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Hart avec Kant: on the Inseparability of Law and Morality

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Hart *avec* Kant:
On the Inseparability of Law and Morality
David Gray Carlson*

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[R]espect for the law is not a motive for morality,
but is morality itself

Immanuel Kant¹

H.L.A. Hart's great work, *The Concept of Law*,² has been called "a masterpiece worth at least the compliment of careful refutation."³ As we approach the 50th anniversary of its publication, I wish to pay precisely this compliment, by viewing

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¹ IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 96 (T.K. Abbott trans., 1996) (1788) [hereinafter KANT, *PRACTICAL REASON*].

² H.L.A. HART, *THE CONCEPT OF LAW* (Peter Cane, Tony Honore & Jane Stapleton eds., Oxford Univ. Press 2d. ed. 1994) (1961) [hereinafter HART, *CONCEPT OF LAW*].

³ NEIL MACCORMICK, *H.L.A. HART* 3 (1981).

Hart through Kantian eyes. From this perspective Hart's work must be found wanting.

The Concept of Law is known for generating four principal ideas:

1. A condition for the existence of a legal system is that the "officials" enforce the law because law has normative power over them. More prosaically, officials follow the rules because they believe it is the right thing to do.⁴ They have "accepted" the rules.⁵ Hart calls this the "internal aspect,"⁶ or "internal point of view."⁷
2. Law and morality are not necessarily connected. This is the separation thesis.⁸
3. Law must be recognized by officials, according to a rule of recognition.⁹
4. Law consists of rules that determine results at the core of their meaning. Beyond the core is the penumbra where discretion displaces law.¹⁰

⁴ HART, *CONCEPT OF LAW*, *supra* note 2, at 58 ([A]nd not only will there be general obedience to his orders, but it will be generally accepted that it is right to obey him."); *see also id.* at 115 (habitual obedience different from the IPV because the obeyer "need not think of his conforming behavior as 'right' . . ."); *see* ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 270-271 (1998) [hereinafter SEBOK, *LEGAL POSITIVISM*] ("[O]ne has an internal point of view if one follows a rule not out of prudence or habit but because one believes the rule itself provides a reason for doing what the rule says, as evidenced by the fact that one believes that failure to conform to the rule is a reason to criticize a nonconforming actor.") (citing HART, *CONCEPT OF LAW*, *supra* note 2, at 90)).

⁵ HART, *CONCEPT OF LAW*, *supra* note 2, at 57.

⁶ *Id.* at 56.

⁷ *Id.* at 98 ("[T]he view of those who do not merely record and predict behavior conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behavior.").

⁸ *Id.* at 185-86 (legal positivism is "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."); *see also id.* at 268 ([T]hough there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality.").

⁹ *Id.* at 100 ("Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation.").

¹⁰ *Id.* at 12.

I claim that all four ideas can be collapsed into Hart's master idea: it is possible for officials to take the internal point of view toward law, and when they do, a legal system exists.

Hart presents his master idea as if it were empirically present in the world. But any such empirical presentation contradicts the idea that human beings are *free*. If *freedom* is accounted for, Hart's master idea must be interpreted *problematically*. For Kant, problematic judgments "are those in which one regards the assertion of denial as merely *possible*."¹¹ When a judgment is considered problematic, then it can never be affirmed as an empirical matter. In effect, it becomes a matter of belief, as licensed by theoretical reason.

If Hart's master idea is problematized along Kantian lines, in order to account for freedom, it contradicts his other three ideas. The second idea (separation thesis) fails for one simple, brutal reason. Morality *is* the internal point of view, if we follow Kant's definition of morality. Because this is so, the condition for the existence of a legal system is morality as such. If Kant is right about morality, the separation thesis is wrong. The best Hart can maintain is that law is separate from *some* moralities, but not from morality as such (with which it is identical).

The third idea is the rule of recognition. This thesis simply repeats a premise of the internal point of view. The internal point of view *is* the act of recognition (coupled with a commitment to obey the recognized rule). My thesis is that, given human freedom, there can be no social rule governing recognition, if a rule is what *causes* an official act.¹² From a Kantian perspective, recognition is not the product of externally given rules. Rather, recognition is the spontaneous (*i.e.*, free and moral) act of the official. The official who follows the law must first *see* the law *as law*. But recognition is not accomplished by following external rules. Rather, recognition is simply a necessary component of the internal point of view. It is not dependent on rules. Rather, the rules are dependent on the practice of recognition. Rules

¹¹ IMMANUEL KANT, CRITIQUE OF PURE REASON A74/B100 (Paul Guyer & Allen W. Wood eds. and trans., Cambridge Univ. Press 1998) [hereinafter KANT, PURE REASON]; KANT, PRACTICAL REASON, *supra* note 1, at 14.

¹² Others have argued that recognition is unruly. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 40-43 (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION 150-152 (Sanford Levinson ed. 1995).

summarize but do not determine practice.

Fourth, Hart's limitation of law to the core of a rule's application—to the place where law is mechanically applied without discretion—is once again a repetition and misinterpretation of the master idea. The core *is* the internal point of view at work. In the penumbra, there is no law, precisely because there the internal point of view *does not function*.

Hart's second, third and fourth propositions simply repeat the premise of the first master idea. If the master idea is problematized to accord for the possibility of human freedom, it contradicts and falsifies all the rest. In my effort to demonstrate that this is so, I divide my argument into seven parts.

Part I discusses what morality is, according to Kant, for whom the notion is strictly procedural. Kant seeks to isolate the *form* of morality from its substantive content. He only occasionally proclaims absolute moral truths.¹³ In the main, he merely describes the position (autonomy) from which moral truth can be enunciated. Similarly, aside from a few stray illustrations, Hart is not interested in proclaiming what the positive primary laws are. He merely announces the internal point of view, the position from which primary laws are recognized and obeyed.

Part II explains the role of the internal point of view in Hart's system. It shows that, properly construed, the internal point of view plays precisely the role that autonomy plays in Kantian moral theory. Each is the position from which morality or law can be discerned. Ironically, Hart separated law's form from law's content, proclaiming "content" to be morality.¹⁴ Yet Kant purported to do the same for morality,¹⁵ proclaiming morality's content to be positive law. Kantian morality is all form and no content, just like Hartian law. Therefore, in form, law *is* morality, and the separation thesis is in error.

¹³ Kant often falls off the wagon in *Metaphysics of Morals* and Kantians are not fond of these lapses. See IMMANUEL KANT, *METAPHYSICS OF MORALS* 386-89 (Mary Gregor ed. and trans., Cambridge Univ. Press 1996) [hereinafter KANT, *METAPHYSICS OF MORALS*]; see also HENRY E. ALLISON, *Kant's Doctrine of Obligatory Ends*, in *IDEALISM AND FREEDOM: ESSAYS ON KANT'S THEORETICAL AND PRACTICAL PHILOSOPHY* 115-56 (1996) [hereinafter ALLISON, *Obligatory Ends*].

¹⁴ JEANNE LORRAINE SCHROEDER, *THE FOUR LACANIAN DISCOURSES: OR TURNING LAW INSIDE-OUT* 34-37 (2008).

¹⁵ "Kant insists that the supreme principle of morality must be formal and, as such, abstract from all ends" ALLISON, *Obligatory Ends*, *supra* note 13, at

Part III shows that there can be no rule of recognition. Rather, legal recognition is the official's spontaneous act. Any reduction of the internal point of view to social rules renders it into a positive, content-laden legality—the dead opposite of what it truly is—morality as such. The rule of recognition must therefore remain formal and unrecognized, if Hart's jurisprudence is to function along Kantian lines.

Part IV shows that the Hartian core, where law resides, is simply a reiteration of the internal point of view. The internal point of view, in its unproblematic state, stands for determinate meaning, and the superfluity of interpretation and human unfreedom. But, since the internal point of view is a problematic position, there *is* no core, as Hart defines it. On Kantian epistemology (as opposed to the metaphysics of "common sense"),¹⁶ it is penumbra all the way down. Logic, Hegel wrote, is the realm of penumbræ.¹⁷ Hart's concept (that is to say, the logic) of law is likewise a realm of penumbræ, if Kant is right about the nature of perception. Interpretation, defined as the realm of *possible* meaning, is the problematic venue in which law must operate. This must be so if there is to be such a thing as human freedom.

Part V anticipates a positivist objection to the above argument. The anticipated argument holds that, in positivism, human beings are the origin of law (the "sources thesis"). In morality, reason—innate to human nature—is the origin of law. The person who submits to positive law therefore has an external master. But the person who submits to the moral law has an internal master—a superego.

In response, I point out that for Kant morality is formal, not substantive. Any attempt to provide content to the moral law violates moral law and makes it into positive law. Moral law as such must remain eternally problematic. Therefore, all law-

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¹⁶ Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 *FORDHAM L. REV.* 1229 (2006) ("Like many of his British predecessors and contemporaries, [Hart] aimed to preserve common sense."). Charles Peirce once remarked, "Find a scientific man who proposes to get along with any metaphysics . . . and you have found one whose doctrines are thoroughly vitiated by the crude and uncriticized metaphysics with which they are packed." 1 *CHARLES SAUNDERS PEIRCE, COLLECTED PAPERS* § 129 (1960).

¹⁷ G.W.F. HEGEL, *HEGEL'S SCIENCE OF LOGIC* 58 (A.V. Miller trans., Routledge 2002) (1969) [hereinafter *HEGEL, LOGIC*] ("The system of logic is the realm of shadows [*Reich der Schatten*], the world of simple essentialities

following, whether Hartian or Kantian, requires what Hegel called a moment of "indestructible positivity"¹⁸—that is to say externality. Externality of the master is ultimately a necessary feature of both Hartian jurisprudence and Kantian practical philosophy. The sources thesis therefore cannot be used to distinguish law from morality, since all positivized moral codes have a "source."

If I am right in the foregoing, is there anything in Hart worth saving? Have I reduced Hart to a nattering nabob of positivism?¹⁹ By no means. Hart's jurisprudence has endured for fifty years, and philosophies usually endure for a reason. Parts VI and VII argue that, in spite of the above criticism, Hart has indeed glimpsed (though imperfectly) some deep psychoanalytic truths. Part VI defends Hart's project as accurately describing an indispensable element to law—its irreducible moral moment. Hart effectively identifies in law the foundational role of master-slave relations. The internal point of view, it turns out, is the logic of slavery. As such, the internal point of view is the death of subjectivity itself. Positive law, taken to the extreme that Hart properly takes it, is the absolute enemy of human freedom. Where law *is*, the subject is *not*. Law occupies the core; the subject is banished to the shadow land of the penumbra. By drawing our attention to the deadly antipathy of law and subjectivity, Hart unintentionally earns for himself an enduring place in Anglo-American jurisprudence.

Part VII concludes by showing that, if the separation thesis cannot be vindicated empirically or logically, it can be rescued as an aspiration of positivism—its goal. The purpose of legality is precisely to displace morality through the means of morality. The internal point of view aims to separate itself from itself, creating a realm of legality—a realm of guilt-free enjoyment. In such a realm, non-officials need not succumb to the sublime monstrosity of the internal point of view. Only when morality is expelled by law can human beings be free in the zone of legality. On this view, the Hartian official is the Christ-like figure who sacrifices himself in the *Abgrund* of the internal point of view in order that ordinary civilians can enjoy. This is the ultimate *noir* morality of Hart's jurisprudence—it expels morality through the use of morality.

freed from all sensuous concreteness.").

¹⁸ G.W.F. HEGEL, *The Spirit of Christianity and Its Fate*, in EARLY THEOLOGICAL WRITINGS 211 (T.M. Knox trans., Harper 1961).

¹⁹ As my colleague, Arthur Jacobson, has accused me.

I. MORALITY

The most important idea in positivism is supposed to be the separation thesis—the assertion that law and morality are not necessarily connected.²⁰ To be sure, a legislator may intend to make morality the content of law. So they may coincide.²¹ But this is purely contingent. The logical connection between law and morality is absent, according to positivist jurisprudence.

In fact, as I read Hart, his claim is more modest: law and morality both have common properties. But since each has properties the other does not have, law and morality do not perfectly coincide. Hart identifies four differences between morality and law:

²⁰ Anthony J. Sebok, *Is the Rule of Recognition a Rule?*, 72 NOTRE DAME L. REV. 1539, 1550 (1997); *see also* Matthew H. Kramer, *On the Separability of Law and Morality*, 17 CAN. J.L. & JURIS. 315 (2004); *but see* JULES L. COLEMAN, *Methodology*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002) ("I simply reject the claim that a positivist must assert that there is no necessary connection between law and morality.").

²¹ HART, CONCEPT OF LAW, *supra* note 2, at 203-04; *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in ESSAYS IN MORAL PHILOSOPHY 54 (A.I. Melden ed., 1958) [hereinafter Hart, *Separation of Law and Morals*].

<u>Morality</u>	<u>Law</u>
(a) importance ²²	(a) instances of unimportance
(b) immunity from change ²³	(b) mutability
(c) an emphasis on intentions	(c) instances of strict liability, regardless of intentions
(d) its reliance on "moral pressure" ²⁴ and "the operation of guilt and remorse." ²⁵	(d) sanctions

These categories would seem to be inductions from moral and legal codes—*ex posteriori* rather than *a priori* claims.

Hart thinks that the primary rules of law and morality did once coincide—in an imagined primitive society. As we shall see, Hart's jurisprudence relies to a surprising degree on a thought experiment about what primitive society must have been like.²⁶

²² In contrast, rules of mere deportment are not moral rules because they are comparatively unimportant. HART, *CONCEPT OF LAW*, *supra* note 2, at 174.

²³ Hart refers to conventional morality of a group—a morality with which individuals might disagree. *Id.* at 169. As such, morality can indeed change, Hart thinks. Law might be influential in bringing about that change. “[Y]et, very often, the law loses such battles with ingrained morality, and the moral rule continues in full vigour side by side with laws which forbid what it enjoins.” *Id.* at 177.

²⁴ *Id.* at 168, 180.

²⁵ *Id.* at 180.

²⁶ *Cf.* MACCORMICK, *supra* note 3, at 108 (“perhaps best seen as a kind of *ex post facto* argument”). Hart's reliance on imaginary history to engender secondary rules is widely considered an embarrassment. PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 183-210 (1992); *see also* Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1698 (1996) (It is unfortunate that Hart introduces his concept of law through a somewhat wooden, fictional history of social development). Even Hart questioned the enterprise. In arguing against a view that morality should be enforced to prevent social dissolution, Hart cast doubt on the utility of studying the disintegration of primitive societies: “[S]uppose that all our evidence was drawn from simple tribal societies or closely knit agrarian societies or closely knit agrarian societies We should not, I take it, have much confidence in applying any conclusions drawn from these to modern industrial societies.” H.L.A. HART, *Social Solidarity and the Enforcement of Morality*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 260 (1983).

According to this account, when society complexified, the need for the secondary rules arose.²⁷ Officials were needed to distinguish between the legal rules and the moral rules.²⁸ So, rather than being a logical claim about law and morality, the separation thesis for Hart is a contingent historical claim.

Yet it is possible to locate a structural difference within Hart's system. Morality, for Hart, is content. Law is form. The form of the law is sufficiently flexible to encompass *any* content, moral or not.²⁹ For Hart, law is *intensive* in the logical sense. A master rule generates the particulars.³⁰ A legal whole precedes the parts.³¹ What validates the primary rules of law is recognition by an official with the internal point of view according to a rule of recognition.³² Morality, however, is logically *extensive*. There is

²⁷ The historic contingency of the secondary rules authorizes Hart to protest against Dworkin's charge that Hart is inducing such rules from the very meaning of the word "law." HART, CONCEPT OF LAW, *supra* note 2, at 246-47. Dworkin calls his critique the "semantic sting"—the embarrassment that positivism should feel when it is revealed that it is engaged in squabbling over what words mean. David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. MIAMI L. REV. 505, 509-10 (2006). Dworkin's alternative is that law has an essential or "conceptual" meaning, not a mere conventional meaning turning on stipulated definitions.

²⁸ HART, CONCEPT OF LAW, *supra* note 2, at 169-70 (in primitive society moral primary rules were "the only means of social control . . . [A]t that stage there might be nothing corresponding to the clear distinction made . . . between legal and moral rules.").

²⁹ On the form-content distinction, see Jeanne L. Schroeder, *His Master's Voice: H.L.A. Hart and Lacanian Discourse Theory*, 18 LAW & CRITIQUE 117, 125 (2007).

³⁰ On the intensive-extensive distinction, see Robert Hockett, *Reflective Intentions: Two Fundamental Decision-Points in Mathematics, Law and Economics*, 29 CARDOZO L. REV. 1967, 2076-82 (2008); see also N.E. Simmonds, *Law as a Moral Idea*, 55 U. TORONTO L.J. 61, 64-65 (2005). Significantly, these scholars associate intension with morality-based jurisprudence, consistent with my thesis here.

³¹ Kant would call the official's recognition of primary rules a determinant synthetic *a priori* judgment. IMMANUEL KANT, CRITIQUE OF JUDGMENT 15 (J.H. Bernhard trans., Hafner Press 1951); see also KANT, PURE REASON, *supra* note 11, at A141/B180.

³² Hart himself gives an example of an intensive morality as one that identifies moral law with the commands of God. "[F]undamental moral principles on this view will be independent of content since they will owe their status not to what they require but to their being the commands of God." H.L.A. Hart, *Legal and Moral Obligation*, in ESSAYS IN MORAL PHILOSOPHY, *supra* note 21, at 106 [hereinafter Hart, *Legal and Moral Obligation*]. It should be

no morality as such—only empirical moralities.³³ When it comes to morality, the parts precede the whole.³⁴ Morality consists of a set³⁵ of conventional primary rules that require the sacrifice of interest or inclination.³⁶ So in this sense law and morality are distinguishable in Hart's philosophy as the difference between form and content. The *content* of law (once it is recognized) may in fact coincide with the content of morality. Hart's four distinctions, therefore, are *ex posteriori* observations about empirical primary rules of law and morality, rather than an account of necessary and sufficient conditions for the existence of morality.³⁷

That morality is always something positive is one of Hart's profound mistakes. For Hart, morality has always already been articulated into a fully symbolized code. According to Hart:

[I] would revive the terminology much favoured by the Utilitarians of the last century, which distinguished "positive morality," the morality actually accepted and shared by a given social group, from the general moral principles used in the criticism of actual social institutions including

noted, however, that Hart's jurisprudence is imperfectly intensive. The rule of recognition has a penumbra, implying that some primary rules are recognized according to no rules at all. *See infra* text accompanying notes 203-04.

³³ Hart, *Legal and Moral Obligation*, *supra* note 21, at 101 ("The area of morality I am attempting to delineate is that of principles which would lose their moral force unless they were widely accepted in a particular social group."); *cf.* IMMANUAL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 4:442 (Mary Gregor ed. and trans., Cambridge University Press 1997) [hereinafter KANT, *GROUNDWORK*] ("Empirical principles are not at all fit to be the ground of moral laws.").

³⁴ Kant calls this "reflective judgment." KANT, *CRITIQUE OF JUDGMENT*, *supra* note 31, at 16.

³⁵ Speaking of etiquette, Hart says, "Such rules do not form a system but a mere set . . ." HART, *CONCEPT OF LAW*, *supra* note 2, at 234. This remark can be extended to Hart's view of morality.

³⁶ *Id.* at 169. Hart portrays conventional morality as changing from society to society, based on utility. *Id.* at 174. But conventional morality also intrudes upon sexual preferences, which Hart opposes as not properly based on utility. *Id.* at 174-75.

³⁷ HENRY E. ALLISON, *KANT'S TRANSCENDENTAL IDEALISM* 126 (2d ed. 2004) [hereinafter ALLISON, *TRANSCENDENTAL IDEALISM*] ("[F]orm must be taken to mean condition and 'matter' that which is conditioned or determined by form.").

positive morality. We may call such general principles "critical morality."³⁸

Morality, for Hart, is always already positivized (unless it is "critical morality"). But law is otherwise (at least modernly). It must be positivized by an official with the internal point of view, according to rules of recognition. So, in Hart's system there is an implicit reference to *negative* law—uncognized law. Until it is recognized by an official, it has no content. We cannot say *what* it is. Properly, Hart should be viewed as promulgating a *negativist*, not a *positivist*, jurisprudence.

Once law is recognized—once it is *positivized* and given content—law potentially comes into conflict with morality. Meanwhile, morality, already positivized, waits about for some positive law to be recognized in order to critique it or perhaps to approve it.³⁹ Only when law's content is revealed can morality have its say about it. Morality is a highwayman lying in ambush, waiting for law to appear. When it does appear, morality passes judgment on it.⁴⁰

³⁸ H.L.A. HART, *LAW, LIBERTY AND MORALITY* 20 (Stanford Univ. Press 1963). Later, Hart wrote, "I do not now regard [positive morality] as a sound explanation of morality, either individual or social." HART, *CONCEPT OF LAW*, *supra* note 2, at 256.

³⁹ Hart argues that the distinction between law as it is and as it ought to be (i.e., morality) is useful, as it allows for the critique of law. *See* Hart, *Separation of Law and Morals*, *supra* note 21, at 51-54. But just because a distinction is *useful* does not prove that it exists.

⁴⁰ The thesis that Hartian law is intensive (form) and morality is extensive (content) must be defended in light of some passages in *The Concept of Law*, wherein Hart addresses a hypothetical objection that the four properties of morality he has discovered are "*formal* criteria. They make no direct reference to any necessary content which rules or standards must have in order to be moral." HART, *CONCEPT OF LAW*, *supra* note 2, at 180-81. Hart anticipates that moral theorists will demand further criteria of connecting moral rules to principles of fairness and equality, but Hart declines to narrow the definition in this way, as it would exclude rules that many would view as "part of the generally accepted picture of the life which individuals are expected and indeed are assumed to live." *Id.* One suspects that Hart is speaking of sexual prudery; any restrictive criterion that eliminated prudery would be too narrow to accord with ordinary usage.

In light of these comments, can I fairly claim that, for Hart, morality is content whereas law is form? In my view, Hart's categories are inductions from those positivized moral codes with which Hart is familiar. These properties do not seem intended to be intensive—that is, preceding the set of specific

By consigning morality to the realm of symbolic discourse—by treating it as always already *positivized*—Hart instantly problematizes it. Is morality what is enshrined in the Bible? If it is, how do we know that? Is morality embedded in the utilitarian principle that dictates we should act to maximize welfare? Who says *that* atheistic heresy is the prime moral directive? Is morality the word of God? Who says (Kant asks) that we have to follow the word of God?⁴¹ The minute morality is codified; it is problematized. It may be mere positive law, not moral law.

primary moral rules. In contrast, his claim about law *is* intensive. The set of primary legal rules *is* what an official recognizes according to a rule of recognition. The point of Hart's theory is that law must not be judged by its content. Yet, morality is always judged by its content.

Evidence that this is so is found in Hart's reference to morality as purely conventional. *Id* at 169. This is a view later renounced in the Postscript. *Id.* at 256. Hart leaves open the possibility that conventional morality might itself be open to criticism on grounds of rational or general principles. He begs off, however, on the issue whether this meta-moral criticism is itself moral. *Id.* at 183-84.

Further evidence that morality is *ex posteriori* is Hart's consideration of whether the legal system as a whole (as opposed to singular laws) must entail morality. His assumption is that natural law must proceed inductively:

Natural law theory [asserts] that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival and these dictate a further necessary content to a legal system (over and over my humble minimum) without which it would be pointless. . . . [I]t seems to me that above this minimum [of survival] the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is "necessary" in this [natural law] sense.

Hart, *Separation of Law and Morals*, *supra* note 21, at 80-81. Because only survival is universally desired, this can be the only natural-law principle, according to Hart. *Id.* This exercise is premised on an inductive claim only. Of course, it is falsified by a single case of a person who wishes not to survive, of which several a week can be found in high schools and post offices across America.

⁴¹ KANT, *GROUNDWORK*, *supra* note 33, at 4:408; KANT, *METAPHYSICS OF MORALS*, *supra* note 13, at 6:439. Morality "is in need neither of the idea of another being above him in order that he recognize his duty, nor, that he observe it, of an incentive other than the law itself." IMMANUEL KANT, *RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS* 6:3 (Allen Wood & George Di Giovanni eds. and trans., Cambridge Univ. Press 1998) [hereinafter KANT, *RELIGION*].

Kant's project was to render morality undogmatic—to ground it in the fact of reason.⁴² This led Kant to develop what Hart lacks—a theory of subjectivity.⁴³

Kant's theory of the subject relies heavily on his theory of epistemology.⁴⁴ According to Kant's "Copernican turn,"⁴⁵ knowledge is always mediated in *apperception*.⁴⁶ In Kant's view, we only know things by our thought of them (the phenomena). We never know the things-in-themselves (the noumena).⁴⁷ Nevertheless, the noumenon wickedly disturbs our curtailed sleep and causes apperception.⁴⁸ If there is such a thing as *appearance*, Kant reasons, there must be some unapperceived

⁴² SIMON CRITCHLEY, *INFINITELY DEMANDING: ETHICS OF COMMITMENT, POLITICS OF RESISTANCE* 33 (2007) ([T]he fact of reason is our consciousness of the determination of the will by the moral law, and therefore the condition of possibility of morality."). "Fact" indicates that reason is not just subjective fancy but is something objective.

⁴³ Hart's lack of a theory is on display in his essay, *Definition and Theory in Jurisprudence*, in *ESSAYS IN MORAL PHILOSOPHY*, *supra* note 21, at 21. Here he urges that corporations should not be equated with "real" persons. Smith is a *real person*. The word Smith is a metaphor for the Smith-beyond-thought. Corporations should be left as metonymies, referring to nothing definite. Psychoanalysis, however, finds the so-called natural subject just as metonymic as the corporation. Michel Rosenfeld, *The Identity of the Constitutional Subject*, in *LAW AND THE POSTMODERN MIND* 157-65 (Peter Goodrich & David Gray Carlson eds., 1998).

⁴⁴ HENRY E. ALLISON, *KANT'S THEORY OF FREEDOM* 36-40, 46, 69 (1990) [hereinafter ALLISON, *KANT'S THEORY*].

⁴⁵ KANT, *PURE REASON*, *supra* note 11, at BXVI (objects "must conform to our cognition").

⁴⁶ This is a Leibnizian term. A.B. DICKERSON, *KANT ON REPRESENTATION AND OBJECTIVITY* 81 (2004); *see also* HENRY E. ALLISON, *Reflections on the B-Deduction*, in *IDEALISM AND FREEDOM: ESSAYS ON KANT'S THEORETICAL AND PRACTICAL PHILOSOPHY* 29-30 (1996) [hereinafter ALLISON, *Reflections*].

⁴⁷ KANT, *PRACTICAL REASON*, *supra* note 1, at 131 ("[W]ith regard to things as noumena, all positive knowledge was rightly disclaimed for speculative reason."); *see also* NORMAN KEMP SMITH, *COMMENTARY TO KANT'S "CRITIQUE OF PURE REASON"* 413 (1992) ("Noumenon in its negative sense is defined as being merely that which is not an object of sensuous intuition. By noumenon in the positive sense, on the other hand, is meant an object of non- sensuous intuition.").

⁴⁸ KANT, *CRITIQUE OF JUDGMENT*, *supra* note 31, at 33; *see also* KANT, *PURE REASON*, *supra* note 11, at A538-41/B567-69 ("[T]hese appearances, because they are not things in themselves, must be grounded in a transcendental object determining them as mere representations . . .").

thing-in-itself that *causes* the appearance.⁴⁹

The noumenal thing-in-itself is therefore transcendental and unknowable.⁵⁰ For Kant, the thing-in-itself is deficient. So it depends on the subject for its existence⁵¹ (using "existence" in the sense of perpetuation in thought over some period of time).⁵² What the subject supplies is the unity of the object. "[K]nowing is doing."⁵³ The subject *synthesizes*. Objects don't synthesize themselves. Objects are inferred, not given. Where object and subject meet is what Kant calls the transcendental unity of apperception—the representation of an object in thought.⁵⁴

⁴⁹ KANT, *PURE REASON*, *supra* note 11, at A251-52/B306-07, A288/B344, A358, A372; SMITH, *supra* note 47, at 415 ("Just as Kant started from the natural assumption that reference of representations to objects must be their reference to things in themselves, so he similarly adopted the current Cartesian view that it is by an inference, in terms of the category of causality, that we advance from a representation to its external ground.").

⁵⁰ Here is where Hegel departs from Kant. Hegel was anti-transcendental. There were no noumena for Hegel—only an absence where the noumenon should be. Kant thought the noumenon was substantive—an object. Hegel clearly has the better of the argument, but this does not stand in the way of our invocation of Kant's moral theory. Kant's theory of morality (which Hegel largely adopted) is unaffected by this dispute. Ardis B. Collins, *Hegel's Critical Appropriation of Kantian Morality*, in *BEYOND LIBERALISM AND COMMUNITARIANISM* 21 (Robert R. Williams ed., 2001); *see also* Kenneth R. Westphal, *Kant, Hegel, and Determining our Duties*, *JAHRBUCH FÜR RECHT UND ETHIK/ANNUAL REVIEW OF LAW & ETHICS* 335 (2005) ("Hegel's procedures for identifying, assessing and justifying practical norms are adapted directly from Kant's.").

That is to say, the subject can be viewed as a negativity—a unity between the real, the symbolic and the imaginary, as Jacques Lacan would say. Jeanne L. Schroeder, *Can Lawyers Be Cured?: Eternal Recurrence and the Lacanian Death Drive*, 24 *CARDOZO L. REV.* 925, 939 (2003). It is therefore no noumenon. Yet the subject-as-negativity responds to the moral law in the way Kant describes.

⁵¹ ALLISON, *Reflections*, *supra* note 46, at 31 (Sensuous data "do not, of themselves, provide all that is necessary for knowledge of objects.").

⁵² Hegel gives provisional validity to Kant's epistemological theory, consigning it to the realm of "existence"—the middle of Hegel's three realms of Being. *See* Jeanne L. Schroeder and David Gray Carlson, *Does God Exist?: Hegel and Things*, 4 *J. CULTURE AND UNCONSCIOUS* 1 (2005). For Hegel, existence describes the realm in which "things" endure, thanks to an apperceiving subject who organizes sensory data into them. Kant, for his part, denied that existence was an independent predicate of a thing. KANT, *PURE REASON*, *supra* note 11, at A599/B627.

⁵³ ANGELICA NUZZO, *KANT AND THE UNITY OF REASON* 13, 24 (2005).

⁵⁴ KANT, *PURE REASON*, *supra* note 11, at B-131-36.

Because apperception includes this subjective element, the subject who apperceives is in a state of doubt about what she perceives. She never has assurance that the apperception accurately reflects the noumenon.⁵⁵ There is always the danger that some natural defect in the perspectival mechanism—eyes, ears, etc.—have presented a distorted view of the thing. The dagger we see before us may be but the product of a heat oppressed brain. To be sure, Kant argued vigorously that the "subjective" contribution to apperception was objectivizing when governed solely by the *a priori* categories.⁵⁶ But whether this is so empirically is always problematic.

Even if apperception according to the categories is objectivizing, it is inherently different from (and perhaps distortive of) the thing-in-itself.⁵⁷ The subject adds time and space to the noumenon, which itself is neither temporal nor spatial.⁵⁸ Nevertheless, apperception is caused by the noumenon. So the noumenon can never be abolished. Every apperception is a mixture of the transcendental thing and a distortion of it. Apperception is split between phenomena and noumena.

According to Kant's epistemology, phenomenal things imply noumena.⁵⁹ This epistemology leads directly to Kant's psychoanalytic theory of subjectivity.⁶⁰ The subject too is a thing

⁵⁵ *Id.* at A294/B350-51 (error is grounded in "the unnoticed influence of sensibility on understanding, through which it happens that the subjective grounds of the judgment join with the objective ones, and make the latter deviate from their destination.").

⁵⁶ *Id.* at A79/B105, A94/B126.

⁵⁷ Here is another point at which Hegel parts company with Kant. Hegel complains of Kant's epistemology, "Knowing is supposed to have reached this conclusion, that it knows *nothing*." HEGEL, LOGIC, *supra* note 17, at 482.

⁵⁸ KANT, PURE REASON, *supra* note 11, at A494-95/B522-23. Since time is not a product of the thing-in-itself, and since the autonomous self is noumenal, time is the enemy of freedom. NUZZO, *supra* note 53, at 53; *see also* PAUL GUYER, KANT AND THE CLAIMS OF KNOWLEDGE 333 (1987) ("Transcendental idealism is not a skeptical reminder that we *cannot be sure* that things as they are in themselves *are* also as we represent them to be; it is a harshly dogmatic insistence that we *can be quite sure* that things as they are in themselves *cannot* be as we represent them to be."). For the view that Kant intended to be agnostic whether the thing in itself was spatio-temporal or not, see ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 37, at 118-28.

⁵⁹ *See supra* note 49.

⁶⁰ KANT, PRACTICAL REASON *supra* note 1, at 239 ("[T]he reader of the *Critique of Pure Speculative Reason* will be thoroughly convinced how highly necessary that laborious deduction of the categories was, and how fruitful for theology and morals.").

unto itself. That is to say, the subject is conscious of its own self as a phenomenon.⁶¹ As with things generally, subjectivity too implies a noumenon, on straight *modus ponens* grounds.⁶² Once again, the subject never knows whether it apperceives a false phenomenon or the thing-in-itself. "[C]ausality with freedom must always be sought outside the world of sense"⁶³ The Kantian subject is therefore a self-doubting object as well as an other-doubting subject.⁶⁴ It is neither entirely phenomenon nor entirely noumenon. Rather, the Kantian subject is suspended between these two extremes, as a third that mediates them.⁶⁵

That part of the subject which is noumenon is the free *autonomous* self. It is the self undistorted by nature. This part of the subject is spontaneous—caused by nothing external to the subject. The part of the subject that is caused by nature is unfree.

⁶¹ *Id.* at 16.

⁶² KANT, PURE REASON, *supra* note 11, at A546/B574 (the subject is a "merely intelligible object"); *see also* KANT, PRACTICAL REASON, *supra* note 1, at 74 ("[T]he notion of a being that has free will is the notion of a *causa noumenon*."). This is "the agency version of the phenomenal-noumenal distinction." ALLISON, KANT'S THEORY, *supra* note 44, at 30. The subject "obviously is in one part phenomenon, but in another part, namely in regard to certain faculties, he is a merely intelligible object, because the actions of this object cannot at all be ascribed to the receptivity of sensibility." KANT, PURE REASON, *supra* note 11, at A546-47/B575-76. Intelligibility implies noumenality for Kant. *Id.* at A494/B522-23.

⁶³ KANT, PRACTICAL REASON, *supra* note 1, at 199.

⁶⁴ *Id.* at 91 (describing "the paradoxical demand to regard oneself qua subject of freedom as a noumenon, and at the same time from the point of view of physical nature as a phenomenon in one's own empirical consciousness."); *see also* Henry B. Allison, *Autonomy and Spontaneity in Kant's Concept of the Self*, in ALLISON, IDEALISM AND FREEDOM: ESSAYS ON KANT'S THEORETICAL AND PRACTICAL PHILOSOPHY, *supra* note 46, at 38 ("As always, for Kant, what is objectively (in the eyes of reason) necessary remains subjectively contingent."); George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 538 (1987) ("Kant concedes that neither the actor nor an observer can be sure if the action proceeds out of duty alone.").

⁶⁵ KANT, GROUNDWORK, *supra* note 33, at 4:400 ("For, the will stands between it's a priori principle, which is formal, and it's a posteriori incentive, which is materials, as at a crossroads"); *see also* PAUL GUYER, KANT ON FREEDOM, LAW, AND HAPPINESS 92 (2000) ("Freedom remains a necessary presupposition of action which the agent conceives to be determined by a rule of any sort, a presupposition that cannot be explained by speculative reason but cannot be precluded either.").

Kant called this heteronomy⁶⁶ or pathology⁶⁷—the phenomenal part of the self. In short, the Kantian subject is reducible to the third antinomy of reason from the *Critique of Pure Reason*. According to this third antinomy, freedom (noumenon)⁶⁸ or nature (phenomenon)⁶⁹ causes the human to act. Reason cannot resolve which of these is true.⁷⁰ But neither are they contradictory. Rather, one is a claim at the level of noumenon, the other at the level of phenomenon. Although we can know nothing of noumena, we are at least licensed to believe in them and hence in freedom.⁷¹ "Freedom can be inferred neither from experience nor from a description of how things are."⁷² This describes *transcendental* freedom,⁷³ which must be distinguished from the inconsistent notion of *practical* freedom or "elective will,"⁷⁴ to which I will return later.⁷⁵

Autonomy is "the *principle of volition* in accordance with which the action is done without regard for any object of the faculty of desire."⁷⁶ It is on the side of the universal, objective part of the subject. Every human is equal and identical on the side

⁶⁶ KANT, PRACTICAL REASON, *supra* note 1, at 49, 60.

⁶⁷ *Id.* at 33, 38.

⁶⁸ KANT, PURE REASON, *supra* note 11, at A444/B472 ("Causality in accordance with laws of nature is not the only one from which all the appearances in the world can be derived. It is also necessary to assume another causality through freedom in order to explain them.")

⁶⁹ *Id.* at A445/B4732 ("There is no freedom, but everything in the world happens solely in accordance with the laws of nature.")

⁷⁰ Or even whether freedom is theoretically possible. KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:225. For this reason, freedom is like a mathematical postulate. *Id.* at 6:225.

⁷¹ ALLISON, KANT'S THEORY, *supra* note 44, at 243 (Kant "reminds us that the first *Critique* was unable to establish the reality of an unconditioned causality but could merely defend it against the charge of inconceivability . . . by creating a 'vacant place' for it in an intelligible world.")

⁷² NUZZO, *supra* note 53, at 119.

⁷³ Transcendental freedom is defined as the "faculty of beginning a state from itself." KANT, PURE REASON, *supra* note 11, at A533/B561. Speculative reason requires transcendental freedom "in order to escape the antinomy into which [reason] inevitably falls, when in the chain of cause and effect it tries to think the *unconditioned*." KANT, PRACTICAL REASON, *supra* note 1, at 13.

⁷⁴ KANT, PRACTICAL REASON, *supra* note 1, at 48.

⁷⁵ See *infra* text accompanying notes 190-94, 197-99.

⁷⁶ KANT, GROUNDWORK, *supra* note 33, at 4:399-440. The faculty of desire is defined as the "*faculty of becoming by means of its idea the cause of the actual existence of the objects of these ideas*." KANT, PRACTICAL REASON, *supra* note 1, at 20 (alteration in original).

of autonomy. Autonomy, freedom, universality, and morality—these are all the same thing for Kant.

Heteronomy is the will that does not give the law to itself; because, external objects give the law. It is on the side of difference and particularity, not universality. It includes things like inclination⁷⁷ or emotion. These are things that we are caused to have. They represent our un-freedom.⁷⁸ We all experience un-freedom when we are in the grip of emotion. It is the regrettable side of ourselves. Heteronomy, evil, slavery to emotion, and desire—these are all the same thing.

For Kant morality is what emerges when we suppress heteronomy.⁷⁹ "[A]n action from duty is to put aside entirely the influence of inclination and with it every object of the will; hence there is left for the will nothing that could determine it except objectively the *law*"⁸⁰ In such a sublime oracular state,⁸¹

⁷⁷ KANT, PRACTICAL REASON, *supra* note 1, at 165 ("For all inclination and every sensible impulse is founded on feeling") *Id.* Inclination "must be construed in a broad sense to refer to any stimulus to action that stems from the sensuous, as opposed to our rational, nature." ALLISON, KANT'S THEORY, *supra* note 44, at 108. Inclinations are not per se bad, however. "[I]t is only insofar as inclinations lead us to neglect our duty that they need to be held in check." *Id.* at 163; *see also id.* at 111. Also, Kant insists that we *choose* at all times to give in to inclination. KANT, RELIGION, *supra* note 41, at 6:25 ("This disposition too, however, must be adopted through the free power of choice, for otherwise it could not be imputed.").

⁷⁸ KANT, GROUNDWORK, *supra* note 33, at 4:428 ("[I]nclinations . . . are so far from having an absolute worth . . . that it must . . . be the universal wish of every rational being to be altogether free from them.").

⁷⁹ KANT, PRACTICAL REASON, *supra* note 1, at 93 ("The essential point in every determination of the will by the moral law, is that being a free will it is determined simply by the moral law, not only without the cooperation of sensible impulses, but even to the rejection of all such, and to the checking of all inclination so far as they might be opposed to that law.").

⁸⁰ KANT, GROUNDWORK, *supra* note 33, at 4:400. Hart sort of agrees with this point. *See* HART, CONCEPT OF LAW, *supra* note 2, at 87. In his definition of *obligation*, Hart gives three requirements: (1) the existence of social pressure to conform (a non-Kantian requirement); (2) importance to maintenance of social life (also non-Kantian); and (3) "it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do." *Id.* at 87. The last point asserts the rule of law against Kantian heteronomy.

⁸¹ ARTHUR SCHOPENHAUER, ON THE BASIS OF MORALITY 79 (E.F.P. Payne trans., 1965) ("From its dark sanctuary oracular sentences infallibly proclaim, alas! not what *will*, but what *ought* to happen.").

whatever we utter in symbolic terms is moral law.⁸² Kant almost never gives us the content of this law—only its form.⁸³ Its form is the famous categorical imperative—"Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation."⁸⁴ Notice that the categorical imperative entails *maxims*. So there are two acts involved. First, there is the act of recognizing one's own maxims. Maxims are the rules that a person actually follows—"subjective principle of volition."⁸⁵ Taken together, these maxims make up our *character*.⁸⁶ When maxims are universalizable, they coincide with the moral law.⁸⁷ Recognition of the maxims is the spontaneous act of the subject. They are apperceptions, and, as such, problematic recognitions.⁸⁸ Second, the subject acts according to maxims. If the act was motivated by adherence to a maxim that conforms to the moral law, then it is a moral act. If the maxim was motivated by something other than pure duty to the law, it was not a moral act—only a hypothetical imperative.

It is a traditional criticism of Kant's moral system that the

⁸² ALLISON, KANT'S THEORY, *supra* note 44, at 244 ("The moral law supposedly describes the decision procedure or *modus operandi* of a hypothetical perfectly rational agent.").

⁸³ In the *Metaphysics of Morals*, however, Kant departs from this. See *supra* note 13.

⁸⁴ KANT, PRACTICAL REASON, *supra* note 1, at 44; see also KANT, GROUNDWORK, *supra* note 33, at 4:421 ("[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law") (alteration in original). A categorical imperative is "one that represents an action as objectively necessary and makes it necessary not indirectly, through . . . some *end* that can be attained by the action, but through the mere representation of this action itself (its form), and hence directly." KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:222. The categorical imperative comes in three versions. In the text is quoted the Formula of Universal Law. There is also the Formula of Humanity as an End in Itself, and the Formula of Autonomy. See GUYER, *supra* note 65, at 172-206.

⁸⁵ KANT, GROUNDWORK, *supra* note 33, at 4:401.

⁸⁶ ALLISON, KANT'S THEORY, *supra* note 44, at 116, 136.

⁸⁷ KANT, GROUNDWORK, *supra* note 33, at 4:402 ("I ought never to act except in such a way that I could also will that my maxim should become a universal law") (alteration in original), 4:447 ("[A]n absolutely good will is that whose maxim can always contain itself regarded as a universal law").

⁸⁸ KANT, RELIGION, *supra* note 41, at 6:20 ("[W]e cannot observe maxims, we cannot do so unproblematically even within ourselves").

autonomous self never acts.⁸⁹ It turns out that passion is what motivates us.⁹⁰ Yet the act of the subject is not disconnected from the universal. The act is always a mixture of autonomy and pathology. This is what Kant called radical evil—"the foul stain of our species."⁹¹ Every human act is smeared with pathology. But it is likewise true that every human act is smeared with morality.⁹² In Hegelese, "the universal is actualized only in the particular."⁹³ But the opposite is also true. The particular is never actualized separate and apart from the universal.

Morality exists when we follow the moral law that we apperceive in a state of autonomy. We follow it freely, not out of inclination. To be sure, the moral law *causes* us to act.⁹⁴ But since the moral law is legislated by the self who recognizes his maxims as universals, nothing outside the self determines the act. The act is free and spontaneous because its motive is entirely internal to the noumenal structure of selfhood. Inclinations, on the other hand, are on the side of particularity and heteronomy. These are contingent and nature-caused. For Kant, motive is everything.

⁸⁹ G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* ¶ 135 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) [hereinafter HEGEL, *PHILOSOPHY OF RIGHT*]; *see also* ALLISON, *KANT'S THEORY*, *supra* note 44, at 186 ("[T]he requirement to act from duty alone is incoherent in the sense that the attempt to . . . preserve the purity of one's disposition, prevents one from acting at all.").

⁹⁰ ALLISON, *KANT'S THEORY*, *supra* note 44, at 65. Kant himself was well aware of this requirement. GUYER, *supra* note 65, at 104-05. This was Hegel's critique, among many others. *See* HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 89, at §135 Remark.

⁹¹ KANT, *RELIGION*, *supra* note 41, at 6:38.

⁹² ALLISON, *KANT'S THEORY*, *supra* note 44, at 39 (Sensible inclination is insufficient to determine the will.), 160 ("[A] germ of goodness remains in the worst sinners . . ."). That human acts are either moral or evil (but never neutral) is referred to Kant's notion of "rigorism." Allison, *Autonomy, in IDEALISM AND FREEDOM: ESSAYS ON KANT'S THEORETICAL AND PRACTICAL PHILOSOPHY*, *supra* note 13, at 130; *see also* KANT, *RELIGION*, *supra* note 41, at 6:24 ("[I]f the law fails . . . to determine . . . free . . . choice . . . an incentive opposed to it must have influence . . . ; and since . . . this can only happen because the human being incorporates the incentive . . . into his maxim (in which case he is an evil human being), it follows that his disposition as regards the moral law is never indifferent (never neither good nor bad).").

⁹³ Allen W. Wood, *The Emptiness of the Moral Will*, 72 *MONIST* 454, 462 (1989).

⁹⁴ *Id.* at 470 (Kant's "theory of action is essentially a causal determinist one . . .").

Morality demands that the universal be instituted for its own sake, not for the sake of gratifying some preference that exists separate and apart from morality. The moral law is "something we act from and not merely in accordance with."⁹⁵ For example, I may give to charity because I feel sad at beholding a starving child. According to Kant's severe definition, I do evil by giving into pathological inclination.⁹⁶ I am moral only if I follow the moral law for its own sake.⁹⁷

And what is my duty? Kant usually declines to give such advice.⁹⁸ He is for the most part a proceduralist. For Kant, moral law is recognized and enunciated by the autonomous person, and whatever emerges from the lips of such an enchanted person is the positivized moral law. Once positivized, morality is problematized, simply because all human acts are smeared with pathology. There is no guarantee that the enunciator of the moral law has successfully purged herself of pathology in the act of recognizing the law. "[T]he morally good is something whose object is supersensible; for which, therefore, nothing corresponding can be found in any sensible intuition."⁹⁹

II. THE INTERNAL POINT OF VIEW

At the time Hart was writing *The Concept of Law*, commissioned as an undergraduate college text,¹⁰⁰ it seemed to him that the dominant jurisprudence was the command theory of Bentham, Austin, and Holmes. According to this theory, law is the command of the sovereign—a legally untrammelled will¹⁰¹—

⁹⁵ CRITCHLEY, *supra* note 42, at 29.

⁹⁶ KANT, PRACTICAL REASON, *supra* note 1, at 144 ("This very feeling of compassion and tender sympathy, if it precedes the deliberation on the question of duty and becomes a determining principle, is even annoying to right-thinking persons, brings their deliberate maxims into confusion, and makes them wish to be delivered from it and to be subject to law-giving reason alone."); *see also* KANT, GROUNDWORK, *supra* note 33, at 4:402; ALLISON, KANT'S THEORY, *supra* note 44, at 109; CRITCHLEY, *supra* note 42, at 26.

⁹⁷ *See* Wood, *supra* note 93, at 457 ("For this reason, [Kant] says that all virtue is founded on 'apathy,' the freedom from all affects which might interfere with the influence of the moral law on us.").

⁹⁸ Such advice (most of it questionable and antiquarian) is given in the *Metaphysics of Morals*, Kant's most disappointing book. *See supra* note 33.

⁹⁹ KANT, PRACTICAL REASON, *supra* note 1, at 88.

¹⁰⁰ HART, CONCEPT OF LAW, *supra* note 2, at 238.

¹⁰¹ *Id.* at 149.

backed by a threat and accompanied by the habit of obedience by the citizens.

Hart thought that, on this definition, law is reducible to the command of the gunman who mugs his victim. After all, the mugger commands and threatens.¹⁰² The gunman, however, typically lacks two attributes of law. The first is *generality*.¹⁰³ The gunman barks an order at the bank clerk. The sovereign, in contrast, issues standing orders.¹⁰⁴ The full Austinian definition that Hart sets up (for the purpose of criticizing it) is: "[T]he laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign."¹⁰⁵ The second thing that the gunman lacks is the habit of obedience by a sufficiently large group.¹⁰⁶

Hart endorses only part of this definition. He agrees that the primary rules "must be generally obeyed."¹⁰⁷ What was missing

¹⁰² Hart writes of the imperative mood as signaling a wish that some other person conform. *Id.* at 18. "Go home," is an example. "Please pass the salt" is not; it is a mere request lacking urgency or hint of ill consequence stemming from non-conformance. "Do not kill me" is a mere plea to a powerful person. *Id.* at 19-20. The term "imperative" is especially appropriate for the gunman robbing bank. Hart insists that the gunman orders the teller to hand over the money, but does not give an order. To give an order suggests authority separate and apart from coercion. The gunman therefore orders the teller but gives an authoritative order to his henchman. *Id.* at 19.

¹⁰³ *Id.* at 124.

¹⁰⁴ *Id.* at 22-23. Because of generality, Hart argues, legal rules necessarily encompass cases not in the mind of the legislator at the time of enactment. Hart, *Positivism*, *supra* note 42, at 84.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ *Id.* at 23-24.

¹⁰⁷ HART, CONCEPT OF LAW, *supra* note 2, at 116. At first Hart confirms that habit of obedience is *not* a condition for the possibility of law. "If by 'efficacy' is meant that the fact that a rule of law which requires certain behavior is obeyed more often than not, it is plain that there is no necessary condition between the validity of any particular rule and *its* efficacy unless the rule of recognition [suggests otherwise]." *Id.* at 103. But to be distinguished is "a general disregard of the rules This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group. In either case, the normal context or background for making any internal statement in terms of the rules of the system is absent." *Id.* at 103-04. This last statement suggests that some degree of habit of obedience is necessary for there to be a legal *system*, even if some laws are not obeyed. *See id.* at 112 (with regard to the general habit of obedience, "[w]e may allow that this

from the Austinian definition, in Hart's opinion, is law's ideological role: "Plainly we shall conceal the characteristic way in which such rules function if we concentrate on, or make primary, the rules requiring the courts to impose the sanctions in the event of disobedience" ¹⁰⁸ Law *causes* the will to act, Hart insists. Perhaps the clearest articulation of Hart's theory of law is in the following passage:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rule of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. ¹⁰⁹

"Acceptance" for Hart signals the internal point of view. ¹¹⁰ According to this ideological component, people actually follow law simply because it is law—because following the law is the right thing to do. ¹¹¹ Thus, Hart agrees with Kant in claiming that the internal point of view stands opposed to mere emotion or

formula does designate one necessary condition"), 114 ("So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists."); *see also* Hart, *Separation of Law and Morals*, *supra* note 21, at 78, 84.

¹⁰⁸ HART, CONCEPT OF LAW, *supra* note 2, at 39.

¹⁰⁹ *Id.* at 116. Elsewhere Hart argues that it is "at least plausible" that legal systems must have sanctions. Hart, *Separation of Law and Morals*, *supra* note 21, at 78-79. But this falls away in the *Concept of Law*.

¹¹⁰ "[T]he idea of acceptance adds nothing to what we say when we simply see internalization as an agent taking the existence of a prescriptive generalization as a reason for action." FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 122 (1991). Schauer interprets Hart as intending that the officials with the internal point view merely recognize law as a mere reason for action with no guaranty that the official will act as the law requires. *Id.* at 120-21.

¹¹¹ HART, CONCEPT OF LAW, *supra* note 2, at 58 ("[A]nd not only will there be general obedience to his orders, but it will be generally accepted that it

inclination.¹¹²

Hart distinguishes the internal point of view from the external point view, and defines it in various ways. Sometimes, the external point of view means an anthropologist who observes a normative system but does not accept the norms themselves.¹¹³ This is a point of view Neil MacCormick would rename the "hermeneutic position."¹¹⁴ At other times, the external point of view is embodied in the person who obeys the sovereign out of fear.¹¹⁵ So the Holmesian bad man is in the thrall of the external point of view. He is pure pathology—an *arbitrium brutum*.¹¹⁶ I will deal with the external point of view in this latter sense, and

is *right* to obey him . . ."), 115 (habitual obedience different from the internal point of view because the obeyer "need not think of his conforming behaviour as 'right . . .'").

¹¹² *Id.* at 57 ("The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical behaviour."). In contrast, Neil MacCormick holds that Hart stands against Kant on the issue whether practical reason exists. "To understand the normativity of legal or moral or other social rules we need only reflect on human *attitudes* to human action. . . . [I]n this respect Hart is a Humean" MACCORMICK, *supra* note 3, at 25-26. I think Hart strongly relies on the idea that the law *causes* the official with the internal point of view to do things, which makes him Kantian in this respect.

¹¹³ HART, CONCEPT OF LAW, *supra* note 2, at 89, 102-03.

¹¹⁴ MACCORMICK, *supra* note 3, at 37-40. In earlier works, both Kelsen and Raz described this position, but forgot to name it so euphoniously. JOSEPH RAZ, THE AUTHORITY OF LAW 155-57 (1979); *see also* HANS KELSEN, PURE THEORY OF LAW 218n (Max Knight trans., 2d ed. 1978).

¹¹⁵ HART, CONCEPT OF LAW, *supra* note 2, at 91. Connected with fear of the gunman is Hart's distinction of *being obliged* versus *having an obligation*.

[T]he statement that a person was obliged to obey someone is, in the main, a psychological one referring to the . . . motives with which an action was done. But the statement that someone *had an obligation* to do something is of a very different type . . . facts about . . . motives, are *not necessary* for the truth of a statement that a person had an obligation to do something.

Id. at 83. I take the point as follows: to be obliged is to be in the thrall of the external point of view. An obligation is a legal fact that has nothing to do with motive. But given the existence of an obligation, a person who acts in its shadow has a motive for acting—the *law itself*. Either the person is under the external point of view (fear or other pathology is the motive) or the person is under the internal point of view (the law itself is the motive).

¹¹⁶ KANT, PURE REASON, *supra* note 11, at A802/B830 ("a faculty of choice purely *animal (arbitrium brutum)*, which cannot be determined save

ignore the hermeneutical anthropologist who also has it, according to Hart.¹¹⁷

In comparison, the internal point of view consists in accepting the rule of law. Conformity to the rule of law is done neither out of fear nor hope of profit.¹¹⁸ Rules (at least the sort that give rise to "obligation") are accompanied by the prospect of criticism for rule-breakers.¹¹⁹ Someone with the external point of view may follow the law out of a dread of criticism,¹²⁰ but this is not why the person with the internal point of view obeys. Obedience is done freely and spontaneously because it is the right thing to do. "There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion," Hart writes.¹²¹

Unlike Kant, who holds the internal and external points of view to be problematic positions,¹²² Hart believes the internal point of view is empirically ascertainable.¹²³ As we shall see, the evidence for the internal point of view is based on *après-acte*

through sensuous impulses, that is, *pathologically*"). Hart therefore thinks that a modern legal system must have sanctions, "not as the motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system." HART, CONCEPT OF LAW, *supra* note 2, at 198.

¹¹⁷ On Hart's careless definition of the external point of view, see Brian Z. Tamanaha, *A Socio-Legal Methodology for the Internal/External Distinction: Jurisprudential Implications*, 75 FORDHAM L. REV. 1255, 1264 (2006) (a "mess of inconsistent references").

¹¹⁸ Accordingly, economists prove incapable of understanding Hartian jurisprudence. Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 FORDHAM L. REV. 1275, 1281 (2006) ("Someday scholars will use economic techniques to estimate the intrinsic value of obeying the law."). The mere mention of price betrays the dignity of the internal point of view.

¹¹⁹ HART, CONCEPT OF LAW, *supra* note 2, at 86-87.

¹²⁰ *Id.* at 88.

¹²¹ *Id.* at 57.

¹²² KANT, PURE REASON, *supra* note 11, at A551/B579n ("The real morality of actions . . . even that of our own conduct, thus remains entirely hidden from us. Our imputations can refer only to the empirical character. How much of it is to be ascribed to mere nature and innocent defects of temperament or to its happy constitution (*merito fortunae*) this no one can discover and hence no one can judge it with complete justice.").

¹²³ See generally John Finnis, *On Hart's Ways: Law as Reason and as Fact*, 52 AM. J. JURIS. 25 (2007). For example, Hart believes the internal point

personal testimony (which Hart takes to be unproblematically reliable). Hart also thinks that the external point of view is equally realizable. People either have the internal point of view or the external point of view. Yet, since Hart wishes not simply to repeat Austin's definition of law as command accompanied with a threat (a view adequate to the external point of view), Hart insists that a legal system requires that *someone* has to have the internal point of view. So Hart postulates that a legal system exists if the *officials* have the internal point of view.¹²⁴ To be sure, *non-officials* could have the internal point of view. Hart hopes this is

of view can actually be observed as a fact in the world:

For it cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. Laws function in their lives not merely as habits or the basis for predicting the decisions of courts or the actions of other officials, but as accepted legal standards of behaviour. That is, they not only do with tolerable regularity what the law requires of them, but they look upon it as a legal standard of conduct [I]t is surely an observable fact of social life that individuals do not confine themselves to the external point of view.

HART, CONCEPT OF LAW, *supra* note 2, at 137-38. Hart also refers to "acting in a certain way" as "manifest[ing] his acceptance of a rule requiring him so to act *Id.* at 139. This cannot be accepted. The same acts of compliance are consistent with both the internal point of view and external point of view. Hence, an act may be visible, but *why* a person acts is not observable at all.

¹²⁴ Hart writes:

[I]n a modern state it would be absurd to think of the mass of the population, however law-abiding, as having any clear realization of the rules specifying the qualifications of a continually changing body of persons entitled to legislate. To speak of the populace 'accepting' these rules, in the same way as the members of small tribe might accept the rule giving authority to its successive chiefs, would involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have. We would only require such an understanding of the officials or experts of the system; the courts, which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he wants to know what it is.

Id. at 60.

so,¹²⁵ and he insults the unofficial population by calling it a nation of sheep if none of them possesses it.¹²⁶

But what is the internal point of view? What is an official? And how many officials suffice to constitute a legal system? Each of these questions will be addressed in turn.

A. *Acceptance*

Hart connects the internal point of view with *acceptance* of the rules. Thus, a person has the internal point of view if he is "a member of the group which accepts and uses them as guides to conduct."¹²⁷ Acceptance is key.¹²⁸

From a Kantian point of view, Hart's discussion of the internal point of view is unsatisfactory—an untrue account of human nature. Hart writes as if the internal point of view is some sort of mind-controlling cult. Once one accepts the rule, the internal point of view seems guaranteed to function.¹²⁹ There is no reference to switching back and forth from the external point of view to the internal point of view from moment to moment, as human beings experience themselves doing. There is, however, a stray reference to an internal-point-of-view-official engaged in *self-criticism*, suggesting that the internal point of view official might sin and break the rule.¹³⁰ Hart also states, sensibly, "No rules can be guaranteed against breach or repudiation; for it is never psychologically or physically impossible for human beings to break or repudiate them"¹³¹ Still, if one may resign from the internal point of view, one is under its sway pending a conscious repudiation. Nor, in Hart's system, can one adopt the

¹²⁵ *Id.* at 116 ("[I]n a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them"). *Id.*

¹²⁶ *Id.* at 117 ("In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."). *Id.*

¹²⁷ *Id.* at 89.

¹²⁸ Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1161-63 (2006).

¹²⁹ Finnis, *supra* note 123, at 32 (in an earlier essay, Hart mixes up practical knowledge with certainty).

¹³⁰ HART, *CONCEPT OF LAW*, *supra* note 2, at 57; *see also* KANT, *METAPHYSICS OF MORALS*, *supra* note 13, at 6:407.

¹³¹ HART, *CONCEPT OF LAW*, *supra* note 2, at 60.

internal point of view with regard to *some* laws—the law of property, for example—while having an external point of view attitude toward others (such as the tax laws). The internal point of view is treated as an all-or-nothing proposition.

Because the internal point of view is a "group" that one joins, the question for Hart becomes the motive for joining the cult. Why would anyone adopt the internal point of view? Why would anyone, Hart wonders, "accept the system voluntarily"?¹³² This is not a good question. The internal point of view *is* the idea that a person follows the law because the law has authority—*law is law!* In short, the internal point of view is what Kant would call transcendental freedom.¹³³ The official who acts is caused to do so by the law, not by something outside the official's personhood. Following the law out of fear, or out of the hope for gain,¹³⁴ is the external point of view. If following the law is grounded in anything *other* than the law itself, then it is not the internal point of view. In a regrettable passage, however, Hart writes: "[I]n fact, their allegiance to the system may be based on many different considerations: calculations of long-term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."¹³⁵ For Hart, the conscious adoption of a motive (the internal point of view) is itself motivated, although perhaps the internal point of view is only a habit of which we are entirely unconscious.¹³⁶

One of the second-order motives is calculation of interest—Kantian pathology.¹³⁷ So heteronomy, i.e., the external point of view, is a reason to take the autonomous position toward law. This leads Hart to deny flatly that the internal point of view is morality.¹³⁸ Yet in Kantian terms such a position is contradictory.

¹³² ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 37, at 13-14.

¹³³ See Stuart Hampshire & H.L.A. Hart, *Decision, Intention, and Certainty*, 67 MIND 1, 5-6 (1958) ("Usually a person engaged in doing something knows . . . what action he is doing . . .").

¹³⁴ In terms of following the law, Hart never speaks of any emotion but fear. But since the internal point of view is emotion-free, and since greed is an emotion, the external point of view encompasses greed as a motive, or so it seems to me. And to Kelsen, who counted both reward and punishment as sanctions. KELSEN, *supra* note 114, at 24-25.

¹³⁵ HART, CONCEPT OF LAW, *supra* note 2, at 203.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 203 ("[B]ut it is not even true that those who do accept the system

If pathology leads to the adoption of the internal point of view, then pathology destroys itself. The renunciation of pathology cannot be pathologically caused. If it were otherwise, the distinction between freedom and pathology would disappear. Freedom would be caused by something external, a contradiction. Furthermore, the introduction of pathology reduces the internal point of view to a hypothetical imperative, not a categorical one. If an official enforces the law only when consistent with self-interest, then the official will *not* enforce the law when self-interest dictates a different course. In short, Hart unwittingly transforms the internal point of view into the external point of view.

A "disinterested interest" in others, Hart says, may also motivate acceptance of the rules.¹³⁹ If this disinterestedness stands for Kantian universality,¹⁴⁰ then the decision to adopt the autonomous position is possibly demanded by the autonomous position. This is a bit like saying it is your duty to do your duty. This is redundant—not to mention generative of an infinite regress.¹⁴¹

And finally, "an unreflecting inherited or traditional attitude"¹⁴² may suffice to motivate the internal point of view. This remark is interesting in that it defeats Hart's attempt to distinguish himself from Austin. Austin defined law as the command of a sovereign backed by a threat, coupled with a public *habit of obedience*.¹⁴³ Hart denied that mere habit was adequate to describe law. Habit is unthinking mechanical behavior, free of self-consciousness (i.e. reflection)¹⁴⁴ or

voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so."); *see also* Coleman, *Methodology*, *supra* note 20, at 342 ("[T]here is nothing in his argument that suggests a moral or political foundation for the internal point of view."); Shapiro, *supra* note 128, at 1161 ("Hart is quite clear that one does not have to believe in the moral legitimacy of the law in order to accept its authority.").

¹³⁹ HART, CONCEPT OF LAW, *supra* note 2, at 203.

¹⁴⁰ Concern for the welfare of others is one of the perfect duties to emerge from the Doctrine of Virtue. KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:387-88.

¹⁴¹ A similar critique has been laid at Kant's door, when Kant argues for a duty to be holy. ALLISON, KANT'S THEORY, *supra* note 44, at 178 ("[T]he claim that we have a separate duty to act from duty involves Kant in an infinite regress.").

¹⁴² HART, CONCEPT OF LAW, *supra* note 2, at 203.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 56 ("In order that there should be such a habit no members of the

normativity.¹⁴⁵ The Austinian man of habit simply refrains from theft, simply pays his taxes, etc. The Hartian man, however, acts and *reflects* while he acts. He refrains from theft, and pays his taxes, and he notices simultaneously that he is motivated by law.¹⁴⁶ He has what Kant called an "intellectual intuition."¹⁴⁷ He thinks and does simultaneously.¹⁴⁸ He knows his own motive, which for Kant is an unknowable thing-in-itself.¹⁴⁹ The Hartian man has an attribute (intellectual intuition) that Kant reserves for

group need in any way think of the general behaviour, or even know that the behavior in question is general; still less need they strive to teach or intend to maintain it. It is enough that each for his part behaves in the way that others also in fact do."); see also KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:407 (habit defined as "a uniformity in action that has become a *necessity* through frequent repetition"), 4:409 (habit is a loss of freedom).

¹⁴⁵ HART, CONCEPT OF LAW, *supra* note 2, at 60.

¹⁴⁶ *Id.* at 57 ("What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard . . ."), 117 ("[T]he acceptance of the rules . . . may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone."). Hart claims that it is also necessary that the internal point of view "should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified . . ." *Id.* at 117; see also *id.* at 90 ("For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility."). I certainly agree that the internal point of view entails self-criticism, but criticism of others seems superfluous, unless the law itself *commands* the person with the internal point of view to criticize others. Criticism of others would appear to be a sanction aimed at person with the external point of view, as Hart elsewhere acknowledges, and therefore not a part of the internal point of view. Hart, *Legal and Moral Obligation*, *supra* note 32, at 106-07; see also KELSEN, *supra* note 114, at 27-28 ("Approval and disapproval by fellow members of the community are sensed as reward and punishment and may therefore be interpreted as sanctions. Sometimes they are more effective sanctions than other forms of reward and punishment.").

¹⁴⁷ For Kant, an intellectual intuition creates the object thought by the mere means of thought. ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 37, at 13-14.

¹⁴⁸ See Stuart Hampshire & H.L.A. Hart, *Decision, Intention and Certainty* 57 MIND 1, 5-6 (1958) ("Usually a person engaged in doing something knows . . . what action he is doing . . .").

¹⁴⁹ KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:392 ("For a human being cannot see into the depths of his own heart so as to be quite certain, in even a *single* action, of the purity of his moral intention and the sincerity of his disposition, even when he has no doubt about the legality of the action."), 6:447 ("The depths of the human heart are unfathomable. Who knows himself well enough to say, when he feels the incentive to fulfill his

God alone.¹⁵⁰

So when Hart, in the above passage, says that a person subscribes to the internal point of view unreflectively, he is saying that *habit* causes the adoption of a position which is not habit. Since it is possible that *every* official is motivated by habit to adopt the internal point of view, then, contrary to Hart's intention, Austin *does* describe a *possible* legal system. And Hart simply describes another. Neither description can be held to be superior to the other.

Hart's position on second order motive is therefore regrettable. The internal point of view is a fraternity that nobody is motivated to join. The official does not surrender his practical freedom at the clubhouse door. The internal point of view *is* motive. It causes the person who has it to do what the law requires just because law is law. The idea of the internal point of view is that law—and nothing else—motivates behavior (at least of the officials). Hart's official with the internal point of view is a robot—a Kantian puppet.¹⁵¹ He recognizes the law. He enforces the law. He follows the law just because it *is* law. In positivist terms, the law has *authority* for the official. What sense is there, then, to insist upon a reason for providing a reason for acting?

In so holding, Hart opens himself up to an infinite regress. If I submit to the law for external reasons, what motivates me to commit myself to external reasons? Perhaps by *habit* I submit to a desire to promote my personal welfare. And what commits me to adopt this habit? Perhaps a genuine concern for others—to show them by example that they too should thoughtlessly pursue their self-interest. In Hart's analysis, motive is always deferred to a higher level. It is therefore never present and, therefore, never knowable. Yet the internal point of view is supposed to be *present*—an empirical fact. Better to cut the matter off at the root. There is the *act* of the official. And there is but one motive—the law made the official do it (internal point of view), or perhaps fear or greed did so (external point of view). This is what the internal point of view must mean. And the internal point of view

duty, whether it proceeds entirely from the representation of the law or whether there are not many other sensible impulses contributing to it that look to one's advantage . . .").

¹⁵⁰ Nicholas Smith, *Law and the Sacred: Levinas's Modern Sacred* 5 LAW/TEXT/CULTURE 145, 146 (2000).

¹⁵¹ KANT, PRACTICAL REASON, *supra* note 1, at 175-76.

is precisely the autonomous position from which law is positivized. Such a reform would restore the internal point of view to the status of the intellectual intuition and of transcendental freedom (which, properly, is problematic).

Hart writes, "There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so."¹⁵² I submit that this is precisely wrong. If the internal point of view means following the law because it is the right thing to do, one cannot, on the one hand, conclude that following the law is the wrong thing to do, and also, on the other hand, conclude that following the law is the *right* thing to do. Morally, the official may think that following the law is wrong; but, if this is the case, the official is in the thrall of the external point of view. He is following the law for some reason *other* than "law is law."

To summarize, Hart's account of the internal point of view is no doubt his greatest contribution to jurisprudence. But it is defectively presented and rife with contradiction. It is treated as an observable empirical fact.¹⁵³ It is treated as guaranteed to produce a required official action. It is presented as entirely unproblematic. None of this accords with human nature as it really is. Once the internal point of view is problematized—once it becomes a mere *candidate* for motive—Hart's internal point of view merges entirely into Kant's autonomous position from which moral law is recognized. As a result, Hart's attempt to separate law from morality must be counted a noble failure.

B. Officials

For Hart, a legal system exists if an "official" possesses the internal point of view and knows the rules of recognition.¹⁵⁴ Hart suggests that the rules of recognition arise from defects in the

¹⁵² HART, CONCEPT OF LAW, *supra* note 2, at 203.

¹⁵³ See COLEMAN, *Methodology*, *supra* note 20, at 339-40 (causal force of law "cannot be denied" and is "an obvious empirical fact").

¹⁵⁴ Jules Coleman points out that this definition presupposes law in defining law—a definitional *faux pas*. That is, officials are made into officials by a rule of adjudication. Therefore, Hart's definition is circular. Jules Coleman, *Incorporationism Conventinality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 120-21 (Jules Coleman ed., 2001).

primitive legal system.¹⁵⁵ According to Hart, primitive society has three defects that give rise to the so-called secondary rules (rules about rules).¹⁵⁶ The first defect of the primitives is doubt as to what the primary rules are.¹⁵⁷ This engenders the rules of recognition, the most important of the secondary rules. Primitives at one time can recognize law without rules, but somehow they lose this innate talent. Primitives must go to school and learn to recognize by the use of rules. The second defect is the problem of stasis.¹⁵⁸ Primitive society has no process for changing the primary rules; a rule of change is needed. The third is the defect of inefficiency.¹⁵⁹ Here Hart assumes that the primary rules are in need of *social pressure* to enforce them.¹⁶⁰ In other words, inherently, at least one member of modern society has the external point of view and needs to be bullied into compliance.¹⁶¹

Officialdom precedes modernity. Hart portrays the primitive

¹⁵⁵ A primitive legal system is a "questionable . . . case[] of law"—a "pre-legal" world organized by a set of self-authenticating primary rules, which impose duties on the citizens. HART, CONCEPT OF LAW, *supra* note 2, at 156 (questionable case of law), 94, 170 (pre-legal world). In such a world, law is extensive, not intensive. The parts (primary rules) precede the whole. When the defect manifests itself, law becomes intensive. The primary rules become that which the officials recognize. Previously self-evident, law requires positivization by the officials.

¹⁵⁶ *Id.* at 94 (secondary rules "may all be said to be on a different level from primary rules, for they are *about* such rules . . ."). In conjunction with the primary rules, secondary rules "may be justly regarded as the 'essence' of law" and "the key to the science of jurisprudence." *Id.* at 155 (essence of law), 81 (key to jurisprudence).

¹⁵⁷ According to Dworkin's reading of Hart, primitive communities "cannot be said to have 'law,' because there is no way to distinguish a set of legal rules from amongst other social rules, as the first tenet of positivism requires." DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 20-21. This is an odd way of reading Hart, in that it seems to require that law is not law *unless* it is unrecognizable in the absence of rules.

¹⁵⁸ HART, CONCEPT OF LAW, *supra* note 2, at 91-92.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 93.

¹⁶¹ Hart maintains that even primitive society requires the internal point of view, in order to generate sanctions to intimidate those with the external point of view. *Id.* at 98 ("Under the simple regime of primary rules the internal point of view is manifested in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment."), 117 ("In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group.").

primary rules as self-evidently defining their own scope, but factual disputes might nevertheless arise as to whether an alleged transgressor actually did the deed alleged.¹⁶² So the origin of officialdom is, first and foremost, the need to make factual determinations as to whether the rules have been violated. It is interesting to note that the officials do not monopolize the power to recognize the law. Adjudication and recognition are initially separate, in Hart's view. The former, at first, involves factual but not legal recognition.

Officialdom, Hart writes, requires rules of empowerment.¹⁶³ There must be a rule that empowers the officials to be officials.¹⁶⁴ Hart calls these rules of adjudication.¹⁶⁵ Rules of adjudication are said to be secondary rules,¹⁶⁶ but this may be questioned. If the rule of recognition is a secondary rule, the rule of adjudication is not secondary in the sense that it is not a rule about what is a rule. Rather, it is a rule that separates official goats from the civilian sheep.¹⁶⁷ The imprecision, however, is a productive mistake because it allows for how the officials take jurisdiction over of the rules of recognition. Not only may the civilians disagree on what the facts are (against a background of perfectly transparent law), but they also might disagree on what the primary rules are. This translates into a disagreement about how the rule of recognition is

¹⁶² *Id.* at 93 ("Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation.").

¹⁶³ *Id.* at 96.

¹⁶⁴ *Id.* Hart also writes that primary rules may impose duties on officials to be officials, e.g., to determine when "a primary rule has been broken." *Id.* But these merely *reinforce* (i.e., are not basic to) rules of empowerment. *Id.* at 97. Nevertheless, if the official chooses to adjudicate, rules exist to describe procedure. *Id.* These the official must recognize and follow. *Id.* So inherently, an official binds himself to follow the law. *Id.* at 98 ("With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view for their analysis.").

¹⁶⁵ HART, CONCEPT OF LAW, *supra* note 2, at 97.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 93 ("Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation."); *but see id.* at 91 (primitive society has no "officials of any kind").

to be applied. The litigators therefore can only delegate to the official not only the question of what the facts are, but also what the law is. Accordingly, Hart writes that rules of adjudication

have intimate connections with [other secondary rules]. Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a "source" of law. It is true that this form of rule of recognition, inseparable from the minimum form of jurisdiction, will be very imperfect. Unlike an authoritative text or a statute book, judgments may may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from the particular decisions, and the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges.¹⁶⁸

Hence, disagreement about the facts implies disagreements about law-facts, giving rise to the common law system, whereby adjudications are sources of law.¹⁶⁹

C. How Many Officials Suffice?

How many officials are required to change the lightbulb of a legal system? At one point, Hart requires that *all* of them must have the internal point of view: "[W]hat is crucial is that there

¹⁶⁸ *Id.* at 91. Notice that primary rules found in case law are *constructed* through the art and skill of the interpreter.

¹⁶⁹ Adjudication is the most important function of officialdom, but there is at least two others mentioned—detection and punishment. Detection and punishment, when unorganized, are a "waste of time." HART, *CONCEPT OF LAW*, *supra* note 2, at 93. This aspect of officialdom, however, is less important and therefore appears later in history, according to Hart.

should be a unified or shared official acceptance of the rule of recognition"¹⁷⁰ *Some* is not enough.

If only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity.¹⁷¹

But absolute unanimity of officials is a hard test to meet. Accordingly, at another point, Hart affirms that a majority will suffice.

To say that at a given time there is a rule requiring judges to accept as law Acts of Parliament . . . entails first, that there is general compliance with this requirement and that deviation or repudiation on the part of individual judges is rare; secondly, that when or if it occurs it is or would be treated by a preponderant majority as a subject of serious criticism and as wrong, even though the result of the consequent decision in a particular case cannot, because of the rule as to the finality of decisions, be counteracted except by legislation which concedes its validity though not its correctness.¹⁷²

The fact that only a "preponderant majority" is required yields the specter that a legal system may pass back and forth between legal and non-legal, depending on whether a slim majority of officials has the internal point of view or the external point of view.

At yet another point, Hart states, "a necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules. In this sense it is true that the coercive power of law presupposes its accepted

¹⁷⁰ *Id.* at 115.

¹⁷¹ *Id.* at 116.

¹⁷² *Id.* at 146.

authority."¹⁷³ In this formulation, only *some* members of society need take the internal point of view for there to be a modern legal system. How much is *some*? The Fregean existential quantifier for "some" is "∃," which more precisely means *at least one* (though perhaps more).¹⁷⁴ Indeed, ∃ is nothing but the negation of ∀, a definition satisfied by a single counter-example.¹⁷⁵ So Hart, who thinks the internal point of view is empirically possible, would admit the possibility of ∀. But, if we have bad manners enough to hold Hart to the rigors of symbolic logic, his definition of law reduces to the existence of at least one official who has the internal point of view. Recall that Hart defines the internal point of view in terms of "a member of the group which accepts and uses [laws] as guides to conduct."¹⁷⁶ If group and "set" are the same thing, there can certainly be a one-member set.

Earlier, I alluded to the way Hart skewered his opponent, Austin, in writing that, for Austin, a gunman who executes a stickup is the law.¹⁷⁷ But for Hart—equally absurd—where a gunman throws away the gun and commands the victim to hand over the loot—a legal system exists if the victim recognizes the duty to do exactly what the gunman says, not out of fear, but because it is the right thing. Austin's gunman becomes Hart's Svengali. Hence, it is possible to turn the tables on Hart and use his anti-Austin reproach against him. Of course, Hart, at one point, asserts that sufficient habit of obedience is also a requirement.¹⁷⁸ So, just as Hart added this element to bolster Austin, we must also add it to bolster Hart. Obedience must be general, but power of recognition belongs to ∃ officials.

III. RECOGNITION

A. Recognition as After-the-Fact Narrative

For Hart, all (or perhaps ∃) officials recognize the primary rules and then follow them because they have accepted them. When the requisite officials adopt the internal point of view, a

¹⁷³ *Id.* at 203.

¹⁷⁴ IRVING M COPI, *SYMBOLIC Logic* 65 (5th ed. 1979).

¹⁷⁵ REBECCA GOLDSTEIN, *INCOMPLETENESS: THE PROOF AND PARADOX OF KURT GÖDEL* 169 (2005).

¹⁷⁶ HART, *CONCEPT OF LAW*, *supra* note 2, at 89.

¹⁷⁷ *See supra* notes 102-06 and accompanying text.

¹⁷⁸ HART, *CONCEPT OF LAW*, *supra* note 2, at 116.

legal system exists. In this formulation, recognition is key. Unless she recognizes what the law commands, the official cannot bind herself to follow it.¹⁷⁹

In post-primitive society, recognition occurs according to *rules*, Hart assures us. Hart makes no attempt to set forth *all* the rules. Rather, he gives scatter-shot examples.¹⁸⁰ Indeed, Hart admits,

In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule For the most part the rule of recognition is not stated, but its existence is *shown* by the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.¹⁸¹

In other words, most of the time, if there is intuition then there must be rules of recognition, though we cannot state what they are. Yet no rule is formulated. There is just recognition—only intuition. Unmediated recognition without reference to any express rules is the hallmark of the internal point of view, Hart thinks.¹⁸² And in so confessing, Hart all but concedes that

¹⁷⁹ H.L.A. HART, *Kelson's Doctrine of the Unity of Law*, in *ESSAYS*, *supra* note 32, at 312-13.

¹⁸⁰ *Id.* at 100 ("[T]hese include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases.").

¹⁸¹ *Id.* at 101.

¹⁸² Hart writes:

The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. This is incorrect only to the extent that it might obscure the internal character of such statements; for . . . these statements of validity normally apply to a particular case a rule of recognition accepted by the speaker and others, rather than expressly state that the rule is satisfied.

Id. at 102-03.

recognition does not proceed according to rules at all.¹⁸³ Recognition—perception of legal fact—simply happens. We do not have a *rule* of recognition. Rather, we have what Dworkin called the *shock* of recognition.¹⁸⁴ Recognition is the *act* of the official with the internal point of view. When acceptance is added to recognition, we have the internal point of view *tout court*.¹⁸⁵

If, per Hart, recognition is the spontaneous act of the officials, then what is a rule of recognition? Psychoanalytic theory holds that rules are narratives created after the fact to describe the spontaneous act.¹⁸⁶ Rules do not cause recognition. Rather the act

¹⁸³ David Lyons reads Hart as intending there to be no articulable rule of recognition:

Hart claims that we can think of every legal system as having a 'rule of recognition', which, *if it were formulated*, would state the ultimate criteria that officials actually use in validating legal standards Hart seems to place no limits on the sort of test that might be employed by officials, and the reason is simple: unlike other legal rules, the rule of recognition may be said to exist only by virtue of the actual practice of officials. Nothing else determines the content of this rule. The tests for law in a system are whatever officials make them—and Hart suggests no limits on the possibilities.

David Lyons, 87 YALE L.J. 415, 423-24 (1977) (emphasis added).

¹⁸⁴ RONALD DWORKIN, LAW'S EMPIRE 58 (1985); *see also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 39-45. Hart aptly describes Dworkin's position: "[L]egal principles cannot be identified by criteria provided by a rule of recognition manifested in the practice of the courts[;] since principles are essential elements of law, the doctrine of a rule of recognition must be abandoned." HART, CONCEPT OF LAW, *supra* note 2, at 263.

¹⁸⁵ It is sometimes claimed that the rules of recognition include identifying criteria *and* a duty to follow the rules actually recognized. MACCORMICK, *supra* note 3, at 21, 105; *see also* RAZ, *supra* note 114, at 93, 179. At the risk of sounding like an analytic philosopher, I would suggest that the rules of recognition are intended to be merely the identifying criteria. The duty to enforce is the province of the internal point of view, when brought into conjunction with the rule of recognition. Otherwise, it would be impossible for a person with the external point of view to recognize a primary rule, unless he also instantly obeyed it for its own sake, in which case he would have the internal point of view, a contradiction. *See* JULES COLEMAN, MARKETS MORALS AND THE LAW 13, 344 n.12 (Cambridge Univ. Press 1988) ("[T]he rule of recognition is not itself a duty-imposing rule.").

¹⁸⁶ David Gray Carlson, *The Traumatic Dimension in Law*, 24 CARDOZO L. REV. 2287 (2003); *see also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 72-73.

of recognition causes the retroactive production of rules. The rule of recognition is nothing other than a narration that the official spins to convince others and himself that he is rule-following, which he subscribes to the problematic position of the internal point of view.

Hart expressly worries about and ultimately rejects the possibility that rules are only after-the-fact narrations. He accuses those who follow this account of confusing the existence of binding rules with the "psychological questions as to the process of thought through which the person went before or in acting."¹⁸⁷ First, Hart admits, actions may be intuitive; an official may act "without first thinking of the rule and what it requires."¹⁸⁸ Yet such thoughtless actions are still genuine applications of the rule because of "their setting in certain circumstances."¹⁸⁹

Hart's entire argument for rules of recognition rests upon this sodden phrase—settings in certain circumstances. What are "circumstances"? What is "setting"? The circumstances in question may "precede the particular action and [others] follow it"¹⁹⁰ So "their setting" seems to refer to the actor's invocation of the rule. Sometimes, the actor cites the rule and *then* acts. Sometimes the actor acts and *then* cites the rule.

The most important of these factors which show that in acting we have applied a rule is that *if* our behaviour is challenged we are disposed to justify it by reference to the rule: and the genuineness of our acceptance of the rule may be manifested not only in our past and subsequent general acknowledgements of it and conformity to it, but in

¹⁸⁷ HART, CONCEPT OF LAW, *supra* note 2, at 139-40.

¹⁸⁸ *Id.* at 140. Hart gives an example of chess. An expert player moves the knight. Later, he is asked why. He responds, because the rules permit it. I submit no chess player would so respond. It is a bit like asking a defendant who has blurted out a confession to the police, "why did you do so?" The response, "because the rules of grammar permitted it," is an unsatisfactory one. Similarly, the chess player is not going to say that moving the knight was arbitrary in terms of the strategy. Rather, he is going to describe a general plan to overcome some problem in his position. The rules of chess, then, stand for what is *possible*, not what is wise. ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 37, at 205-06 (chess rules "determine which moves are legal or 'chessly possible' [T]he fact that a move is legal does not make it a good move.").

¹⁸⁹ HART, CONCEPT OF LAW, *supra* note 2, at 140.

¹⁹⁰ *Id.*

our criticism of our own and others' deviation from it. On such or similar evidence we may indeed conclude that if, before our 'unthinking' compliance with the rule, we had been asked to say what the right thing to do was and why, we would, if honest, have cited the rule in reply.¹⁹¹

So at a minimum, after-the-fact narration is the most important (I would say the only) evidence of the internal point of view.¹⁹² Of course, Hart begs the question whether such testimony is reliable or whether motive (our own or that of others) can ever be observed.¹⁹³ Testimony proves the internal point of view only *if honest and reliable*. Yet, on Kant's theory, we can never know the noumenal motive-in-itself.¹⁹⁴ We can only hope and flatter ourselves that our narrative about rule-following is true.

Is it *ever* possible for a judge to ground action in the rule and *then* act? Kantian moral theory denies this, as it is inconsistent with freedom.¹⁹⁵ Man is never bound, either as to his reasons for acting or as to the primary rules he purports to follow. Man is cursed with freedom, which means spontaneity of the act. Kant "conceives of the moral life as essentially one of conflict between psychic forces in which the human will is playing field and prize rather than autonomous arbitrator."¹⁹⁶

To be sure, we experience ourselves, from time to time, as binding ourselves to our reasons. But this is only the after-the-fact narrative at work. We convince ourselves that our act (or our resolve to act) was caused by pre-existing reason (*i.e.*, the law). Indeed, reason cannot logically rule out *freedom from reason*. Accordingly, the rationality of our acts is ultimately a fantasy, a

¹⁹¹ *Id.*

¹⁹² See H.L.A. Hart, *Problems of the Philosophy of Law*, in *ESSAYS*, *supra* note 32, at 105 (suggesting that rules concern "the standards [judges] respect in justifying decisions, however reached," not how decisions are actually made. "The presence or absence of logic in the appraisal of decision may be a reality whether the decisions are reached by calculation or by an intuitive leap.").

¹⁹³ Finnis, *supra* note 123, at 42 ("Having so fruitfully gone beyond the observer's . . . perspective on bodily movements and behaviour, [Hart] rests officially content with a *report* that the participants have reasons for the behaviour . . .").

¹⁹⁴ See *supra* notes 50-51 and accompanying text.

¹⁹⁵ See *supra* notes 98-99 and accompanying text..

¹⁹⁶ ALLISON, KANT'S THEORY, *supra* note 44, at 126.

story we tell ourselves that can never been verified empirically.¹⁹⁷

Interestingly, Hart does not deny the possibility of retroactive causation "in a given society."¹⁹⁸ That is to say, Hart affirms the possibility of freedom but denies its universality. "Some judicial decisions may be like this," Hart writes,

but it is surely evident that for the most part decisions . . . are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged."¹⁹⁹

In short, Hart relies on self-evidence to support his position that a free being can bind herself to a rule and also on after-the-fact testimony about motive—most of the time. The Kantian position would be that such a position is only problematic, —possible but ultimately undecidable.²⁰⁰

In Hartian terms, law is a fact.²⁰¹ Certainly this is so in primitive society. It is likewise so in sophisticated societies, where experts recognize what the primary laws are, even if the laity cannot. So law is recognized in the same manner that any fact is recognized. Cognition just happens. Now, if Hart is a believer in perception (as opposed to Kantian apperception), then perception is the guarantee of the object perceived. In this case, there can be no rules of recognition. There can only be spontaneous perceptions. Sensory stimulation is sent forth into the

¹⁹⁷ *Id.* at 40 ("I can no more observe myself deciding than I can observe myself judging That is precisely why both activities are merely intelligible in the specifically Kantian sense."); *see also id.* at 63. Fantasy is ultimately the faculty of judgment *redux*. NUZZO, *supra* note 53, at 255-56.

¹⁹⁸ HART, CONCEPT OF LAW, *supra* note 2, at 140.

¹⁹⁹ *Id.* at 141.

²⁰⁰ PURE REASON, *supra* note 11, at A776/B880 ("[I]f he who asserts the reality of certain ideas never knows enough to make his proposition certain, on the other side his opponent can just as little know enough to assert the contrary."); *see also* SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 365 (1999) ("[W]e never know if the determinate content that accounts for the specificity of our acts is the right one: that is, if we have acted in accordance with the Law and have not been guided by some hidden pathological motives.").

²⁰¹ KELSEN, *supra* note 114, at 22.

mind and the mind passively responds by perceiving the fact. This is the opinion of common sense—the "common but deceptive presupposition of the absolute reality of appearances."²⁰² But if this is so, recognition has nothing to do with following rules. Meanwhile, rules of recognition are themselves not recognized according to rules. Unruliness is displaced from the primary to the secondary level, in the hope that there it will not be noticed.

Hart's common sense metaphysics—the uncritical reliance on immediate intuition—is on display in his unsuccessful attempt to avoid an infinite regress with regard to the rule of recognition. The problem Hart fears is that if primary rules must be recognized by officials according to secondary rules of recognition, then there must be a set of tertiary rules of recognition by which the secondary rules of recognition are recognized. And these in turn require a quaternary set of rules, etc. Hart cuts off the necessity of recognition at the second level. Primary rules are supposedly unrecognizable except by means of rules of recognition; but rules of recognition themselves are inherently recognizable and self-validating—the metaphysics of common sense. Thus, Hart's jurisprudence depends on unruly recognition of rules of recognition.

In his account, Hart complains:

Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis.'²⁰³

This claim that law requires a leap of faith Hart finds "seriously misleading."²⁰⁴ "Statements of legal validity" (i.e., recognitions) do admittedly require presuppositions.²⁰⁵ These presuppositions

²⁰² KANT, PURE REASON, *supra* note 11, at A536/B564.

²⁰³ HART, CONCEPT OF LAW, *supra* note 2, at 108. Kelsen, with his *Grundnorm*, is surely who Hart has in mind. *Id.* at 239; *see also* Hart, *Legal and Moral Obligation*, *supra* note 32, at 91; KELSEN, *supra* note 114, at 194-95.

²⁰⁴ HART, CONCEPT OF LAW, *supra* note 2, at 108.

²⁰⁵ *Id.* at 108.

could in principle be stated, Hart says.²⁰⁶ They consist of two things. First, there *are* rules of recognition, which the official accepts (i.e., recognizes and follows).²⁰⁷ Second, a rule of recognition is "not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice" ²⁰⁸ In other words, practice guarantees that rules of recognition exist.²⁰⁹ And existence of the practice is a factual matter.²¹⁰ In short, rules of recognition just *are*.

Hart's attempt to replace dogma with perception is not a success. Indeed, to my eye, Hart confesses that the dogmatists are right. Hart's argument against them is itself nothing but a dogmatic insistence that the rules of recognition exist. Doesn't that insistence make the rules of recognition mere assumptions? Hart disagrees. The very use of the word "validity" suggests that there is system of primary rules organized by the rules of recognition:

No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated', [sic] is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris is the ultimate test of the correctness of

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Hart contradicts himself when he argues that court jurisdiction implies secondary rules. *Id.* at 136. In announcing that the contrary position is impossible, he remarks, "We might try to eke out, with the notion of 'habitual obedience,' the deficiencies of predictability of decision as a foundation for the authoritative jurisdiction required in a court." *Id.* at 136-37. But such an effort would fail for the reasons that "habit of obedience" (in lieu of the internal point of view) fail. Yet Hart's attempt to stop the infinite regress of secondary rules *is* based on the brute fact of habitual obedience that Hart here claims cannot succeed.

²¹⁰ *Id.* at 292 ("The question whether a rule of recognition exists . . . is regarded throughout this book as an empirical, though complex, question of fact."); see also Green, *supra* note 26, at 1694 ("The rule of recognition itself is neither valid nor invalid; it simply exists as a matter of social fact.").

all measurements in metres, is itself correct.²¹¹

What Hart says here is that rules of recognition are, by definition, valid because they exist. And conventional acceptance (*i.e.*, existence) is an empirical claim which is either true or false. If the rules of recognition are found to be present empirically, then they are valid. They are not mere assumptions or religious dogmata.²¹²

[A] rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. *Its existence is a matter of fact.*²¹³

So officials have no account of where secondary rules come from. They only observe that other officials behave as if they are real. Hart thus "refuses to look behind the brute social fact of acceptance in order to ask whether and under what circumstances that acceptance is justified."²¹⁴

So then, how does the official know what rules of recognition are valid—*i.e.*, accepted by the other officials? The official simply intuits the objective rule of recognition, just as she intuits any other object. Then she intuits that other officials have the same intuition. Twice told intuition is the guarantee of the objectivity of the thing perceived.²¹⁵ And this supposedly implies that there are

²¹¹ HART, CONCEPT OF LAW, *supra* note 2, at 109.

²¹² *Id.* ("[T]alk of the 'assumption' that the ultimate rule of recognition is valid conceals the essentially factual character of the second presupposition.").

²¹³ *Id.* at 110 (emphasis added).

²¹⁴ Steven Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 154, at 340.

²¹⁵ Dworkin calls this a "conventional" norm. The bindingness of the norm is the belief that other people abide by the norm. To this can be compared "concurrent" morality—it is true that most people abide, but the fact that they do is not the reason why anyone abides. Rather abiding is the right thing to do—grounded in the rule itself. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 54-55.

no rules of recognition for rules of recognition. Hence, Hart's theory is rescued from infinite regress—*by plain fact*.²¹⁶ Plain fact implies no further ground to which appeal can be made. But is not groundlessness the very definition of dogma?²¹⁷

Hart cuts off infinite regress by claiming that secondary rules of recognition simply *are*. But then this view is contradicted by passages in the *Postscript* to the *Concept of Law* in which Hart claims that rules of recognition *themselves* have a “debatable

²¹⁶ Hart's protest against Dworkin's reduction of Hart to "plain-fact positivism" must be dismissed:

But though my main examples of the criteria provided by the rule of recognition are matters of what Dworkin has called "pedigree," concerned only with the manner in which laws are adopted or created by legal institutions and not with their content, I expressly state [in HART, CONCEPT OF LAW, *supra* note 2, at 72] . . . that in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate beside pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints. In ascribing 'plain-fact' positivism to me . . . Dworkin ignores this aspect of my theory.

HART, CONCEPT OF LAW, *supra* note 2, at 247. Pedigree, here, stands for "plain fact." Hart therefore denies that the American rule of recognition is limited to pedigree. Later, Hart will contradict himself and assert that all legal standards (that is, legal principles that don't determine outcome) have pedigrees and, for this very reason, rules of recognition exist even if standards are permitted to be "law" in Hart's system. *Id.* at 264-65, 269 (all law has a pedigree, include the invitation to edit law on moral grounds).

The above reference to the American rule of recognition defeats Hart's attempt to halt the infinite regress of rules of recognition. If the Fourteenth Amendment incorporates moral principles, it is still a plain fact that the incorporation of moral principles was historically adopted and conventionally recognized as an existing rule of recognition. The constitutional example shows that there cannot only be two levels of law. A primary rule passes muster on the Fourteenth Amendment (a rule of recognition), but the Fourteenth Amendment was itself (rather controversially) adopted pursuant to Part V of the Constitution (a tertiary rule of recognition), which in turn was adopted by a Constitutional Convention (a quaternary rule of recognition). It should be easy to invent a fifth, sixth, etc, level of rule of recognition *ad infinitum*.

²¹⁷ See SMITH, *supra* note 47, at xlii (expounding on the difference between meaning and existence. “Existences rest, so to speak, on their own bottom Meaning, on the other hand, always involves the interpretation of what is given in the light of wider considerations that lend it significance.”). On this distinction, Hart's rules of recognition are meaningless.

‘penumbra’ of uncertainty.”²¹⁸ But if this is so, recognition of a rule of recognition must be subject to a tertiary rule of recognition (separating secondary core from secondary penumbra), defeating Hart's attempt to avoid the infinite regress. The tertiary rule of recognition is required to determine the border between core and penumbra. And so the infinite regress is launched, contrary to Hart's intention.²¹⁹

Be that as it may, if rules of recognition can be intuited according to no rules at all, why is this not also the case for the primary rules? This is certainly Hart's position with regard to primitive society.²²⁰ Hart gives no reason to think that the metaphysics of perception differ between primitive and modern times. Granted, law is complex in modern society, and we need experts to discern the finer points of law. This only proves that the intuitions of experts requires training and experience, just as children need training and experience to discern objects. It does not prove that experts intuit according to a set of pre-existing rules.

In discussing whether "international law" merits the name of "law," Hart ridicules the search for a rule of recognition in a primitive society that has none:

There is indeed something comic in the efforts made to fashion a basic rule [of recognition] for the most simple forms of social structure which exist without one We may be persuaded to treat as a basic rule [of recognition], something which is an empty repetition of the mere fact that . . . [society] observes certain standards of conduct as obligatory rules.²²¹

Yet this charge, leveled at primitive society, is equally applicable in modern municipal society. The best that can be done with municipal law is the empty repetition that judges recognize the rules they recognize.²²²

²¹⁸ HART, CONCEPT OF LAW, *supra* note 2, at 251.

²¹⁹ *Accord*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 60-61.

²²⁰ *See supra* notes 143-52 and accompanying text.

²²¹ HART, CONCEPT OF LAW, *supra* note 2, at 236.

²²² Liam Murphy has written, "Law professors, at least in the United States, seem surprisingly comfortable with the idea that there is no such thing

B. Kantian Apperception

My thesis is that recognition is implied in the definition of the internal point of view. Anyone who binds himself to follow the law must first recognize the law. To this proposition the following objection immediately arises: is not recognition equally necessary to someone with the external point of view? Suppose I follow the law only because I fear a sanction or piggishly wish to enjoy government-created rents. Must I not likewise recognize the law that produces these risks and rewards?

Since Hart holds that only officials need have the internal point of view, and only officials need understand the rule of recognition, then non-officials enrolled in the external point of view need not recognize law at all. They need only consult the official. But even here, the non-official must recognize the official *as an official*, or must recognize a lawyer who takes on MacCormick's hermeneutic position.²²³ So even the unofficial civilians cannot escape the necessity of recognition. Both the internal and external points of view require recognition before the law can be thought to have any motivational worth. Nevertheless, if Kantian epistemology displaces the epistemology of common sense, it is still true that recognition *is* the internal point of view, even if the cognizer is under the spell of the external point of view.

Here's why. Suppose law is a social fact. The metaphysics of common sense implies recognition according to no rules at all. It stands in contrast to Kantian epistemology. In Kantian terms, facts are not perceived. Rather, they are *apperceived*.²²⁴ Apperception consists of two elements. First, the apperceived thing is an appearance—a representation that must be distinguished from the thing-in-itself. Second, an apperception is the spontaneous act of the apperceiving subject.²²⁵ Spontaneity (*Selbthätigkeit*) is the oft neglected element of apperception.²²⁶

as 'the law,' that there are rather just legal materials and good and bad legal decisions." Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1008, 1106 (2008). Such a view resignedly admits that law is extensive; no intensive rules of recognition determine it.

²²³ HART, CONCEPT OF LAW, *supra* note 2, at 136 (rule of adjudication conferring court jurisdiction implies that the community recognizes the official designated by the rule of adjudication).

²²⁴ See *supra* notes 44-56 and accompanying text.

²²⁵ KANT, PURE REASON, *supra* note 11, at A188/B132.

²²⁶ See DICKERSON, *supra* note 46, at 49 ("The task of the Transcendental Deduction is thus to show how the spontaneity and objectivity of the categories are compatible.").

Spontaneity is on the side of the subject. The phenomenon apperceived is on the side of the object. Subject and object therefore meet in a transcendental unity of apperception. Each is a unity of itself and its other.²²⁷

Earlier I suggested that, for Kant, the thing-in-itself intrudes upon the mind and causes a phenomenon to occur.²²⁸ But the thing-in-itself equally depends on the subject. The subject, however, does not laboriously construct the whole phenomenon from its parts of raw sensory data. The subject *instantly* comprehends and recognizes the object,²²⁹ using as tools the famous Kantian categories of quantity, quality, relation and mode—the *a priori* judgments.²³⁰ These are Kant's rules of recognition—though they are not rules *intentionally* followed by the apperceiver. They are, rather, the structure of thinking of which the apperceiver is quite unaware at the moment of using them.²³¹ Significantly, the understanding, which *recognizes objects*, is named by Kant the faculty of rules.²³² In contrast, *judgment* is the "faculty of *subsuming* under rules,"²³³ which turns out to be quite unruly.²³⁴

The categories are Kant's *a priori* judgments. They are prior to experience (which is *a posteriori*). It is submitted that if Hart follows common sense epistemology, there are no rules of recognition. Rather, objects constitute themselves (*i.e.*, are self-evident). If, however, Hart were to follow Kantian epistemology, and if we think that social facts operate like material facts, the rules of recognition are simply the *a priori* categories of the *Critique of Pure Reason*.²³⁵ Of course, these would not be discursive rules but perceptual rules of which the officials would not be conscious. And they are rules which apply to civilians and

²²⁷ That is to say, subject and object need each other to complete themselves. So each is itself, its other and unity of self and other. This is the structure of Hegel's Notion (*Begriff*). DAVID GRAY CARLSON, A COMMENTARY TO HEGEL'S SCIENCE OF LOGIC 257-58, 445 (2007).

²²⁸ See *supra* note 49.

²²⁹ KANT, PURE REASON, *supra* note 11, at B129-30.

²³⁰ *Id.* at A80/B106, A157/B196.

²³¹ DICKERSON, *supra* note 46, at 86.

²³² KANT, PURE REASON, *supra* note 11, at A132/B171, A299/B356.

²³³ *Id.* at A132/B171, A299/B356.

²³⁴ See *supra* note 234 and accompanying text; see also *infra* notes 236-37, 240 accompanying text.

²³⁵ This is how Coleman interprets or perhaps rewrites Hart's rule of recognition. COLEMAN, MARKETS, MORALS AND THE LAW, *supra* note 185, at 13.

officials alike. Yet Hart insists that consciousness of the followed rules coexist with the action in question. "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard" ²³⁶ So Kant's categories are entailed in what Hart would call the "habit of obedience." ²³⁷ No reflective rule following would be involved on this line of analysis.

Apperception operates on the darkling plain of doubt. The apperceiver never knows whether she has objectively apperceived a fact or whether subjective distortion has caused a neural misfire. Misrecognition is a danger if Kantian theory displaces common sense. And what is the guarantee against misrecognition? The same purge of heteronomy and particularity that attends the moral position. That is, Kant's moral theory mirrors his epistemological position. ²³⁸ Any perceiver of a fact owes a duty of fidelity to the object. This is just as true of law as it is of art, literature, or any other object. So recognition as such requires the internal point of view, even if, following recognition, the apperceiver is not committed to the moral proposition that the law ought to be followed. The internal point of view toward the object, without being committed to obey the object, is the hermeneutical position, which MacCormick thought Hart wrongfully omitted from his theory. ²³⁹

The last few paragraphs assumed, with Hart, that law is a social fact, and that apperception is the appropriate concept for determining facts. Kant suggests another possibility. Adjudication, Kant implies, is a logical function of subsuming a particular under a universal. ²⁴⁰ For example, given an apperceived particular (the case) and an apperceived universal (the law), the subsumption of the former to the latter is under the province of general logic, not apperception.

²³⁶ HART, CONCEPT OF LAW, *supra* note 2, at 57; *see also id.* at 115 (habitual obedience leaves out the idea of "conforming behaviour as 'right' His attitude . . . need not have any of that critical character which is involved whenever social rules are accepted.").

²³⁷ KANT, PURE REASON, *supra* note 11, at A132/B171.

²³⁸ *See supra* notes 44-47 and accompanying text.

²³⁹ MACCORMICK, *supra* note 3, at 31-34.

²⁴⁰ For the view that this is Hart's point, *see* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1174 ("Hart's notion of 'standard instance' does not imply an intrinsic, objectivist meaning. Rather, it is an early sighting of the phenomenon of prototype effects arising from experientially grounded and culturally shared nature of cognitive models.").

If so, Kant assures us that "[g]eneral logic contains, and can contain, no rules for the faculty of judgment."²⁴¹ General logic abstracts from all substantive cognitions, Kant says.²⁴² Its only function is to divide the form of cognition into concepts, judgments and inferences, thereby achieving rules for the use of the understanding (the "faculty of rules").²⁴³ But to figure out whether something is under one of these rules would require yet more rules, which would require yet more rules—an infinite regress. Kant states,

[I]t becomes clear that although the understanding is certainly capable of being instructed and equipped through rules, the power of judgment is a special talent that cannot be taught but only practiced. Thus this is also what is specific to so-called mother-wit, the lack of which cannot be made good by any school²⁴⁴

Kant applies these thoughts directly to judges who are also law professors:

A [judge] can have many fine . . . juridical . . . rules in his head, of which he can even be a thorough teacher, and yet can easily stumble in their application, either because he is lacking in natural power of judgment (though not in understanding), and to be sure understands the universal *in abstracto* but cannot distinguish whether a case *in concreto* belongs under it, or also because he has not received adequate training for his judgment through examples and actual business.²⁴⁵

Kant elaborates:

The lack of the power of judgment is that which is properly called stupidity, and such a failing is not to

²⁴¹ KANT, PURE REASON, *supra* note 11, at A132/ B171.

²⁴² *Id.*

²⁴³ *Id.* at A132/B171, A299/B356.

²⁴⁴ *Id.* at A133/B172 (emphasis added).

²⁴⁵ *Id.* at A134/B173.

be helped. A dull or limited head . . . may well be trained through instruction, even to the point of becoming learned. But since it would usually still lack the power of judgment (the *secunda Petri*), it is not at all uncommon to encounter very learned men who in the use of their science frequently give glimpses of that lack, which is never to be ameliorated.²⁴⁶

These passages suggest that Kant (and also Wittgenstein)²⁴⁷ would strongly affirm that there are no rules of recognition by which the official plucks the flower law from the nettle normativity. Rules of recognition are not the life of the law; rather, as Holmes once said, experience is.²⁴⁸

IV. CORE AND PENUMBRA

Hart's implicit epistemology shows no evidence of Kantian apperception.²⁴⁹ Rather, passive perception organizes the official who recognizes law from the internal point of view. Evidence that this is so comes from the fact that law (in the practical sense of that which causes action) is defined as existing solely at the core of a rule's meaning. The core represents the point at which the application of the primary rule is obvious.²⁵⁰ "The plain case" is one "where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic'" ²⁵¹ Here, application proceeds in a guaranteed way. While there is supposedly a rule of recognition identifying the primary rules, once recognized no rule intercedes between the

²⁴⁶ *Id.* at A133/B172.

²⁴⁷ David Bell, *The Art of Judgment*, 96 *Mind* 221 (1987).

²⁴⁸ OLIVER WENDALL HOLMES, *THE COMMON LAW* 1 (1881).

²⁴⁹ Perhaps significantly, Hart is thanked in print by Strawson for having read every misbegotten page of Strawson's attempt to rescue Kant from metaphysics. See P. F. STRAWSON *THE BOUNDS OF SENSE: AN ESSAY ON KANT'S CRITIQUE OF PURE REASON* (1966). Strawson termed apperception a "disastrous model." *Id.* at 21, 174.

²⁵⁰ HART, *CONCEPT OF LAW*, *supra* note 2, at 12 ("Legal rules may have a central core of undisputed meaning, and in some cases it may be difficult to imagine a dispute as to the meaning of a rule breaking out."); see also *id.* at 123 ("Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules.").

²⁵¹ *Id.* at 126.

internal point of view official in the core and the application of the rule. In effect, the law applies itself mechanically through the medium of the official with the internal point of view. The official is entirely passive, a slave to the law, with no freedom or capacity to disobey.

Yet, to account for the experience that all lawyers have—uncertainty as to the rightness of a legal answer—Hart also states that language is "irreducibly open-textured."²⁵²

[T]here is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable ('If anything is a vehicle a motor-car is one') but there will also be cases where it is not clear whether they apply or not. ("Does 'vehicle' used here include bicycles, airplanes roller skates?")²⁵³

A case located beyond the core is in *the penumbra*. Penumbra is where law is *not*. Here the judge is uncertain. The case could go either way. In the core the answer is obvious, but in the penumbra the judge is conscious of her own discretion and the existence of "creative judicial activity within it."²⁵⁴ "Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function."²⁵⁵ Where there is discretion, there is no rule following, only rule production. In the penumbra, will governs. Law does not.²⁵⁶

This is Hart's concession to legal realism—the position that law is just politics. Hart is the Neville Chamberlain of jurisprudence. He surrenders territory to the enemy in the hope of peace through appeasement. Legal realism lives and reigns in the penumbra. Formalism reigns, however, in the core.²⁵⁷ Penumbral

²⁵² *Id.* at 128.

²⁵³ *Id.* at 126.

²⁵⁴ *Id.* at 134.

²⁵⁵ *Id.* at 135.

²⁵⁶ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 17; *see also* Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 S.M.U. L. REV. 75, 84-86 (1999).

²⁵⁷ *See* W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 260 (1994) ("It follows that if we are to have the rule of law, and are not to surrender to legal

cases are "legally unregulated and in order to reach a decision in such cases the courts must exercise the restricted law-making function which . . . [Hart calls] 'discretion.'"²⁵⁸ In England, judges even deny the use of law in the penumbra: "[F]or the courts often disclaim any such creative function and insist that the proper task of statutory interpretation and the use of precedent is, respectively, to search for the 'intention of the legislature' and the law that already exists."²⁵⁹ To be sure, will might be governed by morality. "At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues"²⁶⁰ It would be "folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer."²⁶¹ Interestingly, these same liar judges are assumed to tell the truth when they testify that they recognize a primary rule according to some pre-existing rule of recognition.²⁶²

These passages point to the view that law is in the core and never in the penumbra. Once in the penumbra, a court cannot legally decide that the plaintiff wins because the plaintiff is white and the defendant is not, or that the plaintiff wins because the plaintiff's bribe exceeds the defendant's. Any such decision would be reversed on appeal. Courts, after all, must exercise "a *restricted* law making function which I call 'discretion.'"²⁶³ To be sure, law creates the penumbra. This is so in two senses. First, secondary rules of adjudication constitute the world of officialdom. "[T]he existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative."²⁶⁴

realism, then there must, as a matter of logic, be cases in which the application of legal rules is not at the option of the judge who is to apply them, and these are the plain-meaning cases.").

²⁵⁸ HART, CONCEPT OF LAW, *supra* note 2, at 252.

²⁵⁹ *Id.* at 135-36; *see also id.* at 153 ("[c]ourts have jurisdiction to . . . [choose] between the alternatives which the statute leaves open, even if they prefer to disguise this choice as a discovery.").

²⁶⁰ *Id.* at 204-05.

²⁶¹ *Id.* at 204.

²⁶² *See supra* notes 193-96 and accompanying text.

²⁶³ HART, CONCEPT OF LAW, *supra* note 2, at 252, 273 (emphasis added); *see also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 31 ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.").

²⁶⁴ HART, CONCEPT OF LAW, *supra* note 2, at 136. *See* Simmonds, *supra*

Second, once the official is in place, the official's internal point of view divides the core from the penumbra. Where automaticity of the rules give out, the penumbra begins. The penumbra is the beyond of rules, and so the penumbra is *constituted* by rules. But within the borders of the penumbra, will governs because law gives out.

Hart's definition of core and penumbra has the consequence of eliminating "case law" as any kind of law.²⁶⁵ The problem with case law is that "there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt."²⁶⁶ Hart basically describes common law articulation of rules as "creative or legislative activity"²⁶⁷—that is to say not law at all, since no rules can be stated as to what rules emerge from common law. This consigns to the trash heap of the penumbra a very large category of Anglo-American law. Similarly, the tort of negligence is not law because we do not know in advance what conduct is reasonable. Only when presented with the facts is a legislative decision made.²⁶⁸ Indeed, vast quantities of what ordinary people would call "law" is eliminated because it is not rule-like.

Nevertheless, Hart assures us that, empirically, *most* cases fall in the core; though, of course, no empirical research is or could be presented to justify such a claim.²⁶⁹ Hart's empiricism raises this

note 33, at 65 ("norms that confer extensive discretion upon officials will certainly be regarded as law; but the proliferation of such norms within the system will move the system ever nearer to the margins of applicability of our concept of law.").

²⁶⁵ A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77 (2d Series 1973).

²⁶⁶ HART, CONCEPT OF LAW, *supra* note 2, at 134.

²⁶⁷ *Id.* at 134-35.

²⁶⁸ *Id.* at 133 ("Hence it is what we are unable to consider, before particular cases arise, precisely what sacrifice or compromise of interests or values we wish to make in order to reduce the risk of harm."). *Id.*

²⁶⁹ *Id.* at 134 ("in the vast majority of decided cases there is very little doubt" what rule a precedent represents). *Id.* At other times, Hart is not so sure: "the open texture of law leaves a vast field for a creative activity which some call legislative." *Id.* at 204.

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in light of the circumstances, between competing interests which vary in weight from case to case. None

question: Is the penumbra an empirical claim about language or a conceptual one? Does Hart believe that a careful wordsmith can expand the core to such a degree that the penumbra is eliminated? Hart warns that

we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives.²⁷⁰

There is a "human predicament . . . that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions."²⁷¹ The predicament, however, is perhaps not embedded in language, in spite of Hart's reference to the openness of language.²⁷² Rather, the predicament is that we do not know enough (apparently non-linguistic) facts to eliminate the penumbra. The number of facts in the universe is infinite.²⁷³ If the

the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case.

Id. at 135.

²⁷⁰ *Id.* at 128.

²⁷¹ *Id.*

²⁷² HART, CONCEPT OF LAW, *supra* note 2, at 128; *see also* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 421 (1985) ("Open texture is not vagueness, which is always eliminable, but is rather the *possibility* of future vagueness, which is not eliminable.") (alteration in original).

²⁷³ This is a Leibnizian proposition.

Since the complete concept of an individual substance involves an infinity of elements, and since a finite mind is incapable of infinite analysis, the human intellect can never arrive at [complete knowledge]. As a result, it cannot demonstrate or deduce truths of fact. Nevertheless, such truths remain cognizable in principle, that is, for God Expressed in Kantian terms, this means that all propositions are ultimately analytic and that the syntheticity of truths of fact is merely a function of the limits of analysis, not of the nature of the propositions themselves.

number of facts in the world were finite, "then [linguistic] provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice This would be a world fit for 'mechanical jurisprudence.'"²⁷⁴

This account of the human predicament, locating the problem in the imagination of legislators rather than in language itself, implies that language is not "irreducibly open-textured."²⁷⁵ If the set of facts were finite, then "all possible combinations of circumstances which the future may bring"²⁷⁶ can be anticipated. In such case, language would be up to the task of deciding all cases in advance. As a result, the penumbra is logically required, not by language, but by the infinity of cases arising from the infinity of factual combinations.²⁷⁷

A. The Pervasiveness of Interpretation

That the penumbra is lawless leads Dworkin to suggest that Hart errs by limiting law to *rules*—defined as that which determine outcomes. Rather, Dworkin argues, the law has standards (or principles), which deserve "weight" or respect but which do not determine cases.²⁷⁸ In Dworkin's universe, there is no penumbra because law never gives out.²⁷⁹ Judges *find* law in the penumbra. They do not produce *new* law. Hartians in turn try to rescue Hart from the scandalous claim that there is no law in

ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 37, at 30. In other words, the difference between human and divine knowledge, for Hart, is "more of the same." *Id.* at 32.

²⁷⁴ HART, CONCEPT OF LAW, *supra* note 2, at 128.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ There is a fascinating parallel between Hart's claim and Cantor's account of uncountable real numbers. Both involve the concept of unrestrained, infinite freedom of synthesizing from an infinite set. *See* Hockett, *supra* note 30, at 119-43, 211-12.

²⁷⁸ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 26.

²⁷⁹ SEBOK, LEGAL POSITIVISM, *supra* note 4, at 273. Hart's response to this is to say that, if judges find the law by making it fit with morality (making it the best that can be), then the only difference between Hart and Dworkin is that Hart thinks judges legislate in the penumbra, and Dworkin thinks judges find the law in the penumbra. This difference, Hart suggests, is a quibble, since both agree that judges will consult morality in hard cases. HART, CONCEPT OF LAW, *supra* note 2, at 254-55.

²⁸⁰ *See supra* notes 256-59 and accompanying text.

the penumbra.²⁸⁰ Neil MacCormick uses an old tactic in an attempt to rescue Hart's penumbra from lawlessness: discretion is a matter of degree.²⁸¹ There is comparatively more law in the core than in the penumbra.²⁸² This "more or less" strategy Hart adopts wholesale in his *Postscript to the Concept of Law*.²⁸³

Unfortunately, this concession only serves to prove that there *are no rules* (if rules are defined as that which determines official acts).²⁸⁴ And if there are no rules, there is no core. And if there is no core, there is no rule of recognition, and no internal point of view. In short, Hart's jurisprudence completely blows apart if every law is a standard and none is a rule. There is only discretion, and legal realism has won out.²⁸⁵ Once again, appeasement fails as a tactic for containing a lawless enemy.

This attempt to *quantify* the measures of determinacy and discretion in a judicial decision aims to immunize a claim from refutation by rendering it a subjective, not objective, claim. If lawfulness is a matter of degree, then it is never absent, and also never present. It becomes an unfalsifiable proposition. Hence, there is always law in the penumbra (though comparatively less of it). And there's always discretion in the core. If the substitution of quantitative for qualitative criteria is permitted, the rule of law can never be disproved. The proposition becomes nonfalsifiable empirically. For this reason, MacCormick's continuum (which Hart ratifies in the *Postscript*) must be rejected, if positivism is to survive as a distinctive jurisprudence. The "more or less" strategy renders the core (and with it, law) empirically non-existent. Law

²⁸¹ MACCORMICK, *supra* note 3, at 130.

²⁸² *Id.*

²⁸³ HART, CONCEPT OF LAW, *supra* note 2, at 261 ("rules do not have an all or nothing character").

²⁸⁴ Hart says this explicitly when he concedes that any so-called rule can lose out in competition to a standard. This means that every rule is actually a standard. *Id.* at 262 ("[T]he claim that a legal system consists both of all-or-nothing rules and non-conclusive principles" [said to be incoherent, but it] may be cured if we admit that the distinction is a matter of degree.").

²⁸⁵ STEPHEN GUEST, *Two Strands in Hart's Concept of Law*, in POSITIVISM TODAY 39 (Stephen Guest ed., 1996). Of course, Dworkin, no legal realist, saves the day with his notion of a judge's moral duty of fidelity to law-as-object. But this is a highly Kantian defense and leaves the judge in constant doubt whether a given judicial opinion is the right answer. The only right answer for Dworkin is that law is problematic. Carlson, *Desert of the Real*, *supra* note 27, at 518.

then becomes something other than that which has power over the official with the internal point of view. Law never precedes the act but is only produced in response to it—a narrative strategy for the official deeply in doubt about her intuition.

Yet, if Kant is right and common sense is wrong about the nature of perception, there *is* no core for another reason. According to Kant, every phenomenon is *apperceived*—implying that there is a subjective element involved. The internal point of view, which claims to operate in the core, is revealed as a narrative spun by the official who recognizes law through apperception. It is, in psychoanalytic terms, the official's fantasy.²⁸⁶ On Kantian theory—moral or epistemological—there is no guarantee that this *ex posteriori* narrative is true. A judge never knows the motive-in-itself for her legal opinion—as Dworkin well knows. A judge aspires, through hard work, to *find* the law, using the criterion of fit, and of making the law the best it can be, as evidence that the legal decision is not a subjective illusion.

Law's empire, then, is one of interpretation, not meaning. Meaning is a fantasy structure. Empirical instances of it can never be found. Instead, meaning is problematic. It is *possible* and for that very reason there is only interpretation, never meaning.

The result of this insight, if correct, is that the distinction between core and penumbra is a false one. It is based on the erroneous interpretation of the internal point of view. Given Kantian epistemology, the "correct" interpretation (if I may speak in such non-Kantian terms) is that law is core *and* penumbra at all times. This vastly increases law's empire at the expense of Hart's lawless penumbral frontier.

V. THE EXTERNALITY OF THE MASTER

For positivism, law derives from human legislation.²⁸⁷ Hart, however, does not entirely endorse this proposition:

According to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to

²⁸⁶ SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 123 (1991).

²⁸⁷ MACCORMICK, *supra* note 3, at 158.

morality except where the law thus identified has itself incorporated moral criteria for the identification of the law.²⁸⁸

For Hart, *some* law has its pedigree in human legislation. Some law is directly recognized from the position of morality. So Hart is no thorough-going positivist. Rather, his theory states that only sometimes do human beings legislate. My thesis is that, even when law has a human source, Hart's internal point of view is morality *as such*. It represents respect for the positive law. Accordingly, Hartian law and Kantian morality are the same thing.

A possible objection to the thesis holds that law and morality

²⁸⁸ HART, CONCEPT OF LAW, *supra* note 2, at 269. At some points, Hart seems to endorse natural law, a rather unpositivistic position. Hart names illicit the proposition that a legal system must exhibit conformity with morality or must rest on a widely diffused conviction that there is a moral obligation to follow the law. Though illicit, this proposition "may, in some sense, be true." *Id.* at 185. Hart also says that "the continued reassertion of some form of Natural Law doctrine is due in part to the fact that its appeal is independent of both divine and human authority, and to the fact that . . . it contains certain elementary truths of importance for the understanding of both morality and law." *Id.* at 188. Hart focuses on the desire of humans to live and societies to perpetuate themselves, but proclaims this a contingent fact, not a natural one. *Id.* at 190. Hart then writes that there are "very obvious generalizations—indeed truisms—concerning human nature and the world in which men live," which hold if man wishes to survive. *Id.* at 192-93. So is this natural law or merely prudential reasoning from the hypothetical imperative of survival? It is impossible to tell. Hart refers to the rules he derives as "a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control . . . Such universally recognized principles of conduct . . . have a basis in elementary truths concerning human beings." *Id.* at 193. This Hart calls the minimal content of natural law. *Id.* So it is not clear to me in the end that Hart isn't a natural lawyer.

Also in the *Postscript*, Hart asserts that morality might be part of the rule of recognition. *Id.* at 258. How did it get there? Was this implanted in the human mind by God, or was it conventionally supposed to be part of the rule of recognition? Hart does insist that a rule of recognition is merely conventionally true and is therefore a fact. *Id.* at 258-59 ("Judges may be agreed on the relevance of [moral] tests as something settled by established judicial practice even though they disagree as to what the test require in particular cases."). This suggests that it is empirically possible for morality to play no part in the rule of recognition. None of this is very carefully worked out by Hart. Indeed, Dworkin is quite right that soft positivism is completely indistinguishable from the interpretive jurisprudence that Dworkin advocates. See Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655 (2002).

are different to the extent that the former refers to human legislation, and the latter refers to legislation by universal reason. This objection, however, must be overruled.

The refutation of this hypothetical objection is ultimately simple. It stems from the point that we do not know our own motive. All our acts are smeared with pathology (but also with morality).

In Kant's view, everyone must have a master. Everyone submits to law. Kant called the actual law that we follow maxims. These maxims constitute our character—our regularity.

Maxims incorporate morality and heteronomy. For example, it may be part of my character that I always tell the truth about my resumé, when asked in a professional capacity, unless a great deal of money is at stake. This maxim is obviously a hypothetical imperative: truth-telling is contingent on an empirical fact. The set of all maxims that determine my behavior teaches me who I am.

Kant's categorical imperative is usually described in terms of maxims. For example, "[A]ct only in accordance with the maxim through which you can at the same time will that it become a universal law."²⁸⁹ If I follow this principle, then my maxim is the moral law.

The problem is that I never know whether my acts are from the moral law or from some pathological inclination. Therefore, any legislated maxim is not guaranteed to produce a moral act in compliance therewith. The maxim may in fact legislate only a pathological act.

Any act of legislation is problematic. The problematicity of moral legislation is the heart of Hegel's critique of Kant's moral theory:

I act morally when I am *conscious* of performing only pure duty, and nothing else but that; this means, in fact, when I do *not act*. But when I really act, I am conscious of an 'other', of a reality which is already in existence, and of a reality I wish to produce; I have a *specific* purpose and fulfil a *specific* duty in which there is something else than pure duty, which alone should be intended. Conscience . . . is awareness of the fact that, when the moral consciousness declares *pure duty* to be the

²⁸⁹ See KANT, *GROUNDWORK*, *supra* note 33, at 4:421 (alteration in original).

essence of its action, this pure purpose is a dissemblance of the truth of the matter²⁹⁰

This means that any human act of legislation is problematic. Any ostensible moral maxim might be driven by pathology. As such it is positive law, not moral law. "An attachment to an external rule would surely invoke the phenomenol impulses that would deprive the action of its moral worth."²⁹¹ And, equally, any command of the sovereign might be smeared with morality. It is impossible to say this is not the case.

As a result, if the objection to my thesis is that Hart (at least sometimes) envisions an external master for law, whereas Kant (always) envisions an internal master for morality, the objection fails. The very externality or internality of law is always problematic, and therefore this cannot be a good basis for distinguishing Hart's jurisprudence (once problematized) from Kant's moral theory. Kant's implication is that all moral law may only be positive law. And all positive law may be moral law. As both law and morality share this problematic structure, they are the same thing.²⁹²

VI. THE MASTER DISCOURSE

Hart recognized that the internal point of view is the key to law. In this he can only earn our praise. But his version of the internal point of view was empirical, not problematic. If

²⁹⁰ G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 637 (A.V. Miller trans., Clarendon Press 1977).

²⁹¹ Fletcher, *supra* note 64, at 539-40.

²⁹² Similarly, Finnis writes of

the classical theory of law which treats as central . . . the positing of legal rules and . . . takes their . . . mode of existence to be their existing as a proposal adopted by the choice/decision of their maker Once made . . . , the rules will . . . have to be maintained. But this very maintaining is to be understood as a kind of (re)novation of the making [T]he classical notion of law's existence [is] a kind of extending of the law-making activities of the rulers, an extending by a kind of interior personal re-enactment, person by person, of the ruler's . . . legislative . . . proposals.

Finnis, *supra* note 123, at 36. On this view, a person accepting the rules makes the rules *his own*. They are no longer external but are internal and hence moral.

problematized, the internal point of view is isomorphic to Kantian autonomy. The rule of recognition then becomes a narration after the (f)act of judging, not a rule that causes the judgment. Hart asserted that law and morality are not necessarily connected. But indeed the internal point of view and morality are precisely the same thing. The separation thesis must therefore be discarded. The idea of the rule of recognition must also be discarded. A rule of recognition does not reliably cause recognition. It simply reasserts the presence of the internal point of view. Since the internal point of view is properly problematic, so is recognition. Given the problematics of recognition, there is no core, only penumbra. On Hart's definition of law-as-rules, since there is only penumbra, there is no law. Hart's jurisprudence self-destructs and culminates in complete surrender to legal realism.

In spite of these deficiencies, Hart can nevertheless be credited with a great discovery. What the internal point of view establishes is the concept of subjection to law, not because following the law is useful to some other end, but rather because *law is law*. Hart's jurisprudence is the logic of master-slave relations—a necessary element in the relation between human subjectivity and the law. Yet slavery is a *problematic* state—just like freedom. Nevertheless (to borrow a Hegelianism), it is a *moment* of law—necessary but not sufficient.

The master-slave relation is fundamentally a moral one. It is a mistake to think that the noumenal slave obeys because of fear. Fear represents nothing other than the external point of view toward the master.²⁹³ A slave who obeys out of fear is no slave. A proper slave obeys because that is what slaves do. The logic of slavery is everywhere present in human relations. A soldier must obey the officer. The employee must obey the employer. Properly, these relations are not based on fear, but on duty. Distilled to its essence, these relations of submission logically are the internal point of view as such. The Hartian judge must rather be the incorruptible slave to the law. This is what the internal point of view stands for. It is an inescapable moment of jurisprudence.

Subjectivity's very etymology broadcasts the truth of the last claim. A subject is *subjected*—to a master. Every human being

²⁹³ David Gray Carlson & Jeanne L. Schroeder, *The Role of Fear in Hegel's Master-Slave Dialectic*, 6 Mono KL (2009) (forthcoming).

needs a master. This is connected to Kant's definition of will as a kind of causality.²⁹⁴ Being a causality it cannot be lawless.²⁹⁵ "The moral law is in fact a law of the causality of free agents,"²⁹⁶ Kant writes. For Kant, everyone submits to maxims. These are maxims we impose on ourselves. When the maxims are universalizable, they are the moral law. When the maxims are legal, they are the positive law. Indeed, the difference between Hart and Kant can be reduced to this: for Hart, there is an external master—the law that the judge positivizes by recognizing. For Kant, the master is internal. Innate reason is sovereign for Kant. Rex II is sovereign for Hart. Because reason is smeared with pathology, and Rex II is smeared with reason, neither position can exclude the other.

Who is the external master in Hart's theory? Is there even a sovereign in Hart's definition of law? A sovereign can be defined as one who is habitually obeyed, and one who obeys no one else. Hart clearly denies that, empirically, there is an absolute sovereign who commands but who does not obey. Hart distinguishes between the rule of recognition and the "rejected" theory that "somewhere in every legal system, even though it lurks behind legal forms, there must be a sovereign legislative power which is legally unlimited."²⁹⁷ Hart also protests the Austinian premise that law is the command of a sovereign to the officials. To say that an official obeys a command stretches the meaning of that word "so far beyond its normal use as to cease to characterize informatively these operations."²⁹⁸ Speaking of commands without a commander is like having a nephew without an uncle.²⁹⁹ Hart suspects that any reference to a commander who commands the law is a trick:

Alternatively we can push out of sight the whole official side to law and forgo the description of the use of rules made in legislation and adjudication, and instead, think of the whole official world as one

²⁹⁴ KANT, PRACTICAL REASON, *supra* note 1, at 48 (Will is the "power to determine [one's] causality by the conception of rules . . .").

²⁹⁵ ALLISON, KANT'S THEORY, *supra* note 44, at 136.

²⁹⁶ KANT, PRACTICAL REASON, *supra* note 1, at 65.

²⁹⁷ HART, CONCEPT OF LAW, *supra* note 2, at 106.

²⁹⁸ *Id.* at 113.

²⁹⁹ *Id.*

person (the 'sovereign') issuing orders, through various agents or mouthpieces, which are habitually obeyed by the citizen."³⁰⁰

Hart calls this "a disastrously confusing piece of mythology."³⁰¹

Disappointingly, Hart wishes to abolish the master and retain the slaves. Everyone must have a master. This is implicit in Kant's theory of the maxim. So who is the master in Hart's theory, such that we can say there is a master to whom the official is a slave? The answer is psychoanalytic in nature. The master is a metonym—what Lacan calls a *master signifier*. An ordinary signifier in general refers to a signified. But, being a good post-modern, Lacan is quick to point out that the so-called signified is yet another signifier, which refers to yet another signified. A signifying chain is generated.³⁰² Yet something holds the signifying chain together—a master signifier. The master signifier refers to nothing other than its own self.³⁰³ In Hart's discourse it is a *constructed* position. In short, what Hart calls "a disastrously confusing piece of mythology," Lacan calls a logically necessary moment in language and law.

In the *Concept of Law*, Hart tells an imaginary tale of Rex I.³⁰⁴ Rex I is a sort of magical figure who gets by without rules of recognition. He is therefore self-authenticating and self-identical, pre-castrated in the nature of Father Enjoyment in *Totem and Taboo*.³⁰⁵ The role of Rex I is itself very interesting, but I must pass over the godlike Rex I in favor of Rex II, his mediocre successor. Hart spends much time analyzing the succession of Rex II and concludes that a person is a sovereign only by virtue of the rules that make him so.³⁰⁶ Succession is the first rule of recognition, and is supposed to prove that the internal point of view is logically indispensable.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Cf. KANT, PURE REASON, *supra* note 11, at A68/B93 (Judgment is "the mediate cognition of an object, hence the representation of a representation of it.").

³⁰³ SCHROEDER, *supra* note 14, at 12.

³⁰⁴ HART, CONCEPT OF LAW, *supra* note 2, at 52.

³⁰⁵ SIGMUND FREUD, TOTEM AND TABOO (James Strachey trans., Routledge 1960 (1950)). See Jeanne L. Schroeder, *Totem, Taboo and the Concept of Law*, 1 WASH. U. JUR. REV. 161-64 (2009).

³⁰⁶ SCHROEDER, *supra* note 14, at 59.

What Rex II stands for is the *position* of sovereignty. That the position is filled by an empirical person named Rex II is a mere contingency. What is significant about the rules of recognition is their *universality*—their creation of the place from which law is spoken. Now Hart's system is by no means limited to monarchies. *Anything* can fill the position of the sovereign. So the very position of Rex II is that of the Lacanian master signifier—an idiot that signifies nothing, but one who nevertheless organizes all the other slavish signifiers.

Because the rules of recognition establish the position of the sovereign without any specific content, the position is pure metonymy. A metonym is the inability to name the thing itself but only the context of the thing. We can (supposedly) name the rules of recognition, but we can never name the position described by the rules of recognition. Nevertheless, it organizes the system of imperatives and commands. We act as if the commander existed. We behave as if the emperor had clothes. This is the very ideological power of the law embodied in the internal point of view.

Hart's jurisprudence revolves around this empty center of authority.³⁰⁷ Its very emptiness is what guarantees that the test for law in Hart's system is content independent.³⁰⁸ And this leads to one of Hart's great implied lessons: "The master is an idiot."³⁰⁹ Whatever statement the officials recognize as meeting the rules of recognition is a command, no matter how idiotic it is. "[L]aw must be obeyed *because it is law* and not because there are good reasons to obey it."³¹⁰ If a master is master "because he is strong, he will cease to be master if he weakens. If he is master because he is wise, he would cease to be master if outwitted. He must be obeyed not because he is just, but *just because*."³¹¹ The master may unwisely command disgraceful acts or may prohibit noble ones. These commands are nevertheless obeyed, because they are attributed by the rules of recognition to a master. So if under the

³⁰⁷ HART, CONCEPT OF LAW, *supra* note 2, at 36.

³⁰⁸ *Id.* at 36.

³⁰⁹ SCHROEDER, *supra* note 14, at 39; see Sebok, *Is the Rule of Recognition a Rule?*, *supra* note 20, at 1559 ("Hart never suggested that the rule of recognition has a 'point' or purpose . . .").

³¹⁰ Renata Salecl, *Deference to the Great Other: The Discourse of Education*, in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE AND SOCIETY 163 (Mark Bracher ed. 1994).

³¹¹ SCHROEDER, *supra* note 14, at 137.

rules of recognition Rex II is deemed the master, Rex II commands the officials. This is so even if Rex II is (and often has been) what we clinically can identify as an idiot. This is a necessary moment in any concept of law.

I have followed Dworkin and Schauer, however, in claiming that there are no outcome-determinative rules of recognition.³¹² There is only the shock of recognition. We never know who or what the master is, but we know when he, she or it has spoken. In Hart's system, based on the metaphysics of common sense, the master reigns over the core but has surrendered jurisdiction over the penumbra to the discretion of the officials. But what if we add Kantian epistemology into the mix? Now we have the act of recognition, but the status of it *as a recognition* is in doubt. The official who recognizes that the master has spoken aspires to take the internal point of view. But this is a problematic position. Perhaps the official has heard the master speak, but perhaps it is some other unauthoritative voice. The Dworkinian judge is in a state of doubt—a state of sin. His duty is to the master, yet he may not have anticipated fully what the master wants. So the official constructs his fantasy vision of what the master is. In this constructed vision, based on making the historical materials fit in a way that law is made the best it can be, the master appears, if only for a moment. But, in this vision, the master is no idiot. The master is construed as commanding reasonable imperatives, consistent with moral principles (to the extent possible, in light of the pedigreed historical pronouncements of the past). So what Dworkin is describing is a second necessary (but also insufficient) moment of law. This is the requirement that law must have a point. The master is presumed *not* to be an idiot after all. It takes the expert reconstruction by the official to show that this is so.

The transition from Hart to Dworkin—a necessary progression in a properly Kantian jurisprudence—is nowhere better captured than in Slavoj Žižek's retelling of *The Emperor's Clothes*.³¹³ As most readers will know, in this tale charlatans convince the emperor that the clothes they have tailored for the king are so fine that only the noble souls can see them. The emperor, of course, cannot see them, but, fearing to reveal his ignobility, he pretends to see them and pays the tailor a fine price.

³¹² See *supra* note 12.

³¹³ ŽIŽEK, *supra* note 288, at 11-16.

He then parades around naked (or in the 1930s cartoons, in his underwear). His subjects are afraid to admit they cannot see the clothes for fear of revealing their ignobility. So everyone pretends the emperor is elegantly dressed as an emperor should be. Then an innocent child in the crowd shouts out, "He isn't wearing any clothes." The illusion is shattered. Suddenly everyone knows that no one can see the clothes and that he is not the only ignoble one. Freed from the ideological power of the tailors, the crowd, emboldened to romantic paranoid *jouissance*, has a good laugh at the emperor's expense. The emperor is embarrassed and (implicitly) ceases to be an emperor.

The tale is usually told in a way to make the child the hero, dispelling the fear of the crowd to see the truth. But in Žižek's retelling the child is the villain. It appears that the subjects *wanted to believe* in the master. Without that belief, masterdom (and, with it, law) falls away. This is a catastrophe that cannot be allowed to happen. As Lacan argues, "les non-dupes errent."³¹⁴ So what the officials must do is to supply the emperor with the clothes that sustains the illusion of his sovereign sway and masterdom.

In this parable, the presumptuous boy is the legal realist. The boy's view is that there is nothing material to the claim of clothes. But the Dworkinian judge has faith that the clothes are there. He tells beautiful stories about the elegance of the clothes. For Hart, however, the tailor was no charlatan; the emperor is always empirically dressed up in the clothing of the rules of recognition (which, it turns out, do not exist).

VII. LEGALITY AS THE ASPIRATION OF POSITIVISM

Positivism insists on the difference between what *is* and what *ought to be*.³¹⁵ The former is associated with law. Hart sometimes suggests that he is describing law,³¹⁶ and even names himself a

³¹⁴ HERMAN RAPPAPORT, BETWEEN THE SIGN AND THE GAZE 6-7 (1994). As Rappaport points out, "*les non-dupes errent*" is a pun on "*les noms dupère*," which is Lacan's term for positive law. *Id.* (alteration in original).

³¹⁵ Hart, *Separation of Law and Morals*, *supra* note 21, at 50 ("[D]istinguish, firmly and with the maximum clarity, law as it is from law as it ought to be.").

³¹⁶ HART, CONCEPT OF LAW, *supra* note 2, at 239 ("My aim . . . was to provide a theory of what law is which is both general and descriptive My account is *descriptive* in that it is morally neutral and has no justificatory aims").

sociologist reporting on a social fact.³¹⁷ From the perspective of description, Hart is reduced to reporting on what empirical English-speaking people think the word means. This, of course, opens Hart to empirical refutation. Indeed, it would be an interesting social science exercise to describe Hart's position and Austin's position, and see what percentage of the populace would vote for Austin. Can there be any doubt that Hart would be slaughtered? Yet any such result would completely defeat Hartian jurisprudence, conceived as a descriptive project.

Other passages from Hart's work suggest a very different project—the claim that, if everyone read *The Concept of Law*, he or she, after this transformative education, *would* agree that Hart's definition is better than Austin's. But, if this is the claim, in fact Hart's theory is not empirical at all. Rather, it is highly *counterfactual*—a *logical* or *conceptual* argument that traffics in naturalist essentialism.³¹⁸ It devolves into a *moral* claim—a claim of

³¹⁷ *Id.* at vi ("Notwithstanding its concern with analysis the books may also be regarded as an essay in descriptive sociology."). William Twining writes, "This statement has provoked hoots of derision from the sociologically inclined" William Twining, *General and Particular Jurisprudence*, in POSITIVISM TODAY, *supra* note 251, at 131. Dworkin finds this remark "is more obscuring than clarifying. What kind of sociology is conceptual? What kind makes no use of empirical evidence? What kind defines itself as studying not just legal practices and institutions here and there, but the very concept of law everywhere?" Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1680 (2002).

³¹⁸ See Fitzpatrick, *supra* note 29, at 194 ("Whatever else this antique story may be, it is not linguistic philosophy. It is for a start an elaboration of Hart's arbitrary and essentialist confining of law to rules."). At one point, Hart writes:

We shall not indeed claim that wherever the word 'law' is properly used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases in which the word 'law' is used are not linked by any such simple uniformity, but by less direct relations—often of analogy of either form or content—to a central case. What we shall attempt to show . . . is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power

HART, CONCEPT OF LAW, *supra* note 2, at 81. In this passage Hart claims to be identifying the central (read: essential) case. Contrary uses are analogies—non-essential cases. See also *id.* at 155 (The union of primary and secondary rules "may justly regarded as the 'essence' of law.").

what ought to be³¹⁹—and also an *analytical* judgment of this ought.

Yet, in addition to his essentialism, Hart also suggests a different overtly moral reason why law and morals should be separated, as a matter of word usage:

Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider^[320] and a narrower^[321] concept or way of classifying rules If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.³²²

Hart maintains that his suggested usage *ought to be*, because it will lead to clarity of moral deliberation as to whether evil law should be followed (by those who have escaped from the thrall of the internal point of view).³²³ In short, Hart proposes that positivism liberates moral activism.

I want to suggest a rather different moral implication of Hartian jurisprudence—one that turns Hart's moral aspiration

³¹⁹ GUEST, *supra* note 285, at 30, 38. In his admirable essay, Simmonds implies that a proper intensive method is inductive, not drawn from a metaphysical notion of law-in-itself. First, general usage of the word is identified and then the universal formula is induced that isolates the bare, necessary elements actually present in the particulars. Thus, "no problematic metaphysical commitments are involved: our practices themselves create the archetype because and insofar as they are structured by beliefs and understandings that are best understood by reference to the archetype." Simmonds, *supra* note 30, at 71; *see also* COLEMAN, *Methodology*, *supra* note 20, at 336. This would describe Hart if he actually went out and did the work of surveying word usage. In fact, Hart consulted his own sense of what the words means to *him*. Whether this is an essentialist enterprise or merely a proposal for further empirical research (to be carried out by others), it operates as if it were a straight Platonic enterprise.

³²⁰ The wide usage implies that moral *and* immoral primary rules are to be considered law.

³²¹ The narrow usage implies that only moral rules, not immoral ones, are to be considered law.

³²² HART, CONCEPT OF LAW, *supra* note 2, at 209.

³²³ MACCORMICK, *supra* note 3, at 160 ("Hart's reason for insisting on the conceptual separateness of 'law; and 'morality' is thus a moral reason.").

inside out. Positivist jurisprudence wishes to carve out for human beings a zone of ethics—a zone that Kant labels *impurity*,³²⁴ but also calls *legality*. By legality Kant mean immorality or pathology that is justified because it is consistent with positive law.³²⁵

In legality (as isolated from morality), "[t]he good is still intended, but the objective goodness (or rightness) of what morality requires is not a sufficient incentive. One stands in need of an extramoral inducement, a bribe, as it were, in order to do what duty dictates."³²⁶ As such, legality is the second of the three Kantian evils. And, ironically, the moral program of law is to create the capacity of immorality—otherwise known as negative freedom or original sin.³²⁷ For what is freedom (in the practical sense) but the capacity to violate the moral law, not to mention the positive law? So, far from enabling moralists to resist evil law, the more profound achievement of positivism is to permit the expulsion of moral obligation altogether.

This theory of positivism's secret agenda is drawn from Kant's theory of evil. Recall that Kant defined the subject as the gap between noumenon and phenomenon.³²⁸ It is neither noumenon nor phenomenon, but absolutely dependent on both these concepts. If either pole were to disappear, subjectivity would collapse. If there were no pathology, the body would die and the

³²⁴ KANT, RELIGION, *supra* note 41, at 6:29.

³²⁵ KANT, PRACTICAL REASON, *supra* note 1, at 92 ("If the determination of the will takes place in conformity indeed to the moral law, but only by means of a feeling, no matter of what kind, which has to be presupposed in order that the law may be sufficient to determine the will, and therefore not *for the sake of the law*, then the action will possess *legality* but not *morality* . . ."), 102 (Legality "is possible even if inclinations have been the determining principles of will . . ."); *see also* KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:393 (referring to "the duty of assessing the worth of one's actions not by their legality alone but also by their morality (one's disposition)"); ALLISON, KANT'S THEORY, *supra* note 44, at 160 (In legality, "[o]ne is satisfied and thinks oneself virtuous so long as one's action do not conflict with the law. . . ."); Wood, *supra* note 97, at 455-56 (describing Kant's distinction between acts done from duty and acts in accord with duty).

³²⁶ ALLISON, KANT'S THEORY, *supra* note 44, at 157-58; *see* Ernest Weinreb, *Law as the Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 502 (1987) ("[T]he legal actor is considered to be free even though he does not make his freedom the determining ground of his action [L]aw is indifferent to the particular purposes into which this capacity [for choice of ends] matures.").

³²⁷ *See supra* notes 67-75 and accompanying text.

³²⁸ *See supra* notes 59-75 and accompanying text.

autonomous soul would dissipate. If there were no autonomy, the subject would leave the symbolic realm and revert to the psychosis from which it emerged—psychosis being defined as the absence of the symbolic order and the complete presence of nature.³²⁹

Meanwhile, the free subject acts. *Something* causes the act, but we can never know with certainty what the cause was. Cause is a narrative strategy—a story the subject tells itself to explain the act. Personality—that which is observable concerning the subject—is a narrative of cause-and-effect. If the story is, "I did so because it was my duty" (morality) or "I did so because the law required it" (the internal point of view), then, in the narrative, I am autonomous, moral and law-abiding. If the story is, "I did so because I hoped to maximize my welfare," or "I did so because I was afraid not to," then I am evil. The problem is that, because my true moral self is noumenal, I only have the appearance of my motive, never the motive-in-itself. "[T]he moral law is given as a fact of pure reason . . . though . . . *in experience no example of its exact fulfillment can be found*," Kant writes.³³⁰ Rather, the narrative is an aspiration. It may or may not tell the true story of my motive-in-itself.³³¹

Kant called this uncertain state *radical evil*. The word *evil* refers to heteronomy. The word *radical* refers to the fact that heteronomy is at the root of all acts. Evil can never be eradicated. Against radical evil must be contrasted diabolical evil.³³² Diabolical evil is undiluted by reason. It is pure pathology. It is the internal point of view taken toward nature. But it is a problematic position. All acts are smeared with morality as well as with evil. All acts are merely radically evil.

Every act, whether wicked or charitable, is radically evil. No act can with certainty be connected to autonomy alone. In this regard, Kant listed three characteristic evils. Each one of these is a form of self-deception. In other words, what is evil is the

³²⁹ David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1946 (1999).

³³⁰ KANT, PRACTICAL REASON, *supra* note 1, at 64 (emphasis added).

³³¹ ALLISON, KANT'S THEORY, *supra* note 44, at 246 ("Kant emphasizes that the consciousness of being virtuous is always in danger of resting on self-deception This consciousness, then, is a mere possibility, rather than an actual capacity.").

³³² Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653 (2000).

narrative in which we fool ourselves about our true motives. The implication of this should not be missed. The rule of recognition is narrative. Narrations are radically evil. Ergo, the rule of recognition is an evil. It purports to relieve the judge of guilt for misrecognizing the law.

Two of the Kantian evils, weakness and wickedness, do not concern us. Weakness is the narrative that I could not resist my impulse.³³³ "The devil made me do it." Wickedness is the claim that I enforced the law for the sake of the law, but in fact I enjoyed what I was doing. So a prosecutor who says, "I don't like prosecuting; the law made me do it," is wicked if there was one smidgen of personal satisfaction in watching his victim squirm.³³⁴

Our concern is a third evil—legality. "Legality" consists of acts outwardly conforming to law but undertaken for private reasons unconnected with respect for law.³³⁵ Legality is the moral program of positive law. The idea of legality is that it permits the following narrative: "Sure I went home and got drunk on martinis. What's wrong with that? It's legal." What's wrong with martinis is that they are pathological. They cannot be defended on the ground of nutrition—needed to sustain the personhood of the moral right-acting subject. They are simply an enjoyable temporary relief from my self-condemnatory attitude.³³⁶ In short, they are a guilt-squelching pleasure. Not being the product of autonomy, martini drinking is evil. And legality is the story that I am a good person even though I drink martinis out of inclination.

Legality allows for a zone of sensual pleasure, whereas morality does not. Within the legal zone I can indulge in the illusion of guilt-free pursuits purely because I get pleasure from doing them. Legality relieves me from the monstrosity of the autonomous position. The autonomous position is monstrous because I must act, yet moral law condemns every act performed because it is smeared with heteronomy. This is the paradox of the superego. Logically, the moral law requires an act. Without an act, morality cannot manifest itself. Yet morality condemns every

³³³ KANT, RELIGION, *supra* note 41, at 6:29; *see also* Mark Timmons, *Evil and Imputation in Kant's Ethics*, 2 ANNUAL REVIEW OF LAW AND ETHICS 113, 123-27 (1994). Hart disagrees: "in morals, 'I could not help it' is always an excuse" HART, CONCEPT OF LAW, *supra* note 2, at 179.

³³⁴ The wicked prosecutor "has in effect deliberately adopted a supreme maxim that gives priority to non-moral reasons." Timmons, *supra* note 366, at 130.

³³⁵ KANT, METAPHYSICS OF MORALS, *supra* note 13, at 6:219-20, 6:225.

³³⁶ *Id.* at 6:219-20, 6:427 (denouncing drunkenness).

act. Every act is wrong, because it is a positivization of a maxim and therefore a violation of the moral imperative, which cannot stand positivization. Every act, however, is radically evil. Legality, one of the evils, authorizes (problematically) innocent enjoyment free and clear of the superego.

Merely legal activity, then, is immoral activity. So the moral program of positive law is to create a zone of immoral-but-legal behavior. In short, positivism aspires (but fails logically) to separate law and morality. This separation is not a fact, as Hart would have it, but an *achievement*. Positivism does not just liberate moral activity from law. It also liberates evil from the oppressive regulation of the superego. This is the true psychoanalytic implication of positivist jurisprudence. It purports to dispense with morality altogether.³³⁷

The creation of legality is the program of the official with the internal point of view. He recognizes the law as creating a zone where subjects can enjoy the illusion that they are not guilty. Yet the official who takes the internal point of view sacrifices his own enjoyment in realizing for others the zone of freedom. The one thing that the official with the internal point of view is *not*, is free (in the practical sense).³³⁸ Or more precisely, the free autonomous official gives up his enjoyment by adopting the internal point of view. By this sacrifice, the positive law comes into existence to relieve the ordinary citizens of the sublime horror of the internal point of view, and to bestow the guilt-free relief of the external point of view.

The position of the official is what Lacan identified as sexual perversion. The pervert renders himself into an object of

³³⁷ Compare the only slightly different account of Jules Coleman, who asserts that legality displaces morality for the confused individual who would like to be moral but lacks moral intuition. Jules Coleman, *Authority and Reason*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 301 (Robert P. George ed., 1996). This account still depends on the liberation from morality. Coleman's individual wishes to embrace it. I think individuals are horrified by it, in its sublime form.

³³⁸ KANT, *PURE REASON*, *supra* note 11, A447/B475 ("If freedom were determined in accordance with laws, it would not be freedom, but it would simply be nature under another name . . ."), A593/B571 ("[W]ere we to yield to the illusion of transcendental realism, neither nature nor freedom would remain . . .").

enjoyment for others.³³⁹ And, in his essay *Kant avec Sade*,³⁴⁰ this is precisely what Lacan said Kantian autonomy reduces to. For this reason, Lacan placed Kant's autonomous man alongside the Marquis de Sade. Therefore, I conclude with a simple, straightforward syllogism. If Kant is *avec* Sade, and if Hart is *avec* Kant, then Hart is *avec* Sade.³⁴¹ The official with the internal point of view is the object of private enjoyment, as Shakespeare's Henry V recognized:

What infinite heart's ease
Must kings neglect, that private men enjoy!³⁴²

If we see the king as an official—a representative of the master but not actually the master-as-such—the officials are the object of private enjoyment. Private citizens enjoy; the officials do not.

Hart's own positive morality of choice was utilitarianism. On this view, the proper moral role of law is to increase private enjoyment. But this comes about only through the sacrifice of the official on the altar of the internal point of view.

³³⁹ Philippe Van Haute, *Against Adaptation: Lacan's "Subversion" of the Subject, a Close Reading*, J. PSYCHOANALYSIS OF CULTURE & SOCIETY 353 (2002) ("Lacan describes perversion as a position wherein the subject attempts to become the 'instrument of the other's *jouissance* (without, for all that, obtaining *jouissance* for themselves").

³⁴⁰ See Jacques Lacan, *Kant with Sade*, 51 OCTOBER 55 (James B. Swenson, Jr. trans., 1989).

³⁴¹ WILLIAM P. MCNEIL, *LEX POPULI: THE JURISPRUDENCE OF POPULAR CULTURE* 44-60 (2007).

³⁴² WILLIAM SHAKESPEARE, *HENRY V* act 4, sc. 1.