Defending a Functional Kinds Account of Law

JAN MIHAL[†]

That law is a functional kind — that is, that law's nature is captured by its function — is a question of increasing importance in general jurisprudence.[1] In this paper I defend a functional kinds account of law from a number of major and minor objections to law's having a functional essence. The first of these is put forward by Brian Tamanaha in his *A General Jurisprudence of Law and Society*[2] where he contends that there are many other social practices that satisfy the same function as law does, that play the same role, but which are not considered to be law — I will call this the 'functional equivalents' argument. The second major argument against law having a functional essence is put forward by Leslie Green in his pieces 'The Functions of Law'[3]and 'Law as Means'[4] where he argues that law is not so much individuated by what it does (its functions or goals) but by how it does them (its means) — I will call this the 'law as means' argument. I then briefly explore a smaller issue arising out of Green's work before turning to Ehrenberg's latest book 'The Functions of Law'.[5] This wide-ranging text gives two central arguments against a functional kinds approach to law. The first is based on an analogy originally given by Green but developed by Ehrenberg which compares law's myriad functions as akin to those of a Swiss Army knife. I will explore how problematic this is for a functional kinds approach to law and how it might be handled in defence of the position. I will also show that Ehrenberg's understanding of the relationship between functions and law concedes too much to an anti-functionalist view by holding that having certain functions is neither sufficient nor necessary for something to count as law — rather, functions figure necessarily in

---

† PhD Candidate, Melbourne Law School. This article was the winner of the ASLP Essay Competition in 2017. I would like to thank my supervisors, Dale Smith and Dana Goswick, for their insightful feedback on earlier drafts of this paper, as well as the feedback of the participants of the postgraduate workshop held at the University of Melbourne as part of the ASLP Annual Conference in 2016. I acknowledge the Wurundjeri people of the Kulin nation, upon whose land I lived while writing this article. I also acknowledge the funding of the Australian government through the RTS and my APA, without which I would not have been able to complete this work.

1 See, eg, Michael S Moore, 'Law As a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (1992) 188; Mark C Murphy, 'Natural Law Jurisprudence' (2003) 9 *Legal Theory* 241; Kenneth M Ehrenberg, 'Functions in Jurisprudential Methodology' (2013) 8 *Philosophy Compass* 447.

2 Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (2001).

3 Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117.

4 Leslie Green, 'Law As Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (2010) 169.

5 Kenneth M Ehrenberg, *The Functions of Law* (2016).

our explanations of law but not necessarily in law's existence. Even though there may be some crossover between the authors' arguments in their work,[6] I will, for the sake of simplicity, treat each author more-or-less individually, dealing first with Tamanaha and his arguments, before moving on to Green, and finally Ehrenberg.

I. The Functional Equivalents Argument

In his *A General Jurisprudence of Law and Society*,[7] Tamanaha offers a sustained critique of 'functionalist' accounts of law. While his central target is more the sociological schools which hold that name, his arguments also impact philosophically functionalist positions which contend that law is a functional kind whose essence is determined by its function. His major objection stems from the notion of functional equivalents. Before I expound his argument itself, I will explain the general notion of a functional equivalent and show how it is potentially problematic for a functional kinds account of law.

A. The problem of functional equivalents

A functional equivalent is an object or phenomenon which plays the same role or achieves the same ends — has the same function — as another object or phenomenon. This is obviously unproblematic when both objects belong to the same kind or type of object. One hammer is a functional equivalent of another hammer — this does not put pressure on the idea that 'hammer' is a functional kind (indeed, it offers support to the notion). The existence of functional equivalents is problematic when:

> i) they occur across different kinds or types of thing, at least one of which is a putative functional kind, *and*
>
> ii) when membership in this functional kind by the functional equivalent is intuitively implausible or problematic.

Applying the above to an example: the function of hammers is to drive nails, let's say, but other (kinds of) things can also drive nails, such as rocks and nail guns (satisfying i). It seems weird to call these (kinds of) things hammers, (satisfying ii) ergo hammers are not individuated (solely) by the function they play but by something else, thus they are not a functional kind. This is the fundamental structure of Tamanaha's objection to law being a functional kind, to its essence being a function.

---

6 Ehrenberg in particular, as the most recent author, engages with the others and their arguments.

7 Tamanaha, above n 2.

B. Functional equivalents exist for law

Tamanaha says that '[t]here are many mechanisms that guide conduct and maintain social order, moral norms being a good example, but also including language, habits, and customs, among others. ... Although various mechanisms satisfy the function of law, it does not follow here from that that we should append the label 'law' to all of them.'[8] In this quote, it is obvious that the assumed function of law is to guide conduct and maintain social order. This is a plausible candidate for law's function, although it should be revisable in light of empirical investigation and sociological evidence. For the purposes of this paper, I will treat maintaining social order as the proper function of law, although the arguments (with slight modification of the examples) should be able to stand with any other reasonable putative function given for law.

We can see that Tamanaha's argument corresponds to the fundamental structure given above for functional equivalents arguments: The function of law is to maintain social order, but other (kinds of) things also maintain social order, such as moral norms, language, habits, and customs, (satisfying i) it seems weird to call these (kinds of) things law (satisfying ii) ergo law is not individuated by its function but by something else, thus law is not a functional kind. Tamanaha gives exactly this result as a conclusion of his argument: 'To distinguish law from among other mechanisms that contribute to social order, one must identify the distinguishing characteristics of 'law', indicating what it is that makes law unique unto itself apart from any function it might fulfill.'[9]

One response the functionalist has here, wanting to retain the idea that sharing in the appropriate function is both necessary and sufficient for membership in the class, is to simply claim that these other phenomena (moral norms, habits, customs) do not contribute to social order. This is obviously an empirical question — what causal roles are played by these various features of social life? For the functionalist's response to be fully effective the reply must not only hold that moral norms, behavioural habits, and social customs, do not actually cause or contribute to social order but that no other phenomena contributes to or causes it, that no other phenomenon except law maintains social order. Unfortunately for the functionalist, this seems unlikely as a matter of empirical fact.

Alternately, the functionalist can hold that law's being a functional kind means that having the function of maintaining social order is merely necessary for any phenomenon to be a legal system but that it is not sufficient. Other properties are also required for a set of social facts to constitute law beyond just fulfilling the same function, but function is still an important, indeed central, feature of law.[10]

---

8 Ibid 137.

9 Ibid 176.

10 As will be seen below, this is similar to (thought not exactly the same as) the approach taken by Ehrenberg in his recent book, *The Functions of Law* (2016). He also holds that law is not a functional kind due to the existence of functional

This brings the notion of 'functional kind' itself into question: what does it mean for something to be a functional kind? If having a certain function is only a necessary and not sufficient condition for membership in a functional kind, it seems as if the title 'functional kind' is somewhat misleading — really, it isn't the function that's ultimately determining membership in the kind but rather it is merely vetting potential members. Even if this is an acceptable usage of 'kind' terminology, shifting from sufficiency to necessity obviously involves watering down the claims of what might otherwise be a more full-blooded functionalism, where being a functional kind really involves claims about both sufficiency and necessity, and so is more clearly involving the entire essence of an object. This does raise the issue of what is involved in something being a functional kind, more broadly speaking. Exploring what it means for something to be a functional kind in depth will help make the arguments and disagreements involved clearer, as well as paving the way for a much more effective reply to Tamanaha's objections than the two given above.

C. What does it mean to be a functional kind? — Tamanaha's take

Since Tamanaha is mainly replying to functionalist social theorists who hold that law is identified by its function, he does not use the more philosophical language of functional kinds. Nonetheless, it seems clear that he is working with some understanding of what it takes for something to be a functional kind. This is most clearly revealed, perhaps, when he offers an argument by analogy that compares the relationship between law and maintaining social order with that between a hammer and driving nails. I will quote it in full, adding numbers to make the various requirements, and hence Tamanaha's understanding of a functional kind, more perspicuous:

> [The terms law and order] go together like hammer and nail. But [1] hammers can be put to other uses beside pounding nails; [2] many of the people who use hammers cannot pound nails very well; [3] hammers regularly bend or destroy nails; [4] hammers have many symbolic and metaphorical uses; and [5] nails can be pounded by other things besides hammers (unless one asserts that whatever pounds a nail is by definition a hammer).[11]

Thus, generalising the above, Tamanaha requires that a functional kind a) cannot be put to a use other than the one which is its function, b) cannot be used in an inefficient way in many cases, c) cannot fail to achieve its goals (closely related to point 2), d) cannot have metaphoric or symbolic uses (closely related to point 1) and e) cannot have functional equivalents (per the arguments given above). These points all display a very specific understanding of how a phenomenon comes to be a functional kind for Tamanaha. If it can I) be put to other uses (per a and d) or II) fail or malfunction (per b and c) then it seems like the object mustn't be essentially

---

equivalents and so parts of the reply to Tamanaha will be important for an effective reply to Ehrenberg.

11 Tamanaha, above n 2, 209.

individuated by the functional role that it plays since it can cease to play that role while maintaining its identity, ergo this role is not a necessary property of being a member of that kind. Likewise, if III) any other phenomenon or object can play the same role by being a functional equivalent (per e and the above section) while not becoming a member of the kind, then the function is not sufficient for membership in the kind. For Tamanaha, it is problematic to say that something belongs to a certain functional kind or has a certain function, (e.g. that law has the function of maintaining social order) I) if it ever does anything else, II) if it ever fails to do so ('there are kinds of law and legal systems that are dysfunctional or non-functional, that lead to the disruption of social order.'[12]), or III) if anything else does it without thereby becoming/being a member of that functional kind.

It is important to note that another, more charitable, way of interpreting Tamanaha[13] is not to see his comments about hammers as listing necessary conditions but rather as giving a set whose combination is sufficient for something to be discounted from being a functional kind, but which do not, taken alone, given necessary requirements for *x*'s being a functional kind. He would then have a cluster concept or family resemblance approach to the exclusion of objects from functional kinds. Thus it would be wrong for me to phrase conditions I, II, and III in the strict way that I have — instead, they would have to be taken together and weighted appropriately. So, reformulating the above, it is at least problematic to say that something belongs to a certain functional kind or has a certain function just in case I*) it is often put to other uses, II*) it is prone to malfunction or being misused, *and* III*) other things often tend to fulfill the same function while not thereby becoming a member of the kind. These conditions are jointly sufficient though none of them on their own is necessary. This is a much less stringent, and so a much more defensible, position for Tamanaha to hold. We can assume that a hammer still satisfies all of the above conditions and so isn't a functional kind (since Tamanaha himself uses it as an example) and that this is the case, obviously, for law as well. If I can show that it still makes sense to say that *x* belongs to a functional kind even if I*, II*, and III* are all satisfied, even the more robust cluster concept approach fails since the conditions are not jointly sufficient to exclude *x* from being a functional kind. By showing this I will also end up showing that none of them (or I, II, or III) are necessary, so I will focus my argument on I*, II*, and III* when they all occur together.

Requirements I, II, and III — and their family resemblance cousins I*, II*, and III* — all display a certain understanding of functional kinds, which itself rests on a specific understanding of what it means for an object or phenomenon to have a function. The functionalist must show that these points are all unreasonable and/or unintuitive requirements to hold as part of an understanding of functional kinds. I will show that Tamanaha's understanding of functional kinds is premised on an overly broad and ultimately unintuitive understanding of function.

---

12 Ibid 157.

13 I thank Dale Smith for drawing this interpretation to my attention.

D. Proper functions v mere functions/capacities

Tamanaha holds that membership in a functional kind is determined by what I will term mere functions and capacities. This is why points I*, II*, and III* above are problematic to a functional kinds analysis for him. Once mere functions are distinguished from so-called proper functions, which are the correct understanding of function both generally and when thinking about functional kinds, then one will be able to see why Tamanaha's objections do not apply to a functional kinds analysis of law correctly understood.

I hold a mere function to be any member of the total set of causal effects that an object or phenomenon has in the world. It is merely a description of what an object is doing, what role it is playing, how it is functioning. It includes what an object tends to do and what it is prone to doing, i.e. what it happens to do most of the time. This is to be differentiated from what is called a proper function[14] which is not just what an object happens to do, or tends to do, but rather is the function it is *supposed* to fulfil, in some sense; that is, a proper function is what a thing is *for*. It is the thing's *aim*. It explains the object's existence,[15] either through its history of reproduction (I will follow Ehrenberg in calling this a 'selected function') or through the intentions of the creator (I will follow Ehrenberg is calling this a 'design function').[16] A mere function or capacity is anything an object does or is capable of doing. A proper function, on the other hand, is not just any capacity or effect which an object has, or even the common tendencies and patterns of use and effects which an object is prone to display — it is a capacity or effect which an object has which it is, in some sense, *supposed* to have *by virtue of being that kind of object*. It explains why it is the (kind of) object it is. It is the essential aim of the object. Another useful distinction is that between serving a function and having a (proper) function.[17] An object can serve a function without having it. A kettle can stop a door from closing but this is not what it is supposed to do and this does not make it a doorstop; stopping a door is not what a kettle is for. It is *serving* the function of a doorstop but it does not *have* the function of a doorstop. Likewise, I may use a hammer to scratch my back, but that does not make the hammer a backscratcher since this is not what the hammer is for; backscratching is not its proper function, although it can (merely) function in such a way — it has that capacity, it can serve that function.

It is important to quickly digress somewhat and note the normative language being used here. The apparent normativity of functions (properly understood) and

---

14 Ruth Millikan introduces the term in her *Language, Thought, and Other Biological Categories: New Foundations for Realism* (1984) 17.

15 Leslie Green gives a similar account of function in Green, 'The Functions of Law', above n 3, 118: 'On this view, a consequence is a function if and only if the disposition to produce the relevant consequence figures in the best explanation of the existence or persistence of that feature or item.'

16 Ehrenberg, *The Functions of Law*, above n 5, 21.

17 Karen Neander, 'The Teleological Notion of "Function"' (1991) 69 *Australasian Journal of Philosophy* 454, 465.

functional kinds such as artifacts and biological organs is one of the philosophically fascinating things about them. How can there be a sense in which a *good* torture machine *should* inflict gratuitous suffering? How can there be a sense in which the flesh eating bacteria's enzyme *should* break down human flesh, that it is *mal*functioning if it fails to do so? We can only make sense of this normative element in talking of these objects if we see them as having *proper* functions, functions which they are supposed to play, which they can fail to fulfil.[18] The proper function gives us the standard by which to evaluate members of the kind. Importantly, members can fail and malfunction. Tamanaha's membership conditions I*, II*, and III*, on the other hand, seem to suggest that functions are the effects that something happens to have or tends to have, a function is any capacity something might employ. If something lacks the capacity to hit nails without bending them, this does not mean that it is not a hammer; it simply means that it is a *bad* hammer. This normative element is captured by proper functions. Rocks *can* hammer in nails, but they are not *for* that; they do not have that aim, that proper function. Hammers can and do. When they can't do it properly that is a problem, they are malfunctioning. If a rock can't hammer a nail, it is not a malfunctioning rock.[19]

Tamanaha holds that a putative functional kind *y* fails to have a function in at least those cases where some paradigmatic members of the kind satisfy I*, II*, and III* simultaneously. This understanding of function is too stringent, however, and does not reflect how we think about and ascribe functions. It makes functional kinds too closely linked to what they tend to achieve on a regular basis, rather than on their proper functions which are either what the items were selected for or designed for. Objects retain their *proper* functions even when used more often for other things (per I*), in the face of gross and continued malfunction or misuse (per II*), and when other non-member objects are often used for the same putative function (per III*). Take the example of a hammer which I mainly use to scratch my back, with which I hammer poorly and which is too rusted and so chips when hammering and bends nails, and which has thus been superseded in its hammering capacity by a rock. This object is not or is no longer for hammering in nails according to a Tamanahian analysis. (Perhaps it is for scratching backs, though this is not actually entailed by the argument.) It is not a hammer anymore. However, the very capacity to call its rustiness a defect (something our notion of function should let us do) and to characterise its failure to hammer in nails as malfunction (something else our notion of function should let us do) depend upon us still understanding it as having the function of hammering in nails, and so of retaining its proper function despite satisfying conditions I*, II*, and III*. Similar arguments could apply for kinds

18 Ehrenberg stresses the importance of accounting for failure in any theory of functions throughout his book *The Functions of Law*, above n 5, ch 2.

19 Discussing the normative language in more depth would lead me too far afield. Judith Jarvis Thomson in her *Normativity* (2008) gives an account of how language operates in the case of a 'good toaster' as distinct from other kinds of 'goodness.' Thus, for toasters, law, and other functional kinds, it is not a moral normativity which is attached to them but rather a kind of instrumental, functional normativity.

rather than just particular instances of them — modify the above example by imagining a world full of particularly lazy and inept handy men and particularly rusty hammers. The hammers still retain the function of hammering (provided that the possible world is sufficiently like our own in other respects) even though the majority of hammers do not get used for hammering. Function is not a matter of how something tends to be used and/or how successful it is.

Treating functional kinds in this way fails to capture the relative stability which we expect them to have in spite of how they tend to be used. We attribute defect and malfunction to even the poorest working instances of a given kind and this attribution of malfunction only makes sense if they retain their proper function. Thus any understanding of function which holds I*, II*, and III* to be jointly sufficient for doing away with function(al kinds) should only be adopted if there are no better accounts available. Fortunately for the functionalist, there is a better notion of function available in proper functions, which can clearly be distinguished from mere functions, capacities, and tendencies.[20] Indeed, it is this difference that is captured by our linguistic practices when we say that something is functioning *as* something else. A hammer can function *as* a backscratcher, and this is precisely because the hammer is *not* a backscratcher, even in that instant where it is fulfilling the role of scratching my back. If the hammer were functioning properly (by driving nails, for instance), we would simply say that the hammer is functioning (or functioning well) *period* — we would not say that the hammer is functioning *as* a hammer or *as* a nail driver.[21] Indeed, such sentences seem strange to the ear.

---

20 This does depend on there being a sufficient account of normativity for proper functions. If there simply is no good characterisation of how proper functions can give rise to normative language, then perhaps Tamanaha's account is the only feasible one available. As outlined above, I do believe that there is at least a prima facie account available, following Judith Jarvis Thomson. Furthermore, the designed-for, if not selected-for, proper function account can give the intentions and desires of the creator as the source of the normativity of proper functions.

21 One will also notice that gerrymandered kinds such as 'nail driver' (meaning anything that drives nails) or 'cutter' (meaning anything that cuts), are functional kinds in the purest sense but that few of our commonly used functional kind terms are like this. It is impossible to construct 'functions *as*' statements for these other pure functional kinds because the mere capacity/performance of the specific act (or the common tendency to do so) is sufficient for it to be a member of the kind. Thus one cannot say 'the cutter is functioning as a poker' (where cutter and poker are pure functional kinds referring to anything that can — or tends to — cut or poke, respectively) since anything that is functioning as a poker is, by virtue of definition, a poker. So it just *is* a poker functioning as such, it is not a cutter functioning as a poker (while not actually being a poker, which is the implication of the 'as' in the sentence).

Also, I believe that the appropriateness of '*x* is functioning' statements is a good marker of what are functional kinds. That is, when you can say of *x* that '*x* is functioning' without adding an 'as *y*' qualifier, then it is likely that the *x* we are dealing with is a functional kind. This is because it imports the assumed function with itself. It seems to me that law is such a term — 'the law is functioning' does

Functional kinds are best understood in terms of their proper functions, in the above sense. This gives the kinds more permanence and stability and captures our general thought and talk about functions and functional kinds. It still remains to be seen, however, whether understanding functional kinds with reference to proper functions can respond to the issues raised by Tamanaha.

E. What does it mean to be a functional kind? — take two: proper function and responding to Tamanaha

Under a proper functional understanding of functional kinds, Tamanaha's problematic requirements I*, II*, and III* disappear. This is because whether an object has a proper function or not has little to do with that object's actually satisfying any given causal role or relationship at any particular time, or tending to do so. Proper functions, rather, come in two central varieties — selected functions and design functions. Under the selected functions account, the proper function of an object is determined by the effects that ancestor members had in the world that accounted for their reproduction or existence; the proper function is whatever functions have been selected for in the past. Two objects are members of the same functional kind just when they were both selected for the same reasons; both brought about the same kinds of past effects which in both cases account for their current existence. Another conception of proper function as design functions links an object's proper function to the intentions of its creator. Under this account what it means for two objects to be members of the same functional kind is for the objects' creators to have had the same intentions regarding their use. It should be noted that, for present purposes, I am ambivalent between these two accounts. They have their strengths and weaknesses and which account of proper functions is correct does not impact significantly on the present arguments.

One will notice that under both of these conceptions, the actual current effects of the objects or their successful performance are not related to their membership in the kind. This singlehandedly allows for objects to regularly perform any number of other functions, regularly be used for other uses, and regularly malfunction (unlike Tamanaha's account under I* and II*) and allows other non-member objects to regularly perform the proper function (which is disallowed under Tamanaha's III*) without thereby becoming a member of the functional kind. Under this account of a proper functional kind, maintaining social order is neither necessary nor sufficient for an object or phenomenon to be law.[22] Law may

---

seem to be a reasonable statement without further contextual specification; no 'as *y*' is required. We do not have to add that 'the law is functioning as a maintainer of social order' or 'as a behaviour guider.' Contrast this with 'Sally (not a robot but a natural person) is functioning' or 'the cat is functioning' which both sound very strange without contextual specification — this is because these last two are not functional kinds.

22 Here we can see how this functional kinds theory is separated from certain autopoetic and classical functionalist sociological theories which hold, per Tamanaha, that 'law is essential to the survival and functioning of the overall social system that provides

regularly fail to order society while still having that as a proper function and thus remaining a member of the functional kind.[23] So long as its reproduction and continued existence is explained by its past effect of maintaining social order (following the selected functions approach to proper functions), or it was created for the intended purpose of ordering society (following the design functions approach to proper functions), this is sufficient to show that a social phenomenon belongs to the functional kind law. Likewise, other systems may promote social order without thereby becoming members of the kind, so long as the maintenance of social order does not explain their continued existence (per the selected functions approach), or they were not intentionally designed for that purpose by a creator (per the design functions approach). What *is* both necessary and sufficient is that the phenomenon or object share a proper function with law — that it have the maintenance of social order as its proper function. As highlighted above, having a function as a proper function is determined either by a history of selection for that function or from being designed to have that function.

This responds wholesale to the issues raised by Tamanaha concerning functional equivalents. Moral norms, language, habits, and customs can all perform the role/function of maintaining social order — what is important is that none of them have that as their *proper function*. Having a proper function is not a matter of what functions, effects, or capacities something happens to have or to display at any particular moment in time. This means that hammers have the proper function of driving nails even when they fail to do so, and that rocks do not have the proper function of driving nails even when they succeed is doing so. Recall the fundamental structure of the argument:

> The existence of functional equivalents are problematic when:
>
> i) they occur across different kinds or types of thing, at least one of which is a putative functional kind, *and*
>
> ii) when membership in this functional kind by the functional equivalent is intuitively implausible or problematic.

As shown above, the existence of a functional equivalent is a matter not of function but of proper function and thus the argument has weakened premise (i) — functional equivalents are not found across such a great range of phenomena.

However, an objection might still run, what if some of these social practices *do* have the same *proper* function as law? For instance, what if some social practice has been selected or designed to have the effect of maintaining social order? This

---

its environment'. Tamanaha, above n 2, 188. These accounts are vulnerable to Tamanaha's objections insofar as they do not have a proper functional understanding of law. I will leave it an open question of whether these sociological theorists would avail themselves of the notion of proper function to respond to Tamanaha.

[23] Though it would be a defective member — indeed, to understand its defectiveness requires it to retain its function/its membership in the functional kind.

might be termed a proper functional equivalent and still might pose a problem for a functional theory of law.

F. Proper functional equivalents

It seems as if Tamanaha's objection can be modified from dealing with mere functional equivalents to *proper* functional equivalents. In this case, the argument would run (remembering the fundamental structure from section I.i. and above) that the proper function of law is to maintain social order (this is the reason for its selection or what it was designed to do) but other (kinds of) things also have the maintenance of social order as their proper function (whether it be by selection or by design); it seems unintuitive to call these (kinds of) things law, ergo law is not individuated by its proper function but by something else, thus law is not a functional kind. The problem with this kind of modification is that while moral norms, habits, and social customs might happen to maintain social order, it is not nearly as plausible that they are selected for or designed because they maintain social order. And to the extent that they are, then including them under the heading of law does not seem as problematic as it might under the 'merely happening or tending to maintain social order' pre-modified account.

The burden now falls upon the objector to give examples of things that are reproduced because or have the intended or selected function of maintaining social order (say) but which are not law. Moral norms are unlikely candidates — although they may happen to maintain social order, it is unlikely that this would be their proper function, their aim, or their reason for reproduction, for which they have been selected.[24] There are many situations where people feel that their moral norms come into conflict with an existing immoral social order — this is precisely what occurs when conscientious objectors disrupt an existing social order and legal system to bring about a more just or moral one. Also, people sometimes suppress their moral inclinations because they feel that attempting to achieve the relevant ends would be too inconvenient to pursue and may disrupt an extant social order, causing society to descend into chaos. For that reason otherwise moral people may uphold unjust regimes. Language, too, is an unlikely candidate — although language's existence helps maintain social order, this is not plausibly the main reason for its reproduction, or its intended aim. Much more likely is that it facilitates prompt communication and coordination (jargon-laden technical law often inhibits communication and coordination in the first instance, but for the sake of — perhaps merely imagined — greater social order on a larger scale). Habits are

---

24 While some anti-realist meta-ethical positions hold that morality exists because of the evolutionary advantage of social order it brings, it seems clear that the selection or design of even conventional moral norms is better explained by the fact that people hold them to be just and good. Furthermore, running the anti-realist meta-ethical line that morality exists because of the evolutionary benefits it provides requires committing oneself to a contested meta-ethical position. One example of the controversy is encapsulated in Richard Dworkin, 'Darwin's New Bulldog' (1998) 111 *Harvard Law Review* 1718.

unlikely candidates — they are reproduced, almost by definition, because of certain features of human psychology which tend towards repeating well-known actions and mimicking the repeated actions of others. Social customs generally are unlikely candidates — they all may contribute to the maintenance of social order but they may be reproduced for or designed for all kinds of reasons, and have intentions relevant to a specific area: fashions, tastes, the rhetorical or psychological power of certain social authorities, etc.[25] Religion, also, may promote social order but it is unlikely that this is what it is selected or designed for; a more plausible proper function is that it is for offering spiritual and psychological comfort.

Let us push the functional equivalents argument further and assume that any of the above turn out, upon empirical examination, to be selected or designed because they maintain social order — a subset of social customs like the rules of etiquette, say. This is certainly possible (though for the reasons given above I think it unlikely). In this case, they would have to be considered members of the functional kind 'law' since they have the same proper function. This is less damaging to the functional kinds position than it may seem at first, however. The etiquette in question would plausibly have to be fairly central to a society for it to exist because it maintains social order. Furthermore, social custom is a recognised source of law and there is no principled reason to exclude social etiquette, which is a kind of social custom, as a potential source, especially if it is etiquette that is *so central* to the society that it maintains social order — after all, it regulates and informs the behaviour between persons, much like more paradigmatic examples of customary law. For instance, a code of honour and respect (which is what etiquette is), may exist side-by-side and in a complementary fashion with a permissive system of positive laws; one example may be extra-judicial duels as a manner of conflict resolution and honour maintenance. It is certainly plausible to see such systems of etiquette as forms of customary law, granting the assumption that they are reproduced because or are participated in with the intention to in fact maintain social order, or were designed for that purpose.

Another example to draw out how this modification alters Tamanaha's objection and the scope for reply might be certain practices of dance. It just might happen that dancing helps maintain social order in Western society. This would mean that under a 'mere functions' approach (Tamanaha's original position, without proper functions) it would have to count as law since it has the effect of maintaining social order. That dance is a form of law is highly implausible and thus a strike against a functionalist approach. However, even if dancing happens to maintain social order currently, it is highly unlikely that this is why dancing continues to take place in Western culture, why it is reproduced, why it is intentionally participated in, or that this is a purpose for which it is designed. More plausible is that it is pleasurable to participants and a fun past time. If it had turned out that dancing didn't maintain social order, it would still be participated in and reproduced as a social practice — either by design or selection. Thus the proper function of dancing

---

25 Furthermore, it is unlikely that social customs have design function since they are rarely intentionally created.

within Western culture is not to maintain social order and so it is not a member of the same functional kind as law.

If one imagines a different society (some indigenous societies may be like this) where dance constitutes a central feature of the social order and not only happens to maintain social order but is in fact selected or designed because it does so, it would then share the proper function of law and so would count as a form of law. This might at first seem counterintuitive and a strike against such a functionalist theory of law — dance, after all, isn't law. However, we should remember that we are thinking of dance from a Western perspective. If this other practice really is an integral part of the maintenance of social order, if it is truly selected and/or designed to contribute to social order, then it seems less problematic to consider it a form of law than it would to call the polka legal just because it fortuitously happens to aid the maintenance of social order. Indeed, I see it as a merit of the proper functions approach that it allows such diverse phenomena to be counted among the same functional kind despite cultural prejudice and parochialism which might otherwise draw on their superficial dissimilarities to deny the label of law to what is a proper-functionally equivalent system. Although many things such as song, dance, and initiation ceremonies won't necessarily strike *us* as legal in the first instance, if these practices share the same proper function as law, that is, if they are intentionally or unintentionally reproduced, selected, or designed for the same reasons as paradigmatic instances of law, then they will count. This allows us to sidestep potentially alienating parochial conceptions of law and have a more inclusive, while still rather stringent, account of the phenomenon.

II. The 'Law As Means' Argument

Leslie Green offers some similar arguments to Tamanaha concerning functional equivalents[26] which have already been dealt with, however he also offers a different and equally compelling objection to a functional kind account of law: law is better distinguished by its means rather than its ends. In his piece 'Law as a Means' Green outlines his contention clearly. Law controls society and facilitates certain forms of behaviour

> through the creation, recognition and application of rules. Other social institutions pursue law's ends by other means, for example, by creating economic incentives to which people are likely to respond, by altering the physical environment to change their feasible options, or by assassinating them before they can interfere with the government's plans. Law is distinguished from them less by what it does than by how it does it: law is less a functional kind than it is a modal kind.[27]

Thus to say that law promotes social order, even that this is its proper function, would not be incorrect for Green, but neither would it tell us something

---

26 Green, 'The Functions of Law', above n 3, 120.

27 Green, 'Law As Means', above n 4, 170.

distinctive or characteristic about law. Other things promote social order too, such as economic incentive programs and the assassination of antisocial upstarts. But these things do not strike us as law and this is because they are not serving these functions in the *way* that law would, by the same means. They do not do it through the creation, recognition, and application of rules. We should quickly note that it is available to Green to use the distinction between mere functions and proper functions here. That is, Green could claim that the proper function of these policies of targeted assassination and economic incentivisation is the maintenance of social order. That is, they may be designed or selected because they maintain social order. In this case they may very well be considered to be law, since they operate to maintain social order. Economic incentives and oppressive secret police, if they are truly designed or selected for the purpose of ordering society, do seem like means that law can and does use to maintain (a certain form of) social order. It is also possible, however, that economic incentivisation and targeted assassination do not count as law and lack the proper function of ordering society. This depends on whether law does not merely order society but orders society *all on its own* — law's proper function may be to order society to a certain, very large, extent. The ad hoc impact of economic incentives and assassinations may be too small to count as ordering society in this sense. Since we have already dealt with the argument from functional equivalents, I will not pursue this argument further here.

For Green, law's distinctive means is the creation, recognition, and application of rules. This cannot be the whole story however. It is very plausible that both economic incentivisation and targeted assassination are both underpinned by rules;[28] rules and orders about who to kill and who is allowed to kill, rules about who is to receive what kind of economic stimulus when. For his example to work, there must be something distinctive and unique about how rules work in the context of law. What is distinctive and unique about law is the way the rules themselves figure in the reasoning of those whose behaviour is to be changed. Rules may be involved in economic incentivisation and assassination, but the ways these practices change behaviour on the ground does not have anything to do with the internal rules that exist in these systems. The reasons the behaviour changes on the ground has nothing to do with those rules but rather with their consequences. If, instead of assassination, there was a natural catastrophe which happened to kill the exact same people as the assassin would have, behaviour would have ended up being changed in the same way ('badly' behaving people dying). Likewise, if there were 'natural' incentives for certain behaviour which just happened to map perfectly to the economic incentives the government was planning to implement, behaviour would again be changed in the same way but not because any rules had been changed. In these natural cases no rules are in play. So the change in behaviour does not have to do with the existence of rules. That is, the behaviour on the ground changes due to economic incentives in one case and due to the fact that certain actors who behave

[28] These rules may or may not have the structure of primary and secondary rules. We can imagine that there are the primary rule orders for assassinations alone, but there also might be rules governing who can give orders, and how the chain of command can change. These would seem to be secondary rules.

in certain undesirable ways cease to exist in the other. Behaviour does not change due to the awareness and implementation of the rules by the very same individuals doing the relevant behaving. This is the key ingredient in what is most interesting and distinctive about law as a means — the way it does things with rules and the self-reflexive application of them by the very agents at whom they are directed.

Green's argument, then, is that what is most interesting about law is that it is a specific way of doing things. It does things (achieves its goals, plays its roles, serves its functions) in a particular and distinctive way, through rules and people's awareness of them. This is what is interesting and distinctive about law, claims Green — what its functions are, even its proper functions, does not tell us anything as interesting as how it is achieving those functions, by means of rules. After all, why should the cause(s) of law's reproduction interest us? Or the intentions of its creators or users? Perhaps it is a necessary feature of law that it be reproduced for certain reasons but perhaps also these reasons are not that illuminating or interesting, even if they are unique to law. Law may well have a unique proper function *but this is not the most interesting feature of law as a kind.* What *is* interesting per Green is *how* law does things, its means, its ways.

Here I disagree with Green directly. How law does things — by means of rules and conscious application of them by agents — is not at all distinctive of law, thus it cannot be what is most interesting about law (or else all other systems which worked by means of rules would be equally interesting). There are many non-legal circumstances where behaviour is controlled by way/means of the recognition and application of rules — swimming pools, private clubs, unions, mafia hierarchies — yet none of these situations seem to be legal in any straightforward sense of the term. At best they are quasi-legal or parasitic on legal forms. Indeed, even calling them 'quasi-legal' seems to be extending the notion of the legal to all situations that involve rules just so that law can be distinctively linked to rules. These organisations and institutions operate by the same means as law — the creation, recognition, and application of rules — but they lack entirely law's function and so do not strike us as law. Indeed, what *is* interesting about law is precisely the role and function it plays and is supposed to play (in terms of its proper function) in our social life and in ordering our world in a particular way. This is why national constitutions get printed and reprinted and studied by thousands of people while the constitutions of university student clubs get lost and forgotten;[29] this is why almost all of the rules of legal systems give rise to discussions of justice and fairness in a way that the rules at the local swimming centre rarely do; this is ultimately why we write — and rightly so — about the philosophy of law and not the philosophy of rules. It is ultimately law's proper function (the maintenance of social order, say),[30] the role it plays in our social life, that accounts for why it is reproduced, why it exists at all, and why it is interesting and distinct.

---

29 I admit that undergraduate drinking culture may also have a role to play in this.

30 In the case that law does not maintain social order, and we have yet to discover what law's function is, we can at least claim that it is more likely that law's functions capture what is interesting about law, based on the above considerations.

III. On the Difference between Ends and Functions

Green claims that 'there are no ends universal among or unique to all legal systems, no ends that unify and explain all features of its means.'[31] Different legal systems may have wildly different ends — some might seek to increase the wealth of their populace, others might seek to increase their military might. What is important according to Green is that, to be legal systems, they must achieve these diverse ends through the same means, the recognition and application of rules. This also applies, per Green, on an intra-system level, to particular laws:

> The same means that gave us the Fewer School Boards Act could also have given us a More School Boards Act, or a School Boards (Restoration) Act, and all of these Acts would have been law, and they would have been law in virtue of the means by which they were produced, rather than the character (moral or otherwise) of the ends at which they were aimed.[32]

These acts aim at opposite ends (one assumes, though legislative titles are not always a good guide to the content of the statute)[33] however they have been brought about by the same means, and they operate by the same means and it is these mean which determine that both belong to the kind 'law'. Since they have different functions but are both law, it cannot be the function which determines their membership in the kind.

One can respond to this argument by suggesting that there is a distinction between 'ends' qua specific goals of a certain instance of something's use and its function(s). Not all hammer users share their ends in this sense. Some use hammers to make sheds. Some use hammers to mend shoes. Some use hammers to renovate the patio. This does not mean that hammers do not share the function of driving nails. Indeed, there are many goal-ends to which a hammer can contribute that are all compatible with its function of driving nails. In all of these cases hammers are driving nails (and even if they weren't, they may well still have that proper function). Ordering society and guiding behaviour as a proper function of law leaves open the question of the actual direction the behaviour will be guided or how society will be ordered. There are many different specific ways to order society which are all compatible with law's function of maintaining social order generally. Just because some societies do it one way (instituting more school boards) and others another way

---

31 Green, 'Law As Means', above n 4, 173.

32 Ibid 174.

33 Notable US examples include the Patriot Act (*USA PATRIOT Act*, Pub L No 107-56, 115 Stat 272 (2001)), Wisconsin's Right to Work Laws (Wis Stat § 111.04), and the Internet Freedom Act. See Kevin Matthews, *6 Laws with Super Misleading Names* (11 March 2015) Care2 <http://www.care2.com/causes/6-laws-with-super-misleading-names.html>. An Australian example might be the WorkChoices legislation: *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

(instituting fewer) does not endanger law's being a functional kind and having the same function across these cases.

IV. Cutting Up Functions — Law As Swiss Army Knife

Kenneth Ehrenberg in his recently published 'The Functions of Law',[34] drawing on Green,[35] brings up the example of a Swiss Army knife as a problem for a functional explanation of law. Although his approach does not treat law as a functional kind, the example is relevant to both cases. Instead of having a functional kinds analysis for law, Ehrenberg holds the more modest position that an explanation of law will need to include its functions.[36] The analogy of the Swiss Army knife is only problematic for him to the extent that it shows that some items with plural functions cannot be explained by the functions they serve.

The idea is that law may turn out to be like a Swiss Army knife — as a functional instrument, it might turn out to have many various functions. Ehrenberg plays down the impact that this might have on functional explanations of law. Functions will still be relevant to an explanation of law. They are relevant in either one of two ways. The first way is that the functional explanation of the Swiss Army knife, or of law, may be broad and so cover all the various individual functions under one meta-function; for the Swiss Army knife this is the function of 'provid[ing] a lightweight and easily accessible means to manipulate or adapt one's environment in small ways.'[37] For law this broad function might be something like 'guiding behaviour'. This allows a useful role to be played by the function while explaining the phenomenon — linking together all the various individual functions under a broader heading which increases our understanding of law.

One issue with this approach, as Ehrenberg rightly highlights, is that the broader function which subsumes the various others might be too broad to be useful. Telling us that a Swiss Army knife is used to manipulate and adapt one's environment in small ways is so broad as to be useless in an explanation — nothing important and unique has been uncovered about the object. This, Ehrenberg admits, may also be the case of something like 'guiding behaviour' for law. The second, alternative, way that functions might still figure in an explanation of a multi-faceted object like a Swiss Army knife, or law, is giving the entire list of functions — this approach goes for pluralistic specificity rather than unitary breadth. The explanation would list the various specific functions the object (Swiss Army knife or law) can play and give them as a set, or conjunction. Understanding these various functions will still help us get a better understanding of the kind of thing that law (or a Swiss Army knife) is, claims Ehrenberg. The multiple functions can be categorised to the extent that they have similarities and used to explain the phenomenon in greater depth than one would otherwise be able to.

---

34 Ehrenberg, *The Functions of Law*, above n 5, 130–1.
35 Green, 'Law As Means', above n 4, 184.
36 Ehrenberg, *The Functions of Law*, above n 5, 131.
37 Ibid 130.

The example of the Swiss Army knife is also problematic, however, for a functional kinds approach to law. If law is like a Swiss Army knife, it has a collection of separate functions which may or may not overlap *but* it has no clearly manifest single function which would be sufficient to be *the* function of law. Let us assume, then, that law *is* like a Swiss Army knife in the appropriate ways — that is, that it simultaneously has a number of different proper functions — (such as) resolving disputes, keeping the streets safe, allowing and facilitating certain forms of commerce, etc. Lacking a central function, it will become harder to hold that law is individuated by the functions it has. Re-purposing the responses from Ehrenberg above, there are two central ways of dealing with the issue: either to find a broad meta-function for law or to claim that the functional essence of the kind law is a conjunction or set of various specific functions.

First, I will examine the broader approach. If the best broad meta-function we can find to individuate law is akin to the Swiss Army knife's meta-function of 'provid[ing] a lightweight and easily accessible means to manipulate or adapt one's environment in small ways' then it is likely that the function would be too broad to give a useful functional analysis for law as a functional kind. Perhaps a legal version would be 'guiding behaviour'. It would be too broad and over-inclusive.[38] There are lots of things besides Swiss Army knives that provide a lightweight means of manipulating one's environment and there are lots of things besides law which guide behaviour, even if we include considerations of proper function which were developed above in response to Tamanaha's functional equivalents argument. It should be noted, however, that law might be importantly different to a Swiss Army knife in regards to how its various functions hang together and what unifies them. The Swiss Army knife has a retractable collection of various utensils: blades, scissors, picks, corkscrews and more besides (depending on the version of the knife). These items are unrelated in any way except that they are all retractably built into a central holder. Each and any of them could just as easily exist on their own. Law's functions, on the other hand, seem to be inter-related and even to interact. They are less a collection of relatively unrelated utensils assembled together and more like a web of functions drawn around some of law's central features. One cannot wholly separate law's disagreement settling function from law's social ordering function, from law's coercive function, from law's safety promoting function, from law's economy facilitating function, from law's behaviour guidance function. This suggests that the functions of law are not as disparate as those of the Swiss Army knife and do stem from central core proper functions which have a variety of different effects in the world. The proper function of law as 'ordering society' or 'maintaining control of the majority of coercive power in a community' are plausible candidates for these core functions from which the others arise. Of course, the identity and proper articulation of these core functions requires further

---

38 I am here stipulating that 'guiding behaviour' is too broad to be useful. However, note Ehrenberg, *The Functions of Law*, above n 5, 93. There he highlights the role this function has played in motivating the exclusive positivist view, via the Practical Difference thesis, against inclusive positivism and suggests that this means that 'guiding behaviour' is not so broad to be jurisprudentially useless.

work, both conceptual and sociological; suffice it to say that these broader functions do appear to be prima facie candidates for law's proper function, and the essence of the functional kind for law. It is out of these meta-functions that the various specific functions that one can identify for law arise, unlike in the case of the Swiss Army knife, where each functions is relatively distinct.

Second, even if the various functions of law are not so related to a single core (meta-) function, it may be possible that a conjunction of the functions could be the essence of the kind. This involves the specific rather than the broad approach outlined above. This would simply mean that the functional kind 'law' would have a conjunctive essence. For something to be a member of the kind it would have to have all the appropriate functions. Applying this approach to the Swiss Army knife, it *uniquely* has the conjunctive functions of cutting, picking, sawing, bottle opening and whatever other utensils it has on it. Nothing else has just that combination of functions. Likewise, for something to be law, it would have to have the proper functions of guiding behavior, resolving disputes, providing safety and ordering society, and so forth. This would uniquely establish the requirements for something to be law — it would have to have these functions to be a member of the kind. This approach has the strength of avoiding over-inclusivity and largely doing away with the issue of functional equivalents. There may be a number of phenomena that fulfill some of the functions listed in the set — perhaps vigilante groups keep streets safe and mafia organisations guide the behavior of their members. However, few if any will fulfill all of them while not being instances of law. There is the worry, however, that this approach might be too exclusive — excluding things which we would otherwise want to call law, such as international law. This issue can be resolved by modifying the functions of the set to capture the systems which we would want to call law while avoiding including the systems we would not.

One issue with this approach is that classic examples of essences in the philosophical literature, such as water and gold, have tended to have a single essence (having a molecular constitution of H_2O for water, having atomic number 79 for gold). If a functional kind is a kind which has a function for its essence, then having a conjunctive essence may prove problematic or at least unusual. An essence does seem, generally speaking, to connote a single property which is the irreducible core of a thing. It should be remembered, however, that these natural kind cases involve material constitution — and a single physical object (such as a molecule of water or an atom of gold) cannot have two material constitutions, so it should be expected that, when the essence is a question of material constitution, as it is in the cases of water and gold, there will be a single essence. Objects and phenomena can, however, have multiple functions so it is less clear that there must be only one function that an object or phenomenon has essentially. If two or more functions tend to cluster together due to how the object is selected or designed, there is no in-principle reason that it cannot have more than one proper function essentially. Hammers might be for pulling nails as well as driving them. It should also be remembered that this does not mean that there is more than one essence, or sufficient condition for membership in the kind. Rather, there is a single essence, a

single necessary and sufficient condition for membership in the kind, it is only that this condition is a conjunction of more than one property.

Both of these approaches have their strengths and weaknesses. For what it is worth, I favour the former, broader approach, thinking that there is some core function of law which the analogous Swiss Army knife perhaps lacks. That is, I am happy to distinguish the two cases, holding that a Swiss Army knife may not ultimately be a functional kind in the same way that law is. What the two approaches show, however, is that there are ways to respond to the idea that law is like a Swiss Army Knife, has a variety of functions, and so is not a functional kind.

V. Ehrenberg's Approach to Law's Relationship to Its Functions

Ehrenberg also, in his latest book, expounds with great breadth and depth about how functions should figure in jurisprudential debate and methodology and the implications of this shift in focus for a variety of jurisprudential perspectives. In Chapter 2, he explores four ways in which law could be related to its functions. After outlining what these relations are, I will suggest that Ehrenberg is too restrictive in his treatment of law's relationship to its functions, stopping him from being able to treat law as a functional kind. As we will see, this is predominantly due to arguments which are similar to Green's and especially Tamanaha's and so have already been dealt with, although I will give a succinct reiteration of them as they apply directly to Ehrenberg's argument below. Ehrenberg over-states the impact of these arguments and so unnecessarily restricts the relationship between law and its function.

Ehrenberg gives four ways that law can be related to its function.[39] Although he does not say that they are exhaustive, the list does lend itself to such an interpretation. They are listed below:

1. Performing function *x* is both a necessary and sufficient condition for something to be law (i.e. the function is only and always performed by law)
2. Performing function *x* is a sufficient but not necessary condition for something to be law (i.e. the function is only but not always performed by law)
3. Performing function *x* is a necessary but not sufficient condition for something to be law (i.e. the function is always but not only performed by law)
4. Performing function *x* is neither a sufficient nor necessary condition for something to be law (i.e. the function is neither always nor only performed by law)

---

39 Ehrenberg, *The Functions of Law*, above n 5, 43–6.

Ehrenberg decides that the best way to understand law's relationship to its function is captured by option 4. He holds that law's function is a central part of how we explain law — indeed, an essential part of how we explain it[40] — but he denies that there are any functions that law necessarily serves. Instead, there may be some functions which law generally serves, but which it can also fail to serve at times. He draws the analogy to a hospital[41] — we cannot explain what a hospital is without making reference to its function: to heal people. However, this does not mean that hospitals always succeed at healing people, they can fail in this task. It also does not mean that hospitals are the only institution or activity that heals people; people can be healed by other means. Nevertheless, the function of healing is a central part of understanding what a hospital is and is a necessary element of any explanation of hospitals. So too with law and its functions.

Ehrenberg has two main arguments against options 1-3. One is against the sufficiency claim — that performing a certain function is sufficient for something to be law. The other is against the necessity claim — that performing a certain function is necessary for something to be law. (Either argument is sufficient to defeat option 1, which is that having a certain function is both necessary and sufficient for something to count as law). Contra the sufficiency claim, Ehrenberg states that 'most of the functions usually associated with law are also performed by other institutions, normative systems, or areas of human behaviour such as morality, etiquette, organized religion, and contextual rules in formal or informal associations.'[42] This means that it is unlikely that there will be a unique function for law, that there will be a function that only law plays. Contra the necessity claim, Ehrenberg highlights that law can fail in its functions and that having a full functional account has to allow for the possibility of failure. Any functional account we give for law must allow for the possibility of failure, therefore law cannot necessarily perform any function (since this would exclude the possibility of failure).[43] Both of these arguments are reminiscent of Tamanaha's functional equivalents argument above and, indeed, the response will be similar.

It is interesting that Ehrenberg articulates the four points in terms of performing a function, rather than having a (proper) function. He, earlier in the book, draws the distinction between proper functions and what I have termed above mere functions[44] and so it is surprising that he does not use the distinction here. An object with a selected or design function, a proper function, does not need to perform its function to be a member of the appropriate functional kind; all it needs is either to be selected or designed for that purpose. This makes the problems of functional equivalents and the capacity for failure much easier to deal with for a

40 Ibid 46.
41 Ibid.
42 Ibid 44.
43 Ibid 45–6.
44 Ibid 21–2. These Ehrenberg calls Cummins functions, following the literature and drawing on the author of the piece Robert Cummins, 'Functional Analysis' (1975) 72 *Journal of Philosophy* 741.

functional kinds approach. The distinction can be drawn more clearly by distinguishing between the notion of serving (or performing) a function and having a function.[45] Things can serve functions that they do not have, and things can have functions which they do not, in that moment, serve. The sufficiency claim should therefore be rephrased: It is sufficient for something to be law if it has law's *proper* function. The list given by Ehrenberg contains items which may perform or serve the same the function as law but are unlikely to have the same proper function. None of morality, etiquette, or organised religion are likely to have been designed or selected for the same proper function as law. They may at times serve similar ends such as maintaining social order but, as shown above, they are unlikely to have the same proper function as law. It is not clear that these other social practices have been selected for or designed for maintaining social order or if they just so happen to serve this end along with their other, truly selected for or designed for ends. These practices seem to have other clearer proper functions, such as displaying social respect and rank, in the case of etiquette, and offering spiritual and psychological comfort, in the case of religion. It seems to be a contingent fact that these functions also happen to support and maintain social order — it is not part of the essential proper functions of these practices.

Likewise, the necessity claim should be rephrased: It is necessary for something to have law's *proper* function (of, say, maintaining social order) if it is to be counted as law. This means that a putative instance of law can fail to serve its function, so long as it has the designed for or selected for proper function of maintaining social order. This makes the necessity claim more defensible.[46] Law can fail to serve the function that it has — malfunction is possible. What is necessary for a certain phenomenon to count as law is that it has been selected for or designed for the same function. This will not be a matter of the functions it currently serves but, rather, will be a matter of the intentions of its designers or the effects previous instances of the kind had been selected for in the past. Thus law can fail in achieving its proper functions without endangering its membership in the functional kind. Indeed, it is in fact membership in the functional kind that gives us the relevant criteria for what counts as malfunction; when do failures in performance of a function count as malfunction? The answer to this is when the object fails to perform a *proper* function, the function which determines membership in the kind.

A functional kinds approach depends upon both the sufficiency claim and the necessity claim being correct. For law to be individuated by the functions that it serves requires that having the right proper function is *sufficient* for a phenomenon

---

45 Neander, above n 17, 465.

46 Indeed, Ehrenberg acknowledges in a footnote (Ehrenberg, *The Functions of Law*, above n 5, 46 n 122) that one could 'introduce a distinction between an artifact having a function that it is intended to perform, and actually performing the function'. He suggests that this would only push the issue back one step to cases where law did not even have its selected or design function. I hold that these cases rarely if ever arise, however, and argue for this in the text.

to count as law. For the function of law to be the essence of the functional kind, on the other hand, requires that having the function is *necessary* for membership in the kind. Since Ehrenberg holds that neither of these claims are tenable, he says that law does not have any necessary functions and that no functions are sufficient for membership in the class. This is a weaker relationship between law and its functions, corresponding to option 4 in the above list. Ehrenberg still holds that functions are an essential part of a full explanation and proper understanding of law, just 'without making any extra claims that performance of those functions are either necessary or sufficient for membership in the class of law.'[47]

Since the arguments which lead him in this direction have been shown to have responses from the functional kind position, there is little reason that a theorist interested in the relationship between law and its functions would not take the stronger position of holding that there is a relationship of necessity and sufficiency between law and its functions. This is a much stronger theoretical position which sees the relationship between law and its functions to be a deep philosophical matter of modality which goes to the heart of the phenomenon and its essence rather than simply a matter of giving a fuller explanation of it. Furthermore, seeing law as a functional kind actually explains and makes explicit why law's functions are such an integral part of a full explanation of law: namely, it is because law's functions are at the essential core of its being, since law is a functional kind. If there are some instances of law that have no shared functions (since sharing a function is not necessary for membership) then how would a description of law's characteristic functions help in explaining that particular instance of law? It makes much more sense that an explanation of law requires an explanation of its functions because those functions figure in part of what it is for the phenomenon to be law. Likewise in the case of hospitals, for instance, part of what it is to be a hospital is to have a proper function of healing people and this is what makes that part of our best explanation of what it is to be a hospital. Of course, having the proper function allows for failure in the task — indeed, it is what determines when those failures count as malfunctions.

VI. Conclusion

I have defended a functional kinds account of law's nature from two major objections. Tamanaha's functional equivalents objection does not take account of the distinction between proper functions and mere functions and capacities and so places requirements which are too stringent (or too easily lead to unintuitive consequences) on a functional kinds account of law. Green's claim that law is more distinctively or interestingly a means than an ends (and thus is not best understood as a functional kind) does not take into account that many non-legal systems work by the same means yet are not distinctive or interesting due to those means. I also explored a less central objections arising from Green, concerning how law can achieve a number of different ends while continuously having the same function. I

47 Ehrenberg, *The Functions of Law*, above n 5, 46.

then turned to points arising from Ehrenberg's latest book on the functions of law, dealing with the objection through analogy to the Swiss Army knife and its multiple functions before taking issue with Ehrenberg's unnecessarily weak characterisation of the relationship between law and its functions. By falling short of a fully-fledged functional kinds account of law, it is harder to account for why functions have such an important role in our explanations of the relevant phenomena.