

Law and Authority Under the Guise of the Good, by Veronica Rodriguez-Blanco. Oxford: Hart Publishing 2014. Pp. 215.

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Mind (2016)

<http://mind.oxfordjournals.org/content/early/2016/08/19/mind.fzv213.full?keytype=ref&ijkey=NAz008aQOylEiLF>

1. Introduction

Law is a practical institution the primary business of which is to guide – mainly through rules and commands – the behavior of citizens and officials. Given that the law guides behavior, the law appears normative. That is, the law appears to provide reasons for actions. For example, judges take the law as a reason to settle a dispute in one way rather than another; and citizens take the law as a reason to act as the law requires. Accordingly, an issue that has attracted significant attention in legal philosophy has been explaining the nature of legal normativity.

Legal normativity is particularly puzzling for those who think about law from within a positivistic framework, which is the dominant approach in 20th century and contemporary legal philosophy. Briefly, positivists hold the view that law is something that is posited. Law, in other words, is made by people and institutions and is, therefore, a human artifact, a feature of individual and social behavior and psychology. Given that law is grounded in facts, the puzzle has been to explain the apparent normative nature of law. Simply put, how can social, behavioral and psychological facts give rise to norms? And if so, what sort of norms are these?

In her rich, insightful and novel book Veronica Rodriguez-Blanco offers a fresh and innovative perspective, deploying insights from action theory and the philosophy of practical reasoning to shed new light on the puzzles of law's normativity. Rodriguez-

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Blanco's contention is that legal philosophy has been dominated by an impoverished conception of practical reasoning and intentional action. And, given that the law is first and foremost a practical institution regulating actions, this impoverishment has led to impoverished accounts of the nature of legal normativity. Armed with what she takes to be a richer and better conception of how people reason when they act intentionally, Rodriguez-Blanco sets out to evaluate, amend and challenge the answers given to the puzzles of legal normativity by the key figures of 20th century legal philosophy, as well as to offer her own answers. In addition to legal philosophy, Rodriguez-Blanco also contributes to the literature on the doctrine of the guise of the good and action theory, as well as delves into meta-ethics and moral psychology. This innovative monograph should greatly interest anyone working in general legal philosophy.

2. Intentional actions under the guise of the good

Rodriguez-Blanco rejects a conception of intentional action based on a paradigm involving a mental state – such as a desire – and an act resulting from that mental state. According to Rodriguez-Blanco, this common picture of the structure of intentional actions is incomplete, because it supposedly cannot explain *why* intentional actors – from their own point of view as rational agents – are doing what they are doing. Given that people are rational agents and given that in acting *intentionally* people act *as rational agents*, it follows that we must have some rational point or end for our action, some grounding reason that makes our intentional actions intelligible as actions of rational agents. Accordingly, a theory of intentional action must incorporate this process of rational reasoning underlying intentional action. That is, it must account for *one's own* reasons for acting. The aforementioned conception of intentional action has a hard time providing such an explanation because it focuses only on the voluntariness of intentional actions and has nothing to say about one's reasons for one's actions.

The view that intentional actions involve a kind of reasoning through which one necessarily grounds one's actions in a rational end, value or good-making reason has come to be known as the 'doctrine of the guise of the good' (hereinafter 'GoG'), a

view that has its origins in ancient Greece and is very much alive and well in contemporary philosophy. Most of all, Rodriguez-Blanco relies on the work of Elizabeth Anscombe (Anscombe, 1963), such as adopting her method for unearthing the rational underpinning of intentional actions by asking actors to explain *why* they do what they do. This line of questioning is designed to produce a chain of actions and reasons for those actions, each reason grounding the one that came before it until one reaches an end, value or good-making reason that rationally grounds the whole chain, making it intelligible as a single intentional action. Without such a grounding end or value we cannot, according to Rodriguez-Blanco, characterize behavior as intentional action, because a rational agent's intentional conduct is inherently grounded in reason.

Rodriguez-Blanco gives the example of the action of putting on a kettle (pp. 27-28). To account for this activity as an intentional action of a rational agent we must go, according to Rodriguez-Blanco, beyond merely describing the physical motion of lifting a kettle and putting it on the stove and the mental states of willing the lifting of one's arm and performing that motion. To fully understand this activity and to make sense of it as an intentional action we must explore further, pursuing a line of questions and answers designed to unearth the actor's point or end for the activity:

- Q: why are you putting on the kettle?
- A: to heat the water;
- Q: why do you wish to heat the water?
- A: to make tea with it;
- Q: why do you wish to make tea?
- A: because of tea's restorative virtues.

It is only once the chain of explanations for the action reaches the end of tea's restorative virtues that we have a full understanding of the motion as an intentional action of a rational agent.

It is important to note that the GoG model of intentional action allows for mistakes about the good. Accordingly, although acting intentionally is necessarily always

acting for a *perceived* good, it is possible for one's perceptions to be mistaken (p. 57). Thus, intentional actions are not conditioned on having an end that is *genuinely* good, yet they are conditioned on having an end that the actor *believes* is good. Finally, intentional action under the GoG is, according to Rodriguez-Blanco, a kind of know-how, that is a sort of ability – rather than intellectual process – to guide our actions towards a believed good.

3. Defending the doctrine of the guise of the good

Prior to drawing on the doctrine of the GoG to tackle issues in legal philosophy, Rodriguez-Blanco sets out to defend the doctrine from recent critics, Michael Stocker and David Velleman among them (Stocker 1979, Velleman 2000, pp. 99-122). These familiar challenges to the doctrine of the GoG take the form of counterexamples. Attempting to demonstrate instances of seemingly intentional actions that, nevertheless, do not appear to fall under the GoG, but rather seem either to fall under the 'guise of the bad' or as irrational yet intentional and deliberative actions. Such counterexamples are designed to demonstrate that the GoG model – if taken as a complete theory of intentional actions – is overly constrictive. Stocker's examples include people harming others or themselves with the reason of inflicting harm or doing evil. To this Velleman adds acting perversely or out of silliness, self-destructiveness or despair. As Velleman's arguments suggest, in Rodriguez-Blanco's and Anscombe's world there are no truly evil people, as no one intentionally acts for bad ends. At most there are well meaning or unreflective fools. Even Satan himself, who proclaims 'evil be thou my good,' (Milton 1667, Book IV, line 110) at his worst, if he acts intentionally, aims to do good yet mistakes the good for the bad.

While Rodriguez-Blanco's responses to other criticisms of the doctrine of the GoG strike me as cogent, her response to the aforementioned examples of Stocker and Velleman, I think, falls short. Rodriguez-Blanco proposes deploying:

...the why-question methodology to see whether in these cases the action is an intelligible and intentional action. Let us suppose that I see you putting a needle in the skin of your enemy who is tied up and cannot move. I ask you

‘why?’ and your answer is that it is for the sake of inflicting pain. This is unintelligible. (p.57).

Upon asserting the unintelligibility of this explanation, Rodriguez-Blanco proposes two alternative explanations of cases in which people genuinely think that they harm others for the sake of doing something bad. One is that the person is not acting intentionally – that is not acting out of rational deliberation – but rather out of impulse or pure desire, neither of which is rational and, therefore, are not an intentional actions. Rodriguez-Blanco’s second explanation is that the actor is essentially lying about his true reasons for actions. That is, if his actions are intentional he must secretly believe that some good will come of them.

Here Rodriguez-Blanco leaves me unconvinced. Her claim of ‘unintelligibility’ strikes me as far too strong and even implausible. And her claims (p. 55) that Stocker’s examples involve diminished agency and, therefore, are not examples of intentional actions, are conclusive only in relation to some of the examples, not all. Better to simply bite the bullet and endorse the theory for its other descriptive virtues. The sting of Stocker’s and Velleman’s examples is that they at least arguably look like genuinely deliberative and intentional actions in which one deliberately and intentionally does what one believes is a bad or irrational thing to do. Rodriguez-Blanco’s quoted response to what is essentially a counter-example argument is to deny that these examples involve conduct that is intelligible as intentional and deliberative actions and, therefore, are not good examples of practical reasoning under the guise of the bad or of irrational intentional conduct. Here Rodriguez-Blanco is denying that these are examples of intentional and deliberative actions *because* – following the ‘why?’ methodology – they involve actions that are not grounded in a valuable end or good-making reason. What she is essentially doing is to rule out counterexamples to the claim that all intentional actions are under the GoG on the grounds that the examples do not cohere with the GoG model.

Rodriguez-Blanco’s unwavering commitment to the doctrine of the GoG is both the book’s strength and its limitation. On the one hand, the doctrine of the GoG provides a powerful clear vector around which Rodriguez-Blanco can rearrange and explain a

whole variety of questions regarding the law and our practical life. Moreover, her book makes a compelling case for better incorporation of the insights of action theory into legal philosophy. On the other hand, those more skeptical or less solidly on board with the doctrine of the GoG or with Rodriguez-Blanco's version of it as a good or complete account of intentional action may find it more difficult at times to follow Rodriguez-Blanco on her sometimes revisionist path.

4. How law is normative

The two towering figures of twentieth century legal philosophy, H.L.A. Hart and Hans Kelsen, have provided the most influential accounts of the normativity of law. Rodriguez-Blanco aims to rethink both accounts in light of the doctrine of the GoG, with implications for how we should understand the normativity of law under both theories. Her methodology is to examine the normativity of law by looking to the practical reasoning involved in complying with the law, thereby subsuming the normativity of law to the doctrine of the GoG. For reasons of brevity I will focus only on her discussion of Hart.

Hart's account of the normativity of law is predicated on his idea of the 'internal point of view' (Hart 1961). Hart explains law's normativity as a feature of people's acceptance of the law as reason-giving. We detect this acceptance of the law's normativity when exploring people's law-abiding behavior from their own internal point of view. That is, cases in which people follow the law not for some prudential or instrumental reason but because they think that the law itself is reason to follow it. For example, think of how law followers invoke the law to *justify* their behavior or to *criticize* those behaving unlawfully. In other words, the law's normativity is a feature of people endowing the law with normativity and behaving out of acceptance of the law as a source for reasons. Were we to ask someone who accepts the normativity of the law why, for example, she avoids parking in the park, her answer would be that there is a law to that effect and that people should follow the law. Full stop. For Hart the explanation of the practical reasoning involved in following the law comes, therefore, to a satisfying end with the acceptance of the law's normativity. Notice that Hart is not explaining here the *legitimacy* of the law or its *morality*. Rather, he is

explaining the law's *social* normativity from the point of view of those who view the law as normative. For Hart, therefore, the normativity of law is a feature of social, behavioral and psychological facts.

Rodriguez-Blanco believes Hart's explanation of law's normativity is incomplete (pp. 86-94). For her, intentionally and deliberately following the law and accepting its authority is a form of *intentional action*, as opposed to an impulse or compulsion and, therefore, is necessarily performed under the GoG. For Rodriguez-Blanco, therefore, following the law out of acceptance of the law's normativity is an intentional action much the same as making tea. In fact, she contends that Hart himself also assumed or took following the law as a form of intentional acting. Accordingly, were one's response to the question 'why do you follow the law?' merely 'because it's the law' or 'because I accept the law's authority', then one's intentional following of the law would only be partially intelligible.

Under the doctrine of the GoG intentionally following the law is only intelligible if one's following of the law is grounded in a reason that one believes makes following the law good. Without such a reason one's following the law lacks – from one's own point of view – grounding in a good-making reason and is, therefore, not a product of intentional and deliberative action. From the point of view of the intentional rule-follower the rational chain of justifications for her actions cannot stop with the rule itself, because the rule itself is not, according to Rodriguez-Blanco, a good-making reason. Therefore, Hart's position that the normativity of law is a function of an *acceptance* of the law – i.e., of intentional compliance with the law from the internal point of view – is parasitic on the doctrine of the GoG.

Moreover, Rodriguez-Blanco contends that pursuing Anscombe's 'why?' style of questioning people who follow the law out of acceptance of its normativity in fact leads to concluding that they believe that following the law has good-making features, such as fairness, benefiting society or contributing to social coordination. And without this final link in the chain of one's explanations for why one follows the law we cannot really know whether one in fact accepts the law as normative.

The core implication of Rodriguez-Blanco's claim is the coupling of endorsement with acceptance. That is, Rodriguez-Blanco aims to demonstrate that following the law out of acceptance of its normativity necessarily also involves an endorsement of the law's legitimacy, or at least that there is something good in following the law. Accordingly, if Hart's acceptance theory of the normativity of law is correct, then it follows that the normativity of law is parasitic on an endorsement of the law.

Doubts do, however, arise. Generally, reading Rodriguez-Blanco one gets the feeling at times that the phenomenon of compliance with the law is put in the straight-jacket of a rather strict account of practical rationality. One wonders whether people who follow the law 'because it's the law' would really always respond to Anscombe's 'why?' questioning in the way Rodriguez-Blanco predicts. That is, with an endorsement – manifested in their actions – of the goodness of their lawful behavior – social coordination, fairness, preserving the peace and the goodness of being law-abiding are some of the responses Rodriguez-Blanco imagines (pp. 90, 92). I am more doubtful. It seems to me that people often just accept the law as binding and go about their business following it. Full stop. That is, acceptance of the law is not always coupled with its endorsement. At times, we follow the law without much regard to its legitimacy or to the good of following it. Yet in many such cases we still seem to be acting intentionally and for what we take as a reason – the law.

5. The nature of law's normativity

The leading contemporary account of the nature of legal norms is that of Joseph Raz, who views law as providing 'protected reasons' for actions (Raz 1979, p. 18). That is, the law gives us *reason to do* as the law requires as well as *reason to exclude* from our deliberations other reasons for or against doing as the law requires. This 'exclusionary' quality of law is, according to Raz, the key feature of the normative structure of authority in general and of law in particular as a type of practical authority (Raz 1990, pp. 73-84). Moreover, Raz's position is that law claims to have legitimate authority (Raz 1985, p. 295). Relatedly, a practical authority – such as the law – *is* legitimate, according to Raz if and only if the following applies: were one to follow the authority's directives one would be more likely to comply with the reasons

that apply to one (regardless of the authority) than one would be were one to attempt to comply with those reasons based on one's own practical reasoning. This is known as the 'service conception' of authority (Raz 1986, ch. 3). The idea is that the law, when legitimate, functions to mediate between citizens and the complex reasons that apply to them, reasons they are unlikely to succeed in complying with more fully if left to their own devices. Accordingly, the whole point of law is that it provides us with a way to comply with the reasons we already have, so long as we obey the law *as an authority*, that is follow the law because it's the law and not out of an evaluation of the law's content.

Rodriguez-Blanco claims that Raz's picture of the law's normativity in terms of an authority does not cohere with the view of law under the GoG. As we saw, for Rodriguez-Blanco the normativity of the law – as engaged with by those who accept the law's normativity from the internal point of view – incorporates not only acceptance of the law's normativity but also an endorsement of its goodness. In other words, when we *intentionally* follow the law we do as the law requires not because the law requires it but rather because we believe that what the law requires also happens to be a good thing to do. When guided by the law we do not, therefore, act on the law's *authority* – at least not always. Accordingly, Rodriguez-Blanco's point is that considering that it does not cohere with the process of practical reasoning typically involved in complying with the law, Raz's authority-based account of the nature of law's normativity is mistaken.

Contrary to Rodriguez-Blanco, I am unsure that the authoritative conception of law is incompatible with the doctrine of the GoG. Let's concede that when we intentionally act on authority we do so because we accept the law's claim to legitimacy or, at least, view acting on the law's authority to be good somehow. In doing so, however, we need not accept the *content* of the law's directives as good. It strikes me as enough that one takes following the law *as an authority* as good, in order to satisfy the doctrine of the GoG. In other words, Raz's theory seems to me compatible with at least a lean version of the doctrine of the GoG.

Another point Rodriguez-Blanco gives to deny the authority-based account of law is that rule following requires interpretation (she does not use these terms), and interpretation requires reflection on the rule's grounding reasons (pp. 156-157). Rules are often vague, under-determinative and never sufficiently detailed to cover all contingences that may arise when attempting to follow them. Accordingly, we are often called upon to interpret the rule that we are trying to follow. And interpretation often requires thinking about what the rule is for, using the rule's aims or 'intentions' to fill in the gaps. From this Rodriguez-Blanco deduces that we often do not follow the law as an authority – doing as the law requires because the law requires it – but rather follow the law under the GoG – for the end, value, intention or reason that we ascribe to the law.

Here too I do not agree with Rodriguez-Blanco. It is true that in order to follow the law *as an authority* we must have a sense of what the law is. And to determine what the law is we often must turn to interpretation. It is also true that when interpreting we often turn to the law's ends or 'intentions'. But from this it does not follow that we endorse the ends or intentions that we, as interpreters, ascribe to the law. The doctrine of the GoG is satisfied so long as we endorse the law's authority. In such cases we use the law's ends and intentions as means for complying with the demands of the law, not as independent reasons for action.

6. Rodriguez-Blanco's theory of law's normativity

Rodriguez-Blanco offers her own original account of the nature of the law's normativity, conceived under the GoG (Ch. 8). She holds that when people follow the law intentionally (i.e., under the GoG) they presume that the law is a legitimate authority and/or believe that the actions required by the law are good (regardless of the law's demands). For Rodriguez-Blanco these two cases expose the nature of the law's normativity. Because in these cases those following the law for what they believe is a good-making reason find that reason in the law itself. How does law give us these reasons? According to Rodriguez-Blanco the law claims legitimate authority and adheres to the principles of the rule of law, which according to her give us reasons to assume the law is legitimate (Ch. 7, pp. 160-169). Moreover, the law

provides knowledge of reasons independent of the law that count in favor of the law's content (pp. 152-166).

Rodriguez-Blanco gives an example of a law requiring dumping waste at a designated location as part of a policy of eliminating river pollution (pp. 163-165). She imagines a farmer loading his truck with waste. When asked 'why are you complying with the law?', the farmer responds in one or both of the following ways: he may (i) endorse the reasons that ground the legal rules, that is accept that preventing river pollution is of value and that what the law requires furthers that value; and/or, (ii) accept the goodness of the law as an authority, saying something like 'I follow the law '[b]ecause legal authorities are a good sort of thing, i.e., they correctly and legitimately organize these affairs...' or '... I follow the law because it is good that we have an organized and coordinated society.' ' (p. 164). Notice, therefore, that Rodriguez-Blanco does not appear to think that we can intentionally accept law's authority based on its goodness *as such* (as was my defense of Raz), but rather we do so for more particular good-making features in law's authority.

It is when the farmer responds in one of these two ways that he is complying with the law *intentionally* (i.e., under the GoG). That is, he is acting intentionally for what he believes are good-making reasons that he finds in the law. Accordingly, these answers expose the normative nature of law as it is manifested in the practical reasoning of those who follow the law's guidance: the law provides reasons to assume its legitimacy as well as points to independent reasons in favor of what the law requires.

I have a couple of issues with Rodriguez-Blanco's view. First, I doubt whether it can account for many systems of government we would recognize as legal. Many legal systems do not sufficiently adhere to the principles of the rule of law to ground a presumption of the law's legitimacy. Moreover, not all law is predicated on even apparent good-making reasons. Many laws and even legal systems are patently stupid or immoral or at least not obviously well-grounded. Other laws are entirely opaque, certainly to laypersons, providing no reasons in favor of their content. And still, they are all laws and legal systems with people seemingly intentionally following them out

of acceptance of their normativity. Rodriguez-Blanco's novel theory of the law's normativity strikes me as too narrow to capture the full phenomenon of legal normativity.

Second, unlike my attempt to bring Raz's theory of law under the GoG, Rodriguez-Blanco's description of how people come to accept or assume the goodness of the law's authority strikes me as overly saturated with (practical) reasoning and somewhat out of touch with how most people follow the law's authority most of the time. I doubt, for example, whether there are many farmers and lorry drivers who would regularly explain their following of the law's authority on grounds of social coordination or the overall legitimacy of the legal system. As if such reasons are part of their know-how of law following. Rodriguez-Blanco's account of law following excludes, therefore, much of what seems to me genuine intentional law-compliant behavior, and, therefore, does not capture the full spectrum of legal normativity. Sometimes we accept an authority in ways that appear intentional although when asked to report on the authority's goodness we are at a loss. I am reminded here of a scene from Woody Allen's *Hannah and Her Sisters*, where Allen's character tells his incredulous parents about his plans to abandon Judaism:

Woody: *But if there's a God, then why is there so much evil in the world? Just on a simplistic level. Why-why were there Nazis?*

Woody's Mother (offscreen in the bathroom): *Tell him, Max.*

Max (Woody's father): *How the hell do I know why there were Nazis? I don't know how the can opener works.*

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