The Anarchist Official:
A Problem for Legal Positivism

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Abstract

I examine the impact of the presence of anarchists among key legal officials upon the legal positivist theories of H.L.A. Hart and Joseph Raz. For purposes of this paper, an anarchist is one who believes that the law cannot successfully obligate or create reasons for action beyond prudential reasons, such as avoiding sanction. I show that both versions of positivism require key legal officials to endorse the law in some way, and that if a legal system can continue to exist and function when its key officials reject the reason-giving character of law, then we have a reason to re-examine and amend legal positivism.

Keywords

Philosophical anarchism, Political obligation, General jurisprudence, H.L.A. Hart, Legal positivism, Internal point of view, Rule of recognition, Joseph Raz

Many legal theorists have expounded conceptions of law or legal systems that depend heavily upon a key role to be played by legal officials. In most cases, it is not just the actions, but the beliefs of those legal officials that make the difference between a legal system and simple control by coercion. In H.L.A. Hart's positivist theory, legal officials create legal facts by accepting legal rules (especially a central validity rule) from an internal point of view. Since these legal facts are social facts, their dependence upon the acceptance of legal officials makes it possible for ordinary citizens to have legal obligations without those citizens ever accepting that they do.

If this influential theory requires for its conception of law that legal officials accept, adopt, or uphold law as a valuable component of social organisation or as providing them with robust reasons for action, then the possibility that legal systems can continue to function when some or all key officials[1] do not hold those beliefs is problematic. Given the pivotal role the theory gives to these officials, if the officials do not have the requisite beliefs, then the theory would be telling us that we are not looking at a legal system, that no laws of the system could be valid, or at least that no one could be obligated by the laws of the system. If, apart from what the theory is telling us, we have what appears to be a working legal system, then it is difficult to see why these beliefs should play such a pivotal role, throwing positivism's reliance on officials' beliefs into doubt.

My primary contention in this paper is that if a legal system can continue to exist and function when its key officials do not accept the value or guidance of the law, then we have a reason to amend those legal philosophies that cannot accommodate such a situation. I focus on legal positivism (of Hart and Joseph Raz) as the theory that has the most currency among analytic legal philosophers, and with which I

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[1] I admit that 'key officials' is a rather vague term, whose referents can change easily when considering legal systems in different times and circumstances. In some cases, they may simply be those who are tasked with creating and/or assigning legal obligations. In others, they will be those upon whom those obligations depend for recognition of their legal validity.

find myself in closest agreement.[2] For the purposes of this investigation, anarchists believe that the law cannot successfully obligate or create reasons for action beyond the prudential reason to avoid sanction (and possibly other situational prudential reasons, such as where law coordinates behaviour in an emergency or to avert a dangerous situation).[3] I contend that the possibility of key officials holding these beliefs should be considered as a problem for legal philosophy (and not limited to pure political theory). I begin by examining the anarchist claim, and then show why officials accepting the claim are a problem for positivism, starting with a discussion of obligation in Hart's positivism. Then I turn to an examination of the role of officials' acceptance of the law in Hart and Raz. I do not discuss the merits of the anarchist claims at all, as that is irrelevant to the project.

There are many kinds of anarchists. Some believe law is fine so long as it is not implemented by a government. I will not treat that belief here since the legal theory that is the target of this analysis takes governmental law to be its primary object of study. Additionally, the term 'anarchist' is not meant to carry any disparagement. It is used in its philosophical sense of someone who does not accept that the law carries any particular obligation or who believes the law to be socially disadvantageous, rather than its sometimes pejorative political sense of someone who seeks to undermine government, perhaps by violent means.

The anarchist claim

The anarchist claim is that the law cannot give us non-prudential reasons for action (what I sometimes call the 'antinomian claim'). This should not be confused for another type of anarchist claim (what I call the 'disvalue claim') that the law has a negative value overall. It is possible for the law to be bad for us,

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2 I believe that a similar although perhaps even more serious problem arises for natural lawyers like John Finnis, but that will have to be dealt with elsewhere.

3 In what follows I will generally understand non-prudential reasons to include obligations, except where it is important to discuss obligations separately.

but to give us non-prudential reasons for action;[4] or for it not to provide such reasons, but not have negative value. For example, one could believe that all law fundamentally and necessarily entrenches male-centred power structures, and hence to be of disvalue overall in the context of a wider belief in the equality of the sexes. This person could nonetheless believe that the law successfully provides non-prudential reasons, perhaps to stop at a red light even when we know no one is around. Conversely, one could believe that the law performs valuable behaviour guidance and coordination functions (the reasons for conformance with which are purely prudential), but not believe that it ever is successful in its claims to provide non-prudential reasons. This belief could be based upon the idea that all non-prudential reasons are pre-existing moral obligations, and any claims to create another class of specifically legal obligations are fictional. Or it could be based on the belief that legal obligations are at least non-binding and, therefore, do not generate reasons to comply.

The antinomian claim is a bit narrower in focus than the disvalue claim. To this anarchist, the law can only command by force.[5] Hence there can be nothing wrong with breaking the law in itself, so long as one gets away with it, and the only thing wrong with getting caught is getting punished. The law might claim to provide non-prudential reasons, creating duties and obligations, but such claims are always necessarily a ruse. Under this view, when someone answers the question 'Why did you do that?' with the statement 'Because it is the law', either she properly means by this only that she seeks to avoid punishment for failure to behave in that way, or she shows that she has been taken in by the law's false claim to have successfully given her independent reasons.

A person who accepts the antinomian claim may still believe in the validity of moral obligation and that the law's commands can coincide with one's moral obligations. We are obligated not to kill each

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4 One example of this might be in situations where we have undertaken a promise to obey the law. For helpful analysis and illustrations of this example, see Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press 1987), at 62.

5 This statement should not be misunderstood to mean that this kind of anarchist is a classical positivist, nor that the classical positivists were anarchists in any sense. For one, this anarchist would not see any obligation arising from the threat of force.

other, and the law commands us to comply with that obligation.[6] But under the antinomian claim, in doing so, law does not add any reason to the already existing moral one, except a self-regarding prudential one not to do something that would incur punishment. One way to cash out this view would be to say that no mere legal obligation (an obligation the law claims to have made) can be binding in itself, and that legal obligations are not a separate extant class of obligations; all obligations are pre-existent moral ones, or else they are prudential ones created either by the fear of whatever retaliation the law uses to support its commands or as a result of the law's offering a solution to an important coordination problem. (Later we will see the importance of the distinction between notions of mere legal obligations, which are valid within the legal system that generates them, and notions of morally binding legal obligations, understood as moral duties that only come into existence with law.)

There are plenty of very good arguments against these views, and the reader probably already has quite a few in mind. Remember, however, that we are not concerned here with the validity of these positions, but rather with what happens when these views are held by key legal officials. If a legal system can continue to operate and function with such officials, but a theory of law cannot explain that, then that theory of law is deficient.

Hart's notion of obligation

H.L.A. Hart's theory is that the law consists in the union of primary rules and secondary rules in a system in which key officials accept those rules as valid under a rule of recognition.[7] This rule of recognition consists in the criteria that the officials use to determine which rules are valid within their legal system.

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6 The literature makes a helpful distinction between mere conformity to the law and being guided by the law, where conformity is based on having non-legal moral or prudential reasons for behaving as the law happens to dictate. *S*ee e.g. Joseph Raz, *Practical Reason and Norms* 2d ed. (Princeton, N.J: Princeton University Press 1990), at 124.

7 H. L. A. Hart, *The Concept of Law* 2nd ed. (Oxford: Clarendon Press 1994), at 91ff. Primary rules govern conduct directly; secondary rules govern primary rules (providing for their creation, change, elimination, etc.) or other secondary rules. See K. K. Lee, 'Hart's Primary and Secondary Rules', (1968) 77 *Mind* 561 ; Lawrence B. Solum, *Primary and Secondary Rules*, Legal Theory Lexicon (2004) http://lsolum.typepad.com/legal_theory_lexicon/2004/06/legal_theory_le_2.html.

For Hart, these officials must accept the rules internally, as reasons or justifications for their behaviour in applying and enforcing the laws.[8] The presence or absence of a legal system is a social fact that depends on these officials' acceptance and behaviour.

In developing this theory, Hart argued against the earlier positivist view that legal obligation resulted from the command of a sovereign backed by a threat of force. For Hart, such a 'gunman situation' could create a state of affairs in which we would be obliged to act according to the command, but not obligated to do so.[9] In order to give rise to legal obligation, some people must accept the rule internally: both as a reason and justification for their actions in conformity with it, and as a ground for criticism of others who do not conform. If the right people (i.e., key officials) accept the rule internally, then those subject to the rule can be said to be under an obligation even if those subjects do not accept that obligation.[10]

Hart was clear that the motivation for a person accepting the rule is not important for it to represent a reason or obligation,[11] so long as the motivation is not one of fear of reprisal,[12] and even then such fear is only problematic for those upon whom it is incumbent to accept the law internally.[13] Hence, an official who accepts the rules in order to retain his job is just as good at creating legal reasons and obligations as

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8 See e.g. Veronica Rodriguez-Blanco, 'Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View', (2007) 20 *Canadian Journal of Law & Jurisprudence* 453 at 459; Scott J. Shapiro, 'What Is the Internal Point of View?', (2006) 75 *Fordham LR* 1157 at 1165.

9 Hart, *The Concept of Law op cit*, p 82, arguing against John Austin, *The Province of Jurisprudence Determined; and, the Uses of the Study of Jurisprudence* (Indianapolis, IN: Hackett Pub. 1998).

10 Hart, following Bentham and Kelsen, held that legal obligations were *sui generis* to the law and not a species of moral obligation, a view disputed by Joseph Raz, who holds that legal obligations are claims to impose moral obligations. H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press 1982), at 128ff; Joseph Raz, 'Hart on Moral Rights and Legal Duties', (1984) 4 *Ox J L Stu* 123 at 129; Raz, *Practical Reason and Norms op cit*, p 127; *id*. 'No system is a system of law unless it includes a claim of legitimacy, of moral authority. That means that it claims that legal requirements are morally binding, that is that legal obligations are real (moral) obligations arising out of the law.' Raz, *Hart on Moral Rights and Legal Duties op cit*, p 131. Hence, in discussing Hart's theory, legal obligations are to be understood as social creations and not to imply any moral obligation to comply. *See also* Shapiro, *What Is the Internal Point of View? op cit*, p 1161. Nevertheless, in that they are still obligations they still represent non-prudential reasons in that, where legally valid, they apply regardless of the interests of the subject.

11 Hart, *The Concept of Law op cit*, p 203.

12 *id*. Of course, one might have multiple motivations, and even where fear is the primary factor, secondary motivations may suffice to lead one to see the rule as a reason when there is no risk of reprisal.

13 *id*.

one who believes the law is conducive to important social ends.[14] The problem with fear of reprisal is that it does not give rise to the recognition of a legal obligation, only a psychological feeling of being compelled. Also, when one acts out of fear of reprisal, it is that fear which serves as the reason for one's act in conformity with the rule, rather than the rule itself. Other motivations can lead the person to recognise the rule as an instrumental reason. According to Hart, the existence of a legal obligation is a social fact that is independent of the feeling of being bound, which one might or might not have accompanying it.

Another important way to view the distinction between motivations from fear of reprisal and other motivations is through the lens of the internal and external points of view. One who complies with the law purely out of fear of retaliation is using the law simply as a prediction of what others will do and hence never will see the law itself as a reason for action.[15] To see this, just consider that one who acts only out of fear of reprisal will never have a reason to comply with the law so long as he is sure of avoiding the reprisal. Most other motivations for compliance, however, will allow one to see obedience to the law as instrumentally valuable to achieving the goal embodied by that motivation. If one wishes to do as others do, then even though the law is initially still just a predictor of behaviour, one can come to view it as (instrumentally) reason-giving when one understands that others are trying to conform their behaviour to it. Since others are trying to comply with it, and this person is motivated to do as others do, he comes to

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[14] Seeing rule following as a means to retaining the official's job should not be misunderstood to be a fear of losing the job as a form of reprisal. Hart provides a non-exhaustive list of motivations someone might have for accepting legal rules internally to show that the motivation need not be moral. The list includes 'calculations of long term interest' and 'the mere wish to do as others do'. *Id*.

[15] *id*. Seeing the law as primarily a predictor of others' behaviour is, of course, the classic stance of the legal realist, exemplified by O.W. Holmes' 'bad man,' who analyses the law in terms of what he can get away with. Oliver Wndell Holmes, 'The Path of the Law', (1897) 10 *Harvard Law Review* 457 at 459. This view was a target for Hart, who believed the law is just as much for the 'puzzled man' who is seeking guidance. Hart, *The Concept of Law op cit*, p 40. The issue this paper addresses could be interpreted as asking what happens to Hart's (and Raz's) theory when Holmes' bad men are the key officials (except that the officials would not be depending on the internal acceptance of anyone else).

see the law as giving him a reason to do as it requires. This is to see its requirement as a legal obligation, and according to Hart, it need not be to see it as a moral one.[16]

There is some suggestion in the literature that Hart and other modern positivists such as Joseph Raz and Jules Coleman are mistaken to exclude fear of reprisal as a permissible primary motivation for officials. For example, Matthew Kramer has pointed out in passing that Gregory Kavka proved the possibility of a government in which each official is only motivated to comply by fear of all the others.[17] While this was not intended by Kramer to be a complete argument, as it stands it is not enough to prove the point against Hart and the others. Kavka showed that it would be possible for a *government* to be based entirely on a 'net of fear', in which each citizen (and official) is only compliant out of fear of what the others will do to her, with no one of them (except the single sovereign issuing the directives) motivated directly by her acceptance of the sovereign as justified rule-giver.[18] I emphasise the word 'government' in the previous sentence because that is the focus of Kavka's argument; he does not apply this argument to the concept of law or the possibility of a legal system with such characteristics. Hence Hart and the others could easily reply that it might be possible for a *government* to be entirely founded upon fear. But unless and until some key officials adopt the internal aspect of rules and see the directives of the leader as reason-giving, we would be hard-pressed to say that we are looking at a *legal system*. We would not have the requisite network of recognition and 'critical reflective attitudes' that make a legal system possible.[19] It would just be the gunman situation writ-large.[20]

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16 Hart, *The Concept of Law op cit*, p 203. See also *supra* note 10.

17 Matthew H. Kramer, *In Defense of Legal Positivism : Law without Trimmings* (Oxford ; New York: Oxford University Press 1999), at 94; Matthew H. Kramer, 'Review of the Practice of Principle by Jules Coleman', (2003) 62 *The Cambridge Law Journal* 495 at 497 See also Sean Coyle, 'Practices and the Rule of Recognition', (2006) 25 *Law and Philosophy* 417 at 433 The references are to Kavka's 'The Paradox of Perfect Tyranny,' Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Princeton, N.J.: Princeton University Press 1986), at 254.

18 Kavka, *Hobbesian Moral and Political Theory op cit*, p 257.

19 Hart, *The Concept of Law op cit*, p 57. See also *id*; Shapiro, *What Is the Internal Point of View? op cit*, p 1165 (explaining how the rule of recognition validates other primary rules even when those other rules are being ignored).

In a way, my arguments below can be seen as an attempt to bring a version of Kramer's Kavka-esque point home against this element of modern positivism. Rather than focusing on what I take to be the politically and psychologically confusing case of officials being motivated by fear, however, I ask simply what happens when officials do not accept the law itself as reason-giving. If the answer still allows for the presence of a legal system, then Hart's imagined response to Kramer and Kavka is insufficient on its face.

An antinomian anarchist does not recognise a non-prudential reason arising from the law, and hence will not see any legal obligation as binding. In this, she might be understood to say that legal obligations are fictional, or at least are not reason-generating.[21] The more important issue is whether a group of officials who adopt this view could still create or maintain such an obligation on others. If the anarchists can do so, then Hartian-style positivism does not have a problem with the anarchist official. However, if anarchist officials are incapable of creating or maintaining a valid reason-giving legal obligation, then

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[20] In an enlightening email exchange, Michael Stokes (in his role as Editor of this journal) helped me to see even more clearly why the need for internal acceptance not motivated by fear is a requirement for key officials but not for ordinary citizens (or even petty officials). Stokes suggested that the hypothetical situation of a game of tennis played under threat shows the possibility of accepting rules from the internal point of view while doing so out of fear. In such a game, it would appear that the players can have a perfectly legitimate game while complying with the rules only because of fear. (Stokes suggests that the players adopt the internal point of view with respect to the rules in order to play the coerced game, but I am not sure this is clear – we may be engaged with the rules in order to comply, but we are not taking the rules themselves as our reason for action.) Even the umpire of the game can apply the rules out of fear, so long as there are not hard cases requiring an interpretation of the rules. However, if there were a hard case, or one that required an appeal to the governing body of the game, it does not make sense to say that fear can motivate a specific interpretation of the rules. If the official acts under the threat 'decide as you are directed to or else…', then the decision is not an application of the rules; if the official acts under the threat 'decide correctly or else…', then the threat is not providing any guidance and is immaterial to the application of the rule.

[21] I don't think much turns upon whether our antinomian denies the possibility of legal obligations entirely or accepts the social-fact thrust of legal positivism (see e.g. Jules L. Coleman, 'Rules and Social Facts', (1991) 14 *Harvard Journal of Law and Public Policy* 703 at 706), thereby accepting the bare existence of legal obligations, but denying that any are binding in themselves. The result of both positions is that legal obligations are not reason-generating. *But see* Rodriguez-Blanco, *Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View op cit*, p 462, which can be interpreted to argue for the collapse of this distinction in Hart, given that the failure to adopt the internal perspective by officials undermines both the existence and identification of the legal norm.

Hart's positivism cannot explain the possibility of a legal system existing where such officials are sufficiently prevalent.[22]

Another possible line of reply for the Hartian might be simply to deny that the antinomian can be an official, or at least one of the officials whose recognition is key to the existence of the legal system. But I do not think this line of argument is really open to a positivist. To make this claim, the positivist would have to say that the notion of what constitutes an official is set by the jurisprudential theory rather than by the law itself. It would be to say that accepting the law from the internal point of view is a necessary condition to being an official (or at least a key official). This cannot be compatible with a theory that holds the law to be comprised by social practice, under which the law itself must set the criteria for who counts as a valid official.[23] [24] While the jurisprudential theory could define the concept of an official more broadly than the constitutive conditions of any given legal system, it cannot do so more narrowly or risk defining otherwise operative and functioning legal systems out of existence. That move might be open to a traditional natural lawyer (who would be more comfortable denying the title 'legal system' to a system

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22 One implication of this is to dispute the adequacy of Hart's project as interpreted by Scott Shapiro. Shapiro holds that Hart did not intend for his account of social rules to explain how those rules could be reason-giving, believing this to be an unnecessary task for jurisprudence. Shapiro, *What Is the Internal Point of View? op cit*, p 1166. The argument of this paper shows that since Hart believed the adoption of the internal point of view by key officials to be conceptually necessary for the existence of a legal system, the lack of an account of how law is reason-giving in conjunction with this leaves too large a lacuna for the theory to be adequate. If we had an account of how a legal system could be reason-giving while still based upon a practice theory of the basic validity rule, then we might still be able to understand the existence of a legal system where key officials did not accept the internal point of view toward the rules. *See also* Rodriguez-Blanco, *Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View op cit*, p 465 (characterizing as "the deepest problem in jurisprudence" to explain how law conceived as a set of rules can be reason.

23 This can be seen as an application of Raz's claim: 'The law itself determines which facts create laws and which abrogate them'. Raz, *Practical Reason and Norms op cit*, p 152. See also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford; New York: Clarendon Press 1994), at 280 note 28 (explaining that the rule of recognition identifies the bodies on whom it imposes a duty to recognize as valid the rules that fit the descriptions it contains).

24 Many legal systems require officials to undertake oaths to uphold the law. One might be tempted to see this as building a requirement into the legal system that accepting the law from the internal point of view is a constitutive criterion to being an official of the system (putting aside the obvious problem that the official can simply lie in taking the oath and would still be considered an official by the system). While this might be common, it is by no means necessary to the existence of the legal system. Hence, there are many possible (and likely actual) systems that do not legally require their officials to (avow that they) accept the law from the internal point of view.

not sufficiently in accord with external reason or morality), but not a positivist. One might think that this problem is alleviated somewhat if we retreat to say simply that, while an antinomian can be an official as defined by law, she cannot be a key official, defined by Hart's theory as someone whose behaviour helps to constitute and apply the rule of recognition. The problem with this retreat is that, once again, the particular legal system often makes it clear which officials are key in Hart's sense. If the judges of a constitutional court or an executive empowered to enforce only those laws she considers valid are antinomians, who is the Hartian to claim that they are not key officials?

One question might be what level of prevalence among officials creates the problem for positivism?[25] The answer to this question will have to be left somewhat vague, as demanded by the vagueness of the notion of the key officials. For one, since the notion of which officials are key for Hart is left up to the legal system itself, the level of prevalence that creates the problem will vary by legal system. Where the system contains a constitutional court empowered to make determinations of validity, those officials will certainly be key; and any number of anarchists on that court sufficient to affect an outcome will be sufficient to cause a problem for the theory. Generally, since under positivism legal validity generally depends upon a web of acceptance among key officials, one anarchist official is not likely to be problematic unless she is particularly well placed. It is likely that where the system contains an executive empowered to enforce laws considered valid by that executive, that official and any subordinates who have final operational decision in the application of certain laws will be key officials. In such cases, one well-placed anarchist would be enough to create a problem for the theory. Lest it be thought too remote a possibility to be worrisome, consider the case of Jón Gnarr, elected mayor of Reykjavik, Iceland (home to more than a third of the country's population) in May, 2010. An avowed anarchist, his Best Party, which controls much of city government after the election, is made up primarily of punk rockers.[26] Unfortunately, an emailed request to his administration to define his understanding of anarchism and its

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25 I thank an anonymous reviewer for this journal for raising this question.

26 Sally McGrane, *Icelander's Campaign Is a Joke, until He's Elected*, (2010).

relation to the reason-giving aspect of law went unanswered. Nevertheless, clearly the municipal legal system of Reykjavik did not cease to exist upon the ascension of his administration, meaning either the officials do not hold the requisite problematic beliefs or legal positivism as it stands has a lacuna.

However, whatever level of prevalence of anarchists among key officials is required to create the problem - even if the likelihood of that level is remote - the conceptual possibility of such a legal system indicates that Hart's theory is not complete: there is at least one legal system possible that his theory cannot explain.

Another question might be what an anarchist key official would have to do in order to create the problem for positivism? As will become clear, it may be nothing more than doing her job while believing that nothing she does creates non-prudential reasons.

Hart's ecumenism

Under Hart's theory, any reason (other than pure fear of reprisal) for internal acceptance on the part of the officials is enough to create legal reasons. The problem with Hart's theory is that it seems to lead to one or the other of two difficult positions: Either it allows a perspective that would not believe in any legal reasons to create or uphold them. Or we are led back to excluding anarchist officials and saying that they cannot create legal reasons because they cannot adopt them from the internal point of view. This would be difficult because then the theory would not be able to explain the presence of law in (or would counter-intuitively deny the title of 'law' to) a system populated (extensively or in key positions) with anarchist officials.

Let us examine Raz's explanation of Hart's theory of the rule of recognition, which culminates in his suggestion that judges can be anarchists.[27] Among other things, Raz wishes to highlight the fact that those

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[27] Joseph Raz, *Practical Reason and Norms* (London: Hutchinson 1975), at 147.

who accept and apply the basic rule that gives the validity criteria for rules within a given legal system do not need to do so for moral reasons.

> [T]hat a rule is followed by a person requires only that he holds it to be valid, i.e., believes that the norm subjects are justified in following it – justified perhaps, only because it already exists and is practiced and despite the fact that it should not have been made and that it should even now be changed.[28]

The subject is the person to whom the rule or norm is addressed. For the purposes of parsing this passage it is very important to distinguish two types of rules and two types of subjects. There are the usual rules of law, most of which are likely to be primary rules of behaviour, aimed at the citizens, residents, or simply all those present within the jurisdiction of that legal system. These usual rules also include secondary rules that confer power on citizens or officials, but they are less important at the moment. However, one (or more[29]) of those secondary rules is the rule of recognition, a collection of the validity conditions for the recognition of law within that legal system, guiding the legal officials to determinations about what counts as the law of that system.[30] So a legal official is a special kind of subject to a special kind of rule. When a legal official views a primary rule to be valid law, she believes that people who are subject to the rule 'are justified in following it' because it conforms to the validity criteria within the rule of recognition.[31] When a legal official does that, she is also following the rule of recognition herself and believes herself (as a subject of that rule) to be justified in doing so.[32] Once again, within the theory this is conceptually necessary for the legal system to exist: 'Without supposing that officials take the attitude of

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28 *id*.

29 Joseph Raz, *The Concept of a Legal System : An Introduction to the Theory of Legal System* 2d ed. (Oxford: Clarendon Press 1980), at 200.

30 Hart did hold that private citizens could also be guided by the rule of recognition, but this is not necessary. Hart, *The Concept of Law op cit*, p 100.

31 The official does not have to be self-consciously aware of the rule of recognition itself. Indeed it might just be a description of convergent practices on the part of the officials that the officials use – perhaps subconsciously – as validity criteria. But this is disputed in the literature. Compare, e.g. Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?', (2007) 27 *Ox J L Stu* 1 with Andrei Marmor, *Social Conventions : From Language to Law* (Princeton, N.J.: Princeton University Press 2009), at 162.

32 Shapiro, *What Is the Internal Point of View? op cit*, p 1165.

norm-acceptance to the rule of recognition, there could be no rule of recognition and hence law could not exist as a conceptual matter.'[33]

Raz continues his discussion of the rule of recognition:

> Moreover, the official may follow the rule either without having any beliefs about why he is justified in doing so, or for prudential reasons (his best way of securing a comfortable life or of avoiding social embarrassment, etc.), or even for moral reasons which are based on his moral rejection of the system. An anarchist, for example, may become a judge on the ground that if he follows the law most of the time he will be able to disobey it on the few but important occasions when to do so will tend most to undermine it. Another may become a judge because he holds that he is justified in applying the law of which he disapproves when he is bound to do so if he makes good use of the powers judges have to make new laws and change existing laws on occasion.[34]

While it might be possible to imagine someone taking these positions in order to undermine the system, it is not yet clear whether such a person could create legal reasons, especially if she does not herself believe in those reasons. One important point that would tend to argue in favour of allowing such an official to create legal reasons is Hart's discussion of the difference between an obligation (as a kind of reason) and being obliged.[35] In supporting the claim that orders backed by threats cannot create obligations but rather only oblige the subject to act in conformity with the order, Hart notes that being obliged is purely a psychological causal explanation for action, while having an obligation is a normative explanation that is independent of the subject's belief. It is therefore possible to have an obligation and not be aware of it, which would make no sense when applied to being obliged.[36] If the existence of the obligation can be

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33 *id*.

34 Raz, *Practical Reason and Norms op cit*, p 148. As will be discussed in the next section, there are significant differences between the anarchist judge, as described by Raz here, and the antinomian official we are considering as problematic for the theory. For one, the judge described here appears capable of seeing the law as providing non-prudential instrumental reasons to act in certain ways in order to undermine the system (assuming that is a goal that can generate non-prudential reasons, e.g., to take personal risks to undermine the system for the sake of the betterment of others). Our antinomian anarchist is not particularly concerned to undermine the system.

35 Hart, *The Concept of Law op cit*, p 82.

36 This is not meant to imply that Hart would accept 'metaphysical conceptions of obligation or duty as invisible objects mysteriously existing 'above' or 'behind' the world of ordinary observable facts' *id*, which he explicitly rejects as an alternative to the predictor theory. Instead, for Hart, that one can be under an obligation without being aware of the fact can be traced to the existence of a social rule (itself a social fact)

independent of the subject's belief, then we might be able to say that the legal official can create an obligation (or reason) without believing herself to have done so.[37] If the (antinomian) anarchist judge hands down a decision that someone is legally obligated to behave in a certain way, then that person has a legal reason to do so even if the judge does not actually believe her own decision to have any implications for the person's moral obligations or to provide any reasons other than prudential.

The problem with this view arises when we incorporate Hart's understanding of rule-following into the picture. The difference between something being a rule and it being merely a regularity of behaviour is taking an internal perspective on it, taking a 'critical reflective attitude', seeing it as offering guidance and as a reason for the action and for criticism of failures to act.[38] Otherwise, the 'rule' is merely a prediction of how people will behave. One accepts the rule when one takes the internal point of view with respect to it. '[O]ne takes the internal point of view towards a rule when one intends to conform to the rule, criticizes others for failing to conform, does not criticize others for criticizing, and expresses one's criticism using evaluative language.'[39] So the characteristic elements of rule acceptance are psychological and behavioural in nature.[40]

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that others adopt that applies to the person obligated *id*. I thank an anonymous reviewer for this journal for pointing out the need to mention this and the quotation.

37 This should not be misunderstood to imply that legal officials can create legal reasons or obligations without the rest of the legal system in place to assign them that power. The official's status and power depends on that wider system. Nevertheless, the system often does assign the power to create legal reasons or obligations to individual officials - with judges as perhaps the most conspicuous example - and even to private individuals, as in the case of contracts. Problems arise either when a significant number of officials of the background system that confers the power don't believe in it, or when the power is conferred on a key official who doesn't believe in it. I thank Michael Giudice for pointing out the need for this clarification.

38 Hart, *The Concept of Law op cit*, p 56.

39 Shapiro, *What Is the Internal Point of View? op cit*, p 1163.

40 Rodriguez-Blanco, *Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View op cit*, p 463 argues that Hart eschewed a psychological explanation of the internal point of view in favour of a two stage explanation of the internal point of view (the first of which was behavioural and the second of which was 'volitional'), in order to explain legal rules as obligatory and differentiate them from orders backed by threats. Even if we reject the need for any deep psychological explanation, however, the problem of the anarchist official is therefore just as pressing in that the official lacks the volitional component of the internal point of view.

Sometimes this psychological element might be obscured by Hart's emphasis on the fact that the rule functions as the reason for action or criticism. After all, as with obligations, reasons can exist independently of anyone's recognition of them.[41] When I am crossing the street, I have a reason to look both ways even if I am unaware of that reason. I would have that reason even in a world of bad practical reasoners, in which no one was aware of that reason. But since, for Hart, these social rules depend ultimately for their validity on a shared practice (the rule of recognition),[42] their normativity must rest on at least some (official) internal acceptance.[43] True, as Raz points out, under Hart's view one could have many different motivations for accepting the rule, which need not be based on moral considerations and even could extend to goals that would undermine the very system of which the rule is a part. However, it is difficult to see how an antinomian anarchist, who does not believe in the possibility of valid legal reasons, could internally accept and endorse a rule that obligates her to create or enforce legal reasons and obligations, no matter what her ultimate motive might be.

Consider Hart's claim that the characteristic manifestation of internal acceptance of the rule of recognition is the use of phrases like 'it is the law that…'.[44] When spoken by an anarchist official actively trying to undermine the system (perhaps when speaking of something she knows to be inconsistent with the rule of recognition), it does not reflect acceptance from the internal point of view. As Scott Shapiro explains it, 'the internal point of view refers to a specific kind of normative attitude held by certain insiders, namely, those who accept the legitimacy of the rules.'[45] Granted, this anarchist is using the fact of others' acceptance to undermine the system, and relying perhaps on the fact that others will perceive such language as acceptance. Hart seems to have some appreciation of this when discussing the acceptance of the rule of recognition as 'manifested' by the behaviour of officials acting in accordance

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41 Raz, *Practical Reason and Norms op cit*, p 17.

42 Hart, *The Concept of Law op cit*, p 255.

43 In support of this compare Hart's discussion of the scorer of a game who stops obeying the scoring rules. *Id*.

44 *id*.

45 Shapiro, *What Is the Internal Point of View? op cit*, p 1159. Of course for Hart, this 'normative attitude' does not necessarily imply a belief in the *moral* legitimacy of the rules.

with it.[46] But by Hart's own logic, if there is no internal acceptance of the rules, then there can be no obligation, since the rules will not function as a reason for compliance. Hart claims quite clearly that acceptance of the rule of recognition by officials is *logically necessary* for the existence of a legal system.[47] Hence, a legal system in which many or even simply key officials are not accepting the rule of recognition should be a conceptual impossibility.[48]

Hart recognised the problem of legal officials refusing to follow the rule of recognition (e.g., by making decisions they believe to be inconsistent with it), and claimed that it leads us only to an aberrant borderline case of a legal system, one which is simply a step away from dissolution due to the chaos of conflicting judicial orders.[49] But what if the choices of these anarchists accidentally go against their goal of undermining the legal system and actually serve to strengthen it? After all, if the officials start claiming validity for rules they know fail to meet the criteria of validity, or even if they simply start denying validity to those they know to meet the criteria, people might start to cling more desperately to the legal system.[50] Then the social fact of the presence of the legal system is independent of officials accepting the rule of recognition. Thinking about the *'lusus naturae'* of this situation not only 'sharpens our awareness of what is often too obvious to be noticed',[51] it threatens Hart's theory itself.

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46 Hart, *The Concept of Law op cit*, p 101.

47 *id*.

48 This discussion calls attention to a possible ambiguity in Hart's use of 'accept' when applied to officials in that he sometimes seems to consider it purely behaviourally and sometimes psychologically (or 'volitionally,' see above n.40). It is clear that, in assessing the social aspect of rules (including a practice theory rule like the rule of recognition), we must look to behaviour in order to assess practically the existence and application of the rule. However, Hart's clear reference to the necessity of a 'critical reflective attitude' and repeated discussions of the nature of internal acceptance as seeing the rule as reason-giving lead me to conclude that some psychological elements are essential in Hart's explanation. See John Gardner, 'Nearly Natural Law', (2007) 52 *Am J Juris* 1 at 9. Raz argues that Hart's notion of acceptance amounts to a full moral endorsement. Joseph Raz, 'The Purity of the Pure Theory', (1981) 35 *Revue Internationale de Philosophie* 441 at 454; Kevin Toh, 'Raz on Detachment, Acceptance and Describability', (2007) 27 *Ox J L Stu* 403 at 414. I thank an anonymous reviewer for this journal for suggesting the need for this clarification.

49 Hart, *The Concept of Law op cit*, p 116.

50 See Raz, *The Concept of a Legal System : An Introduction to the Theory of Legal System op cit*, p 200 (noting that officials might not meet with criticism if they stop recognizing the validity of laws as picked out by the rule of recognition).

51 Hart, *The Concept of Law op cit*, p 116.

Raz's judge and validity vs. obligation

In order to understand this problem more fully, and to see that it is a problem not limited to Hart's particular form of positivism, let us turn to the distinction raised earlier between legal validity and a moral obligation created by law. Clearly, one might believe in a structure of legal validity emanating from a central validity rule, like the rule of recognition, without believing that the law is creating any moral obligations, or for that matter, any non-prudential reasons. Raz is not interested in supporting a general moral obligation to obey the law, and in fact argues against one.[52] Any theoretical tension raised by his example of the anarchist judge must be understood in light of his use of it to elucidate Hart's theory. The question is therefore whether the anarchist judge poses any difficulty to a positivist theory of law with Razian refinements. I think he has made the problem a bit more difficult to see, but hasn't completely eradicated it.

The primary distinction between Hart and Raz on the subject of obligation is that Hart believes legal obligation to be a separate class of socially created obligation, distinct from morality (but still non-prudential).[53] So for him the problem with the anarchist official is whether officials who do not believe the law can create reasons for action can still create legal obligations (which are a kind of reason for action). For Raz, valid legal obligations purport to be moral obligations. Indeed, where they are legitimate exercises of authority, they are successful creations (or reports) of moral obligation. So for Raz, the problem is whether officials who do not believe the law can ever successfully create non-prudential obligations can still use the law to do so.

Raz raised the example of the anarchist judge in the context of discussing Hart's rule of recognition, using the language of one being 'justified' in following a rule rather than being 'bound' by the rule (in the sense of obligation) precisely in order to focus on the notion of the validity of rules, rather than their

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52 Raz, *Practical Reason and Norms op cit*, p 233.
53 See above n.10 and text accompanying n.16.

bindingness.[54] Here is where the distinction between valid legal rules and morally binding legal rules becomes most important. Since, for Raz, a legally valid, duty-imposing rule necessarily claims to impose a moral obligation,[55] it can only be binding if it is successful in imposing a moral obligation (otherwise its claim to be binding is false). Hence we can talk directly of its moral bindingness. If an antinomian key official can recognise the legal validity of legal rules without agreeing to their moral bindingness, then the antinomian might not appear to pose a threat to the theory's explanation of law and legal systems.[56] After all, we would have a systemically valid legal system since legal validity depends on the key officials internally accepting the rule of recognition and acting accordingly upon the rules that it guides them to recognise. So, all that seems necessary is that the official accepts the rule of recognition enough to establish the legal validity of legal rules. Raz doesn't believe that laws by themselves morally obligate us,[57] but clearly still believes we have legal systems, so this would appear to be the tactic he favours.

The problem is that, *ex hypothesi,* the antinomian official believes that the law only commands by force, and the only reasons it 'creates' are those represented by the threat of force, as well as any solutions it offers to important coordination problems. I put the word 'creates' in quotes because either these purely prudential reasons pre-date their legal application and hence are not created by law, or they are created by the threat of force and not the legal rule itself. In the case of coordination solutions, the reason to do as the law demands comes from the pre-existing prudential reason one has to coordinate one's behaviour with

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54 Raz makes a distinction between validity *tout court* and legal validity - holding the former to be true of a rule when its subjects have some justification in following it, and the latter to be true of a rule only when the rule is validated within and by a wider legal system (where 'the fact that it belongs to [the] system is (part of) a reason for its validity'). Hence it is possible for a norm to be legally valid in that it belongs to the system, without it being valid in any wider sense in that its subjects have no (non-legal) justification for following it. Raz, *Practical Reason and Norms op cit*, p 127. See above, text accompanying notes 27 & 28.

55 Joseph Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* (Oxford ; New York: Oxford University Press 2009), at 111.

56 Raz believes that an official can behave as if the law is legally binding by making pronouncements of its legal validity, without believing that it is morally binding. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford; New York: Clarendon Press 1979), at 155. This claim and its implications will be discussed below.

57 That is, they do not morally obligate us necessarily and independent of circumstance, but may, for example, if they help us to do the right thing better than we would do on our own. Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception', (2006) 90 *MinnLR* 1003 at 1014ff.

others in that pressing circumstance. Consider the fact that if there was another, non-legal, solution to the coordination problem which had an equal or better chance of success than the one proffered by law – including the chance that others will comply with it – then there would be no reason left to follow the law (unless we deny the antinomian hypothesis and understand the law to create non-prudential reasons for compliance). Turning to the threat of force, it is the threatened force that is giving any reason for action, not the rule itself. If one can avoid the sanction, there is no reason to comply. So we are left with the following challenge: Does a belief that the only reasons law seems to generate are in the application and manipulation of pre-existing prudential ones contaminate the antinomian official's ability to recognise the validity of legal rules within a positivist theory?

Recalling Raz's explanation that a belief in the validity of rules is a belief that those subject to the rules are justified in following them, it would appear that complying with a legal directive in order to avoid threatened force or head-on collisions (as an example of an important coordination problem) is a fine justification for compliance. However, under Hart's original explanation of the internal acceptance of rules by officials, if the officials themselves only comply with the rules because of fear of reprisal, they never take the internal point of view.[58] To quote Shapiro again: 'Seen from the internal point of view, the law is not simply sanction-threatening, -directing, or -predicting, but rather obligation-imposing.'[59] So, if the officials do not see the law as obligation-imposing, then they cannot take the internal point of view. And if they never take the internal point of view on the law, then we never get past the gunman situation into a bona fide legal system. They never see the rules themselves as reasons, signs *for* people to comply, instead of signs *that* people will comply.

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[58] To the extent that solutions to important coordination problems, like what side of the street to drive on, are primary rules, the officials are more concerned (in their official roles) with creating and imposing such rules than in following them. While we can imagine a primary rule directed at officials to identify and solve important coordination problems, our antinomian will see that as simply another case of the law repeating a pre-existing moral obligation.

[59] Shapiro, *What Is the Internal Point of View? op cit*, p 1157.

While ordinary citizens may not need to recognise their obligations and may always treat the law as a system of threats under Hart's strain of legal positivism, at least the key officials must subjectively feel obligated by the rules guiding their legal validity decisions in order for legal validity itself to get off the ground. Hence, an antinomian official, who does not believe that the law creates reasons for action, does not believe that any law found legally valid under her application of the rule of recognition is creating any new reasons for action for others, other than one flowing from any threatened sanction for non-compliance or pre-existing reason to coordinate behaviour. The problem is then to explain how the law can still be a reason-generating normative system[60] without the key officials' internal acceptance of that fact, given the emphasis in the theories on the importance of official acceptance.

This requires a deeper investigation of antinomian officials' attitude toward the rule of recognition itself. Since questions about its legal validity are misplaced (since it is constitutive of legal validity for the system),[61] it is not incumbent upon legal officials (or others) to accept it as legally valid. It is simply *what is done* and *what is to be done* by officials when determining legal validity. However, it seems that the *key* officials still must take the internal point of view on the rule of recognition in order to confer legal validity on the rest of the system.[62] Put in Razian terms, key officials must accept the validity (*tout court*, i.e. the justifiability) of the rule of recognition. Judges, for Raz, 'act on the belief that laws are valid reasons for action [and] hold laws to be exclusionary reasons in that they disregard all non-legal reasons except where allowed by law to act on non-legal reasons'.[63] Raz and Shapiro both make it clear that

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60 To say that a law is a norm entails that it is a reason for action. Raz, *Practical Reason and Norms op cit*, p 154.

61 Hart, *The Concept of Law op cit*, p 109; Raz, *Practical Reason and Norms op cit*, p 151.

62 As mentioned above, it might be possible within the theory for individual officials in non-key roles or who are isolated in their failure to adopt the internal point of view not to threaten the validity of the system. The problem arises when we consider what is entailed by the theory when too many or too important officials are antinomian anarchists.

63 Raz, *Practical Reason and Norms op cit*, p 171.

Hart's rule of recognition specifies the content of the officials' duty to apply the law.[64] If the antinomian official does not recognise a duty to apply the law, then it is difficult to see how she could take the internal point of view on the rule of recognition.

There are two refinements Raz makes, which must be addressed in order to show that the antinomian official is still a problem for Raz's version of positivism. They both involve important elaborations on the perspective of the official upon whom the theory makes it incumbent to accept the rule of recognition from an internal point of view. The first is Raz's claim that it is enough for an official to make committed normative statements about the law when declaring it valid.[65] This implies the possibility of an official speaking as if the law is valid without believing it to be so. A quick read of a footnote in which Raz distinguishes between full endorsement of a rule and weak acceptance of the rule might seem to support this:

> It is important to distinguish … between one who fully endorses a rule, i.e. believes that its subjects ought to follow it, and one who weakly accepts it, i.e. believes that he should follow it himself. …. Hart maintains that judges at least weakly accept the rule of recognition. A judge who merely weakly accepts it must, it would seem, pretend that he fully endorses it. Hence his statements are fully normative.[66]

The consideration, which Raz mentions elsewhere,[67] of officials pretending to endorse a rule, when applied to the rule of recognition only means that officials are 'weakly' accepting it. That is, they still must believe that they should follow it themselves. Their pretence is in any statements that others should be bound by it. But it still appears necessary for the judges to have weak acceptance in order for there to be a legal system. In support of this consider Raz's notion of the 'legal point of view'. The legal point of view consists of the norms of the legal system itself and any other norms the system requires its subjects

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64 *id*; Scott J. Shapiro, 'What Is the Rule of Recognition (and Does It Exist)?', in Adler and Himma eds), *The Rule of Recognition and the Us Constitution* (Oxford: Oxford University Press 2009) . It should be noted that this interpretation of the rule of recognition as a duty-imposing rule is controversial. See e.g. Raz, *The Concept of a Legal System : An Introduction to the Theory of Legal System op cit*, p 199.

65 Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 155.

66 *id*.

67 E.g. Raz, *Hart on Moral Rights and Legal Duties op cit*, p 130.

to act upon. The person who acts from the legal point of view follows those legal norms and sees them as 'exclusionary reasons for disregarding [any] conflicting reasons which they exclude'.[68] But while it is not necessary for most subjects to act according to the legal point of view in order for the system to be in force, 'it is necessary that its judges, when acting as judges, should on the whole be acting according to the legal point of view. This entails also that the courts must regard ordinary citizens as required to [act from the legal point of view] and judge them accordingly.'[69] The only way to square these two passages with each other is to say that the judge who only has weak acceptance of the rule of recognition (i.e. only sees himself as justified in following it, without extending that judgment to others) is limiting the weakness of that acceptance to the rule of recognition itself. He is thereby still acting from the legal point of view. But, in so doing, he is also still viewing others as required to follow (not just comply) with the particular rules he picks out as legally valid.[70] However, our antinomian official does not even have weak acceptance since she does not believe herself (let alone others) to be bound by the rule of recognition. Nor does she believe that others are bound by the rules it picks out as valid. So if we are not blinded by the theory and think it plausible still to say that we have a legal system after we elect or appoint a slate of antinomian anarchists, then there is still a problem with the theory. After all, if we did elect a slate of antinomian anarchists to key positions, I believe they would have to take affirmative steps to nullify the legal system – not that it would cease to exist as soon as they took office.

The other important and related point Raz raises is the prevalence of what he calls 'detached' perspectives on the law. These are exemplified by his example of the meat-eater who accompanies his

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68 Raz, *Practical Reason and Norms op cit*, p 171. See also, Luís Duarte d'Almeida, 'Legal Statements and Normative Language', (2011) 30 *Law and Philosophy* 167 at 180; Toh, *Raz on Detachment, Acceptance and Describability op cit*, p 408.

69 Raz, *Practical Reason and Norms op cit*, p 171.

70 One might object that, according to Raz's analysis, statements like 'According to law, you ought to pay your taxes' 'simply state what one has reason to do from the legal point of view, namely, what ought to be done if legal norms are valid [i.e. justifiable] norms …. [without] presuppos[ing] that the law is valid'. *Id*. While it is true that the semantics of the statements themselves allow for their truth when uttered without a belief in the validity of the norm, it is clear from the passages above that this is not an option for the judge charged with determining and asserting their legal validity. This issue will also be dealt with in the next paragraph.

vegetarian friend to a dinner party, warning the friend, ‘‘You should not eat this dish. It contains meat.’’[71] The statement highlights reasons from a point of view that is not necessarily shared by the speaker. (In other contexts, such as that of a law professor lecturing on what the law requires, the speaker might share a belief in the reasons but the statement doesn't commit him in any way.) While such statements are certainly common in legal contexts, the examples Raz gives are invariably of people who are not fulfilling key official roles: law professors, legal scholars, and lawyers advising clients.[72] Indeed, Raz contrasts the detached statement with the internal statement that is ‘characteristic of the judge, and of the law-abiding citizens…’.[73] The question remains whether it is possible for a judge to adopt only the detached perspective.[74]

Recall that Raz raises the possibility of the anarchist judge in the context of expanding upon Hart's list of possible motivations an official might have for taking the internal point of view with regard to the rule of recognition.[75] His anarchist is one who follows the rule of recognition in order to undermine the legal system at key points.[76] This person, it could be argued, will see the rule of recognition as providing provisional reasons for determining which laws to call valid, even if some of those reasons are overridden at key points by the anarchist's project of undermining the system. The problem is that the antinomian official, as we've defined her, might fit Raz's description of an anarchist judge (although I think that is still unclear), but does not take the point of view necessary for a functioning legal system. Raz held that

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71 *id*. See also Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 155.

72 Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 153; Raz, *Practical Reason and Norms op cit*, p 176. Raz's discussion of the detached perspective follows Kelsen, who noted that anarchists could be law professors, ‘describ[ing] positive law as a system of valid norms, without having to approve of this law’. H Kelsen, *Pure Theory of Law* (Berkeley: University of California Press 1978), at 218 n.82. Contrary to Kevin Toh's assertion at Toh, *Raz on Detachment, Acceptance and Describability op cit*, p 408, Raz's examples of detached statements include those made by lawyers but NOT those made by judges. ‘Judges, if anyone, take the law as it claims it should be taken. They more than anyone acknowledge the law at its own estimation.’ Raz, *Hart on Moral Rights and Legal Duties op cit*, p 131. In an email, Toh admitted to me that he did not see the need for a distinction between judges and lawyers at the time he wrote.

73 Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 155.

74 For recent criticism of Raz's use of detached statements to explain situations where internal statements are not being made, see Duarte d'Almeida, *Legal Statements and Normative Language op cit*.

75 Hart, *The Concept of Law op cit*, p 203; Raz, *Practical Reason and Norms op cit*, p 148.

76 Raz, *Practical Reason and Norms op cit*, p 148.

officials can endorse and follow the law for any reason, or no reason.[77] But they must still endorse and follow it in some way, while our antinomian is not doing so. Even when she makes detached statements of law, she maintains an 'external perspective' on both the rule of recognition and the rules of the legal system. She does not see them as justifying or legitimating criticism of those who do not conform, and she assigns evaluative statements made on the basis of the norms of the system to others, without adopting them herself.[78] While Hart, Raz, and Shapiro all concur that there is no necessity for an official to accept the moral value of the rule of recognition or the legal system that it validates, an antinomian official still cannot take the internal point of view they all agree is so necessary to Hart's theory, and by extension, most modern legal positivism.

This discussion can be boiled down to a final question. Putting aside the discussion of detached statements and weak acceptance, why isn't it enough for Raz (or Hart for that matter) to simply say that officials need only to profess publically to uphold the reason-giving ability of the law, rather than that they must privately accept it in some way?[79] For a first reply, the antinomian official, as we have envisioned her, has no obvious reason to make a false claim to uphold the law as reason-giving. It is not clearly a precondition of her taking office. It seems entirely possible that a judge could be elected or appointed to a key role who claims only to decide what's best given the facts presented and without depending on previous decisions or legislation as binding. That judge can even go so far as to say that her decision itself does not give the parties any reason to comply beyond threats of sanction or other pre-existing prudential considerations. If the network of other officials is not predisposed to seeing this as problematic, it need not create any immediate problems for the legal system as a whole.

Beyond this point, however, the thrust of this paper is to suggest that it is not a threat to positivism to say that officials need not privately accept the law as reason-giving, although this would make for an

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77 Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 155.
78 Hart, *The Concept of Law op cit*, p 55; Shapiro, *What Is the Internal Point of View? op cit*, p 1162.
79 I thank an anonymous reviewer for this journal for suggesting this question be raised in this way.

amendment to these theories as they stand. As they stand, Hart's and Raz's theories incorporate the need for official internal acceptance. One issue is that without that internal acceptance, it is difficult to get a clear handle on the nature of legal obligation. Raz, for one, is in a position to do away with the need for internal acceptance more easily in that, under his theory, a detached statement of legal obligation can be understood to be true just in case the statement actually describes a moral obligation, a fact not dependent upon the official's belief. This possibility is opened up by his theory of authority, under which the facts that legitimate a directive need not be the ones considered by the official making it.[80] Indeed, the space his theory leaves for this possibility makes the criticism above appear more in the way of suggesting simply that he carries through on another break with Hart and jettison the need for official internal acceptance entirely. One passage that might initially seem to cut against this possibility being open to Raz is where he notes that legal authorities 'regard themselves as having the right to impose obligations on their subjects, … claim[] that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed…'.[81] However, that passage equates legal authorities with 'the institutions of law' and, for Raz, the claims of the institutions and the claims of the officials can come apart,[82] leaving open the possibility of Raz accommodating officials' private rejection even as the institutions themselves are understood to claim obedience. To the extent that some critics of Raz believe it to be a weakness of his theory of authority that the claims of law can be analyzed independently of those of officials,[83] jettisoning that idea by Raz would make it more difficult for him to reply to the points I raise in this paper.

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80 See, e.g., Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 29; Joseph Raz, *The Morality of Freedom* (Oxford; New York: Clarendon Press 1986), at 51; Joseph Raz, 'Reasoning with Rules', (2001) 54 *Current Legal Problems* 1 at 15.

81 Joseph Raz, 'Authority, Law and Morality', (1985) 68 *Monist* 295 at 300. (I thank an anonymous reviewer for this journal for pointing out the relevance of this passage.)

82 This is necessary in order to attribute legitimate authority to customary law, which arises independently of official enactment. Raz, *The Authority of Law: Essays on Law and Morality op cit*, p 29.

83 E.g., Kenneth Einar Himma, 'Law's Claim of Legitimate Authority', in Coleman (ed), *Hart's Postscript* (New York: Oxford 2001) 271 .

Conclusion

We are left with the fact that, as it stands, one of the most influential theories of law in discussion today cannot account for the conceptual possibility of a legal system where some or all of the key officials do not accept the value or validity of that system. While it is admittedly an unlikely turn of events that such officials come to power, that the theory entails such a legal system is conceptually impossible represents a gap in our understanding of the law itself.

Given the power of legal positivism, it is unlikely that the best solution will be to scrap it entirely. Instead, I suspect that a solution will be found in a greater focus on the interplay between the actions and attitudes of officials and of the rest of the public. Brian Tamanaha, for example, argues that the public creates the officials,[84] and Sanne Taekema has recently argued that too much has been made of the distinction between officials and the rest of the public in positivist theories.[85] Frederick Schauer has also argued that the possibility of a system in which the judges 'have no non-prudential reason to adopt the internal point of view' should lead us to reject the judges as the key officials for determining the rule of recognition, preferring possibly the public at large.[86] Without endorsing these particular theories, I note them as potential solutions to the problem outlined in this paper. This problem should, therefore, be seen as an additional motivation for pursuing these and similar attempts at altering the dependence legal positivism has upon the beliefs of key legal officials.

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84 Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford ; New York: Oxford University Press 2001), at 144.

85 H. Sanne Taekema, 'Does the Concept of Law Need Officials?', (2008) 2 *Problema Anuario de Filosofia y Teoria de Derecho* 157 at 174.

86 Frederick Schauer, 'Positivism through Thick and Thin', in Bix (ed), *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press 1998) 65 at 74.

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