to exist and be deemed nondefective. This does not mean, however, that shared acceptance is all that matters, to the point of being the only relevant element defining an institution’s nature and content. Shared acceptance is necessary as a mechanism but is not in itself constitutive of what a legal artefact is. This, according to ART, is instead determined by a given deliberative history consisting of creative processes, subsequent modifications, intended repurposing, adjustments, and emergent features: The whole of this history is an objective fact. It can be fuzzy, vague, and difficult to ascertain. But it is nonetheless objective, and therein lies what a legal artefact is.8 Hence, in interacting with a legal institution at a given time T, I have to take into account the extent to which the artefact is accepted within the community. But statements and theoretical discussions about the nature of that institution are not simply statements about the content of actual, shared intentional states, in the same way that statements about a Gothic church are not simply statements about what we believe about that church. We could, for example, all believe that our Gothic church was built from scratch, and thus that its structure is completely original, and if this view were to gain sufficient shared acceptance, it could be taught in schools and become the mainstream view about our Gothic church. But someone could always turn up and show that the church was built on top of a preexisting Roman temple

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8 On the dialectic that may operate between the mechanism of shared acceptance of a legal artefact and the artefact’s deliberative history (and so, in the first place, its original authorial process), compare Burazin 2016, 396. Burazin writes in particular that “our collective concept of what a Kx (institutional artefact) is, is what determines, at the first level only, the nature of of that Kx,” but he also writes that “the final real nature [...] of a produced institutional artefact is, at the second level, nevertheless shaped by its author’s intentions [...].” Also, as discussed in Thomasson 2003, 587–88, 600, the dialectic between shared acceptance and deliberative history in legal artefacts can be interpreted as a way to merge the dependence principles of institutional entities with artefactual kinds.
with a similar structure, and hence that the mainstream view is false. The same holds for legal institutions. To understand what a legal institution is within a legal system, we try to reconstruct the legislator’s intention, the institution’s legislative and judicial history, and how its function and structure have been understood and have changed over time in the broader framework of the legal system. This explains what the institution is, its role and rationale in our legal culture. Of course, these are not facts that can be empirically ascertained in the same way that we would be able to do with Roman ruins hidden beneath a Gothic church. But this does not mean that they are not facts. If we all lapse into a collective amnesia and started to think, for example, that property can be protected only by private means, without any intervention of the state, it would be perfectly appropriate to discuss whether this makes sense, legally speaking, given the objective development of our legal culture. Hence my conclusion: As immaterial artefacts, legal institutions cannot be what they are if there is no shared acceptance behind them, but the content of any actual shared acceptance can be criticized and discussed in light of the artefact’s objective deliberative history.

As mentioned, however, the artefact theory cannot explain everything about legal institutions. The ART formula cannot, for example, explain the specific features that distinguish legal artefacts from other kinds of immaterial, rule-based artefacts, such as games, morality, and rituals. Hence, it can explain the anthropological proximity of these phenomena—they all unfold in domains where immaterial artefacts play a relevant role—but not the specific features that distinguish them. Legal positivism and legal realism, by contrast, have insisted on at least two peculiar features of legal artefacts. First, legal artefacts are created by political authority, and so are binding in a specific sense having to do with social coercion. Second, legal artefacts are made to adapt to contextual circumstances by means of authoritative interpretations of the original creative process and of its technical and teleological rationality. Thus, without either of these two elements—the legal-positivistic focus on authority and the legal-realistic focus on judicial interpretation—the artefact theory of law would be

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9 An argument “from amnesia” can also be found in Ehrenberg 2016, chap. 5, sec. C, where it is deployed to show that an institution’s existence depends on shared acceptance. Ehrenberg, however, argues that the existence of legal artefacts over time cannot be reduced to the existence of actual psychological states, and this is precisely what I am trying to capture with the idea of deliberative history. To this end, Ehrenberg instead appeals to Searle’s concept of an institution, and in particular to the entrenchment of institutional frameworks in background assumptions.

10 Of course, an institution’s deliberative history can be changed. Good constitutional arguments can perhaps be found to support the need for a new understanding of property. But this, again, would not be a discussion about the content of shared intentional states of acceptance: It would rather be a genuine legal problem.
incomplete, at least as I have framed it, because it cannot on its own explain those two peculiarities of legal artefacts.

This is where context comes into play. Given their symbolic, linguistic nature, immaterial artefacts are in fact dependent on the social practices in which they are embedded. An artefact consisting of a system of rules cannot determine its own practical import: It constitutes, on a “surface” level, an indefinite number of technical, institutional concepts, but it cannot constitute the overall meaning of that system of concepts, which depends on the “deeper” practice for which those concepts are created (Marmor 2009, chap. 3; Roversi 2010). The same system of rules can amount to a game of chess or a ritual of chess or perhaps a legal procedure called chess, depending on the background needs and values for which that system has been built (Schwyzer 1969), and very often those background assumptions appear within the system in the form of meta-institutional concepts not constituted by the system of constitutive rules but rather presupposed by that system (Miller 1981). Over the course of history, of course, this deeper level of background assumptions can very well change (deliberately or otherwise), and this background and history is bound to influence the deliberative histories of the artefacts embedded in it. Hence, that authority and interpretation have such a central role in the legal domain, and that they apply to immaterial artefacts—these are facts that need to be located in the deeper context, having to do with the deeper practices rather than with the surface artefacts created within those practices: We are dealing here with the deeper, shared concept of law rather than with the specific artefacts created within that context (in this regard see also Burazin 2015, 70–72). This is why a theory of how those artefacts are structured cannot explain everything about law—nor, I submit, could it explain everything about any context in which immaterial artefacts are relevant. Even for the legal domain, then, we may need a deeper treatment of the possible ethnological contexts in which artefacts are used and categorized: We may need what Preston (2014, 157–58) calls an “ethnotechnology.”

One could object at this point that if a theory of law cannot explain the specific features of legal institutions as distinguished from other normative phenomena, it is not a theory of law at all. I will concede this point: We would not have a comprehensive theory of law, but it would still be able to explain some features of legal institutions that any legal theory should take into account. In fact, while the artefact view connects legal positivism and legal realism in the matter of objectivity and acceptance, it also rejects some of the tenets of those two conceptions: In regard to legal positivism, it rejects the idea that the objectivity and normativity of legal facts can simply be grounded in a community’s de facto acceptance of those facts; in regard to legal realism, it rejects the idea that legal objectivity is in the end nothing

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11 On the relation between legal institutions as artefacts and law as a kind of artefact and as a broader practice of using such artefacts, see Gardner 2004, 171, 174.
but an illusion. When these claims are reconsidered from the point of view of an artefact theory of law, it becomes clear that the objectivity of a legal artefact is neither an illusion nor an outcome of plain acceptance, be it authoritative or not: It is rather the product of a deliberative, objective history—a set of facts which may be difficult to ascertain but which are nonetheless objective.

4. How Legal Artefacts Can Be Conceived as “Natural”: Institutional Mimesis

The discussion has so far been aimed at explaining how an artefact theory of law can act as an explanatory bridge between legal positivism and legal realism. The question that comes up at this point concerns natural law theory: Can the artefact theory of law also be connected with natural law theory?

Considered ideal-typically, natural law theory maintains that the existence and content of legal institutions (at least the most basic ones) is determined by factors that are at least in part objective, meaning that their validity is independent of whether humans accept them, such that it then becomes the task of human beings to figure out what those requirements are and to mould their institutions accordingly. Whether an artefact theory of law is consistent with this view depends on what the natural lawyer identifies as the objective factors serving as criteria for determining whether something exists as law and what contents it needs to have to that end. In the rationalistic version of natural law theory—the one that has been historically dominant—these objective factors are determined by objective reasons that humans should be able to recognize as correct. Framed in terms of the artefact theory of law, this tenet can be interpreted as one of either teleological or technical rationality. In the first case, the claim is that in order for legal artefacts to be paradigmatic and nondefective, they must ultimately serve an objectively rational purpose; in the second case, the claim is that, whatever purpose they serve, they must pursue it in an objectively rational way. If we assume that what contemporary natural lawyers by and large subscribe to is the first thesis, we would see a contrast with the historico-intentionalistic theory of artefacts presented here, which instead subscribes to the second thesis. But in so doing it does not rule out the first one: Nothing in this theory prevents the teleological reasons behind legal artefacts from being objective. In fact

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12 This assumptions can very well be simplistic. Indeed, while Finnis (1980, 11–19) and Moore (1992, 216, 218) can be seen to espouse the first view, it unclear to me whether Murphy’s concept of “decisive reasons for action” (Murphy 2006, 32; see also Crowe 2012, 172) should be interpreted in teleological or technical terms, though his discussion of the “common good” (Murphy 2006, chap. 3) suggests that he inclines to the first view. Fuller, for his part, should be understood to espouse second, technical view. For a deeper and critical discussion of contemporary natural law theory from the standpoint of an artefact theory of law, see Ehrenberg 2016, chap. 4.
this is a *liberal* theory, envisioning a whole range of possibilities for these reasons: These could be determined by our evolution as members of the human species, for example, or by objective moral standards. So the artefact theory of law here advanced neither *rules out* the possibility of these reasons being objective nor *requires* them to be objective. What it does assume is rather that deliberative histories are objective, and that they form the criteria of objectivity for legal discourse. Hence, if these deliberative histories are grounded in objective teleological reasons, then rationalistic natural law theory and this artefact theory of law will arrive at similar conclusions, showing that essential to legal artefacts is the emergence of objective functions: The artefact theory would in this case take a distinctively functionalist stance. But if the deliberative histories behind legal institutions are not grounded in objective teleological reasons, then on the historico-intentional theory of law they will still exist: They will not lose their legal character, nor will they for that reason be deemed defective. In this case, the artefact theory and natural law theory would lead to different conclusions.

Even if a historico-intentionalist artefact theory of law can be inconsistent with natural law theory, and in most cases it will be, there is a way in which it can explain how legal artefacts can *appear* to be natural—a way in which it can explain how legal relations can be conceived as derived from nature, thus at least accounting for the original view of classic natural law theory. This requires a further assumption, namely, that conceptions of nature can play a role in the deliberative history of legal artefacts, thus influencing the way in which they are framed. This phenomenon I call “institutional mimesis,” which more specifically takes place when one or more rules constitutive of a legal artefact imitate or at least are structurally homologous to some descriptions of a natural reality which is supposed to exist before and independently of the construction of that artefact. There are several examples in the history of law that can be interpreted as mimetic constructions of legal artefacts.\(^\text{13}\) Here, I will provide one concerning forms of legal organizations.

It is a traditional view in legal and political history that the modern concept of the state emerged in 17th-century Europe, progressively transforming the multi-centred, pluralistic legal arrangements typical of the Middle Ages into a single, hierarchical organization governed by its own logic. Now, according to Stephen Toulmin, the rise of such a new and unified political framework, organized according to an internal rationality and in a sense universal, should be viewed as inextricably intertwined with a specific conception of the natural world: the conception encapsulated in the new mathematical science that emerged in the same period and whose foremost champion was Isaac Newton. Writes Toulmin:

\(^{13}\) For a fuller discussion, see Roversi 2016, 240ff.
Between 1660 and 1720, few thinkers were only interested in accounting for mechanical phenomena in the physical world. For most people, just as much intellectual underpinning was required for the new patterns of social practice, and associated ideas about the polis. As a result, enticing new analogies entered social and political thought: if, from now on, “stability” was the chief virtue of social organization, was it not possible to organize political ideas about Society along the same lines as scientific ideas about Nature? (Toulmin 1992, 107)

According to Toulmin, from the beginning of the 18th century, the hierarchical structure associated with the modern state could be seen to “mirror” the structure of nature (on a specific conception of the physical world) and could thus be justified through this analogy. But, conversely, the scientific conception of nature that underpinned this analogy was in its own turn strengthened from its very inception by its justificatory power: “[T]he world view of modern science—as it actually came into existence—won public support around 1700 for the legitimacy it apparently gave to the political system of nation-states as much as for its power to explain the motion of planets” (Toulmin 1992, 128). This is precisely an example of institutional mimesis, because the constitutive rules defining the mutual relations of hierarchy within the state’s structure, and hence the corresponding interaction plans connected with those roles, imitated relations of dependence among natural entities described through nomological scientific statements.

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

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

Although this example is not equivalent to that advocated by Toulmin (the state is described by Kelsen to be mimetic of an organism, and not of cosmic order), it is interesting to note that, in doing so, Kelsen tacitly presupposes precisely the kind of institutional mimesis indicated by Toulmin, namely, that of the state as a hierarchic order in which everything “has its place,” as Toulmin says.

One could say that these examples of mimetic legal institutions are simply a curiosity, something which may be significant for the concept of the state but not for law overall. But I want to conjecture that this kind of institutional mimesis is not simply a byproduct of contingencies: It is rather something that has had a more profound impact on the creation of legal institutions. Consider the very genesis of this concept in Western legal thought, namely, the Roman idea that a universitas can be endowed with a legal personality separate from that of its members, as in Ulpian’s famous passage, “If a debt is owed to the universitas, it is not owed to the individual members,
and what is owed by the universitas is not owed by the individual members” (Digest 3, 4, 7, 1). In his 1928 essay “Corporations as universitates,” Karl Olivecrona maintains that, in Roman legal thought, the very idea of a corporation having a legal personality separate from that of its individual members depended on its being considered a separate entity, something that can exist in its own right, and not simply as a collection of parts. This was possible in light of a specific distinction between three kinds of natural corpora, a distinction which can be found in the Stoic philosophers and which was accepted by the Roman jurists. According to this distinction, which is clearly formulated in a famous passage by Pomponius (Digest, 41, 3, 30, pr.), and which can be found in Seneca as well, there are three kinds of corpora to be found in nature: homogeneous objects of a given species whose parts are melted together and have no separate standing, for example, a statue; objects of a given species whose parts have their own separate species but are connected in a coherent way, for example, a ship (corpus ex cohaerentibus); and, finally, objects of a given species whose parts have their own separate species and are also physically independent, for example, a herd of sheep (corpus ex distantibus). In Olivecrona’s view, the universitatis discussed by the Roman jurists were to be conceived as corpora ex distantibus:

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

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

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

If Olivecrona’s and Toulmin’s theses are correct, institutional mimesis has played a role both in giving rise to the very concept of a legal organization in ancient Western legal thought and in the development of the paradigmatic case of a legal organization—the state—in the Western public law of the modern era.

The question is whether it is possible to find some independent ground for this conjecture. Now, if we consider the kind of conceptual transformation that moves from the universe to the state, or from a kind of “body” to a legal corporation, it seems that there are a couple of important metaphors involved: one revolving around the idea of an overall order, another revolving around the idea of physical unity. And this is where we can find backing for the overall idea of institutional mimesis. In fact, theories about “conceptual metaphors,” prominent in the current debate in cognitive linguistics, show that abstract concepts can be created through the use of metaphors that can very well originate in the physical domain (Lakoff 1996, Lakoff and Johnson 2003, Johnson 2007). Here is Lakoff’s definition of a conceptual metaphor:
A conceptual metaphor is a correspondence between concepts across conceptual domains, allowing forms of reasoning and words from one domain [...] to be used in the other [...]. It is extremely common for such metaphors to be fixed in our conceptual systems, and thousands of such metaphors contribute to our everyday modes of thought. For the most part, we use them without effort or conscious awareness. Yet [...] they play an enormous role in characterizing our worldviews. (Lakoff 1996, chap. 4)

Other authors have elaborated on the idea of conceptual metaphors by showing, more in general, how conceptual structures can result from a “blend” between different conceptual domains (Fauconnier and Turner 2002, chap. 3). In this kind of conceptual “blending,” two or more different “mental spaces” are connected in virtue of a structural similarity by way of a more or less arbitrary correspondence relation which can very well be metaphorical. This relation gives rise to an “integration network” in which elements are connected by way of their common features, and in which the resulting connections are projected onto a new integrated conceptual construct having an “emergent structure,” that is, new features that were not present as such in the original input mental spaces. This idea of emergent structures, along with that of a metaphorical correspondence relation, seems to support the hypothesis that legal artefacts can be created by taking into account an underlying conception of nature and “transforming” metaphorically it into a normative structure.

5. Conclusion

In this paper I have tried to argue for the following four theses. First, a historico-intentionalist model of artefacts applied to law can explain some aspects of the conflict between legal positivism and legal realism, and in particular the tension between shared recognition and legal objectivity. Second, given that this model cannot explain the authoritative aspects of artefacts and the central role of their authoritative interpretation, it cannot provide a general theory of law. Third, while a conception of law in terms of artefacts can support rationalistic natural law theory, this theory requires much stronger assumptions than the historico-intentionalist model presented here. However, fourth, this model can account for some basic intuitions about the “naturality” of law, conjecturing that the influence these intuitions have had in the history of legal philosophy can be explained on cognitive grounds (institutional mimesis).

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References


