The Illuminati Problem, Rules of Recognition, and What Distinguishes Law from Non-law?

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This is a pre-copyedited, author-produced PDF of an article accepted for publication in the Oxford Journal of Legal Studies following peer review (forthcoming in print).

ABSTRACT

How to distinguish law from non-legal but systematic and rule-guided practices of legal officials? This issue features prominently in the debate on 'positive originalism' in US constitutional law, and in similar fundamental controversies in other legal orders. I take it as a question about content and constitution of ultimate rules of recognition. Legal philosophers have been too quick in dealing with this problem. I argue that there is more space to claim that non-officials have a constitutive relationship with the content of the law, thus potentially providing a standard to distinguish legal and non-legal practices of officials. However, to the extent officials play a constitutive role in the law, what matters is their genuine acceptance of ultimate rules of recognition. To show this, I develop the concept of ACCEPTANCE of a social rule by specifying the requirement of genuineness of acceptance and the role of mental dispositions associated with acceptance.

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My thanks for inspiration and for discussion of the Illuminati Problem to William Baude and Stephen Sachs. I also wish to thank John Adenitire, Kristin Albrecht, Hrafn Asgeirsson, Nico Cornell, Hasan Dindjer, Ryan Doerfler, Ken Ehrenberg, Chris Essert, Robert Hughes, Martin Kelly, Grant Lamond, Marcin Matczak, Lucas Miotto, Hillary Nye, Adam Perry, Tony Reeves, Alex Sarch, Stefan Sciaraffa, Alice Schneider, Ewan Smith, Jean Thomas, Kevin Toh, Leah Trueblood, the anonymous referees for this Journal, and the General Editor. The previous versions of this paper benefited from discussions at the Legal Philosophy Workshop 2016 (Queen's University), the University of Edinburgh, the University of Oxford, the University of Cambridge and the University of Surrey.

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1. Introduction

If legal officials mislead the public as to what they accept sources of law (and of legal change) to be, what does that mean for the content of law? Are ‘official stories’ of the law publicly communicated by officials constitutive of the content of law?¹ This is at the core of the Illuminati problem introduced by William Baude in his discussion of a discrepancy between public statements of American judges and their actions, which is a live issue in the debate on originalism in US constitutional law.² More generally, Baude’s thought experiment provides a frame for thinking about legal systems characterised by prevalent and pernicious ‘informal’ social practices of legal officials (eg Soviet law). What distinguishes law from non-legal but systematic and rule-guided official practices? Those questions engage the core of HLA Hart’s theory of law, which I adopt. Specifically, I take them as questions about the content and constitution of ultimate rules of recognition.³

I argue that the ‘official story’ of the law is not *necessarily* constitutive of the content of law.⁴ The ‘official story’ is not everything that officials publicly say. It only includes fundamental (‘higher-order’) ideas, shared among officials, ‘from which other legal conclusions are usually derived’.⁵ For instance, ideas like that the US Constitution can only be changed through the Article V amendment process. However, even though I claim that the

¹ For an explanation of the term ‘official story’ see below in this section, n 4-5 and accompanying text.

² William Baude, ‘Is Originalism Our Law?’ (2015) 115 Columbia Law Review 2349.

³ HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) ch VI.

⁴ It is not my purpose to argue against the false claim that *everything* officials say is necessarily constitutive of the content of law, because I do not think anyone holds such an implausible view. I argue against a more limited proposition that *some* things that officials say (ie the official story) are constitutive of the content of law. I thank an anonymous referee for this journal for pressing me on this point.

⁵ Stephen E Sachs, ‘The “Constitution in Exile” as a Problem for Legal Theory’ (2014) 89 Notre Dame Law Review 2253, 2266; Stephen E Sachs, ‘Originalism as a Theory of Legal Change’ (2015) 38 Harvard Journal of Law and Public Policy 817, 870.

official story is not necessarily constitutive, I develop three arguments showing that in some circumstances there may be a significant constitutive connection between the official story and the content of law.

In doing so, I develop the Hartian model of foundations of law. First, I modify Adam Perry's account of the concept of ACCEPTANCE of a social rule by specifying the requirement of genuineness of acceptance and the role of mental dispositions associated with acceptance. Second, I propose a jurisprudential account of the constitutive role of non-officials in legal systems. I confront the rich literature on that topic, systematise the discussion, and provide arguments for the view that social practices of non-officials also ground ultimate rules of recognition.

My argument proceeds as follows. In sec. 2, I illustrate what is at stake by presenting Baude's Illuminati thought experiment, how it relates to debates in US law, and the case of 'informal' practices in Soviet law. Then, in sec. 3, I provide several possible answers to the question how systematic, rule-guided practices of legal officials could amount to subverting the law? In sec. 4, I introduce the concept of RULES OF RECOGNITION and the role they could play in accounting for constitutive relationship between the official story and the content of law.

In the three subsequent sections, I evaluate three lines of argument for such relationship. First, in sec. 5, I reject the possibility that mere pretending to accept some ultimate rule of recognition has a constitutive relationship with the content of law. However, I also note that it is psychologically plausible that people often genuinely accept rules they profess to accept. Second, in sec. 6, I consider to what extent the constitutive role of non-officials for existence of law could have consequences for the content of law, in particular, by making it the case that the official story determines or constrains the law. Finally, in sec. 7, I focus on the contingent possibility that in some individual legal systems, positive law requires compatibility between the official story and the content of law.

2. What is the Illuminati Problem About?

Before moving on to specific questions of general jurisprudence, I want to clarify the problem I aim to address, both in the abstract (Baude's Illuminati thought experiment) and in actual legal systems (of the United States and of the Soviet Union). I begin with the more general perspective.

A. Baude's Illuminati Story

It will be useful to set out in slightly more detail the title example of the Illuminati conspiracy. As William Baude has written:

Suppose we lived in a world whose judicial system looked, to most legal observers, exactly like ours: Judges issued opinions based on the Constitution, the U.S. Code, the common law, and various precedents interpreting them. But suppose a few canny professors figured out that the judges were all secretly part of an Illuminati conspiracy, ruling entirely for the benefit of their secret overlords and just pretending they were following the Constitution and these other sources. Would we say that actually the Illuminati instructions *are the law* because they describe the secret practice of the judges? Or would we say that the judges were part of a widespread conspiracy to *subvert the law*? I would say the latter, and I think many others would as well.⁶

I agree with Baude that there is something wrong with a legal system that functions as described in this example. Baude's conclusion has some intuitive pull. I will refer to the problem of discrepancy between descriptions of the foundations of the law made by legal officials in public (the official story)⁷ and the rules they use for themselves (the ones that actually guide their actions) as 'the Illuminati Problem.'

Two clarifications are in order. First, the Problem arises not because some officials sometimes intentionally act not according to the law. This is a common phenomenon in all legal systems and as such does not create confusion as to the content of the law.⁸ The Problem arises only when there is some systematic practice

⁶ Baude (n 2) 2388.

⁷ On the meaning of the 'official story' see n 4-5 above and the accompanying text.

⁸ See Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to the Law' (2011) 24 Canadian Journal of Law and Jurisprudence 305. I thank an anonymous referee for this journal for pressing me on this point.

of officials, guided by general rules, which is inconsistent with the 'official story' of the law that officials sell to the public.

Second, the issue is not whether the officials in question make distinctions between 'Illuminati-rules' (or 'the black telephone rule' as in the Soviet example – see below) and 'the law'. As John Finnis noted, jurisprudence is not lexicography.⁹ Just because officials describe something as 'the law', it does not preclude the possibility that law as understood in Hartian general jurisprudence merely overlaps with what those officials call 'the law'. Once jurisprudence begins with the conceptual basis – seeing law as a systematic, rule-guided practice with authoritative institutions – then we can go out and look for such practices in the world. Parts of those practices will already be called 'the law', but parts may not be so called by the participants.

B. Positive Originalism in US Law

This thought experiment was introduced in the context of Baude's advocacy for 'positive originalism,' a view on US constitutional law developed by Baude and by Stephen Sachs.¹⁰ In short, according to positive originalism, contemporary American legal practice is committed (as a matter of the current rule of recognition) to the proposition that there has been no unlawful change in American law since the US Constitution was enacted. This is not supposed to be a correct historical description of the American constitutional past; it may very well be a fiction. The point is that the current US ultimate rules of recognition require justifying every departure from the law as practised at the end of the 18th century by reference to the methods of legal change accepted at that time.

The Illuminati Problem comes into play when positive originalists respond to a seemingly obvious objection that a significant group, if not the vast majority, of contemporary US legal officials do not feel so constrained in practice. There are piles of non-originalist court judgments, or so it would seem.¹¹ This leads theorists like Larry Alexander, Fred Schauer, Brian Leiter, and others, to conclude that the real ultimate rules of recognition

⁹ John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 4.

¹⁰ Sachs, 'Originalism as a Theory of Legal Change' (n 5); Baude (n 2); see also Richard Primus, 'Is Theocracy Our Politics?' (2016) 116 *Columbia Law Review Sidebar* 44; Charles L Barzun, 'The Positive U-Turn' (2017) 69 *Stanford Law Review* 1323.

¹¹ Baude disputes this claim in Baude (n 2).

are inconsistent with the official story of US law, as identified by Baude and Sachs.¹² On such view, the rule of recognition of US law could be ultimately ‘whatever five Justices of the Supreme Court decide’.¹³

However, if Baude and Sachs are correct about the Illuminati case, then it is open to them to point out, as they do, that the same legal officials publicly avow the content of the rule of recognition their actions appear to violate. On this view, the ‘official story’ of US law is an originalist one. Acting in contravention of the official story, the officials are ‘subverting the law,’ not making it the case that the law ‘turns non-originalist.’¹⁴

C. Law in the Soviet Union

Even if someone is not convinced that the Illuminati Problem is of practical relevance in the US context, it still has practical and theoretical importance. In fact, I believe that the story told by Baude does illuminate an important feature of positivist general jurisprudence and how it allows for an accurate picture of legal systems like that of the Soviet Union.

Aleksandr Solzhenitsyn has famously written:

In his mind's eye the judge can always see the shiny black visage of truth - the telephone in his chambers. This oracle will never fail you, as long as you do what it says.¹⁵

However incredible this may sound to a Western reader, significance of ‘telephone justice’ is a well-documented aspect of

¹² See eg Larry Alexander and Frederick Schauer, ‘Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance’ in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 190; Brian Leiter, ‘Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature’ (2015) 66 *Hastings Law Journal* 1601.

¹³ Alexander and Schauer (n 12) 190.

¹⁴ Naturally, a critic could take the battle into the positive originalists’ turf and argue that what the officials publicly say cannot be interpreted the way the positive originalists argue it should be. But this line of criticism is outside the scope of the present paper. For arguments partly along these lines, see Jeffrey Pojanowski and Kevin C Walsh, ‘Enduring Originalism’ (2016) 105 *Georgetown Law Journal* 97; Primus (n 10); Barzun (n 10). For further jurisprudential discussion, see Mikolaj Barczentewicz, ‘The Limits of Natural Law Originalism’ (2018) 93 *Notre Dame Law Review Online* 101.

¹⁵ Aleksandr Solzhenitsyn, *The Gulag Archipelago*, vol III (Harper & Row 1974) 521.

communist and post-communist legal systems.¹⁶ The phrase refers to a widespread judicial practice of following directions from party officials as to how to decide a particular case. Naturally, telephone justice was not part of the ‘official story’ of Soviet law.

Telephone justice is far from being the only systematic way in which Soviet legal practice diverged from the official story. Even without express ‘suggestions’ how to decide particular cases, Soviet judges acted within a complex framework of formal and informal rules (ie rules coming from other sources than the ‘formal’ sources of law). There were secret directives of the Communist Party of the Soviet Union addressed to legal officials, there were rules of hierarchical dependence and of goals and measures of judicial performance, and so on.¹⁷

To the extent those practices were inconsistent with the official story, were they just undermining the law? If so, then we are at risk of concluding that ‘the law’ the officials were undermining had little in common with the law that guided actions of both law-officials and law-subjects. Just like in Baude’s Illuminati example a question arises: which actions of legal officials constitute the content of law and which do not? Where is the boundary between law and non-legal (or ‘informal’) practices of legal officials?

One feature of the Soviet case distinguishes it in an important way from Baude’s Illuminati story. Namely, the discrepancy between the official story and the rules the officials actually followed was widely known.¹⁸ In the USSR, that widespread knowledge likely contributed to law-subjects’ feeling of alienation from the law. However, if Baude and Sachs are correct that a discrepancy between what officials say and what they do obtains

¹⁶ See eg Stephen Breyer, ‘Judicial Independence: Remarks by Justice Breyer’ (2007) 95 *Georgetown Law Journal* 903, 904-05; Kathryn Hendley, “‘Telephone Law’ and the ‘Rule of Law’: The Russian Case” (2009) 1 *Hague Journal on the Rule of Law* 241; Peter H Solomon, ‘Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China’ (2010) 43 *Communist and Post-Communist Studies* 351; Alena Ledeneva, ‘Telephone Justice in Russia: An Update’ [2011] *The EU-Russia Centre Review* <http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_review_XVIII_ENG.pdf>.

¹⁷ See eg Peter H Solomon, ‘The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice’ (1987) 39 *Soviet Studies* 531, 544.

¹⁸ See eg Solomon (n 16) 359.

in US constitutional law, then the Soviet case illustrates that such discrepancy may be sustainable even when it is not a secret.¹⁹ Hence, the following discussion is not about secret laws, but about such discrepancy, even if widely known.

3. Why Illuminati-officials Are Subverting the Law?

What are the reasons for Baude's conclusion that the officials in the Illuminati story are *subverting* the law? Why would we say that telephone justice was a systematic official practice of *violating* Soviet law, not a part of it? More generally: how a systematic, rule-guided practice of legal officials could be subverting the law? Here are several possible answers; all but the first two rely on Hart's concept of RULES OF RECOGNITION:

- 1) It would be morally bad to have a systemic discrepancy between what officials say and what the law requires (a kind of a moral estoppel argument for the whole legal system).
- 2) The law necessarily must be capable of guiding action, hence it must be ascertainable to law-subjects.
- 3) The pattern of normative attitudes ('acceptance') that partly grounds ultimate legal rules, ie ultimate rules of recognition, consists of attitudes possessed even by Illuminati-officials towards the rules they merely publicly say they follow.
- 4) All law-subjects, not just legal officials, co-constitute the content of law at the most fundamental level (of ultimate rules of recognition).
- 5) The rules of recognition of this individual legal system make it the case that the law is what officials say it is, or that an official engaged in deception as described by Baude does not count as a legal official.

On the first answer, it would be morally bad if the law required something other than what legal officials publicly say it requires, hence it does not. I agree that there would be something morally

¹⁹ One reason why the discrepancy may be acceptable to the American public is because they like the substantive results of nonoriginalist precedents so much that they are not worried about departures from the original law, even if those departures are unlawful.

wrong with the situation described by Baude. However, the first argument proceeds from a moral 'ought' to a legal 'is'. It contradicts directly the core premises of the positivist model of law, which I adopt here, and given that it is not my goal to give a direct defence of legal positivism I will say no more about this argument.

The problem with the second answer is that deficiencies in knowability or ascertainability do not affect existence of *individual laws*, but if they are grave and far-ranging enough, they may mean that we are not dealing with a *legal system*.²⁰ Hence, if the official story of the law, told publicly by legal officials, is *entirely* inconsistent with how the officials apply the law and the law-subjects have no other way of discerning what the law really requires,²¹ then there is no law (at least not for non-officials²²). Others have dealt with the issue of secret laws and with the possibility of a total failure of law to guide.²³ Almost uncontroversially, secret laws may exist. Secret legal systems cannot.²⁴ But nothing follows for the legal system like that from Baude's Illuminati story, where the discrepancy between the

²⁰ See eg Matthew H Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (OUP 1999) 45–48; Matthew H Kramer, *Objectivity and the Rule of Law* (CUP 2007) 113–118. Rules of any *particular* legal system could make it the case that knowability (publicity, clarity) affects existence and content of validated laws, see sec. 7 below. However, if the condition of knowability is to apply to the rules that impose this condition, then a different ground is needed. See also Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 43–44, 49–51; Gerald J Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *The Journal of Legal Studies* 165, 186–197.

²¹ For an account of how law-subjects could ascertain the content of law merely by observing acts of law-application (eg in common law systems), see Kramer, *In Defense of Legal Positivism* (n 20) 45–48; Kramer, *Objectivity and the Rule of Law* (n 20) 113–118.

²² See sec. 6.A(i) below.

²³ Claire Grant, 'Secret Laws' (2012) 25 *Ratio Juris* 301; Adam Hill, 'Stability, Assurance, and the Concept of Legal Guidance' (2015) 34 *Law and Philosophy* 141.

²⁴ To be precise, there could be legal systems where the only law-subjects are legal officials, but the point stands that legal systems cannot be entirely secret to their subjects; see sec. 6.A(i) below.

official story and systematic official practice only obtains for a small part of the law.²⁵

However, this rejoinder may be too quick. Perhaps there are other ways of establishing a connection between the official story and the content of law. (And between law's capacity to guide action and law's content). Ways, which would not depend on consistency between the official story and official practice. To see whether that is the case, I will now turn to consider answers (3)-(5) while questioning some of the features of the standard Hartian model of the foundations of legal systems.

4. Rules of Recognition and the Illuminati Problem

In the Hartian framework that I accept, as do Baude and Sachs, the most fundamental ground of the content of law (ie the most basic thing that has bearing on it in an unmediated way) is in ultimate rules of recognition. A rule of recognition could make it the case (not necessarily directly) that the official story *is* the law or that officials who mislead the public do not count as legal officials. Such a solution based in the *content* of an ultimate rule of recognition would be a contingent feature of a concrete legal system (eg of US law only) and it may be practically difficult to ascertain whether such situation obtains. I deal with this possibility in sec. 7 below.

Before I do that, however, I will consider whether there is something *generally true* about ultimate rules of recognition, not merely true in *some* legal systems, that would help establish a constitutive relationship between the official story and the content of law. In doing so, I will re-evaluate some of the basic features of the standard Hartian account of ultimate rules of recognition. This is significant because the standard account may be seen as stacking the cards against Baude and Sachs. Why? It focuses on social rules of legal officials, which in principle could be different from what the officials tell the public.

Ultimate rules of recognition play an important role in every legal system. They define the ultimate criteria of legal validity. In

²⁵ Had it obtained for a significant part of the law, then there would have been no need for 'canny professors' to uncover anything. It would have been obvious to anyone.

other words, they provide the final stage of legal explanation of why any individual law is law. It is an ultimate rule of recognition of UK law that makes it the case that Acts of Queen-in-Parliament are valid law of the UK. There is no codified constitution or any other legal source that does so. Similarly, an ultimate rule of recognition makes it the case that the US Constitution is law.

From the perspective of the Illuminati Problem, the crucial aspect of ultimate rules of recognition is how they are constituted. In what follows, I accept that ultimate rules of recognition are social rules. That is, that they are grounded in a special kind of patterns of thought and behaviour of a certain group of people ('recognitional community'²⁶). What I do not take for granted, is which sorts of thoughts and which groups of people count in constituting ultimate rules of recognition.²⁷

I do not take that for granted for two reasons. First, it could be that the kind of thoughts that constitute ultimate rules of recognition are thoughts possessed even by someone who *pretends* to be guided by a rule. Hence, the official story could be constitutive of the law despite conscious subterfuge on the part of legal officials. Second, perhaps – contrary to what Hart expressly said – ultimate rules of recognition are somehow grounded in a social practice of the *whole society*, not just of legal officials. If so, then it is plausible that law's content is constrained by what officials say it is and that officials' private thoughts and actions are not necessarily constitutive of law's content.

On the other hand, if ultimate rules of recognition are grounded exclusively in *genuine* acceptance by *legal officials*, then it follows that the official story is not necessarily and directly constitutive of the content of law.²⁸ Thus, it would be hard to resist the conclusion that the orders of the Illuminati are law in Baude's story. And more generally, this would support the view that supposedly 'informal' or 'non-legal' systematic, rule-guided practices of legal officials (like telephone justice) can be, in fact, law. I think this view is mostly sound, but it does require

²⁶ To my knowledge, the term 'recognitional community' was introduced by Matthew Adler in 'Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?' (2006) 100 Northwestern University Law Review 719, 726.

²⁷ By 'thoughts' I mean 'mental states', but I use the former term to avoid making the argument overly technical in a direction of philosophy of mind. More precision will be needed in sec. 5 below on the concept of ACCEPTANCE.

²⁸ Regarding 'genuine acceptance', see sec. 5.B below.

significant modifications. My analysis of a strong version of the challenge against the standard Hartian account will also show that some arguments used so far to defend it are unsuccessful. My discussion concludes by identifying the strongest argument for the Hartian account.

In sec. 5, I discuss what counts as ‘acceptance,’ ie the internal (mental) attitude of members of recognitional communities that is part of what constitutes ultimate rules of recognition. Then, in sec. 6, I consider the possibility that ultimate rules of recognition are somehow constituted, at least partially, by thoughts and behaviour of all law-subjects, not just of legal officials. Finally, in sec. 7, I come back to the issue to what extent a relationship between the official story and the law may be grounded in the content of an ultimate rule of recognition.

5. Acceptance of Ultimate Rules of Recognition

A. The Concept of acceptance

According to HLA Hart, his account of social rules

treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called ‘acceptance’.²⁹

The idea of a normative attitude of acceptance as a ground for social rules continues to inspire legal and social philosophers.³⁰ There are several features of acceptance of a rule that are common ground among the Hartians:

1. It is an attitude, ie a mental state or a set of mental states.
2. It does not entail moral endorsement of the rule in question (in particular, it does not entail a belief that one *morally ought* to follow the rule).
3. It is somehow directed towards the rule.

²⁹ Hart (n 3) 255.

³⁰ See eg Geoffrey Brennan and others, *Explaining Norms* (OUP 2013) 28–29; Adam Perry, ‘The Internal Aspect of Social Rules’ (2015) 35 OJLS 283.

4. It is somehow connected with dispositions to use the rule as a guide for one's actions, to criticise others for non-conformity with the rule, to accept criticism of one's own non-conformity as valid and perhaps some others.

Recently, Adam Perry developed the concept of ACCEPTANCE in a way inspired by philosophy of action.³¹ I will follow Perry in claiming that to accept is to have a belief-independent attitude.³² To accept a rule that one 'ought to F,' one does not have to *believe* that one 'ought to F'. To accept is to act *as if* one had a belief. In the case of accepting a rule it means to take the rule as a special kind of reason for action.³³ However, I develop and modify Perry's account by insisting on genuineness of normative acceptance and focusing on the associated dispositions (see sec. 5.B).

Rules are general standards of behaviour (or patterns of behaviour, if one prefers Hart's own view). If one takes a rule *as a rule*, then she will recognize some residual normative pull of the rule even if background justifications of the particular rule are removed from the picture.³⁴ Think about a request of a gunman (secured by a threat of shooting you). If you know that you are somehow invincible or incapable of being killed, then that knowledge eviscerates any reason-giving force of the request. There is nothing left. On the other hand, when one accepts a

³¹ Perry (n 30). See also eg Jonathan Cohen, 'Belief and Acceptance' (1989) 98 *Mind* 367.

³² Perry (n 30) 292. Perry argues that acceptance is not directed towards rules themselves, but to their propositional content; see *ibid* 296–97.

³³ However, for a social rule (or any other norm) to exist and for it to be 'genuinely normative' are distinct matters. I follow Scott Shapiro in adopting a weaker notion of a 'norm,' to mean only 'any standard ... that is supposed to guide conduct and serve as a basis for evaluation or criticism.' Scott Shapiro, *Legality* (Harvard UP 2011) 41; see also David Plunkett, 'A Positivist Route For Explaining How Facts Make Law' (2012) 18 *Legal Theory* 139, 176. Such standards may exist even if they are not morally obligatory, not even *pro tanto*. Pace Greenberg, I believe that evil or repugnant social rules may and, alas, do exist ('obtain'). Contrast with Mark Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Herschovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 273. As Greenberg himself anticipates, my point is that whether they are 'all-things-considered binding' is a different matter; see *ibid* 274.

³⁴ See eg Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (OUP 1991) 120–26.

morally bad social rule, eg a rule that people of different races ought not to share bathrooms, it could be that the agent rejects all the specific background justifications of this rule, but there will still be some ‘ruleness’ left (perhaps because the agent believes that undermining social rules would lead to disintegration of the society).³⁵ For the sake of completeness, perhaps it could be that people accept rules in a stronger fashion, as final reasons, without any background justifications.³⁶ I also view this as a proper instance of acceptance.

Accepting a rule does not equal following it. Rules have different weight and they may be overridden by other considerations, some rules more often than others.³⁷ To accept a rule and to be guided by it is to treat it as a reason.³⁸ But it does not follow that all rules provide conclusive reasons for action.³⁹ Few rules, if any, purport to be absolute.

B. Genuine vs Pretended Acceptance

I go beyond Perry’s account of ACCEPTANCE in stressing the connection between acceptance of a rule and associated normative dispositions. I note, what Perry does not,⁴⁰ that there is a difference between real (*genuine*) acceptance and pretended acceptance.⁴¹ Even if someone appears to act as if they accept a

³⁵ On the notion of ‘ruleness’, see *ibid* 102-04.

³⁶ I am not committed to the view that all rational action is conducted under the ‘guise of the good’; see Kieran Setiya, *Reasons Without Rationalism* (Princeton UP 2007). But see Veronica Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (Hart Publishing 2014); Ori J Herstein, ‘Book Review: Law and Authority Under the Guise of the Good’ (2016) 125 *Mind* 1213.

³⁷ Schauer (n 34) 103-09, 121-22.

³⁸ *ibid* 120.

³⁹ *ibid* 113. See also Joseph Raz, *The Concept of a Legal System* (2nd edn, OUP 1980) 202.

⁴⁰ Perry (n 30) 293.

⁴¹ Hart considered the issue of genuineness of acceptance in *The Concept of Law*, see Hart (n 3) 139-41. He was right to insist that acts of rule-following do not require conscious, concurrent thought about the rule. He was also correct about the best evidence we may have of whether someone genuinely accepts a rule. Importantly, Hart did not claim that it is conclusive or direct evidence. For instance, I think Hart would agree that a person may be disposed to respond to why-questions by reference to a reason, but it does not follow that the person is disposed to guide their actions by that reason; see Markus E Schlosser, ‘Taking Something as a Reason for Action’ (2012) 41 *Philosophical*

rule, it does not follow that they really (genuinely) accept, they could be merely pretending to. To use a familiar jurisprudential example, anarchist judges may genuinely accept ultimate rules of recognition, but they also may just pretend to accept.⁴²

If someone genuinely accepts a rule, they also have some associated dispositions.⁴³ Among them are: dispositions to act in accordance with the rule,⁴⁴ dispositions to have a reactive attitude of blame towards rule-breakers, normative expectations that others (rule-addressees) conform, and so on.⁴⁵ If someone fails to have the appropriate dispositions, then they do not accept (genuinely).⁴⁶

For example, an anarchist judge could fail to have genuine normative expectations that others conform. Similarly, they could fail to have dispositions to form a reactive attitude of blame (although they may have dispositions outwardly to pretend they blame).

Papers 267, 287. By allowing the possibility of pretence in rule-following, Hart's account is consistent with what I develop here in more modern terms.

⁴² See eg Kenneth M Ehrenberg, 'The Anarchist Official: A Problem for Legal Positivism' (2011) 36 *Australian Journal of Legal Philosophy* 89, 102. On the other hand, pace Ehrenberg, not every official who is motivated to undermine the legal system fails to accept. Naturally, if no official accepts the rule of recognition (not even a part of it), but they only pretend to do so, then there is no legal system. This, however, is unlikely enough so that it is not a problem for Hartian positivism.

⁴³ I do not want to commit myself here to a definite view on what exactly is the connection between acceptance and those dispositions (eg whether acceptance is identical with the dispositions, whether it is grounded in them, whether it is a set, etc.). I merely claim that if some relevant dispositions are absent in a person's mind, the person does not accept a rule (genuinely), but they still may be pretending to accept.

⁴⁴ Only if they are an addressee of this rule; as I argue below, rules may be accepted by other members of the group than those whose actions the rule purports to regulate, see sec. 6.B(i) below. For the non-addressees, acceptance of the rule does not entail a disposition to conform with the rule but does entail other dispositions.

⁴⁵ Here 'to expect' is used in the sense of normatively 'calling for' or 'requiring' in one's own mind. Not in the sense of 'predicting', and not in the sense of doing anything externally observable. This is distinct from a disposition to criticise (by speech, non-verbal communication, etc.).

⁴⁶ As I said in n 44 above, a disposition to conform is only appropriate for rule-addressees, a normative expectation that others conform is appropriate for all who accept a rule.

Those who do not accept a rule but merely pretend to do so, are like actors on a stage who *merely* recite a script: they do not treat the rule as a reason for action of the relevant kind and they do not have the mental states entailed by acceptance.⁴⁷ For instance, a liberal actor playing a slave-owner could fail to have a disposition to have a genuine reactive attitude of blame (in their own mind) towards fugitive slaves (or actors playing them). This means that this particular actor does not genuinely accept the rules directed to slaves.⁴⁸

The difficulty is that we may be unable to distinguish by external observation whether someone accepts a rule or not; one's behaviour may be consistent with both hypotheses.⁴⁹ Merely conforming to a rule (as distinguished from complying with it),⁵⁰ criticising others' non-conformity and so on – all that may be consistent with not accepting the rule. In particular, it may be consistent with accepting a different rule that is mostly co-extensive with the first rule but has a different content.

On one interpretation of the Illuminati story this is at the very core of the issue. If the officials tell us that they follow a rule X, but in their own practical reasoning they act because of Illuminati orders that are mostly co-extensive with the rule X, do the officials *really* accept the rule X? It is at least possible that they do not accept X.

C. Genuine Acceptance and Illuminati-law

However, it also could be the case that Illuminati-officials genuinely accept the rules they profess to apply and hence that to

⁴⁷ I do not want to deny that other actors may be more psychologically involved with the roles they play, doing more than *merely* recite their lines.

⁴⁸ To use another of Perry's examples, the same may apply to spies: they could just be pretending to accept the rules of groups they infiltrate. Perry (n 30) 292.

⁴⁹ I thus disagree with Kenneth Himma who claimed that '[e]ach feature constituting a social rule is empirically observable'. Kenneth Himma, 'Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 99.

⁵⁰ On the distinction between compliance (acting for a reason) and mere conformity (acting in a way consistent with a reason, but not necessarily for that reason), see Joseph Raz, *Practical Reason and Norms* (OUP 1999) 178–79.

the extent that they act inconsistently with those rules, they are subverting the law. To the extent rules that are part of the official story of the law regulate actions of legal officials and to the extent the officials *conform*⁵¹ to those rules, it is psychologically plausible that it would be a strain on the officials not to accept those rules.⁵² This is not an analytical claim, but an empirical generalization (prediction).

Even though there are large parts of the official story of any legal system that officials very likely accept, it need not be true of entire official stories. It is not difficult to see how, for instance, cynical Soviet legal officials unfailingly kept reciting the official story of the Soviet law, while not accepting at least some parts of it as rules guiding their actions. Especially, it would not be a big psychological strain on officials not to accept rules that are very rarely of practical relevance to them. Hence, an abstract rule of judicial independence, publicly professed by legal officials, is less likely to be truly accepted by them than a more concretely action-guiding rule like ‘decide cases according to what your black phone tells you’.

Another issue is that even if legal officials accept the rules they profess, in Baude’s example they also plausibly accept secret rules regarding supremacy of Illuminati-directives. In that sense, they genuinely act as if they believed in a rule that the Constitution is the highest law (most of the time), but whenever they receive a directive from the Illuminati, they act as if they believed in a rule that Illuminati orders are supreme. What would such apparent contradiction mean for the content of law?

Here, the external aspect of social rules could come to the rescue.⁵³ If, in cases where the Constitution and the orders of the Illuminati require incompatible actions, the officials act in accordance with the latter, it suggests that this is a rule to which the officials are more fundamentally committed (see sec. 7 below). And in that case, if we do not have a standard external to the officials, like a meta-recognitional social rule of the whole society (see sec. 6.A below), then it may be plausible to conclude that from the legal perspective, Illuminati orders are ultimate law and

⁵¹ See n 50 above.

⁵² Brian Tamanaha is correct that there are many rules that judges, could not but to ‘internalize’ (eg ‘referring to oneself in the third person object form – “the Court finds that...”’). See Brian Z Tamanaha, *Realistic Socio-Legal Theory* (OUP 1997) 182.

⁵³ Hart (n 3) 56.

any conflicts with inferior legal rules (like the Constitution) are to be resolved on the terms of Illuminati orders.

Finally, as Richard Primus' response to Baude's paper illustrates very well, epistemology of ultimate legal rules is very difficult.⁵⁴ So far as those rules are grounded in social practices, a serious problem is that any set of facts is consistent with infinite descriptions in terms of rules, as famously noted by Wittgenstein.⁵⁵ When Illuminati-officials act *as if* they accept that the Constitution is the highest law, they at the same time act *as if* they accept that the Illuminati directed them to say the Constitution is the highest law and to act consistently until further notice, and so on. A way out of this quandary is to focus on facts which are consistent with one hypothesis, but not with another. However, the debate between Sachs, Baude, and their critics shows how contentious it is to classify facts of law-application as consistent with one rule-hypothesis and not another.⁵⁶

6. Officials vs Subjects: Who Grounds Foundations of Law?

Perhaps it is not legal officials whose social practice defines law's content at the most fundamental level. Perhaps non-officials co-constitute the foundations of law.⁵⁷ If that is the case, then one may want to conclude that law-subjects 'delegate' identification of law's content to legal officials in a conditional way. One of those conditions could be that the law is what the officials say it is, even if the officials are in fact guided in their practical reasoning by some other rules.

⁵⁴ Primus (n 10).

⁵⁵ Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, MacMillan 1953) §§ 177-202; Saul Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP 1982); Jules Coleman, *The Practice of Principle* (OUP 2001) 79-80; Christopher Kutz, 'The Judicial Community' (2001) 11 *Philosophical Issues* 442, 450; Kramer, *Objectivity and the Rule of Law* (n 20) 22.

⁵⁶ See eg Baude (n 2); Primus (n 10); Barzun (n 10).

⁵⁷ In what follows, I adopt a terminological convention of using 'non-officials' and 'law-subjects' interchangeably, setting aside the issue that in a sense legal officials are also law's subjects.

HLA Hart famously argued that even though it is possible for non-officials (law-subjects) to have an appropriate mental attitude of acceptance towards ultimate rules of recognition, this is not necessary – it is not a general truth about law.⁵⁸ Thus, recognitional communities do not include non-officials.⁵⁹ This is right, though Hart's argument requires improvement. The need for amendment is in line with the fact that, as Leslie Green noted, 'the most misunderstood part of Hart's view is the way in which law is, and is not, related to social consensus.'⁶⁰

However, before I turn to consider both good and bad arguments defending my Hartian position, I will make the case for the opposite view. I will argue that there is a sense in which thoughts and actions of the public at large have a constitutive relationship with the content of the law on the most fundamental level of ultimate rules of recognition.

A. Law-subjects Count Too!

(i) Legal officials in the Hartian model

Hart gave us a picture of foundations of law, which privileged the group of people engaged in authoritative identification, making, and application of law – legal officials.⁶¹ It does not matter what those people call themselves in any given society (ie whether they use the label 'officials').⁶² There must be, among officials, a social rule (an ultimate rule of recognition) according to which the group's members have a duty to identify certain things as elements of a specific body of rules (the law). In that body of rules there must be, at least, some rules (rules of adjudication) conferring on certain members powers to settle disputes authoritatively according to the rules. The body of rules will likely also include rules (rules of change) empowering some members to change rules.⁶³

⁵⁸ Hart (n 3) 59, 117.

⁵⁹ Adler (n 26) 733.

⁶⁰ Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan Law Review 1687, 1700.

⁶¹ It may even be said that on Hart's view there could be legal systems in communities consisting only of legal officials. See Coleman (n 55) 100–101; Kutz (n 55) 462; Adler (n 26) 733.

⁶² See eg John Gardner, *Law as a Leap of Faith* (OUP 2012) 290–291.

⁶³ Hart himself would have probably said that rules of change are just as crucial as rules of adjudication. In seeing rules of change as not

Who exactly counts as a legal official in the Hartian model? Hart suggested that it is the group of all legal officials of the system in question,⁶⁴ but subsequently he lapsed into speaking about the courts only.⁶⁵ There are several options on the table. Grant Lamond suggests that the group is wider than just the judges.⁶⁶ Jeffrey Goldsworthy argues that the group includes more than judges, but not all legal officials – merely the senior ones.⁶⁷ Joseph Raz has an even broader concept PRIMARY LAW-APPLYING INSTITUTIONS.⁶⁸ Finally, some are inclined to say that at least in the case of the United States all citizens form the recognitional community (or one of the recognitional communities, in Matthew Adler's case).⁶⁹ My own view is closest to Raz's. However, what is important for the present argument is that most people in large societies are not legal officials in the relevant sense.

(ii) Law-subjects in the Hartian model

Hart made the point that it was a strength of Austin's account that it had a realistic picture of how non-officials interact with the law: through 'habitual obedience to orders backed by threats'.⁷⁰ According to Hart, non-official acquiescence towards law is a 'relatively passive aspect of the complex phenomenon which we call the existence of a legal system'.⁷¹ However, it would be too quick to end the discussion here – there remains an important question of the content (or direction) of that 'passive' relationship non-officials have with the law.

necessary, I follow Raz; See eg Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 105; Gardner (n 62) 257.

⁶⁴ Hart (n 3) 117.

⁶⁵ In the Postscript to *The Concept of Law*, Hart has written: '... the rule of recognition, which is ... a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts'; *ibid* 256.

⁶⁶ Grant Lamond, 'The Rule of Recognition and the Foundations of a Legal System' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing 2013) 112.

⁶⁷ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) 238–43.

⁶⁸ Raz, *The Authority of Law* (n 63) 108–11.

⁶⁹ Adler (n 26) 726; Baude (n 2) 32. See also Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 34.

⁷⁰ Hart (n 3) 61.

⁷¹ *ibid*.

Hart specified two conditions for existence of legal systems of the sort he was interested in (municipal law):

- (1) acceptance of rules of recognition, change and adjudication (secondary rules) by legal officials and
- (2) general conformity with law on the part of law-subjects.⁷²

On a common reading of Hart, the content of ultimate legal rules (rules of recognition) is exclusively determined by thoughts and actions of legal officials.⁷³ The only constitutive relationship that non-officials have with law is that if they do not conform with it most of the time, the legal system ceases to exist for that society.

General conformity by non-officials is therefore a necessary part of a constitutive explanation of law's existence in any community that includes a significant number of non-officials. Now, what does general conformity entail? Could it consist of a pattern of actions by non-officials, compatible with what the law requires, but where the non-officials do not realise that they are acting in conformity with the law?⁷⁴ John Gardner suggested that this would not be enough. On his reading of Hart, which I share, general conformity must be non-accidentally related with the law.⁷⁵ The law (even in a very simplified way) and legal officials (even just the ones that people directly interact with) must figure in non-officials' practical reasoning adequately often or else the legal system does not exist for those non-officials.⁷⁶

It is then not quite true that 'it does not matter what each individual citizen's reasons for compliance are.'⁷⁷ There is only no necessity that *canonical contents of individual legal rules* figure in law-subjects' practical reasoning. However, *the law* and *legal officials*, as the ones who say what the law requires, must figure in

⁷² *ibid* 116.

⁷³ See eg Kenneth Himma, 'Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States' (2003) 4 *The Journal of Law in Society* 149, 154; Adler (n 26) 733.

⁷⁴ Matthew Noah Smith, 'Officials and Subjects in Gardner's *Law as a Leap of Faith*' (2014) 33 *Law and Philosophy* 795.

⁷⁵ Gardner (n 62) 284; see also John Gardner, '*Law as a Leap of Faith* as Others See It' (2014) 33 *Law and Philosophy* 813, 838.

⁷⁶ How often is adequately or sufficiently often? Joseph Raz provided a useful discussion in his *The Concept of a Legal System* (n 39) 203–205.

⁷⁷ Stephen Perry, 'Where Have All the Powers Gone?' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 300.

it. Otherwise it would have been possible for general non-official conformity with law to be coincidental.⁷⁸

For instance, it is enough that part of a driver's motivating reasons for driving within what the law sets as speed limit is her vague belief that the law requires driving safely or with a reasonable speed. Why does she believe so? Maybe because of what a police officer said when rebuking her previous speeding. In this case, the law plays a non-coincidental role in the driver's conformity with the law. However, it is not necessary that the driver has any beliefs (or other mental states) about correct legal statements like 'it is prohibited to drive above 70 miles per hour on a motorway.' She *may* have such beliefs. If she does, this will make it more likely that she will, in fact, conform to the law. But this is not essential adequately to account for non-coincidental conformity. Also, it is even more clearly not necessary that the driver has any beliefs on textual contents of statutes, regulations and so on, which ground the truth of the correct legal statement.

To be precise, *some* non-official conformity with the law may be coincidental. For a legal system to exist, it is only necessary that non-officials conform non-coincidentally sufficiently often.

If the preceding discussion is correct, as I believe it is, then law-subjects count a great deal in a constitutive explanatory account of law. Whenever legal officials *as a group* lose the capacity to guide actions of non-officials, they will cease to be legal officials of the legal system of the whole society. Assuming, for now, that the recognitional community (the group whose social practice constitutes ultimate rules of recognition) consists of officials, then the recognitional community's status as the recognitional community (of the legal system of the whole society) is partly dependent on non-officials.

True, in a legal system like that of the contemporary United States, we identify officials by what valid (non-ultimate) legal rules say about who counts as an official and by facts of how those rules were applied (eg facts of appointment of judges). In this sense, one is only an official if her role is legally recognised.⁷⁹ However, who counts as an official in the jurisprudential sense is, at least in principle, a distinct question from the question whom

⁷⁸ This is consistent with the claim that a non-official's grasp of what lawyers perceive as the content of the law (eg canonical propositional representations of legal norms) may be very thin or even non-existent.

⁷⁹ For a helpful discussion of 'legal institutions' and 'organisations', see Denis Galligan, *Law in Modern Society* (OUP 2006) 126.

positive law designates as ‘an official’.⁸⁰ In other words, the issue is not about who is called ‘an official’ in practice, but about who performs the legally significant role that is referred to as ‘official’ in general jurisprudence. Positive law may appear to be unconcerned with how the people it designates as officials are perceived by the society at large. But general jurisprudence supplies an additional necessary condition for officials as a group to acquire and retain their role (in the jurisprudential sense): a condition of having the capacity to guide action of non-officials.⁸¹

(iii) *Why not go further?*

Denis Galligan is right that even taking the above into account, ‘Hart relegates citizens to the sidelines.’⁸² Hence, one might be tempted to go further and say: if official practices of recognition (that ground ultimate rules of recognition) are partly dependent on thoughts and actions of non-officials, then why would we take official practices as *ultimate* in a constitutive explanatory account of law? An ultimate place of officials would have been obvious had our object of explanation been *law-among-officials* (eg in a community that consists only of officials). But even Hart seems to have been interested in *law-in-society* instead. Otherwise, why include the condition of general non-official conformity at all?

I will note here two possibilities of reforming the Hartian account to give a more significant place to non-officials, both of which may have significance for the Illuminati Problem:

- (1) what I call ‘the meta-recognitional view’ according to which the true ultimate social rule at the foundation of law is a social rule of the whole society, and

⁸⁰ Lamond (n 66) 111–112.

⁸¹ A significant advantage of this argument is that it does not rely on any claims on robust normativity of law, viz. on how law creates genuine reasons for action for its subjects. The constitutive connection between non-officials and existence of law in a society is established merely by looking into whether the law figures in ordinary citizens’ practical reasoning. There is no requirement that the people are normatively correct in following law in this way, that they *really should* do so. It is also not required, unlike in Postema’s elaborate coordination account, that legal officials are *obligated* to make and apply laws in a way that is accessible to the public or that is consistent with non-officials’ expectations; Postema (n 20) 186–196. Without being inconsistent with those other arguments, the one made here is simpler and demands fewer controversial assumptions.

⁸² Galligan (n 79) 121.

- (2) including at least some non-officials in the recognitional community (in the social group that gives rise to the rule of recognition).

The meta-recognitional view

The situation that would pose the most direct challenge to Hart's own view would be that of existence of an all-society social rule of conditional conformity. For instance, in some society, people at large could have dispositions to conform to law only as long as 'the law is what officials publicly say it is'.⁸³ Or, perhaps more realistically, they might conform conditionally on the law not being extremely barbaric. I will assume for the sake of argument that such a social rule of conditional conformity is possible (but not that it is necessary), even if the conditions over which peoples' attitudes overlap are very hard for a legal system to violate.⁸⁴

This would be consistent with the people delegating day-to-day identification of law to an official practice of recognition,⁸⁵ but such delegation could be conditional. 'The law is what officials publicly say it is' is just one possible condition. There could be others, both regarding specific subjects or overall 'disregard of

⁸³ My thanks to William Baude for inspiring this line of argument.

⁸⁴ Matthew Kramer is right that there could be a 'harshly repressive regime' where officials 'adopt or condone myriad noxious forms of behaviour which the citizens detest.' He is also right that

As soon as we move down to the level of concreteness at which the norms of a regime are apt to be formulated, there is ample room for significant divergences between the basic proscriptions contained in those norms and the basic proscriptions favored by the citizenry. ... Agreement at an abstract level on the need for certain fundamental proscriptions can be accompanied by far-reaching disagreement at the more concrete level where the proscriptions are spelled out.

Kramer, *In Defense of Legal Positivism* (n 20) 213–214. What follows is that these sorts of social rules are likely to be very minimally constraining. This is consistent with the observation that rebellions happen very rarely.

It may be too quick to follow Dennis Galligan in giving significant weight to the cultural significance of the ideas of constitutionalism in contemporary Western societies like, eg, '[t]he idea that [officials] have no powers other than those conferred by law; that the powers they have must be exercised reasonably, proportionately...'; see Galligan (n 79) 131–132. Just because those ideas are prominent in non-official elite imagination, it does not follow that they are accepted as a social rule in entire societies and even if they are, that this rule has enough specificity to constrain any actual official action. This remains a vital empirical question.

⁸⁵ See eg Galligan (n 79) ch 7.

popular opinion [that] reaches truly outrageous proportions', as Kent Greenawalt suggested.⁸⁶

For this to be a challenge to Hart, one also needs to accept that it is not necessarily the case that a social practice of officials is fundamentally constitutive of law as law of the whole society. What is really fundamental, is existence and content of *some* social practice, amounting to a social rule, specifying – likely in very broad terms – what counts as law and what social group counts as legal officials. Perhaps, in some, or even many, actual societies this social practice exists only among legal officials.⁸⁷ It is a mistake to argue that just because legal officials feature in *all* legal systems, they are the only ones whose thoughts and behaviour ground the content of *every individual* legal system (at least on the fundamental level).

After all, every legal system of a society with a significant number of non-officials is partly constituted by those non-officials. This is part of Hart's view. Hence, if those non-officials have a social practice of rule-guided conditional conformity to law, then it may seem plausible that the content of this social rule partly determines (constrains) the content of law (as the law of the whole society).

How would the meta-recognitional rule manifest itself? Just like any social rule, we would see it in action, eg, in social pressure on those who do not conform. If those in charge of the legal system transgress against whatever the conditions are, the non-officials could seek rectification of the situation, through

⁸⁶ Kent Greenawalt, 'How to Understand the Rule of Recognition and the American Constitution' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 163.

⁸⁷ This is analogous to the problem of different degrees of acceptance or knowledge between different legal officials. One cannot just assume that one tier of legal official counts because they know more – what is there to know is the very question (see sec. 6.B(ii) below). And this is not the Hartian approach to general jurisprudence: we do not start with the content of law and work backwards to decide who are the people who know and accept the sources of what we first identified. Had that been our method we would only have been able to claim our conclusion to be true of the legal systems we did this exercise for. We first decide, through a conceptual argument, who counts and then claim that their practices constitute the law at the ultimate level. Depending on how we carve the underlying social practices, we may end up with different contents of the law.

elections, referendums or through non-legal (but lawful) forms of social pressure (protest, ostracism, etc.).

Broadening the recognitional community itself?

For Hart, non-officials did not count as members of the recognitional community. Ronald Dworkin claimed otherwise, but he was mistaken as a matter of exegesis.⁸⁸ But what if Hart was wrong? This is a distinct argument from the one I just sketched. Before, I argued that there may be a 'meta-recognitional' social rule that is a part of Hart's second condition of existence of law (that of non-coincidental general conformity by non-officials). Now, I will suggest broadening the recognitional community itself. That is, that the social group whose thoughts and behaviour ground ultimate rules of recognition may include at least some non-officials.

Irrespective of the issue whether in all legal systems any non-officials accept ultimate rules of recognition,⁸⁹ what about the law-subjects who *do* accept?⁹⁰ Hart himself states that it is possible for non-officials to accept ultimate rules of recognition.⁹¹ If law-subjects accept, then why should their acceptance not be considered as contributing to the grounding of ultimate rules of recognition on an equal basis with that of the officials?⁹²

This matters because we might get different content of a rule when we count the 'acceptance-votes' of legal officials and if we count 'acceptance-votes' of everyone who accepts some rule of the proper form (that does the job of an ultimate rule of recognition: ie imposes on legal officials duties of recognition).⁹³

⁸⁸ Dworkin (n 69) 34; see also Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035, 1700-02.

⁸⁹ Hart (n 3) 117; Green (n 60) 1700-02; Smith (n 74); Gardner (n 75) 837-42.

⁹⁰ Michael A Wilkinson, 'Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law' (2010) 30 OJLS 441, 461-62; Lamond (n 66) 108-110.

⁹¹ Hart (n 3) 114.

⁹² Why say that 'this would amount at most to a *separate* social rule'? Lamond (n 66) 116-117.

⁹³ The discrepancy is precisely what makes it very attractive for Baude and Sachs to adopt the broader view of the recognitional community. To put it simply, it seems that the general public in the US is more originalist than US legal officials. Hence, if one wants to say that positive originalism is required by ultimate rules of recognition, one's argument will be stronger, *ceteris paribus*, if the 'acceptance-votes' of the public

Why not go this way? I will first consider several bad counterarguments, but in the end, I conclude that there is a convincing reason to endorse the officials-only view. The following discussion applies to both the meta-recognitional argument and to the argument for broadening the recognitional community.

B. Bad Counterarguments

(i) *Officials are the only addressees of rules of recognition*

Hart allowed for the possibility of a legal system where non-officials accept ultimate rules of recognition.⁹⁴ There is little that is necessarily different in attitudes of officials and of non-officials regarding ultimate rules of recognition.⁹⁵ Both officials and non-officials can accept any kind of rule: primary or secondary, duty-imposing or power-conferring.

However, perhaps the only people who can be in a constitutive relationship with an ultimate rule of recognition are its addressees.⁹⁶ Ultimate rules of recognition impose on legal officials duties to identify certain things as law.⁹⁷ Arguably, they also confer powers to ‘engage in authoritative acts of law-identification.’⁹⁸ The point is that whatever they require, allow or empower, they address only legal officials.

To the extent this argument is supposed to stem from the nature of social rules in general, it fails. A social rule may be grounded in a social practice of those who could not be directly guided by what the rule requires.⁹⁹ A rule that men ought to take their hats off in church may be a social rule of the whole society,

count for determining the content of ultimate rules of recognition than if they do not.

⁹⁴ Hart (n 3) 114.

⁹⁵ Galligan (n 79) 128–130.

⁹⁶ For an argument that seems implicitly to assume this, see Perry (n 77) 302–303.

⁹⁷ Hart (n 3) 94–95, 105–106.

⁹⁸ Matthew H Kramer, ‘In Defense of Hart’ (2013) 19 *Legal Theory* 370, 378–380. But see Raz, *The Authority of Law* (n 63) 93.

⁹⁹ PMS Hacker, ‘Hart’s Philosophy of Law’ in PMS Hacker, Joseph Raz and HLA Hart (eds), *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (Clarendon Press 1977) 15; Lamond (n 66) 109.

including women and children. This is so because women and children can still genuinely accept it, even if this will manifest only in dispositions to criticise those who do not conform and in normative expectations that men will conform.¹⁰⁰ You do not have to be an addressee for your acceptance to be a part of the social practice that grounds it.

Ultimate rules of recognition could be a special kind of social rules, for which it is true that they can only be constituted by a social practice of those to whom they are addressed. But that needs to be established by a different argument, because it does not follow from their nature as duty-imposing (or power-conferring) social rules.

(ii) The knowledge argument

Hart has written:

the reality of the situation is that a great proportion of ordinary citizens-perhaps a majority-have no general conception of the legal structure or of its criteria of validity.¹⁰¹

Naturally, Hart did not claim that non-officials cannot possess the same knowledge about the content and the sources of law that officials have. He expressly mentions lawyers as ‘experts of the system.’¹⁰² However, it may be tempting to say that only those who know the sources of law can be in a constitutive relationship with them. This argument fails.

Whose thoughts and behaviour count in grounding foundations of law (either in the recognitional or the meta-recognitional way) cannot depend on relatively greater knowledge of the content and of the sources of law for two reasons.

First, unless we restrict the group of officials only to sophisticated judges of highest appellate courts, then at least some officials who authoritatively say what the law is (eg police officers) will differ little from many non-officials in how much they ‘know’ about the sources of law. And even if we restrict the group of officials just to senior judges, some non-officials like lawyers and legal academics know more than most legal officials. If it is about knowledge, the legal experts should count as members of the

¹⁰⁰ See also n 44-46 above.

¹⁰¹ Hart (n 3) 114; see also *ibid* 60-61.

¹⁰² Hart (n 3) 60.

recognitional community. But this is almost trivial compared to the second argument.

Second, using relatively greater knowledge as an argument against the meta-recognitional view or against broadening the recognitional community is question-begging. In an inquiry like this, one must first establish what is the object of knowledge. Only then one can properly ask who possesses that knowledge. We do not have the luxury of perfect knowledge of the content of law in any legal system that would allow us to work backwards to who possesses it. To some extent, this is a matter of controversy in every legal system.

In fact, if one wants to argue from the content of rules to who generated them, then one should more readily conclude that the recognitional community is very broad. Why? Given disagreement and indeterminacy, a non-arbitrary way to proceed is to start with prevalent agreement at least among those who purport to be legal experts (full unanimity may be too strong). If one is rigorous in that inquiry, then the result is likely to be a strikingly bare-bones picture of law (at least at the top). For instance, some parts of what, according to some, counts as constitutional law, may not figure in it.

When it comes to ultimate rules of recognition, the object of knowledge will differ depending on how widely we cast our net. We are likely to get more detailed, sophisticated content if the recognitional community consists of high level judges and very sparse, shallow content if we make the group much broader. More importantly, we may get *inconsistent* results.

The problem with the knowledge argument is even more pronounced when we contrast it with the meta-recognitional view. Perhaps the bulk of non-officials can never be relied on to have any beliefs (or attitudes) regarding Hartian secondary rules.¹⁰³ Hence they will not have an internal point of view towards them.¹⁰⁴ But why simply assume, for instance, that Hartian criteria of validity ('whatever Queen-in-Parliament enacts is law') are really fundamental? Perhaps what is fundamental is how non-officials identify the group of officials as officials of the legal system of the whole society?

True, the content of any meta-recognitional social rule is likely to be very thin and to condition conformity only on

¹⁰³ Adler (n 26) 734.

¹⁰⁴ Hart (n 3) 117.

seemingly extreme transgressions of legal officials. But once this is admitted, then it is a hypothesis arguably consistent with empirical observations. It is no less suspect than a univocal set of ultimate rules of recognition. This goes to show that deciding between the different views I presented may not be possible through looking at historical instances of law, however tempting such 'realism' is.

(iii) *Incompatibility with alienation from law*

General jurisprudence should not preclude the possibility for law-subjects to be alienated from the law.¹⁰⁵ There may be a worry that either accepting the meta-recognitional view or broadening the rule of recognition would be incompatible with this conclusion.

For some, this worry may stem from an implicit assumption of a normatively robust, moralized notion of acceptance that neither I, nor Hart, use. If someone genuinely uses a rule to guide her behaviour, or at least to criticise others for non-conformity and so on, then she accepts the rule. Hence, even if someone believes a legal rule to be unjust but she uses it in this sense, then she accepts.

A more serious challenge concerns 'confusion and mystification'.¹⁰⁶ What if law-subjects are being deceived about, or for some other reason are prevented from knowing, the content of law? Non-coincidental conformity is required only most of the time for law to exist. Conversely, it could be that some people systematically are prevented from staying on the right side of the law. If this situation is too prevalent, then it would threaten the law's existence-in-society, in accordance with the second condition of law's existence. Hence, some alienation in this sense

¹⁰⁵ See *ibid* 208-09; Jeremy Waldron, 'All We Like Sheep' (1999) 12 *Canadian Journal of Law and Jurisprudence* 169, 175-77; Adler (n 26) 734; Green (n 88) 1052-54, 1057; Wilkinson (n 90).

As Jeremy Waldron put it:

... considering what positive law actually is, its existence in a society raises a real and serious prospect that it will be used to facilitate injustice and to confuse and mystify many of those who are subject to that injustice and who have no choice but to live their lives under its auspices.

Waldron 181.

¹⁰⁶ See n 105 above.

is possible, and perhaps, inevitable. Too much and the law would cease to exist (for the society as a whole).

There is space for that even on the meta-recognitional view. The levels of alienation we observe in real-life instances of law, both in terms of perception of injustice of law and in terms of unknowability, do not lead people to stop conforming to the law, but they do give rise to different forms of social protest.

Of course, this is also consistent with the hypothesis that people conform to law in an unconditional way. That people did not rebel in Nazi Germany or in Soviet Russia can also be explained in several ways. To some extent, the true iniquity of those legal systems was hidden through disinformation. Hence, the law-subjects may have been factually mistaken that their conditions of conformity were satisfied. Also, whatever we may like to think about ourselves, it seems that people do not rebel so easily even if they know that they are acquiescing to an iniquitous system.¹⁰⁷ In this sense, the cases of alienation show how minimally constraining the meta-recognitional practice is. But this does not mean that it does not obtain.

C. A Plausible Counterargument: Institutional Role of Officials

Legal systems are institutionalized normative systems. Leslie Green argued that this entails that ‘the only consensus necessary for law is a consensus of elites.’¹⁰⁸ Joseph Raz claimed that law-applying institutions have priority among all legal institutions, because ‘they have final authority to declare what is law.’¹⁰⁹

¹⁰⁷ As Galligan noted:

... it is hard to think of historical examples of a [legal] system where citizens merely obeyed and only officials accepted. The more we learn about those [legal systems] qualifying as the most repugnant of recent times, the Germany of Hitler, Soviet Union of Stalin, or the China of Mao, the clearer it becomes that they had not just the obedience but the positive support of large sections of the population. If examples of regimes that lacked popular support could be found, the chances are their life was short, rendering them a pathological rather than normal case of a legal system.

Galligan (n 79) 128.

¹⁰⁸ Green (n 60) 1702. See also Waldron (n 105) 180–81.

¹⁰⁹ Moreover, on Raz’s view it is ‘... reasonable to take the law to consist of those norms, rules, and principles, that are presented to individuals as guides to their behaviour by the body of legal institutions as a whole’; Raz, *The Authority of Law* (n 63) 88.

Stephen Perry challenged this argument rightly pointing out that the way Raz presented it, it appears question-begging.¹¹⁰ Perry noted that who has the final authority Raz speaks of ‘would seem to be a question of law within the particular legal system’ and not something that general jurisprudence could settle.¹¹¹

If seen as empirical statements regarding the *content* of actual legal systems, Raz’s claims are implausible. They would not be a proper response to someone who prefers to see all citizens as possessing law-defining authority in the relevant, constitutive sense. It is not incoherent to have a ‘deep popular constitutionalist’ view, to use Matthew Adler’s term,¹¹² accepting meta-recognition or a broad rule of recognition.

The better argument is conceptual. Consider the methods that non-officials can use to affect what is the content of law even on the folk concept of law. They can participate in elections of law-officials. They can also exert social pressure on officials, eg by lobbying or by protest. However, in both types of cases, the effect of actions of non-officials on the content of law (again, even on the folk concept) is mediated by officials. Non-officials do not exercise legal authority in those situations, which is the distinctly legal method of interacting with the law.¹¹³ One important piece of evidence for this understanding of our concept of law is that both officials and non-officials in their attempts to determine issues of ultimate criteria of validity ‘[regard] as relevant’ ‘the views of other officials’, but not those of non-officials.¹¹⁴ Whatever non-officials can do does not count as direct influence over the law.

As Hart has written, the officials’ interaction with the law is the ‘relatively active aspect’ of law’s existence, while the non-officials’ interaction is the ‘relatively passive aspect’.¹¹⁵ Austin’s concept of law, at least on Hart’s rendition, privileged the passive aspect of habitual obedience to orders backed by threats of coercion. Hart’s concept of law privileged the active aspect of ‘the

¹¹⁰ Perry (n 77) 321.

¹¹¹ Perry’s second point was that in some legal systems there are legal norms that the courts are barred from applying; see *ibid*.

¹¹² Adler (n 26) 798.

¹¹³ As Scott Shapiro rightly put it: ‘The business of law is the creation and exercise of authority, and its participants are the officials who operate the levers of legal power.’ Scott Shapiro, ‘Law, Plans, and Practical Reason’ (2002) 8 *Legal Theory* 387, 418.

¹¹⁴ Lamond (n 66) 112.

¹¹⁵ Hart (n 3) 61.

law-making, law-identifying, and law applying operations of the officials or experts of the system'.¹¹⁶ If we accept Hart's concept of law, then to show a direct constitutive connection between non-officials and the content of law, we would need to establish that they directly play such active role.

However, to establish that the conceptual argument is conclusive requires more than space allows to offer in this paper. A full argument must show why authoritative interactions with law (like legislating and adjudicating) should be privileged in a constitutive account of law to the extent of excluding other kinds of interaction.¹¹⁷ It could still be argued that, like with games, the role played by the 'scorer' is not the one that matters ultimately to constituting the game – something that Hart seems not to have addressed sufficiently.¹¹⁸ If law is special in this respect, that should be adequately justified.

Referendums

Even assuming the conclusion of the conceptual argument, what about referendums? A referendum could be a method for changing even the highest laws (eg a codified constitution). A legal system may allow for referendums to be called and organized entirely without involvement of 'ordinary' officials, like members of the established branches of government. In that sense, there would be no official intermediation.¹¹⁹

If, pace Raz, law-application is not privileged in our concept of law over law-creation, then the following conclusion appears to have some force. Whenever the people at large possess authority to change the law in such an unmediated way, their social rule of identifying the law and delegating further law-

¹¹⁶ *ibid.*

¹¹⁷ Other than as a binary condition of existence of legal systems as I argued in sec. 6.A(ii).

¹¹⁸ I thank the anonymous referee for this journal for pressing me on this point.

¹¹⁹ Raz would likely respond that this is a method of law-creation, not of authoritative determination of the content of law (while applying the law). Hence, whatever the referendum result, it would still be subject to the final authority of the courts. The courts will get to say what the referendum result means. But, as I said, without further justification, this is question-begging. It could be that the courts are in some important sense bound by referendum results. For instance, that they could not declare a referendum invalid. Also, just because the courts may have final authority it does not follow that they cannot err as to what the law requires.

identification to some group of legal officials is at the constitutive foundation of law. Ultimate official custom (practice) of recognition is then derivative. Importantly, this means that the legally-relevant content of the official practice of recognition could be constrained by the meta-recognitional social rule of non-officials.

There remains an issue of what makes it legally the case that a referendum is a referendum. A counter to the last argument may stress that this is likely to be defined in a law grounded in merely official practice. However, it is possible to have a popular sovereigntist view according to which it is always open to the people at large to self-organise in referendums or constitutional conventions and make laws, irrespective of whether this method of law-making is otherwise provided for by the law.¹²⁰

7. ‘The Law Is What the Officials Have *Said It Is*’ as the Content of a Rule of Recognition¹²¹

The last of the five answers I suggested to why a systematic, rule-guided official practice could be subverting the law is that *another aspect* of the same practice (broadly construed) makes it the case. This answer may succeed even if all the previous responses fail. It is also fully consistent with the standard Hartian model. In practical terms, there may be considerable epistemic difficulties in making this argument work. But it does open a promising avenue for those, like Sachs, who wish to argue that the ‘real’ law is somehow ‘in exile’.¹²²

It could be that, *prima facie*, officials both accept a rule ‘whatever the black phone tells you is law’ and a conflicting rule (eg ‘all valid laws have to be compatible with the official story of

¹²⁰ After all, this was an argument self-consciously relied in the process of making of the US Constitution. See eg Gordon S Wood, *The Creation of the American Republic, 1776-1787* (Norton 1972) 342; Bruce A Ackerman and Neal Katyal, ‘Our Unconventional Founding’ (1995) 62 University of Chicago Law Review 475, 568; Richard S Kay, ‘Original Intention and Public Meaning in Constitutional Interpretation’ (2009) 103 Northwestern University Law Review 703, 707.

¹²¹ The title of this section was inspired by Stephen Sachs.

¹²² Sachs, ‘The “Constitution in Exile” as a Problem for Legal Theory’ (n 5).

the law’).¹²³ If that is the case, then the question is whether one of those rules is accepted as more fundamental? In other words, whether the officials, in addition to accepting those individual rules, also accept that there is a hierarchical relationship between them (or at least that there is a legal mechanism of authoritative settlement of such issues).

If there really is no hierarchy, then it just means that there are incompatible rules regarding ultimate source of law (ultimate duties of recognition).¹²⁴ Note that this would not necessarily be a case of official disagreement, but of internal inconsistency, which could obtain even on perfect, univocal convergence.

However, there are good reasons to think that to the extent this would be of great practical significance, officials do adopt systematic ways of resolving such apparent conflicts. Hence, if the conflict between the two rules from my example matters, eg, in judicial practice, and if there are strong external (non-legal) pressures for officials to converge one way, then it will not be surprising that they do. In Soviet law, the ‘telephone justice’ rule plausibly trumped any rules on publicness of law (to the extent they were genuinely accepted, not merely professed).¹²⁵ The same could be true of the rule that Illuminati-directives trump all laws, including the Constitution.

Leaving this aside, the things get very interesting if we *can* somehow show that officials are fundamentally committed to rules incompatible with what is a clearly observable aspect of official practice. For instance, if we can show that clearly non-originalist judgments of US courts are inconsistent with a

¹²³ See also the discussion in sec. 5.C above.

¹²⁴ Existence of a hierarchy may be observed in situations of conflict of rules, even if no one expressly acknowledges that there is a hierarchy; see sec. 5.C above.

¹²⁵ At least some aspects of the official story of Soviet law were neither intended, nor used, as a standard to guide official action. There was no ‘genuine acceptance’ of a rule of recognition consistent with the official story. As Peter Solomon has written:

In the USSR and Communist China alike, informal practices always played a major role in public life ... and both the public and elites alike were accustomed to a wide gap between formal rules and the realities of life ... To be sure, constitutions spoke of the independence of judiciary and the right to a defense at trial, but constitutions were not understood by most observers to represent either fundamental law or an accurate portrayal of real socialist institutions.

Solomon (n 16) 359.

fundamental commitment of US officials to originalism. This is precisely what Stephen Sachs aimed to show in his recent work.¹²⁶

To put things more generally, ultimate rules of recognition could provide for several things that might make it the case that ‘the law is what the officials publicly have said it is’. Most straightforwardly, there could be a hierarchically supreme ultimate rule of recognition containing this precise condition (‘the law is what...’). It is not implausible to expect officials to accept something like requirements of knowability or publicness at least for ultimate sources of law and legal change. Officials could also accept that non-official views on ultimate sources of law are determinative to some extent.¹²⁷ Another possibility is for officials to accept that any valid law vesting someone with a status of an official must include a condition that this person does not participate in a conspiracy like that of Baude’s Illuminati.

Many possible contents of ultimate rules of recognition could lead to the result that ‘the law is what the officials have said it is.’ However, there are two serious limitations of this type of answer. First, the conditions could only apply to laws hierarchically inferior to the rule imposing those conditions. A more fundamental (higher) rule of recognition may qualify inferior rules of recognition, but not the other way. Also, if requirements of publicness are grounded in a valid law, like a codified constitution, then they could not possibly qualify the rules grounded in ultimate practices of recognition.

Secondly, this answer faces serious epistemic difficulties. If the officials profess to be committed to ‘the law is what the officials have said it is’ rule, but they systematically do something else, then how would we know what is more fundamental? One cannot just assume that ‘the law is what the officials have said it is’ is more fundamental for the officials. To give too much weight to abstract declarations of principle by legal officials is problematic.¹²⁸

¹²⁶ Sachs, ‘The “Constitution in Exile” as a Problem for Legal Theory’ (n 5); Sachs, ‘Originalism as a Theory of Legal Change’ (n 5).

¹²⁷ Lamond (n 66) 109–110. This would be a reverse of the case of non-officials delegating law-identification to officials; see sec. 6.A above.

¹²⁸ For instance, in the already mentioned response to Baude, Richard Primus provocatively suggests that on the Sachs/Baude line of argument we may have to conclude that the US is a political theocracy. Yes, quite often US politicians act inconsistently with that hypothesis. But at the same time, we have mountains of data points showing how

8. Conclusion

I argued that it is difficult to establish that what the officials publicly say about the content of law determines or constrains the content of law. My discussion suggests that law does have an inherent capacity to alienate non-officials and that this problem cannot be alleviated on the level of general jurisprudence.¹²⁹ However, I noted that one attractive way to combat alienation, in the jurisprudential sense, is to turn non-officials into officials. In other words, to give non-officials legal tools, like participation in a referendum, to influence the content of law without intermediation of ‘full-time’ officials.¹³⁰

US politicians profess adherence to what can be plausibly seen as theocracy. See Primus (n 10).

¹²⁹ Note that the understandings of ‘alienation from law’ are likely to be different in socio-legal and in jurisprudential inquiry. Non-officials could know and even enthusiastically accept *the official story of the law*. But, if I am right, this would be consistent with them rejecting or being in the dark about *the content of law*, to some extent. However, this should not be overstated. There is still the requirement of non-coincidental conformity of non-officials for law to exist as law-in-society (not just law-among-officials) and this requirement brings jurisprudential and socio-legal perspectives closer.

¹³⁰ Take, for instance, a legal system that recognizes citizen-administered referendums with power to change any law and not subject to judicial scrutiny (at least to the extent legislative proceedings of UK Parliament are non-justiciable). It is open to argue that in such legal system the relevant social practice grounding foundations of law is that of all citizens, not just ‘full-time’ officials (what I called the ‘meta-recognitional’ practice).