

## Law, the Rule of Law & Goodness-Fixing Kinds

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We can evaluate laws as better or worse relative to different normative standards. One might lament the fact that a law violates human rights or, in a different register, marvel at its ease of application. A question in legal philosophy is whether some standards for evaluating laws are fixed by—or grounded in—the very nature of law. I take Raz’s (1977, 2019) discussion of the distinctively legal virtues, those that fall under the rubric of the “Rule of Law” such as clarity, generality, and non-retroactivity, as my starting point for exploring a very general puzzle about the relationship between law’s essence and its virtue.<sup>1</sup>

The claim that there are some virtues that laws have *qua laws* invites a comparison between law and other “goodness-fixing kinds” (Thomson 2008). A kind is goodness-fixing if what it is to be a member of the kind fixes a standard for evaluating instances as better or worse. For example, if an object belongs to the kind CLOCK, whether it keeps time accurately provides a basis for evaluating it as better or worse *as a clock*. Furthermore, the relevant normative fact—if a clock does not keep time accurately, it is a bad clock—is at least partly explainable in terms of the nature of clocks (clocks are things that are supposed to be keep time accurately). Hence, for any goodness-fixing kind, *K*, that sets a standard, *S*, for evaluating *Ks as Ks*, we can ask:

- (1) How does the nature of *Ks* explain *S*?
- (2) Does being a *K* depend on meeting a minimum threshold of *S*-relative goodness?

In the case of law and its constitutive standard defined by the Rule-of-Law virtues, these questions lack settled answers. Although Raz offers some discussion, I argue that his answers have the surprising upshot of rendering law *sui generis* relative to other goodness-fixing kinds, and that preserving continuity with other goodness-fixing kinds involves revising the general picture.

Here’s how the discussion proceeds. §1 begins with the observation that the existence of constitutive standards of evaluation for laws attracts extraordinary consensus within legal philosophy. §2 examines Raz’s influential explanation of such standards: law’s existence creates opportunities for certain wrongs (e.g., the arbitrary use of power) that the Rule-of-Law virtues uniquely mitigate. After highlighting the ways this account conflicts with general principles of explanation, modality, existence, and persistence that plausibly govern goodness-fixing kinds, I argue that we should aim for an account of law’s virtue that treats law as less exceptional. §3 explores the prospects of such an account within the constraints of Raz’s broadly positivist assumptions about law’s nature. I argue that the desired account of law’s own virtue is to be found in the normative assumptions that are implicit in the way

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<sup>1</sup> I will try as much as possible to abstract away from any determinate conception of the rule-of-law virtues. My interest is in a more general issue: why are there any distinctively legal virtues at all? The discussion will no doubt be informed by some assumptions about the content of the Rule of Law, drawn primarily from Raz’s influential account.

that law, unlike other forms of social organization, is socially embraced. However, this account entails amending, albeit not too drastically, the standard positivist framework.

§1 *The least controversial thesis in legal philosophy*<sup>2</sup>

Legal philosophy has been marked by stark disagreements about many aspects of law—its nature, grounds, and relationship to other normative systems. But when it comes to the idea that laws can be better or worse *qua* laws there is a surprising amount of agreement. Legal positivists, natural law theorists, and non-positivists more broadly all seem to embrace (with few exceptions) what I shall call the Rule of Law thesis:

RULE OF LAW: Laws are governed by certain evaluative norms—that is, they can be evaluated as better as worse based on certain characteristics—simply in virtue of being law.

Legal philosophers might disagree about the content of the relevant norms or the precise characteristics that are constitutively good-making. But they don't disagree that there *are* some such distinguished characteristics that are distinctly *legal* virtues. Consider the following statements:

- “[T]he fact that the rule of law protects us from wrongs for which the law’s existence creates opportunities makes it the specific virtue of the law *as law*, a universal doctrine applying to all legal systems; the law’s own virtue....” (Raz 2019: p15)
- “[A]ttention to the principles ... justifies regarding certain positive laws as radically defective, *precisely as laws*, for want of conformity to those principles.” (Finnis 1980: p24)
- “A law that ignores or contradicts the demands of justice or the common good therefore seems defective – and not merely morally defective – but *defective precisely as law*.” (Crowe 2019: p138)
- “A total failure in any one of these eight directions [generality, publicity, non-retroactivity, ...] does not simply result in a bad system of law; it results in something that is not properly called a legal system...” (Fuller 1964: p39).
- “A sharp knife is a good knife .... Similarly, the claim is that if the law meets the conditions of the rule of law, it is better law ....” (Marmor 2008: p10)
- “Unjust regimes are like broken clocks... Broken clocks are real, but defective clocks. They do not do what objects of their type are supposed to do .... While they may be pure and unadulterated, they are nonetheless poor and defective.” (Shapiro 2011: p391)
- “The Rule of Law is one of the ideals of our political morality and it refers to the ascendancy of law *as such* and of the institutions of the legal system in a system of governance.” (Waldron 2016)

Of course, these aren't identical claims. Shapiro, Crowe, and Finnis regard various moral characteristics as constitutively good-making, and generally have a broader conception of law's

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<sup>2</sup> In a different philosophical context (metaethics), Rosen (2020) confers the title of “least controversial” on the thesis that the normative supervenes on the non-normative. In the philosophy of law, the idea that some virtues of law are constitutive virtues can play an analogous dialectical role as supervenience in metaethics, as I hope will become clear.

constitutive virtues than, say, Raz and Marmor.<sup>3</sup> Nevertheless, a common theme runs through their claims about law—namely, that a distinguished set of characteristics define norms for evaluating law *as law*. And examples of similar statements in the literature are easily multiplied.<sup>4</sup>

To make our observation even less theory-laden, we might say that legal philosophy employs a familiar idiom of kind-relative evaluation (“being good/bad as *x*”), familiar not just as a subject of philosophical study but for being widely employed in ordinary evaluative thought and talk.<sup>5</sup> Instances of a broad range of natural, biological, and artifactual kinds are commonly evaluated in this way as members of a kind—indeed, that is one reason why the idiom is philosophically interesting (Crane and Sandler 2017). The linguistic resources available for marking this species of evaluation are in fact quite rich: we might say “*Ks*, insofar as they are *Ks*, are better if they are *G*...”, “*Ks*, as such, should be *G*...” “inasmuch as something is a *K*,...” “what is a *K* is to that extent...”, and so on.<sup>6</sup> We mark kind-relative evaluative criteria in other ways, including based on our modal and classificatory judgments which we’ll discuss shortly. And it is not just philosophers who have employed these idioms in evaluating law. For much of recorded legal history, ordinary jurists have treated the proposition that laws ought to conform to certain norms simply in virtue of what law is as a platitude—indeed, as self-evident (Atiq 2021).<sup>7</sup> Hence, the Rule of Law thesis, understood minimally as the view that laws can be evaluated *as law*, comes as close to common ground as we find anywhere in philosophy.

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<sup>3</sup> See also Murphy (2006: ch2). Natural lawyers argue that the moral merits of law, such as law’s moral justifiability, are kind-relative merits. As I explain later, their account of why law is a goodness-fixing kind fails to adequately explain, though for different reasons than Raz’ account, why the Rule of Law defines a kind-relative standard for evaluating laws.

<sup>4</sup> Kramer (2007: ch3) in his qualified critique of Lon Fuller’s “principles of legality” acknowledges that some degree of conformity to the rule of law is “necessary” for the existence of a legal system and that ideal conformity may be “aspirational” for all legal systems. Even HLA Hart who was otherwise skeptical of the principles of legality has the following to say about “generality” as law’s own virtue:

If we attach to a legal system the minimum meaning that it must consist of general rules—general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals—this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that one essential element of the concept of justice is the principle of treating like cases alike.... So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles (Hart 1958, p619).

See discussion in Waldron (2008). I return in Section III to Hart’s view, breezy as it is, and the extent to which it fits the proposal I ultimately defend.

<sup>5</sup> On kind-relative evaluation, see Geach (1956), Foot (2001), Thomson (2008), and Scanlon (this volume). My argument in this paper is compatible with a range of different accounts of the semantics of kind-relative normative claims.

<sup>6</sup> I rely here on observations owing to Barney (2023) concerning the ubiquity of what they call “qua-predication.” However, Barney does not focus on the role such predications play in kind-relative evaluation specifically.

<sup>7</sup> A good question in experimental jurisprudence concerns the degree to which the assumption is commonly shared that laws can be evaluated as law. As far as I can tell, there has been little systematic work on this precise question, although adjacent questions have attracted some study. A recent study by Hannikainen et al. (2021) asked subjects whether there could be laws that violate Rule-of-Law principles (e.g., laws applied retrospectively

While the Rule of Law thesis is widely accepted, it is not entirely clear why it should hold. That is, it isn't clear why law's nature should entail *any* constitutive norms of evaluation at all. After all, there are plenty of things that aren't subject to such norms. It makes little sense to ask what makes a rock good *as a rock*, and the same goes for colors, prime numbers, sets and collections. Neither is it clear why law's nature should render some specific characteristic—generality, say—a constitutive virtue of laws. Such questions warrant our attention because, as I argue next, the most prominent set of answers in legal philosophy—Joseph Raz's—sets law and our talk of law's constitutive virtues oddly apart from other goodness-fixing kinds and our kind-relative evaluations, generally.<sup>8</sup>

### §2 Raz's exceptional explanation

Raz includes clarity, stability, publicity (both in terms of the content of the law and the reasons for it), generality, and non-retroactivity as core rule-of-law virtues, while allowing that there may be other characteristics of law that are constitutively good-making. For ease of discussion, I'll work with Raz's list, which happens to be widely endorsed, while leaving open that there may be other such virtues.<sup>9</sup> According to Raz, the reason these features are “the specific virtue[s] or ideal[s] that law should conform to” is that their instantiation “protects us from wrongs for which the law's existence creates opportunities.”<sup>10</sup> Put differently, law when it conforms to the rule-of-law virtues “minimize[s] the danger created by the law itself” (Raz 1979: p224).<sup>11</sup> The precise danger is that of “arbitrary government,” which Raz (2019: p5) defines in explicitly normative terms as the “use of power that is indifferent to the proper reasons for which power should be used.”

For present purposes, we can grant that law's existence uniquely entails a risk of abuse of power, though the existence of various non-legal institutions and social rules might entail similar risks (consider religious institutions) and, presumably, the risk is not a necessary feature of law (given the

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or unintelligible laws). The authors found paradoxical that their subjects reported both that such laws cannot exist, but also that there are such laws.

<sup>8</sup> The view's influence is reflected in Jeremy Waldron's (2016) article on the Rule of Law in the *Stanford Encyclopedia of Philosophy*, which ends with the question of the relationship between “the rule of law and the concept of law,” and delivers Raz's distinctive answer. Likewise, Kristen Rundle (2023) in her contribution on the Rule of Law to the Cambridge Elements Series on the philosophy of law notes that “the preponderance of scholarship” has been preoccupied with a Razian theme of “power and measures to prevent its arbitrary exercise.”

<sup>9</sup> Political theorists sometimes defend a conception of the Rule of Law that emphasizes various ‘substantive’ features concerning the safeguarding of basic rights. See discussion in Tamanaha (2012: ch8). However, the substantive conception of the Rule of Law is controversial as an account of the *kind-relative* standard for evaluating laws, even if it captures an independent normative ideal for evaluating laws (Marmor 2004; Kramer 2007). Since the formal features like generality and publicity attract consensus as core ingredients of the Rule of Law, whether construed as a kind-relative standard or as an independent normative ideal, it makes sense to take those features as our explanatory starting point.

<sup>10</sup> Aquinas in *Summa Theologica*, Pt. 1-II ques. 95, Art 3, appears to take a similar view of the legal virtue of clarity as desirable to prevent “any harm ensuing from the law itself.”

<sup>11</sup> In his earlier writings on the subject, Raz (1979: 213) seems to endorse the Fullerian thesis that the Rule of Law might be explainable as a necessary condition on law's capacity to “guid[e] the behavior of its subjects” (cf. Fuller 1964). But Raz rejects this view in later work where he develops his more influential explanation in terms of abuse of power (Raz 2019: p4-5; cf. Raz 1979: 224). Raz was right to reject the guidance account for reasons I discuss in §3.

conceivability of law in a society of angels).<sup>12</sup> We can grant, also, that law’s conformity to the rule of law mitigates this risk: when the rules of a legal system are exceedingly specific (consider: bills of attainder), unclear (vague constitutional provisions), easily altered (unstable agency regulations), lacking in public justifications (unexplained “shadow docket” rulings), and applied retroactively (ex post facto laws), they lend themselves to misuse by legal officials. The question is whether we can find in such facts—granted for the sake of argument—a satisfying explanation for why the rule-of-law virtues are virtues “of the law *as law*, a universal doctrine applying to all legal systems.”

Raz’s explanation captures an important aspect of the Rule of Law. It explains why the Rule of Law is not just a legal ideal, but a moral or political one (Marmor 2008). Since avoiding arbitrary government and the abuse of power is morally desirable, the way in which legal systems become better for instantiating the constitutive virtues of law is not just *as legal systems*, but in their avoidance of morally regrettable states of affairs and their realization of conditions that are, perhaps, intrinsically worthwhile, such as free and public deliberation about the rules of social organization. Hence, one way in which Raz’s explanation is appealing is that it invokes a potential feature of laws—mitigating the risk of abuse of power—that is both good (a virtue) and plausibly related to the Rule-of-Law features.

However, there are problems with the proposal. One would expect the explanation to be consistent with the logic of our kind-relative evaluations generally. After all, the claim that the Rule of Law defines the virtue of “law *as law*” employs an idiom in ordinary use. Recall that Raz is trying to explain something people generally think and say about law, and what people generally think and say about law bears all the markers of kind-relative evaluation. And kind-relative evaluation—our ordinary talk of what it takes to be a good instance of a kind—appears to be governed by general principles. For instance, it is tempting to suppose that for any  $x$  that is an instance of a goodness fixing kind,  $K$ , with good-making feature,  $F$ , the following modal principle holds:

necessarily, the fact that  $x$  is  $F$  makes  $x$  a better  $K$  if it is a  $K$ .<sup>13</sup>

To illustrate, telling time accurately is a constitutive virtue of clocks, and for any clock, the fact that it tells time accurately necessarily makes it a good clock in a perfectly ordinary sense of a ‘good.’ Put the clock in any possible scenario in which it is still a clock and its ability to tell time accurately makes it better *as a clock*.<sup>14</sup> This much seems intuitive (try the principle out with other goodness-fixing kinds,

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<sup>12</sup> In fact, it was Raz (2002: p159) who argued for the conceivability of a legal order established by rational beings with “universal and deep-rooted respect towards their legal institutions and ... lacking all desire to disobey their rulings.”

<sup>13</sup> The principle invokes a kind-relative sense of ‘good.’  $x$ ’s *Fness* needn’t be all things considered good or morally good. Additionally, the principle is formulated to avoid making  $x$  a good clock for telling time accurately in worlds where  $x$  is not a clock. To illustrate, imagine a world in which an object with all of the same physical attributes as a clock in our world appears on the scene *ex nihilo*, rather than through an intentional act (of creation or use). Given plausible assumptions about the nature of artifacts, the physical object is not a clock in the imagined scenario, but merely something that resembles a clock, and is not obviously appraisable as a clock. It would be fine to say, of course, that it *would* be a good clock if it were used as one. I return to this issue later.

<sup>14</sup> Might a clock be *too* good at telling time accurately, so good that it makes it worse as a clock? That wouldn’t tell against the above principle. Rather, it would call for a more careful characterization of the constitutive virtue of clocks: perhaps it is *telling time accurately and effectively*. More generally, a kind’s good-making feature  $F$  can be a logically complex property (the property of *being  $F_1$  and ( $F_2$  or  $F_3$ )*...) or one that admits of degree.

such as houses, knives, hearts, and livers). Hence, one would expect Raz's explanation of law's constitutive virtues to be modally secure—to generalize across possible worlds. But the relevant counterfactuals about legal systems, the Rule of Law, and abuse of power are hard to assess. It's not obvious that a legal system's conformity to the Rule of Law mitigates the risk of abuse of power not just in the actual world, *but in all possible worlds*.<sup>15</sup>

There may be ways of finessing this issue (e.g., in terms of counterfactual notions of risk).<sup>16</sup> But more glaring problems emerge when we try to apply Raz's explanatory approach to other goodness-fixing kinds. It isn't generally true that the risks entailed by the existence of *Ks* explains the constitutive standard for evaluating *Ks*. The existence of chairs uniquely generates a health risk associated with leading a sedentary lifestyle, but the constitutive standard for evaluating chairs (e.g., being comfortable to sit on) is not explainable in terms of such risks. On the contrary, kind-relative standards of goodness often exacerbate the evils uniquely associated with the kind (consider knives and stabbings). In fact, it turns out to be very difficult to come up with *any* other kind, besides law, that works the way Raz proposes.<sup>17</sup>

Such considerations point to a larger difficulty of locating Raz's explanation within a general theory of goodness-fixing kinds. A standard model for explaining the constitutive virtues of artifactual or biological kinds invokes an essential function. A clock is, essentially, an artifact that is designed or used for a particular purpose—telling time—which in turn explains why clocks that don't tell time accurately are bad or defective as clocks.<sup>18</sup> They don't do what clocks are, by their very nature,

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<sup>15</sup> We can render the objection more precise. It relies on the assumption that an adequate explanation for why *x*'s *Fness* makes *x* in possible world, *w*, a good *K* in *w* should invoke facts at *w* instead of what's true in some other world. Consider, e.g., a plausible functionalist explanation of the constitutive virtue of clocks which satisfies this principle. A clock is essentially an artifact designed, more or less successfully, to tell time, and so in any possible world in which *x* is a clock, it is true in that world that the object was designed to perform a specific function. And the fact that it was so designed is what explains why being good at telling time makes *x* a good clock. Raz's account treats a fact about legal systems as explanatory that isn't suitably general (i.e., it doesn't hold in all relevant worlds): the Rule of Law virtues do not mitigate the risk of abuse of power in all worlds with legal systems. Consider, again, a world of angels who very much need laws of property, contract, and administration, as well as higher-order laws for making, determining, and changing the laws, even if they lack any need for, say, criminal or tort laws.

<sup>16</sup> It is plausible that the Rule-of-Law virtues render a legal system less prone to being misused by *ordinary* officials (or persons with ordinary psychological tendencies). But relying on this point entails complicating Raz's account: the rule-of-law virtues are constitutive virtues of law because they render law much less subject to abuse *by ordinary officials* or something to that effect. But it seems odd to think law's constitutive virtues would still be virtues of law in worlds where the risk of abuse of power is entirely counterfactual (such as angelic worlds).

<sup>17</sup> Plausibly, there are sub-kinds, such as medicine bottles and kitchen knives, whose constitutive virtues might include features that mitigate risks uniquely associated with the sub-kind. Insofar as something is a kitchen knife, it ought not to be so sharp as to exacerbate the risk of injury in use. But in none of these cases does the mitigation of a unique risk *fully* explain the constitutive virtues of the kind. Kitchen knives still need to be good at cutting things. Thanks to Amin Afrouzi for the examples.

<sup>18</sup> It is often pointed out that "design" is too strong a description for the kind of conscious effort that licenses attributions of functions to artifacts (Kitcher 1993, Marmor 2023). For our purposes, we needn't take sides in the controversy over the precise nature of the attitudes that confer functions. The key idea, for our purposes, is that of a function derived from an *intentional* act or acts, and, more specifically, from *characterizing* intentions—that is, intentions in relation to an object that regard it as falling under some description. More on this below.

supposed to do. It wouldn't be an exaggeration to say that functions that fix standards of goodness inform our concepts of such kinds (Thomson 2008).<sup>19</sup> In the case of biological kinds such as hearts and livers, the concept of an etiological function plays a similar theoretical role of explaining why instances of the kind exist (Wright 1973; Millikan 1984). An etiological function is a function derived not from the intentions of agents, but from what natural processes reinforce or select for: the ability to perform some function well explains the proliferation of the kind in question.<sup>20</sup> A heart has the function of circulating blood precisely because its ability to do so explains the proliferation of hearts in an environment characterized by various selection pressures.<sup>21</sup> Accordingly, a heart with a clogged artery is bad or defective, *qua* heart, in virtue of its failure to do what hearts are supposed to do given their nature.

To be clear, I am not arguing that we must embrace, without qualification, a functionalist explanation of the constitutive virtues of laws. Nor am I suggesting that Raz must have intended his explanation (or his claims about what makes “law good *qua* law”) to fit the functionalist model. The point is to make vivid the ways Raz's account departs from our general understanding of goodness-fixing kinds and kind-relative virtue. The account can't be justified in functionalist terms. It is hard to maintain that avoiding abuse of power is an essential function of law, whether in the intentional or etiological sense. The countless individuals involved in the design and running of legal institutions often lack the relevant intentions; and, in fact, there are many historical examples of legal systems that were adopted by agents with pre-legal authority (military and economic power, social status, etc.) for the express purpose of entrenching their own power. It is therefore hard to justify Raz's account in terms of law's “intended” function. It is similarly hard to find a justification in an “etiological” function for law. It is a questionable or at the very least unproven empirical thesis that the proliferation of law and legal systems is causally explained by law's ability to mitigate the risk of abuse of power by those with power. More plausibly, law and legal systems proliferate because of their ability to solve various complex problems associated with living in community with others, problems that may or may not include the danger of arbitrary government, a danger whose proper conceptualization is, after all, a modern achievement.

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<sup>19</sup> For present purposes, I don't think I need to take a precise view on the nature of essential truth, but in the interest of clarity, when I say that a property is essential to a kind, I mean that the kind necessarily “encodes” the property (Zalta 2006)—that is, we conceive of the kind in terms of the property. I have singled out intended and etiological (or “proper”) functions as opposed to other kinds of functions (accidental, exaptative, or systems-dependent) (Preston 1998; Cummins 1975) precisely because, as I explain further below, intended and etiological functions are sometimes essential to a kind in a way that explains why the kind is goodness-fixing. Such functions explain both why exhibiting some degree of kind-specific goodness is necessary for kind-membership and why exhibiting the relevant virtues necessarily makes instances better as members of the kind. Bear in mind throughout that it is the category of goodness-fixing kinds that's motivating our discussion.

<sup>20</sup> There may be a third concept of function employed in the literature on goodness-fixing kinds. It is the concept of a psychological or introspectable function, reflected in claims to the effect that belief aims at truth or that desires aim at their own satisfaction or, even, that rational agents aim to know the world and satisfy their desires in it (Smith 2013). Even if there are *a priori* psychological functions that fix normative standards, such functions presumably have no application to law.

<sup>21</sup> By contrast, there is no explaining the presence of rain in terms of rain's tendency to water the soil, or the presence of gravity in terms of gravity's ability to keep us grounded. Not just any natural feature or system is amenable to functional analysis. What plausibly unifies function attributions in natural science as well as social theory is the fact that functions explain the existence of kinds (Kitcher 1993).

Finally, Raz’s explanation seems not to be informed by general principles of existence and persistence that plausibly govern goodness-fixing kinds. It is tempting to suppose that instances of such kinds exist and persist only insofar as they exhibit a minimal (albeit underspecified) degree of kind-specific goodness—their existence and persistence is subject to what Lindemann (2017) calls the “threshold requirement.” We regularly make (true) claims like “this ‘coffee’ is so bad, it isn’t even coffee” or “this thing is too blunt to count as a knife.” And it isn’t just ordinary thought and talk that favors the threshold requirement; the principle is embraced by most theorists. Consider Amie Thomasson’s (2003: 600; 2007: 59) account of what it takes to be an instance of an artifactual kind (goodness-fixing or not):

Necessarily, for all  $x$  and for all artifactual kinds  $K$ ,  $x$  is a  $K$  only if  $x$  is the product of a *largely successful intention* that  $(Kx)$ , where one intends  $(Kx)$  only if one has a substantive concept of  $K$ s and intends to realize that concept by imposing  $K$ -relevant features on the object.<sup>22</sup>

Unpacking this account, it assumes that (a) the existence of artifacts depends on an intentional act (e.g., an act of creation or deliberate use), (b) that the act must involve an intention to realize in an object some of the essential features of the artifactual kind, and, crucially, (c) that the intention should be “largely successfully realized” in that the object should exhibit the relevant features to some extent. Where the  $K$ -relevant features include the ability to perform some function, the “successful intention” condition more or less entails the threshold requirement: genuine instances of the kind must be good to some degree at performing their function.<sup>23</sup> An object doesn’t count as a chair simply because I intended for it be a chair. If I have extremely false beliefs about chair manufacturing—I think chairs are produced by throwing raw materials out the window—what I end up creating by acting on my beliefs is not a chair but a heap, despite my good intentions. As Hilpinen (1993: 161) puts it: “if an author fails in every respect, he does not produce a genuine artifact, but only ‘scrap.’”

So, there are very good reasons for accepting the threshold requirement: it conforms to pre-theoretic intuition and survives the rigors of theory (even if it might be denied).<sup>24</sup> But Raz’s account of the Rule of Law seems inconsistent with it or, at the very least, is unable able to explain why it should hold. For it is unclear why extreme and pervasive abuse of power within a legal system should preclude the system’s existence or persistence. To be sure, legal systems that govern arbitrarily—based on the whims of a despot, say—may be less likely to be accepted or obeyed over time. That is one

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<sup>22</sup> As I indicated earlier, we needn’t take sides on the precise nature of the intentional acts (whether of conscious design or deliberate effort or systematic use...) that result in artifacts. I am using Thomasson’s view as illustrative of my point that plausible and broadly accepted principles governing artifacts entail the threshold requirement. Compare an analogous principle suggested by Vega-Ecabo and Lawler (2014: p116):

Given a maker  $M$  and an artifact  $A$ ,  $M$  creates  $A$  only if the following conditions are satisfied: 1.  $M$  has the intention  $I$  of creating  $A$ . 2. The content of  $M$ ’s intention  $I$  to create  $A$  involves an idea of what kind of thing an  $A$  is. 3.  $M$  carries out intention  $I$ . 4. *The intention  $I$  is successfully satisfied.* 5.  $M$  is able to assess the degree of success of his intention  $I$  to create  $A$ .

What determines whether the minimal “successful intention” condition has been properly met? Presumably the threshold depends on our concept of the kind in question.

<sup>23</sup> “More or less” because of the inherent vagueness in the idea of a “largely successful intention” and the possibility of multiple  $K$ -relevant features. Still, the connection between the successful intention condition on artifactual existence and the threshold requirement is extremely close.

<sup>24</sup> For a critical view, see Lindemann (2017).



way in which they might cease to exist on account of their arbitrariness, given that on most accounts of the nature of law, a system of rules counts as a *legal* system only if it is socially accepted. But this would secure a contingent and causal connection at best between arbitrary government and law's existence. By contrast, the threshold condition tracks a *constitutive* and necessary connection between the existence of goodness-fixing kinds and the manifestation of kind-relative goodness. The way in which a radically blunt piece of scrap metal fails to be a knife, despite the good intentions of an incompetent designer, is non-causal and constitutive.

In fact, as I'll argue shortly, making room for the threshold requirement involves supplementing Raz's positivist starting points concerning law's nature. Legal positivists take the legality of rules and the existence of legal systems to be fundamentally grounded in exclusively social facts, such as acceptance of a set of rules by members of a community. Explaining why the threshold view is inconsistent with the standard positivist picture requires some discussion, and I develop the point more fully in the section to follow. But roughly if a set of institutional rules can be so defective relative to the Rule of Law to be incapable of being law, then, given standard assumptions about grounding, facts concerning the Rule-of-Law virtues—facts that aren't in any sense "social" in nature (though they needn't be moral)—belong in the grounds of law in ways positivists have yet to acknowledge.<sup>25</sup>

In any case, we've seen enough of the ways that Raz's explanation sets law apart from other goodness-fixing kinds to set up our challenge. The explanation: (1) does not clearly generalize across possible worlds and legal systems; (2) appeals to facts that aren't generally explanatory of the constitutive virtues of other goodness-fixing kinds; (3) doesn't fit standard explanatory models that appeal to a kind's intended or etiological function; and (4) fails to accommodate a threshold constraint on the existence and persistence of legal systems. Of course, we needn't assume that kind-relative evaluation must work the same way for all goodness-fixing kinds. But if law is exceptional in these and other ways, it would be good to know *how* exceptional and *why*. Since it is unclear why law should be so exceptional, I submit that we should aim for a theory of law's virtue that preserves greater continuity with other goodness-fixing kinds.<sup>26</sup> In fact, there are several reasons for seeking a more unified account of kind-relative evaluation, even if, ultimately, the proof is in the pudding.<sup>27</sup> As we

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<sup>25</sup> Positivists sometimes concede a modal relationship between the existence of law and the instantiation of the Rule of Law (cf. Hart 1961: p206-7; Marmor 2004: p42-3; Kramer 2007: 51-53). However, as I argue in Section III, the relationship is best analyzed in terms not of modality, but of grounding and essence.

<sup>26</sup> While it's possible that when Raz and others describe the Rule of Law as a virtue of "law *qua* law," they employ the ordinary idiom of kind-relative evaluation in some artificial or extraordinary way, that can hardly be our default assumption. It is therefore a worthy theoretical exercise to see how far we can explain law's constitutive virtues while preserving continuity with other goodness-fixing kinds and without making too many controversial assumptions about law's nature.

<sup>27</sup> There are independent reasons for thinking that the analogy with artifactual goodness-fixing kinds is especially apt. Consider Brian Leiter's (2011, p666) pointed observation about law's artifactual nature:

The concept of law is the concept of an artefact, that is, something that necessarily owes its existence to human activities intended to create that artefact. Even John Finnis, our leading natural law theorist, does not deny this point. I certainly do not understand Kelsen, Hart, Raz, Dickson or Shapiro to deny this claim. Those who might want to deny that law is an artefact concept are not my concern here; the extravagance of their metaphysical commitments would, I suspect, be a subject for psychological, not philosophical investigation.

shall see, our efforts reveal a shared motivation for seemingly disparate themes in legal philosophy, including in Raz’s own views about the nature of law.

§3 *Law as an unexceptional goodness-fixing kind*

The goal of this final section is to see whether we can secure an explanation with the desired features while minimizing controversial assumptions about law’s nature. Since legal positivism imposes stricter constraints than opposing views on the kinds of facts we can appeal to in explanation, a positivist account of law provides a natural starting point for discussion.<sup>28</sup> The results should be of interest to non-positivists, however, since they bear on positivism’s explanatory adequacy.

Legal positivists ground the existence of law and legal systems in social facts. Roughly, legal systems exist only when and because various hierarchically structured rules of social organization are accepted and obeyed by members of a community (cf. Hart 1961). Accordingly, one might look to explain the Rule of Law in terms of what it takes for rules to be capable of social acceptance, and, unsurprisingly, several philosophers have pursued a strategy along these lines.<sup>29</sup> Andrei Marmor (2008) suggests that one of law’s essential functions is guiding people’s behavior, and, consequently, the Rule-of-Law features like clarity and publicity “make the law good” precisely in virtue of the fact that they make the law “good in guiding human conduct.” Similar themes run through Lon Fuller’s (1964: 38-57) classic discussion of the “inner morality of law”—that law is a functional kind, that its specific function is to “subject human conduct to the governance of rules,” and that performing that function

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If law is indeed an artifact (a claim I haven’t presupposed at any point in the argument), it ought to behave like other artifactual kinds whose constitutive virtues are systematically explained by kind-relative functions.

<sup>28</sup> Most non-positivists agree with positivists that social facts play a role in grounding law. The point of disagreement concerns whether, in addition, facts that aren’t essentially social (e.g., normative facts) belong in the grounds.

<sup>29</sup> The idea of law as a functional kind has been defended in several different contexts, though not always or even typically in relation to the Rule of Law. Ehrenberg (2016: 182) describes the many essential functions, from coordination to dispute settlement to the conferral of normative statuses, that have historically been attributed to law, while cataloging the different accounts in the literature of the precise relationship between law’s nature and its alleged functions. For related discussion, see Murphy (2005, 2006), Moore (1992) and Crowe (2019: ch9). In defense of natural law theory, Mark Murphy argues that law’s constitutive function is to give agents moral reasons for action. He defends this functional thesis based on two key claims: 1) that law “characteristically”—or frequently under normal background conditions—gives agents such reasons for action; and (2) that the law makes various demands which presuppose that agents have decisive reasons for compliance. I am very skeptical of the theory of function-attribution that undergirds Murphy’s account, for reasons discussed below (see fn31) and elsewhere (Atiq manuscript). But the main problem with the account, given our current goals, is that it fails to explain the Rule of Law. Even if we assume that law’s “characteristic activity” and essential function “is to provide dictates . . . which the agents to whom they are addressed have decisive reason to comply” (2005: 27), this does not explain why generality, say, is a constitutive virtue of law. Highly specific rules telling named individuals how to act in one-off situations can give agents “decisive reasons to comply” when backed by threat of sanction. Even absent such threats, non-general norms could conceivably give agents decisive moral reasons for compliance, if certain forms of moral particularism turn out to be true. This result is in a way unsurprising because natural law theorists like Murphy aren’t principally concerned with explaining the Rule of Law; their goal is to show that the moral merits of law are legal merits. Thanks to Brian Leiter for discussion on these points.

effectively requires conformity to the Rule of Law.<sup>30</sup> It is not always transparent what justifies such functional claims about law, but I'll explore a potential justification shortly. The key point for now is that *if* law has an essential function, we might be able explain the constitutive standard for evaluating laws by leveraging a perfectly general phenomenon associated with functional kinds: a kind's essential function grounds a standard for evaluating its instances.

The general strategy is promising because it relies on an independently motivated explanatory model, but the specific proposal confronts problems. One problem is that any claim about law's *essential* function needs to be motivated based on an account of what makes some functions essential, especially given that not just any use or 'function' to which instances of a kind might be put can explain kind-relative virtue.<sup>31</sup> Additionally, an essential function as broad as "guiding conduct" or "subjecting human conduct to the governance of rules" couldn't explain the Rule of Law for several reasons.<sup>32</sup> First, even if law aims to guide behavior or oblige those who are subject to its demands, the same could be said about the rules of social clubs, etiquette, criminal organizations, or religion. But the Rule of Law is not so obviously a constitutive virtue of these other forms of social organization. Second, even if *some* Rule-of-Law virtues, like clarity and non-retroactivity, necessarily augment law's ability to guide action or garner acceptance, it is hardly obvious that other relevant virtues, such as generality or even publicity, bear the same relation to the identified functions.<sup>33</sup> Rules that lack public justifications can be, and historically have been, widely accepted and endorsed, and the same is true of exceedingly specific laws, such as bills of attainder that pick out named individuals or impose one-off obligations: they are capable of guiding behavior.<sup>34</sup> Third and most importantly, even if we were to assume that the Rule-of-Law virtues, whether individually or in combination, render law more likely to perform its action-guiding or obliging function, this unfortunately does not result in the kind of explanation of

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<sup>30</sup> As I noted previously, Raz (1979: 213) in his earlier writings seemed friendly to Fuller's explanation of the Rule of Law in terms of action-guidance though he ends up rejecting it. Recently, Jonathan Crowe (2019) has defended Fullerian claims about law. Crowe maintains that "a putative legal enactment that is incomprehensible, imposes contradictory requirements or is otherwise impossible to follow" is incapable of creating a "sense of social obligation" and, so, bad *qua* law, since an essential function of law is to foster a sense of social obligation. For my qualified critique of Crowe's view, see Atiq (2020). As I note there, I very much agree with Crowe's insight that law is a goodness-fixing kind.

<sup>31</sup> That's true of one-off uses. But in fact, even regular and continuous uses do not necessarily explain constitutive virtue. Flathead screwdrivers are regularly used to pry things open. It may be the statistically dominant use to which such screwdrivers are put since most screws are Philips-head. But that wouldn't make *prying things open* the constitutive function of flathead screw drivers. Relatedly, what makes a flathead screwdriver good as a screwdriver is its effectiveness at turning screws, not prying thing open.

<sup>32</sup> To be fair, Marmor (2008: p9) notes explicitly that "guiding conduct" may not be the only essential function of law, so what I'm about to say is compatible, in principle, with his view.

<sup>33</sup> In fact, since law aims to guide different subjects in different ways, it is not even clear why a feature like retroactivity should inhibit law's action-guiding function. A retroactive statute can certainly guide the behavior of officials tasked with enforcing it. Nevertheless, a retroactive law is *paradigmatically* bad as law (in the kind-relative sense of 'bad').

<sup>34</sup> Generality is often thought to be the "essence of the rule of law" (Raz 1977: 215). And so, it counts decidedly against the guidance account that it cannot explain this key feature. We could complicate our account of the nature of the guidance at issue. Perhaps law aims to guide agents based solely on general principles or generally applicable reasons. But any such complication would have to be motivated via an account of law's nature: why does law aim to guide agents in this specific way? The problem is that there is no straightforward justification for invoking such fine-grained functions for law, as I discuss further below.

the constitutive virtues that we are after. For not every characteristic that improves a goodness-fixing kind's ability to perform its essential function counts as a constitutive virtue. A clock that requires substantial quantities of energy to function is less likely to tell time accurately, but being energy-efficient is not a constitutive virtue of clocks. Put differently, an energy-hungry clock isn't necessarily a bad clock, for there are energy-abundant worlds where such clocks function perfectly well.<sup>35</sup> Relatedly, we need some way of distinguishing a feature like publicity from other features that plausibly contribute to law's ability to guide action or garner acceptance (such as being in conformity with what agents have independent reason to do) but that aren't so undisputedly constitutive virtues of law.

Hence, the challenge in developing a functionalist account of the Rule of Law is to specify a suitable function, explain why law has the relevant function essentially or constitutively, and, finally, explain how this essential function relates to the Rule-of-Law virtues. One of the benefits of making all this clearer, as we shall see, is that it should help us make progress on other, more central questions in legal philosophy.

(a) *Law's acceptance under the guise of the good*

I suspect the problems confronting existing functionalist accounts can be overcome with a more precise characterization and justification of law's function. To that end, consider a recurring theme in the literature that what distinguishes legal rules from the rules of etiquette, clubs, and other forms of social organization is that law elicits a form of social acceptance that is fraught with normative assumption.<sup>36</sup> A famous illustration of this theme comes from Raz (1985) himself, who maintains that law necessarily "claims authority" over its subjects. On a natural interpretation of Raz's authority thesis, it is a claim about how legal officials and other members of the community must regard the rules of social organization for there to be a *legal* system—namely, as rules that give people genuine and potentially decisive normative reasons for compliance.<sup>37</sup> A similar idea is implicit in Scott Shapiro's (2011: 212) suggestion that what distinguishes legal rules from the rules of a criminal organization is that only the former are essentially presented and accepted by officials as having a "moral aim" (roughly, that of solving various moral problems posed by living in community with others).<sup>38</sup> Even HLA Hart's (1961: 56) famous thesis that the existence of a legal system depends on officials taking the "internal point of view" on a set of rules is naturally (though not uncontroversially) understood in terms of normative attitudes. Taking the internal point of view on the rules involves thinking that

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<sup>35</sup> The point can be made in several ways. Recently, Marmor (2023: p89) has argued that artifactual functions are grounded in the "continuous and prevalent" use (or uses) to which objects are put. Now, I don't think that's right, since an artifact can be used pervasively for some purpose that doesn't amount to the artifact's essential or explanatorily relevant function. See the example in fn31 of flat-head screwdrivers being used to pry things open. But setting this issue aside, Marmor would surely agree that not every characteristic that makes a chair better able to serve the ends reflected in general usage counts as a constitutive virtue. So, we need a distinction. And a natural one to make in this context is the distinction between characteristics that are constitutively tied to the uses to which we put chairs and those that aren't. *Being energy-efficient* is not constitutively tied to the way clocks are used around here. If, contrary to fact, we started using clocks *to conserve energy*, then being energy-efficient would bear the right relation to general usage to count as a constitutive virtue.

<sup>36</sup> See discussion in Gardner (2012: 13-15).

<sup>37</sup> Raz (1995: 217) explicitly endorses this interpretation: "the [authority] claim is made by legal officials wherever a legal system is in force." See discussion in Roughan (2018: p194).

<sup>38</sup> I set aside the underdiscussed question of whether this putative "aim" is conceived by agents of law in essentially moral terms—that is, under a description that essentially involves moral concepts.

there are reasons for obeying and enforcing them, reasons that may give rise to an obligation but that needn't be moral in nature (cf. Holton 1998).<sup>39</sup>

We can distill from these disparate theses a unifying principle of broad appeal, namely, that the intentions of agents that ground law's existence are "characterizing intentions": legal rules are, essentially, rules that are accepted (chosen, enforced, followed...) *as N*, where *N* could be any property like *having authority*.<sup>40</sup> Recall that such characterizing intentions play several important roles in the case of ordinary artifactual kinds like clocks and knives. For one, they inform our concept of the kind and its essential function: a knife is, essentially, an object that is designed (or used) *as an object for cutting things*. Additionally, characterizing intentions determine whether some object counts as an instance of the kind: a sharp object counts as a knife only if someone more or less successfully intends it *as* a tool for cutting things. Hence, if the mode of social acceptance that grounds law's existence similarly involves some shared, collective assumptions about the character of the accepted rules, we may be able to derive from this characterization an intended function for law and, in turn, an explanation for the Rule of Law.

We can rule out certain possibilities regarding the nature of the attributed property. Suppose that *being N* is just the complex conjunctive property constituted by the specific Rule of Law virtues (*being general and non-retroactive and public and ...*). If so, then a system of rules would count as a *legal* system only if it is accepted for the express purpose of establishing a general, clear, non-retroactive, and public form of social organization. But that seems highly unlikely given that legal systems plausibly exist and have existed in the absence of such complex intentions.<sup>41</sup> For such a view to be at all workable, our account of the content of the Rule of Law would have to be very thin (and less plausible, as a result). In fact, such a view may well have been Hart's (1961: p206), who observes, albeit in passing

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<sup>39</sup> At the very least, the internal point of view couldn't be equivalent to unreflective obedience or conformity; more plausibly, it involves some deontic or evaluative judgments about the law made by officials. See Hart (1961: p56):

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought' 'must' and 'should', 'right' and 'wrong.'

<sup>40</sup> It would be best not to get distracted by exegetical questions concerning how Raz (or Shapiro or Hart) intended the claims about law's authority (or its moral aim or the internal point of view) to be understood. The key point for now is that *if* the mode of social acceptance that grounds law's existence essentially involves some assumptions about the character of the accepted rules, we may be able to derive from this characterization an intended function for law and, in turn, an explanation for the Rule of Law.

<sup>41</sup> Fuller (1964: p146) notes the risks of attributing too much purpose to complex, collectively designed institutions:

There is an intrinsic improbability about any theory that attempts to write purpose in a large hand over a whole institution. Institutions are constituted of a multitude of individual human actions. Many of these follow grooves of habit and can hardly be said to be purposive at all. Of those that are purposive, the objectives sought by the actors are of the most diverse nature. Even those who participate in the creation of institutions may have very different views of the purpose or function of the institutions they bring into being."

As he goes to observe, our core functionalist thesis about law must be a "modest and sober one" to be at all plausible.

and somewhat obscurely, that “generality” is part of the “minimal meaning” of a “legal system.”<sup>42</sup> But generality is only one of several Rule-of-Law virtues.

A more likely scenario is that *being N* is a normative property, with a non-obvious, constitutive connection to specific Rule-of-Law virtues. There are at least two reasons why this property is likely normative in nature. The first we’ve already noted: there are independent grounds for thinking that some very general normative assumptions about the law—such as *having authority* or *being non-arbitrary* or *being conducive to general welfare*—are implicit in the way that law, by its very nature, is socially accepted.<sup>43</sup> The second reason builds on a point we’ve now made in a few different ways. The relationship between *being N* and *being general, public, and so on* cannot be merely causal or contingent or else we’ll run into the same problems that we discussed earlier. If the generality and publicity of the law merely make it *more likely* that law performs its essential function, this won’t be sufficient to explain the status of the Rule-of-Law virtues as virtues of law *as law*. The connection must be non-causal and constitutive. And while there is no non-normative property that is constituted by the Rule-of-Law features as far as one can tell, it is very tempting to suppose that there *is* some normative ideal—perhaps an ideal of fairness or rationality or reciprocal restraint—whose realization constitutively requires general, clear, public, and non-retroactive rules of social organization; an ideal that legalistic societies may be especially attuned to. Recall that an important virtue of Raz’s account of the Rule of Law was precisely that it captured our intuitive sense that the Rule of Law is not just a legal ideal—that is, it doesn’t just make the law better *qua law*. The Rule of Law makes the law better in some kind-independent and possibly moral sense. And so, it is tempting to suppose that law is, by its very nature, socially accepted *as* a mechanism for realizing a singular normative ideal that we might call, without begging too many questions hopefully, “the ideal of the Rule of Law.”

Taking stock, our search for a satisfying explanation of law’s own virtue has cast several independently defensible claims about law’s essence in a new light. The existence of law depends on rules being accepted by members of a community *as rules that realize a normative ideal*. This fact about law explains (in the usual way for artifactual kinds) law’s defining function: legal orders aim at the relevant ideal. And law’s function, in turn, explains (again, in the usual way) the constitutive standard for evaluating laws—the Rule of Law—so long as the ideal’s realization constitutively depends on the

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<sup>42</sup> Hart’s (1961: p206-7) observations in this vein are worth quoting in full:

Further aspects of this minimum form of justice which might well be called ‘natural’ emerge if we study what is in fact involved in any method of social control . . . which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. *If social control of this sort is to function, the rules must satisfy certain conditions*: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. . . . Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality. Indeed, *one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality*, and suggested that they be called ‘the inner morality of law.’ Again, if *this is what the necessary connection of law and morality means, we may accept it*. It is unfortunately compatible with very great iniquity.

<sup>43</sup> This is not the place to go over the various reasons for embracing the authority thesis or related theses, but I take it a primary reason is extensional adequacy: without some such commitment, our theory of law collapses the distinction between law and other systems of social control and organization. See discussion in Gardner (2012: 13-15); Shapiro (2011: 215). Moreover, legal systems do characteristically provide ‘official’ narratives of justification articulated in terms of justice and righteousness. It is hard to come with a real world example of one that doesn’t.

realization of a social order which exhibits the Rule-of-Law features. Granted, we've left the relevant ideal underspecified, but the aim was to develop the right explanatory schema, one that meaningfully constrains our account of the nature of law, and in more ways than one, as we shall see shortly. However, for purely illustrative purposes suppose that a system of rules counts as a legal system only if it is embraced as a body of rules that is meant to secure procedural fairness. Then, we have a basis for thinking that law's essential function is to realize a procedurally fair system of governance. And provided that a procedurally fair system is, essentially, a system with rules that are general, public, non-retroactive, and so on, then it should be transparent why the law is good *qua* law, in a perfectly ordinary sense of 'good,' when it conforms to the Rule of Law.

(b) *The sincerity condition*

The above explanation leverages by design general principles governing how artifactual kinds acquire their essential functions and become subject to constitutive norms of evaluation. Consequently, the explanation's viability turns on an important assumption that we haven't yet made explicit: namely, that a community's representation of law *as N* must be more or less sincere. This assumption warrants separate discussion because of what it implies about broader debates in legal philosophy.

Our explanation of the Rule of Law would be undermined if law's existence could be grounded in a form of social acceptance that is insincere in its normative characterization of the rules. For we've made explanatory use of an intuitive principle that an object that is intended to perform the *K*-function is better *as a K* if it performs that function well. No analogous principle for objects designed or used with insincere intentions seems true. If a creator merely represents herself as making a *K* but does not intend for the created object to perform the *K*-function (that is, she is either indifferent to whether it does or intends the contrary), then her creative efforts do not necessarily produce a *K* or an object that is subject to the constitutive standard for evaluating *K*s.<sup>44</sup> If I promise to build you a house but intend, instead, to build a miniature model of one, it makes little sense to say that what I end up producing would be, *by its very nature*, better if it could provide shelter.<sup>45</sup> It isn't a house because neither I nor anyone else intended for it be one. Of course, something insincerely designed to be a house could end up being effectively used by others as a house (if it happens to perform the house-function well). It would then count as a house and be subject to relevant norms, but in virtue of a different kind of sincere intentional act—being used as a shelter-providing structure. Hence, for a system of rules to be subject to the constitutive norms of evaluation defined by the Rule of Law, the system must be embraced *more or less sincerely* as a mechanism for realizing the ideal of the Rule of Law.<sup>46</sup>

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<sup>44</sup> What if a creator intends to make a *K* but falsely believes that *K*s do not perform the *K*-function and intends not to confer any such function on the created object? This possibility assumes that one can have the concept of a *K* without knowing that *K*s perform the *K*-function. In such cases, it makes sense say that the creator intends conflicting things: she *sincerely* intends to produce something with the *K*-function without knowing that that is what she intends or that her various intentions are conflicting. I don't doubt that such conflicts are possible in the design of legal systems.

<sup>45</sup> Relatedly, insincerely representing oneself as *phi-ing* does not make one subject to the constitutive norms of *phi-ing* well, though it might make one subject to norms of honesty and the like.

<sup>46</sup> Alternatively, we can make the point in terms of the sincerity of an agent's intentions in their engagement with the artifact. Pretending to use a sheet of paper as a shelter-providing structure does not necessarily confer on it any such function.

This result is significant because positivists do not usually acknowledge a “sincerity condition” on the normative attitudes that inform the social activities that produce law.<sup>47</sup> In fact, any such condition is more often denied. David Plunkett (2013), for instance, argues that positivists should understand the idea that law has a “moral aim” in terms that are compatible with officials insincerely representing legal rules as morally motivated. It is sufficient for members of a community to act *as if* the rules of social organization were meant to promote the general good or fairness, even if their true intentions are entirely selfish, arbitrary, and non-moral. However, any such system of rules would not be subject to the Rule of Law for the reasons we’ve highlighted. Whatever else might be said in favor of a view like Plunkett’s, it cannot rely on our explanation of the Rule of Law “as a universal doctrine applying to all legal systems,” for our account presupposes that law, necessarily, depends on a degree of sincerity in the normative attitudes that condition its existence.<sup>48</sup>

(c) *The threshold requirement*

Consider, finally, the threshold principle governing goodness-fixing kinds—its present application and broader jurisprudential significance. As discussed earlier, whether an object counts as an instance of a goodness-fixing kind depends on its manifestation of some degree of kind-specific goodness, and, relatedly, in the case of artifactual kinds, on an agent’s more or less successful intention to imbue in the object the artifact’s essential characteristics. Our account treats law as an abstract artifact that’s based on a collective’s intention to adopt rules with the purpose of realizing the ideal of the Rule of Law. If that assumption is justified, then law should be subject to the same principles that govern artifactual kinds generally: a legal system cannot exist in the absence of rules that satisfy to some minimal degree the relevant ideal.<sup>49</sup> This upshot fits nicely with the fact that, historically, the legality of putative systems of law that have departed significantly from the Rule of Law has been reasonably questioned.

It also bears, ultimately, on what metaphysically grounds—that is, fundamentally and non-causally explains—the existence of legal systems. The threshold principle provides a basis for thinking that law must be grounded at least partly in the realization of a normative ideal. Consider, first, what

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<sup>47</sup> See discussion in Holton (1998).

<sup>48</sup> Matthew Kramer (2007: pp63-71) in his qualified critique of Fuller’s view makes the important point that the moral worthiness of a legal system’s compliance with the Fullerian principles (of generality, clarity, and so on) depends on the system’s reasons for compliance. Kramer argues at length that officials of a wicked regime might implement the Fullerian principles for purely prudential or self-interested reasons and I’m sure he is right about this. But if my argument holds, then any such system of social organization would not qualify as a *legal* system, and not because it fails to comply with the Fullerian principles, but because the participants of such a system fail in their implementation of the regime to be motivated by the right normative ideals. This is far from mere stipulation or a conversation-stopping use of definition to deflect or rule out contrary views. We’ve demonstrated that certain non-obvious commitments about law’s nature are implicit in our other, more explicit commitments regarding law, the rule of law, and goodness-fixing kinds more broadly. We can put the key upshot in terms of a distinction that Kramer himself draws—between the rule of law, construed as a set of characteristics that define “necessary” and “aspirational” criteria for any legal system, and the Rule of Law, construed as a “moral-political ideal.” What we’ve discovered is that some (underspecified) moral-political ideal of the Rule of Law is a key part of the explanation for *why* the relevant characteristics define necessary and aspirational criteria for all legal systems.

<sup>49</sup> This is not quite Fuller’s view, but closer to his position than Hart’s in their famous debate concerning the relationship between law and the rule of law, as I explain further below.



makes any such implication non-obvious. It might be extremely unlikely to the point of being hard to imagine for a system of rules to be embraced by a community *as law*—that is, as a body of rules meant to realize the ideal of the Rule of Law—that doesn't exhibit enough of the Rule-of-Law virtues to qualify as a legal system. Indeed, everything we've discussed so far is compatible with the possibility that even the Third Reich was successful in establishing a legal system, despite its opaque and non-public laws that retroactively “cured” large-scale murder (cf. Fuller 1964: p101; Hart 1961: p206-7). So, plausibly, the properties:

(a) being a system of rules that's socially accepted in the way that positivists maintain creates law,

and

(b) being a system of rules that sufficiently instantiates the Rule of Law to qualify (in principle) as a legal system,

co-travel modally as long as we restrict our attention to psychologically realistic possibilities. That is, it is hard to construct a psychologically realistic scenario where one property is instantiated by a legal system but not the other. But this means that we cannot rely as easily on a standard modal test to decide between the following grounding hypotheses:

(a) law is grounded in the social acceptance of rules alone (as positivists traditionally maintain),

versus

(b) law is grounded in social acceptance *and* (more controversially) in the minimal conformity of rules to a normative ideal.

The standard modal test relies on an iron-clad rule of grounding: if *A* facts fully (and non-disjunctively) ground *B* facts, then there can be no possible world where the *A* facts obtain but the *B* facts don't (Rosen 2010, Fine 2012). This test for evaluating the sufficiency of our grounding hypotheses is unhelpful precisely because a possible world where the social acceptance condition obtains but the Rule-of-Law condition doesn't strains our powers of imagination. It's a far-out possibility at best. So, in all easily conceived worlds in which law exists, the social acceptance condition is plausibly satisfied. In this way, both grounding theses might appear to pass the modal test.

The analogy with artifactual kinds that has helped us explain the Rule of Law can also help us decide between these two grounding hypotheses. For in the case of other artifactual kinds, we *can* test analogous hypotheses by teasing apart modally the broadly social fact of an object's being designed with the intention of performing a kind-specific function and the normative fact of the object being minimally good at that function. It is not hard to imagine scenarios in which an aspiring clock-maker intends to make a clock but fails, for reasons of incompetence, at creating an object that functions sufficiently well to be a clock. And in these worlds, a purely social grounding hypothesis about clocks is plainly falsified: it is not true that anyone's intention to make a clock (or their intention to treat something as if it were a clock) on its own suffices for the existence of clocks. Hence, in the case of non-legal artifactual kinds with functions and constitutive standards of success, no account of what grounds instances of such kinds is complete that doesn't include kind-specific goodness facts. Since we've assumed throughout that things shouldn't work differently in the case of law, law's existence

must be similarly grounded partly in its realization of the Rule of Law to some minimal and underspecified degree.

To reiterate, this result holds even if it is difficult to imagine a body of rules being accepted *as law* and yet clearly failing to be law.<sup>50</sup> The modal considerations should help clarify why we haven't conceded significant ground to non-positivists. The fact that law is grounded in the *minimal* satisfaction of a normative ideal is entirely consistent with both actual and possible legal systems that grossly violate the Rule of Law, not to mention moral ideals. Moreover, the normative facts that ground law, on this view, may turn out to be normative in only a thin and naturalistically acceptable sense.<sup>51</sup> In short, we haven't strayed too far from our broadly positivist starting points, or, for that matter, the reasons that motivate positivist assumptions about law, in our search for a satisfying explanation of law's own virtue.

### *Conclusion*

As I emphasized at the outset, the claim that laws, like houses, clocks, and knives, exhibit kind-relative goodness is intuitive and widely embraced. It is an excellent candidate for a dialectically neutral starting point in the philosophy of law. And we've now seen that its implications can help us make progress on the traditional questions of jurisprudence.

Several of our conclusions turn on the assumption that it is desirable for a theory of law's virtue to preserve continuity across goodness-fixing kinds. These can be stated in conditional form: *if* positivists want their account of law and the Rule of Law to be consistent with our understanding of goodness-fixing kinds more generally, they should embrace the following claims:

- 1) rules of law are essentially accepted by members of a community under some normative description that's constitutively tied to the Rule-of-Law virtues;
- 2) this perspective on the rules as satisfying a normative ideal must be more or less sincerely held by members of the community; and
- 3) the existence of a legal system is grounded, partly, in the system's minimal conformity to the normative ideal.

But there is also a less conditional conclusion. We've seen that subsuming law within a larger conceptual scheme, involving artifactual, functional, and goodness-fixing kinds, requires revising the standard positivist account of law's nature. In fact, it involves conceding some ground to non-

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<sup>50</sup> Marmor (2009: ch2) suggests that our inability to imagine a world where rules are socially regarded as law but aren't *in fact* law counts in favor of positivism. I've argued against an inference to positivism based on such inconceivability in prior work (Atiq 2020: p9), but our present discussion suggests another reason for doubting the inference.

<sup>51</sup> To say that law ought to conform to the Rule of Law or that legal systems are better for instantiating the Rule of Law virtues is to say nothing more mysterious than that clocks ought to tell time accurately or that a more accurate clock is better *qua* clock. That said, unlike clocks, law turns out to have a function that is irreducibly normative. This result seems practically consequential. It entails, for example, that a critique of law when it falls short of the normative ideal of the Rule of Law does not need to appeal to standard sources of law, such as statutes, precedents, customs, or constitution, to be justified as a *legal* critique. But the main payoff is intellectual: our argument shows that no account of law's nature could be complete without a metaphysics of normativity. For further discussion of the upshot, see Atiq (manuscript on file with author).

positivists, by affording normative facts a fundamental, even if minimal, role in the metaphysics of law.<sup>52</sup>

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<sup>52</sup> As far as I can tell, the only way to avoid this minimal concession would be to treat law as *sui generis* or reject the cross-kind comparisons entirely. But this would be a mistake for, as I’ve emphasized throughout, positivists would then face the explanatory burden of saying what makes law and our talk of legal goodness so exceptional. One might try to defend the view that there is nothing special to say about the Rule-of-Law virtues other than that they happen to be associated with law for contingent reasons—such as the fact that historically legal systems with, say, *ex post facto* laws have been greatly reviled. However, any such view would be hard to maintain. Consider the implausibility of analogous claims about other goodness-fixing kinds—that providing shelter is only contingently associated with houses. Additionally, the view would lack resources for explaining widely shared assumptions within legal philosophy and practice, including the proposition that the Rule of Law defines a universal standard for evaluating laws, an aspirational ideal for all possible legal systems. In short, a positivist rejection of our dialectically neutral starting-point that laws, like houses, clocks, and knives, exhibit kind-relative goodness would not only be objectionably ideological; it would sharpen a familiar charge against legal positivists of being out of step with the ordinary and unexceptional ways in which we think and talk about law’s normativity, its own virtue.

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