

Abstract

Charges of hypocrisy in law and politics are so endlessly leveled they seem to have lost their charge and meaning. These charges, however, conceive of hypocrisy as a personal failing; that is they imply that lawyers and politicians are hypocritical. Focusing on hypocrisy as a personal failing misses the way hypocrisy can infect law and legal systems institutionally. Realizing that hypocrisy can be an institutional failing helps us to isolate particular legal defects which otherwise escape our attention.

This article begins by clarifying the moral defect we describe as hypocrisy. Though in many ways intuitive, deeper inspection reveals hypocrisy can be difficult to precisely describe. Once clearly defined, one notices that hypocrisy can be a failing of not just people but of laws and legal systems. The article assesses why, despite the difficulties of translation, one can identify the political vice of legal hypocrisy. Examples of legal hypocrisy are highlighted in the separate but equal doctrine of the Jim Crow south and in persistent marital exception to rape laws. Isolating the unique harms of legal hypocrisy shows both what it is and what it is not; legal hypocrisy is not reducible to poor treatment or discrimination. Finally, the article concludes that legal hypocrisy is more dangerous than many of the defects that have seized the imagination of legal theorists. Legal hypocrisy is insidious because it threatens not only those who its “direct” victims, those treated hypocritically, but damages even those who deploy hypocrisy by undermining fidelity to law and ultimately, the rule of law itself.

Legal Hypocrisy

Ekow N. Yankah

Allow me two examples of hypocrisy. In Moliere's *Tartuffe*, Tartuffe dupes Orgon and Madam Pernelle, the head of a wealthy household and his mother respectively, into friendship and admiration by affecting a pious and humble character.¹ His pious character and divine authority are entirely a sham; he is happy to lie, cheat and steal to get whatever he desires. Yet the more he pretends to pious character, the more Orgon fixates on and trusts him. By doing so, he ingratiates himself into Orgon's house and even to have Orgon betroth his daughter to him. All the while, Tartuffe is schemes to seduce Orgon's wife, Elmire and steal Orgon's wealth. The character is so vivid an example that the word Tartuffe has become synonymous with the word hypocrite.

Now the second. A member of the Victorian upper middle class sits in a comfortable home in London, surrounded by friends at a lavish dinner. The conversation turn to the needs of the poor and she professes the importance of charity to relieve the plight of the downtrodden. She does take a moment to thank her hosts for "a most gracious meal" which is served by a bevy of servants. Another servant takes her to her carriage which still another will drive to her home. The number of servants are possible only because of the extremely low wages they are paid. The servants live in slums of London, in shocking poverty but kept out of view. Our Victorian is aware only in the vaguest way that both these facts are true. Of course she occasionally sees the poor but rarely thinks deeply of them or the causes of their poverty. She merely glances over (and typically skips) articles in the paper which examine the systematic causes of poverty. She gives a small amount to charity but goes no further. Many people would describe her as a hypocrite.

The above are fairly commonly understood examples of hypocrisy. In first case, Tartuffe, the villain avows moral values he does not in fact have in order to deceive

¹ MOLIÈRE, *TARTUFFE: A COMEDY IN FIVE ACTS* (tr. Richard Wilbur) (New York: Harcourt Brace & Co., 1997).

others into trusting him for his own benefit. The avowals belie his true aims which are completely antithetical to those values. He does so in order to seduce Orgon's wife and steal his treasure. The second case is somewhat more subtle. The hypocrisy of the Victorian woman is not that she consciously acts to deceive for her own benefit. Rather, it is that she is complacent in even determining much less living up to the demands that her avowed moral values make of her. She does this in a way, but only in a way, unknowingly. She shields her eyes from the truth around her and spares herself the cost, emotional, financial and otherwise, of living up to her professed values.

It will be my claim in this piece that the same two types of hypocrisy are a danger not just in our personal morality but in our legal system as well. There is a special type of fault a legal system, broadly viewed, can have -- that of legal hypocrisy. It is a fault that resembles, in important ways, the two types of hypocrisy noted above. The first is to explicitly act in ways that betray the avowed values of the legal system. This is often done to gain some sort of benefit. The second is to ignore the demands of the avowed values of the legal system. As in the personal case, when a legal system "shields its eyes" in this way, it spares itself the cost and effort of living up to the demands of political morality.

Translating a personal character flaw into an institutional failing risks misunderstanding and confusion so it is perhaps best to start with two examples. Though they will not be entirely without controversy, they can sketch out the position and allow us to address objections. The first can be found in the American legal regime of "separate but equal" spanning roughly the Reconstruction period to at least the close of the Civil Rights era. Very roughly, the end of the Civil War brought the 13th and 14th Amendments which guaranteed among other things, "equal protection of the law."² Despite a nation rending war fought to eradicate slavery, the Constitutional Amendments and initial moves to assist the newly freed slaves integrate into society, the Federal government soon realized it would have to decide how to manage the resistance of southern states to truly treating the newly freed slaves as legal equals. Shortly, the Federal government, in order to

² 14th Amend.

placate the southern states for political reasons, decided to cede the legal regulation of segregation to individual states. This was done with full knowledge that southern states were actively undermining legal equality between the races. One example was the Second Morrill Act which continued the exclusion of blacks from entering the land grant colleges and instead established separate colleges which become known as the historically black colleges.³ This represented, for all practical purposes, a capitulation to the southern states on the political value of equality. Most famously, the United States Supreme Court upheld the doctrine of separate but equal in its odious decision of *Plessy v. Ferguson*.⁴ All of this occurred while no one could reasonably believe that the separate facilities being provided Blacks were anything like equal. Moreover, all of this occurred without regard to the avowed national legal and political value which had been enshrined in the 14th Amendment - equal protection under the law.

The second example, though perhaps more controversial, is that of spousal rape in the later half of the last century.⁵ Historically, marriage was considered to include an irrevocable grant of conjugal rights thus marital rape was not recognized as a crime.⁶ It goes without saying that this was gravely wrong but the extent to which it represented hypocrisy in the legal system is less clear. On the one hand, the rape of women had long been a core criminal law violation. This violation was partly based on antiquated views of a violation of a woman's purity and honor, often understood as much as the honor of her male family as her own. There may also have been imaginable (not to say plausible) reasons to think married women stood in a different relationship vis-à-vis their autonomy, though these reasons seem the comfortable harbor of those who did not wish to critically inspect their thinking. The only slightly more plausible reasons of wishing to avoid invading the intimacy of the family home lack the necessary counterbalance to violence against sexual integrity.

³ Cite Morrill Act, Second Morrill Act (1890).

⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵ I am grateful to Chavi Keeney Nana for the example.

⁶ Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Sollom Emlyn ed., 2d ed. 1778).

Whatever the historical status of marital rape, as our communal views and, just as importantly, our avowed legal values began to regard women as equals before the law, the exception in rape laws for marital rape could no longer be squared with a picture of an autonomous woman having surrendered her rights to sexual autonomy upon marriage.⁷ As a matter of our legal principles, we began to recognize the equality of women in myriad ways, the most obvious example being the passage of the Nineteenth Amendment in 1920. Rape had come to be legally recognized as a violation of a woman's autonomy. Yet it was not until 1975 that South Dakota became the first state to remove the exception for the prosecution of rape among spouses. North Carolina was the last state to formally recognize this crime in 1993. Still, in 33 states, the crime of spousal rape is a lesser charge than that of rape between strangers. And in the same way that allocating overly meager resources indicated complacency in the Victorian example above, the lack of willingness to prosecute cases of spousal rape indicates the same in domestic violence cases. Thus, the refusal to prosecute men for rape within marriage has increasingly become an instance of legal hypocrisy.

These two examples share key features with the examples of personal hypocrisy above. In the first case, the legal system acts in a way that betrays its avowed political moral values. It does so in exchange for a benefit; at least, the white southerners who sought to benefit from discrimination. The second example is closer to the fault of our Victorian. It is the institutional equivalent of willful blindness. The system ignores the proper demands of the legal recognition that women are equals who are entitled to have their autonomy respected. In doing so it spares itself the cost and effort of living up to the demands of its own political morality. Of course, many readers will have objections to the simple picture I have drawn and we will revisit the examples for closer inspection. For now, they serve only to ground the idea that hypocrisy can be an institutional vice as well as a personal one. The claim is that hypocrisy is as dangerous, indeed more, in a legal and political setting as in our personal lives.

⁷ This view of rape as a violation of a woman's honor and in large part that of her father, family and tribe is most clearly revealed in the laws regarding rape in combat situations. See CATHARINE A. MACKINNON AND CHAVI KEENEY NANA, *SEXUAL VIOLENCE* in *OXFORD COMPANION TO COMPARATIVE POLITICS*. (forthcoming)

Given how commonly charges of hypocrisy ring out, it is surprising that a view of legal hypocrisy has never captured the attention of the legal academy. Charges of hypocrisy are usually viewed as a political failing only in an attenuated sense. Hypocrisy is seen primarily as a personal failing; one that is exacerbated or endemic in law and politics but a personal failing nonetheless. This is what is usually meant when one speaks of politics and the legal system as full of hypocrites; people usually mean politicians and lawyers are hypocritical. The usual illocution, however, misses an important feature, that is, the way in which hypocrisy can be a defect not just of persons but of laws and legal systems. There is a unique legal fault that one may label “legal hypocrisy” which is often obscured by the relentless and loose charge of hypocrisy in political discourse. Ignoring legal hypocrisy not only blinds us to a particular fault of legal systems but leaves those harmed by it unable to properly name their complaint or for others to recognize its harms.

Ironically, the overused claims of hypocrisy in political conversation does not sap the claim of its charge. Rather than draining the criticism of meaning, endlessly volleyed and widely believed claims of hypocrisy in politics and law amplify the subtle yet devastating toll exacted on our legal system. Put plainly, legal hypocrisy threatens unique damage to the very rule of law. Though related to other evils picked out under the banner of “Rule of Law,” hypocrisy is a particular type of legal harm that cannot be fully accounted for by looking to other related defects. The harms of legal hypocrisy are all its own and are made more dangerous because they are too often elided with other defects of law.

Legal hypocrisy is a much less abstract and more immediate danger to law than many defects which have attracted a disproportionate share of the attention from legal philosophers. Worse still, legal hypocrisy is doubly harmful in that it harms not only those who are the direct object of hypocritical injury but insidiously harms even the powerful who allow hypocrisy to continue for their immediate advantage. These unique harms can combine faster than one imagines to drain the legitimacy – that is to say the lifeblood – out of a legal system. Lest readers attribute such statements to the usual academic handwringing and exaggeration, one need only spare a glance at other nations which have slid down the path from mottled corruption to hypocrisy to widespread

cynicism. A conversation with a Kenyan cabdriver or a Nigerian shopkeeper provides stark warnings of the dangers to the rule of law that lie in legal hypocrisy. No matter how noble the person or disciplined the worker, citizens of these countries all too often speak of the legal system in their countries with a tone of utter disillusionment. I speak of a disillusionment that is grounded in more than the feeling that some in government are greedy or corrupt. Rather, it is a cynicism born of the knowledge that the legal system itself is deeply hypocritical, pretending to chase certain avowed goals while being wholly orientated to another. When a legal system is hypocritical it simply becomes a (barely) disguised tool for power. It communicates to citizens that they are not to be taken seriously as agents with moral claims deserving of respect or to whom uses of power need be justified. Citizens find themselves shrugging at the meaninglessness of not just political statements but legal pronouncements; it is this attitude that one sees in the detachment of the Nigerian and Kenyan. It is the view of one who regards the legal system with cool remove, no longer bothering to inspect it for legitimacy. At least as related to the rule of law, it is the view of citizens defeated. And it is a warning.

Understanding hypocrisy in morality is not without controversy much less describing the political vice I term legal hypocrisy. I will begin by describing the moral vice of hypocrisy. Though I will not attempt settle every controversy surrounding definitions of hypocrisy, I am confident that the account described is satisfactory for moving forward. More challenging is translating the description of a personal vice to fit institutional practices, that is to say describing the characteristics of legal hypocrisy. The primary, not to say only, reason this is challenging is the difficulty of assessing hypocrisy in the institutional setting of disparate and sometimes conflicting intentions. Secondly, care must be taken to distinguish legal hypocrisy and its particular harm from straight-forward poor treatment. Still, once the shape of hypocrisy is clearly defined, hypocrisy can be seen as a moral description which can be applied not only to persons and intentional states but to institutions and institutional positions.

After sketching out a view of what legal hypocrisy is, it is important to isolate its unique features and harms; that is to say what legal hypocrisy is not. To do this, it is crucial to

note the ways in which legal hypocrisy differs from other legal defects. A useful starting point is the most celebrated exploration of the internal normative demands of a legal system, Lon Fuller's *The Morality of Law*. Though Fuller touches upon myriad flaws of a legal system, he pays little attention to the vice of legal hypocrisy. Nor is the harm of legal hypocrisy properly captured in other related defects such as discrimination; indeed, eliding the two results in frustration of valid normative claims and harm to the rule of law. Even in the related jurisprudential literature of coherence in law, the dangers of legal hypocrisy have received little sustained attention. Legal hypocrisy (like moral hypocrisy) has unique faults and harms.

Even if one agrees with the description of legal hypocrisy, applying the diagnosis is surely fraught with controversy. While I will suggest some tentative places in which a claim of legal hypocrisy might sound, my comments in this regard will be preliminary. I doubt very much that over current issues of great importance there will be many uncontested applications of legal hypocrisy. Nonetheless, pointing out a few candidates will give shape to the model.

Whether the examples, both historical and current are entirely convincing, they serve the important purpose of allowing one to focus on the harms of legal hypocrisy. I conclude by exploring the distinct two fold harms of legal hypocrisy. First, legal hypocrisy injures those who may be described as the primary victims by sanctioning a particular way of taking advantage of them. Secondly, legal hypocrisy frustrates the normative claims of those victims by undermining the language in which they can press their claims and obscuring the validity of those claims to those to whom they are addressed. Third, legal hypocrisy communicates a view to its direct victims of their inferiority and insults them by ignoring their nature as rational agents. In a way that is worse than being the victim of moral hypocrisy, being the victim of legal hypocrisy is to be treated with contempt.

Lastly, legal hypocrisy is doubly dangerous because it harms not only its direct victims but those who engage in the hypocrisy. This is not only because of the straight-forward analogy with other moral vices, for example, the way cruelty corrupts those who commit

it as it hurts those who are its victims. Hypocrisy is distinctive in that it undermines the bonds of integrity and trust that preserve the rule of law. Thus, by undermining this integrity, we weaken the bonds of fidelity to law. Ultimately, legal hypocrisy is a legal vice. It corrupts not just a society generally but those very great goods that are served and uniquely preserved by law.

Part I: Hypocrisy

The ease with which charges of hypocrisy are hurled belies the slipperiness in defining exactly what constitutes hypocrisy. This slipperiness is due in part to the peculiar fact that hypocrisy is a vice defined by its relationship to other vices; to be hypocritical, one intuitively feels, is to be false to other moral values. The once removed nature of the vice of hypocrisy splinters the moral assessment many attach to it. Judith Shklar saw hypocrisy as the great unforgiveable accusation of our age, recklessly tossed about to camouflage substantive moral disagreement.⁸ Michael Walzer sees the redemptive quality in hypocrisy in that the hypocrite at least tacitly acknowledges that there are communal moral norms he is breaching.⁹ Others argue that hypocrisy, isolated, is relatively benign. On this view, the hypocrite who hides his cruelty is blameworthy for his cruelty; that he is hypocritical adds little to our condemnation.¹⁰ On the far end of the spectrum, Nietzsche doubted that modern man held convictions strong enough that they could betray them; thus he almost longed for people strong enough to be hypocrites.¹¹ What common view of hypocrisy can be taken from these disparate views?

It may be best to start with the classic explication of hypocrisy in the work of philosopher Gilbert Ryle. Ryle certainly captures a core truth of our intuitions of hypocrisy when he describes hypocrites as “people who pretend to motives and moods...[a person who] pretends to motives and abilities other than one’s real ones, or [] pretends to strengths of

⁸ Judith N. Shklar, *ORDINARY VICES*, 45-48, 63-65, 80-81 (1984).

⁹ MICHAEL WALZER, *JUST AND UNJUST WARS*, 19-20 (1977).

¹⁰ Christine MacKinnon, *Hypocrisy, with a Note Integrity*, 28 *AM. PHIL. Q.* 321 (1991).

¹¹ FRIEDRICH NIETZSCHE, *THE TWILIGHT OF THE IDOLS*, 73-74 (1964).

motives and levels of ability other than their real strengths and levels.”¹² Further, Ryle proposes that to be hypocritical is to be insincere or calculated in one’s manner to give a false impression.¹³ Thus to be hypocritical implies deliberately avoiding “saying what comes to one’s lips, while pretending to say frankly things one does not mean.”¹⁴

Though much of what Ryle proposes applies naturally enough to the archetypal case of hypocrisy his account misses the mark by being both over and underinclusive. Ryle’s remarks are overinclusive because he focuses not on hypocrisy *per se* but on the deceit that all too often accompanies hypocrisy. Yet deceit by itself is not sufficient to ground a charge of hypocrisy. There are many people who may deliberately “avoid saying what comes to their lips” without being seriously liable to the charge of hypocrisy. The polite guest that praises an uninteresting meal or an atrocious but much beloved family heirloom does not immediately illicit our sense that they are hypocrites.¹⁵ A parent might quite commonly fake being very much upset at a rather predictable fault of her child in order to impress a lesson upon them. A teacher may pretend that they would never have taken a short cut preparing for class to set a standard for their student. A lawyer in a negotiation pretends to be in disbelief at the offer on the table. All create a false impression of their motives and moods or the strengths of their abilities yet none are obviously hypocrites.¹⁶

Thus hypocrisy is not simply deceit but it is a special and typically blameworthy kind of deceit.¹⁷ The actors in our following examples would be open to a charge of hypocrisy only under certain further conditions. Imagine that the house guest has long proclaimed a policy of ruthless honest about food, décor and other aesthetic matters only to help themselves to the social lie when dining at his boss’s home. Or that the teacher who has long advocated holding students up to realistic and attainable standards that they

¹² GILBERT RYLE, *THE CONCEPT OF THE MIND*, 60TH ANNIVERSARY EDITION 153 (1949).

¹³ *Id.* at 162.

¹⁴ *Id.*

¹⁵ Béla Szabados, *Hypocrisy*, 9 CAN. J. PHIL. 195, 196 (1979).

¹⁶ *Id.*

¹⁷ Eva Feder Kittay, *On Hypocrisy*, 13 METAPHILOSOPHY 277 (1982).

themselves would consistently uphold. These persons would now appropriately be called hypocrites.¹⁸

What makes the above cases of hypocrisy is that in each the actions do not merely show some sort of deceit but that they evidence a deceitful act which violates the self-avowed standards of the hypocritical actor.¹⁹ The reason the social politeness of declaring Grandma Edna's tchotchkes beautiful does not necessarily make one a hypocrite is because few of us value honest above all other moral values including caring for the feelings of others.²⁰ Indeed, one may often deflect a charge of hypocrisy by pointing out that one is not betraying self-avowed standards but balancing a conflict of values – here honesty against kindness. This is why Nietzsche romantically mourned hypocrisy, for he felt modernity had so seriously eroded the strength of values that most people did not have the strength of convictions to even *be* hypocritical.²¹ Thus, only the aesthetic fanatic who, helping himself to social politeness at the opportune moment, is open to the charge of hypocrisy.

Notice that each of the above actors have merely been described open to the charge of hypocrisy. This is because hypocrisy bespeaks a certain amount of betraying or ignoring the values one has avowed. The surreptitious snacker, caught hamburger in hand, may convince the accusing friend that he genuinely believes that fast food poisons the mind and body but that he simply caved to a contemptible craving. So too when your friend who has a mistress tells you of why your embarking on an affair would be a betrayal of your marriage vows. The suffering in his voice and confessions of self-loathing may hold at bay one's accusations of hypocrisy. Some acts that violate our genuinely held values are not acts of hypocrisy but evidence of weakness of will.²² Some actors may be

¹⁸ Béla Szabados, *Hypocrisy*, *supra* note 15, 196-197.

¹⁹ *Id.* at 197.

²⁰ Christine McKinnon, *Hypocrisy, With a Note on Integrity*, 28 AM. PHIL. Q. 321, 324 (1991).

²¹ FRIEDRICH NIETZSCHE, THE TWILIGHT OF THE IDOLS, *supra* note 11.

²² INSERT ARISTOTLE. Judith N. Shklar, ORDINARY VICES, *supra* note 8, 54; Béla Szabados, *Hypocrisy*, *supra* note 15, 199-200; Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 282; Dan Turner, *Hypocrisy*, 21 METAPHILOSOPHY 262, 263 (1991).

in an even more extreme position of professing to not be in control of their will. This may be the case when the drug addict beseeches a friend not to start doing drugs.²³

In the unruly world, without its philosophical niceties, the line between weakness of will and hypocrisy is often blurry, read more by experience than by applying crisp analytical distinctions. Often the fact that someone is open about failing to live up to their values convinces us that they genuinely hold themselves accountable to those values.²⁴ This is where a lack of deceitfulness can be an important defense against a charge of hypocrisy. The absence of deception, however, is not sufficient to always dispel the charge of hypocrisy. Honest or not, where one consistently fails to live up to their declared values, we rightfully grow weary of their claim that they are merely giving in to temptation and begin to suspect them of hypocrisy.²⁵ The friend who eats cheap burger after burger or has tryst after tryst begins to lose credibility. Though, it is difficult to draw a bright line between akrasia and hypocrisy, the question will remain, to what extent do the person's actions show that they are false to their professed values? Ryle's definition is ultimately overinclusive because not all deceit is hypocritical; hypocrisy is defined in part by deceitfulness that cuts against one's avowed values.

If Ryle's is overinclusive in conflating deception with hypocrisy, it is underinclusive in tying deception only with explicit deception. To be fair, though Ryle's examples focus on conscious decisions to deceive it is not clear he need be so limited. Ryle, after all, is not tied to the notion that one need always act with explicit intentions, reminding us that one often has imperfect access to their own thoughts or motives.²⁶ Still, Ryle's focus on one pretending to false moods and motivations and refraining from what comes to one's lips overly focuses on conscious and explicit hypocrisy.

²³ Dan Turner, *Hypocrisy*, *supra* note 22, 265. See also, Saul Smilansky, *On Practicing What We Preach*, 31 AM. PHIL. Q. 73, 77 (1994); Roger Crisp and Christopher Cowton, *Hypocrisy and Moral Seriousness*, 31 AM. PHIL. Q. 343, 345 (1994).

²⁴ *Id.* at 263-264.

²⁵ Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 282-284.

²⁶ GILBERT RYLE, *THE CONCEPT OF THE MIND*, *supra* note 12, 149-162.

Acting explicitly against one's values is only the most obvious way one can violate moral norms they avow. Another way one may betray moral norms is to fail to act as they require one to act. Take the example of someone who castigating a hunter, charging that hunting is *per se* cruel to animals. The hunter fires back, accusing the critic of being a hypocrite for having had a steak dinner the night before. "You accuse me of being cruel to animals, yet you happily eat meat, week in and week out that you can only afford because of a huge industrial agricultural complex which grows animals in the most horrifying and painful conditions. At least I go hunt my meat while you simply turn a blind eye to the suffering you so condemn, you hypocrite." More subtly, one can fail to appropriately cohere their lives to the moral values they profess. In the case of our Victorian who professes the value of charity, one may find her hypocritical upon learning of the meagerness of her contributions of time and money to charity.

The hunter's charge of hypocrisy is instantly recognizable not because he accuses the critic necessarily of having consciously acted against her values. Rather, the hunter notes that his accuser is guilty of ignoring the kind of actions which her avowed values require. By failing to inspect the world around her and discover the source of her endless bounty of meat, the accuser displays a blameworthy inertness to the moral values she professes to hold. That is to say, we recognize hypocrisy in moral complacency in matching our acts to our professed values.²⁷ The classic example is found in the Bible:

Do not judge lest you be judged yourselves. For in the way you judge, you will be judged; and by your standard of measure, it shall be measured to you. And why do you look at the speck in your brother's eye, but do not notice the log that is in you own eye? You hypocrite, first take the log out of your own eye, and then you will see clearly enough to take the speck out of your brother's eye.²⁸

Christ teaches that the values with which we judge the world first and foremost demand observation from those who apply them.

The hypocrisy exemplified here is the easy hypocrisy of complacency, betraying your values not by consciously acting against them but by refusing to live up to the standards

²⁷ Judith N. Shklar, *ORDINARY VICES*, *supra* note 8, 47, 54-55

²⁸ Matthew 7:1-5.

one avows. Unlike Ryle's focus on explicit and willful deception, such hypocrisy is often evidenced unconsciously, by an unwillingness to inspect our own actions and motivations with a clear eye or to avoid noticing unattractive moral facts about the world that are indicted by our moral standards.²⁹ Even more subtly, if controversially, some may find hypocrisy in those who do not ignore the demands of their avowed moral values but rather adopt moral values so meager that they will rarely make demands of them at all.³⁰ The social justice reformer who does not seek to exploit others but blithely ignores that the bevy of servants around her is only made possible by unjust economic relationships strikes many as the archetypal hypocrite.³¹ Judith Shklar similarly notes the hypocrisy of the Victorian middle class, who despite their avowals of charity, turned a blind eye to the crushing poverty around them.³²

Much as conflicts in values and weakness of will complicated the connection between hypocrisy and deceit, parallel issues can make it difficult to determine hypocritical complacency. Obviously, not every failure to doggedly pursue a moral value legitimately makes one a hypocrite for there are competing moral values and limits on the resources one can dedicate to any goal. A parent can note that they value their children's education consistent with not spending every dollar of disposable income on tutors so long they have provided adequately for those children's schooling. A more complicated case is the example of our economic reformer. I take it that where such reformers tries to comport their life with their values – paying what they take to be just market rates, seeking out fair trade partners and working towards political and structural changes in the economy - they are not hypocrites, though they may admit that they remain participants in an unjust system.³³ In some cases that vaguely resemble complacency, one will fall short of what one values simply because one lacks the resources to fulfill these demands at all. So in the extreme case a parent will genuinely profess that they believe music education is important for their children while bemoaning the fact that they cannot afford the expense

²⁹ Béla Szabados, *Hypocrisy*, *supra* note 15, 208-210; Roger Crisp and Christopher Cowton, *Hypocrisy and Moral Seriousness*, *supra* note 23, 343-344.

³⁰ Roger Crisp and Christopher Cowton, *Hypocrisy and Moral Seriousness*, *supra* note 23, 345; see also PLATO, *THE REPUBLIC*, 331b1-5.

³¹ Judith N. Shklar, *ORDINARY VICES*, *supra* note 8, 66-67.

³² *Id.* at 54-55.

³³ Saul Smilansky, *On Practicing What We Preach*, *supra* note 23, 74.

of violin lessons. At some point, of course, the unwillingness to dedicate enough resources or make any sacrifices for a goal that one professes to value will indict one as a hypocrite.³⁴ That the parent who professes to care deeply about their child's education can always find money for a vacation but not for tutors will raise our suspicions. As before drawing the line between a lack of ability and hypocritical complacency will be a matter of judgment.

Nonetheless, complacency makes clear that hypocrisy need not be grounded deliberate deceit or violation of one's moral norms. The model proposed by Ryle was underinclusive insofar as it focused on explicit instances of hypocrisy. Since hypocrisy is at core about the gap between one's actions and one's avowed moral norms, one can be hypocritical by simply failing to live up to the demands of those norms.

One feature has been strangely lost in pursuing the distinctions above. I take it to be true that, strictly speaking, hypocrisy need not concern something of great importance, such as in the case of the fast food snacker. Hypocrisy need not even be something we condemn; we may be happy that our partner swallows her fanatical commitment to truth and compliments Grandma Edna's baubles.³⁵ Yet it would be strange to allow fine analytical distinctions make one lose sight of the fact that hypocrisy is nearly always a charge of moral condemnation and a serious one at that.³⁶

Some philosophers have argued that the specialness of hypocrisy lies in morally blameworthy deceit about important moral values. Béla Szabados notes that Ryle's focus on deceit misses the fact that hypocrisy is typically a term of moral condemnation.³⁷ Eva Kittay argues that the hypocrite deceives in areas of real importance such as religious and interpersonal matters.³⁸ Christine McKinnon similarly believes that the charge of hypocrisy is appropriate where one is deceived in personal areas we take seriously.³⁹ But

³⁴ *Id.* at 73.

³⁵ Larry Alexander and Emily Sherwin, *Deception in Morality and Law*, 22 *LAW & PHIL.* 393 (2003).

³⁶ Judith N. Shklar, *ORDINARY VICES*, *supra* note 8, 45-47; Béla Szabados, *Hypocrisy*, *supra* note 15, 197.

³⁷ *Id.* at 196-197, 205.

³⁸ Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 279, 285-286.

³⁹ Christine McKinnon, *Hypocrisy, With a Note on Integrity*, *supra* note 20, 322.

the above examples reveal that hypocrisy is not definitionally limited to blameworthy misleading in important areas. One might find it morally praiseworthy that one's friend put aside their fanatical and arrogant belief that expressing their honest opinion always trumps the hurt feelings of those insulted.⁴⁰ A friend who constantly professes that eating fast food is a sign of weakness caught with a cheap burger in his hand may be accused of hypocrisy but all may agree that it is a rather trivial hypocrisy.

Others have questioned why hypocrisy is, by itself, a matter of moral concern. If Bob is accused of being hypocritical because he pretends to be kind-hearted when he is in fact cruel, is it not his cruelty that deserves condemnation rather than the hypocrisy itself?⁴¹ Noting why this initially sensible suggestion fails brings into focus the particular harms of hypocrisy. The first and most intuitive response is that hypocrisy is often interwoven with deceiving another to gain an advantage.⁴² In the most vulgar cases, the nature of this advantage can be straightforwardly material. Among the archetypal literary hypocrites, Moliere's *Tartuffe* and only slightly more complicated, Dickens' *Uriah Heep*, stand as prime examples. Both dissemble, manipulate and lie in order to serve their own ruthless ambitions and gain advancement and wealth from their benefactors. *Tartuffe* continually proclaims his weaknesses to Orgon, the master of the house, knowing that this false modesty will ever more deeply ingratiate him, while he plots to relieve Orgon of his wealth, his house and his very wife.⁴³ *Heep* similarly proclaims his modesty and humble status, attempting to solicit David Copperfield's favor, all the while plotting to blackmailing his employers and marry their daughter.⁴⁴

⁴⁰ Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 280.20 So we need not only attach the charge of hypocrisy when some one acts against positions we positively value. We may recognize that a person is a hypocrite because they betrayed some avowed value they hold though we do not hold that same value. It is true, however, that given that hypocrisy is usually condemned, we would be hesitant make prominent our charge of hypocrisy.

⁴¹ Christine McKinnon, *Hypocrisy, With a Note on Integrity*, *supra* note 20, 321. This view of hypocrisy as derivative is usually raised when, as above, hypocrisy leads to people acting in ways we find laudable. See Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 277.

⁴² Christine McKinnon, *Hypocrisy, With a Note on Integrity*, *supra* note 2039, 322.

⁴³ MOLIÈRE, *TARTUFFE*, *supra* note 1.

⁴⁴ CHARLES DICKENS, *DAVID COPPERFIELD*, XXX

The point here is straight forward. Deception may not be either sufficient or necessary for hypocrisy, but the standard case of hypocrisy entails misleading others for one's own advantage. The advantage may be exceedingly obvious, as where Tartuffe seeks material and romantic gains. But it may be relatively more subtle as where one seeks status by pretending to be more charitable or upstanding than they are in reality. This is why we level the charge of hypocrisy at the politician who preaches family values while secretly carrying on extramarital affairs. It is the typical desire to gain an advantage that has led many to define hypocrisy as deceitful behavior in areas that we think of as important, chiefly moral and religious realms.⁴⁵ Though as pointed out, one could conceivably be hypocritical in trivial areas – the fast food snacker served as example – the payoff is usually insufficient to warrant studied hypocrisy. More importantly, it is this manipulation which marks the separate moral injury of hypocrisy, quite apart from the underlying vice one might isolate. The injury of hypocrisy is contained not merely in the greed of Tartuffe and Heep. There is a separate injury in their intent to use and manipulate others to serve their greed.

Once isolated, the independent injury of being manipulated is immediately familiar. Many things of tremendous moral value depend entirely on their being freely and honestly given. Friendships are importantly distinct from economic exchanges because they are embedded in relationships of genuine mutual affection and esteem.⁴⁶ To be loved is one of the most important human desires. But friendship and love are valuable when they are sincere; when actions genuinely evidence the corresponding emotional state.⁴⁷ To find out that the person you love is merely pretending to love you for your wealth or looks is to feel injured in a way that is distinct and deeper than to find out that a thief is planning on robbing you.⁴⁸

Thus being harmed by hypocritical deceit is to be harmed separately from the greed, selfishness or whatever else that may motivate the injury. The injury resides in more than

⁴⁵ Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 279, 285-286.

⁴⁶ *Id.* at 285-286.

⁴⁷ *Id.*

⁴⁸ *Id.*

the fact that another seeks to gain an advantage. It even transcends the fact that one person victimizes another. It is a special injury in that one is manipulated and used for those ends. It is an injury that comes with built in insult. In the way that is true of being used, it is on some level a cavalier or contemptuous disregard of one's personhood.⁴⁹

Further, because hypocrisy works by betraying avowed morals and values, hypocrisy causes the unique injury of damaging the trust we place in expressions of moral values or in the very strength of those moral values.⁵⁰ One of the critical sins of hypocrisy is that it reveals an unwillingness to take the demands of morality seriously.⁵¹ Either by duping us in order to use our moral intuitions against us or by turning a blind eye to the moral demands she avows, the hypocrite shows a casual contempt for us and for our moral codes.⁵² By so doing, she undermines our faith that these codes are important and to be taken seriously by all within our community.⁵³ Thus hypocrisy undermines the very value of moral goods by making their expressions seem cheap and uncertain.⁵⁴ There is nothing overly abstract in noting the harm to faith in the expression of moral values or the confidence in those values when confronted with evidence of hypocrisy. One need look no further than the distrust in outwardly pious behavior and in the strength of the avowed moral values of the Catholic Church wrought by the ongoing crisis of sexual abuse and cover-up by priests and officials. Hypocrisy is dangerous not just because it attacks a person but because it undermines trust and fidelity to moral values – friendship, love or faith – on the whole.

A quick summary. Hypocrisy is not solely defined, as Ryle indicated, by faking moods or motives. Parents often pretend to be enthralled by their child's artwork and friends will compliment a quite middling dinner. Rather, hypocrisy exists when one pretends in

⁴⁹ *Id.*

⁵⁰ Alasdair MacIntyre points out the similar harms done by lying, which, of course, is often if not always a part of hypocrisy. Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?* in GRETE B. PETERSON (ED), *The Tanner Lectures on Human Values, Vol. 16 (1995)*, 307, 355-356.

⁵¹ Roger Crisp and Christopher Cowton, *Hypocrisy and Moral Seriousness*, *supra* note 23, 347.

⁵² *Id.*

⁵³ Christine McKinnon, *Hypocrisy, With a Note on Integrity*, *supra* note 20, 327-329.

⁵⁴ Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 279, 285-286.

a way that undermines our avowed (or self-avowed) moral values. That is why genuine conflicts of values or weakness of will may mean one is not a hypocrite but endlessly repeated examples of weak will rightfully raise suspicion in one's sincerity. Further, hypocrisy is not only evidenced when one acts against avowed moral values but by hypocritical complacency; when one omits to act as required by avowed moral norms. Again, this may be excused by lack of resources but consistent unwillingness to dedicate resources when available will open one to the charge of hypocrisy. Lastly, hypocrisy is nearly universally vilified because it is so often instrumental and manipulative. The hypocrite typically betrays avowed moral norms to gain an advantage, whether it be the benefit of admiration without the work and sacrifice or simply trying to steal another's money. The hypocrite all too often seeks to manipulate and use others for their gain. Worse, in doing so, they not only victimize the person they deceive but they attack the very moral norms and values to which they pretend. Hypocrisy is dangerous because it undermines faith in and fidelity to in many of our most important normative values.

Part II: Legal Hypocrisy

The picture of hypocrisy painted above is, I believe, common enough to recognize ordinary life. Of course, part of the reason is that this picture turns on ordinary experiences with single persons where the charge of hypocrisy is most at home. In particular, the ordinary hypocrite is condemned as having a blameworthy intentional state; either they intend to mislead others for their advantage or they are lax in failing to live up to their avowed moral standards. If the claims of hypocrisy rely entirely on the picture of a person with natural intention state, can we imagine that law, an institution rather than a person, can be properly indicted as hypocritical? After all, the difficulty of treating Congressional pronouncements, such as statutes, as the product of a single intentional actor is the source of endless academic debates surrounding the perennial question of legislative intent. How can we expect to do any better in constructing a coherent actor out of "law" who can be said to have behaved hypocritically?⁵⁵

⁵⁵ One could point out that even in the case of natural persons the charge of hypocrisy does not depend on the claim that natural persons have perfectly accessible mental or intentional states. Gilbert Ryle, *The Concept Of The Mind*, supra note 12, 149-162; Alison Gopnik, *How Do We Know Our Minds: The Illusion of First-Person Knowledge of*

First, it is important to notice that nothing in the model of hypocrisy painted above relied on mental or intentional states. Roughly, I have described hypocrisy as deceiving others in ways that violate dearly held or avowed moral standards or acting in ways that ignore the moral pull of those moral standards. Additionally, I noted that the charge of hypocrisy is typically a moral criticism because it is so often attempted in order to manipulate others to gain an advantage. None of this commits one to claims regarding mental states applies naturally to social institutions.

The reason this is so is both obvious and yet easily missed. Institutions, just the same as persons, have avowed moral values.⁵⁶ This is true for corporations, clubs, nations and legal systems.⁵⁷ A painful example was noted earlier; the reason the current crisis in the Catholic Church cuts so deeply is because the institution is one that is meant to be based on moral values of faith, Godliness, respect and most of all, of caring for its members. There is no doubt that a criminal biker gang engaged in systematic sexual abuse would raise our outrage. But it would not generate the feelings of betrayal that accompany hypocrisy. Because we understand that some groups are dedicated to the relief of poverty and others espouse the pursuit of scientific truth as their reason d'être, we understand that corporate bodies and normative systems have avowed moral values.⁵⁸

Intentionality, 16 *Behav. & Brain Sci.* 1 (1993); Daniel C. Bennett, *Consciousness Explained*; Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychol. Rev.* 231 (1977). But rather than trying to undermine the picture of a coherent individual, it is more useful to make firm the picture of legal hypocrisy as institutional hypocrisy.

⁵⁶ Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, 3 *LAW & PHIL.* 355, 367-374 (1984); Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, 25 *Oxford Journal of Legal Studies* 369, 372-373 (2005). Scott Shapiro has thoughtfully engaged classic questions of analytical jurisprudence by turning to a more organizational view of the purposes of legal systems. IF the questions and conclusions are different, we share the view that there is much moral charge in taking an institutional view of law. SCOTT J. SHAPIRO, *LEGALITY*, 6-7 (2011).

⁵⁷ We engage in the habit of attributing motivations, reasons and normative stances in the perfectly normal instance of requiring agencies to give reasons for their actions and decisions. This sort of thinking can be expanded beyond agencies as our demands are aimed at the interlocking groups that make up the legal system. Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*; 59 *DEPAUL LAW REV.* 1091, 1096, 1107-1109 (2010).

⁵⁸ Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, *supra* note 56, 372-373.

Related, it is worth noting that the claim of hypocrisy as described is an ascription and thus can comfortably apply to institutions. Hypocrisy, in the sense used here, is not simply a description of a moral insult. It is a description of a shortcoming loaded with moral significance. Put another way, hypocrisy here is not used in its typical sense as an indictment of a character flaw. Rather it is a moral ascription. In this way, there is nothing strange about the ascription of moral value to an institution. We quite normally describe an army as cruel or a soccer team as elegant.⁵⁹ When used to point out a morally important feature of an institution, we can and do use morally significant terms in a way that is distinct from the description of individual character flaws.⁶⁰ Thus, if the objection remains that, in some sense, the description of legal hypocrisy borrows a legal ascription by way of analogy, I would argue that nothing significant is lost. Whether the indictment that an army is cruel is a proper ascription or an analogy to an individual's cruelty does nothing to take away from the gravity of the moral charge.

Once we recognize that institutions can, just as well as persons, have avowed moral standards, it is remarkable how clearly institutional hypocrisy tracks our considerations of personal hypocrisy. Institutional hypocrisy occurs not simply when the institution is "deceitful" about its practices but when that deceitfulness cuts against the institutions avowed moral values. In the case of law, this occurs when the legal system in one way or another misleads citizens about the ways in which laws serve its own espoused values.

Let us return to the example of the separate but equal doctrine in the United States. The genesis of the Civil War was rooted in a question about whether or not southern states had the right to maintain a system of slavery. The defeat of the South and the adoption of the 13th and 14th Amendment announced a new political moral vision, that of equality under the law. These values were enshrined in the Federal Constitution to expressly guide our political and legal values nationally.

⁵⁹ Daryl Glaser, *Does hypocrisy matter? The case of U.S. foreign policy*, 32 *Review of International Studies* 251, 252 - 253 (2006).

⁶⁰ *Id.*

Notwithstanding these newly avowed norms, it quickly became clear that Southern States were dedicated to using the law to undermine the vision of equality under the law at every turn. Thus the Southern States embarked on creating a legal system which pretended to recognize the equality of the newly freed slaves but in fact was designed to subjugate the black race. To put the point plainly, it was simply impossible to be aware of the separate conditions, facilities and rights meted out to African-Americans and be confused as to which legal regime was privileged. The idea that a white southerner could have surveyed black schools and neighborhoods been coolly indifferent as to which race was assigned which facilities and imagined them equal belies belief. Further, the Federal government quickly acquiesced in this charade, ceding the enforcement of segregation laws to the southern states for political reasons. While it would be naïve to imagine that any large institution could instantly rearrange itself around a new set of institutional, it is implausible to describe the adoption of the separate but equal doctrine for over a century as anything other than a decision to legally undermine the 14th Amendment's promise of equality under the law. In this sense, it is perfectly clear that (even) the facially neutral laws that regulated both races were deeply misleading; they were established merely to create an impression, if that, of equality while obscuring deep, systematic and institutionalized inequality.

Much as in the individual case of hypocrisy, institutional or legal hypocrisy will not be always be simple or self-evident. As lying to Aunt Edna about how much you like her rhinestone birds was a matter of a conflict of values – kindness versus truth – legal norms will often be confusing or misleading because they serve several goals at once. Indeed, this is more likely in the institutional case as legal norms are the product of various actors compromising between their various goals and values.⁶¹ Thus it may be arguable that in the first few years following the 14th Amendment there were genuine questions of how to implement the law including balancing it with other demands. Indeed, one might view the Civil Rights Act of 1875 as the last effort to pursue, in the face of resistance, the demands of equality preserved in the 14th Amendment. Following the Compromise of

⁶¹ Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

1877, which removed federal troops from the South, and the steady acquiescence of the Federal government in enforcing any viable notion of equality under the law and the institution of the “separate but equal” doctrine, there can be little doubt that the legal system capitulated its norm of true equality for political gains. Some may be tempted to describe this situation as a conflict of norms between political goods and a political value but this threatens to empty our moral values of their meaning. Moral values are in conflict when we can admit that two or more morally admirable values call us to serve them. To equate political horse-trading with a conflict in values would be analogous to claiming that Tartuffe was not a hypocrite but rather simply experiencing a conflict of values between his gaining flesh and gold versus the value of honesty. I suppose such a view is possible but it risks the moral wrong of hypocrisy fading before our eyes.

Analogous to the individual case, there will be times when legal institutions fail to uphold their avowed moral values due to a weakness of institutional or political will. A law school or law firm dedicated to judging applicants solely on merit may find itself accepting a weaker applicant who is faculty member’s daughter or partner’s son. In such cases, we might think of this as a moment of institutional weakness of will rather than a wholesale rejection of its moral standards. As in the individual case, there will be a blurry line where one begins to view weakness of will as hypocrisy. Consistent violations of an avowed moral code however, whether by a person or an institution, undermines the claim that the person or the institution takes that moral code seriously. And again, the extent to which the institution is honest and openly addresses failures of will may influence our judgment on whether such examples constitute full fledged hypocrisy. Here too our example gives good reason to describe the separate but equal doctrine as hypocritical. It is impossible to describe a prolonged and systematic betrayal of the ideal of equal protection under the law, which lasted nearly a century, as an episodic moment of weakness of will.

Turning to the second prong of our analysis, the parallels of hypocritical complacency are even more aptly applied in the case of institutional hypocrisy than in the individual case. A legal regime, or a component part of it, may express a commitment to certain moral

values then do little to realize them. The institution may not establish the procedures needed to ensure the avowed value is served, reward observation of that value among its employees or dedicate enough time, energy or money to its realization. The legal axiom “better ten guilty men go free than one innocent man suffer” may be hypocritical if the resources it takes to ensure that the innocent do not suffer are widely absent and cheap shortcuts, such as overcharging and then plea bargaining are widely used to avoid establishing true guilt or innocence. Of course, just as in the individual case, we will remain sensitive for institutions that fall short of their avowed moral standards due to lack of resources. If each criminal case were litigated fully, the criminal law system would come to a screeching halt. But chronic and unrepaired underfunding may eventually lead to the conclusion that the system is hypocritically betraying its values through complacency.

One example of hypocritical institutional complacency was the spousal exception to rape laws in modern American law. As noted, early rape laws were based on a conflicted view of women, a view in which women were certainly not considered the autonomous equal of men. On such a view, the idea that a woman could not be raped by her husband, to whom she had given irrevocable sexual consent upon marriage was, if not attractive, possible. Increasingly, however, women sought for and the law began to recognize the idea that women were to be considered autonomous equals. One, not to say the only, example of this was the passage of the 19th Amendment, which granted women the right to vote. To be sure, this recognition was slow and halting. The Equal Pay Act, for example, did not pass until 1963. Nor could one imagine that a new norm of equality would instantly take hold. The point here remains that as the law began to recognize the autonomy of women, the view of a woman having granted consent upon marriage to her sexual personhood which she could not control was unsupportable.

Given that the underlying view of women as non-autonomous was eroding, an exception to the rape laws for married women increasingly revealed hypocritical complacency. I describe this as complacency because the legal system (in this case) did not institute new legal methods of undermining the value of equality. Rather, the legal system left in place

an antiquated legal norm that failed to appropriately respect the newly developing legal values. The failure to live up to the new legal values could be found first in the continued *de jure* marital rape law exception. The first state to eliminate the first state to remove the marriage exception for rape was South Dakota in 1975. The last state to remove the exception was North Carolina in 1993. Even today, rape in the context of a marriage remains a lesser offense in 33 states. Besides the complacency found in the *de jure* treatment of marital rape, the systematic lack of enforcement of the marital rape laws are also evidence of legal complacency.⁶²

In the case of personal morality, we noted that a lack of resources can often be confused with complacency. Certainly, the question of whether the overwhelming use of plea bargaining to avoid the cost of trials in the American legal system is a matter of strained resources or a system that complacently ignores the demands of determining true innocence or guilt may be confusing because of the resources that full prosecution of every trial would require. The case of hypocritically ignoring marital rape seems less susceptible to such a critique. Though the cost of realizing complete legal equality for women may represent a tremendous investment and reordering of the legal system, ignoring the prosecution of those who rape women in the context of marriage is attributable to inexcusable complacency.

A moment's pause is necessary to inspect this analogy. It may seem, at first blush, that to describe legal norms as "misleading" or "complacent" is to trade on an analogy with the purposeful deception of a person and thus to rely on a picture of mental states or intentions that is out of place in the institutional setting. This need not be the case. Institutions can manipulate or mislead without having mental states and intentions identical to persons. It is of course true that institutions act through persons. But institutionally hypocrisy is neither identical to nor captured by individual attitudes. Institutions are misleading when they have procedures, rules or norms that come to be known as misleading. Institutions are complacent when they systematically refuse to invest available resources into projects demanded of them. This can be the case because

⁶² CITE

individual actors desire deception, as in when officials promulgate laws under deliberately misleading titles, e.g. “The Protection of Natural Resource Bill” that actually strips prior protections from law. But it may well be the case when no particular actor aims at deception or complacency but the culmination of many acts is known to be intentionally misleading or complacent. The automobile insurance company that generates profits because it meets the legal requirements for coverage even while all are aware that it offers no real liability protection in the case of an accident is an example. Likewise, the company that has endless procedures for dealing with unhappy customers which actually serves to frustrate customers into simply relenting is another.

Additionally, there are genuine cases where no individual in an organization intends deception but we rightfully describe the institutional practices as deceptive. Imagine a case where a group of company managers institute a complex financial fraud. They are arrested or flee the scene but because the information is not public, individuals continue to buy the fraudulent bonds, securities or goods. It may be that the original bad actors have left the institution but the misleading practices remain in place. One would still describe the company as engaging in a fraud. We quite rightfully see that individual intent and collectively misleading practices can come apart.

Noticing that institutional practices and individual attitudes can come apart is important exactly because it allows us to notice institutional hypocrisy without needing to locate it in the mental state of an individual. Imagine a despicable police officer who refuses to investigate martial rape charges because he openly admits he does not believe that women should be treated as fully autonomous individuals. His superior subscribes to the same view and thus does not reprimand or fire him. Can the policemen claim that there is no legal hypocrisy here because they, individually, are not acting hypocritically?⁶³ Or return to the hypothetical fraudulent financial firm. When a new board of directors takes over, can they avoid unwinding the scheme by claiming that they never, as individuals, intended to deceive others?

⁶³ I am grateful to my colleagues at the Cardozo School of Law Junior Faculty Workshop for pushing me on this issue and to Maggie Lemos in particular for the example.

The reason the answer to both is no is not located in the individual mental states of the actors but in their relationship to collective or institutional norms. The hypocrisy of the police officers lies in the betrayal of their role related duties. When police officers put on their uniform, they implicitly vow to uphold the law, not to prosecute their own personal prejudices. Similarly, the new board of directors is not responsible because they individually sought to deceive others, rather they are bound by their role to unwind the fraudulent practices of the company. Indeed, this is one of the most important contributions of understanding institutional hypocrisy. It corrects the view that individual actors can escape the responsibility of fixing hypocritical practices because they are not individually blameworthy. In any case, the key thing to notice at the moment is that institutional practices can be accused of complacency or be misleading quite apart from the mental states of any individual.

I have argued that institutions as small as a club and as broad as a legal system can suffer from the moral failing of hypocrisy in the same way as individuals. Yet much like individuals, there are important conflating variables that make it unclear when the charge of hypocrisy is appropriate. As a result, it will often be difficult to agree on diagnoses of legal hypocrisy. If the application of the term is too difficult, then recognizing this legal failing becomes merely academic (in the pejorative sense). Still, the fact that many cases of legal hypocrisy will be controversial does not mean that all cases will be. It is a mistake to discard moral criteria because it is hard to recognize when they are perfectly satisfied; it is easy to recognize when they have been horribly breached.⁶⁴

My claim has been simple. Once we understand that hypocrisy is to act against your avowed moral values, either by acting deceptively in violation of those values or by failing to act in ways demanded of those values require, we can see that hypocrisy can be a failing of institutions as well as persons. This is because many institutions, be they churches, clubs, corporations or normative systems, have explicitly avowed moral values

⁶⁴ LON L. FULLER, THE MORALITY OF LAW, XX (1964).

in a way that is quite analogous to individuals. Thus, hypocrisy is not tied to a picture of a natural person with individual mental states.

Much as in the individual case, claims of hypocrisy will in some cases be complex. There will be moments when what seems like a violation of an avowed moral norm will be attributable to conflicts with other held legal norms – conflict of values cases. Secondly, there will be times when an institution is dedicated to a moral norm but fails it in a moment of institutional weakness of will. Even more poignantly, institutions are susceptible to failing to live up to avowed moral values simply by being complacent. Again, this will be complicated when one has to disentangle failure to adequately pursue moral values due to lack of resources. Just as in the individual case, however, a chronic unwillingness to dedicate sufficient resources to realizing collective moral goals will indicate that the institution is merely paying that moral value lip service.

Part III: Legal Hypocrisy as a Unique Harm

The preceding section sought to persuade that hypocrisy can be viewed as a legal and institutional vice rather than a solely personal fault. This section addresses the opposite intuition. Not only is legal hypocrisy a possible legal fault but it is an obvious and conventional legal fault or so the intuition goes. This intuition does not deny that legal hypocrisy exists but rather rejects that claim that there is anything unique about what I have termed legal hypocrisy. The question it poses is whether there any unique threat to the rule of law posed by legal hypocrisy which is not perfectly well recognized in traditional understandings of the rule of law?

The first place one might look to see if legal hypocrisy is unique is Lon Fuller's seminal exploration of the internal moral values that guide the rule of law in *The Morality of Law*. In Fuller's classic, he uses the charming parable of Rex, the newly crowned king to isolate eight different legal faults, ways in which one can fail to construct a working legal system.⁶⁵ Fuller notes that legal systems (1) which fail to have specific legal norms that are generally applicable to broader circumstances, (2) have legal norms which are not

⁶⁵ LON FULLER, *THE MORALITY OF LAW*, *supra* note 64, 33-91.

made publically available, (3) have laws that are applied retroactively, (4) have legal norms which are unclear, (5) are plagued by legal norms that continually contradict each other, (6) require the impossible, (7) are inconsistent through time, endlessly changing (8) or fail to maintain congruence between the promulgated law and the actions of officials will have importantly failed to be a legal system at all. This is because failing these “internal moral demands” of law undermines the law’s ability to fulfill its primary purpose, that is, to guide human action.⁶⁶

Clearly Fuller’s criteria hint at need to avoid hypocrisy within the legal system and he clearly would have understood widespread hypocrisy to be a threat to the rule of law. Still the Fullerian criteria do not pay sufficient attention to the vice of legal hypocrisy. An inspection of the closest related internal moral criteria for law reveal why.

The first Fullerian criteria which is important for our purposes is the requirement to avoid contradiction between laws. There is no question that the use of contradictory laws can contribute to the hypocrisy of a legal system. But Fuller’s focus is not on laws that contradict by espousing on legal value will pursuing another. Fuller is focused on laws which command one action while simultaneously commanding another.⁶⁷ Fuller recognizes that such contradictory commands need not clash in a strictly logical sense. A law that commands that install car plates on one day while simultaneously punishing the action is not, formally speaking, contradictory; it merely commands that a man do something and be punished for it.⁶⁸ It is contradictory, however, in the sense that laws that conflict in this manner cannot rationally guide a citizen’s actions.

The second Fullerian criteria closely related to our topic is the requirement to maintain congruence between declared rule and official action.⁶⁹ Here Fuller notes the dangers of laws which declare the law of the land to be one thing but have no discernible

⁶⁶ *Id.* at XXX.

⁶⁷ *Id.* at 36, 65-68.

⁶⁸ *Id.* at 65-68.

⁶⁹ *Id.* at 38, 81-82.

relationship to the actions of officials.⁷⁰ Here Fuller is closest to what I describe as legal hypocrisy, noting that the congruence of law to official action may be undermined by “mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive towards personal power.”⁷¹ Fuller continues to note that the characteristic mood of managing this divergence, judicial monitoring and regulation of official actions, can “produce equally damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law.”⁷² Unsurprisingly, Fuller continues on to focus on the role of judicial interpretation, particularly the importance of examining the legislative purpose (not to say the intent of individual lawmakers) to guide the interpretation of incomplete or ambiguous laws.⁷³

The spirit of Fuller’s examples are surely cousin to the harms of legal hypocrisy. There is a sense in which the laws which enforced the separate but equal doctrine stood in contradiction to the letter and the spirit of Equal Protection Clause of the 14th Amendment and incongruence between official doctrine and enforced laws are often key in perpetuating legal hypocrisy. Clearly, those concerned about legal hypocrisy will be on guard against the legal flaws of which Fuller warns. Still, Fuller’s examples pay insufficient attention to legal hypocrisy as such and thus miss this important threat to the rule of law.

The reason is that Fuller’s examples focus more on the conflict between legal statutes rather than between legal norms and other more general legal principles and values. To make the distinction more stark, notice that permitting an exception for martial rape violated neither of Fuller’s requirements that laws do not contradict each other or that official actions cohere to official doctrine. Even in the Fullerian sense, the martial rape exception did not contradict another statute, other than to the extent to which exceptions

⁷⁰ *Id.* at 38.

⁷¹ *Id.* at 81.

⁷² *Id.* at 82.

⁷³ *Id.* at 83-91.

always import tension. Nor was the vice in the martial rape exception incongruence between official action and announced doctrine for the martial rape exception was, for much of the last century, the announced doctrine. Fuller's criteria certainly surround the fault of legal hypocrisy, indeed Fuller's work is critical because it so richly draws the dangers of legal systems succumbing to internal vice. But ultimately the Fullerian requirements fail to hold it square in our sights.

Another place where one might expect the fault of legal hypocrisy examined is in the rich analytical jurisprudential literature surrounding legal coherence.⁷⁴ Indeed, many of the faults of legal hypocrisy have been recognized, in one way or another, by the various scholars wrestling with concepts of legal systems displaying the independent value of normative coherence. These scholars have explored the extent to which law must be "coherent," "fit together," "display one point of view" or "speak with one voice."⁷⁵ Yet curiously, the authors engaged in this debate, rarely focus on the crux of the issue before us, how a particular type of incoherence, namely hypocrisy, both undermines the legal system and treats legal subjects with contempt.

The reason for this remarkable oversight is, I suspect, simply a divergence between the core goals of these different projects. It would be unfair to argue that those exploring coherence are uninterested in the ultimate effects of incoherence; after all, one of the core claims of these scholars is that to one extent or another, incoherence affects the ability of a legal system to be justified or legitimate.⁷⁶ Still, the jurisprudential scholarship on coherence tends to be focused inward on law, primarily motivated by questions of what determines a legally valid norm. Though discovering where legal norms are hypocritical may ground a view on whether or not such norms count as law at all, I will remain

⁷⁴ Coherence theories of law are related to but distinct from epistemic coherence theories, the most influential of which is Quine's. W.V.O. QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (2d rev. ed. 1980); W.V.O. QUINE, *On What There Is*, in FROM A LOGICAL POINT OF VIEW 1 (2d rev. ed. 1980); W.V.O. QUINE, *WORD AND OBJECT* (1960). For an illuminating contrast between epistemic and legal coherence theories see JOSEPH RAZ, *The Relevance of Coherence*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1994).

⁷⁵ For an excellent inspection of the landscape of coherence literature, see, Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, *supra* note 56, 371-372.

⁷⁶ *Id.* at 373; NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY*, 106-107, 152 (1978).

largely agnostic about any ultimate conclusions about this sense of validity. The issue of legal hypocrisy, while embedded in the conversation of legal coherence, focuses on a *particular* way that law is incoherent. More importantly, focusing on legal hypocrisy highlights the way in which incoherence can do moral harm both to the rule of law and to citizens.

Given the broad and varied nature of the writings on coherence, it takes a supreme act of will to avoid the tempting word play on its... lack of agreement. It would be impossible to adequately address the sophistications of the coherence literature without losing sight of our theme entirely. Rather than try to tackle the entire body of literature, I will contrast legal hypocrisy with the demands made by those who advocate legal coherence generally. Though I do not take on any particular scholar, Neil MacCormick's influential model will usefully serve as the skeleton around which to build our contrast. After examining those who explicitly advocate a view of law based on coherence, I will turn to the related work of Ronald Dworkin. Dworkin's important work is subtle enough that it is not obvious that he would describe his model as a coherence theory. Nonetheless, the affinities are immediately obvious and too powerful to ignore.

Coherence theories of law are a natural place in which to locate a theory of legal hypocrisy. Both theories defend the view that the legal system as a normative system can be seen as having seen as an institutional voice. Further, coherence theories have as a key premise that legal norms should be (or should be interpreted as) consistent both between other legal norms and the principles to which they respond. So in MacCormick's words, "The basic idea is of the legal system as a consistent and coherent body of norms whose observance secures certain valued goals which can intelligibly be pursued all together."⁷⁷ Importantly, MacCormick defines "consistent" as meaning that "however desirable on consequentialist grounds a given ruling might be, it may not be adopted if it is contradictory to some valid and binding rule of the system."⁷⁸ "Coherence" on the other hand is used to capture a sense of how the rules of a legal

⁷⁷ NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY, *supra* note 76, 106.

⁷⁸ *Id.*

system hang together; it describes the way legal norms can be taken together to pursue an intelligible and mutually compatible values or policies.⁷⁹ Likewise, Stefano Bertea notes that coherence requires more than the absence of inconsistency, it includes an idea of connectedness and of mutually supportive and a rationally reinforcing structure within a system of norms.⁸⁰ Bertea notes that coherence applies to a certain ordered fit among not just legal norms but legal principles and values as well.⁸¹ Most importantly, coherence theories hold that law can be coherent to a greater or lesser extent.⁸²

It is clear that theories of legal coherence have a great deal in common with the concerns of legal hypocrisy advanced here; indeed, legal hypocrisy may be a subset, but a very special subset, of incoherent legal norms. But because coherence theories are internally focused -- one might say coherence theories tend towards making analytical claims about law -- coherence theories will highlight claims that are orthogonal to issues of hypocrisy. Just as importantly, whether coherence theories of law are ultimately persuasive in their analytical claims, the concerns about legal hypocrisy remain.⁸³ Ultimately, legal hypocrisy is concerned not simply with normative coherence but with how claims of normative coherence are *used* and the extent to which they treat citizens with a lack of respect.

A moment to unpack the preceding. Coherence theories of law are primarily concerned with the extent to which a ruling of law can be made coherent or brought under the ambit of the existing rulings of a normative structure. Justification of a legal norm may ultimately depend on other things, external to coherence itself, such as consequentialist

⁷⁹ *Id.* at 106-107, 156; Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, *supra* note 56, 356-359.

⁸⁰ Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, *supra* note 56, 371-373. See also, Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, *supra* note 56, 377-386; Kenneth Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Calif. L. Rev. 369, 370 (1984).

⁸¹ *Id.* at 372-373.

⁸² NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY*, *supra* note 75, 126, 152-153, 167-173; Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, *supra* note 56, 373.

⁸³ For powerful critiques of coherence theories of law generally, see Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, *supra* note 56 and JOSEPH RAZ, *The Relevance of Coherence*, *supra* note 74.

justification.⁸⁴ Whatever, the ultimate measure of justification, coherence plays a part in justifying legal norms. But coherence alone does not account for the hypocritical use of law. Legal hypocrisy concerns not simply the coherence of legal norms to other legal norms or the coherence of legal norms to legal principles. Legal hypocrisy is concerned foremost with the coherence of legal norms to *avowed* or *expressed* legal principles. As we shall see momentarily, it is the gap between avowed principles and legal norms which grounds hypocrisy and harms citizens; it is this gap in which misleading claims of coherence are used.

An example may clarify the meaning. Imagine a society which forwards a conception of itself as dedicated to its equitable treatment of its poor and social mobility premised on merit alone. The society may do for its own self-gratification, to protect itself from external criticism (say from international actors) or a host of other reasons. Underneath this portrayal, the society's laws uniformly favor a small, elite ruling class, ossifying their power and entrenching their wealth. From the point of one concerned only with coherence, the fault here may seem small. After all, though there is some incoherence, the body of law is in fact quite coherent. For one focused on hypocrisy, however, the gap is shocking... and made all the worse by the fact that the body of law is perfectly unified against the avowed principle. It is true that both the incoherence and the hypocrisy could be removed by simply giving up on the feigned principle of equitable treatment, about this I will have more to say later. But even this similarity does not show that coherence theories and legal hypocrisy have the same concerns. Imagine that a law is introduced which takes a small step in unraveling the iron grip of the powerful elite. Notice that from the point of view of coherence, this law has made things worse! From the point of view of one concerned with hypocrisy the legal system has taken a step forward. It is of course available to those who advocate coherence to point out that coherence is only one factor in moral justification.⁸⁵ Nonetheless, it will be impossible not to recognize that the system has become less coherent. The crucial point is that legal hypocrisy, though

⁸⁴ NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY*, *supra* note 76, 161, 164-166.

⁸⁵ Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, *supra* note 56, 359; JOSEPH RAZ, *The Relevance of Coherence*, *supra* note 74, 298, 303-304.

related, is unique in the harms it isolates. Incoherence is one way of being hypocritical but hypocrisy is a legal vice all its own.

It is impossible to leave a discussion of legal coherence without discussing the enormously influential interpretivist theory of Ronald Dworkin. Dworkin's theory, complex, subtle theory and evolving over the years, has been the subject of endless debate. Indeed, some doubt that Dworkin should ultimately be classified as a coherence theorist.⁸⁶ We need not settle that debate here, for what is clear is that Dworkin's work has much to say about coherence and touches importantly on the themes of legal hypocrisy explored here.

Unfortunately, here is not the place for a careful exegesis of Dworkin's work and in any case, immeasurable scholarly attention makes that work unnecessary. Quickly outlining the classic formulation of Dworkin's theory of law can show the ways in which it is closely related but ultimately not identical to the coherence theories above. Dworkin's theory, coherence theories and my view of legal hypocrisy share the intuition that institutions can be ascribed principles or, put another, that law speaks with its own voice.⁸⁷ In so doing, the law is committed to "speaking in one voice;" acting in a principled and coherent manner towards all its citizens.⁸⁸

The famously important point for Dworkin is that political, legal and moral principles are internal to the law.⁸⁹ They are constitutive of law and thus demand coherence between legal norms and legal principles.⁹⁰ Dworkin labels the demand for coherence as the demands of "integrity," thus integrity for Dworkin requires both that legislatures and judges respectively attempt to create and enforce law as coherent in principle.⁹¹

⁸⁶ For a case that Dworkin is not a coherence theorist, see JOSEPH RAZ, *The Relevance of Coherence*, *supra* note 74, 319-325. For a persuasive case that he is, see Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, *supra* note 56, 365-371; S.L. HURLEY, NATURAL REASONS 262-263 (1989).

⁸⁷ RONALD DWORKIN, *LAW'S EMPIRE* 49-72, 165 – 167 (1986).

⁸⁸ *Id.*

⁸⁹ *Id.* at 246-247, 293.

⁹⁰ *Id.* For a fuller explanation of Dworkin's thesis, see Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. Rich. L. Rev. 1195, 1248-1250 (2008).

⁹¹ *Id.* at 167.

Ultimately, Dworkin's argues that a purported norm is a legal norm (*i.e.* a law) to the extent it is embedded in and coherent with the principles that best explain and interpret a community's legal practice.⁹² By the best explanation, Dworkin means both the explanation that best rationally describes the practice and its purpose as well as puts it in its best moral light.⁹³ So while Dworkin shares the conclusion that legal norms demand coherence, his theory goes further in making a certain type of coherence criterial to a norm qualifying as a legal norm.

I have left aside important parts of Dworkin's theory of law, both in important past writings as well as its evolution over a number of years, to highlight the portions that directly relate to our theory of legal hypocrisy. Given how much Dworkin's interpretivist theory and my claims share, can legal hypocrisy be viewed as a purely Dworkinian project? I can happily submit that mine can be seen as a broadly Dworkinian project, yet there are important benefits to cabining my view from the entirety of Dworkin's theory.

First, Dworkin's view is a view about what makes something a valid legal proposition.⁹⁴ Because for Dworkin, truth propositions of law can only be discovered through an interpretive process, jurisprudence and adjudication are inextricably intertwined.⁹⁵ Dworkin's jurisprudential claim and its clash with positivist and natural law and even virtue theories of have spilled more ink than any other in legal philosophy over at least two generations. Elsewhere, I have forwarded my own arguments pressing Dworkin's claims and reviving the long dismissed claim that jurisprudence has been insufficiently attentive to the role of coercion in fixing the legal character of norms.⁹⁶ Crucially, those claims need not delay us here. The coherence between legal principles and legal norms necessary to avoid hypocrisy claims much less. Indeed, one of the critical differences between my claims and the full Dworkinian project is that the ills of legal hypocrisy call

⁹² *Id.* at 225.

⁹³ *Id.* at 225, 52.

⁹⁴ *Id.*

⁹⁵ *Id.* at 90, 167, 225.

⁹⁶ Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, *supra* note 90. See also Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 *RATIO JURIS* 1 (2010); Frederick Schauer, *The Best Laid Plans (Book Review of Scott Shapiro's LEGALITY)*, 120 *Yale L.J.* 586 (2010).

for repairing the law while remaining agnostic as to deeper questions of the validity criteria or truth propositions of a legal system. Given how deeply controversial such claims are, it is not trivial to be able to prosecute our claims while eschewing the full metatheoretical demands of Dworkin's theory.

This leads to the second distinction between legal hypocrisy and Dworkin's model of law. As noted earlier, Dworkin's is a complicated model which locates the interpretive project of determining what a legal system is in the social practices of a given community. Though that interpretive project does so by constructing the most morally attractive explanation of those social practices, it may well be that in a given community even the best interpretation of those practices is morally unattractive. Hence, like the coherence theorist who must incorporate an elitist and unjust legal norm for the sake of coherence, Dworkin's theory may, in a given community, compel adoption of laws which are hypocritical and unjust.⁹⁷ This may happen because a society's avowed moral principles may simply not be the best rational explanation of their actual legal and social practices; indeed this is the archetypal case of hypocrisy.

To be sure, Dworkin may have resources to address this gap. After all, Dworkin grounds the obligation to follow the law in "associative obligations." That is to say that people are bound by the law of their community in part by the other interwoven bounds that make being a member of that community valuable. That associative obligation is, in turn, justified by the fundamental respect for each person a society owes its members. Thus, it may be that such hypocrisy violates the respect due to some members of the community and thus, they owe the law no fealty. Nonetheless, focusing on legal hypocrisy makes such philosophical maneuvering unnecessary and more forcefully isolates the wrong done to others than those who prize coherence. Legal hypocrisy and Dworkin's concerns have a close relationship. But focusing on legal hypocrisy turns the view away from the internal criteria of legal systems and brings into sharp relief the way law treats others. Even after elevating coherence, legal hypocrisy remains a unique harm.

⁹⁷ *Id.* at 176 – 177.

[Insert short section on Dworkin and legislatures]

The last intuition we need address is that what I describe as legal hypocrisy is not unique but rather an over-intellectual description of common everyday discrimination. It is obviously true that hypocrisy and discrimination are related; indeed, I suspect hypocrisy is often motivated by or permitted due to subtle and not so subtle prejudices. Nonetheless, they remain importantly different. In fact, one of the critical harms we will explore in the next section is how hypocrisy obfuscates discrimination.

Imagine two different countries. One has an immigration system based on a guest worker program. The program is explicit in denying its guest workers many basic civil and legal rights. Workers are not allowed freedom of movement, discouraged from intermingling with the native population and prohibited from becoming citizens. Essentially, the legal system holds out this deal; in exchange for higher wages, you must live here on our terms and lousy terms at that.

In comparison, let us return to the country which clothed its laws, which entirely serve the elite, in a hypocritical egalitarian garb. As one might imagine, the workers in this country are treated even worse. Basic civil and legal rights are non-existent for workers. But worse than being non-existent, there are legal pretenses to such rights; laws on the books appear to make overtures at such rights but upon close inspection, subtle exceptions, absent enforcement and regulatory capture makes those rights entirely chimerical. The promise of available citizenship for “good workers” is touted but any visitor who attempts to secure citizenship is immediately frustrated by byzantine regulations and stymied by myriad forms of regulatory resistance. Though in both cases there is discrimination, in the second case there is the additional harm of legal hypocrisy. At first blush this may seem minor, after all, both groups appear to be in very much the same position. But as we shall see, this additional harm is not merely abstract. Legal hypocrisy is both a separate and a very real harm.

In this section, I have tried to address the intuition that legal hypocrisy does not represent a unique harm apart from other legal harms. I began by inspecting the idea that legal hypocrisy is no different than other faults highlighted by traditional rule of law literature. Inspecting Fuller's classic *The Morality of Law*, we noticed that traditional rule of law concerns do not accurately capture the evils of legal hypocrisy. Of course there are important connections; one way in which hypocrisy is instituted is often by violating the ideals of the rule of law. Those guarding against legal hypocrisy will pay particular attention to the Fullerian faults of contradiction between laws and a gap between legal pronouncements and official actions. Still, merely focusing on the ways laws can contradict each other or the gap between pronounced law and official action pays insufficient attention to institutionalized hypocrisy which works either by having a gap between avowed legal norms and principles rather than a clash between norms or where there is no gap between official action and legal norms because the promulgated legal norms fail to live up to the requirements of the law's animating principles.

Secondly, I addressed the contention that legal hypocrisy is merely a form of legal incoherence. Again there was important overlap between incoherence and hypocrisy; one of the ways of perpetuating institutionalized hypocrisy is by ignoring legal incoherence. Even with this important overlap, authors exploring legal incoherence often failed to isolate or focus on legal hypocrisy. Instead, incoherence literature tend to focus internally on the requirements of a coherent legal or normative structure rather than focus on the way incoherence can be used to harm others. As a result, we noticed that paradigmatic cases of hypocrisy could hide under very coherent legal systems indeed. Further, because coherence exerts its own normative pull, noticing hypocritical espoused morally attractive principles shielding a coherently evil system can appear to recommend merely require casting aside the morally attractive principle for the sake of coherence.

The work that most closely echoes a concern for legal hypocrisy is that of Ronald Dworkin. Though complex and evolving, Dworkin's work has traditionally been concerned with explicating the way in which legal principles are a part of the law. Thus, Dworkin has long argued that legal norms must incorporate underlying legal principles,

that law “must speak with one voice.” Despite the ways in which legal hypocrisy builds on the Dworkinian project, it is an important difference, and advantage, that focusing on legal hypocrisy avoids contentious analytical jurisprudential claims about the validity conditions of legal norms. Though there is little in the Dworkinian project I believe would be at odds with my views on legal hypocrisy, focusing on legal hypocrisy alone allows us to address a legal failing while shedding a lot of philosophical baggage. Secondly and related, because the crux of legal hypocrisy is the harm it does to others, we need not struggle with Dworkin’s problem that his interpretivist theory of coherence may well result in a the best explanation of a certain community’s practices being that they are hypocritical.

Lastly, I proposed that legal hypocrisy cannot simply be elided with discrimination. As illustrated by our examples, one can discriminate without being hypocritical. Where discrimination is combined with or done through hypocrisy, however, there is a separate and very real additional harm. Examining the difference between discrimination in isolation and the case of discrimination through hypocrisy allows us to see the unique harms of legal hypocrisy. It is to these unique harms we now turn.

Part IV: The Harms of Legal Hypocrisy

Assume that one were to grant that legal systems and institutions can be ascribed avowed principles such that they can be seen as hypocritical. Further grant that legal hypocrisy is a unique legal fault not fully recognized by traditional rule of law or coherence theories of law. Even were these the case, would there be special reason for worrying about the harms of legal hypocrisy over and above the discriminatory behavior it seems to entail?

I began by drawing a rough analogy from instances of personal hypocrisy to a theory of institutional and systemic hypocrisy. The ways in which a legal system could be hypocritical, it was argued, tracks many of the ways in which people can be hypocritical. Similarly, the injuries caused both to particular others and to our interpersonal bonds generally, are strikingly parallel in the personal versus the institutional cases.

The first and most obvious harm in treating others hypocritically is that hypocrisy typically takes advantage of another by subsidizing or cheapening immoral behavior. A core harm of hypocrisy is that it seeks to disguise and make easier the ways in which we seek advantage. In the most direct cases the “subsidy” is easy enough to see at every level. Tartuffe seeks wealth and the object of his desire; trickery and fraud are the ways to do this without earning them. The real subsidy in hypocrisy, however, is in the shielding his immoral behavior from scrutiny and justification. It goes without saying that had he openly pursued his desires others would have called him to account. Given that his aims were entirely unjustifiable, being called to account would be equivalent of being exposed, humiliated, stopped and punished. This is the harm earlier isolated as hypocritical deception, wherein one betrays an avowed principle to seek an advantage.

Even in the more subtle cases of hypocrisy, one can see the way in which advantages are being subsidized. Take the politician who publically preaches of the importance of family values while he is a private philanderer. This is a sadly commonplace form of hypocrisy was earlier identified as failing to live up to the demands of one’s avowed moral principles. What he gains is the status of being viewed as virtuous without the sacrifice, discipline and dedication that we actually admire in the virtuous. In the case of the politician, the benefit is obviously material; it is the image of virtuousness that in part leads to admiration and in turn professional success.⁹⁸ Further, one need not be a politician to solicit status by professing admirable values one does not actually possess. Ultimately, having one’s claims to righteousness or some moral value shielded from close inspection acts as a sort of subsidy.⁹⁹

Rehearsing these harms sets the stage for exploring the analogous harms of legal hypocrisy. The first is that by professing false moral values, a legal system can mislead its subjects in order to take advantage of them. The method is analogous. If citizens are mislead to believe that they are serving one value, while the legal system serves another

⁹⁸ Christine McKinnon, *Hypocrisy, With a Note on Integrity*, *supra* note 20, 326-327.

⁹⁹ *Id.*; Judith N. Shklar, *ORDINARY VICES*, *supra* note 8, 50.

unjustifiable one, then the legal system is not called upon to justify its actual goals.¹⁰⁰ If those justifications are absent, then like *Tartuffe*, the system avoids being rebuffed. Plainly put, the legal system can pursue immoral goals under the hypocritical cover of moral ones.

Let us return to our example of the United States during the reconstruction era. As I noted earlier, the passage of the 13th Amendment and 14th Amendment after the bloody and brutal Civil War pronounced new legal principles that prohibited “involuntary servitude,” guaranteed the removal of all the “badges and incidents” of slavery and guaranteed “equal protection under the law.” These principles were initially pursued, in part by the passage of the Civil Rights Act of 1875.¹⁰¹ But by the time *The Civil Rights Cases* reached the Supreme Court, the political will to pursue this principle had waned for a number of political reasons. Thus, the Supreme Court ruled that the powers granted by the 13th and 14th Amendment only reached actions taken by the state and that private transportation companies, hotels and theaters were immune from its reach.¹⁰² To pen this ruling, the Court had to come to the remarkable conclusion that the refusal by private parties, no matter how widespread, to accommodate a person on the basis of that person’s race cannot be regarded as imposing any badge of slavery or servitude upon the applicant so long as it was not a State law or regulation.¹⁰³ It is a case like this which makes most clear legal hypocrisy, for they strip away the cover of bad faith argument, giving lie to the claim that one could imagine a genuine conflict of values between a good faith effort to pursue the equality that had declared the legal principle of the land and other morally valuable goals worth pursuing.

As heartrending as this story is (and setting aside that it seems an obvious case of failing to live up to one’s avowed principle), it is prelude. The Supreme Court’s bloodless

¹⁰⁰ Judith N. Shklar, *ORDINARY VICES*, *supra* note 8, 69.

¹⁰¹ [A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. 18 Stat. 335, 336 § 1 (1875).

¹⁰² 109 U.S. 3, 20 – 24 (1883).

¹⁰³ *Id.*

interpretation of the 13th and 14th Amendment set the country down a path of deep injustice, the scars of which remain today. Particularly, the Court's reasoning culminated in its later conclusion in the odious *Plessy v. Ferguson* that a Louisiana law that allowed trains to establish "separate but equal" cabins did not violate the Constitution.¹⁰⁴ Finally in 1906 the Court held in *Hodges v. United States* that Congress lacked the authority to pass the Civil Rights Act of 1866.¹⁰⁵

Why bother with this pretense? No one could seriously believe that the accommodations given to southern blacks was anything like equal nor is it conceivable that any Justice on the Supreme Court would have been willing to trade places with a black southerner or would genuinely have expressed surprise that being excluded from great swathes of public life was anything short of daily humiliation. Understanding the aims of hypocrisy makes clear the reason for the pretense. The southern states were set on furiously undermining the legal principle of "equality under the law" at every turn and the northern states had turned their back on pursuing equality. Establishing a regime of "separate but equal," if only in name, allowed the southern states to actively shield the near century long construction of the Jim Crow south by "pretending" it was upholding racial equality. It allow the legal system to be misleading, paying lip service to the value of equality will mitigating the need to avoid justifying what it could no longer under the avowed legal principle, the plain inequality in the legal treatment of African-Americans. And, of course, the Northern States were complicit in playing along.¹⁰⁶

Even more directly, hypocritical deception is often primarily aimed at misleading the victims to act as one wishes, once again subsidizing the cost to the institution. One need no uglier example of purposeful deception than the nefarious "Arbeit Macht Frei" which greeted millions of doomed Jews and other Nazi victims at Auschwitz.¹⁰⁷ Though the evil of the Nazi State had transcended hypocrisy, the sign's purpose remains telling. By holding out the

¹⁰⁴ 163 U.S. 537, 540 (1896).

¹⁰⁵ 203 U.S. 1 (1906).

¹⁰⁶ This example reveals that one can rarely separate the hypocrisy of misleading others for advantage and the hypocrisy of failing to live up to avowed moral principles. While there are situations that are more in one "mood" than the other, they will often shade into each other.

¹⁰⁷ Admittedly, this may not qualify as sheer hypocrisy since the Nazi state had by then dedicated itself to the extermination of Jews and other "undesirables." Thus, the Nazis saw no conflict in lying to those they wished killed. Nonetheless, it serves as a chilling example of purposeful deception to subsidize the costs of enforcement.

hope to the victims of the camp, at least initially, the Nazi institutions sought to convince them to work and dampen the impulse to immediately revolt. Closer to hypocrisy than to pure deception, the continued invocations of the pledges of equality within the 13th and 14th Amendments in a very real sense served as institutional placation. In truth, there was little many African-Americans thought they could do, at least individually. But gesturing at the freedoms to which the legal principles pretended served to bolster the argument that African-Americans *should* observe the law. After all, the law was explicitly guaranteeing equal (if separate) treatment. Analogous to the personal case of hypocrisy, institutional hypocrisy can mislead subjects into acting in the institution's perceived advantage and cheapen the cost of compliance by communicating to the victim, the oppressor and others who could call the institution into account, that it is pursuing values it only professes.

This brings us directly to the second unique harm of legal hypocrisy. Legal hypocrisy does more than mislead and manipulate the victim of the hypocrisy, it frustrates and insults them as well. The frustrating element of institutional hypocrisy is directly related to the subsidization explored. Because hypocrisies allow a legal system to profess to be pursuing one moral value while in fact pursuing another less laudable one, it undermines those who are exploited or mistreated by obscuring to others who could hold the system to account the nature of their injury. That is to say, besides being mistreated, hypocrisy undermines the way those injured can voice their complaint. After all, others think, how can one complain when the law has explicitly professed its dedication to morally valuable ends, however imperfect it may be in its execution.

One example instance of this drawn from our earlier examples can be found in the infamous Scottsboro Trials. In brief, the case involved nine African-American youths who got into a fight with several white youths on a train. When the train pulled into its next stop, Paint Rock, Alabama, the boys were hauled out of the train by an angry mob of white men armed with pistols, rifles, and shotguns.¹⁰⁸ It was not until the boys were in jail that they discovered that they were also being charged with the rape of two white women.¹⁰⁹ When the sheriff's deputies saw the two women had been on the train with the men their first thought was that they must have been raped. Though no one could say for certain which came first, the

¹⁰⁸ JAMES GOODMAN, STORIES OF SCOTTSBORO, 3 - 4 (1995).

¹⁰⁹ *Id.*

sheriff's interrogation or the women's accusation, there could be no serious doubt that the Black youths had not bothered them in any way.¹¹⁰ It is worth noting that this charge came only after an evening in which a large angry mob had descended on the jail house to lynch them, halted only because the county sheriff called the governor who had to send the National Guard to secure the prison.¹¹¹

The "trial" of the prisoners began six days after the indictment. When the first trial was called there was no one to represent the defendants. Unable to find anyone who wished to represent the boys, the trial judge appointed "all the members of the bar" as defendant's lawyer for the purpose of arraignment. Until the morning of the trial, the poor and illiterate young men had no representation. The trial featured four days of testimony by the women, recounting what was described as the most debauched crime in the history of state. Not surprisingly, all the defendants were sentenced to death.¹¹²

Ultimately, the United States Supreme Court set aside the trials due to their fundamental unfairness. There were a total of eleven trials, years lost in jail and commutations before the entire tragic affair would end. In any case, what is important for our purposes was the perceived danger in the Supreme Court's setting aside of the Scottsboro convictions.

[A] local newspaper warned in connection with a mob-dominated trial conducted contemporaneously with Scottsboro that challenging the conviction was "playing with fire," since a hasty trial was preferable to a lynching and indeed was "a first step, and a very important one." Local newspapers frequently crowed with pride after a lynching was averted and congratulated local citizens on the admirable self-restraint they had demonstrated. White Alabamians seemed genuinely puzzled at the outside criticism of their handling of the Scottsboro cases. Avoiding lynching was "a genuine step forward," and thus was deserving of commendation, not condemnation. The state supreme court lauded the speed of the Scottsboro Boys' trial as likely to instill greater respect for the law. A state member of the Commission on Interracial Cooperation thought it was odd that Alabama should be criticized for delivering exactly what the [Commission] had been fighting so hard to accomplish – replacement of lynchings with trials.¹¹³

¹¹⁰ *Id.*

¹¹¹ *Id.* at 5-6, 13- 23.

¹¹² *Powell v. Alabama*, 287 U.S. 45, **XX** (1932).

¹¹³ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 56-57 (2000).

To be sure, there were Alabamians who suspected the original trials had not been fair and did not protest the new trial ordered by the Supreme Court.¹¹⁴ But others could seek comfort in the formality of a trial that signaled the law's commitment to due process and justice, ignoring that the "trial" was little more than a slightly more formal lynching. In this way, the hypocrisy, that is the pretense of pursuing due process while actually serving as formalized murder, allowed Alabamians to rebuff, to others and in their own mind, criticism surrounding the trial.

In this way the complaint of the Southern black as to the *de facto* segregation that dominated their lives fell on even deafer ears. The hypocrisy which comforts one group undermines the voice of the victim to even raise a complaint. "After all," the Alabamian might think, "we are pursuing justice or we have guaranteed legal equality. And if there are a few mistakes made here and there, well... mistakes are unavoidable." Of course, the Black Alabamian is well aware that the system suffers from nothing like "a few mistakes" but rather a systematic and unjustifiable pattern of rights violations, humiliation and violence which is shielded from moral scrutiny by mass hypocrisy. It is the hypocrisy that allows others to shield their own eyes and avoid being called into account or taking on the burden of correcting the institutional failings. For that matter, institutionalized hypocrisy allows one to avoid calling ones own self into account. As Lon Fuller so elegantly put it,

[The affinity between legality and justice... has] deeper roots. Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts. Many persons occupying positions of power betray in their relations with subordinates uniformities of behavior that may be said to constitute unwritten rules. It is not always clear that those who express these rules in their actions are themselves aware of them. It has been said that most of the world's injustices are inflicted, not with fists, but with the elbows. When we use our fist we use them for a definite purpose, and we are answerable to other and to ourselves for that purpose. Our elbows, we may comfortably suppose, trace a random pattern for which we are not responsible, even though our neighbor may be painfully aware that he is being systematically pushed from his seat. A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his fists, but for his elbows as well.¹¹⁵

¹¹⁴ John Temple Graves 2d, *Alabama Approves Scottsboro Ruling*, The New York Times, November 13, 1932.

¹¹⁵ LON FULLER, THE MORALITY OF LAW, *supra* note 64, 159.

It is the use of hypocrisy which muffles the demands of the Southern Black who protests that they are faced with lawless violence if the unsupportable accusation of any white woman renders their life forfeit. It is the same complaint of the Iranian or Nicaraguan who argues that the United States' foreign policy has aimed at undermining his country's democratic government for geopolitical reasons, only to be met with blank stares and a public slogan that America supports democracies.¹¹⁶ It is the pent up frustration of the woman who points out that an exception to rape in the case of marriage violates any view of her as an equal autonomous citizen, only to be met by lack of interest in the "technicalities" of what is assumed to be a just system. Lastly, hypocrisy is made worse because it comes with a built in insult. To be the object of another's hypocrisy is, as Fuller noted, to not warrant a justification save the shallowest kind.¹¹⁷ In failing to make any serious attempt to justify ourselves to those we treat hypocritically, we communicate to them that they are not moral agents to be taken seriously.¹¹⁸

Finally, hypocrisy does not just hurt those who are its direct victims. The vicious irony is that ultimately hypocrisy, particularly in an institutional or legal setting undermines the bonds of trust and fidelity to are the very lifeblood of the rule of law. Recall that in examining private hypocrisy, we noticed that hypocrisy undermined the confidence society shared in expressions of moral values.¹¹⁹ Hypocrisy did so by revealing that the hypocrite treats both the victim of hypocrisy and the moral codes which they value with causal indifference or contempt. When hypocrisy becomes widespread, confidence in declarations and expressions of moral principles lose their force.

If this is deeply troubling in our personal lives, it is a mortal threat to the rule of law. Law, unlike personal relationships, relies much more on a general, widespread and shared faith that legal institutions pursue the values espoused. That may seem odd to say, given that legal institutions have enforcement mechanisms (police, etc.) that have no obvious analogy in our personal lives. Yet a moment's reflection and a glance at various uprisings in Arab Africa make clear that only the most oppressive legal systems can maintain control unless there is

¹¹⁶ Daryl Glaser, *Does hypocrisy matter? The case of U.S. foreign policy*, *supra* note 59, 256 - 258. For possible conflict of values cases see *Id.* at 255-256.

¹¹⁷ Christine McKinnon, *Hypocrisy, With a Note on Integrity*, *supra* note 20, 325-327.

¹¹⁸ Eva Feder Kittay, *On Hypocrisy*, *supra* note 17, 286.

¹¹⁹ *Id.*

widespread believe (or at least begrudging acquiescence) to the legitimacy of the system. Further, unlike our friends, law cannot count on our generosity or forgiveness, cannot rely on fine tuned apologies or reconciliations. The law must hold itself out as generally and widely justified and legitimate.

There is a second reason why legal hypocrisy represents a grave threat to the rule of law. Law, unlike personal relationships, is the locus of much disagreement and contestations about rights, obligations, goods and liabilities. A plaintiff argues she is owed compensation because another driver's actions were unreasonable. A corporation argues that it cannot be held liable for pollution because it was correct in its interpretation of an environmental regulation. This contestation leaves permanent the potential for uncertainty. One party will often suspect that it is being treated unfairly. Further, many decisions will be made in areas where deep uncertainty is unavoidable. One group of industry paid experts assert that 100 parts per million of a heavy metal can be expelled into a river with no serious environmental impact. An opposing group of environmentalists argue that only a third that number is safe. In each of these circumstances, the law must be a salient focal point of not just coordination but of faith.¹²⁰ It will not suffice for citizens to be able to inspect and finally conclude that each individual legal decision deserves respect. First, the sheer number of decisions makes that impracticable but more importantly, many cases, such as the level of tolerable pollution, will admit for a range of answers with no independent discernible criteria of correctness. Rather, it is critical for the rule of law that the fact that a legal decision has been made is generally capable of securing trust that a reasonable decision has been made and fidelity to following the law as a way of continuing the project of social cooperation.¹²¹ More and more people seeing the law as hypocritical, and thus treating them with contempt, makes such fidelity impossible.

It is easy to underestimate what a pressing problem the corrosive effects of legal hypocrisy is on fidelity to and the rule of law. Yet seeing its effects all around brings home its dangers. Take a current, though admittedly controversial, example. Many people suspect that the current American immigration policy reveals a deeply hypocritical stance. The exact reason its hypocritical is quite hard to pin down. There is the uncomfortable, if subconscious,

¹²⁰ Jeremy Waldron, *Why Law – Efficacy, Freedom, or Fidelity?*, 13 *Law and Phil.* 259, 275-277 (1994).

¹²¹ *Id.* at 275-277, 281-283.

realization, reinforced in one's lived experience, that our major cities, New York, Los Angeles, Chicago, Dallas..., would come to a screeching halt were it not for the cheap labor of hundreds of thousands of illegal immigrants. Citizens with greater knowledge or deeper interactions are aware of how often the laws of the country appear to solicit such workers only to wrap them in a regulatory limbo, neither here with permission yet not able to leave without uprooting their lives and family, who often have various legal statuses. Lastly, many either know or sense that the simple answer, obtain citizenship or leave, is in reality a nearly dysfunctional mess; the promised path to citizenship is all too often a Kafkaesque series of starts and stops. Indeed, for many, it was a stunning exposure of our disregard that The Dream Act, which would allow provisional residency for the children of undocumented workers who had been brought here as minors and were willing to either go to college or serve in the military was defeated. In total, the huge segments of our economy run on the subsidized labor of vulnerable groups of people who we neither allow full citizenship nor can afford, inflammatory rhetoric aside, to do without. Yet vulnerable immigrants are often the focus of national eruptions of anger, harassment and vilification. It is not surprising that many citizens view our immigration policy, consciously or unconsciously, as a national play in hypocrisy.

The result of this on the fidelity to law is as predictable as it is alarming. The laws governing the employment and pay of illegal aliens are routinely disregarded at best or view with utter contempt at worst. New York City is America's largest and, by some measures, its wealthiest and most liberal city. Yet citizens who would never consider any other act of serious law breaking think nothing of hiring undocumented workers and paying them under the table in order to save money. Nannies and day laborers, both highly visible and nearly invisible, make the City run. Even if one does not seek out such workers, it is impossible to miss that one's life in an already expensive city is subsidized by the number of delivery men, janitors and craftsmen who are undocumented aliens. So without bothering to notice, we all participate in a collective hypocrisy; a mass blindness to rampant law breaking.

It is bad enough that any particular area of the law suffers from some measure of passive hypocrisy. The widening danger is that the corrosive effects of such hypocrisy cannot so easily be contained. When the legal system sends a message that the labor of undocumented workers can be used for our benefits and leisure without reciprocity of political kinship or

even the decency of justification, it becomes increasingly acceptable to act on our collective contempt. It does not seem to me a coincidence that states like Arizona, however much real pressure they are under, are able to react by proposing the most humiliating and harassing of laws. Harkening back to much darker regimes, AZ SB 1070 requires any person who could be suspected of being an illegal immigrant to carry government identification or risk punishment. It makes it a crime to transport someone reasonably suspected of being an illegal alien, asking family members and friends who have legal status to isolate the loved one's in their midst.

What Moliere knew was that a political environment which allowed hypocrisy would only cultivate more hypocrisy from its citizens.¹²² Similarly, Lon Fuller warned that the vices of law were accumulative; allowing one rule of law tenet to be slighted only made it easier to bruise the next one.¹²³ That is the lesson of the Jim Crow South and the widespread disdain for the hypocrisy of our immigration laws. Legal hypocrisy is a threat to the rule of law and ultimately, it is as bad for “us” who seek advantage as it is for “them” who we victimize.

¹²² Judith N. Shklar, *ORDINARY VICES*, *supra* note 8, 52.

¹²³ LON L. FULLER, *THE MORALITY OF LAW*, *supra* note 64, 92.