

## Legal Hypocrisy

Laws can warp people and societies in nearly countless ways. But within important debates about what grounds a claim of discrimination or whether some extraordinarily painful interrogation method constitutes torture I have the nagging sense of something missing, a legal wrong unnamed. This Article begins the project of naming that vague intuition by identifying the defect of legal hypocrisy. Identifying legal hypocrisy is critical for more than theoretical clarity. I suspect today, the hypocritical use of law to accomplish illicit ends is more common and dangerous than open discrimination and in some cases even bald law breaking.

Hypocrisy is more dangerous than open discrimination or law breaking because it shields legal wrongs from public scrutiny. Take the recent example of whether government officials are permitted to torture in the face of grave security risks. Because the issue implicates national security, human rights and our very national identity, it is critical that it be accorded deep political inspection. As an example the Israeli Supreme Court wrestled openly with the question under the most pressing of circumstances. In America, by contrast, this debate, save brief spasms of public scrutiny, was obscured behind the banner that “America does not torture.” To an extraordinary degree, this serious reckoning was stalled by hypocritical obfuscation.

Whatever the right resolution to political questions, all are harmed when hypocritical avowals silence public debate. Institutional hypocrisy allows legal actors to achieve, undercover, what cannot be achieved in the sunlight. Minorities, for example, are harmed and frustrated not only because legal actors and laws (openly) discriminate against them. African-Americans, Hispanics, Homosexuals and undocumented workers perceive that the law harms them by explicitly avowing particular values while quietly subverting those values; not only injuring the powerless but undermining their ability to call the law into account. If the days of simply being banned from living in White neighborhoods or being legally excluded from elite institutions have passed, there is the more subtle yet often devastating harm of banks offering unequal loans or institutions avowing a commitment to “merit” while keeping special considerations out of view. Recognizing legal hypocrisy as a unique political fault allows those suffocated by institutional hypocrisy to regain their voice.

Let us ground our institutions with two commonplace and non-legal examples of hypocrisy. In Molière’s *Tartuffe*, Tartuffe dupes Orgon, the head of a wealthy household, into friendship by affecting a pious character.<sup>1</sup> 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

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<sup>1</sup> MOLIÈRE, *TARTUFFE: A COMEDY IN FIVE ACTS* (Richard Wilbur trans., Harcourt Brace & Co. 1997) (1664).

more he affects piety, the more Orgon fixates on and trusts him. Thus, she ingratiates and even manages to have Orgon's daughter betroth to him. All the while, Tartuffe schemes to seduce Orgon's wife and steal his wealth. The character is so vivid the word Tartuffe has become synonymous with "hypocrite".

Now the second. A member of the Victorian upper middle class sits with 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 thanks her hosts for "a most gracious meal," served by a bevy of servants. A servant takes her to her carriage and still another drives her home. The number of servants are possible only because of their extremely low wages. The servants live in slums of London, in shocking but hidden poverty. She 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 glancing over (or skipping) articles in the paper examining the systematic causes of poverty. She gives a small amount to charity but goes no further.

The above are fairly commonly understood examples of hypocrisy. In first case, Tartuffe avows moral values he does not hold to deceive others for his benefit despite aims completely antithetical to those values. The second case is somewhat subtler. The hypocrisy of the Victorian woman is not conscious deception rather it is complacency in determining much less living up to the demands of her avowed moral values. She does this in a way, but only in a way, unknowingly. She shields her eyes, sparing herself the costs of living up to her professed values.

My claim is that the same two features of hypocrisy are a danger not just in our personal morality but in legal systems as well. There is a special type of fault a legal system can have -- that of legal hypocrisy. It is a fault that resembles the two facets 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," it spares itself the cost of living up to the demands of political morality.

Given how commonly charges of hypocrisy ring out, it is surprising that 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. When one speaks of politics as full of hypocrites, one usually means politicians are hypocritical. This locution misses the important feature that hypocrisy can be a defect not just of persons but laws and legal systems. The legal fault of "legal hypocrisy" 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 its victims unable to properly name their complaint or for others to recognize its harms.

Typically, when an insult or accusation is overused, its effectiveness wanes. Ironically, 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. Put plainly, legal hypocrisy threatens unique damage to the very rule of law. Though related hypocrisy is a particular type of legal harm that cannot be fully accounted for by looking to other “Rule of Law” defects. Legal hypocrisy is all the more dangerous because it is too often elided with other legal defects. Worse still, legal hypocrisy harms not only those who are the direct object of hypocritical injury but insidiously harms even the powerful who wield it for their immediate advantage. These unique harms can quickly drain the legitimacy – the lifeblood – from a legal system.

Lest readers attribute such statements to the usual academic handwringing, glance at nations that have slid from mottled corruption to hypocrisy to widespread cynicism. A conversation with a Kenyan cabdriver or a Nigerian shopkeeper provides stark warnings of the dangers that lie in legal hypocrisy. No matter how noble the person or disciplined the worker, citizens of these countries too often speak of their legal system with utter disillusionment. I speak of a disillusionment 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 others. When a legal system is hypocritical it becomes a (barely) disguised tool for power. It communicates to citizens that they are not taken seriously as agents deserving of respect or to whom uses of power need be justified. Citizens shrug 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.

In Part I, 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. Part II takes up the challenge of translating the description of a personal vice to fit institutional practices, describing the characteristics of “legal hypocrisy.” Part III explores the unique harms of legal hypocrisy.

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, I will resist the urge to fully flesh out the fields of law exhibiting legal hypocrisy. The purpose of this piece is to get the idea of legal

hypocrisy fully in view, leaving to future work its application. I conclude by exploring the distinct two fold harms of legal hypocrisy. First, institutional hypocrisy harms its primary victims by silencing them as it takes advantage and secondly, hypocrisy harms even those who engage in it by undermining the practices, in this case the legal bonds, on which it rests.

### Part I: Hypocrisy

The ease with which charges of hypocrisy are hurled belies the slipperiness in defining exactly what constitutes hypocrisy. Hypocrisy is a slippery vice, defined in part by its relationship to other vices. To be hypocritical, one intuitively feels, is to be false to other moral values. This once removed nature splinters the moral assessment many attach to it. Judith Shklar saw hypocrisy as the great unforgivable accusation of our age, recklessly tossed about to camouflage substantive moral disagreement.<sup>2</sup> Michael Walzer sees in it a redemptive quality in that the hypocrite at least tacitly acknowledges that there are communal moral norms he is breaching.<sup>3</sup> Others argue that isolated, hypocrisy is relatively benign. The hypocrite hiding his cruelty is blameworthy for cruelty, hypocrisy adds little to our condemnation.<sup>4</sup> On the far end of the spectrum, Nietzsche doubted that modern man held convictions strong enough to betray; he almost longed for people strong enough to be hypocrites.<sup>5</sup> What common view can be gleaned from these disparate assessments?

It may be best to start with the classic explication by Gilbert Ryle. Ryle captures a core truth of our intuitions of hypocrisy when he describes hypocrites as people “who pretend to motives and moods...[or] pretends to motives and abilities other than one’s real ones, or [ ] pretends to strengths of motives and levels of ability other than their real strengths and levels.”<sup>6</sup> Further, Ryle proposes the hypocritical are insincere to give a false impression.<sup>7</sup> Thus to be hypocritical implies deliberately avoiding “saying what comes to one’s lips, while pretending to say frankly things one does not mean.”

Though much of what Ryle proposes applies naturally his account is both over and underinclusive. Ryle’s remarks are overinclusive because he focuses not on hypocrisy *per se* but on the deceit that accompanies hypocrisy. There are many people who may deliberately “avoid saying what comes to their lips” without being seriously liable to the

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<sup>2</sup> JUDITH N. SHKLAR, *ORDINARY VICES*, 45-48, 63-65, 80-81 (1984).

<sup>3</sup> MICHAEL WALZER, *JUST AND UNJUST WARS*; 19-20 (1977).

<sup>4</sup> Christine McKinnon, *Hypocrisy, with a Note on Integrity*, 28 *AM. PHIL. Q.* 321 (1991).

<sup>5</sup> FRIEDRICH NIETZSCHE, *THE TWILIGHT OF THE IDOLS*, 73-74 (1964).

<sup>6</sup> GILBERT RYLE, *THE CONCEPT OF THE MIND*, 60TH ANNIVERSARY EDITION 153 (1949).

<sup>7</sup> *Id.* at 162.

charge of hypocrisy. The polite guest that praises an uninteresting meal or an atrocious but much beloved family heirloom does not immediately illicit the sense that they are hypocrites.<sup>8</sup> It is the houseguest who has proclaimed a policy of ruthless honesty about aesthetic matters only to help themselves to a social lie when dining at his boss's home that is appropriately called a hypocrite.<sup>9</sup>

Hypocrisy is not merely deceit but deceit which violates the avowed standards of the actor. The social politeness of declaring Grandma Edna's tchotchkes beautiful does not make one a hypocrite because few value honesty above all other moral values including kindness.<sup>10</sup> 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. This is why Nietzsche romantically mourned hypocrisy, he felt modernity had so eroded the strength of values that most did not have the strength of convictions to even be hypocritical.<sup>11</sup>

Notice the above are merely open to the charge of hypocrisy, *i.e.* *betraying* avowed values. A friend who has had a mistress may warn an affair would be a betrayal of marriage vows. His confessions of self-loathing may forestall accusations of hypocrisy. Some acts that violate genuinely held values are not hypocrisy but weakness-of-will or akrasia.<sup>12</sup> Some actors even profess to not be in control of their will, say the drug addict beseeching a friend to avoid drugs.<sup>13</sup>

In the unruly world the line between akrasia and hypocrisy is blurry, read more by experience than by crisp analytical distinctions. That someone is open about failing to live up to their values may convince they genuinely hold themselves accountable to those values.<sup>14</sup> Yet consistent failure to observe declared values makes us weary of claims of temptation and suspect them of hypocrisy.<sup>15</sup> The friend who has tryst after tryst loses credibility. The question will remain, to what extent do the person's actions them 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.

<sup>8</sup> Béla Szabados, *Hypocrisy*, 9 CAN. J. PHIL. 195, 196 (1979).

<sup>9</sup> Szabados, *supra* note 8, at 196-97.

<sup>10</sup> Christine McKinnon, *Hypocrisy, With a Note on Integrity*, 28 AM. PHIL. Q. 321, 324 (1991).

<sup>11</sup> NIETZSCHE, *supra* note 5.

<sup>12</sup> SHKLAR, *supra* note 2, at 54; Szabados, *supra* note 8, at 199-200; Kittay, *supra* note **Error! Bookmark not defined.**, at 282; Dan Turner, *Hypocrisy*, 21 METAPHILOSOPHY 262, 263 (1991).

<sup>13</sup> Dan Turner, *supra* note 12, at 265; see also, Roger Crisp and Christopher Cowton, *Hypocrisy and Moral Seriousness*, 31 AM. PHIL. Q. 343, 345 (1994), Saul Smilansky, *On Practicing What We Preach*, 31 AM. PHIL. Q. 73, 77 (1994).

<sup>14</sup> *Id.* at 263-264.

<sup>15</sup> Eva Feder Kittay, *supra* note **Error! Bookmark not defined.**, at 282-284.

If Ryle is overinclusive, conflating deception with hypocrisy, he is underinclusive in tying hypocrisy only with explicit deception. To be fair, while Ryle's examples focus on conscious deception, he need be so limited. Ryle is not tied to the notion that one need always act with explicit intentions, reminding us that one often has imperfect access to his/her own thoughts or motives.<sup>16</sup> Still, Ryle's focus on one pretending to false moods and motivations overly focuses on conscious and explicit hypocrisy.

Acting explicitly against one's values is only the most obvious way one can violate avowed moral norms. One may also betray moral norms by failing to act as they require. Our Victorian who professes the value of charity is hypocritical given her meager charitable contributions of time and money; she shows a blameworthy inertness to the moral values she professes. We recognize hypocrisy in moral complacency in matching our acts to our professed values.<sup>17</sup>

Unlike explicit deception, such hypocrisy is evidenced by an unwillingness to inspect our own actions and motivations or avoiding noticing unattractive facts that are indicted by our moral standards.<sup>18</sup> One may also find hypocrisy in those who adopt moral values so meager that they will rarely make demands of them at all.<sup>19</sup> The social justice reformer who blithely ignores that the bevy of servants around her is only made possible by unjust economic relationships strikes many as the archetypal hypocrite.<sup>20</sup>

Much as in conflicts of values, weakness-of-will makes it difficult to isolate hypocritical complacency. Not every failure to doggedly pursue a moral value makes one a hypocrite. Parents can value their children's education consistent with not spending every dollar of disposable income on tutors if they have provided adequately for schooling. Economic reformers who comport their life with their values – paying what they take to be just market rates – are not hypocrites though they may see that they remain participants in an unjust system.<sup>21</sup> In some cases, one will fall short of one's values due to a lack of resources to fulfill moral demands. At some point, of course, unwillingness to dedicate enough resources or make any sacrifices for a goal that one professes to value will indict one as a hypocrite.<sup>22</sup> As before, drawing the line between a lack of ability and hypocritical complacency will be a matter of judgment.

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<sup>16</sup> RYLE, *supra* note 6, at 149-162.

<sup>17</sup> SHKLAR, *supra* note 2, at 47, 54-55

<sup>18</sup> Szabados, *supra* note 8, at 208-210; Crisp and Cowton, *supra* note 13, at 343-344.

<sup>19</sup> Crisp & Cowton, *supra* note 13, at 345; *see also* PLATO, THE REPUBLIC, 331b1-5.

<sup>20</sup> SHKLAR, *supra* note 2, at 54-55, 66-67.

<sup>21</sup> Smilansky, *supra* note 13, at 74.

<sup>22</sup> *Id.* at 73.

One feature has been strangely lost in pursuing the distinctions above. Strictly speaking, hypocrisy need not concern something of great importance; hypocrisy need not even be something we condemn. We may be happy our partner swallows a fanatical commitment to truth and compliments Grandma Edna's baubles.<sup>23</sup> (This may even explain very strange cases as when we are glad that someone who professes evil values is inconsistent, say the virulent racist who treats a few ethnic friends with some amount of decency.<sup>24</sup>) Yet it would be strange to allow fine analytical distinctions obscure the fact that hypocrisy is nearly always a charge of serious moral condemnation.<sup>25</sup>

One may question why this is so. If Bob hypocritically feigns kind-hearted when he is cruel, is it not his cruelty that deserves condemnation?<sup>26</sup> Noting why this sensible suggestion fails brings into focus the particular harms of hypocrisy. First and most intuitively, hypocrisy is often interwoven with deceiving another to gain an advantage.<sup>27</sup> In vulgar cases, this advantage can be straightforwardly material. Tartuffe dissembles in order to gain advancement and wealth or more subtle as where one seeks moral or ethical credit by pretending to be better than they; think the politician who preaches family values while secretly carrying on extramarital affairs. It is this desire to gain advantage that leads many to define hypocrisy as deceitful behavior in important areas, chiefly moral and religious realms.<sup>28</sup> Trivial areas usually have an insufficient payoff to warrant studied hypocrisy.

More importantly, it is manipulation that marks the separate moral injury of hypocrisy, quite apart from the underlying vice one might isolate. There is a separate injury in the intent to use and manipulate others to serve one's greed. Once isolated, the independent injury of being manipulated is immediately familiar. Many things of value depend on their being freely and honestly given. Friendships and love are importantly distinct from economic exchanges because they are embedded in relationships of genuine mutual affection and esteem. Both are valuable only when they are sincere; when actions

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<sup>23</sup> Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 *LAW & PHIL.* 393 (2003). *See also*, Kittay, *supra* note **Error! Bookmark not defined.**, at 280. So we need not only attach the charge of hypocrisy when someone 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.

<sup>24</sup> LESZEK KOLAKOWSKI, *In Praise of Inconsistency*, in *TOWARD A MARXIST HUMANISM: ESSAYS ON THE LEFT TODAY* (trans. Peel) (1968).

<sup>25</sup> Szabados, *supra* note 8, at 196-197, 205. Kittay, *supra* note **Error! Bookmark not defined.**, at 279, 285-86. McKinnon, *supra* note 10, at 321-322.

<sup>26</sup> McKinnon, *supra* note 10, at 321. This view of hypocrisy as derivative is usually raised when, as above, hypocrisy leads to people acting in ways we find laudable. Kittay, *supra* note **Error! Bookmark not defined.**, at 277.

<sup>27</sup> McKinnon, *supra* note 10 at 322.

<sup>28</sup> Kittay, *supra* note **Error! Bookmark not defined.**, at 279, 285-286.

genuinely evidence the corresponding emotional state. To find out that the person you love is pretending to love you for your wealth or looks is to feel a distinct and deeper injury than to discover a thief wishes to rob you.

Thus hypocritical deceit is a separate harm from the greed, selfishness or whatever else that may motivate the injury. The special injury in that one is manipulated and used for another's ends. It is an injury that comes with a built-in insult. As with being used, it is a contemptuous disregard of one's personhood.

Further, by betraying avowed morals and values, hypocrisy uniquely damages our trust in expressions of moral values.<sup>29</sup> Hypocrisy reveals an unwillingness to take the demands of morality seriously.<sup>30</sup> Indeed, what ties both hypocritical betrayal and complacency together is that they both reveal one is insufficiently attentive to the avowed values undermining our faith that these codes are to be taken seriously by all within our community.<sup>31</sup> Thus hypocrisy undermines the very value of moral goods by making their expressions seem cheap and uncertain.<sup>32</sup> There is nothing overly abstract in noting the harm to confidence in the expression of moral 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 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.

## Part II: Legal Hypocrisy

The picture of hypocrisy painted above is, I believe, common enough to recognize because it turns on ordinary experiences with natural persons. The question then is can an institution rather than a person, be properly indicted as hypocritical?<sup>33</sup> After all, the difficulty of treating Constitutional and Congressional pronouncements as the product of

<sup>29</sup> 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 16 THE TANNER LECTURES ON HUMAN VALUES 307, 355-56 (Grete B. Peterson ed., 1995).

<sup>30</sup> Crisp & Cowton, *supra* note 13, at 347.

<sup>31</sup> McKinnon, *supra* note 10, at 327-29.

<sup>32</sup> Kittay, *supra* note **Error! Bookmark not defined.**, at 279, 285-86.

<sup>33</sup> 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. RYLE, *supra* note 6, at 149-62; Alison Gopnik, *How Do We Know Our Minds: The Illusion of First-Person Knowledge of Intentionality*, 16 BEHAV. & BRAIN SCI. 1 (1993); DANIEL C. BENNETT, *CONSCIOUSNESS EXPLAINED* (1992); 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.

a single intentional actor is the source of endless academic debate surrounding the question of legislative intent.<sup>34</sup> How can we expect to do any better in constructing a coherent actor out of “law” who can be accused of behaving hypocritically?

First, it is important to notice that nothing in the model of hypocrisy painted above relied on mental or intentional states. Hypocrisy was described as acting in ways that violates avowed moral standards or ignore the pull of those moral standards. Additionally, hypocrisy is typically a moral criticism because it attempts to manipulate for advantage. None of this commits one to claims regarding natural mental states or forecloses application to social institutions.

The reason is both obvious and yet easily missed. Institutions, as persons, have avowed moral values.<sup>35</sup> This is true for corporations, clubs, nations and legal systems.<sup>36</sup> 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 the moral values of faith and caring for its members. A criminal biker gang engaged in systematic sexual abuse would raise our outrage but not the betrayal that accompanies hypocrisy. Because some groups are understood as dedicated to the relief of poverty or the pursuit of scientific truth, we understand that corporate bodies and normative systems have avowed moral values.<sup>37</sup>

Describing legal norms as “misleading” or “complacent” seems to trade on an analogy with the purposeful deception of natural persons, relying on a picture of intentions 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 true that institutions act through persons. But institutional hypocrisy is neither identical to nor captured by individual attitudes. Institutions can be 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 by their avowed values. This can be because individual wish to deceive – think of deliberately misleadingly titled.

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<sup>34</sup> Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent As Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

<sup>35</sup> Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, 3 LAW & PHIL. 355, 367-74 (1984); Stefano Berteia, *The Arguments from Coherence: Analysis and Evaluation*, 25 OXFORD J. OF L. STUD. 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).

<sup>36</sup> Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*; 59 DEPAUL L. REV. 1091, 1096, 1107-1109 (2010).

<sup>37</sup> Stefano Berteia, *The Arguments from Coherence: Analysis and Evaluation*, *supra* note 35, 372-373.

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. Imagine a group of company managers institute a complex financial fraud. They flee the scene but because the information is not public, individuals continue to buy the fraudulent securities. One would still describe the company as engaging in a fraud. We rightfully see that individual intent and collectively misleading practices can come apart.

That groups and institutions can be thought of as autonomous agents is in fact perfectly commonplace. Large groups and institutions can form beliefs, evaluate morally attractive and unattractive choices and respond to available options.<sup>38</sup> Take a group of traveling friends arguing over their daily itinerary. One prefers a beach day, another, the City's cultural sights and still another some shopping. After a bit of negotiation, they come to a plan. The plan can only be described as a joint plan or a complex web of joint intentions not reducible to the desires or intentions of any one of the members.<sup>39</sup> No single action take during the group's day will be understandable without reference to the group's plan as a group. If the person designated to buy museum tickets has no foreign currency, another member will jump in and purchase the tickets.<sup>40</sup> New intentions in individual members, evaluations of certain actions, mechanisms and routines by which goals are reached will be adopted without it being the case that those beliefs, evaluations and intentions are reducible to any particular individual. Imagining an annual travel group dedicated to cultural tourism or beach vacations, one sees can be autonomous agents to which principles can be ascribed quite apart from individual members.

Noticing that institutional practices and individual attitudes come apart recognizes institutional hypocrisy without needing to locate it in the mental state of an individual. A despicable police officer who refuses to investigate marital 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 they shield the institutional hypocrisy here because they, individually, are not acting hypocritically?<sup>41</sup> Or return to the hypothetical fraudulent financial firm. When a

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<sup>38</sup> Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 177-178 (2007); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011). Philip Pettit & David Schweikard, *Joint Action and Group Agency*, 36 PHILOSOPHY OF THE SOCIAL SCIENCES 18-39 (2006); Margaret Gilbert, *Collective Preferences, Obligations, and Rational Choice*, 17 ECONOMICS AND PHILOSOPHY 109-120 (2001); MICHAEL BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY (1999).

<sup>39</sup> Philip Pettit & David Schweikard, *Joint Action and Group Agency*, 36 PHILOSOPHY OF THE SOCIAL SCIENCES 18-39 (2006); Margaret Gilbert, *Collective Preferences, Obligations, and Rational Choice*, 17 ECONOMICS AND PHILOSOPHY 109-120 (2001); MICHAEL BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY (1999).

<sup>40</sup> *Id.* at 191-192.

<sup>41</sup> 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.

new board of directors takes over, can they avoid unwinding the scheme by claiming that they individually never intended to deceive others?

The reason the answer is no is located not in the individual mental states of the actors but in their relationship to institutional norms. The hypocrisy of the police officers lies in the betrayal of their role related duties. When police officers are meant to uphold the law not to prosecute their own prejudices. Similarly, the new board of directors is not responsible because they individually sought to deceive; they are bound by their role to unwind the fraudulent practices. This illustrates a surprising and even stronger facet of our claim. If a police force institutionally avowed a commitment to equal protection under the law but each individual police officer was an avowed racist, their institutional role still makes it possible to view the police force as hypocritical. Not only is institutional hypocrisy not reducible to the individual hypocrisy of each member of the institution, it may exist even though no member of the institution is being hypocritical.<sup>42</sup>

One of the important contributions of understanding institutional hypocrisy is that it corrects the view that individual actors can escape the responsibility of addressing hypocritical practices because they are not individually blameworthy. The same features that make institutional hypocrisy irreducible to individual hypocrisy make it all too easy for individual actors to deny personal culpability. Each individual's actions may be so minor or innocuous that despite leading to predictably immoral results, each can view themselves as blameless.<sup>43</sup> So in apartheid South Africa, for example, many lawyers, judges and other legal actors could tell themselves a story of institutional failure on which their blameworthiness was so miniscule as to disappear.<sup>44</sup> Just as in the institutionalized travel club duties to act turned on group roles recognizing that one is part of a hypocritical institution gives rise to a duty for any actor placed to ameliorate the situation, irrespective of their individual blameworthiness. In any case, the key thing to notice is that institutional practices can be misleading or complacent apart from the mental states of any individual.

Once we recognize that institutions can 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.

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<sup>42</sup> I am grateful to Lawrence Solum for the example.

<sup>43</sup> Philip Pettit, *supra* note 38, at 194-96; Frank Jackson, *Group Morality*, in *METAPHYSICS AND MORALITY: ESSAYS IN HONOUR OF J. J. C. SMART*, ED. PHILIP PETTIT, RICHARD SYLVAN, AND JEAN NORMAN (1987).

<sup>44</sup> I owe this example to David Dyzenhaus, from who it was quite moving.

By way of example, think of the “separate but equal” doctrine in the United States. The end of the Civil War and the adoption of the Thirteenth and Fourteenth Amendments announced a new political moral vision for the country, that of equality under the law. Notwithstanding these newly avowed norms, it quickly became clear that Southern States were dedicated to creating a legal system which pretended to recognize the equality of the newly freed slaves but in fact was designed to subjugate. Plainly, it was impossible to be aware of the separate conditions and rights meted out to African-Americans and be confused as to who was privileged. Further, the Federal government, following the compromise of 1877, acquiesced in this charade, ceding the enforcement of segregation laws to the southern states for political reasons. While no large institution could instantly rearrange itself around a new set of norms, 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 Fourteenth Amendment’s promise of equality.

A last ditch effort to describe this situation as a conflict of norms between political values threatens to empty our moral values of their meaning. Moral values conflict when 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 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 not just obscuring hypocrisy but draining moral values of meaning.

Analogous to the individual case, legal institutions sometimes fail to uphold their avowed moral values due to momentary weakness of institutional will rather than wholesale rejection of 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 whether by an institution undermines the claim the institution takes the value seriously. Again, the extent to which the institution openly addresses failures may influence our judgment on whether such examples constitute full-fledged hypocrisy.

Secondly, hypocritical complacency aptly applies in the case of institutional hypocrisy. A legal regime may express a commitment to certain moral values then do little to realize them. Institutions may omit procedures needed to serve avowed values or dedicate enough time or money to their realization. The legal axiom “better ten guilty men go free than one innocent man suffer” may be hypocritical if the resources required 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.<sup>45</sup>

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<sup>45</sup> To be precise, the old saying “better ten guilty men go free than one innocent man suffer” cannot be taken to stand literally for a legal principle. We, as a society, are interested not just in false positives but false negatives. Thus there are countless variations of finding the guilty innocent and vice versa which would cause us to reject the literal reading of this phrase. What is true is that the sentiment stands for a powerful legal principle about the state’s commitment to

Just as in the individual case, we will remain sensitive for institutions that fall short due to lack of resources. But chronic and unrepaired underfunding may eventually lead to the conclusion that the system is hypocritically betraying its values through complacency.<sup>46</sup>

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 precisely satisfied; it is easy to recognize when they have been horribly breached.<sup>47</sup> 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.

### **Part III: Legal Hypocrisy as a Unique Harm**

The preceding section demonstrated 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 it is anything unique. Is there any unique threat to the rule of law posed by legal hypocrisy not perfectly well recognized in traditional understandings of the rule of law?

The first place one might look is Lon Fuller's seminal exploration of the internal values of law in *The Morality of Law*.<sup>48</sup> Fuller argues that legal systems that display eight faults (1) non generally applicable norms, (2) non publically available norms, (3) retroactive norms, (4) unclear norms (5) contradictory, (6) norms requiring the impossible, (7) inconsistent or endlessly changing norms (8) or norms that are incongruent with official action will have importantly failed to be a legal system at all. Failing these "internal moral demands" of law undermines the law's ability to fulfill its primary purpose -- to guide human action. Fuller's criteria hint at avoiding hypocrisy and he clearly would have understood hypocrisy as a threat to the rule of law. Still the Fullerian criteria do not pay sufficient attention to the vice of legal hypocrisy.

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determining guilt and innocence as well as the presumption of innocence. I am grateful to Michael Pardo for pushing me on this point.

<sup>46</sup> John H. Langbein, *Torture and Plea Bargaining*, 46 UNIV. CHICAGO LAW REV. 3 (1978).

<sup>47</sup> LON L. FULLER, *THE MORALITY OF LAW* (1964).

<sup>48</sup> *Id* at 33-91.

Take the Fullerian criteria of avoiding contradiction between laws. No question, the use of contradictory laws can contribute to the hypocrisy of a legal system. But Fuller's focus is not on laws that espousing one legal value while pursuing another. Instead he focuses on laws commanding one action while simultaneously requiring a conflicting action.<sup>49</sup> Fuller recognizes that such contradictory commands need not clash in a strictly logical sense. A law that commands that one install car plates on one day while simultaneously punishing that action is not, formally speaking, contradictory; it merely commands that a man do something and be punished for it.<sup>50</sup> It is contradictory, however, in the sense that such laws cannot rationally guide a citizen's actions.

The second closely related Fullerian criteria is the requiring congruence between declared rule and official action.<sup>51</sup> Fuller notes the dangers of laws that have no discernible relationship to official action.<sup>52</sup> Here Fuller is closest to 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."<sup>53</sup>

Fuller's examples are surely cousin to the harms of legal hypocrisy. The separate but equal doctrine stood in contradiction to the letter and spirit of the Fourteenth Amendment. Further, incongruence between doctrine and official actions are often key in perpetuating legal hypocrisy. Still, Fuller's examples pay insufficient attention to legal hypocrisy as such and miss this important threat to the rule of law.

To make the distinction more stark, notice the long standing criminal law exception for marital rape did not violate Fuller's prohibition of contradiction. Nor did it display incongruence for the marital rape exception was, for much of the last century, the announced doctrine. As the law began to recognize that women were to be considered autonomous equals, the view of a woman having granted permanent consent upon marriage was unsupportable. Thus, the marital rape exception displays blameworthy complacency because the legal system left in place an antiquated legal norm that failed to appropriately respect the newly developing legal value. Ultimately the Fullerian requirements fail to hold hypocrisy squarely in our sights.

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<sup>49</sup> *Id.* at 36, 65-8.

<sup>50</sup> *Id.* at 65-8.

<sup>51</sup> *Id.* at 38, 81-2.

<sup>52</sup> *Id.* at 38.

<sup>53</sup> *Id.* at 81.

Another place where one might expect the fault of legal hypocrisy examined is the rich literature surrounding legal coherence.<sup>54</sup> Indeed, many of the faults of legal hypocrisy have been recognized, in one way or another, by the various scholars wrestling with the idea of legal systems displaying normative coherence that is the extent to which law must be “coherent,” “fit together,” “display one point of view” or “speak with one voice.”<sup>55</sup> 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 course, coherence scholars interested in ultimate effects of incoherence particularly the extent incoherence affects legitimacy of a legal system.<sup>56</sup> Still, the jurisprudential scholarship on coherence tends to focus inward, 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 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. While coherence theories focus internally on legal regimes for a certain form of consistency, legal hypocrisy focuses externally on the way law can be used to treat citizens. More importantly, focusing on legal hypocrisy highlights the harm incoherence can do to both citizens and the rule of law.

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. Adequately addressing the sophistications of the literature is impossible here but Neil MacCormick’s influential model will usefully serve as a contrast.

Coherence theories have as a key premise that legal norms or should be interpreted consistently both between each other and the principles to which they respond. MacCormick’s envisions “[a] legal system as a consistent and coherent body of norms whose observance secures certain valued goals which can intelligibly be pursued all together.”<sup>57</sup> Importantly, MacCormick believes “however desirable on consequentialist

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<sup>54</sup> 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).

<sup>55</sup> For an excellent inspection of the landscape of coherence literature, see, Berteau, *supra* note 35, 371-2.

<sup>56</sup> *Id.* at 373; NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY*, 106-107, 152 (1978).

<sup>57</sup> MACCORMICK, *supra* note 56, at 106.

grounds a given ruling might be, it may not be adopted if it is contradictory to some valid and binding rule of the system.”<sup>58</sup> “Coherence” on the other hand is used to capture a sense of how the rules of a legal system hang together; it describes the way legal norms can be taken together to pursue an intelligible and mutually compatible values or policies.<sup>59</sup>

Legal hypocrisy may then be a subset, but a very special subset, of incoherent legal norms. But because they are internally focused -- tending towards 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.<sup>60</sup> 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. Legal hypocrisy is concerned foremost with the coherence of legal norms to *avowed* or *expressed* legal principles.

An example may clarify. Imagine a society that conceives itself as dedicated equitable treatment of its poor. In fact, the society’s laws uniformly favor an elite ruling class. From the point of one concerned only with coherence, the fault here may seem small. After all, though there is an important separation of principle, the law is coherent. For one focused on hypocrisy, however, the gap is shocking because the 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 equality. 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 coherence advocates to point out that coherence is only one factor in moral justification.<sup>61</sup> Incoherence is one way of being hypocritical but hypocrisy is a legal vice all its own.

It is impossible to leave this discussion without discussing Ronald Dworkin’s enormously influential interpretivist theory of law. Dworkin’s theory, complex and evolving over the years, has been the subject of endless debate.<sup>62</sup> Unfortunately, here is not the place for a careful exegesis of Dworkin’s work and case immeasurable scholarly attention makes

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 106-7, 152-6, 167-73, 372-3; Berteau, *supra* note 35, 373; Levenbook, *supra* note 35, 356-9.

<sup>60</sup> For powerful critiques of coherence theories of law generally, see Levenbook, *supra* note 35 and RAZ, *supra* note 54.

<sup>61</sup> Levenbook, *supra* note 35, at 359; RAZ, *supra* note 54, at 298, 303-4.

<sup>62</sup> For a case that Dworkin is not a coherence theorist, see RAZ, *supra* note 54, at 319-25. For a persuasive case that he is, see Levenbook, *supra* note 35, at 365-371; S.L. HURLEY, NATURAL REASONS 262-263 (1989).

that work unnecessary. Dworkin's share the intuition that institutions can be ascribed principles or that law speaks with its own voice.<sup>63</sup> The famously important point for Dworkin is that political, legal and moral principles are internal to the law<sup>64</sup> and law thus demands "integrity" between legal norms and principles.<sup>65</sup> Ultimately, Dworkin argues that a norm is only a legal norm (*i.e.* a law) if it coheres with the principles that best explain and justify a community's legal practice<sup>66</sup> making integrity criterial to law.

I have left aside important parts of Dworkin's theory to highlight portions that directly relate to our theory of legal hypocrisy. Given how much they share, can legal hypocrisy be viewed as a purely Dworkinian project? I happily submit that mine can be seen as a broadly Dworkinian project, yet there are important benefits to cabining my view from Dworkin's.

First, Dworkin's is a view about what makes something a true legal proposition.<sup>67</sup> Dworkin's clash with positivist and natural law theories have spilled more ink than any other in legal philosophy over two generations. Legal hypocrisy claims much less remaining agnostic to deeper questions of the validity criteria or truth propositions of legal systems.<sup>68</sup> Given how controversial such claims are, it is not trivial to be able to prosecute our claims while eschewing the meta-theoretical demands of Dworkin's theory.

Secondly, Dworkin's complex theory locates the interpretive project of determining what a legal system is in a community's social practices. The interpretive project does so by constructing the most morally attractive explanation of those social practices. Still, in any given community even the best interpretation of those practices may be morally unattractive. Hence, Dworkin's theory may, in a given community, compel adoption of laws which are hypocritical and unjust.<sup>69</sup> Obviously, 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, particularly in grounding political obligation in "associative obligations." Those associative obligations may, in turn, be justified by the fundamental respect a society owes each member. Thus, it may

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<sup>63</sup> RONALD DWORKIN, *LAW'S EMPIRE* 49-72, 165-7 (1986).

<sup>64</sup> *Id.* at 246-247, 293.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 225.

<sup>67</sup> *Id.*

<sup>68</sup> Some thoughtful commentators insist that reading Dworkin as engaged in a debate about "valid" legal criteria versus true legal propositions is a persistent mistake in the positivist literature. Danny Priel, *The Significance of Legitimacy to Legal Theory*, 57 *MCGILL LAW JOURNAL*

<sup>69</sup> *Id.* at 176 – 177.

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 outside of 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.

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 prejudice. Nonetheless, they remain importantly different. In fact, one of the critical harms of hypocrisy is that it obfuscates discrimination.

Imagine two different countries. One has an immigration system based on a guest worker program. The program explicitly denies guest workers basic civil 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, recall the country that clothed its laws, which entirely serve the elite, in a hypocritical egalitarian garb. The workers in this country are treated even worse. 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 close inspection reveals those rights chimerical. 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.

#### **Part IV: The Harms of Legal Hypocrisy**

Granting the preceding, is 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 hypocrisy. The ways in which a legal system could be hypocritical tracks many of the ways in which people can be hypocritical. Similarly, the injuries caused, both to others and to interpersonal bonds generally, are strikingly parallel.

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 disguises the ways in which some seek advantage. In the

most direct cases the “subsidy” is easy enough to see. Tartuffe uses trickery and fraud to obtain his desires or a politician pretends to virtue to subsidize her image for professional gain. Obviously, had Tartuffe openly pursued his desires others would have called him to account. Ultimately, his unjustifiable aims would have been exposed and punished. Having moral claims shielded from close inspection acts as a sort of subsidy.<sup>70</sup>

Institutional hypocrisy imposes analogous harms of legal hypocrisy. By professing false moral values, a legal system misleads subjects in order to take advantage of them. If citizens are misled to believe that they are serving one value, while the legal system serves another unjustifiable one, then the legal system is not called upon to justify its actual goals.<sup>71</sup> Like Tartuffe, the system avoids being rebuffed. Plainly put, the legal system can pursue immoral goals under the hypocritical cover of moral ones.

Earlier we noted the example of the separate but equal doctrine. To pen this ruling, the Court concluded that the refusal by private parties to accommodate a person on the basis of race, no matter how widespread, could not be regarded as imposing any badge of slavery or servitude so long as it was not a state.<sup>72</sup> The Court’s reasoning culminated in the odious *Plessy v. Ferguson* ruling that a Louisiana law establishing “separate but equal” accommodations did not violate the Constitution.<sup>73</sup> Finally in 1906 the Court held in *Hodges v. United States* that Congress lacked the authority to pass the Civil Rights Act of 1866.<sup>74</sup>

Why bother with this pretense? No one could seriously believe that the accommodations given to southern blacks was anything like equal or misunderstood 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. 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 paying lip service to the value of equality while 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.<sup>75</sup>

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<sup>70</sup> *Id.*; SHKLAR, *supra* note 2, at 50.

<sup>71</sup> SHKLAR, *supra* note 2, at 69.

<sup>72</sup> 109 U.S. 3, 20 – 24 (1883).

<sup>73</sup> 163 U.S. 537, 540 (1896).

<sup>74</sup> 203 U.S. 1 (1906).

<sup>75</sup> 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.

The continued invocations of the pledges of equality within the Thirteenth and Fourteenth Amendments in a very real sense served as institutional placation. By gesturing at the freedoms to which the legal principles pretended, White Southerners bolstered their argument that African-Americans *should* observe the law. After all, the law was explicitly guaranteeing equal (if separate) treatment. This is not to say that African-Americans were confused but rather the hypocrisy placated the larger (White) community. Holding out the promise that the law was institutionally committed to equality could both mollify, to some extent, the demand for immediate change and stifle the demands when made.<sup>76</sup> Analogous to the personal case of hypocrisy, institutional hypocrisy can mislead subjects and cheapen the cost of compliance by communicating to the victim and others who could call the institution into account.

There is, however, an important if somewhat counterintuitive view that questions or even reverses the criticism of hypocrisy as a fault. One exotic version was seen in Nietzsche's complaint that modern principles were so riddled with inconsistency that they lacked the rigor to be betrayed. More intuitively, one may believe certain amounts of dissembling may be required to lead others into protecting important moral goods or social values. An early example of this is found in Plato's "noble lie" where he seems to condone deception if necessary to insulate social arrangements from destabilization.<sup>77</sup> Likewise, Machiavelli famously argues that statesmen must serve the good of the community before being concerned with their own integrity, lying if they must to preserve certain political values.<sup>78</sup> There are countless modern critics who hold hypocrisy may bind, protect and serve certain values, particularly important social values that are eroded by a fanatical (modern) devotion to honesty and disclosure. On this view, one way to protect martial fidelity, for example, is to return to Victorian discretion. This sentiment is reflected in the charming old quip, "hypocrisy is the compliment that vice pays to virtue." The sentiment is reflected, in part, in Walzer's view that the hypocrite at least tacitly acknowledges that there are communal moral norms he is breaching.<sup>79</sup>

This criticism draws much force from the sober recognition that valuing pathological honesty is surely a mistake and important commitments in both our public and private lives counsel discretion. To condemn hypocrisy is not to favor the undignified indiscretion of daytime television confessionals. When disentangled from conflict of values cases, however, "morally attractive hypocrisy" has little appeal.

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<sup>76</sup> I am grateful to Dan Priel for pressing me on this point.

<sup>77</sup> PLATO, *THE REPUBLIC*, CITE AT 127-129. Plato's ultimate conclusion is far from clear and this does not seem to represent his mature views evidenced in *The Laws*.

<sup>78</sup> NICCOLLO MACHIAVELLI, *THE PRINCE*, CITE.

<sup>79</sup> MICHAEL WALZER, *JUST AND UNJUST WARS*, 19-20 (1977).

The first reason is countenancing hypocrisy in the service of moral goods strikes me as rarely successful. It is hard to imagine the culture of secrecy and hypocrisy surrounding infidelity of a few generations past was one that preserved or nurtured marital values. At least the serious accounts betray easy nostalgia, highlighting the oppressive silence and quiet disregard with which the value of fidelity was treated in favor of its cousin, public respectability.

Such hypocrisy is not just typically ineffective but often endangers other values as well. Cultures in which fidelity was largely “observed in the breach,” are ones in which women were largely powerless to object to hurtful betrayal of marriage vows or unsatisfying, empty marriages so long as betrayal was thinly veiled. Ultimately, fidelity, like other moral values, seems better served by genuine praise of its value and honest appraisal of the difficulties of its demands.

Lastly, even were there moments when we might be tempted to allow social norms to remain hypocritical, it is worth remembering that the strictures of political morality which bind legal institutions are very different than the norms which govern our social lives. Legal institutions risk more than social opprobrium and humiliation, though they may also do this. Legal institutions shape duties which are coercively enforced and the very rights which define citizenship. There are powerful reasons to avoid allowing hypocrisy to take root in our legal institutions.

This brings us directly to the second unique harm of legal hypocrisy. Legal hypocrisy does more than mislead and manipulate victims of the hypocrisy, it frustrates and insults them as well. 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 by obscuring to others who could hold the system to account the nature of their injury. Thus, 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.

Take the infamous Scottsboro trials, which involved a sham trial for nine African-American boys in 1931 Alabama for rapes they did not commit.<sup>80</sup> The poor and illiterate young men, who had no representation until the morning of their trial, were unsurprisingly sentenced to death after four days of testimony by the women, recounting what was described as the most debauched crime in the history of state.<sup>81</sup> Ultimately, the United States Supreme Court quashed the verdicts due to their fundamental unfairness. It is striking that locales viewed the Supreme Court’s setting aside of the convictions as

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<sup>80</sup> JAMES GOODMAN, *STORIES OF SCOTTSBORO*, 3 - 4 (1995).

<sup>81</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

“playing with fire” since a hasty trial was preferable to a lynching. White Alabamians seemed genuinely puzzled at the outside criticism and local newspapers frequently crowed with pride. The state Supreme Court lauded the speed of the Scottsboro Boys’ trial as likely to instill greater respect for the law. Alabamians took comfort in the formality of a trial ignoring that it was little more than a slightly more formal lynching. 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.

Similarly, the complaint of Southern Blacks 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 pattern of rights violations, humiliation and violence shielded from moral scrutiny by mass hypocrisy. For that matter, institutionalized hypocrisy allows one to avoid calling one’s 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 others 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.<sup>82</sup>

It is the use of hypocrisy which muffled the demands of the Southern Black threatened with lawless violence, the woman who complains about the martial rape exception to be met with a lack of interest in “technicalities,” the litigant who complains that a decision alters, without acknowledgement, the legal standard applied or the Iranian or Nicaraguan who complains about U.S. foreign policy met with a public slogan that America supports

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<sup>82</sup> FULLER, *supra* note 47, at 159.

democracies.<sup>83</sup> These examples reveal why the suffocation of the victim's voice is not merely the effect of hypocrisy but is often the very point of hypocrisy. Hypocrisy smothers another's ability to voice their complaint and call for an accounting of their treatment. Thus, 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.<sup>84</sup> 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.<sup>85</sup>

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 that 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.<sup>86</sup> Personal 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 and the Middle East make clear that only the most oppressive legal systems can maintain control unless there is widespread believe (or at least begrudging acquiescence) in the legitimacy of the system. Further, unlike our friends, law cannot count on our generosity or forgiveness and cannot rely on fine tuned apologies or reconciliations. The law must hold itself out as generally and widely justified and legitimate.

Law, unlike personal relationships, is the locus of much disagreement and contestations about rights, obligations, goods and liabilities. This contestation leaves permanent the potential for uncertainty. One party will often suspect that it is being treated unfairly. Many decisions will be made in areas where deep uncertainty is unavoidable. In each of these circumstances, the law must be a salient focal point of not just coordination but of

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<sup>83</sup> Daryl Glaser, *Does Hypocrisy Matter? The Case of U.S. Foreign Policy*, at 256-8, 36 *REVIEW OF INTERNATIONAL STUDIES* 251 (2006). For possible conflict of values cases see *Id.* at 255-256. I am grateful to George Fletcher for the example and rewarding conversation on this and other related subjects.

<sup>84</sup> McKinnon, *supra* note 10, at 325-327.

<sup>85</sup> Kittay, *supra* note **Error! Bookmark not defined.**, at 286.

<sup>86</sup> *Id.*

faith.<sup>87</sup> It is critical for the rule of law that the fact that a legal decision has been made is generally capable of securing trust and fidelity to following the law as a way of continuing the project of social cooperation.<sup>88</sup> Seeing the law as hypocritical, and thus treating one with contempt, makes such fidelity impossible.

Understanding the threat of hypocrisy highlights the complex way in which fidelity, respect for citizens and the rule of law are connected.<sup>89</sup> On the simplest picture, “the rule of law” is tied to the guidance function of law; it makes it possible for a legal system to guide human action. On this bare picture, hypocrisy need not threaten the rule of law. It is often the case that in the most hypocritical legal regimes, the subjects are well aware of exactly what is expected of them.<sup>90</sup> Yet what Fuller noted is that guidance as such cannot be the sole value that grounds the rule of law. Fuller noticed that two conflicting laws which require one to do an act while prescribing punishment for that same act do not, in a logical sense, prevent law from guiding. Rather it betrays the law’s promise to provide guidance in a manner that is respectful of an individual’s agency. The very point of providing guidance for citizens is lost when guidance becomes disconnected from basic respect, reducing legal guidance to little more than the kind of rules used to train dogs. Though law steeped in hypocrisy may still provide guidance, it cannot guide one as an agent worthy of respect.

What Molière knew was that a political environment which allowed hypocrisy would only cultivate more hypocrisy from its citizens.<sup>91</sup> Similarly, Lon Fuller warned that the vices of law were accumulative; allowing one tenant of the rule of law be slighted only made it easier to bruise the next one.<sup>92</sup> That is the lesson of the Jim Crow South. Understanding that the laws that applied to Black Americans were exercises in hypocrisy allowed them to be often ignored altogether.<sup>93</sup> 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.

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<sup>87</sup> Jeremy Waldron, *Why Law – Efficacy, Freedom, or Fidelity?*, 13 *LAW & PHIL.* 259, 275-7 (1994).

<sup>88</sup> *Id.* at 275-77, 281-83.

<sup>89</sup> FULLER, *supra* note 53, 65-8.

<sup>90</sup> I am grateful to Denise Reaume for a powerful set of questions along this line.

<sup>91</sup> SHKLAR, *supra* note 2, at 52.

<sup>92</sup> FULLER, *supra* note 47, at 92.

<sup>93</sup> Gerald J. Postema, Rights, equality, and justice: A conference inspired by the moral and legal theory of David Lyons: Law’s ethos: Reflections on the public practice of illegality. 90 *BUL Review*, 1847 (2010).