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The Folk Concept of Law Law Is Intrinsically Moral

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Most theorists agree that our social order includes a distinctive legal dimension. A fundamental question is that of whether reference to speci c legal phenomena always involves a commitment to a particular moral view. Whereas many philosophers advance the 'positivist claim that any correspondence between morality and the law is just a function of political circumstance natural law theorists insist that law is intrinsically moral. Each school claims the crucial advantage of consistency with our folk concept. Drawing on the notion of dual character concepts we develop a set of hypotheses about the intuitive relation between a rule s moral and legal aspects. We then report a set of studies that conflict unexpectedly with the predictions by legal positivists. Intuitively an evil rule is not a fully-fledged instance of law.

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1 Introduction

Philosophers have long debated whether law is intrinsically moral—that is, whether a wicked rule or rule system may count as a paradigmatically legal rule or system. The debate pits natural law theorists, who, following Plato, hold legal standards to correspond inherently with moral standards, against legal positivists, who hold that any correspondence between morality and the law is just a function of political circumstance. For the positivist, a rule system s wickedness does not diminish its legality: 'the existence and content of the law … [is] a matter of social fact whose connection with moral or any other values is contingent and precarious [Raz 1994: 210]. At stake is the question of whether reference to speci c legal phenomena always involves a commitment to a particular moral view. One prominent point of agreement among theorists is the desirability of consistency with the folk concept of law. So far, however, there has been no systematic investigation of this concept. To ll this gap, we develop a set of hypotheses from two alternative strands of natural law thought by enlisting the insight that folk concepts may differ in the complexity of their *structure* [Knobe et al. 2013]. We then report a set of studies that test these hypotheses together with their positivist counterpart. We nd that, intuitively, an evil rule is not a fully-fledged instance, or central case, of LAW.

Ostensibly, the value of recourse to intuitions about law s intrinsic morality is contested: ‘we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage [Hart 1961: 209] (similarly, Finnis [1980: 17–18]). In the actual course of argument, however, such scepticism recedes. A brief review of prominent positivist and natural law contributions establishes the folk concept s role as a ground on which to defend a theory of the moral content of legality. Consider, at the outset, the received case for law s amorality:

> If [critics of slavery] said that the [slave-owner s legal] right is pernicious, and that therefore he *ought* not to have it, they would speak to the purpose. But to dispute the existence or possibility of the right, is to talk absurdly. [Austin 1832: 279]

> The system of norms we *call* a legal order is a system … [that] may have any kind of content. [Kelsen 1945: 113; emphasis added]

> it is plain that … the law … need [not] extend [its] minimum protections and bene ts to all within [its] scope, and often … ha[s] not done so … Nothing, surely, but confusion could follow from a proposal to leave the study of [wicked] rules to another discipline. [Hart 1961: 200, 209]

> We are all sadly familiar with laws which are racially discriminating, which suppress basic individual liberties such as freedom of speech or of worship … It is precisely because such obvious laws are ruled out as non-laws by the theory [of natural law] that it is incorrect. It fails to explain correctly our ordinary concept of law. [Raz 1999: 164]

> The fact that an account [of the nature of law] does not square with some of our intuitions—that it requires us, say, to deny that the Nazis had law—may count against that account. [Shapiro 2011: 17]

Only the last two quotations invoke our folk concept explicitly, but each appeals to the proper—that is, non-confused or non-absurd—use of shared language as a reason to suppose that legal standards need bear no relation whatever to moral standards—for example, to abolitionism or to racial equality. Against this understanding of our ordinary concept, natural law theorists press two alternative interpretations. According to classical natural law theory, a thoroughly immoral rule fails entirely to capture what we mean by ‘law :

> Surely we will not dare to say that these laws [permitting self-defence] are unjust, or rather, that they are not laws at all. For it seems to me that an unjust law is no law at all. [Augustine 395: 8]

> A tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law … [E]very human law has just so much of the nature of law, as it is derived from the law of nature. [Aquinas 1269: 44, 92]

> The positive law … takes precedence even when its content is unjust … however … where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute … lacks completely the very nature of law. For law … cannot be otherwise de ned than as a system and an institution whose very meaning is to serve justice. [Radbruch 1946: 7]

For ‘neo-classical natural law theorists, there is, in contrast, an attenuated sense in which ‘law might indeed refer to evil rules:

> law can be considered and spoken of *both* as a sheer social fact of power and practice, *and* as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them. This dual character of positive law is presupposed by the well-known slogan ‘Unjust laws are not laws. [Finnis 2020: Introduction]

> there is an available sense in which [the Nazi system] plainly was law. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. [Dworkin 1986: 103–4]

The proposed attenuation in the sense in which 'law refers to wicked rules has been described in different ways and remains inchoate.[1] The paper s theoretical contribution will be to explicate the neo-classical strand of natural law theory as the claim that law has the same complex dual character structure that the folk concepts of several different social roles—such as SCIENTIST and CHRISTIAN—have been found to exhibit.

Unifying positivism and natural law theory, classical and neo-classical strands alike, is an appeal to folk intuition. Naturally, the theorist is free to argue that some or all aspects of the folk concept of law are incorrect. One such strategy might be to point to the relative difficulty for mere laypeople in discerning the basic nature of abstract categories in general (for example, Williamson [2011: 226] and Devitt [2011: 418]). But the well-known risk that bias toward favoured theories might affect our general processes of belief formation (see Kunda [1990]) has been thought to undercut recognition of expert professional philosophical intuition: Philosophical study involves 'teaching neophyte philosophers to have intuitions that are in line with those of more senior members of the profession [Weinberg et al. 2001: 438] (see also Machery [2012] and Priel [2019]). Consequently, a theorist s departure from the folk concept of law might demand that she furnish a supplementary account of the relative difficulty for laypeople in discerning the nature of law in particular [Jackson 1998]. Accordingly, legal theorists appeal to folk intuition is understandable: it would seem to 'come at a big cost if the antipositivist were to rely … on the idea that she is using a concept [of law] that is distinct from that used by folk [Plunkett 2012: 204] (and, similarly, Atiq [2020: 3] and Shapiro [2011: 17]), *or* vice versa. Of course, the theorist remains at liberty to argue that any cost is outweighed by the achievement of some alternative theoretical virtue. Our objective is simply to establish which theory in fact incurs the cost, so that the burden of proving such a balance may be correctly allocated.

Formally, each conflicting characterisation of folk intuitions concerning law s relation to morality stands to be con rmed or discon rmed. But the argumentative context sets expectations. Positivism is widely perceived to be the dominant contemporary theory of law (for example, D Amato [1990], Dworkin [2002], and Finnis [2020]). Signi cantly, positivism s dominance has been explicitly attributed to its successful reproduction of our folk concept: Mark Greenberg, a critic of positivism, explains its influence by reference to the 'deep roots in ordinary thought of 'the idea that the law is what the [authoritative] texts say [2014: 1298]. In line with these perceptions, we had anticipated that the positivist characterisation would be con rmed by the data. To our surprise, it was not.

Beginning only with Donelson and Hannikainen s recent examination of Lon Fuller s [1964] novel claim that law-making must observe morally desirable procedural

[1] Elsewhere, Dworkin [1978: 326] holds that the role of moral rights in the 'calculation of legal rights is consistent with the possibility of 'realistic cases of wicked rules that are unreservedly legal. Likewise, Finnis elsewhere suggests that a non-central case of law is simply a borderline case: each property may be '*more or less instantiated* [such that] [l]aw, in the focal sense of the term, is *fully* instantiated only when each … is fully instantiated [1980: 277].

requirements, the empirical study of ordinary intuitions about the nature of law is in its infancy. This paper tests claims concerning intuitions about the broader relation between a rule s legality and the morality of its substance.

We start by showing how an experimental approach can help to advance the debate by deriving hypotheses about the folk concept that correspond to each of the three basic appeals to intuition just described (section 2). We then present three studies (section 3), setting out the respective motivation, method, and result. In the concluding discussion (section 4), we elaborate on the implications for jurisprudence and for the plurality of dual character conceptual structures.

2 Hypotheses about the Folk Concept of Law

Positivists and classical natural law theorists agree that, in so far as a rule lacks any of a certain set of properties, which includes membership of a system of generally obeyed rule-making, it falls outside with the category LAW. To support their view that it also includes the property of morality, classical natural law theorists argue, against positivists, that the folk possess what we would now (following Williams [1985]) describe as a thick, rather than a merely descriptive, concept of law. For the natural law theorist, the characterisation of rules as 'legal is roughly the same as the characterisation of acts as 'courageous . Just as the act must be describable as risky, so the rule must be describable as a member of the indicated sort of system; equally, just as the act must also be evaluated positively, so the rule must also be evaluated positively (or at least not extremely negatively) [Toh and Enoch 2013: 264–5].

Thick folk concepts have not yet emerged as a speci c focus of empirical inquiry, but concepts whose application depends simply on the extent to which each of a particular set of properties is instantiated are now an established subject of investigation—such as the concept of knowledge as true justi ed belief (for instance, Weinberg et al. [2001], and Machery et al. [2017]), and the concept of law as the output of generally obeyed, *procedurally* moral, rule-making [Donelson and Hannikainen 2020]. Conversely, among those for whom a law s substance is intrinsically moral, many now speak of a more complex folk concept, whose normative and descriptive contents, instead of combining to discharge a single classi cation, each take on autonomous classi catory roles (for instance, John Finnis and Ronald Dworkin; similarly, Murphy [2013]).

Whereas it is not possible to characterise a risky but wicked act as in any sense courageous, neo-classical natural law theorists believe that there is a sense in which a valid but wicked statute does, in contrast, remain lawful. We propose to capture this divergence as a difference over the concept s structure. A single character concept has just one criterion for category membership (which might invoke both concrete and abstract properties). This criterion may identify objects whose status as category members is borderline, but it will not identify any that are plainly members in one sense and plainly not in another. In contrast, a dual character concept has distinct criteria, invoking concrete and abstract properties, respectively, that may yield opposed membership verdicts.

Research in experimental philosophy has established that certain folk concepts—for instance, SCIENTIST and ARTIST—exhibit such dual character, whereas others—for instance, SECOND COUSIN and BUS DRIVER—do not (see Knobe et al. [2013] and Del Pinal and Reuter [2017]). In respect of (only) the former categories, most people

have been found to accept the following sort of statement as both natural-sounding and applicable to concrete cases:

> 'There is a sense in which she is clearly an X, but ultimately, if you think about what it really means to be an X, you would have to say that she is not an X at all.

For instance, most people have been found to agree that a postdoctoral researcher who is employed to run experimental studies but who is completely uninterested in her findings is clearly a scientist in some sense but is not a true scientist at all. In contrast, in the case of SECOND COUSIN, most people disagree with the suggestion that people with appropriate ancestry who lack warm feelings towards each other are not true second cousins. Understood accordingly, neo-classical natural law holds that wicked rules are like incurious postdoctoral researchers: they plainly qualify as members of the relevant category in some sense but plainly not in a deep sense. Already, the category DOCTOR, which is also possibly associated with a dual character folk concept, has been identified as a possible analogue of LAW [Bix 2010: 214]:

> As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: 'She's no lawyer' or 'He's no doctor.' This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is 'not really law' may only be to point out that it does not carry the same moral force.

The structure of a dual character concept is subtler than this analysis allows. There is a difference between something's failure to exhibit the essence of a category of which it is a member and its failure merely to possess some feature possessed by some of the category's other members. We can agree that an unjust law will lack the same moral force as a just one just as we can agree that the doctor who has an interest in healing people will feel greater satisfaction in contributing to positive patient outcomes, or that the larger paper clip will be the more efficient at holding the larger bundle of pages. It is only by analogizing morality's relation to the *nature* of law to interest-in-healing's relation to the *nature* of doctorhood that we may carve out a distinctive neo-classical position. The neo-classical theorist holds that just as only the medical professional who desires to heal others intuitively qualifies as a true doctor, only a rule that is just intuitively qualifies as a true law.

The proposed dual character natural law view regiments the basic neo-classical thought that wicked rules possess an attenuated lawfulness into an alternative that is precise enough to be tested systematically. Equally, both single and dual character strands admit of variations that hold morality to be intrinsic to legality to different degrees. We will test five competing hypotheses:

Table 1 Hypotheses about the folk concept of law

Strong Classical NL.	An unjust rule is intuitively not a law in any sense.
Weak Classical NL.	A grossly unjust rule is intuitively not a law in any sense.
Strong Neo-classical NL.	An unjust rule is intuitively not a law at all in the deep sense.
Weak Neo-classical NL.	A grossly unjust rule is intuitively not a law at all in the deep sense.
Positivism.	A grossly unjust rule is intuitively no less a law than is a just one.

While positivists agree that morality is not intrinsic to a rule's legality, they may differ, nonetheless, on whether the existence of a particular law is subject to the moral facts. Whereas 'exclusivist' positivists deny that law may ever depend on

morality (for example, Gardner [2001]), 'inclusivist positivists concede that, in a particular society, rules, and, by extension, laws, might be required to be moral [Hart 1979: 463]:

> in some legal systems, conformity to certain moral principles—for example, a catalogue of individual rights and liberties—is recognised by the courts as part of a basic criterion for legal validity.

Crucially, in relation to any society in which rules are not required to be just, positivists agree that a grossly unjust statute is intuitively no less a law than is a just one.

We noted at the outset that most theorists endorse the positivist hypothesis. Accordingly, we predicted the existence of a folk concept that featured a looser intrinsic relation between law and morality over one that featured a stricter relation—namely, neo-classical over classical alternatives, weak over strong alternatives.

3 Empirical Evidence

In the present section, we report the results of a series of experimental philosophy studies (see Sytsma and Livengood [2016]). The studies received approval from the Research Ethics Committee of Maynooth University and were administered online. The subsections below provide a qualitative synopsis of our findings, while the corresponding statistical analyses are reported in the Appendix. Where mean ratings are provided in brackets, they refer to the average response across participants on a Likert scale from 1 to 7.

3 1 Study 1

In our initial study, we surveyed 218 students (65 women) at Maynooth University who were yet to take a course in legal philosophy. The experiment consisted of two tasks in a fixed order. Participants first completed the acceptability judgment task, and then the hypothetical scenario task.

3 1 1 Acceptability Judgments

First, we examined whether participants view LAW as a dual character concept, composed of both deep and superficial properties. The task that we employ, adapted from Knobe et al. [2013], builds on a paradigm that emerged in empirical linguistics to understand competent speakers' untrained capacity to perceive the grammaticality of novel sentences [Chomsky 1957; Cowart 1997]. This task can be appropriated to probe the folk's *conceptual* competence, too. Accordingly, we asked participants whether the following statement sounded natural or, instead, weird to them:

> 'There's a sense in which it is clearly a law, but ultimately, if you think about what it really means to be a law, you'd have to say that there is a sense in which it is not a law at all.

Does this conjunction sound natural? If it does, this would indicate that people recognise the possibility that something can be a law in two different senses—a superficial sense and a deeper one. Consider, instead, an equivalent statement about the concept SCREENSAVER:

> 'There s a sense in which it is clearly a screensaver, but ultimately, if you think about what it really means to be a screensaver, you d have to say that there is a sense in which it is not a screensaver at all.

We predicted that this statement would not sound natural to our participants: *prima facie*, a screen saver does not possess deep properties. This hypothesis was borne out in our data: most participants treated SCREENSAVER as a single character concept (weird and not natural: 67), and rejected the dual character interpretation (natural and not weird: 16 ; see Appendix: Analysis 1).

With the concept LAW, in contrast, we observed more diverse reactions. As shown in Table 2, many participants demonstrated a *single* character view (weird and not natural: 38), while many others evinced a *dual* character view (natural and not weird: 36). Both views garnered greater support than would be expected by chance (see Appendix: Analysis 1).

Table 2 Classi cation based on acceptability judgments for each concept.

	LAW	JUDGE	SCREENSAVER
Single Character	87 (38%) *	95 (41%) *	149 (65%) *
Dual Character	83 (36%) *	82 (36%) *	37 (16%)
neither)	60 (26%)	53 (23%)	44 (19%)

*: signi cantly more than expected by chance; : signi cantly fewer than expected by chance.

If something can be a law in more than one sense, then we might expect concepts tied to interpreting the law to also have a dual character. It might be possible to think of associated role concepts—for instance, JUDGE—as also having both super cial and deep properties. Accordingly, we formulated a comparable dual character passage for JUDGE. As with LAW, and unlike SCREENSAVER, we observed a roughly even division between participants who thought that the statement sounded 'weird and those who thought that it sounded 'natural (see Table 2).

3 1 2 Hypothetical Scenario

In principle, by relieving the respondent of the task of synthesising her understanding, the consideration of concrete instances may be thought to present an epistemically superior setting: 'attributing … error to folk metalegal theory may not be a great cost, because ordinary speakers plausibly needn t possess sophisticated theories of their own practice [Finlay and Plunkett 2018: 67]. Following the abstract task, we asked participants to consider a hypothetical society that enacts a clearly immoral statute:

> 'Figuria is a large, industrialised state, with a law-abiding population. Its constitution assigns unfettered legislative power to an elected assembly and omits any mention of individual rights. In accordance with the relevant constitutional formalities, Figuria s legislature recently enacted a statute (S), which was duly published to judges, officials, and the population at large. S, whose enactment was prompted by a belief in white supremacy, restricts marriage to couples of the same race.

We adapted the acceptability judgment task, and asked participants whether they agreed with each conjunct: (A) there is a sense in which *S* is law, and (B) ultimately, when you think about what it really means to be a law, you would have to say that *S* is not truly a law. Throughout section 3, we refer to ratings of the rst conjunct as judgments of *super cial legality*, and to ratings of the second as judgments of *deep legality*.

In Figuria, rules are evidently not required to be just. Accordingly, for positivists, inclusivist and exclusivist alike, a grossly unjust statute such as *S* is intuitively no less a law than is a just one. However, participants revealed a different pattern of intuitions: overall, they tended to report that *S* is not a law in a deep sense (*Mean* = 4.50), and were divided even as to whether there is a sense in which *S* is a law at all (*Mean* = 4.16; see Appendix: Analysis 2). Thus, most participants rejected the positivist view that wickedness does not diminish a rule s lawfulness. This result is ambiguous, however, between classical (that is, thick) and neo-classical (that is, dual character) natural law variants.

To understand better how moral appraisals play into ascriptions of legality, half of the study sample were randomly assigned to judge both the legality and the morality of Figuria s interracial marriage ban.[2] As expected, most participants strongly agreed that prohibiting interracial marriage is immoral (*Mean* = 6.22). Stronger moral condemnation was associated with greater denial of deep legality, but not of super cial legality (see Appendix: Analysis 3). In other words, consistently with a natural law view, the more that participants believed the marriage ban to be wrong, the more likely they were to deny that it was truly law.

3 2 Study 2

In Study 1, participants considered a single statute. To diversify the content of legal text in Study 2, we expanded our set of immoral statutes (interracial marriage ban; no property for women; sterilisation of those with below-average IQ; abolition of public healthcare), and drafted a second set of four morally permissible statutes (mandatory theory exam for driver s license; random audits to prevent tax evasion; ban on flammable children s nightclothes; mandatory site visit for building compliance). Our second study asked whether people deny the legality of the wicked statutes while acknowledging the legality of the morally permissible ones.

We surveyed a further 172 students (63 women) at Maynooth University, who were yet to take a course in legal philosophy. Each participant read about two hypothetical statutes, one moral and one immoral, in a counterbalanced order across participants. As in Study 1, participants were asked whether they ascribe super cial and, in turn, deep legality.

Extending the results of Study 1, participants were undecided about super cial legality (*Mean* = 3.76), but tended to strongly deny the deep legality of immoral statutes (*Mean* = 4.74). When looking at the morally permissible statutes, participants agreed that there is a sense in which these qualify as law (*Mean* = 5.16), and tended—if weakly—to ascribe deep legality, too (*Mean* = 3.74; see Appendix: Analysis 4). Thus, participants tended to deny that a grossly unjust rule is as much a law as is a just one.

At the end of the study, participants were asked to report whether the policy associated with each statute (for example, ‘promoting tax compliance by authorizing random tax audits , or ‘transferring a wife s property to her husband to promote a patriarchal society) is, in their view, morally permissible or instead morally impermissible. These reports provide an opportunity to understand whether participants appraisals of a statute s morality determine their assessments of its legality.

[2] This also provided an opportunity to determine whether participants had been inclined to use legality as a proxy for morality (see Appendix: Analysis 3).

In line with Study 1, respondents personal moral attitudes predicted their assessments of statutes legality: the more that participants saw any statute as morally impermissible, the less likely they were to describe it as legal in either sense (Appendix: Analysis 5). Thus, once again, the moral character of a statute appeared to determine its perceived lawfulness. Accordingly, Study 2 broadly reproduces Study 1 s nding that people reveal predominantly natural law views, comprising both single and dual character streams.

3 3 Study 3

In Studies 1 and 2, participants tended to view immoral statutes as lacking the essence of law—while many were prepared to deny that immoral statutes were law in any sense at all. These effects were linked to their moral convictions regarding the issue in question: to the extent that participants condemned the purpose of a statute, they were likely to regard it as at least in some sense unlawful. However, since both studies examined statutes that perpetrate gross injustice, they did not arbitrate between strong and weak versions of natural law theory.

In Study 3, we sought to examine whether natural law intuitions emerge even when considering statutes that are not unequivocally wrong, but are simply divisive. As such, our nal study speci cally tests the strong versions of natural law theory. We drafted four matched pairs of morally controversial statutes (criminalising or decriminalising immigration, assisted suicide, recreational drug use, and prostitution). In each pair, the decriminalising statute involved a progressive social policy. As such, strong versions of the natural law theory would predict that 'right -leaning participants view these statutes as unlawful. Meanwhile, the criminalising statute in each pair involved a conservative social policy. So, according to strong versions of natural law theory, participants on the political 'left should perceive them as unlawful.

To evaluate these hypotheses, for Study 3, we recruited 300 panellists from Proli c (viz., https://www.proli c.co) strati ed by political self-placement: 150 who identi ed politically with 'the left , and 150 who identi ed with 'the right .

3 3 1 Political Identity

We found no evidence that people deny the legality of ideologically objectionable statutes. Instead, most participants viewed both sets of policies as lawful (see Table 3). If anything, participants on 'the right *and* on 'the left ascribed greater legality to the conservative statutes (see Appendix: Analysis 6).

3 3 2 Moral Attitudes

To gauge participants moral attitudes, we asked them to complete a post-test questionnaire—rating three statements about each of the four policy issues. Averaging the three responses resulted in a measure of participants attitudes toward each speci c issue. For example, to understand participants views about immigration (one of the policy issues), they were asked whether they agreed, or instead disagreed, with the following statements:

(1) I support open borders in my country.
(2) Immigration must be kept within reason. (reverse-scored)
(3) Immigrants make a valuable contribution to society.

These measures afforded a more ne-grained analysis of the relationship between moral attitudes toward each policy issue and ascriptions of legality. We then re-ran the previous analyses, asking whether ascriptions of legality depend on people s moral views about the issue in question (rather than on their general political orientation). This analysis uncovered an effect of moral attitudes on judgments of deep legality *only*, just as in Study 1. For any given issue, participants with conservative views were more likely to ascribe deep legality to statutes criminalising immigration, assisted suicide, recreational drug use, and prostitution. However, participants with progressive views were no more likely to ascribe deep legality to statutes authorising those activities (see Appendix: Analysis 7).

3 4 Synthesis

Studies 1 and 2 demonstrated that people tend to deny the lawfulness of gravely immoral statutes, as predicted by natural law theorists. Consistently with their division on the acceptability of dual character descriptions of the concept LAW, participants split between the classical natural law view that evil rules are in no sense law and the neo-classical view that such rules are laws in a super cial sense but not in the deeper sense of what it means to be a law. Thus, intuitively, an evil rule is not a central case of LAW.

Study 3 then examined whether this association between morality and legality

Table 3 Aggregate frequency of alternative concepts of law

	Grossly unjust			Unjust (Study 3)		
	Study 1	Study 2	Aggregate	Prog s	Con s	Aggregate
Descriptive	61 (28%)	40 (24%)	101 (26%)	101 (62%) *	67 (51%) *	169 (57%) *
Dual Character	70 (32%) *	45 (26%)	115 (30%) *	42 (25%)	27 (20%)	68 (23%)
Thick Concept	65 (30%)	71 (41%) *	136 (35%) *	10 (6%)	24 (18%)	34 (12%)
(*Uninterpretable*)	23 (10%)	15 (9%)	38 (10%)	10 (6%)	13 (10%)	24 (8%)

Note: Frequencies are rounded to the nearest integer due to split ties.
*: signi cantly more than expected by chance.
: signi cantly fewer than expected by chance.

emerges even when assessing merely controversial statutes. This time, we found that mere ideological objectionability did not attenuate a statute s lawfulness—which speaks against strong versions of both classical and neo-classical natural law theory.

In all three studies, we asked participants to report their personal moral attitudes toward the issues at stake. Participants moral attitudes consistently predicted their ascriptions of essential legality: moral approval was linked to greater ascriptions of deep lawfulness, while disapproval was linked to the denial of deep lawfulness. In contrast, judgments of super cial legality did not depend systematically on participants moral attitudes. Taken together, the evidence may best be explained by the folk s adherence to a weak variant of natural law.

4 Discussion

It has occasionally been suggested (notably, by Murphy [2008: 1094]) that there is no single folk concept that speci es the relation of law to morality. In line with this suggestion, Donelson and Hannikainen '[cast] doubt upon the notion that we have a …

univocal concept of law [2020: 24]. Notably, the latter examined procedural moral principles only. On the broader question of law s relation to substantive moral principles, we have found evidence of a uni ed, albeit skeletal, folk concept—namely, that wickedness diminishes lawfulness.

The reported studies point to distinct but overlapping intuitions. Consistently with the predictions of positivism and of weak natural law theories, a rule s legal character is intuitively undiminished by mere moral doubtfulness or controversy. Conversely, and in the face of theorists widespread endorsement of the positivist hypothesis, but consistently with weak natural law alternatives, we found that a rule s legality *is* intuitively diminished by grave immorality. As shown in Table 3, non-descriptive intuitions about law were found to dominate.

A large majority (64.4) rejected the view that, ultimately, law is just a matter of concrete social facts. It follows that positivist theories of law appear to be encumbered with supplying an account of the existence of massive folk error about a basic feature of the category. Thus, unexpectedly, the results seem to reverse the dialectic disadvantage hitherto standardly attributed to the natural law theorist (compare [Plunkett 2012], above): the 'cost … of … using a concept that is distinct from that used by the folk seems to be borne, instead, by the positivist. Of course, the legal theorist is free to argue that this cost is outweighed by the achievement by some alternative 'expert concept of law of some other theoretical virtue. What our data reveal is that it is on positivists that the burden of defending such a calculation seems to lie.

The complication is that participants intuitions appear to come apart on the question debated by classical and neo-classical natural law theorists—namely, of whether a rule s wickedness precludes its possession of even a depleted legal character. On the issue of the relative prevalence of thick, as against dual character concepts, the evidence is inconclusive. Nevertheless, the possession by a considerable proportion of the folk of a thick concept of law suggests that our initial expectation that law and morality would be loosely related, if at all, was altogether misplaced.

Conversely, the possession by a comparable proportion of the folk of a dual character concept of law attests to the fruitfulness of the notion of conceptual structure in explaining our intuitions. Together with recent investigations of the concepts ART [Liao et al. 2020] and WATER [Tobia et al. 2020], the studies con rm that a dual structure may be exhibited not only by role but also by kind concepts (natural or social). Equally, they bear on assumptions about the relation *between* a dual character concept s normative and descriptive dimensions. According to the standard model of dual character, the respective classi catory roles of normative and descriptive contents are strictly equivalent [Knobe et al. 2013: 249] (similarly, Reuter [2019: 1] and Liao et al. [2020: 7–8]):

> the concrete and abstract criteria can come apart in either direction. Just as it is possible to ful ll the concrete criteria without ful lling the abstract ones, so too it is possible to ful ll the abstract criteria without ful lling the concrete ones.

In the case of LAW, however, it seems doubtful that the associated abstract criterion might be thought to freely determine the concept s application. Theorists agree that a key descriptive feature of a legal system is its possession of an enforcement function (see, for instance, Hart [1961] and Finnis [2020]). *Prima facie*, the absence of such a function is inconsistent with the legality of a morally sound norm, just as the absence of risk is inconsistent with the courageousness of a morally sound act. We

can agree that the expression of gratitude upon receiving something of value is morally obligatory. But it would seem implausible to imagine that the norm that one should express gratitude qualifies as legal in any sense at all. Likewise, there may be a set of alternative bills before a legislature, in respect of a given issue, that are equally morally permissible. Without positing some descriptive feature that is unique to an enacted statute, it is not clear how the property of morality might serve to classify any particular alternative as legal.

Accordingly, our data suggest that dual character concepts may take different forms. In the case of LAW, unlike that of ARTIST or of SCIENTIST, it seems that the concrete and abstract criteria cannot come apart in either direction, but only in the direction of the concrete. Whereas it may be possible to qualify as a (non-true) law by satisfying LAW's enforcement criteria but not its moral criterion, it is not possible to qualify as a law at all by satisfying LAW's moral criterion but not its enforcement ones. Rather, the autonomous classificatory operation of LAW's normative content is confined to those objects that descriptively qualify as laws. The resultant conceptual structure represents a hybrid between that of a thick concept such as COURAGE and that of a social role concept such as SCIENTIST.[3]

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References

Atiq, E.H. 2020. There Are No Easy Counterexamples to Legal Anti-Positivism, *Journal of Ethics and Social Philosophy* 17/1: 1–26.
Augustine 395 (1993). *On Free Choice of the Will*, trans. T. Williams, Indianapolis: Hackett Publishing.
Austin, J. 1832. *The Province of Jurisprudence Determined*, London: John Murray.
Aquinas, T. 1269 (1993). *The Treatise on Law:(Summa Theologiae, I-II; qq. 90–97)*, trans. R.J. Henle, Notre Dame: University of Notre Dame Press.
Bix, B. 2010. Natural Law Theory, in *A Companion to Philosophy of Law and Legal Theory, 2nd edn*, ed. D. Patterson, Malden, MA: Wiley-Blackwell: 211–27.
Chomsky, N. 1957. *Syntactic Structures*, The Hague: Mouton.
Cowart, W. 1997. *Experimental Syntax. Applying Objective Methods to Sentence Judgments*, Thousand Oaks, CA: Sage Publications.
D Amato, A. 1990. Pragmatic Indeterminacy, *Northwestern University Law Review* 85/1: 148–89.
Del Pinal, G. and K. Reuter 2017. Dual Character Concepts in Social Cognition: Commitments and the Normative Dimension of Conceptual Representation, *Cognitive Science* 41/S3: 477–501.

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Devitt, M. 2011. Experimental Semantics, *Philosophy and Phenomenological Research* 82/2: 418–35.
Donelson, R. and I.R. Hannikainen 2020. Fuller and the Folk: The Inner Morality of Law Revisited, in *Oxford Studies in Experimental Philosophy*, *Vol. 3*, ed. T. Lombrozo, J. Knobe, and S. Nichols, Oxford: Oxford University Press: 6–28.
Dworkin, R. 1978. *Taking Rights Seriously*, Cambridge, MA: Harvard University Press.
Dworkin, R. 1986. *Law s Empire*, Cambridge, MA: Harvard University Press.
Dworkin, R. 2002. *Sovereign Virtue: The Theory and Practice of Equality*, Cambridge, MA: Harvard University Press.
Enoch, D. and K. Toh 2013. *Legal* as a Thick Concept, in *Philosophical Foundations of the Nature of Law*, ed. W. Waluchow and S. Sciaraffa, Oxford: Oxford University Press: 257–78.
Finlay. S. and D. Plunkett 2018. Quasi-Expressivism about Statements of Law: A Hartian Theory, in *Oxford Studies in Philosophy of Law, Vol. 3*, ed. J. Gardner, L. Green, and B. Leiter, Oxford: Oxford University Press: 49–86.
Finnis, J. 1980. *Natural Law and Natural Rights*, Oxford: Clarendon Press.
Finnis, J. 2020. Natural Law Theories, *The Stanford Encyclopedia of Philosophy*, ed. E. N. Zalta, URL= https://plato.stanford.edu/entries/natural-law-theories
Fuller, L.L. 1964. *The Morality of Law*, New Haven, CT: Yale University Press.
Gardner, J. 2001. Legal Positivism: 5½ Myths, *American Journal of Jurisprudence* 46/1: 199–227.
Greenberg, M. 2014. The Moral Impact Theory of Law, *Yale Law Journal* 123/5: 1288–342.
Hart, H.L.A. 1961. *The Concept of Law*, Oxford: Clarendon Press.
Hart, H.L.A. 1979 (2016). The New Challenge to Legal Positivism, *Oxford Journal of Legal Studies* 36/3: 459–75.
Jackson, F. 1998. *From Metaphysics to Ethics: A Defence of Conceptual Analysis*, Oxford: Clarendon Press.
Kelsen, H. 1945. *General Theory of Law and State*, Cambridge, MA: Harvard University Press.
Knobe, J., S. Prasada, and G.E. Newman 2013. Dual Character Concepts and the Normative Dimension of Conceptual Representation, *Cognition* 127/2: 242–57.
Kunda, Z. 1990. The Case for Motivated Reasoning, *Psychological Bulletin* 108/3: 480–98.
Liao, S., A. Meskin, and J. Knobe 2020. Dual Character Art Concepts, *Paci c Philosophical Quarterly* 101/1:102–28.
Machery, E. 2012. Expertise and Intuitions About Reference, *Theoria: Revista de Teoría, Historia y Fundamentos de la Ciencia* 27/1: 37–54.
Machery, E., S. Stich, D. Rose, M. Alai, A. Angelucci, R. Berni nas, … and J. Zhu 2017. The Gettier Intuition from South America to Asia, *Journal of Indian Council of Philosophical Research* 34/3: 517–41.
Mummolo, J. and E. Peterson 2019. Demand Effects in Survey Experiments: An Empirical Assessment, *American Political Science Review* 113/2: 517–29.
Murphy, M. 2013. The Explanatory Role of the Weak Natural Law Thesis, in *Philosophical Foundations of the Nature of Law*, ed. W. Waluchow and S. Sciaraffa, Oxford: Oxford University Press: 3–21.
Murphy, L. 2008. Better to See Law This Way, *New York University Law Review* 83: 1088–108.
Priel, D. 2019. Evidence-Based Jurisprudence: An Essay for Oxford, *Analisi e Diritto* 19/2: 87–116.
Radbruch, G. 1946 (2006). Statutory Lawlessness and Supra-Statutory Law, trans. B. Litschewski Paulson and S.L. Paulson, *Oxford Journal of Legal Studies* 26/1: 1–11.
Raz, J. 1994. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press.
Raz, J. 1999. *Practical Reason and Norms*, Oxford: Oxford University Press.
Reuter, K. 2019. Dual Character Concepts, *Philosophy Compass* 14/1: e125571: 1–10.
Shapiro, S.J. 2011. *Legality*, Cambridge, MA: Harvard University Press.
Struchiner, N., I. Hannikainen, and G. Almeida 2020. An Experimental Guide to Vehicles in the Park, *Judgment and Decision Making* 15/3: 312–29.
Sytsma, J., and J. Livengood. 2016. *The Theory and Practice of Experimental Philosophy*, Peterborough: Broadview Press.
Tobia, K.P., G.E. Newman, and J. Knobe 2020. Water Is and Is Not H_2O, *Mind Language* 35/2: 183–208.
Weinberg, J.M., S. Nichols, and S. Stich 2001. Normativity and Epistemic Intuitions, *Philosophical Topics* 29/1–2: 429–60.
Williams, B. 1985. *Ethics and the Limits of Philosophy*, Cambridge, MA: Harvard University Press.
Williamson, T. 2011. Philosophical Expertise and the Burden of Proof, *Metaphilosophy* 42/3: 215–29.

Appendix

Analysis 1: Proportion Tests in Table 1

Naturalness and weirdness were rated on separate Likert scales. We dichotomised both ratings, and cross-classi ed participants according to these dichotomised variables (that is, resulting in four quadrants). Thus, by chance, we would expect to observe 25 of the sample in the single character (weird and not natural) quadrant, 25 in the dual character (not weird and natural) quadrant, and 50 of the sample in the remaining two quadrants. In Table 2, we report proportion tests against the corresponding expected proportion. This reveals more single character pro les than expected across all three concepts, fewer 'neither pro les for all three concepts, and critically more dual character pro les for LAW and JUDGE than expected, but fewer than expected for SCREENSAVER.

Analysis 2: Legality of Hypothetical Marriage Ban in Study 1

One-sample *t*-tests against the scale midpoint (i.e. 4) for super cial and deep legality revealed that

(i) participants were unsure whether there is a sense in which *S* is law ($M = 4.16$, 95 CI [3.91, 4.40]; $t(229) = 1.24$, $p = .21$), but that
(ii) they tended to agree that *S* is not a law in the deeper sense ($M = 4.50$, 95 CI [4.28, 4.72]; $t(229) = 4.27$, $p < .001$).

Analysis 3: Moral Opposition and Legality Ascriptions in Study 1

Half of the participants viewed a version of the study with an explicit prompt of their moral attitudes toward the interracial marriage ban ('It is immoral to restrict marriage to couples of the same race to promote white supremacy) that appeared on the same page. Moral opposition correlated with the denial of deep legality, $r(106) = .21$, $p = .033$, but was uncorrelated with judgments of super cial legality, $r(106) = .06$, $p = .56$.

Manipulating the presence of the morality question also enables us to ask whether the rejection of legality is a mere *demand effect* (Mummolo and Peterson [2019]; see also Struchiner, Hannikainen, and Almeida [2020]). Does the natural law intuition persist even when participants are given an opportunity to convey their discontent through the separate moral probe? Welch two-sample *t*-tests revealed no difference in either legality judgment (super cial: $t[222.9] = 0.54$, $p = .59$; deep: $t[213.8] = 0.85$, $p = .40$)—helping to allay concerns about demand effects.

Analysis 4: E ects of Moral Valence in Study 2

We regressed super cial and deep legality judgments on scenario (applying effect coding), and evaluated the statistical signi cance of the intercept. For immoral statutes, deep legality exceeded the midpoint ($t = 5.35$, $p < .001$), whereas super cial legality did not signi cantly differ ($t = -1.47$, $p = .15$). For moral statutes, super cial legality exceeded the midpoint ($t = 9.25$, $p < .001$), while deep legality judgments fell below the midpoint, at the marginal signi cance level ($t = -1.72$, $p = .087$).

Analysis 5: Moral Permissibility and Legality Ascriptions in Study 2

We conducted two mixed-effects regressions with participant and statute as crossed random effects. Moral permissibility predicted greater deep legality ($B = -0.19$, 95 CI [-0.30, -0.07], $t = -3.18$) and super cial legality ($B = 0.35$, 95 CI [0.24, 0.46], $t = 6.33$), both ps $< .001$.

Analysis 6: Political Identity in Study 3

Model comparisons revealed no *identity×statute* interaction (mere: $^2[df = 1] = 0.11$, $p = .74$; essential: $^2[df = 1] = 1.39$, $p = .24$). Unexpectedly, these analyses revealed main effects of statute orientation on

both measures: speci cally, conservative statutes were seen as more lawful than progressive statutes, by participants on the right (mere: $B = 0.28$; essential: $B = -0.53$) and on the left (mere: $B = 0.33$; essential: $B = -0.35$), all ps $< .01$.

Analysis 7: Moral Attitudes in Study 3

Cronbach s αs for the three-item measures were good (immigration: .83, assisted suicide: .76, drug use: .77, prostitution: .75). Model comparisons revealed an *attitude*×*statute* interaction for deep legality ($^2[df = 1] = 7.00$, $p = .008$), but not super cial legality ($^2[df = 1] = 1.18$, $p = .28$). Simple slopes analyses indicated that, although progressive views did not predict deep legality ascriptions to progressive statutes, $B = 0.01$, $t = 0.20$, $p = .85$, conservative views did predict deep legality ascriptions to conservative statutes, $B = 0.16$, $t = 2.58$, $p = .010$.