2011

Hart v Finnis: How will Positivism and Natural Law Account for the Socio-Legal Paradigm in Wikipedia

Siyuan CHEN
Singapore Management University, siyuanchen@smu.edu.sg

Hart v Finnis: How Will Positivism and Natural Law Account for the Socio-Legal Paradigm in Wikipedia?

Chen Siyuan*

I. Overview and schematic layout

> "*Imagine a world in which every single person on the planet is given free access to the sum of all human knowledge. That's what we're doing.*"[1]

There is little doubt that Wikipedia is one of the world's most influential websites today – and its sphere of influence is set to grow in days to come.[2] The evidence for this is strong. As of December 2010, Wikipedia is the internet's 6th most popular website (by virtue of the Alexa Traffic Rank),[3] and it is also the most popular "general reference" site in cyberspace,[4] with almost 4 million articles in the English language edition.[5] It has been and will continue to be the flagship of Web 2.0,[6] with every single edit being potentially scrutinised by a global audience, and it is well on its way to becoming the world's largest repository of knowledge and most consulted resource.[7] Anyone who has any decent amount of experience using the internet will know that searching for anything on the internet via popular search engines such as Google, Bing or Yahoo! will almost invariably result in Wikipedia entries being ranked among the top 5 hits;[8] as a result, anybody who has access to the internet would very likely have used Wikipedia in one

* LL.B. (National University of Singapore, First Class Honours); LL.M. (Harvard University); Assistant Professor, Singapore Management University Faculty of Law. I wish to express my thanks and gratitude to Professor Scott Brewer for emboldening me and agreeing to supervise this piece of work. All errors (stylistic or substantive), however, remain my own. I also wish to dedicate this endeavour to my family, Eunice and her family, my teachers and my students. Above all, to God be the glory.

[1] Jimmy Wales, co-founder and *de facto* leader of Wikipedia, presenting his vision of a cyber utopia: *see* Rob Miller, "Wikipedia Founder Jimmy Wales Responds", *Slashdot*, July 28, 2004.

[2] *See e.g.*, Time's Person of the Year: You – TIME, http://www.time.com/time/magazine/article/0,9171,1569514,00.html (last visited December 24, 2010). As Wikipedians explain it (befittingly) in Wikipedia – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia (last visited December 24, 2010): "When *Time* magazine recognized "You" as its Person of the Year for 2006, acknowledging the accelerating success of online collaboration and interaction by millions of users around the world, it cited Wikipedia as one of several examples of Web 2.0 services, along with YouTube, MySpace, and Facebook."

[3] *See* Wikipedia.org: Traffic details – Alexa, http://www.alexa.com/siteinfo/wikipedia.org (last visited December 5, 2010). Alexa states that "The rank is calculated using a combination of average daily visitors and pageviews over the past 3 months. The site with the highest combination of visitors and pageviews is ranked #1."

[4] *See* Top Sites by Category: Reference – Alexa, http://www.alexa.com/topsites/category/Top/Reference (last visited December 24, 2010).

[5] *See* Statistics – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Special:Statistics (last visited December 24, 2010). The rate of growth is likely to be slower as compared to 2007 through 2009, but it will not be surprising to see the total exceed 4 million within a couple of years.

[6] *See* Tim O'Reilly and John Battelle, "Web Squared: Web 2.0 Five Years On", (2009) Web 2.0 Summit White Paper.

[7] As is popularly opined, it will be a "first port of call" for all manner of research projects, including the subject of law.

[8] *See* Andrew Dalby, The World and Wikipedia, (2009), at 82 to 83.

way or another.[9] And it is not uncommon for us to chance upon exceptionally well written and referenced articles with outstanding detail and scope.[10] However, while everybody may be familiar with what Wikipedia is in a very general sense, not everybody is necessarily well acquainted with how Wikipedia actually governs itself – an increasingly complex society in cyberspace, as it were,[11] with almost 100,000 "active contributors" from around the world working on the project,[12] and hundreds of thousands of other unidentifiable or casual editors contributing hundreds of thousand edits on a daily basis as well. Specifically, one has to realise that for an international community of editors to build up the world's largest encyclopedia effectively, a comprehensive array of internal regulations needs to be constantly designed (principally by the editors no less), refined (just like any other article in the encyclopedia), and adhered to, and indeed this is a very nuanced process that has been ongoing – and will continue to take place. This point is particularly significant, bearing in mind that Wikipedia by and large holds true to its widely known mantra as being "the free encyclopedia" that anyone is able to edit,[13] at any place,[14] and at any point in time.[15] From the aforementioned realisation, a whole host of potentially intriguing socio-legal issues emerge.

---

[9] As of December 2009, Alexa records that some 10% of "global internet users… visit wikipedia.org": *supra*, *Alexa*, note 3.

[10] *See* Wikipedia: Featured articles – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Fa (last visited December 24, 2010).

[11] *See generally*, *infra*, *The Future of the Internet*, note 26. This is also partly a personal attestation. Having been an active contributor to the encyclopedia since June 2005 – editing and writing articles, and uploading and sharing photographs – I am rather familiar with many of the processes of Wikipedia, and have observed a wide spectrum of behavioural and interactive patterns to come to this conclusion. For a number of years now, I have been placed in the top 300 in the world for total number of edits made with over 50,000. I have also uploaded hundreds of pictures unto Wikimedia Commons, written dozens of "Good Articles" (*see* Wikipedia: Good articles – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Ga (last visited December 24, 2010)) and "Featured Articles" (*id*), and have received numerous "barn stars" (*see* Wikipedia: Barnstars – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Barnstar (last visited December 24, 2010)) – unofficial marks of achievements – for my contributions (*see* User: Chensiyuan – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/User:Chensiyuan/About (last visited December 24, 2010)).

[12] *See* Wikipedia Statistics – Tables – Active Wikipedians – Wikimedia, http://stats.wikimedia.org/EN/TablesWikipediansEditsGt5.htm (last visited December 24, 2010).

[13] For a collation of the criticisms levelled against this concept, *see* Criticism of Wikipedia – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Criticism_of_Wikipedia (last visited December 24, 2010). Former Britannica Online editor-in-chief Robert McHenry once remarked, "The user who visits Wikipedia to learn about some subject, to confirm some matter of fact, is rather in the position of a visitor to a public restroom. It may be obviously dirty, so that he knows to exercise great care, or it may seem fairly clean, so that he may be lulled into a false sense of security. What he certainly does not know is who has used the facilities before him.": *see* The Faith-Based Encyclopedia – University of Rochester, Department of Computer Science, http://www.cs.rochester.edu/~vandurme/misc/wikipedia_comment.html (last visited December 24, 2010).

[14] Even China – one of the last bastions to prevent access to Wikipedia – has recently lifted its ban on Wikipedia. For a comprehensive historical survey of China's cyclical lifting and restoration of its bans, *see* Blocking of Wikipedia by the People's Republic of China – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Blocking_of_Wikipedia_by_the_People%27s_Republic_of_China (last visited December 24, 2010).

[15] *See* Reliability of Wikipedia – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Reliability_of_Wikipedia (last visited December 24, 2010).

To elaborate on what I mean: key to Wikipedia's success (in terms of the scale and depth of the project and its current web presence) has been its intricate web of guidelines, ethical norms, philosophies, policies, rules, precedents, sanctions, administrative procedures, and dispute resolution and adjudication mechanisms (for convenience, I will refer to these entities in this paper collectively as "regulations")[16] that govern how editors and administrators should edit, provide input on policies, shift balances of power, behave, and interact with each other. A safe prediction will be that this intricate web will only become even more intricate as Wikipedia forges ahead to increase its encyclopedic legitimacy.[17] Necessarily, from a socio-legal viewpoint, a question of tremendous interest is why should these regulations be binding, without exception, on editors who – given that Wikipedia is what I describe as essentially an *evolving microcosm of an international community*,[18] or more boldly, a multicultural society constantly mutating in the strong sense of the word – come from different backgrounds and have different values and beliefs? Then there are even more precise questions: how, and why is it that certain regulations have the elevated status of enforceable rules, and some are merely general guidelines;[19] what is the normative basis of the mandate bestowed upon administrators to govern other editors, since Wikipedia is not a democracy[20] (but predicated on the rather elusive and abused concept of consensus)[21] and yet administrators are in effect "voted" in;[22] can arbitration hearings (for resolving serious disputes between users) be conducted

[16] For a quick overview of the regulatory and administrative structure, *see* Wikipedia: Editorial oversight and control – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Editorial_oversight_and_control (last visited December 24, 2010).

[17] *See e.g.*, Wikipedia: Flagged protection and patrolled revisions – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Flagged_protection_and_patrolled_revisions (last visited December 24, 2010); but *cf*, Wikipedia: Why stable versions – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Why_stable_versions (last visited December 24, 2010). Larry Sanger, the co-founder of Wikipedia, created Citizendium as a response to the purported unreliability of Wikipedia: *see* http://en.citizendium.org/wiki/Welcome_to_Citizendium (last visited December 24, 2010). Incidentally, there was a lot of community rhetoric raised recently against the implementation of flagged revisions in the English version of Wikipedia. The German Wikipedia has an even more sophisticated system in the form of "trust" ratings.

[18] Consider too, that if Wikipedia stays on course to become the world's *de facto* number one repository of all human knowledge, will it assume the structure of definitive international, non-governmental legal regimes? For instance, the International Olympic Committee, by virtue of the Olympic Charter, through its creation and rendering of rules, by-laws and decisions, has become an autonomous regime governing the relevant sports world and are even given effect as such by governments. Indeed, the advent of cyberspace has created many pockets of private, self-contained, self-governed and ethics-driven enclaves such as internet forums and user review-related websites. It is submitted that none of them, however, match the sort of social and *quasi*-legal nuances and depth found in Wikipedia.

[19] *See e.g.*, Wikipedia: Policies and guidelines – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:PG (last visited December 24, 2010).

[20] *See* Wikipedia: What Wikipedia is not – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:What_Wikipedia_is_not (last visited December 24, 2010).

[21] *See* Wikipedia: Consensus – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Consensus (last visited December 24, 2010).

[22] *See* Wikipedia: Requests for adminship – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Requests_for_adminship (last visited December 24, 2010).

fairly in cyberspace;[23] how and why do new norms even come into existence and how and why are they modified; and last but not least, why, in the first place, and assuming that they have the choice, do editors obey the regulations? And the list of questions continues.

This paper therefore humbly endeavours – an attempt unprecedented in the legal academic context it seems – to examine, from a jurisprudential or legal theory viewpoint, how and why regulations made and adhered to in Wikipedia are made and adhered to by Wikipedians.[24] Even though Wikipedia is not intuitively associated with a "conventional" legal system with a keen focus on traditional judicial elements that govern "society" as is popularly conceived (an association that is probably the progeny of orthodox legal theory),[25] it is still highly plausible and indeed purposeful to examine Wikipedia's system of rules (that have a technical aspect and a social aspect – the former governing editing and the latter governing behaviour), enforcement measures and adjudication devices within the context of the larger and ever enigmatic questions, "What is law?" or "What is the nature of law?", both of which are also connected to the question of "What exactly causes people to obey the law?" Can any legal theory possibly come close to answering these questions?

Proceeding on that basis, this paper will consider whether the legal theories proffered by the proponents of positivism and the proponents of natural law square with the *quasi*-legal paradigm found in Wikipedia.[26] In the interests of focus, greater attention will be accorded to H.L.A. Hart and John Finnis. These two philosophers have been chosen because they represent, in my opinion, an excellent modern sampling of views that

---

[23] *See* Wikipedia: Arbitration – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Arbitration (last visited December 24, 2010); and Wikipedia: Arbitration Committee – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Arbcom (last visited December 24, 2010).

[24] A "Wikipedian" is defined, for the purposes of this paper, as any user who attempts or successfully makes an edit to the encyclopedia.

[25] *See e.g.*, H.L.A. Hart, The Concept of Law, (1994) at 17: "For [the purpose of this book] is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the *distinctive structure of a municipal legal system* and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena." (emphasis added); Ronald Dworkin, Law's Empire, (1986) at 407: "The *courts* are the capitals of law's empire, and *judges* are its princes" (emphasis added); and John Finnis, Natural Law and Natural Rights, (1980) at 148: "We can certainly speak intelligibly and usefully of law of some lesser group, even of a gang. But, as the common understanding of the unqualified expressions of 'law' and 'the law' indicates, *the central case of law and legal system is the law and legal system of a complete community*. That is why it is characteristic of legal systems that… they claim authority to regulate *all forms of human behaviour*… they therefore claim to be the supreme authority for their respective community, and to regulate the conditions under which the members of that community can participate in any other normative system or association…" (emphasis added).

[26] *See e.g.*, Jonathan Zittrain, The Future of the Internet – and How to Stop it, (2008) at 143: "Wikipedia – with the cooperation of many Wikipedians – has developed a system of self-governance that has many indicia of the rule of law without heavy reliance on outside authority or boundary… [its] structure is a natural form of what constitutionalists would call subsidiarity: centralized, "higher" forms of dispute resolution are reserved for special cases, while day-to-day work and decisions are undertaken in small, "local" groups [footnote omitted]. Decisions are made by those closest to the issues, preventing the lengthy, top-down processes of hierarchical systems."

demonstrate two principal competing schools in legal theory,[27] *viz*., positivism and natural law.[28] Very broadly speaking, the gist of each philosopher's theory can be condensed, respectively, as law being a system of primary and secondary rules, with a particular premium placed on the internal point of view, critical reflective attitude and rule of recognition (Hart's "soft" version of positivism); and law as a system preferably governed by, or reflective of the "common good" or constitution of a worthwhile life, brought to bear by the 7 (or 8, if we include "work") basic goods[29] and 9 basic requirements of practical reasonableness[30] (Finnis' "restatement" of classical natural law).

This paper will analyse the salient features, strengths and weaknesses of the claims of each legal theory *vis-à-vis* this peculiar, yet familiar phenomenon which we know as Wikipedia; and much as Hart and Finnis have placed certain limits on the reach of their theories,[31] this paper will attempt to conclude as to which theory is more successful at providing a universal (and therefore complete) account of what law is.[32] It bears repeating, therefore, that an overarching presupposition of this paper is that Wikipedia represents some sort of society that is governed by some manner of law (*i.e.*, an acceptable approximation of a legal system). Where appropriate, there will be occasional recourse to other legal philosophers involved in the positivism and natural law divide; just as well, there will also be references to relevant sociological studies – studies that may or may not have some explanatory effect on human behaviour in this context. Finally, while a paper premised on relatively unchartered waters will necessarily be incomplete and disarmed of the benefit of literary precedence, it is hoped that this paper will form the foundations of deeper studies into *avant-garde*, content- and norm-generative societies (such as Wikipedia) that transcend time and physical boundaries.

---

[27] That there even exists a dichotomy between positivism and natural law, has, of course, been disputed by several jurisprudence scholars: *see e.g.*, Brian Bix, "On the Dividing Line Between Natural Law Theory and Legal Positivism", (2000) 75 Notre Dame Law Review 1613; and W.J. Waluchow, "The Many Faces of Legal Positivism", (1998) 48 University of Toronto Law Journal 387 at 388. There are those, of course, who prefer to see the real dichotomy (at least from the Anglo-American viewpoint) as between Hart/Dworkin or Hart/Raz: *see e.g.*, Brian Leiter, "Has Law Moral Foundations?", (2003) 48 American Journal of Jurisprudence 17 at 17 to 19. Then there are even those believe Finnis is actually more rightly classified as a positivist: *see e.g.*, Tan Seow Hon, "Validity and Obligation in Natural Law Theory: Does Finnis Come too Close to Positivism?", (2003-2003) 15 Regent University Law Review 195 at 221.

[28] *See e.g.*, Cristóbal Orrego, "H.L.A. Hart's Understanding of Classical Natural Law Theory", (2004) 24 Oxford Journal of Legal Studies 287; and Kent Greenawalt, "How Persuasive is Natural Law Theory?", (2000) 75 Notre Dame Law Review 647.

[29] Life; knowledge; play; aesthetic experience; sociability or friendship; practical reasonableness; and religion.

[30] Active pursuit of goods; coherent life plan; no arbitrary preference among values; no arbitrary preference among persons; detachment and commitment; efficiency within reason; respect for every basic value in every act; requirements of the common good; and following one's conscience.

[31] But, as will be elaborated in the sections detailing their theories, their intended reach of their theories remain considerably wide.

[32] As a minor prefatory remark, there are at least two aspects of the system of regulations in Wikipedia that render it an atypical legal (but nevertheless legal) institution: (a) affairs are for all intents and purposes conducted entirely in cyberspace; and (b) it cannot be said that the conventional model of separating the legislature, executive and judiciary, insofar as creating, interpreting and enforcing the regulations are concerned, is clearly used. It is submitted that the consequence of these two aspects, however, are minor or tangential to the discussion at hand.

Having provided an overview of this paper, it will now be timely for me to set out the framework of the task at hand:

Part I has been covered above. In Part II, we will get up to speed with the ins and outs of Wikipedia by examining a hypothetical situation in which a new user creates a new article, and subsequently interacts with other users in a variety of ways *vis-à-vis* the management of the article. In Part III, we will consolidate and classify all the regulations that we have encountered in the hypothetical. After we have gotten a flavour of the potential jurisprudential issues through the hypothetical narrative (which in itself can only be a limited representation of the many socio-legal facets of Wikipedia) and the taxonomical table, we will look briefly at, without over-simplifying, the principal claims made by H.L.A. Hart (Part IV), followed by John Finnis (Part V). It is hoped that this will create the necessary platforms prior to us "connecting the dots" between the two legal theories and the various facets of the socio-legal paradigm of Wikipedia explored in Part VI. Concluding remarks will naturally reside in the final part, Part VII.

II. The hypothetical of James Williams the Harvard quarterback and Mary the ardent fan: getting a grasp of a Wikipedia article's chronology – from creation to management

> *"As time goes on, the rules and informal policies on Wikipedia tend to become less and less plastic and harder and harder to change."*[33]

Regardless of one's degree of familiarity with Wikipedia, it will be a useful exercise for the purposes of this paper to sketch out the general chronological processes involved when a new Wikipedia entry is created, beginning from the very first edit of the article to the subsequent management of the article created. Obviously, not all processes (and regulations) can be canvassed, but this exercise should still allow us to have a good sense of where the social, ethical and legal issues may possibly arise, and for the more adventurous, preconceive how these issues may be resolved in jurisprudential terms. Indeed, a general pattern may arguably be discerned in that the longer an article stays in existence and is debated, the greater the recourse is to rules and (later on) *quasi*-legal precepts – all of which are animated by community norms. To create an even greater verisimilitude (and hence greater understanding) of these processes, I will employ the

[33] Mark Pellegrini, better known as "Raul654" – Wikipedia administrator, bureaucrat, oversighter, checkuserer, arbitrator emeritus (all terms explained in due course) and one of the most influential personnel on Wikipedia, proclaiming the somewhat counter-intuitive "Law #7" (given that Wikipedia is synonymous with maximum fluidity): *see* User:Raul654/Raul's laws – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/User:Raul654/Raul%27s_laws (last visited December 24, 2010).

device of the hypothetical.[34] Much as it will soon become clear that I will need to urge you to indulge me with my fictitious conjurations in the following pages, the portrayal of the events in terms of community reactions and interactions are not far removed from actual daily happenings on Wikipedia. Where necessary, some of the major events happening in the hypothetical will be elaborated in subsequent parts of the paper; and where appropriate, I have also incorporated concise summaries in the footnotes accompanying the hypothetical to briefly explain the content and the application of the regulations invoked.

(a) James Williams does not exist on Wikipedia

Let us suppose we wish to create an entry on a person named James Williams. A quick search on Wikipedia will reveal that there are more than 20 people named James Williams who have a Wikipedia article written on them[35] (the nuts and bolts of the disambiguation process ought to be reserved for another time)[36] – but none of them are about the James Williams that we are looking for. As it were, our hypothetical James Williams was a statewide sensation when he turned out for his high school football team as the starting quarterback. However, because he comes from a small town in a relatively small state, his star is not shining as brightly as it should be for the moment – so, as popular culture dictates, he does not yet have a Wikipedia entry on him. Still, not long after being admitted into Harvard University, his rise to prominence begins. After playing just a couple of preseason games for the Crimsons, word has spread around campus about James Williams' game: his superb decision-making and throwing abilities have made him an instant favourite. National Football League ("NFL") scouts reportedly begin to traverse the country to watch James Williams in action and the internet college football forums are abuzz about Williams' prospects in the 2011 NFL Draft; netizens from Williams' town have even audaciously declared the 2011 draft to be the "Williams Sweepstakes". Some of his fans then use the Wikipedia search as a barometer of his fame, only to discover that James Williams the Harvard quarterback is not documented in any way whatsoever by what is now undisputedly acclaimed as the world's largest encyclopedia.[37]

(b) Mary has a little stab

Still, amongst his legions of fans, only one fan (let us call her Mary; and let us further make her a Harvard Law School freshman) has found the impetus to attempt to write the name of James Williams the Harvard quarterback into posterity (or so she thinks), *i.e.*, the

---

[34] It may be said that to this end, I am to some degree taking a leaf out of Professor Duncan Kennedy's methodology in Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", (1986) 36 Journal of Legal Education 518.

[35] *See* James Williams – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/James_Williams (last visited December 24, 2010).

[36] For now, however, *see* Wikipedia: Disambiguation – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Disambiguation (last visited December 24, 2010); and *infra*, note 47.

[37] *See* Wikipedia: Size comparisons – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Size_comparisons (last visited December 24, 2010).

chronicles of Wikipedia. She, like pretty much any other netizen who has used Wikipedia, does not have a clue how to actually edit it. Nevertheless, with an autographed poster of James Williams in hand, she is filled with a newfound sense of courage and decides to make her maiden edit on Wikipedia. Realising that it is not a requirement to register as a user to make edits,[38] Mary decides that she will edit under the identity of an IP address.[39] She is then directed to a couple of pages where she is greeted with what seems to be friendly advice on how to get started,[40] and that one of the "five pillars" of Wikipedia is the exhortation to editors to "be bold" and simply edit away.[41] She does not fail to notice that there is a whole litany of purported guidelines and policies that spell out in considerable detail how and what she should write when creating a new article, but Mary is overwhelmed by zeal and ignores them for the time being. She recalls vaguely though, that as she is writing an encyclopedic "biography of a living person", she needs to write from a neutral point of view, provide verifiable sources, avoid original research, and avoid making defamatory edits.[42] But she also recalls that rules can be

---

[38] *See* Wikipedia: Why create an account? – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Why_create_an_account%3F (last visited December 24, 2010).

[39] *See* Wikipedia: Editors should be logged in users – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Editors_should_be_logged_in_users (last visited December 24, 2010).

[40] *See* Wikipedia: Your first article – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Your_first_article (last visited December 24, 2010).

[41] *See* Wikipedia: Five pillars – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Five_pillars (last visited December 24, 2010): "Wikipedia does not have firm rules besides the five general principles presented here. Be bold in updating articles and do not worry about making mistakes. Your efforts do not need to be perfect; because prior versions are saved by default, no damage you might do is irreparable."; and Wikipedia: Be bold – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Be_bold (last visited December 24, 2010).

[42] *See* Wikipedia: Biographies of living persons Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Blp (last visited December 24, 2010): "Editors must take particular care adding "biographical material about a living person"' to any Wikipedia page. Such material requires a high degree of sensitivity, and must adhere strictly to all applicable laws in the United States and to all of our content policies, especially:

- Neutral point of view
- Verifiability
- No original research

We must get the article right. Be very firm about the use of high quality references. Material about living persons that is unsourced or poorly sourced – whether the material is negative, positive, or just questionable – should be removed immediately and without waiting for discussion. Biographies of living persons must be written conservatively, with regard for the subject's privacy. Wikipedia is an encyclopedia, not a tabloid paper; it is not our job to be sensationalist, or to be the primary vehicle for the spread of titillating claims about people's lives. The possibility of harm to living subjects is one of the important factors to be considered when exercising editorial judgment. This policy applies equally to biographies of living persons and to biographical material about living persons on other pages. The burden of evidence for any edit on Wikipedia rests with the person who adds or restores material, and this is especially true for material regarding living persons. Therefore, an editor should be able to demonstrate that such material complies with all Wikipedia content policies and guidelines."

ignored on the encyclopedia if it fulfills some abstract notion of common sense or community consensus.[43]

After an hour or so, Mary has created a 1,000 word draft write-up on her idol using the "sandbox",[44] replete with superlative descriptions such as "James Williams is widely considered as the next football star to redefine the game" and "many scouts agree that James Williams possesses a vision unparalleled by anyone who has ever played the game". Despite her initial suspicion that the article might be toned down by other editors, she is convinced that she has provided enough sources to verify the claims stated.[45] Satisfied with her draft, Mary attempts to submit her edit, but realises that unregistered users can only make edits and not create new articles.[46] She quickly creates a random account and submits the edit; in an instant, the article on "James Williams (Harvard quarterback)"[47] is born. While Mary is content with her achievement, elsewhere, the creation of this article is noticed by other users who frequently patrol a page that lists all recently created new articles.[48]

(c) The gatekeepers come crashing

A number of these users proceed to examine the contents of the page in question: one of them immediately call into question the notability[49] of this particular James Williams and

---

[43] This will be made clearer as the hypothetical develops.

[44] *See* Wikipedia: Sandbox – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Sandbox (last visited December 24, 2010).

[45] *See* Wikipedia: Verifiability – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Verifiability (last visited December 24, 2010): "The threshold for inclusion in Wikipedia is verifiability, not truth – that is, whether readers are able to check that material added to Wikipedia has already been published by a reliable source, not whether we think it is true. Editors should provide a reliable source for quotations and for any material that is challenged or likely to be challenged, or the material may be removed."

[46] *See* Wikipedia: Why create an account – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:SIGNUP (last visited December 24, 2010).

[47] *See* Wikipedia: Naming conventions (people) – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Naming_conventions_%28people%29 (last visited December 24, 2010).

[48] *See* New Pages – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Special:NewPages (last visited December 24, 2010).

[49] *See* Wikipedia: Notability – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Notability (last visited December 24, 2010): "If a topic has received significant coverage in reliable sources that are independent of the subject, it is presumed to satisfy the inclusion criteria for a stand-alone article.

- "Significant coverage" means that sources address the subject directly in detail, and no original research is needed to extract the content. Significant coverage is more than a trivial mention but it need not be the main topic of the source material.
- "Reliable" means sources need editorial integrity to allow verifiable evaluation of notability, per the reliable source guideline. Sources may encompass published works in all forms and media. Availability of secondary sources covering the subject is a good test for notability.
- "Sources", for notability purposes, should be secondary sources, as those provide the most objective evidence of notability. The number and nature of reliable sources needed varies depending on the depth of coverage and quality of the sources. Multiple sources are generally preferred.

raises this issue on the article's "talk page" (a separate page for users to discuss various aspects of the article); another finds the flowery prose and positive bias unacceptable and slaps a "tag" at the top of the article,[50] indicating that the neutrality policy has been contravened.[51] Within a couple of hours, the attention of a bunch of other seasoned editors have been called to the article, and one of them, after performing a series of searches on the major search engines (and an internal search on the internal links to the article), decides to nominate the article for "deletion" over "proposed deletion"[52] and "speedy deletion"[53] on the basis that the subject matter does not satisfy the "notability" criterion to warrant inclusion in Wikipedia. Over the next 7 days, interested editors debate on whether the article should be kept or deleted. Some express the belief that the sole problem with the article is that its style of writing is too biased; the majority, however – despite some of them having heard of Williams before – express concerns about the purported notability of James Williams, for the only sources used in the article are internet college football forums, and a single op-ed piece on *The Harvard Crimson*, which are hardly compelling secondary sources of information to establish the notability of a subject matter.[54] Almost all of the editors notice that the creator of the article has had only 1 edit to her name thus far,[55] although not all of them openly make this comment.

Mary – who has been too busy with readings for her classes at Harvard Law School to monitor the developments on the page – will go on to discover to her dismay that she can

---

- "Independent of the subject" excludes works produced by those affiliated with the subject including (but not limited to): self-publicity, advertising, self-published material by the subject, autobiographies, press releases, etc.
- "Presumed" means that substantive coverage in reliable sources establishes a presumption, not a guarantee, that a subject is suitable for inclusion. Editors may reach a consensus that although a topic meets this criterion, it is not appropriate for a standalone article. For example, such an article may violate what Wikipedia is not.

A topic for which this criterion is deemed to have been met by consensus, is usually worthy of notice, and satisfies one of the criteria for a stand-alone article in the encyclopedia. Verifiable facts and content not supported by multiple independent sources may be appropriate for inclusion within another article."

[50] *See* Wikipedia: Tagging pages for problems – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Tagging_pages_for_problems (last visited December 24, 2010); and Wikipedia: Tags – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Tags (last visited December 24, 2010).

[51] *See* Wikipedia: Neutral point of view – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Neutral_point_of_view (last visited December 24, 2010): "Neutral point of view (NPOV) is a fundamental Wikimedia principle and a cornerstone of Wikipedia. All Wikipedia articles and other encyclopedic content must be written from a neutral point of view, representing fairly, and as far as possible without bias, all significant views that have been published by reliable sources. This is non-negotiable and expected of all articles and all editors."

[52] *See* Wikipedia: Proposed deletion – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Proposed_deletion (last visited December 24, 2010).

[53] *See* Wikipedia: Criteria for speedy deletion – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Criteria_for_speedy_deletion (last visited December 24, 2010).

[54] *See* Wikipedia: Reliable sources – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Reliable_sources (last visited December 24, 2010).

[55] *See* Help: User contributions – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Contributions (last visited December 24, 2010).

no longer find her fruit of labour on Wikipedia. It turns out that the outcome of the deletion discussion was "delete", with 12 editors voting to delete the article, 1 preferring to express a "neutral" opinion, and 3 voting to "keep" the article. The consequence of this "community consensus"[56] meant that the article was completely purged less than a week after it was created. Mary does a little detective work and discovers that 6 of these editors hail from Yale Law School – as proclaimed on their "user pages"[57] – and concludes it is probably no coincidence that they have descended upon this deletion discussion. She is understandably indignant about this and attempts to restore the article by recreating an entry under her first user name. As she does this, she is confronted with the message "You are recreating a page that was previously deleted" – Wikipedia had kept a log of the article's deletion history,[58] and the message served to deter editors from starting another deletion debate for no good reason. After examining the deletion log, Mary surmises that if she can include a couple more "legitimate" citations and references, the article may get to stay. She uses her law school research tools and navigates through the databases containing archives of the regional newspapers, and she manages to find a bunch of short articles in *The Boston Globe* and *Boston Herald* that make references to James Williams. After incorporating these articles into the entry, Mary, imbued with a stronger belief that this must surely pass the test of notability, recreates the article on "James Williams (Harvard quarterback)". She then realises that she has made a typographical error, but acting on a moment of impulse, she logs out, makes the correction edit, and in the edit summary field,[59] Mary relies on her double anonymity[60] as an unregistered "IP user" and

---

[56] *Supra*, *Wikipedia: Consensus*, note 21: "Discussions should always be attempts to convince others, using reasons. If discussion turns into a polarized shouting match then there is no possibility of consensus, and the quality of the page will suffer… Consensus among a limited group of editors, at one place and time, cannot override community consensus on a wider scale. For instance, participants in a WikiProject cannot decide that some generally accepted policy does not apply to articles within its scope, unless they can convince the broader community that such action is right. In the case of policies and guidelines, Wikipedia expects a higher standard of participation and consensus than on other pages. In any case, silence can imply consent only if there is adequate exposure to the community… Consensus is not immutable. Past decisions are open to challenge and are not binding, and one must realize that such changes are often reasonable. Thus, "according to consensus" and "violates consensus" are not valid rationales for making or reverting an edit, or for accepting or rejecting other forms of proposal or action. Wikipedia remains flexible because new people may bring fresh ideas, growing may evolve new needs, people may change their minds over time when new things come up, and we may find a better way to do things. A representative group might make a decision on behalf of the community as a whole. More often, people document changes to existing procedures at some arbitrary time after the fact. But in all these cases, nothing is permanently fixed. The world changes, and the wiki must change with it. It is reasonable and indeed often desirable to make further changes to things at a later date, even if the last change was years ago."

[57] *See* Wikipedia: User page – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/User_page (last visited December 24, 2010).

[58] *See* Deletion log – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Special:Log/delete (last visited December 24, 2010).

[59] *See* Help: Edit summary – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Edit_summary (last visited December 24, 2010).

[60] There is "double" anonymity because on the first level, even registered Wikipedia editors do not use their real name or reveal much information about themselves; and on the second level, because a single IP address can actually be used by several users (registered or otherwise), it becomes even more difficult to identify if two edits from the same IP address emanate from the same person. Some anonymous editors also hop from one IP address to another so that they are less easily traceable. Here, of course, it is a dead giveaway that Mary and the "anonymous IP user" are one and the same person.

departs with the scathing words, "Do not even attempt to delete this, you moronic self-appointed gatekeepers of Wikipedia. Stop politicising Wikipedia with your anti-Harvard bias and go get a life." This time round, she stays by her computer to keep track of the edit history[61] of her article.

(d) Richard crosses swords

Within 20 minutes, a member of the "Recent Changes Patrol" squad[62] (let us call him "Richard") – a volunteer group that regularly monitors, *inter alia*, the directory of recently modified articles[63] – spots the recreation of the article by the same registered user that had created the original article and promptly re-nominates the article for deletion without even reading it (and thus not realising that changes have been made to the original version). On the "talk page"[64] Mary's user page, Richard accuses Mary (without knowing the real identity Mary of course) of being a "recalcitrant idiot" and tells her to "stop this nonsense and wasting everybody's time. Nobody cares about your small town hero. Your attempt at sock-puppetry was also so lame."[65] Mary is incensed once again but this time round, she has performed her due diligence and apprised herself of some of her Wikipedian "rights". She cites the "Do not bite the newbies policy"[66] in the preface of her response to Richard on the talk page of her user page, before countering with another diatribe of her own, calling Richard "a stupid, illiterate dick" because he is "patently unable to comprehend the core Wikipedia policy of verifiability", and that he is "probably another idiot from Yale". Richard's immediate retort on the same page is that he "will not deal anymore with losers who cannot even successfully hide behind anonymous IP addresses." Perceiving her adversary to be escaping from the argument, Mary changes her user name to face off with Richard on his own terms. Her new user name is "The Vengeance of Mary", and on her user page, she pins up a "user box" proudly stating that she is a student at Harvard Law School,[67] and declares her "mission"

---

[61] *See* Help: Page history – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Edit_history (last visited December 24, 2010).

[62] *See* Wikipedia: Recent changes patrol – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Recent_changes_patrol (last visited December 24, 2010).

[63] *See* Recent changes – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Special:RecentChanges (last visited December 24, 2010).

[64] *See* Wikipedia: Talk page – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Talk_page (last visited December 24, 2010).

[65] *See* Wikipedia: Sock puppetry – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Sock (last visited December 24, 2010): "A sock puppet is an alternative account used for fraudulent, disruptive, or otherwise deceptive purposes that violate or circumvent the enforcement of Wikipedia policies."

[66] *See* Wikipedia: Please do not bite the newcomers – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Bite (last visited December 24, 2010): "Wikipedia articles are improved through the hard work of regular editors, but also through numerous anonymous contributions made by newcomers. Remember: all of us were new editors at Wikipedia once, and in some ways (such as when editing an article on a topic outside our usual scope) even the most experienced among us are still newcomers. New members are prospective contributors and are therefore Wikipedia's most valuable resource. We must treat newcomers with kindness and patience — nothing scares potentially valuable contributors away faster than hostility."

[67] *See* Wikipedia: Userboxes – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/User_box (last visited December 24, 2010).

is to "demonstrate the multiple inadequateness of the sad sod Richard". Before Richard can respond, an administrator[68] (let us call him "Max") chances upon this heated dispute and intervenes. Max refers the two of them to a tenet of Wikipedia's "code of conduct", *i.e.* civility in interactions between editors,[69] and requests Mary to edit the contents of her user page and Richard to give Mary a proper chance at familiarising herself with Wikipedia. He seems to ignore Mary's hostile user page and Richard's charge of sock-puppetry for the moment and subtly warns that extreme breaches of civility may result in sanctions such as blocks.[70] Placated by this act of balanced administrative intervention, both parties back off from exchanging insults with each other for the time being.

(e) Vandalism; reversion; conflict of interest; illegality; harassment; threat of suit

Meanwhile, the second round of "consensus building" commences on the deletion page of the article. 14 of the 16 editors who had voted on the first round return, and a further 4 editors, including Richard and Mary, join in the fray for the first time. Richard is unable to rein in his need for confrontation and raises a new issue in the debate, *viz.*, that Mary has created the article in spite of being in a "serious position" of conflict of interest[71] –

---

[68] *See* Wikipedia: Administrators – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Admin (last visited December 24, 2010): "Administrators, commonly known as admins or sysops (system operators), are Wikipedia editors who have been trusted with access to restricted technical features... For example, administrators can protect and delete pages, and block other editors."

[69] *See* Wikipedia: Civility – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Civility (last visited December 24, 2010): "editors should always endeavour to treat each other with consideration and respect. Even during heated debates, editors should behave politely, calmly and reasonably, in order to keep the focus on improving the encyclopedia and to help maintain a pleasant editing environment. This policy applies to all editing on Wikipedia, including user pages, talk pages, edit summaries, and any other discussion with or about fellow Wikipedians. Incivility consists of personal attacks, rudeness, and aggressive behaviours that disrupt the project and lead to unproductive stress and conflict. Editors are human, capable of mistakes, so a few, minor, isolated incidents of incivility are not in themselves a major concern. A behavioral pattern of incivility is disruptive and unacceptable, and may result in blocks if it rises to the level of harassment or egregious personal attacks. A single act of incivility can also cross the line if it is severe enough: for instance, extreme verbal abuse or profanity directed at another contributor, or a threat against another person can all result in blocks without consideration of a pattern. This policy is not a weapon to use against other contributors. To insist that an editor be sanctioned for an isolated, minor offense, or to treat constructive criticism as an attack, is itself potentially disruptive, and may result in warnings or even blocks if repeated."

[70] *See* Wikipedia: Blocking policy – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:BLOCK (last visited December 24, 2010): "Blocking is the method by which administrators may technically prevent users from editing Wikipedia. Blocks are used to prevent damage or disruption to Wikipedia, not to punish users. Blocks sometimes are used as a deterrent, to discourage whatever behavior led to the block and encourage a productive editing environment."

[71] *See* Wikipedia: Conflict of interest – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Coi (last visited December 24, 2010): "A Wikipedia conflict of interest (COI) is an incompatibility between the aim of Wikipedia, which is to produce a neutral, reliably sourced encyclopedia, and the aims of an individual editor. COI editing involves contributing to Wikipedia in order to promote your own interests or those of other individuals, companies, or groups. Where advancing outside interests is more important to an editor than advancing the aims of

the conflict of interest being that Mary, as a Harvard law student (as proclaimed on her user page), is "blatantly perpetuating Harvard propaganda" on Wikipedia by "increasing (undue) coverage of an unknown football player." He adds that "Williams will fail [[WP:ATHLETE]][72] anytime" and points to a few other recent articles on college athletes that had been deleted for lack of notability. Finally, Richard alleges, a photograph of James Williams (taken, as gleaned from the camera properties, by a premier DSLR camera setup) that Mary has uploaded unto the page breaches copyright as it can be directly attributed to a photograph taken by a student working for *The Harvard Crimson* website.[73] Mary, putting her recently acquired legal skills to good effect, dismisses the first and third objections as "separate questions that are red herrings" and that the "only issue" is whether this particular James Williams warrants an independent entry on Wikipedia. To that end, she argues that with the provision of new quality references reporting on James Williams, the notability criterion should be satisfied; she further disputes the precedential value of the other articles that Richard cites, saying that the concept of precedent does not exist[74] on Wikipedia and that his comparison of the articles was not a fair one to begin with anyway. Another editor then rebuts this, arguing that the new sources merely make passing mention of James Williams, and that the article currently portrays Williams to be "some sort of superstar (more so when we consider the appellation) when he is not (yet), so this is clearly a case of breaching WP:NOTCRYSTAL."[75] Mary again dismisses this as illogical reasoning, arguing that "nowhere is it suggested in the article that James Williams is supposed to be a future "star" – he is already a sufficiently noteworthy quarterback, as corroborated by at least two independent and reliable sources."

Wikipedia, that editor stands in a conflict of interest. COI editing is strongly discouraged. When editing causes disruption to the encyclopedia through violation of policies such as neutral point of view, what Wikipedia is not, and notability, accounts may be blocked. COI editing also risks causing public embarrassment outside of Wikipedia for the individuals and groups being promoted. Editors with COIs are strongly encouraged to declare their interests, both on their user pages and on the talk page of any article they edit, particularly if those edits may be contested. Most Wikipedians will appreciate your honesty. Editors who disguise their COIs are often exposed, creating a perception that they, and perhaps their employer, are trying to distort Wikipedia. When investigating possible cases of COI editing, Wikipedians must be careful not to reveal the identity of other editors. Wikipedia's policy against harassment takes precedence over this guideline on conflict of interest. An editor's conflict of interest is often revealed when that editor discloses a relationship to the subject of the article to which the editor is contributing. Where an editor does not disclose an existing affiliation or other conflict of interest, carefully following Wikipedia's neutral point of view policy may help counteract biased editing."

[72] *Supra*, *Wikipedia: notability*, note 49: "[Additional criteria for notability of athletes] are (1) People who have competed at the fully professional level of a sport, or a competition of equivalent standing in a non-league sport such as swimming, golf or tennis; and (2) People who have competed at the highest amateur level of a sport, usually considered to mean the Olympic Games or World Championships."

[73] *See* Wikipedia: Copyrights – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Copyrights (last visited December 24, 2010); Wikipedia: Copyright violations – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Copyvio (last visited December 24, 2010); and Wikipedia: Non-free content – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Non-free_content (last visited December 24, 2010).

[74] As shall be seen, however, this is not entirely accurate.

[75] *Supra*, *Wikipedia: What Wikipedia is not*, note 20: "Wikipedia is not a collection of unverifiable speculation. All articles about anticipated events must be verifiable, and the subject matter must be of sufficiently wide interest that it would merit an article if the event had already occurred... It is not appropriate for editors to insert their own opinions or analyses."

Eventually, several other editors support the reasoning of Mary over the objectors', and the result of the discussion was 12 for "keep", 4 for "oppose", and 2 for "neutral". The article is therefore allowed to continue existing, much to the delight of Mary. Refusing to let the matter rest, Richard, on top of the "neutrality tag" already imposed on the article, slaps another 3 "tags" on the James Williams article: a generic "clean up" tag and two specific "verifiability" (for inadequate sources) and "copyright violation" (for the photograph) tags. Mary reverts this almost immediately by using the "undo" function,[76] implying that Richard has vandalised the page.[77] The latter, who is raising his sentry duty over the page, "undoes" the "undo" just as quickly, while deploring Mary in the edit summary field and adding "take it to the talk page; in fact I am going to re-raise the issue with the naming convention of this article". Mary reverses him, stating that the "burden of proof" is on Richard to back his claims, failing which to discharge means the tags are unwarranted. Richard "undoes" her a second time (accompanied with a counterclaim of "wikilawyering"),[78] and when Mary reverses that, she is hit with a "3RR" warning by Richard on her user talk page,[79] coupled with a threat to report her behaviour to an

---

[76] *See* Help: Reverting – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Undo#Undo (last visited December 24, 2010): "The MediaWiki software allow editors to easily revert (or "undo") a single edit from the history of a page, without simultaneously undoing all constructive changes that have been made since. To do this, view the page history or the diff for the edit, then click on "undo" next to the edit in question. The software will attempt to create an edit page with a version of the article in which the undesirable edit has been removed, but all later edits are retained."

[77] *See* Wikipedia: Vandalism – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Vandalism (last visited December 24, 2010): "Vandalism is any addition, removal, or change of content made in a deliberate attempt to compromise the integrity of Wikipedia. Vandalism cannot and will not be tolerated. Common types of vandalism are the addition of obscenities or crude humor, page blanking, and the insertion of nonsense into articles. Any good-faith effort to improve the encyclopedia, even if misguided or ill-considered, is not vandalism. Even harmful edits that are not explicitly made in bad faith are not vandalism. For example, adding a controversial personal opinion to an article once is not vandalism; reinserting it despite multiple warnings is (however, edits/reverts over a content dispute are never vandalism, see WP:EW). Not all vandalism is obvious, nor are all massive or controversial changes vandalism. Careful thought may be needed to decide whether changes made are beneficial, detrimental but well-intended, or outright vandalism."

[78] *See* Wikipedia: Wikilawyering – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikilawyering (last visited December 24, 2010): "Wikilawyering (and the related legal term pettifogging) is a pejorative term which describes various questionable ways of judging other Wikipedians' actions. It may refer to certain quasi-legal practices, including:

- Using formal legal terms in an inappropriate way when discussing Wikipedia policy;
- Abiding by the letter of a policy or guideline while violating its spirit or underlying principles;
- Asserting that the technical interpretation of Wikipedia:Policies and guidelines should override the underlying principles they express;
- Misinterpreting policy or relying on technicalities to justify inappropriate actions."

[79] *See* Wikipedia: Edit warring – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:EW (last visited December 24, 2010): "The "three-revert rule" ("3RR") is a bright-line rule concerning blatant overuse of reverting, a common kind of edit war behavior. It states that a user who makes more than three revert actions (of any kind) on any one page within a 24-hour period, may be considered to be edit warring, and blocked appropriately, usually for a 24-hour period for a first incident. 3RR draws a line where edit warring via reverts is clearly beyond a reasonable level and action will be taken if it has not already been."

administrator. She is about to refute him on the grounds of bad faith and ill-purposive interpretation of the rule when Max, who presumably has been monitoring their conduct since their previous dispute, steps in once again. He explains that not only is this "edit war" pointless, it also comes with consequences, such as losing editing privileges indefinitely.[80] He also suggests that Mary may have been subconsciously affected by "WP:OWN",[81] and urges them to find common ground between them so that the entry can be improved.

Common ground was not forthcoming, however. In the weeks that Mary has spent editing on Wikipedia, she has also been editing other Harvard-related articles. To her horror, she discovers that Richard has been relentlessly following her editing trail, placing tags on articles that she has edited – and running the gamut from WP:WEASEL[82] and WP:MOS[83] to WP:NOR.[84] She believes that she has due cause to plead either

---

[80] *Ibid*: "Wikipedia pages develop by discussion, with users following editing policy and trying to work together to develop consensus, and by seeking dispute resolution and help if this isn't working. An edit war occurs when individual contributors or groups of contributors repeatedly override each other's contributions, rather than try to resolve the disagreement by discussion…. Edit warring activity is bad for the readers and editors of Wikipedia. Attempts to force one stance, or one version of an article, at the expense of another can lead to the loss of a neutral point of view, and creates animosity between editors that reduces the possibility of consensus. Users who continue to edit war after proper education, warnings, and blocks on the matter degrade the community and the encyclopedia, and may lose their editing privileges indefinitely."

[81] *See* Wikipedia: Ownership of articles – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Own (last visited December 24, 2010): "Some contributors feel possessive about material they have contributed to this project. Some go so far as to defend it against all others. It is one thing to take an interest in an article that you maintain on your watchlist. Maybe you are an expert or you just care about the topic. But if this watchfulness starts to become possessiveness, then you may be overdoing it. Believing that an article has an owner of this sort is a common mistake people make on Wikipedia. You cannot stop everyone in the world from editing "your" stuff, once you have posted it to Wikipedia. As each edit page clearly states:

- If you do not want your writing to be edited and redistributed at will, then do not submit it here.

Also:

- If you do not want your ideas (for article organization, categorization, style, standards, etc.) challenged or developed by others, then do not submit them."

[82] *See* Wikipedia: Avoid weasel words – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Weasel (last visited December 24, 2010): "Weasel words are phrases that are intentionally evasive, ambiguous or misleading. On Wikipedia, the term refers to evasive, ambiguous or misleading attribution. Weasel words can present an apparent force of authority seemingly supporting statements without allowing the reader to decide whether the source of the opinion is reliable, or they can call into question a statement."

[83] The Manual of Style, or "MOS", is the style guide to Wikipedia, covering subjects from article titles and headings to internal consistencies of articles and abbreviations: *see* Wikipedia: Manual of style – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Mos (last visited December 24, 2010).

[84] *See* Wikipedia: No original research – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:No_original_research (last visited December 24, 2010): "Wikipedia does not publish original research or original thought. This includes unpublished facts, arguments, speculation, and ideas; and any unpublished analysis or synthesis of published material that serves to advance a position. This means that Wikipedia is not the place to publish your own opinions, experiences, arguments, or conclusions. Citing sources and avoiding original research are inextricably linked. To demonstrate that you are not presenting original research, you must cite reliable sources that are directly related to the topic of the article, and that directly support the information as it is presented."

harassment[85] or complain about a troll,[86] and sends a private message to Max to express her concern. To compound Mary's horror, Richard somehow clairvoyantly anticipates this course of action and sends her a private message, stating that "you are a coward and I know what you are up to. Quit whining to admins." Her legal reflex kicking in, Mary briefly considers threatening to sue Richard, but soon realises that it is not feasible (no sustainable cause of action), and that it actually violates a Wikipedia policy if she has not exhausted local remedies.[87] Even so, she remains troubled that Richard knew that she had sent a private message to Max; only the invocation of the rarest of privileges by the rarest of users – CheckUser[88] – will confirm or disconfirm her remote suspicion that Richard and Max *might actually be the same person*.

---

[85] *See* Wikipedia: Harassment – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Harrassment (last visited December 24, 2010): "Harassment is defined as a pattern of offensive behavior that appears to a reasonable observer to have the purpose of adversely affecting a targeted person or persons, usually (but not always) for the purpose of threatening or intimidating the primary target. The intended outcome may be to make editing Wikipedia unpleasant for the target, to undermine them, to frighten them, or to discourage them from editing entirely… "Wikistalking", an older term, is discouraged because it can confuse minor online annoyance with a real world crime. Many users track other users' edits, although usually for collegial or administrative purposes. Proper use of an editor's history includes (but is not limited to) fixing errors or violations of Wikipedia policy or correcting related problems on multiple articles. In fact, such practices are recommended both for Recent changes patrol and WikiProject Spam. The contribution logs can be used in the dispute resolution process to gather evidence to be presented in requests for comment, mediation, WP:ANI, and arbitration cases... If "following another user around" is accompanied by tendentiousness, personal attacks, or other disruptive behavior, it may become a very serious matter and could result in blocks and other editing restrictions."

[86] *See* What is a troll? – Wikimedia, http://meta.wikimedia.org/wiki/What_is_a_troll%3F (last visited December 24, 2010): "Trolling is any deliberate and intentional attempt to disrupt the usability of Wikipedia for its editors, administrators, developers, and other people who work to create content for and help run Wikipedia. Trolling is a violation of the implicit rules of Internet social spaces and is often done to inflame or invite conflict. It necessarily involves a value judgment made by one user about the value of another's contribution."

[87] *See* Wikipedia: No legal threats – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:No_legal_threats (last visited December 24, 2010): "Rather than immediately threatening to employ litigation, you should always first attempt to resolve disputes using Wikipedia's dispute resolution procedures. If you must take legal action, we cannot prevent you from doing so. However, it is required that you do not edit Wikipedia until the legal matter has been resolved to ensure that all legal processes happen via proper legal channels. You should instead contact the person or people involved directly, by email or through any other contact methods the user provides. If your issue involves Wikipedia itself, you should contact Wikipedia's parent organization, the Wikimedia Foundation. Do not issue legal threats on Wikipedia pages. If you make legal threats or take legal action over a Wikipedia dispute, you may be blocked from editing so that the matter is not exacerbated through other channels. Users who make legal threats will typically be blocked from editing while legal threats are outstanding."

[88] *See* Wikipedia: CheckUser – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:CheckUser (last visited December 24, 2010): "On Wikipedia, CheckUser is a tool allowed to be used by a small number of users who are permitted to examine user IP information and other server log data under certain circumstances, for the purposes of protecting Wikipedia against actual and potential disruption and abuse. CheckUser itself simply produces log information for checking; it can require considerable skill and experience to investigate cases even with the tool."

(f) The attempt to disrobe Max of administrator privileges: lacuna in the regulations; request for comment; mediation; arbitration

The truth quickly dawns upon Mary when she receives an apologetic reply from Max via the private message function. It turns out that Richard and Max are not the same person but brothers in real life, and Max had informed Richard of Mary's complaint. Mary is mortified at this revelation, and in her fit of anger, she trawls through the rules and policies of the project to found a basis for impeaching Richard's post of administrator – and finds none. She is unable to even find something legitimately analogous that governs the situation, even though she perceives this subterfuge to be an egregious transgression for an administrator – a post which, in her view, requires a high degree of moral standing. In her paranoia, she wonders too if the brothers have ever teamed up to "game the system" in some way or another.[89] But above all her concerns, she faces a very great difficulty in trying to get Max demoted: only either the Arbitration Committee or Jimmy Wales (or "Jimbo Wales"), the founder and *de facto* sovereign of Wikipedia – and not even high-level bureaucrats[90] – can remove the adminstratorship of administrators.[91] The visitation of first principles, however, grants Mary an epiphany: she would simply edit the rules pertaining to administrators so that they applied to her complaint. In other words, she will take the law into her own hands, just as she is entitled to. She is aware

---

[89] *See* Wikipedia: Gaming the system – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:GAME (last visited December 24, 2010): "Gaming the system means using Wikipedia policies and guidelines in bad faith to thwart the aims of Wikipedia and the process of communal editorship deliberately. Gaming the system is an abuse of process and disruptive. Related terms are wikilawyering and pettifogging, which refer to following an overly strict or contrived interpretation of the letter of policy to violate the principles of the policy. Gaming also refers to attempts to circumvent enforcement of Wikipedia policies and procedures by using various tricks to make bad faith edits and other disruptive behavior go unnoticed by other editors. An editor gaming the system is seeking to use policies with bad faith, by finding within their wording apparent justification for disruptive actions and stances that policy is clearly not at all intended to support. In doing this, the gamester separates policies and guidelines from their rightful place as a means of documenting community consensus, and attempts to use them selectively for a personal agenda."

[90] *See* Wikipedia: Bureaucrats – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Bureaucrats (last visited December 24, 2010): "Bureaucrats are Wikipedia users with the technical ability to:

- promote other users to administrator or bureaucrat status;
- grant and revoke an account's bot status; and
- rename user accounts.

They are bound by policy and consensus to grant administrator or bureaucrat access only when doing so reflects the wishes of the community, usually after a successful request at Wikipedia:Requests for adminship. In like fashion, they are expected to exercise judgment in changing usernames, and in granting or removing bot flags on the advice of the Bot Approvals Group. They are expected to be capable judges of consensus, and are expected to explain the reasoning for their actions on request and in a civil manner. Bureaucrats do not have the technical ability to remove admin rights from users or to grant other levels of access (they cannot assign oversight or checkuser rights). These actions are performed by stewards, a small multilingual group that serves all Wikimedia projects."

[91] *Supra*, *Wikipedia: Administrators*, note 68: "If an administrator abuses administrative powers, these powers can be removed. Administrators may be removed either by Jimmy Wales or by a ruling of the Arbitration Committee. At their discretion, lesser penalties may also be assessed against problematic administrators, including the restriction of their use of certain powers or placement on administrative probation. The technical ability to remove administrator status rests with stewards and Jimmy Wales."

that there is a real lack of consensus among Wikipedians regarding the limited avenues for removal of adminship,[92] but tries anyway. Her unilateral edit on the said page is almost instantly reverted, and although she presents her case on the talk page, she is peremptorily shut off by other editors who cynically question her sudden interest in administrator guidelines and her raising of "trivial concerns". Mary responds to this by saying that the rules on administrators are incomplete, vague or inadequate, and accordingly, unjust. Much to her chagrin, nobody bothers to respond to this argument. She toys momentarily with the idea of creating multiple sock-puppet accounts to invade the space and rewrite the rules, but discovers just as quickly that such a horde will be easily found out in these parts.

After a few days, an erudite administrator, Johan, empathises with Mary's situation and sends her a private message. Mary explains what has happened, to which Johan remarks: "This seems like a hard case in the sense that it is a grey area. I don't really think Max has done anything wrong though his brother quite clearly has. Sure, he could have done himself a favour by declaring earlier his relationship with Richard, but in this particular situation, I don't think the obligation is a hard and fast one. Even if you can find some rule that applies to this case, I doubt it will be determinate in any of our dispute resolution platforms because I believe Max has a really good reputation in the community and is actively involved across various wiki platforms like Wikitionary and Wikimedia Commons. I truly suggest concilliation as your first port of call. If concilliation really fails, you can consider a "request for comment"[93] to test the palatability of both your argument and proposed reformation of the policies. Speaking of concilliation, I know you probably don't want to talk to Max directly for the time being, so mediation is also another viable alternative; in this respect, you can look to either the Mediation Committee or the Mediation Cabal.[94] Of course, the last resort of arbitration is always available,[95] but

---

[92] *See* Wikipedia: Requests for de-adminship – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Requests_for_de-adminship (last visited December 24, 2010): "A large number of Wikipedians are in agreement that RFA is broken. What they cannot agree on is how it is broken, or what to do in order to fix it. That being said, a great number of Wikipedians agree that the community needs some sort of desysopping process that does not involve having to go to Arbcom (with its attendant prerequisites) or Jimbo (with the attendant concerns about having a "constitutional monarch" become directly involved in day-to-day process). It is probably fair to state that a large number of people who say RFA is broken feel that way due to the possibly unfairly adversarial nature of the process. And it is probably fair to say further that one of the reasons the bar is set so high is the very lack of a robust desysopping process; admins are currently essentially promoted for life, and so a great deal of care must be taken--perhaps too much – when promoting them."

[93] *See* Wikipedia: Requests for comment – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Rfc (last visited December 24, 2010): "Requests for comment (RfC) is an informal, lightweight process for requesting outside input, and dispute resolution, with respect to article content, user conduct, and Wikipedia policy and guidelines."

[94] *See* Wikipedia: Mediation – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Mediation (last visited December 24, 2010): "Mediation is an activity in which a neutral third party, the mediator, guides and regulates structured discussion to facilitate reaching consensus on a disputed issue. The aspects of mediation commonly are:

- a difference of positions between the respective parties;
- a desire on the part of the parties to find a positive solution to the dispute and to accept a discussion about respective interests and objectives;

honestly, let's try not to go there unless everything else fails (that's a requirement anyway). We ought not to look at this in terms of sanctions for one another,[96] but solutions on how to move forward. This is not meant to take away your rights and privileges or asking you to compromise, it's just that practically speaking, it's easier for everyone if we can all find a common space to continue to co-exist on this great project."

Mary is slightly ambivalent regarding her next course of action, and as she ponders her options, Max sends her another private message: "Dear Mary. I am really sorry for any misunderstanding that has occurred. Perhaps I should have made it clear from the outset that there was some conflict of interest in my intervening of your dispute with my brother, or perhaps I should have stayed away completely from the start. I send you this message not with the aim or hope that you will not avail of your right to complain against me… I sincerely believe that you are a good editor and that you are beginning to find your way around nicely around this encyclopedia, in the same way that Richard is also beginning to really understand how this whole project works. I will say nothing further but this: we are united in our cause to build the largest repository of knowledge, though

---

- the intention of achieving a positive result through the help of an independent, neutral third-party not connected with any of the involved parties;
- the intention of achieving a stable result, preferably a long-lasting agreement between the parties.

The mediated agreement is described as the consensus of the parties on a proposal that has been developed with the help of the mediator. The mediator may or may not set out a formal agreement for the parties to accept; some mediators prefer to help guide the parties towards developing their own agreement. Agreement to mediate does not obligate the parties to accept any proposed agreements."

[95] *Supra*, *Wikipedia: Arbitration*, note 23: "The arbitration process within the Wikipedia community exists to impose binding solutions to Wikipedia disputes that neither communal discussion, administrators, nor mediation have been able to resolve. Arbitration matters are handled by a panel of experienced users, the Arbitration Committee. As well as hearing disputes, the Committee also handles issues where exceptional factors such as privacy may preclude public consideration. The Committee has considerable autonomy to address such issues, within the broad scope of Arbitration Policy."

[96] *See* Wikipedia: Editing restrictions, Wikipedia – the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Editing_restrictions (last visited December 24, 2010): "The Arbitration Committee may impose restrictions on users engaged in inappropriate behavior, usually following a request for arbitration. Such restrictions may be revoked by the Committee by passing a "motion in a prior case"…

The following is a list of the most common types of restrictions. More unique restrictions which have been imposed in unusual circumstances are not listed:

- Account restriction…
- Civility restriction…
- Probation (supervised editing)…
- Revert limitation…
- Topic ban…";

and Wikipedia: General sanctions – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:General_sanctions (last visited December 24, 2010): "The Arbitration Committee may impose general sanctions on all editors working in a particular area, usually following a request for arbitration. Administrators employing these sanctions are reminded of the need to issue appropriate notifications and to log all sanctions as specified in each case. Such general sanctions may be revoked by the Committee by passing a "motion in a prior case"…:

- Article probation…
- Community article probation…
- General restriction…
- Discretionary sanctions…"

our methods and philosophies will differ. Rather than be adversarial and keep going at each other's throats, let us be cooperative. Again, it was never my intention to put you in the position that you are in now. I really hope we can work this out amicably."

This turn of events makes Mary consider the path of confrontational dispute resolution even more carefully. On the one hand, she is confident that her legal background will put her in good steed in representing herself before the Arbitration Committee[97] or any other high-level body (should it come to that) and challenging any unjust decision they render. Indeed, Mary had already prepared a draft case for an RFC,[98] setting out what she thought should constitute the statement of the dispute, the evidence of improper behaviour, the applicable policies and guidelines, users that will corroborate her testimony and her possible responses to "outside views";[99] if need be, she also had her draft statement of the case (including her defence) for the Arbitration Committee ready. On the other hand, taking the diplomatic route may open more doors for her in this world, should she choose to continue participating in it. Moreover, she recalled reading somewhere that the Arbitration Committee has been mired in a controversy or two before,[100] and is not too keen to take her chances with them – she remains firmly interested in continued contribution to the project. In the end, Mary decides to follow the path of concilliation and makes her peace with Max (and later, Richard); even though she got off to a rocky start to this project, she knows that she will be playing a part in making it even bigger than what it is now. And, like what we will attempt to do now, she will continue to ponder jurisprudential questions of law, morality and politics that permeate and demarcate this cyber world known as Wikipedia.

III. Recap: classification of terms and concepts concerning the creation and management of a Wikipedia entry

Having traipsed a good (but nevertheless small) part of the Wikipedian landscape from the perspective of Mary, let us recapitulate the various regulations we came across. As can be seen in the table below, the regulations can be divided into five broad categories, *viz*. etiquette, policies and guidelines, penal measures, dispute resolution procedures, and miscellaneous and legal issues. Although the table is by no means either a perfect classification of the entire citadel of regulations governing Wikipedia (not to mention that many rules could not be canvassed in the hypothetical) or a reflection of the terminology

---

[97] *Supra*, *Wikipedia: Arbitration*, note 23. For the complete index of cases heard by the Arbitration Committee thus far, *see* Wikipedia: Arbitration/Index/Cases – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Arbitration/Index/Cases (last visited December 24, 2010).

[98] *Supra*, *Wikipedia: Requests for comment*, note 93. For one of the most prominent RFCs to date, see Wikipedia: Requests for Comment/Tony1, Wikipedia – the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Requests_for_comment/Tony1 (last visited December 24, 2010). "Tony1" was and remains the most prominent copyeditor and (to a lesser extent) policy-cum-guideline-change activist on the project.

[99] *Ibid*.

[100] *Supra*, *The World and Wikipedia*, note 8 at 139 to 142. In one of the controversies, a British Labour councillor had been anonymously editing Wikipedia, including many political articles in the UK. He was voted into the Arbitration Committee under rather suspicious circumstances, but resigned when his cover was blown.

that Wikipedia employs,[101] it does serve a useful function in segregating regulations that have consequences that flow from a breach, from those that do not. Essentially, an editor can largely ignore (or disobey) regulations that fall under the rubric of "etiquette" and face no danger of his cyber existence on Wikipedia being threatened. But, for the regulations falling under the remaining categories, they have to varying degrees, some force of, or relation to, "law" in an approximate sense of the word. As a matter of intuition then, the latter categories may be where the answers to this paper can be found.

1. Editing etiquette
❖ Assuming good faith ❖ Edit summaries ❖ Discussion on talk pages ❖ Tagging ❖ Registration
2. Editing policies and guidelines
❖ Neutrality ❖ Notability ❖ No original research ❖ Consensus ❖ Sourcing and verifiability ❖ Biographies of living persons ❖ Formatting and internal consistency ❖ Conflicts of interest ❖ Nomination for deletion
3. Acts leading to penal measures such as blocking and banning
❖ Vandalism and approach towards unregistered users ❖ Incivility, harassment and personal attacks ❖ Edit warring and the 3RR ❖ Trolling ❖ Disrupting and/or gaming the system ❖ Sock and meat puppetry
4. Dispute resolution procedures
❖ Private settlement ❖ Discussion on talk pages ❖ Administrator intervention ❖ Request for comment ❖ Informal and formal mediation ❖ Arbitration

[101] Wikipedia does actually distinguish between policies, principles and guidelines – each with different degrees of necessary adherence, but it is submitted that the classification presented in this paper is a more nuanced and helpful one.

5. Legal and miscellaneous issues
❖ Selection and removal of administrators ❖ Threats of suing ❖ Defamation ❖ Copyright infringement ❖ Varying degrees of page protection ❖ Politicisation ❖ Powers of checkuser and oversight ❖ De facto sovereignty

At this point it may also be helpful to make a further preliminary remark. On the internet – Wikipedia included – one can quite safely maintain a separate existence and identity from real life. If so, it may seem a technical impossibility to discuss related concepts like society, citizens, obedience and law, because the very concept of "citizen" (and therefore society and law) is meaningless if one can shed an old identity and adopt another at will. Two counterpoints can be made to this objection. The first is that the majority of the regular editors (those exposed to the regulations the most) on Wikipedia do act in good faith and do not adopt separate accounts to manipulate the system. Not only are the consequences for being found out severe, but it is also very inconvenient to maintain a separate existence for long without raising suspicion,[102] and exhausting to keep up the façade. The second is that the regulations do already anticipate the use of multiple identities to abuse the system, so this problem of multiple identities should be seen as just another issue to be addressed by the regulations rather than as something that entirely subverts our jurisprudential analysis of the system. Moving along, it will be apposite now to consider the principal claims of our two legal theorists *vis-à-vis* the central question that confronts us in this essay: "what is law, and how do I know what is law?"

IV. The principal claims of H.L.A. Hart

> "*My aim in this book was to provide a theory of what law is which is both general and descriptive. It is general in the sense that it is not tied to any particular legal system or culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect.*"[103]

(a) Objectives and dismantling John Austin

It should come as no surprise that Hart's magnum opus, *The Concept of Law*,[104] forms our starting point in the examination of his claims. *The Concept of Law*, of course, is considered as one of the most (if not the most) important literature in legal positivism.

[102] Most sock or meat puppet accounts are created just to support the primary account's edits on a select number of articles. By viewing the edit history of the sock or meat puppet accounts, it is usually not difficult to trace the edit trail to the primary account. And since sock puppet accounts are usually created to edit controversial articles, there will be many pairs of eyes looking out for suspicious activity.
[103] *Supra*, *The Concept of Law*, note 25 at 239.
[104] *Ibid*.

And Hart makes clear which side of the fence he stands out from the outset. In the preface, we are told that his book should be regarded "as an essay in analytical jurisprudence", which is "concerned with the clarification of the general framework of legal thought, rather than with the criticism of law"; further, despite its concern with analysis, "the book may also be regarded as an essay in descriptive sociology".[105] Hence for Hart, law is a form of social phenomenon that is understood by reference to the actual social practices of a community (what we may call the social fact thesis), and there is no necessary connection between law and morality (what we may call the separability thesis).

Hart is quick though to concede that his theory emerges directly from the ashes of John Austin's command theory of law[106] – a theory that the former methodically decimates in the first four chapters of *The Concept of Law*. Austin's command theory essentially involved the following claims: (1) law comprises sovereign commands (general orders backed by threats); (2) such commands are given by a sovereign who is habitually obeyed by society; (3) the sovereign does not habitually obey others; and (4) sanctions will follow if the commands are not obeyed. Insofar as Hart's theory builds on Austin's, it is useful for us quickly recall some of the main flaws of Austin's theory that Hart himself pointed out:[107]

> First, it became clear that though of all the varieties of law, a criminal statute… most resembles orders backed by threats given by one person to others, such a statute none the less differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others. Secondly, there are other varieties of law… which cannot, without absurdity, be construed as orders backed by threats. Thirdly, there are legal rules which differ from orders in their mode of origin… Finally, the analysis of law in terms of the sovereign… failed to account for the continuity of legislative authority characteristic of a modern legal system… the notion of a *tacit* order, seemed to have no application to the complex actualities of a modern legal system… treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distort the ways in which these are spoken of, thought of, and actually used in social life. This had no better claim to our assent than the theory that all the rules of a game are 'really' directions to the umpire and the scorer.

Declaring Austin's theory a "failure", Hart then proceeds to record a "fresh start" for his own theory.[108]

(b) Union of primary and secondary rules

Central to Hart's theory (and his assault on Austin's theory) is his conceptualisation of, and place for, rules. He starts off by using the "gunman model" to distinguish between a

[105] *Ibid* at vi.
[106] *See* John Austin, The Province of Jurisprudence Determined, (1832).
[107] *Supra*, *The Concept of Law*, note 25 at 79 to 80 (emphasis in original).
[108] *Ibid* at 80.

person being "obliged" and being "obligated" to obey a command[109] – a distinction that Austin's theory did not seem to be able to sustain. Then, under the rubric of social practice, he draws further distinctions between: (1) habits and rules; (2) the internal and external aspects of rules; (3) conventions and obligations; (4) moral obligations and legal obligations; and (5) primary rules and secondary rules. It appears that the key to understanding some of the initial distinctions is the "internal" (as opposed to external) aspect of rules, manifested in one important form as the "critical reflective attitude". On this, Hart wrote:[110]

> The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical behaviour. No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to those of restriction… But such feelings are neither necessary nor sufficient for the existence of 'binding' rules… What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism… demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must' and 'should', 'right' and 'wrong'.

What Hart was trying to achieve then was to filter out the unwanted elements that we might conflate with legal rules, such as habits (which only have an "external" aspect), mere social conventions (which are short of obligations and lack that "feeling" of compulsion), obligations as understood by Austin, and moral obligations (which have no centralised system and may be dependent merely on guilt). Having done this, he goes on to explain how while primitive societies probably only require primary rules (of obligation, like some basic form of criminal law or social custom) to operate,[111] it cannot be the case for sophisticated and modern societies that have more developed legal systems:[112]

> It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by… a regime of unofficial [primary] rules [governing restrictions on the free use of violence, theft and deception]. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways… The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex… The remedy for the *static* quality of the regime of primary rules consists in the introduction of what we shall call 'rules of change'. The simplest form of such a

[109] *Ibid* at 6, 82 and 85.
[110] *Ibid* at 57.
[111] *Ibid* at 91.
[112] *Ibid* at 92 and 94 to 97 (emphasis in original).

> rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules… The third supplement to the simple regime of primary rules, intended to remedy the *inefficiency* of its diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them 'rules of adjudication'.

In other words, it is the union of primary and secondary rules that gives a modern legal system its shape and form. And it is probably not controversial to suggest that among the 3 secondary rules, understanding how the rule of recognition – Hart's "ultimate rule" of a legal system[113] – is the most crucial.

(c) The rule of recognition and the two minimum conditions of a legal system

Apart from its trait of remedying the uncertainty of primary rules as stated above, the description of the rule of recognition may be elaborated as follows:[114]

> [The rule of recognition] may, as in the early law of many societies, be no more than an authoritative list or text of the rules is to be found in a written document or carved on some public monument… what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule… In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions. Moreover, where more than one of such general characteristics are treated as identifying criteria, provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law.

Furthermore, the validity of the rule of recognition cannot be questioned, in that it "can neither be valid nor invalid but is simply accepted as appropriate for use in this way."[115] Again, the "internal" aspect of rules plays a part in our understanding of this rule:[116]

> In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule… For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. There is, of course, a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular

[113] *Ibid* at 105 to 107.
[114] *Ibid* at 94 to 95 (emphasis in original).
[115] *Ibid* at 109.
[116] *Ibid* at 101 to 102 (emphasis in original).

> conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules… The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view.

Hart, however, recognises that the union of primary and secondary rules is actually insufficient to "describe the relationships to law involved in the existence of a legal system";[117] obedience (*cf.* efficacy) needs to be more thoroughly accounted for. Therefore, he adds that:[118]

> There are… two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever… The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses.

Accordingly, since law is a matter of social fact, in a situation like a *coup d'état* or social revolution where the officials no longer (according to their internal point of view) accept the rule of recognition, a legal system may not exist in the intervening periods. Under the normal run of things, however, the rule of recognition helps the legal system in question to: (1) establish a test for valid law; (2) confer validity on the other rules; and (3) unify the laws.[119] In certain jurisdictions, the rule of recognition may even explicitly incorporate morality.[120]

---

[117] *Ibid* at 114.

[118] *Ibid* at 116 to 117 (emphasis in original). But then Hart also says at 206: "the certification of something as legally valid is not conclusive of the question of obedience… however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a *moral scrutiny*" (emphasis added).

[119] *See also* Neil MacCormick , H.L.A. Hart (Jurists: Profiles in Legal Theory), (2008) at 138 to 139.

[120] *Supra*, *The Concept of Law*, note 25 at 243, 247 and 250: "Even if… the participant's internal perspective manifested in the acceptance of the law as providing guides to conduct and standards of criticism also included a belief that there are *moral* reasons for conforming to the law's requirements and *moral* justification of its use of coercion, this would be something for a morally neutral descriptive jurisprudence to record but not to endorse or share… though my main examples of the criteria provided by the rule of recognition are matters of what Dworkin has called 'pedigree' [footnote omitted], concerned only with the manner in which laws are adopted or created by legal institutions and not with their content, I expressly state both in this book (p. 72) and in my earlier article on 'Positivism and the Separation of Law and Morals' [footnote omitted] that in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate beside pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional constraints… the rule of recognition may incorporate

(d) Minimum content of natural law

But, Hart does not stop here. The insufficiency of the concept of the union of primary and secondary rules in accounting for a legal system is further supplemented by his formulation of the "minimum content of natural law". He states that for a community (and *a fortiori*, a legal system) to survive (an indisputable goal of human society for Hart),[121] certain rules constructed around the consequence of the "human condition" must exist as a matter of fact, and there are at least 5 aspects to this "minimum content of natural law": (1) human vulnerability, *viz*., we are all susceptible to physical attacks; (2) approximate equality, *viz*., even the strongest us among us need to sleep at some point; (3) limited altruism, *viz*., we are, generally speaking, selfish; (4) limited resources, *viz*., we all need food, clothes and shelter but these are limited resources; and (5) limited understanding and strength of will, *viz*., we cannot be safely relied upon to cooperate with our fellow men all the time.[122]

---

as criteria of legal validity conformity with moral principles or substantive values…" (emphasis in original).

[121] Fuller and Aquinas would say of course, that if the highest aim of a captain were to preserve him ship, he would keep it in the port forever. That is, man's desire to survive can only be the lowest common denominator of aspiration.

[122] *Supra*, *The Concept of Law*, note 25 at 193 to 198: "In considering the simple truisms which we set forth here, and their connection with law and morals, it is important to observe that in each the case the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content. The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to an maintain the rules, coercion of others who would not voluntarily conform would be impossible… (i) *Human vulnerability*. The common requirements of law and morality consist for the most part not of active services to be rendered but of forbearances, which are usually formulated in negative form as prohibitions. Of these the most important for social life are those that restrict the use of violence in killing or inflicting bodily harm… If there were not these rules what point could there be for beings such as ourselves in having rules of *any* other kind?... (ii) *Approximate equality*. Men differ from each other in physical strength, agility, and even more in intellectual capacity. None the less it is a fact of quite major importance… that no individual is so much more powerful than others, that he is able, without cooperation, to dominate or subdue them for more than a short period… (iii) *Limited altruism*. Men are not devils dominated by a wish to exterminate each other… neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible… (iv) *Limited resources.* It is a merely contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil. These facts alone make indispensable some minimum form of the institution of property (though not necessarily individual property), and the distinctive kind of rule which requires respect for it…. (v) *Limited understanding and strength of will*. The facts that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefits obvious… On the other hand, neither understanding of long-term interest, nor the strength or goodwill of will, upon which the efficacy of these different motives towards obedience depends, are shared by all men alike… except in very small closely-knit societies, submission to the system of restraint would be folly if there was no organisation for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations. 'Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not… what reason demands is *voluntary* cooperation in a *coercive* system" (emphasis in original).

Hart's concession to natural law (albeit in a limited and "minimum" sense),[123] of course, is but part of his wider attack against the 3 main opponents to legal positivism of his day, natural law, formalism, and legal realism (or rule scepticism). This is canvassed briefly in the next two sub-sections. In his thrust and parry with natural law, he distinguishes between justice and morality, and law and morality, to demonstrate his point that there is no necessary connection between law and morality. He refutes the formalists' claim that rules are the be all and end all when it comes to resolving legal disputes. Finally, responding to the realists' charge that (legal) rules are indeterminate, Hart argues that the uncertainty over what rules apply and how they apply is not quite as large as the realists make it out to be; more often than not, rules play an important and consistent role in the disposition of legal disputes.[124]

(e) Distinguishing between justice and morality, and law and morality

As a precursor to his subsequent endeavour to "disentangle" law and morality, Hart found it necessary to distinguish the concepts of justice and morality:[125]

> The terms most frequently used by lawyers in the praise or condemnation of law or its administration are the words 'just' and 'unjust' and very often they write as if the ideas of justice and morality were coextensive… A man guilty of gross cruelty to his child would often be judged to have done something morally *wrong bad*, or even *wicked* or to have disregarded his moral *obligation* or duty to his child. But it would be strange to criticise his conduct as *unjust*… 'Unjust' would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault… Justice constitutes one [distinct] segment of morality primarily concerned not with individual conduct but with the ways in which *classes* of individuals are treated. It is this which gives justice its special relevance in the criticism of law and of other public or social institutions. It is the most public and the most legal of the virtues. But principles of justice do not exhaust the idea of morality; and not all criticism of law made on moral grounds is made in the name of justice. Laws may be condemned as morally bad simply because they require men to do particular actions which morality forbids individuals to do, or because they require men to abstain from doing those which are morally obligatory. It is therefore necessary to characterise, in general terms, those principles, rules and

[123] *See also ibid* at 181: "We have, indeed, insisted that in all moral codes there will be found some form of prohibition of the use of violence, to persons or things, and requirements of truthfulness, fair dealing, and respect for promises. These things, granted only certain very obvious truisms about human nature and the character of the physical world, can be seen in fact to be essential if human beings are to live continuously together in close proximity; and it therefore would be extraordinary if rules providing for them were not everywhere endowed with the moral importance and status we have described. It seems clear that the sacrifice of personal interest which such rules *demand* is the price which must be paid in a world such as ours for living with others, and the protection they *afford* is the minimum which, for beings such as ourselves, makes living with others worth while. These simple facts constitute, as we argue in the chapter, a core of indisputable truth in the doctrines of Natural Law." (emphasis in original).

[124] Although in his book Hart discussed formalism and rule-scepticism before going on to natural law, I have taken the liberty to reorder the discussion to better suit the structure of this paper.

[125] *Supra*, *The Concept of Law*, note 25 at 157 to 158 and 167 to 168 (emphasis in original).

> standards relating to the conduct individuals which belong to morality and make conduct morally obligatory. Two related difficulties confront us here. The first is that the word 'morality' and all other associated or nearly synonymous terms like 'ethics', have their own considerable area of vagueness or 'open texture'. There are certain forms of principle or rule which some would rank as moral and which others would not. Secondly, even where there is agreement on this point… there may still be great philosophical disagreement as to their *status* or relation to the rest of human knowledge and experience. Are they immutable principles which constitute part of the fabric of the Universe, not made by man, but awaiting discovery by human intellect? Or are they expressions of changing human attitudes, choices, demands, or feelings?

Having done that, Hart goes on to the second phase of his clarification exercise: removing morality from the equation. He does not deny that moral rules and legal rules have "certain striking similarities" (mirroring what he says about the "minimum content of natural law") – bearing in mind too, that he does not deny that the rule of recognition can incorporate substantive justice and principles of morality.[126] However, he points out that there are "certain characteristics which law and morals cannot share":[127]

> Moral and legal rules of obligation and duty have… certain striking similarities enough to show that their common vocabulary is no accident. These may be summarised as follows. They are alike in that they are conceived as binding independently of the consent of the individual bound and are supported by serious social pressure for conformity; compliance with both legal and moral obligations is regarded not as a matter for praise but as a minimum contribution to social life to be taken as matter of course. Further both law and morals include rules governing the behaviour of individuals in situations constantly recurring throughout life rather than special activities or occasions, and though both may include much that is peculiar to the real or fancied needs of a particular society, both make demands which must obviously be satisfied by any group of human beings who are to succeed living together. Hence some forms of prohibition of violence to person or property, and some requirements of honesty and truthfulness will be found in both alike. Yet, in spite of these similarities, it has seemed obvious to many that there are certain characteristics which law and morals cannot share… [first], importance is not essential to the status of all legal rules as it is to that of morals… [second], morals and traditions cannot be directly changed, as laws may be, by legislative enactment… [third], legal responsibility is not necessarily excluded by the demonstration that an accused person could not have kept the law which he has broken; by contrast, in morals 'I could not help it' is always an excuse, and moral obligation would be altogether different from what it is if the moral 'ought' did not in this sense imply 'can'… [fourth], the typical form of legal pressure may well be said to consist in… threats. With morals on the other hand the typical form of pressure consists in appeals to the respect for the rules, as things important in themselves, which is presumed to be shared by those addressed.

[126] *Supra*, note 120.
[127] *Supra*, *The Concept of Law*, note 25 at 172, 175 to 176 and 178 to 180.

Because of the unshared characteristics, Hart disputes the necessary connection between law and morality. He further points out 6 supposed misconceptions that natural law advocates present as the necessary connection between law and morality – resulting in a blurring and our confusion over the concept of law – and much of what he says regarding this is worth quoting *in extenso*:[128]

> [I]t cannot be seriously disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted. But… it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice… the claim that there is some further way in which law *must* conform to morals beyond that we have exhibited as the minimum content of Natural Law, needs very careful scrutiny. Many such assertions either fail to make clear the sense in which the connection between law and morals is alleged to be necessary; or upon examination they turn out to mean something which is both true and important, but which it is most confusing to present as a necessary connection… (i) *Power and authority*. It is often said that a legal system must rest on a sense of moral obligation or on the conviction of the moral value of the system, since it does not and cannot rest on mere power of man over man… But the dichotomy of 'law merely being based on power' and 'law which is accepted as morally binding' is not exhaustive. Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so… (ii) *The influence of morality on law*. The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals… No 'positivist' could deny [this], or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connection of law and morals, its existence should be conceded. (iii) *Interpretation*. Laws require interpretation if they are to be applied to concrete cases… the open texture of law leaves a vast field for a creative activity which some call legislative… Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values… Yet if [this is] tendered as evidence of the *necessary* connection of law and morals, we need to remember that the same principles have been honoured nearly as much in the breach as in the observance… (iv) *The criticism of law*… the assertion that a *good* legal system must conform… to the requirements of justice and morality… is not a tautology, and in fact, in the criticism of law, there may be disagreements both as to the appropriate moral standards and as to the required points of conformity… (v) *Principles of legality and justice*. It may be said that the distinction between a good legal system which conforms at certain points to morality and justice, and a

[128] *Ibid* at 185, 202 to 208 and 211 (emphasis in original). Hart also says at 200: "The protections and benefits provided by the system of mutual forbearances which underlies both law and morals may, in different societies, be extended to very different ranges of persons. It is true that the denial of these elementary protections to any class of human beings, willing to accept the corresponding restrictions, would offend the principles of morality and justice to which all modern states pay, at any rate, lip-service… Yet it is plain that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope, and often they have not done so."

> legal system which does not, is a fallacious one, because a minimum of justice is necessarily realised whenever human behaviour is controlled by general rules publicly announced and judicially applied… in analysing the idea of justice, that its simplest form… consists in more than taking seriously the notion that what is to be applied to a multiplicity of different persons is the same general rule, undeflected by prejudice, interest or caprice… (vi) *Legal validity and resistance to law*…. What [positivists] were, in the main, concerned to promote was clarity and honesty in the formulation of the theoretical and moral issues raised by the existence of particular laws which were morally iniquitous but were enacted in proper form, clear in meaning, and satisfied all the acknowledged criteria of validity of a system. Their view was that, in thinking about such laws, both the theorist and unfortunate official or private citizen who was called on to apply or obey them, could only be confused by an invitation to refuse the title of 'law' or 'valid' to them… A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.

In dealing with unjust laws then, Hart would prefer the approach of passing retrospective legislation to denounce an unjust law, rather than have an unjust law declared as a non-law from the outset.[129] Having attempted to disambiguate the necessary elements of law, Hart ensures that the jurisprudential issues raised by the formalists and realists are also addressed.

(f) The role of language and dealing with the uncertainty of rules

For Hart, because rules are often given as general directions to classes of individuals, there are 2 principal devices in which rules are communicated: (1) communication by authoritative general language, or legislation; and (2) communication by authoritative example, or precedent.[130] He does not deny that there can be uncertainty surrounding the

---

[129] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in David Dyzenhaus and Arthur Ripstein (eds), Law and Morality, (2001) at 60. In contrast, Gustav Radbruch would, in the context of the Nazi grudge informer case that Hart was responding to, prefer that a law would be valid only if: (1) it had passed the tests contained in the formal criteria of legal validity of the system; and (2) it did not contravene basic principles of morality: *see* Michael Doherty, Jurisprudence: The Philosophy of Law, (2001) at 154.

[130] *Supra*, *The Concept of Law*, note 25 at 124 to 129: "In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without direction, as requiring from the certain conduct when occasion arose, nothing that we now recognise as law could exist. Hence the law must predominantly, but by no means exclusively, refer to *classes* of person, and to *classes* of acts, things and circumstances… Two principal devices, at first sight very different from each other, have been used for the communication of such general standards of conduct in advance of the successive occasions on which they are to be applied. One of them makes a maximal and the other a minimal use of general classifying words. The first is typified by what we call legislation and the second by precedent… Communication by example in all its forms, though accompanied by some general verbal directions… may leave open ranges of possibilities, and hence of doubt, as to what is intended even as to matters which the person seeking to communicate has himself clearly envisaged… In contrast with the indeterminacies of examples, the communication of general standards by explicit general forms of language… seems clear, dependable, and certain… Much of the jurisprudence of this century has consisted of the progressive realisation (and sometimes the

rules. For legislation (authoritative general language), there is uncertainty in language, and even all the canons of interpretation at our disposal cannot eliminate all uncertainties. The solution lies not in simply employing more language because we will still operate under 2 handicaps: (1) our relative ignorance of fact; and (2) our relative indeterminacy of aim. In discussing these 2 handicaps, Hart also takes aim at formalism,[131] the antithesis to realism:[132]

> If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance of every possibility. We could make rules, the application of which to particular cases never called for a

---

exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative language (legislative) is far less firm than this naïve contrast suggests… Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have been what has been termed an *open texture*… Natural languages like English are when so used irreducibly open-textured… we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives… the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps… our relative ignorance of fact… our relative indeterminacy of aim… [the] rigidity of our classifications will thus war with our aims in having or maintaining the rule… In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly be appreciated and settled when they arise in a concrete case. In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide… Sometimes the sphere to be legally controlled is recognised from the start as one in which the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance. Accordingly, to regulate such a sphere the legislature sets up very general standards and then delegates to an administrative, rule-making body… even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them… the rule-making authority must exercise a discretion… A second similar technique is used where the sphere to be controlled is such that it is impossible to identify a class of specific actions to be uniformly done or forborne and to make them the subject of a simple rule, yet the range of circumstances, though very varied, covers familiar features of common experience. Here common judgments of what is 'reasonable' can be used by the law. This technique leaves to individuals, subject to correction by a court, the task of weighing up and striking a reasonable balance between the social claims which arise in various unanticipatable forms." (emphasis in original).

[131] The traditional exponents of this theory will be the likes of Christopher Langdell. But, consider too the more extreme version of formalism presented in John Maxey Zane, "German Legal Philosophy", (1918) 16 Michigan Law Review 287 at 292: "it must be perfectly apparent to anyone who is willing to admit the rules governing rational mental action that unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment."

[132] *Ibid* at 129 to 130.

> further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence. Plainly this is not our world… This inability to anticipate brings with it a relative indeterminacy of aim. When we are bold enough to frame some general rule of conduct… the language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds… When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us… Different legal systems, or the same system at different times, may either ignore or acknowledge more or less explicitly… [the] need for further exercise of choice in the application of general rules to particular cases. The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimise the need for such choices, once the general rule has been laid down.

Hart's assailment of formalism is complete when he points out that there exists uncertainty in the use of precedent (authoritative example) as well:[133]

> Any honest description of the use of precedent in English law must allow a place for the following pairs of contrasting facts. *First*, there is no single method of determining the rule… Notwithstanding this, in the vast majority of decided cases there is very little doubt… *Secondly*, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. *Thirdly*, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by courts that are bound by it following two types of creative or legislative activity… Notwithstanding [the act of narrowing or widening the rule found in the precedent] left open by the binding force of precedent, the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule… the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules, which unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case… In a system where *stare decisis* is firmly acknowledged, [the] function of the courts is very like the exercise of delegated rule-making powers by an administrative body.

Yet as can be seen from the preceding passage, Hart also takes issue with the position taken by the realists or rule sceptics,[134] who deny, *inter alia*, that rules can determine the outcome of a legal dispute.[135] Although (as stated above) Hart acknowledges that there

---

[133] *Ibid* at 134 to 135 (emphasis in original).

[134] *Cf.* fact sceptics.

[135] *See e.g.*, Oliver Wendell Holmes, "The Path of the Law", (1998) 78 Boston University Law Review 699 at 705 to 706: "The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the

can be uncertainty surrounding which rules apply and how they apply, in the majority of cases, this does not present a real dilemma in the resolution of legal disputes. So while the inherent ambiguity of language renders rules with an "open texture", there is still a "core" of cases wherein rules can be applied uncontroversially and there can be a safe prediction of the likely outcome.[136] Concomitantly, within these confines, there is little discretion for the arbiter of the dispute (say, a judge).[137] Situated outside the "core", however, is the "penumbra" and this is where cases become harder and the judge is compelled to exercise a much greater degree of discretion, and may "make law" as a consequence, wherein he is usually guided by aims, purposes, and policies.[138] The judge may be guided by various miscellaneous sources of law, such as foreign cases, but equally, he may base his decision on his own conception of fairness and justice.[139]

---

logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions."; and John Dewey, "Logical Method and Law", (1914) 10 Cornell Law Quarterly 17 at 23: "As a matter of fact, men do not begin thinking with premises. They begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation. The problem is not to draw a conclusion from given premises; that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to *find* statements, of general principle and of particular fact, which are worthy to serve as premises. As matter of actual fact, we generally begin with some vague anticipation of a conclusion… and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions." (emphasis in original).

[136] *See supra*, *The Concept of Law*, note 25 at 135 to 144.

[137] *See also ibid* at 137: "It is possible that, in a given society, judges might always first reach their decisions intuitively or 'by hunches', and then merely choose from a catalogue of legal rules one which, they pretended, resembled the case in hand; they might then claim this was the rule which they regarded as requiring their decision, although nothing else in their actions or words suggested they regarded it as a rule binding on them. Some judicial decisions may be like this, but it is surely evident that for the most part decisions… are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged."

[138] *See also supra*, *Positivism and the Separation of Law and Morals*, note 129 at 36 and 41: "If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions are to be rational, their rationality must lie in something other than a logical relation to premises… the intelligent decision of penumbral questions is one made not mechanically but in the light of aims, purposes, and policies, though not necessarily in the light of anything we would call moral principles."

[139] *See also The Concept of Law*, note 25 at 251 to 253: "It is of course true that an important function of the rule of recognition is to promote the certainty with which the law may be ascertained. This it would fail to do if the tests which it introduced for law not only raise controversial issues in some cases but raise them in all or most cases. But the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition… A margin of uncertainty should be tolerated, and indeed welcomed in the case of many legal rules, so that an informed judicial decision can be made when the composition of an unforeseen case is known and the issues at stake in its decision can be identified and so rationally settled… that there are such objective moral facts [as Dworkin would suggest] is a

Ronald Dworkin – most notably in *Law's Empire* – has much to say to this (*e.g.*, the "semantic sting"; supplementing rules with principles; law as interpretation; internal and external scepticism; the constraints of fit and value; law as a coherent web; and the "one right answer" thesis),[140] but any meaningful discussion of his objections will be beyond the scope of this paper.[141] Suffice to say for now, Dworkin's main point is that judges are more constrained by rules (and principles) than Hart has claimed, and they therefore have less discretion than Hart has claimed. To do otherwise undermines both democracy and the expectations of litigants.

Now that we have set out the principal claims of Hart, we can turn to Finnis.

V. The principal claims of John Finnis

> "*I have not presented natural law or the principles of practical reasonableness as expressions of God's will. And I have positively declined to explain obligation in terms of conformity to superior will.*"[142]

(a) Justification of self-evidence

The groundbreaking *Natural Law and Natural Rights*[143] is our first port of call insofar as the endeavour of identifying Finnis' central claims is concerned. It may perhaps be helpful to first obtain a helicopter view of his claims.[144] For Finnis, the justification for law is the concept of self-evidence; self-evidence also being the methodology by which he identifies the 7 basic goods (knowledge, life, play, aesthetic experience, friendship, practical reasonableness, and religion) necessary for human flourishing:[145]

> The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have. [Thomas] Aquinas considers that

---

controversial philosophical theory; if there are no such facts, a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion in accordance with his best understanding of morality and its requirements and subject to whatever constraints on this are imposed by the legal system."

[140] *Supra*, *Law's Empire*, note 25 at 52 to 53, 65 to 72, 78 to 84, 90 to 96, 120 to 128, 160, 224 to 226, 235 to 245, 255 to 260, and 272 to 273. *See* for instance the claim he makes about law as integrity at 225, 238 to 239 and 245: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice… Law as integrity asks a judge… to think of himself as an author in the chain… He knows that other judges have decided cases that, although not exactly like his case, deal with relation problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be… Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."

[141] *See also* Lon Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart", (1958) 71 Harvard Law Review 630 at 662: "The most obvious defect of his theory [of the core and penumbra] lies in its assumption that problems of interpretation typically turn on the meaning of individual words."

[142] *Supra*, *Natural Law and Natural Rights*, note 25 at 403.

[143] *Ibid*.

[144] *See* Tan Seow Hon, "Justification and Validity in Finnis' Natural Law Theory", (1999) at 7 to 8.

[145] *Supra*, *Natural Law and Natural Rights*, note 25 at 34.

> practical reasoning begins not by understanding this nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgments defining human nature [footnote omitted], but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations. But again, there is no process of inference. One does not judge that 'I have [or everybody has] an inclination to find out about things' and then infer that therefore 'knowledge is a good to be pursued'. Rather, by a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).

In other words, Finnis argues that using self-evidence[146] to identify such goods – which the legal system can then be modified to secure – avoids the problems of religious exclusivity, non-cognitivism (and accordingly, moral relativism), deductive syllogism and the so-called "Humean guillotine".[147] Indeed, this concept of self-evidence forms part of the larger strategy that Finnis employs in restating classical natural law theory,[148] and

---

[146] *See also ibid* at 33 to 34: "[I]t is simply not true that 'any form of a natural-law theory of morals entails the belief that propositions about man's duties and obligations can be inferred from propositions about his nature' [footnote omitted]. Nor is it true that for [Thomas] Aquinas 'good and evil are concepts analysed and fixed in metaphysics before they are applied in morals' [footnote omitted]. On the contrary, Aquinas asserts as plainly as possible that the first principles of natural law , which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason (and not just by metaphysicians) are *per se nota* (self-evident) and indemonstrable [footnote omitted]. They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about good and evil, or about 'the function of a human being', [footnote omitted] nor are they inferred from a teleological conception of nature, [footnote omitted] or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate). Principles of right and wrong, too, are derived from these first, pre-moral principles of practical reasonableness, and not from any facts whether metaphysical or otherwise."; and Joseph Boyle, "Natural Law and the Ethics of Traditions" in Robert George (ed), Natural Law Theory, (1992) at 23: "What defines a [self-evident] proposition… is that it is a necessary truth in which the connection between the terms is immediate, unmediated by the middle term of a demonstrative syllogism. So… there is no absurdity in saying that a proposition is self-evident, that is, known through itself, and that some people do not see that it is self-evident…"

[147] *See* David Hume, A Treatise of Human Nature, (1739) at 469: "In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surpris'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it."

[148] Hart saw classical natural law theory as such: "The doctrine of Natural Law is part of an older conception of nature in which the observable world is not merely a scene of… regularities, and knowledge of nature is not merely a knowledge of them. Instead, on this older outlook every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding toward a definite optimum state which is the specific good – or the end… appropriate for it… This is the teleological conception of nature as containing in itself levels of excellence which things realise": *supra*, *The Concept of Law*, note 25 at 188 to 189. Finnis, though, may not have seen himself as such a neoclassical natural law theorist: "[Principles of natural law refer to] (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued or realised, and

it has led legal theorists to consider him as being responsible for reviving natural law theory.[149] The relevance of self-evidence and the basic goods, then, is that the objective of a legal system is to provide a framework that helps an individual secure the 7 basic goods, and such a framework is arrived at by employing the 9 requirements of practical reasonableness.

(b) Unjust laws as laws?

But as an advocate of natural law theory, does Finnis go as far as to deny unjust laws are laws? Will an unjust law bind a citizen beyond the moral sense? One commentator has accurately captured the characterisation:[150]

> In his important book, *Natural Law and Natural Rights*, Finnis distinguishes what he calls the 'focal' meaning of law from its 'secondary' meaning (Finnis, 1980, p11). The focal conception of law is an ideal form of law, a form to which actual law is an approximation. The central case of law is the law of what Finnis calls 'a complete community', where a complete community is 'an all-round association' in which are co-ordinated 'the initiatives and activities of individuals, of families, and of the vast network of intermediate associations' (Finnis, 1980, p 147). Its 'point or common good' is to secure 'a whole ensemble of material and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development' (Finnis, 1980, p 154). Thus when 'law' is used in its focal or central meaning it describes rules which secure the common good by co-ordinating the different goods of

---

which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing acts that… are reasonable-all-things-considered… and acts that are unreasonable-all-things-considered, *i.e.* between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards… the principles of natural law explain the obligatory force (in the fullest sense of 'obligation') of positive laws, even when those laws cannot be deduced from those principles": *supra*, *Natural Law and Natural Rights*, note 25 at 23 to 24.

[149] *See e.g.*, Raymond Wacks, Understanding Jurisprudence, (2009) at 28; and Ian MacLeod, Legal Theory, (2007) at 106.

[150] Denise Meyerson, Understanding Jurisprudence, (2007) at 39 (emphasis in original). *See also supra*, *Natural Law Theory*, note 146 at 114: "[Finnis] rejects the traditional view that natural law validates positive law, so that positive law which is incompatible with natural law is not truly law at all… preferring the view that natural law provides a means for assessing the merit or demerit of positive law. In other words, Finnis' view is that natural law is evaluative, rather than constitutive, of positive law."; and *supra*, *Justification and Validity in Finnis' Natural Law Theory*, note 144 at 110 to 111: "Finnis appears more positivistic… in his view as to the effect of immorality of the impugned law on its legal validity. Finnis contends that unjust laws are laws, and that there is a legal obligation in the legal sense, but sometimes not a legal obligation in the moral sense, to obey them. This is qualified by an overarching moral obligation to obey laws insofar as to avoid the situation of the whole system being thrown into contempt. He agrees that in some cases laws may be so iniquitous that obedience may be withheld, but… so do the positivists Austin and Bentham. His only point of departure from positivism seems to be his elaboration of the definition of law in the central or focal sense, where he argues law should incorporate his principles of practical reasonableness, be tailored to help one secure the basic goods, and be consistent with the rule of law. He also argues that true authority must come from acting in favour of the common good. But again, it is questionable if positivists would disagree."

> individuals, this is the true purpose of law. It follows from this, says Finnis, that unjust laws are not laws in the *focal* sense of the term. They are not 'true' laws, or law 'in the fullest sense', in the same way that a neglectful parent may be described as 'no parent'. They are defective *as laws* and therefore, judged from the perspective of law's focal meaning, 'less' legal than laws that are just (Finnis, 1980, p 279). But there are also, in Finnis's view, secondary meanings of the term 'law': here we are talking about instances of law which are 'undeveloped, primitive, corrupt, deviant or otherwise "qualified sense" or "extended sense" instances of the subject-matter' (Finnis, 1980, p11). When we are concerned with law in such a secondary sense – when we are concerned with what is merely 'in a *sense*' law – there is no point in saying that unjust laws lack legal validity. Rather, they are valid laws which fall short of the moral ideals which are contained in the concept of law in its fullest sense.

At the same time, however, it is worth mentioning that Finnis has questioned before the usefulness of positivism – of the variety espoused by Hart – and even labelled the enterprise "redundant":[151]

> Positivism never coherently reaches beyond reporting attitudes and convergent behaviour… It has nothing to say to officials or private citizens who want to judge whether, when, and why the authority and obligatoriness *claimed* and *enforced* by those who are *acting* as officials of a legal system, and by their directives, are indeed *authoritative reasons* for their own conscientious action. Positivism, at this point, does no more than repeat (i) what any competent lawyer – including every legally competent adherent of natural law theory – would say are (or are not) intra-systematically valid laws, imposing "legal requirements" and (ii) what any streetwise observer would warn are the likely consequences of non-compliance. It cannot explain the authoritativeness, for an official's or a private citizen's conscience (ultimate rational judgment) of these alleged and imposed requirements, nor their lack of such authority when radically unjust. Positivism is not only incoherent. It is also redundant.

Thus on the one hand, Finnis has decried positivism as redundant, and on the other hand, he will not deny the use of Hart's test in identifying law in a legal system as valid[152] – a

---

[151] John Finnis, "Natural Law: The Classical Tradition" in Jules Coleman and Scott Shapiro (eds), The Oxford Handbook of Jurisprudence and Philosophy of Law, (2004) at 21 (emphasis in original). Positivists, naturally, had something to say in response – *see e.g.*, Joseph Raz, "The Problem About the Nature of Law" in Guttorm Floistrad, Contemporary Philosophy: A New Survey, Volume 3, (1986) at 123 to 124: "If a theory of adjudication is a theory of law, if all the considerations to be used by courts are legal considerations, the theory of the nature of law is a moral theory. A different conclusion emerges if one follows the… institutional approach. Since law belongs to the executive stage, it can be identified without resort to moral arguments, which belong by definition to the deliberative stage. The doctrine of the nature of law yields a test for identifying law the use of which requires no resort to moral or any other evaluative argument. But it does not follow that one can defend the doctrine of the nature of law itself without using evaluative (though not necessarily moral) arguments. Its justification is tied to an evaluative judgment about the relative importance of various features of social organizations, and these reflect our moral and intellectual interests and concerns."

[152] *See also supra*, *Natural Law and Natural Rights*, note 25 at 351: "[A] theory of natural law need not have as its principal concern, either theoretical or pedagogical, the affirmation that 'unjust laws are not law'. .. The principal concern of a theory of natural law is to explore the requirements of practical

test which may potentially consider an unjust law as law. Perhaps then, if Hart is (as he acknowledges) a soft positivist,[153] Finnis should be considered a soft natural law theory advocate.[154] Yet one is left with the sense that the necessity of the connection between law and morality – or lack of – is more fatal in the case of Finnis. Labels may not always matter, but it may be useful to bear these distinctions in mind before we move on.[155] For

---

reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law and obligation. And the principal jurisprudential concern of a theory of natural law is thus to identify the principles and limits of the Rule of Law… and to trace the ways in which sound laws, in all their positivity and mutability, are to be derived… from unchanging principles…"

[153] *Supra*, *The Concept of Law*, note 25 at 250.

[154] *See e.g.*, *supra*, *Justification and Validity in Finnis' Natural Law Theory*, note 144 at 115: "[*Natural Law and Natural Rights*], while not being a version of true natural law, may indeed be the inchoate version of, or launchpad for, a more complete theory of natural law." Moreover, whereas his fellow natural law theory advocate Lon Fuller would condemn a system that lacks the 8 minimum desiderata (*see* Lon Fuller, The Morality of Law, (1969) at 39: "The first and most obvious lies in a failure to achieve rules at all, sot that every issue must be decided on an *ad hoc* basis. The other routes are: (2) a failure to publicise, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules of (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure to achieve congruence between the rules as announced and their actual administration.") as a "bad system of law… [and] something that is not properly called a legal system at all", Finnis does not seem to go as far, preferring (impliedly) to describe a legal system that lacks the rule of law as being in bad shape (*supra*, *Natural Law and Natural Rights*, note 25 at 270), although he does make the effort to supplement Fuller's theory of the internal morality of law: *supra*, *Natural Law and Natural Rights*, note 25 at 270 to 276; and *supra*, note 152. For a critique of Fuller's theory, however, see H.L.A. Hart, Book Book Review of *The Morality of Law*, (1965) 78 Harvard Law Review 1281 at 1285 to 1286: "[Fuller's insistence in *the Morality of* Law] on classifying these principles of legality as a 'morality' is a source of confusion both for him and his readers... [T]he crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification 'inner', is that it perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ('Avoid poisons however lethal if they cause the victim to vomit'...) But to call these principles of the poisoner's art 'the morality of poisoning' would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned."

[155] Consider, at this juncture, the comment made in Lloyd's Introduction to Jurisprudence, (2008) at 132: "Finnis is a social theorist who wants to use law to improve society. His arguments for law thus, not surprisingly, centre on its instrumental value. The focal meaning of law concentrates on what it achieves, not what it is… we are left with the suspicion that Finnis gives us no substantial reason why social ordering through law is the most appropriate way of organising political life, that it has, in other words, the greatest moral value." *See also supra*, *Natural Law and Natural Rights*, note 25 at 290: "[T]he concern of the [natural law] tradition… has been to show that the act of 'positing' law (whether judicially or legislatively or otherwise) is an act which can and should be guided by 'moral' principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere 'decision'; and that those same moral norms justify (*a*) the very institution of positive law, (*b*) the main institutions, techniques, and modalities within that institution (e.g. separation of powers), and (*c*) the main institutions regulated and sustained by law (e.g. government, contract, property, marriage, and criminal liability). What truly characterises the tradition is that it is not content merely to observe the historical or sociological fact that 'morality' thus affects 'law', but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens."

if Finnis is *not* saying that his 7 basic goods and 9 requirements of practical reasonableness allow us to identify a legal system but rather, one should merely *aspire* that a legal system possess these characteristics, he may not be sitting opposite Hart on the table of jurisprudence. Then again, this situation is replicated if Hart's rule of recognition somehow (for the sake of argument) demands that the legal system is structured around Finnis' 7 goods and 9 requirements – they will not be opposing each other. I think the conundrum can be resolved this way: this paper is not only concerned with analysing which theory better *accounts* for what Wikipedia *is*, but also how and why Wikipedians behave the way they do. So if indeed the Wikipedian community is structuring its regulations around basic goods and requirements of practical reasonableness, then it goes to show that Finnis' normative account of law has given us resources the account for questions relating to the *how* and *why*, and such aspiration actually *exists*.

(c) The 7 basic goods necessary for human flourishing

Finnis prefaces his identification of the 7 basic goods – which are not to be quite thought of as moral values yet[156] – as follows:[157]

> It is now time to revert, from the descriptive or 'speculative' findings of anthropology and psychology, to the critical and essentially practical discipline in which each reader must ask himself: What *are* the basic aspects of my well-being. Here each one of us, however extensive his knowledge of the interests of other people and other cultures, is alone with his own intelligent grasp of the indemonstrable (because self-evident) first principles of his own practical reasoning. From one's capacity to grasp intelligently the basic forms of good as 'to-be-pursued' one gets one's ability, in the descriptive disciplines of history and anthropology, to sympathetically… see the point of actions, life-styles, characters, and cultures that one would not choose for oneself.

Finnis acknowledges that there are other things which people would wish to see included, but opines that these are likely to be qualities which facilitate the pursuit of the 7 basic goods rather than themselves being goods; in any event, it is entirely possible for someone to come up with a shorter or longer list, employing different nomenclature.[158] The goods also cannot be "analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit or any of the others… there is no objective hierarchy amongst them."[159] The pursuit of the goods, however, requires a community; it is by an appeal to the common good that Finnis develops his concept of justice:[160]

---

[156] *Ibid* at 62 and 86.
[157] *Ibid* at 85 (emphasis in original).
[158] *Ibid* at 90 to 92. Finnis denies, however, at 95 to 97, that "pleasure" can be the "point of it all", agreeing with Robert Nozick's conclusions regarding the thought experiment about the "experience machine".
[159] *Ibid* at 92.
[160] *Ibid* at 219 to 220. He also says at 161 to 163: "In its full generality, the complex concept of justice embraces three elements… The first element might be called *other-directedness*: justice has to do with one's relations and dealings with other persons; it is 'inter-subjective' or inter-personal. There is a question of justice and injustice only where there is a plurality of individuals and some practical question concerning

> There is, I think, no alternative but to hold in one's mind's eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specifications of rights as tends to favour the pattern, or range of patterns. In other words, one needs some conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing. One attends not merely to character types desirable in the abstract or in isolation, but also to the quality of interaction among persons; and one should not seek to realise some pattern 'end-state' imagined in abstraction from the processes of individual initiative and interaction, processes which are integral to human good and which make the future, let alone its evaluation, is incalculable.

Moving on to the values proper, life is identified by Finnis as a first basic value,[161] a value that corresponds to our drive for self-preservation. Life includes bodily and cerebral health, "freedom from the pain that betokens organic malfunctioning or injury", and "the transmission of life by procreation of children."[162]

Finnis' second basic value – which he devotes an entire chapter of his book to – is that of knowledge, "considered as desirable for its own sake, not merely instrumentally."[163] He first clarifies that the knowledge in question is "speculative knowledge", as opposed to knowledge sought only "instrumentally", and that speculative knowledge is "one form of human activity, the activity of trying to find out, to understand, and to judge matters correctly."[164] He next makes the compelling argument that the "sceptical assertion that knowledge is not a good is operationally self-refuting. For one who makes such an assertion intending it as a serious contribution to rational discussion, is implicitly committed to the proposition that he believes his assertion is worth making, and worth making *qua* true… But the sense of his original assertion was precisely that truth is not a good worth pursuing or knowing."[165]

The third basic value, play, is considered by Finnis to be a "large and irreducible element in human culture… [which is sometimes] enjoyed for its own sake"; and it may be

---

their situation and/or interactions vis-à-vis each other… The second element… is that of *duty*, of what is owed (*debitum*) or due to another, and correspondingly of what that other person has a right to… The third element… can be called *equality*… it may be better to think of *proportionality* [footnote omitted], or even of *equilibrium* or balance." (emphasis in original).

[161] *Ibid* at 85.

[162] *Id*.

[163] *Ibid* at 87.

[164] *Ibid* at 59 to 60.

[165] *Ibid* at 74 to 75. But *see supra*, *Legal Theory*, note 149 at 115 to 116: "First, on the question of knowledge as a good generally, it is possible to argue that the distinction between *speculative* and *instrumental* knowledge is false, with the goodness of all knowledge depending on the use (if any) to which it is put. For example, knowledge which confers the ability to unleash nuclear power may be a good when applied to generating electricity cheaply, and yet be an evil when applied to creating weapons of mass destruction… Secondly, to say that denying that knowledge is a good is 'operationally self-refuting' is merely to set up an Aunt Sally in order to knock it down. All that is required by way of reply to Finnis on this point is a rewording of the proposition… so that it becomes a denial that all knowledge is necessarily a good…" (emphasis in original).

"solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or *ad hoc*".[166]

The fourth basic value, aesthetic experience, is actually linked to the third value of play. Finnis points out the subtle difference between them as follows: "Many forms of play… are the matrix or occasion of aesthetic experience. But beauty is not an indispensable element of play. Moreover, beautiful form can be found and enjoyed in nature. Aesthetic experience, unlike play, need no involve an action of one's own; what is sought after and valued for its own sake may simply be the beautiful form 'outside' one, and the 'inner' experience of appreciation of its beauty."[167]

The fifth basic value is sociability, "which in its weakest form is realised by a minimum of peace and harmony amongst men, and which ranges through the forms of human community to its strongest form in the flowering of full friendship… friendship involves acting for the sake of one's friend's purposes, one's friend's well-being."[168]

The sixth basic value is practical reasonableness, it being the "good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's own character."[169] This value involves freedom and reason, and integrity and authenticity.[170]

The seventh and final basic value is religion. Although Finnis' personal faith (Catholicism) may lead us to believe that "religion" involves belief in some sort of uncaused cause (like God),[171] "religion" is used here by Finnis in a broader and extended sense. He proposes that all humans are concerned to know how things come about, whether there might be something superior to human intellect to which humans are subject to, and the place of humanity within this cosmos.[172] Again, the basic goods have no moral force *per se*; it is the 9 requirements of practical reasonableness that structure our pursuit of the goods, and provide the criteria for distinguishing ways of acting that are morally right or wrong. Together, these 2 aspects of Finnis' theory constitute the universal and immutable principles of natural law.[173]

---

[166] *Ibid* at 87.
[167] *Ibid* at 87 to 88.
[168] *Ibid* at 88.
[169] *Id*.
[170] *Id*.
[171] But *see supra*, *Justification and Validity in Finnis' Natural Law Theory*, note 144 at 112: "Finnis does not seem to be sure whether his theory… can truly be understood without his apparent [footnote omitted] 'conclusion' of God."
[172] *Supra*, *Natural Law and Natural Rights*, note 25 at 89 to 90.
[173] *See also ibid* at 223 to 225: "Are there then no limits to what may be done in pursuit of protection of human rights or of other aspects of the common good? Are there no fixed points in that pattern of life which one must hold in one's mind's eye in resolving problems of rights? Are there no 'absolute' rights, rights that are not to be limited or overridden for the sake of any conception of the good life in community, not even 'to prevent catastrophe'?... it is always unreasonable to choose directly against any basic value, whether in oneself or in one's fellow human beings. And the basic values are not mere abstractions; they are aspects of the real well-being of flesh-and-blood individuals. Correlative to the exceptionless duties entailed by this requirement are, therefore, exceptionless or absolute human claim-rights – most obviously,

(d) The 9 basic requirements of practical reasonableness

The requirements of practical reasonableness serve a number of purposes. They: (1) enable us to distinguish between reasonable and unreasonable acts, "[guiding] the transition from judgments about human goods to judgments about the right thing to do here and now";[174] (2) provide the "deep structure of moral thought" and that everything required by virtue of them "is required by natural law";[175] and (3) "provide the fundamental principles of any legal system that meets the requirements of reason, and sound human laws will respect them and seek to implement them."[176]

The first requirement is having a coherent plan of life, which Finnis says is inspired by John Rawls' "rational plan of life".[177] Since life is short and we all need to make choices, choices should be internally consistent. It will be a mistake simply to live for the moment and make choices on that basis.[178]

The second requirement is avoiding arbitrary preferences among values. As Finnis explains: "Any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense… of other forms of good. But the commitment will be rational only if it is on the basis of one's assessment of one's capacities, circumstances… it will be unreasonable if it is on the basis of a devaluation of any of the basic forms of human excellence…"[179]

The third requirement is avoiding arbitrary preferences amongst persons. There is "reasonable scope for self-preference. But when all allowance is made for that, this third

---

the right to have one's life taken directly as a means to any further end; but the right not to be positively lied to in any situation… in which factual communication… is reasonably expected; and the related right not to be condemned on knowingly false charges; and the right not to be deprived, or required to deprive oneself, of one's procreative capacity; and the right to be taken into respectful consideration in any assessment of what the common good requires."

[174] *Ibid* at 70.

[175] *Ibid* at 124 and 127.

[176] *Supra*, *Understanding Jurisprudence*, note 150 at 40. *See also supra*, *Understanding Jurisprudence*, note 149 at 49 to 50: "Consider for a moment some of the many difficulties that face the moral or legal philosopher attempting to answer [moral questions]. First, moral or ethical evaluation is itself problematic. Merely by postulating the view that the exercise has some point, one is resisting ethical nihilism or non-cognitivism. And by suggesting, as one would clearly wish to do, that the matter may in several important senses, be universalised, one is rejecting relativist, emotivist, and existentialist arguments and by claiming that it has some practical value – which I assume it does – one is embracing some of prescriptivism… Secondly, a number of fundamental moral judgments turn on which conception of ethics on adopts. I think that this issue is best confronted by way of a deontological, or action-centred (rather than outcome-centred) approach. Thirdly… the selection of *any* society as a model is not free of difficulty. It requires, at the very least, an accurate account of its political and legal system… the predicament of the judge in such a system depends on several empirical observations about the regime which are neither uncomplicated nor uncontroversial. Fourthly, it may be that the value of any consideration of the judge's moral dilemma is likely to be diminished without a credible theory of the judicial function in a common law context." (emphasis in original).

[177] John Rawls, A Theory of Justice, (2005) at 408 to 423.

[178] *Supra*, *Natural Law and Natural Rights*, note 25 at 103 to 105.

[179] *Ibid* at 105.

requirement remains, a pungent critique of selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help… and all the other manifold forms of egoistic and group bias."[180]

The fourth and fifth requirements are complementary, and they are detachment and commitment respectively. Finnis elaborates: "[Detachment means there is] no good reason to take up an attitude to any of one's particular objectives, such that if one's project failed and one's objective eluded one, one would consider one's life drained of meaning… [commitment means] having made one's general commitments one must not abandon them lightly… [although] one should be looking creatively for new and better ways of carrying out one's commitments".[181]

The sixth requirement is efficiency within reason. One is to "bring about good in the world (in one's own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s). One must not waste opportunities by using inefficient methods. One's actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, by their consequences".[182] Finnis also declares utilitarianism and consequentialism to be irrational strategies of moral reasoning: "'Good(s)' should be measured and computed in the manner required by consequentialist ethics only if (*a*) human beings had some single, well-defined goal or function… or (*b*) the differing goals which men in fact pursue had some common factor, such as 'satisfaction of desire'. But neither of these conditions obtains. Only an inhumane fanatic thinks that man is made to flourish in only one way or for only one purpose."[183]

The seventh requirement is respect for every basic value in every act, and one formulation of this requirement is that "one should not choose to do any act which *of itself does nothing but* damage or impede a realisation or participation of any one or more of the basic forms of human good… consequentialist reasoning is arbitrary and senseless… [each basic value] is objectively basic, primary, incommensurable with the others in point of objective importance."[184]

The eighth requirement is that of promoting the common good (of the community).[185] The common good is the "ensemble of conditions which would enable each to pursue his own objective… [it refers to] the factor or set of factors… which, as considerations in someone's practical reasoning, would make sense of or given reason for his collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with him."[186]

The ninth and final requirement is following one's conscience, that is, "one should not do what one judges or thinks or 'feels'-all-in-all should not be done… If one were by

[180] *Ibid* at 107.
[181] *Ibid* at 109 to 110.
[182] *Ibid* at 111.
[183] *Ibid* at 112 to 113.
[184] *Ibid* at 118 to 119 (emphasis in original).
[185] *Ibid* at 125.
[186] *Ibid* at 154.

inclination generous, open, fair and steady in one's love of human good, or if one's milieu happened to have settled on reasonable *mores*, then one would be able, without solemnity, rigmarole, abstract reasoning, or casuistry, to make the particular practical judgments… that reason requires. If one is not so fortunate in one's inclinations or upbringing, then one's conscience will mislead one".[187]

With the claims of the two jurists established, we can now consider their validity in the Wikipedian context. The analysis will be made along the following lines: (1) types of rules; (2) authority and obedience; (3) lawmaking; and (4) law enforcement, unjust laws and dispute resolution.

VI. Analysing the claims *vis-à-vis* the world of Wikipedia

> *"When we face heavy regulation, we see and shape our behaviour more in relation to reward and punishment by an arbitrary external authority, than because of a commitment to the kind of world our actions can help bring about."*[188]

(a) The different types of rules for community living

Some preliminary observations are in order before a discussion of the different types of rules that exist on Wikipedia. By now, it should be apparent that Wikipedia, analysed as a community governed by some conception of law, is both familiar and *sui generis* at the same time. It is familiar because some of the rules and consequences flowing from those rules are the very same found in conventional, municipal legal systems.[189] The regulations concerning, for instance, basic honesty, incivility, disruptive behaviour, copyright infringement and dispute resolution procedures come to mind – bearing in mind that these regulations do not simply govern one-off transactions and interactions, but day-to-day community living. And it is *sui generis* because Wikipedia is (in theory) among other reasons, neither a democracy that has the conventional tripartite elements of the legislature, the executive, and the judiciary, nor a community comprising "citizens" of a fixed or determinate locale – although at present, it is a community comprising

---

[187] *Ibid* at 125. Consider too, the views of proponents of legal idealism, that "Persons may be brought to act through a variety of ways… [they can be] moved to a particular course of action by bringing about a state of affairs such that, in conjunction with a correct moral argument, that course of action is morally required.": *see* Charles Fried, "The Laws of Change: The Cunning of Reason in Moral and Legal History", (1964) 77 Harvard Law Review 1258 at 1259.

[188] *Supra*, *The Future of the Internet*, note 26 at 128.

[189] *See also supra*, *A Theory of Justice*, note 177 at 235 and 240: "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled… By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed. Rather, the existence of effective penal machinery serves as men's security to one another."

Americans more than any other nationality.[190] Then there is the interesting notion that there are no barriers other than standing in the community as to who can become an official on Wikipedia. One final noteworthy difference is purpose: whereas a conventional legal system that governs a conventional system is built in such a way so as to let people live (in the broadest sense of the term), the regulations of Wikipedia are made with the view to facilitating the creation of an encyclopedia, or the compiling of existing human knowledge. One thing is for sure: Wikipedia is as "recent" as it gets in terms of a brand new community designing its rules of living from scratch. Professor Jonathan Zittrain describes the foundational legal philosophy of the project authoritatively in the following terms:[191]

> Wikipedia began with three attributes. The first was verkeersbordvrij. Not only were there few rules at first – the earliest ones merely emphasized the idea of maintaining a "neutral point of view" in Wikipedia's contents, along with a commitment to eliminate materials that infringed copyright and an injunction to ignore any rules if they got in the way of building a great encyclopedia – but there were also no gatekeepers… This is a far cry from the elements of perfect enforcement: there are few lines between enforcers and citizens; reaction to abuse is not instantaneous; and missteps generally remain recorded in a page history for later visitors to see if they are curious. The second distinguishing attribute of Wikipedia was the provision of a discussion page alongside every main page. This allowed people to explain and justify their changes… Controversial changes made without any corresponding explanation on the discussion page could be reverted by others without having to rely on a judgment on the merits… The third crucial attribute of Wikipedia was a core of initial editors… who shared a common ethos and some substantive expertise…. Like the development of the Internet's architecture, then, Wikipedia's original design was simultaneously ambitious in scope but modest in execution, devoted to making something work without worrying about every problem that could come up if its extraordinary flexibility were abused. It embodied principles of trust-your-neighbor and procrastination, as well as "Postel's Law", a rule of thumb written by one of the Internet's founders to describe a philosophy of Internet protocol development: "[B]e conservative in what you do; be liberal in what you accept from others [footnote omitted]."

What Professor Zittrain described – the behavioural and legal traits during the genesis of Wikipedia – have since undoubtedly evolved into something quite different. The number of regulations has only headed northwards exponentially, and do not appear to be navigating elsewhere anytime soon. Discussions on the rules and policies (and how they should be shaped) among Wikipedians are no longer happening mainly on article talk pages, but also with appreciable enthusiasm happening across various project pages,[192]

---

[190] Andrew Lih, The Wikipedia Revolution, (2009) at 136.

[191] *Supra*, *The Future of the Internet*, note 26 at 133 to 134. The "verkeersbordvrij" is a traffic sign that means "free of traffic signs" in the Dutch language.

[192] *See e.g.*, Wikipedia: SGpedians' notice board – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:WikiProject_Singapore (last visited December 24, 2010).

notice boards,[193] requests for comments,[194] proposal pages,[195] community polls,[196] (the now defunct) "Quickpolls",[197] and even global conventions,[198] to name a few examples.

(1) Measuring against Hart

Preliminary observations aside, we come then to the question of whether Wikipedia's regulations comport better with the legal theory of Hart or Finnis. At first blush, there may be a compelling parallel drawn between Hart's conception of rules (law as strictly comprising rules and not non-rules),[199] and Wikipedia's distinctions between the various regulations as outlined earlier on.[200] Like Hart's system, Wikipedia's regulations comprise rules of varying degrees of obligation; not all regulations, when not adhered to, matter in terms of legal consequences.[201] Some are mere conventions (*e.g.*, edit summaries)[202] and some are mere moral exhortations (*e.g.*, assuming good faith).[203] Hart's rule of recognition will help sort this out. But, some problems arise precisely when we look at things from the angle of secondary rules. Much as the very nature of Wikipedia (and thus, its regulations) is constant change, the following probably statements accurately capture a longstanding community practice – a regulation that has the highest "legal status" in the form of policy:[204]

---

[193] *See* Wikipedia: Noticeboards – Wikipedia, the free Encyclopedia, http://en.wikipedia.org/wiki/Wikipedia:Noticeboard (last visited December 24, 2010).

[194] *See e.g.*, Wikipedia: Requests for comment/Biographies of living people – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Requests_for_comment/Biographies_of_living_people (last visited December 24, 2010); and Wikipedia: Requests for comment/Biographies of living people – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Requests_for_comment/Biographies_of_living_people/Phase_II (last visited December 24, 2010).

[195] *See e.g.*, Global Sysops Proposal – Wikimedia, http://meta.wikimedia.org/wiki/Global_sysops/Vote (last visited December 24, 2010).

[196] *Supra*, *The Wikipedia Revolution*, note 190 at 128 to 131. *See also* Wikipedia: Requests for Comment/Biographies of Living People – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:RFC/BLP (last visited December 24, 2010).

[197] These were described as "an ad hoc "night court" for the community to quickly decide, in twenty-four hours, how to discipline problem users… In a community that prided itself on assuming good faith and thoughtful consensus, Quickpolls made an unusual spectacle of these cases, creating a virtual village mob: *supra*, *The Wikipedia Revolution*, note 190 at 126 to 127.

[198] *See* Wikimania – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikimania (last visited December 24, 2010).

[199] *Supra*, section IV(b).

[200] *Supra*, section III.

[201] *Supra*, *Wikipedia: Policies and guidelines*, note 19.

[202] *Supra*, *Help: Edit summary*, note 59.

[203] *Supra*, *Wikipedia: Vandalism*, note 77; *supra*, *Wikipedia: Gaming the system*, note 89.

[204] *Supra*, *Wikipedia: What Wikipedia is not*, note 20. *See also supra*, *Wikipedia: Guidelines and policies*, note 19: "Wikipedia policies and guidelines are developed by the community to describe best practice, clarify principles, resolve conflicts, and otherwise further our goal of creating a free, reliable encyclopedia. Although Wikipedia does not employ hard-and-fast rules, its policy and guideline pages describe its principles and best-known practices. Policies describe standards that (within the limits of common sense) all users should normally follow, and guidelines are meant to contain best practices for doing so."

> Wikipedia is not governed by statute: it is not a moot court, and rules are not the purpose of the community. Written rules do not themselves set accepted practice, but rather document already existing community consensus regarding what should be accepted and what should be rejected. When instruction creep is found to have occurred, it should be removed. While Wikipedia's written policies and guidelines should be taken seriously, they can be misused. Do not follow an overly strict interpretation of the letter of policy without consideration for the principles of policies. If the rules truly prevent you from improving the encyclopedia, ignore them. Disagreements are resolved through consensus-based discussion, rather than through tightly sticking to rules and procedures. Furthermore, policies and guidelines themselves may be changed to reflect evolving consensus. A procedural error made in posting anything, such as a proposal or nomination, is not grounds for invalidating that post.

To remove all doubt, this policy is repeated in several places, most notably and most succinctly in the article Wikipedia: Ignore all rules. In a sentence (and nothing more), we are told that "If a rule prevents you from improving or maintaining Wikipedia, ignore it."[205] If the preceding quotes from Wikipedia: What Wikipedia is not and Wikipedia: Ignore all rules are correct, then perhaps the (overarching) rule of recognition on Wikipedia is this: there are rules, but they can be ignored sometimes because these rules either were borne out of convenience or only have a temporary quality; "common sense" or anything done in furtherance of improving the encyclopedia can prevail if necessary.[206] Is this possible, given that the rule of recognition is supposed to remedy *uncertainty*?[207] Indeed, while Hart's conception of the rule of recognition bears several *marks*, the *content* of the rule is concededly more open-ended and may of course incorporate morality and justice.[208] Yet even his theory may not have countenanced a rule of recognition that in effect says, "rules may not apply, and there is really no telling how when and how they may occur".[209] On the bases of human nature and the function of language, he was expecting uncertainty in rules to be at a premium.[210] Here, however, the core and the penumbra no longer take predictable forms;[211] the core may become the penumbra and vice versa as and when it happens, since rules may be disregarded when

---

[205] Wikipedia: Ignore all rules – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Ignore_all_rules (last visited December 24, 2010). *C.f.* Felix Cohen, "Transcendental Nonsense and the Functional Approach", (1935) 35 Columbia Law Review 809 at 833: "the really creative legal thinkers of the future will not devote themselves… to the taxonomy of legal concepts and to the systematic explication of principles… buttressed by 'correct' cases… Creative legal thought will more and more look behind the traditionally accepted principles of 'justice' and 'reason' to appraise in ethical terms the social values at stake in any choice between two precedents…"; and *supra*, *Logical Method and Law*, note 135 at 25: "statutes have never been kept up with the variety and subtlety of social change… which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions must be vague and classifications indeterminate."

[206] A complementary rule of recognition may be that parties to adjudicated disputes (such as arbitration) will accept and conform to the outcome of the decision.

[207] *Supra*, note 112.

[208] *Supra*, note 114 ,115, and 116.

[209] Admittedly, this is also reminiscent of Hans Kelsen's concept of the "grundnorm".

[210] *See also supra*, note 130.

[211] *Supra*, note 138.

"common sense" or some grander "purpose" is invoked.[212] The uncertainty here is not a child of uncertain language; in addition, if this formulation of the rule of recognition is correct, the *penultimate* rule asks that rules be dispensed with.[213] This, to my mind, also far exceeds the sort of very limited discretion that Hart's theory permits to be given to officials to overrule precedents.[214] After all, Hart situates himself as being in between formalism and rule-scepticism, not belonging to either extreme.[215]

One may consult the rule of change for a way out,[216] only to find another obstacle: the function of the rule of change is to allow the introduction of new primary rules of conduct, and to eliminate old rules. This is very distinct from the notion that rules are sometimes binding and sometimes not.[217] Moreover, using common sense as a trump card does not eliminate the old rule or become a new rule in itself, it merely serves as the governing rule for the particular dispute at hand. Or, can we find a rebuttal in Hart's "minimum conditions" for a legal system?[218] To recapitulate, the conditions are that: (1) the rules that are validated by the rule of recognition must be generally obeyed by citizens and officials; and (2) the secondary rules must be effectively accepted as common public standards of official behaviour by the officials. We have already addressed the issue of which regulations have the force of "law" and which do not, thus answering the question about the acceptance of the rule of recognition. So the next issue to be resolved is how general must the obedience be? The fact that Wikipedia has continued to burgeon in every sense of the word without showing any visible sign of collapse suggests, *prima facie*, that it is a thriving community, brought about no less by a stable legal order, which in turn has to be brought about either by preponderant obedience or efficient enforcement (obedience and enforcement will be discussed in separate sections below).[219] As for the secondary rules, nothing we have seen so far suggests that the officials (*e.g.*, the administrators, the bureaucrats, and the arbitration committee) do not accept the secondary rules as common public standards of official behaviour. Adjudicators, adjudicatory processes and the process of selecting adjudicators are not without controversy,[220] but the acceptance of them is not in question in Wikipedia, as evidenced by their continued and likely-to-be-continued existence. Finally, the dynamic, ever-changing nature of Wikipedia itself suffices to ensure the upholding of the rule of change.

---

[212] *See also supra*, note 133.

[213] Yet another way to look at the issue is through the lens of "consensus". Consensus is also the underpinning concept in international law, to which Hart believes his theory can somewhat account for (as opposed to traditional positivism which could not): *see supra*, *The Concept of Law*, note 25 at Chapter X. But international law is not analogously predicated on the lack of rules; the legal structures of international law are certainly more defined and rigid than "rules may or may not apply".

[214] *Supra*, note 133.

[215] *Supra*, IV(f).

[216] *Supra*, note 112.

[217] *See also supra*, *The Concept of Law*, note 25 at 117: "In [a primitive legal system], since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules."

[218] *Supra*, note 116.

[219] *Infra*, VI(b) and VI(d).

[220] *Supra*, *The Wikipedia Revolution*, note 190 at 183 to 200; and *supra*, *The World and Wikipedia*, note 8 at 174 to 195.

Perhaps then the easiest reconciliation is that the rule of recognition can indeed be as open-ended as the one suggested above. Nonetheless, the tentative nature of the answers to the challenge presented principally to the rule of recognition so far may conveniently prompt us to dismiss the comparison of Wikipedia to a legal system – but, we will have to march on for now to see if it does bear too many other important marks of a legal system before we can do that. Nor can we accuse the Wikipedia community for not being sophisticated enough to come up with sufficient rules such that common sense can be invoked so easily as a trump – given the enormity and complexity of the project, as well as the extent of the participation, the *status quo* appears to be a situation arrived at deliberately.[221] In addition, there is nothing peculiar about the policy claiming that the "purpose" of Wikipedia is not rules – which community's is?

(2) Measuring against Finnis

Does Finnis fare any better in this respect? Does his theory, for instance, offer any legal restraint on the ostensible unpredictability surrounding the application and non-application of rules? Are there any self-evident truths about human behaviour and human nature that rein in the potential mayhem that should be an inevitable consequence of there being no clear direction as to when rules should apply? And even if there are, do they form part of his formulation of rules? To be sure, Finnis does offer a definition of law:[222]

> [Law, in the focal sense, refers] primarily to rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that good common by features of specificity, minimisation of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.

From the above extract, although Finnis also uses the terminology of rules and institutions (but probably does not apply them as precisely as Hart would for the different

[221] The project did start off with some sort of bohemian cum nihilistic philosophy: *see supra*, *The Wikipedia Revolution*, note 190 at 112: "When Wikipedia was launched, it started out with very few fixed rules. The wiki culture was still new to everyone involved, and Larry Sanger [the other founder of Wikipedia] was simply trying to gather critical mass for the project. One of the most famous original and innovative rules was his: Ignore all rules (IAR). It is not as nihilistic as it sounds. The earliest incarnation read: If rules make you nervous and depressed, and not desirous of participating in the Wiki, then ignore them and go about your business [footnote omitted].""

[222] *Supra*, *Natural Law and Natural Rights*, note 25 at 276 to 277.

types of Wikipedia regulations),[223] what sets Finnis apart from Hart is the requirement of furthering the "common good" of the community. It is submitted that this "common good" for human beings is simply a reference to Finnis' 7 basic goods,[224] his indispensable precursor to deciphering community morality.[225] But assuming that we are dealing with penumbral situations, is this any different or better than Hart's theory, which tells us to look to aims, policies and purposes?[226] Is it any more sensible and explanatorily adequate to equate "common sense" or "purpose" with "common purpose"?[227] Professor Zittrain offers some clues:[228]

> When disputes come up, consensus is sought before formality, and the lines between subject and regulator are thin. While not everyone has the powers of an administrator, the use of those special powers is reserved for persistent abuse rather than daily enforcement. It is the editors – that is, those who choose to participate – whose decision and work collectively add up to an encyclopedia – or not… This is the essence of law: something larger than an arbitrary exercise of force, and something with meaning apart from a pretext for that force, one couched in neutral terms only for the purpose of social acceptability. It has been rediscovered among people who often profess little respect for their own sovereigns' "real" law, following it not out of civic agreement or pride but because of a cynical balance of the penalties for being caught against the benefits of breaking it. Indeed, the idea that a "neutral point of view" even exists, and that it can be determined among people who disagree, is an amazingly quaint, perhaps even naïve notion. Yet it is invoked earnestly and often productively on Wikipedia… Wikipedia shows, if perhaps only for a fleeting moment under particularly fortuitous circumstances, that… the fewer the number of prescriptions, the more people's sense of personal responsibility escalates.

If indeed we can interpret this to mean that the Wikipedia community, in its aversion to formal rules (despite the proliferation of rules), in effect prefers to be unshackled from the rigidity of rules and allow some form of "free morality"[229] (constrained, presumably,

---

[223] *See also Ibid* at 270: "So it is that legal order has two broad characteristics, two characteristic modes of operation, two poles about which jurisprudence and 'definitions of law' tend to cluster… they can be summed up in two slogans: 'law is a coercive order' and 'the law regulates its own creation'."

[224] *Ibid* at 155: "For there is a 'common good' for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness are good any and every person. And each of these human values is itself a 'common good' inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or an inexhaustible variety of occasions. These two senses of 'common good' are to be distinguished from a third, from which, however, they are not radically separate. This third sense of 'common good' is the one commonly intended throughout this book, and it is: a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realise reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."

[225] *Ibid* at 126.

[226] *Supra*, note 138.

[227] *See also supra, Natural Law and Natural Rights*, note 25 at 153.

[228] *Supra, The Future of the Internet*, note 26 at 144.

[229] "Free morality" is essentially morality found external to the morality found within the law, the latter being analysed in a more structured and disciplined manner. *See e.g.*, Owen Fiss, "Objectivity and Interpretation" in Sanford Levinson and Steven Mailloux (eds), Interpreting Law and Literature, (1991) at 239: "The prescriptive element in adjudication and legal texts does not preclude objective interpretation.

by reason and logic) as the ultimate dictate for disputes (difficult or otherwise),[230] it is ironic, because both Wikipedia and positivism (in the main, clarity and certainty of rules) are in my view associated with the left on the political spectrum. This irony also speaks to a discordance between a modern and an ancient assertion: respectively, that the left is not anti-rational; and natural law is rational.[231] That of course is a minor (and debatable) point and the larger point is that Wikipedia may well be governed not so much by rules, but some abstract notion of morality, and a morality that exceeds Hart's minimalist natural law concept that is tied to survival.[232] And if we presuppose (which we can, I think) that its existing regulations are borne out of moral considerations, then law *is* about morality in Wikipedia, and this brings it at odds with Hart's insistence on the conceptual separation of law and morality.[233] The necessity of this conclusion comporting with Finnis' theory of whether humans idealise toward law in a focal sense will depend on what sort of morality is in question. After all, Finnis' version is about timeless and objective morality,[234] which necessarily shelters itself from the winds of culturally relativistic and popular/prevailing moral claims, and is distinct from amoral concerns like efficacy and efficiency (important values in a project like Wikipedia).[235] And it would seem that the most direct way to answer this query is to ask if the regulations (including the rule that common sense can act as a trump) are designed, designated, and structured around securing the basic goods using principles of practical reasonableness. To this end, I would think that the salient goods to be secured in this context would be knowledge,

---

Prescriptive texts are as amenable to interpretation as descriptive ones… Interpretation does no require agreement or consensus, nor does the objective character of legal interpretation arise from agreement. What is being interpreted is a text, and the morality embodied in that text, not what individual people believe to be the good or right. An individual is… morally free to dispute the claim of the public morality…"

[230] *See also supra*, *The Wikipedia Revolution*, note 190 at 83: "The power of Wikipedia's model is that it is free-form – anyone can edit any page at any time. Contributors work on a micro-level… The community trusts individuals to behave responsibly. Lessons learned from dealing with vandals, troublemakers, and noisy individuals in Usenet were applied by Wikipedia's toolmakers and community members. Obnoxious users could be blocked from editing, and articles could be locked to prevent vandalism. And changes to whole sets of articles could be done through software robots… as Wikipedia took off, the community found most people were remarkably well behaved and productive, something not everyone would have thought about a site that encouraged anyone to edit any page at any time."

[231] *See e.g.*, Susan Jacoby, The Age of American Unreason, (2009) at xi to xii: "it is difficult to suppress the fear that the scales of American history have shifted heavily against the vibrant and varied intellectual life so essential to functional democracy. During the past four decades, America's endemic anti-intellectual tendencies have been grievously exacerbated by a new species of semi-conscious anti-rationalism, feeding on and fed by an ignorant popular culture of video images and unremitting noise that leaves no room for contemplation or logic. This new form of anti-rationalism, at odds not only with the nation's heritage of eighteenth-century Enlightenment reason but with modern scientific knowledge, has propelled a surge of anti-intellectualism capable of inflicting vastly greater damage than its historical predecessors inflicted on American culture and politics."

[232] *Supra*, IV(d).

[233] *Supra*, IV(e).

[234] *Supra*, note 153.

[235] But *see* Allen Arthur Leff, "Unspeakable Ethics, Unnatural Law", (1979) Duke Law Journal 1229 at 1249: "All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good", and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs."

play, aesthetic experience, sociability, and practical reasonableness – not all goods have to be pursued to fulfill the theory.[236] As for the 9 basic requirements of practical reasonableness, the theoretical answer is probably yes, the community does try in principle to build a moral framework along similar lines prescribed by those requirements. In theory, all editors are treated as equals, neutrality is a virtue, hostility is frowned upon, and consensus a non-negotiable imperative. The problem is that in reality, some editors are more equal than others,[237] Wikipedia is saddled with countless agendas that affects its neutrality,[238] hostility/incivility is not well managed[239] and consensus is a chimera.[240] Be that as it may, it remains a fact that the community demonstrably strives to attain the ideal, much as it demonstrably fails on many fronts.

(b) Authority and obedience

So much for the different forms of rules. Authority and obedience, two interconnected concepts flowing from rules as discussed above, form our next ground of analysis. People do not conform to some sort of legal order just because the demand is made; people do so in part because the order (be it rules or leaders) has authority over their lives, and in part because they personally see the purpose or utility of obedience in the context in question.

---

[236] *Supra*, *Natural Law and Natural Rights*, note 25 at 100 and 103 to 105.

[237] *See e.g.*, Essjay controversy – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Essjay_controversy (last visited December 24, 2010); and *see supra*, *The Wikipedia Revolution*, note 190 at 199: "[Wikipedia founder] Wales, traveling in India at the time and likely working off imperfect information, defended Essjay in public and to the press. Shortly after, Essjay was elevated by Wales to the ranks of serving on the Arbitration Committee, the highest level of service for deciding on community matters. Wales stated later, "Essjay has always been, and still is, a fantastic editor and trusted member of the community… He has been thoughtful and contrite about the entire matter, and I consider it settled." [footnote omitted]… Debate raged as ad hoc straw polls were taken as to what to do with Essjay. Wale's early support was crucial to keep Essjay's standing intact, but as the pressure built, Jimbo changed his mind. "I have asked Essjay to resign his positions of truest within the community,' he later said [footnote omitted]." *See also* Wikipedia biography controversy – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Seigenthaler_incident (last visited December 24, 2010); and *see supra*, *The Wikipedia Revolution*, note 190 at 194: "The Seigenthaler incident caused some soul searching in the community, and brought about a big policy change. After the dust had settled, the English Wikipedia prevented anonymous users from creating new articles in Wikipedia, thereby preventing "drive-by" page creation. This would, in theory, up the quality of new content. It was controversial at the time. Some users complained that it was anti-wiki, that the encyclopedia that "anyone can edit" would be missing out on converting users into editors. In the end, *Wales's social capital won out*, and page creation was turned off for anonymous users." (emphasis added).

[238] *Ibid* at 169 to 200; and *supra*, *The World and Wikipedia*, note 8 at 72 to 81 and 174 to 195. *See also e.g.*, Talk: Jesus – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Talk:Jesus (last visited December 24, 2010); Talk: Barack Obama – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Talk:Barack_Obama (last visited December 24, 2010); and Talk: Thierry Henry – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Talk:Thierry_Henry (last visited December 24, 2010). One cannot help but notice too that the porn industry (or at least its supporters) has made a dramatic impact on the project – there is an incredible amount of coverage given to porn stars, including detailed write-ups, "helpful" external links, and quality photographs. For the most part, they operate well within the "law", but it is difficult to resist the notion that with increased internet presence comes increased revenue for the industry.

[239] *Ibid* at 185 to 188.

[240] *Ibid* at 119 to 122 and 222 to 223.

Wikipedians are no different, though certainly in Wikipedia, those aforementioned rationales may not apply equally because of the fact that "citizenship" – or, netizenship – is really virtual in that "real" legal systems in the "real world" are here reduced to words, anonymous identities, and, well, an internet connection.[241] And there is no question that there exist well-behaved editors who play by the rules just to gain a *quasi*-moral clout more than anything else; thus, in edit conflicts (either over content or regulations) involving their interests, they tend to get greater backing from fellow editors, and can use false "consensus" to quell even logically sustainable objections to their tyranny.[242] While that may be true, it has never been clear if this is representative behaviour of the majority of the community. At any rate, we return to the original question: what makes Wikipedians obey the regulations?

The best we have is anecdotal accounts, some parts corroborated by the writings of Professor Zittrain, Lih and Dalby that we have explored earlier on. And from my experience (including reading about others') and understanding of certain key facts, I can make the following conclusions with some certitude: (1) millions of people visit Wikipedia everyday; (2) of these millions, an overwhelming majority do not make edits but only trawl for information, and thus, they have nothing to do with the regulations and vice versa; (3) of the remainder who do make edits, a significant portion of these are unregistered users, who may not necessarily retain the same IP address in subsequent edits;[243] (4) a significant portion of editors, both registered and unregistered, do not make any legitimate contributions – they are either set up to disrupt the system in some way or just to perform vandalism; (5) for such editors, a majority of them do not stay the course and often leave within days, weeks, or months and do not return, and thus if they should be considered as part of the Wikipedia community, they should be at the very fringe; (6) the editors who have passed through all the preceding filters form the core of the Wikipedia community, and a great majority of them are registered users; (7) a majority of these core editors prefer to respect existing regulations if they can.

By that, I mean most of these core editors will not commit the more egregious offences like harassment, stalking, threats (including that of suit), defamation, conflict of interest, and sock-puppetry, despite the veil of user names. Many are likely to, however, from time to time breach regulations like the 3-revert-rule, the prohibition against name-calling (a more specific form of incivility), the fair use rationale,[244] maintenance of neutrality, and of course, consensus. These breaches of so-called lesser offences are largely attributable to the fact that editing sensitive or controversial subject matter tends to bring out the worst in editors, as well as compel them to push the envelope where it is not so clear if something constitutes an offence. The long and short of it all is that obedience and authority on Wikipedia are simultaneously shaped by 3 distinct assumptions: (1) Wikipedians who obey the regulations do so because it affords them the best opportunity

---

[241] *See also supra*, III.

[242] *See* again the complex nuances of how consensus on Wikipedia is "achieved": *supra*, *Wikipedia: Consensus*, note 21.

[243] "Significant portion" is used in contradistinction to "majority" because the percentages are less clear to me.

[244] *See* Wikipedia: Non-free content – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Fair_use (last visited December 24, 2010).

to remain as productive contributors to the project; (2) major transgressions usually result in expulsion from the project, while minor ones are more greatly tolerated and/or ignored, hence there is far greater obedience of the regulations surrounding major transgressions; and (3) because the authoritative force of the rules is brought about by the declarations and practices of previous and existing "core" groups of editors,[245] it can either have the colour of self-serving elitism, or well established "consensus".[246] An important parenthetical comment ought to be made here: another possible reason for non-obedience is the perception of a law as unjust. This will be dealt with in a separate section below,[247] after I elaborate on some of the repercussions of false consensus.[248] With that, the time is now ripe to compare this with the theories of Hart and Finnis.

(1) Measuring against Hart

One of the building blocks of Hart's theory is that obedience of the law "often suggests deference to authority and not merely compliance with orders backed by threats."[249] This has already been mentioned in part above.[250] According to Hart, it is also important to distinguish between social rules and habits in several ways: (1) a habit is about convergent behaviour of a group, but unlike a rule, deviation from the regular course need not be a matter for any form of criticism, and threatened deviation is not met with great pressure for conformity;[251] (2) when a person is criticised for deviating from a rule, criticism is considered legitimate or justified;[252] and (3) a social rule has an "internal aspect", such that the relevant participants, possessing the "reflective critical attitude", regard a pattern of behaviour as a standard for all the people in the group or activity to uphold.[253]

Hart further explains how obedience and authority dovetail in his chapter on laws and morals; incidentally, this also forms the prelude to his warning to keep law and morality conceptually separate:[254]

> [A] society with law contains those who look upon its rules from the internal point of view as accepted standards of behaviour, and not merely as reliable predictions of what will befall them, at the hands of officials, if they disobey. But

[245] *Supra*, note 191.
[246] *See also* James Surowiecki, The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations, (2005) at 186: "[All] the evidence suggests that the order in which people speak has a profound effect on the course of a discussion. Earlier comments are more influential, and they tend to provide a framework within which the discussion occurs. As in an information cascade, once that framework is in place, it's difficult for a dissenter to break it down. This wouldn't be a problem if the people who spoke earliest were also more likely to know what they were talking about. But the truth is that, especially when it comes to problems where there is no obvious right answer, there's no guarantee that the most-informed speaker will also be the most influential."
[247] *Infra*, VI(d).
[248] *Infra*, VI(c).
[249] *Supra*, *The Concept of Law*, note 25 at 51.
[250] *Supra*, IV(b).
[251] *Supra*, *The Concept of Law*, note 25 at 55.
[252] *Ibid* at 55 to 56.
[253] *Ibid* at 56 to 57.
[254] *Ibid* at 201 to 202.

> it also comprises those upon whom, either because they are malefactors or mere helpless victims of the system, these legal standards have to be imposed by force or threat of force; they are concerned with the rules merely as a source of possible punishment. The balance between these two components will be determined by many different factors. If the system is fair and caters genuinely for the vital interests of all those from whom it demands obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable. On the other hand, it may be a narrow and exclusive system run in the interests of the dominant group, and it may be continually more repressive and unstable with the latent threat of upheaval. Between these two extremes various combinations of these attitudes to law are to be found, often in the same individual. Reflection on this aspect of things reveals a sobering truth: the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organised legislature, courts, officials and sanctions brings its solid gains at a certain cost… the cost is the risk that the centrally organised power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not.

This rings a familiar tune. Hart is suggesting that authority and obedience go hand in hand because if the authority is built on morally vacuous foundations, obedience and instability are almost guaranteed. But this does not transpose itself altogether perfectly in the Wikipedia world. There, the problem of "sometimes rules apply, and sometimes they do not, and nobody really knows when, how, or why" rears its head again. We have a fair and yet uncertain mix of benevolent regulations, oppressive elites (though not always centrally organised),[255] genuine respect and unpredictable application of the regulations all happening at the same time. The problem is somewhat ameliorated (and better pronounced) by taking a more nuanced view of how often regulations are applied/adhered to: that is, there is a pretty strong correlation between the often-ness and the severity/importance of the regulation in question. Hart's theory is better preserved and represented when seen in this light, for initial doubt of the prominence and influence of regulations (or rules) is mitigated. Still, it is submitted that there is a lingering and subtle doubt over the possibility that the community is truly governed neither by a sovereign (Jimmy Wales) nor a team of officials (*e.g.*, Wales, the Arbitration Committee,

[255] It may be argued of course that the Wikipedia regulations are more a result of the wisdom of crowds in action. *See supra*, *The Wisdom of Crowds*, note 246 at 10: "[There are] four conditions that characterise wise crowds: diversity of opinion (each person should have some private information, even if it's just an eccentric interpretation of the known fact), independence (people's opinions are not determined by the opinions of those around them), decentralisation (people are able to specialise and draw on local knowledge), and aggregation (some mechanism exists for turning private judgments into a collective decisions). If a group satisfies those conditions, its judgment is likely to be accurate. Why? At heart, the answer rests on a mathematical truism. If you ask a large enough group of diverse, independent people to make prediction or estimate a probability, and then average those estimates, the errors each of them makes in coming up with an answer cancel themselves out. Each person's guess, you might say, has two components: information and error. Subtract the error, and you're left with the information." Therefore, even though there is a gloss of free-wheeling mayhem and madness to the methods of the Wikipedia community, crowd wisdom may have the transcendent effect of creating a stable legal order even if the rules are unclear and unclearly applied. The core community simply adjusts, adapts, recalibrates, and moves on.

bureaucrats and administrators): the *community governs itself*. That is a tempting and possibly the main explanation as to why rules can sometimes be ignored. This thread of reasoning will be explored in greater detail in the next section, after this sub-section on Finnis.

(2) Measuring against Finnis

For Finnis, he rests upon once again on his conceptions of community living, shared objectives, and the common good (all of which are built on the backs of the 7 basic goods and 9 basic requirements of practical reasonableness):[256]

> The more the coordination of the relevant persons is pursuant to some value or open-ended commitment, or , if directed to some definite and realisable project, is nevertheless controlled by concern for some value(s) that requires adaptation of the coordination in response to contingencies, the more likely we are to be willing to think of the participants as constituting a group. And… the more likely it is that the participants themselves will think of themselves as a group, and look about for practices, usages, conventions, or 'norms' for solving their coordination problems, and/or for someone with authority to select among available solutions. Such norms will then be though of as norms *of* and *for* the group, and the leader(s) will be thought of as having authority *in* and *over* the group. The 'existence' of the group, the 'existence' of social rules, and the 'existence' of authority tend to go together. And what makes sense of these ascriptions of existence is in each case the presence of some more or less shared objective, or, more precisely, some shared conception of the point of continuing cooperation. This point we may call the common good.

Indeed, one aspect of Finnis' theory that may have slipped our attention is the idea of leaders who are "thought of as having authority in and over the group"; and underlying and necessitating this idea is the formation of a group identity. The general comparison to a community and its leaders is apparent, as is the specific comparison to a community governed by (*inter alia*, legal) rules and having leaders such as the executive and the judiciary. Finnis talks more about this on his chapter on authority in *Natural Law and Natural Rights*:[257]

---

[256] *Supra*, *Natural Law and Natural Rights*, note 25 at 153 (emphasis in original). *See also* 148 to 149: "the common understanding of the unqualified expressions 'law' and 'the law' indicates, the central case of law and legal system is the law and legal system of a complete community… it is characteristic of legal systems that (i) they claim authority to regulate all forms of human behaviour… (ii) they… claim to be the supreme authority for their respective community, and to regulate the conditions under which the members of that community can participate in any other normative system… (iii) they characteristically purport to 'adopt' rules and normative arrangements… from other associations within and without the complete community, thereby 'giving them legal force' for that community… All these defining features, devices, and postulates of law have their foundation, from the viewpoint of practical reasonableness, in the requirement that the activities of individuals, families and specialised associations be co-ordinated. This requirement itself derives partly from the requirements of impartiality between persons, and of impartiality as between the basic values and openness to all of them…"

[257] *Ibid* at 245 to 246 and 250 to 251 (emphasis in original).

> The need for somebody, or some body, to settle co-ordination problems with greater speed and certainty is apparent in any community where people are energetic and inventive in pursuit of their own or of common goods… Authority… in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community. This principle… is the first and most fundamental… It remains true that the sheer fact that virtually everyone *will* acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that the person has… authority in that community. But to this perhaps scandalously stark principle there are two significant riders. First: practical reasonableness requires… that, faced with a purported ruler's say-so, the members of the community normally should acquiesce or *withhold* their acquiescence, comply or *withhold* their compliance, precisely as he is, or is not, designated as the lawful bearer of authority… The second rider is this: while 'consent' as distinct from acquiescence is not needed to justify or legitimate the authority of rules, the notion of consent may suggest a sound rule of thumb for deciding when someone should be obeyed even though general acquiescence is not likely, and for deciding when someone whose stipulation will be generally acquiesced in should nevertheless be treated as having no authority in practical reason.

The suggestion has already been made earlier[258] that Wikipedia is an endeavour consistent with the pursuit of some of the 7 basic goods, and the regulations are, in a broad but nevertheless accurate sense, consistent with the employing of the 9 basic requirements of practical reasonableness to structure a socio-legal system which facilitates that pursuit. Insofar as that is true, such an endeavour will likely lead to the sort of "complete community" that Finnis contemplates, and such a community, if properly governed, will be governed by those who have authority – authority as he characterises it, no less.[259]

But, like Hart's theory, Finnis' theory may not be a perfect fit if the community, notwithstanding the presence of *quasi*-sovereigns, administrators, tribunals and what not, is ultimately (or predominantly) still a legislative authority itself and upon itself,[260] and if so, our analysis is potentially halted by such conclusions. There is a break in the tradition of concentrating the powers of authority in (democratic or otherwise) a select or appointed group, although one way we can get around this is to consider the administrators, bureaucrats, Jimmy Wales, and the Arbitration Committee *et cetera* as sharing the powers of the judiciary and the executive, while the community possesses legislative power like some sort of legislature or parliament – enough power even to overrule any decisions made by the judiciary and the executive. This is not too implausible since apart from "common sense", "consensus" is the other big word that can be wielded around to magical effect in Wikipedia (but with greater magical effect if you are an administrator, bureaucrat, Jimmy Wales, or the Arbitration Committee). The

[258] *Supra*, VI(a)(2).
[259] *See also supra*, *Natural Law and Natural Rights*, note 25 at 260: "The authority of the law depends… on its justice or at least its ability to secure justice."
[260] This may probably be the only exception to the "rules" of "common sense prevails" and "no hard-and-fast rule".

drawback to this approach is that judicial powers (*e.g.*, interpreting the law)[261] and executive powers (*e.g.*, enforcing the law)[262] are endeavours not strictly confined to the province of the officials – non-official Wikipedians do take it upon themselves to interpret policies and try to get misdemeanours punished even though they lack the official power to do so. Whichever the case, it seems apposite to now move on and consider this related issue of lawmaking in Wikipedia. We might get a more complete picture of the netizen dynamics in the realms of Wikipedia.

(c) Lawmaking

There are at least 2 aspects to the question of lawmaking: who does it; and how is it done. As always we have to confront the theoretical position. Theoretically, in Wikipedia, norms adopt the coercive, binding characteristic of regulations when there is, *inter alia*, clear and consistent community practice – and, as we have seen, not necessarily just because the Arbitration Committee passes a judgment over a dispute,[263] the administrators make some executive decisions over troublemakers, or the bureaucrats authorise some high-level security bypass to probe into user behaviour:[264]

> We live under the rule of law when people are treated equally, without regard to their power or station; when the rules that apply to them arise legitimately from the consent of the governed; when those rules are clearly stated; and when there is a source of dispassionate, independent application of those rules [footnote omitted]. Despite this apparent mess of process and users, by these standards Wikipedia has charted a remarkable course. Although different users have different levels of capabilities, anyone can register, and anyone, if dedicated enough, can rise to the status of administrator. And while Jimbo Wales may have extraordinary influence, his power on Wikipedia depends in large measure on the consent of the governed – on the individual decisions of hundreds of administrators, any of whom can gainsay each other for him, but who tend to work together because of a shared vision for Wikipedia. The effective implementation of policy in turn rests on the thousands of active editors who may exert power in the shape of the tens of thousands of decisions they make as Wikipedia's articles are edited and reedited. Behaviours that rise to the level of consistent practice are ultimately described and codified as potential policies, and some are then affirmed as operative ones, in process that is itself constantly subject to revision.

In truth, the reality is actually a little more discomforting than that. It is not so much the case that it is the community that decides, but an elite sector (usually defined by the seniority and experience of the users) within the community that does so.[265] Professor

---

[261] *E.g.*, *infra*, VI(d).
[262] *Id*.
[263] Some Wikipedians' user page bear the infobox "This user elected ArbComm to resolve disputes, not govern." This is ironic, because chances are these are the same people who are part of some group who push for legislative reform under the guise of consensus.
[264] *Supra*, *The Future of the Internet*, note 26 at 142.
[265] In contradistinction to Surowiecki (*supra*, note 246), Caplan is much more skeptical about the collective wisdom of crowds. He cites emotionalism as a difficult barrier for a crowd to surmount – *see* Bryan

Zittrain partly alludes to this in the preceding paragraph and confirms this again in a later part:[266]

> Yet Wikipedia's awkward and clumsy growth in articles, and the rules governing their creation and editing, is so far a success story. It is in essence a work in progress, once whose success is defined by the survival – even growth – of a core of editors who subscribe to and enforce its ethos, amid an influx of users who know nothing of that ethos. Wikipedia's success, such as it is, is attributable to a messy combination of constantly updated technical tools and social conventions that elicit and reflect personal commitments from a critical mass of editors to engage in argument and debate about topics they care about. Together these tools and conventions facilitate a notion of "netizenship": belonging to an Internet project that includes other people, rather than relating to the Internet as a deterministic information location and transmission tool or as a cash-and-carry service offered by a separate vendor responsible for its content.

The euphemism of "critical mass" is used but the simple truth is there is an "elite"[267] group of like-minded people that calls the shots.[268] Suffice to say this delegation of lawmaking to an elite core is antithetical to the notion that Wikipedia, including its regulations, is a product of community consensus (*cf.* democracy), or even more ambitiously, the so-called collective wisdom of crowds.[269] Never mind unconventional

---

Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies, (2008) at 100 to 102: "The connection between error and lack of information is obvious. But is lack of information the root of *all* error? Introspection and personal testimony advance another candidate: emotional commitment [footnote omitted]. Holding fast to beloved opinions increases subjective well-being… Introspection about uncovers mixed cognitive motives. Recall the last argument you had on a topic you feel strongly about. You probably made an effort to give the other side a fair hearing. Why was it necessary, though, to *make an effort*? Because you knew that your emotions might carry you away; you might heatedly proclaim yourself the victor even if the evidence was against you… Irrationality is therefore all around us, and not just according to a demanding test like rational expectations… If ignorance were the sole cause of error, sufficiently large does of information would be a cognitive panacea. You could fix *any* misconception with enough facts… if the evidence *were* one-sided, the fraction convinced would rise to 100% with *all* the relevant information. Their emotional attachment to their beliefs is too intense: "Don't confuse me with the facts."" (emphasis in original).

[266] *Id.*

[267] "Elite" is a deliberate misnomer. People who are drawn to the wrangling and wrestling of policy dictation either do it out of compassion, or more commonly, out of a sense empowerment virtual reality affords them. "Elite" in this context is not meant in any way to convey intellectual or ability superiority.

[268] The group itself can be amorphous at times but the concept (of group domination) does not change.

[269] *See also supra*, *The Wisdom of Crowds*, note 246 at 267: "[T]he idea that the right answer to complex problems is simply "ask the experts" assumes that experts agree on the answers. But they don't, and if they did, it's hard to believe that the public would simply ignore their advice. Elites are just as partisan and no more devoted to the public interest than the average voter. More important, as you shrink the size of a decision-making body, you also shrink the likelihood that the final answer is right. Finally, most political decisions are not simply decisions about how to do something. They are decision about what to do, decisions that involve values, trade-offs, and choices about what kind of society people should live in. there is no reason to think that experts are better at making those decisions than the average voter." Contrast this again with Caplan's position – *see supra*, *The Myth of the Rational Voter*, note 265 at 180 to 181: "Experts are not an antidote to voter irrationality. But for better and worse, they loosen the link between public opinion and policy. The electorate's blind spots open loopholes for politicians, bureaucrats, and the media to exploit. But if the public was working against its own interests in the first place, the welfare effect of "exploitation" is ambiguous. Faith in leaders is the clearest example. Its dangers are obvious… But political

democracy, this falsified consensus is a tight slap in the face to the project's pretentiously noble proclamation[270] that its policies have "have wide acceptance among editors" and that its guidelines "are sets of best practices that are supported by consensus".[271] The (admittedly unofficial) aversion to "wikilawyering" only helps to foreclose rational debate[272] about the content and application of guidelines and policies.[273] Exacerbating all these problems is the fact that editors who have been around the project long enough already know that "consensus" is often more illusory than not. Countless good editors have left and will not return because of the unceasing political tractions and agenda-pushing that distract them from the more vital matters at hand (*e.g.*, adding encyclopedic information in a professional manner), the lack of community support for valuable contributors and solid ideas, the system's tendency to side with recalcitrant people who have brought nothing (or worse, nothing but negative contributions) to the table, the unflinching systemic bias against genuine minorities or non-English cultures,[274] and the system's unwillingness to admit that all the "five pillars" are constantly breached and contradicted left, right and centre, thus precluding any agitation to solve these deeply fundamental problems.

Furthermore, over the years, purported "consensus-building" exercises on policies and guidelines for the project as well as controversial article pages, have become

---

faith also allows leaders – if they are so inclined – to circumvent their supporters' misconceptions. Faith creates slack, and slack *in the right hands* leads to better outcomes. All you need are better leaders who are *somewhat* well intentioned and *less* irrational than their followers… Bureaucracy also has mixed effects. If the public lets them, politicians pass the buck, blaming their mistakes and misdeeds on subordinates. Before we condemn buck-passing, however, we should remember how many good ideas and socially beneficial actions the public classifies as "mistakes" and "misdeeds". Last, consider propaganda. We tend to think that causes twist the facts and appeal to emotions when truth is not on their side. Nazism and Communism are obvious examples. But in theory, propaganda can be used to fight error as well. If a person clings to his mistakes despite the evidence, irrational persuasion is his only hope." (emphasis in original).

[270] *See e.g.*, the date auto-formatting debate on Wikipedia: Manual of Style (dates and numbers)/Three proposals for change to MOSNUM – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Manual_of_Style_%28dates_and_numbers%29/Three_proposals_for_change_to_MOSNUM (last visited December 24, 2010); the BC/BCE debate on Talk: Jesus/Archive details – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Talk:Jesus/Archive_details (last visited December 24, 2010); the "failed" featured article bid for the article on the "Roman" Catholic Church on Wikipedia: Featured article candidates/Roman Catholic Church/archive 5 – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Featured_article_candidates/Roman_Catholic_Church/archive5 (last visited December 24, 2010); and the debate on whether to call "football", well, "football" on Talk: Association football – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Talk:Association_football (last visited December 24, 2010).

[271] *Supra, Wikipedia: Policies and guidelines*, note 19. The more accurate term should be "widespread indifference" or "widespread lack of objections". It should be added that within each wikiproject, project members have considerable autonomy in setting out their own project conventions – without overriding Wikipedia policies.

[272] Though to be frank, those accused of wikilawyering often are those who pretend more than they should that they are experts in the art of argument.

[273] *Supra*, note 78.

[274] For instance, if one should try to create an article on say, a local culinary dish of a small country, that article is likely to be deleted if found out, because it is unlikely to have any English-based sources to back it up. There are countless many other examples that can be gleaned from trawling the archives for "articles for deletion".

unnecessarily protracted, complicated, and emotional,[275] leading those longstanding editors (who have interests outside Wikipedia) who still remain to contribute in their own editing enclaves (usually their pet areas of interest), while keeping a very wide berth of all the arguing and politicking in discussion spaces. Some of these editors do not even go beyond minor edits anymore,[276] preferring to keep a more manageable number of items on their watchlist free of vandalism or irresponsible edits. All said, there is a whole lot of dishonesty and hypocrisy going on in Wikipedia, but faithful editors who have managed to persevere continue to plug away and stay away from the politics, fixing errors in the system, copyediting, and systematically documenting information on the world around us. That is, keeping the project alive longer than they should. Is this really an unfamiliar phenomenon? It is highly doubtful. The amount of abuse and exploitation the project has had to tolerate is nothing short of incredible. That it continues to sustain itself (in fact, make progress) is even more incredible.

(1) Measuring against Hart

Hart's secondary rules are usually able to tell us how laws come into being, the most likely rule being the rule of recognition. For instance, it is not uncommon for the rule of recognition to be associated with the following (non-exhaustive) series of notions: (1) whatever bill is properly enacted by the legislature will have the force of law; (2) whatever decision that is passed by the apex court in the judiciary is binding on the other courts; or (3) whatever subsidiary legislation that is passed by the executive or whatever new law or decision that is passed must pass constitutional muster.[277] The function of the rule of recognition, after all, is to remedy the uncertainty as to what constitutes law. It helps separate the law from the non-law, such as "irrelevant" moral considerations and moral constraints.

In view of the legislative actualities of Wikipedia, we can add another layer to our previous formulation of the rule of recognition in our section on rules.[278] On top of the rule that "rules may or may not apply, depending on common sense", we can formulate the chronologically prior rule that "rules can be called rules if nobody objects; and likewise, rules can be made by anybody, if nobody objects".[279] We explored earlier if the former rule passed the test of the "minimum conditions" of a legal system – specifically, whether the secondary rules are accepted by the officials.[280] If we consider the officials to be the administrators, bureaucrats, and so forth, I think most of them will also accept our

[275] One only needs to refer to any of the discussion pages of policies and guidelines reform, or controversial subjects, for a sampling. No doubt the discussions are rich and detailed, but they are always carried out by the same few people associated with the subject matter in question. To be precise, some of these "same few people" leave after a while, but they are soon replaced with newer kids on the block who possess the same sort of political stamina and desire.
[276] Because they may have to deal with constant disputes over substantive edits to the contents of the articles.
[277] *Supra*, *Understanding Jurisprudence*, note 149 at 104.
[278] *Supra*, VI(a)(1).
[279] Specifically, if nobody "important" objects.
[280] *Supra*, VI(a)(1).

subsidiary formulation of the rule of recognition. The longstanding status quo of how official behaviour on Wikipedia has been attests to that.[281]

What if, however remote this might sound, there are actually no real "officials" (in a superior versus subordinate sense) on Wikipedia? If the community acts as the lawmaker, does that make every member of the community some form of official as well? That is, we have to recall that there is no distinct hierarchy between Wikipedians because Wikipedians do not have to wait for democratic processes to oust the politically disfavoured and reform the law indirectly from there (since the legislators and not the citizens *per se* rewrite the laws), but simply need to band together in sufficient numbers to present some argument against the disputed law in question to declare the law as changed.[282] This notion – that there are no officials – may sound like a stretch, but it is not inconsistent with the Wikipedia ethos that they are not a community strictly governed by rules;[283] instead, the community as a whole decides for itself what the prevailing position on a particular issue should be. They are the rule-makers as much as they are the rule-abiders.[284] As it were, it is certainly not unheard of to have a legal system that has no centralised legislature: the international law regime comes to mind as the most obvious example.[285] On this point, it is noteworthy that Hart claims his theory can, unlike orthodox positivism of his day, account for the non-centralised lawmaking aspect of international law.[286] And this is where we begin to see an interesting coincidence developing between the one key attribute of both Wikipedia and international law: Wikipedia, like international law, is about an international community. Since probing into this coincidence might be beneficial, we ought to examine how Hart first addressed the conundrum posed by international law by identifying the main reasons why even his theory may not be able to account for international law:[287]

> [T]he absence [in international law] of an international legislature, courts with compulsory jurisdiction, and centrally organised sanctions have inspired misgivings… The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligations… It is indeed arguable… that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules.

---

[281] That is, the officials will usually uphold established guidelines and policies when making their decisions when there are disputes.

[282] Other groups may come in and oppose this of course, and if this becomes a really complex battle, the higher powers-to-be may intervene and impose a more structured framework to determine the policy content, such as a project-wide poll or vote.

[283] Yet this seems like a self-contradiction: if they are not governed by rules, but are required (as a rule) to use "consensus" to reformulate the rule, they are ultimately still relying on rules.

[284] This is beginning to sound like a radical reformulation of Austin's command theory of law: *see supra*, note 106.

[285] There remains, of course, people firmly opposed to the notion that international law is even law to begin with: *see e.g.*, Lori Damrosch, Louis Henkin, Sean Murphy and Hans Smit, International Law, (2009) at 2 and 32 to 35.

[286] *Supra*, note 213.

[287] *Ibid* at 214.

And Hart's rebuttal to these objections commences with dispelling two major doubts of the legal character of international law:[288]

> To argue that international law is not binding because of its lack of organised sanctions is tacitly to accept the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats. This theory… identifies 'having an obligation' or 'being bound' with 'likely to suffer the sanction or punishment threatened for disobedience'. Yet… this identification distorts the role played in all legal thought and discourse of the ideas of obligation and duty… The sceptic may point out that there are in a municipal system… certain provisions which are justifiably called necessary; among these are primary rules of obligation… are they not equally so for international law?... In societies of individuals, approximately equal in physical strength and vulnerability, physical sanctions are both necessary and possible… because of the inequality of states, there can be no standing assurance that the combined strength of those on the side of international order is likely to preponderate over the powers tempted to aggression. Hence the organisation and use of sanctions may involve fearful risks and the threat of them add little to the natural deterrents… there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify… reprisals and counter-measures. When the rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts… [The other persistent source of perplexity] about the obligatory character of international law has been the difficulty felt in accepting… that a state which is sovereign may also be 'bound' by… international law… there are many different types and degrees of dependence (and so of independence) between territorial units which possess an ordered government… the social contract theories of political science… explain the facts that individuals, 'naturally' free and independent, were yet bound by municipal law… all international obligation arises from the consent of the party to be bound…

The rebuttal then continues in the following terms:[289]

> What predominate in the arguments, often technical, which states address to each other over disputed matters of international law, are references to precedents, treaties, and juristic writings; often no mention is made of moral right or wrong, good or bad… A legislature cannot introduce a new rule and give it the status of a moral rule by its *fiat*, just as it cannot, by the same means, give a rule the status of a tradition… There is nothing in the nature or function of international law which is similarly inconsistent with the idea that the rules might be subject to legislative change… It is… a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or 'binding' rules. This is… a luxury of advanced social systems… once we emancipate ourselves from the assumption that international law *must* contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states?... It is true

[288] *Ibid* at 217 to 222, 224 and 226.
[289] *Ibid* at 228, 230, and 235 to 236 (emphasis in original).

> that, on many important matters, the relations between states are regulated by multilateral treaties… such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules… Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system.

What should we make of all this? That Wikipedia is a primitive sort of society? That Wikipedia still uses a primitive form of lawmaking? That Wikipedia comprises individuals not of approximate strength and equality? Regarding the first possibility, the community has been pretty sophisticated in developing its regulations. But the main problems are still that first, everything is potentially unravelled (and has been as past practice shows) by an overly flexible set of rules of recognition; and second, even the rule of change is unable to account for common sense as a trump card.[290] Perhaps a way out is to identify "consensus" as a stronger trump card (than common sense) when the application of the regulations is uncertain. This gives the system a more stable look. Regarding the second possibility, one is entitled to disagree with Hart's evaluation that a municipal legal system is so unequivocally more sophisticated than the international law regime. The former is sometimes faster in passing laws and resolving disputes and hence more efficient, yes, but not necessarily more sophisticated. The municipal legal system is in no way the established and undisputed standard-bearer and accordingly should not be hailed as one. In fact, it may be said that the Wikipedia community uses not a primitive form of lawmaking, but an *avant-garde* one.[291] Practically, it may be doomed to failure, but theoretically, its appeal lies in giving equal power to every single participant in the community. The participant's power and right goes beyond suffrage, and right into lawmaking itself. Thus, while Hart is able to explain why even entities who are "more equal than others" may nevertheless still obey the law (the third possibility), the crack that is still to be found is in the Wikipedia phenomenon of self-governance.

(2) Measuring against Finnis

Finnis' account on lawmaking needs to be first seen in the context of the foundations of his theory of law. He tells us that the "central case of law and legal system is the law and legal system of a complete community, purporting to have authority to provide comprehensive and supreme direction for human behaviour in that community, and to grant legal validity to all other normative arrangements affecting the members of that community".[292] He also tells us that law "needs to be coercive (primarily by way of punitive sanctions, secondarily by way of preventive interventions and restraints)… [It] brings definition, specificity, clarity and thus predictability into human interactions, by way of a system of rules and institutions so interrelated that rules define, constitute, and

---

[290] *Supra*, VI(a)(1).

[291] As is consistent with international law trends, the degree of influence of the state (and concomitantly, the municipal legal system) has been waning since the advent of international and non-governmental organisations following World War II. Some people have even speculated that there will be a true order of "global governance", and Wikipedia will conceivably be situated in one of the strata of such a scheme.

[292] *Supra*, *Natural Law and Natural Rights*, note 25 at 260. *See also supra*, note 150.

regulate the institutions, while institutions create and administer the rules, and settle questions about their existence, scope, applicability, and operation."[293] He continues:[294]

> The primary legal method of showing that a rule is valid is to show (i) that there was at some past time… an act… which according to the rules in force… amounted to a valid and therefore operative act of rule-creation, and (ii) that… the rule thus created has not determined… by virtue either of its own terms or of any act of repeal valid according to the rules of repeal in force… It is a working postulate of legal thought… that whatever legal rule or institution… has been once validly created remains valid, in force or in existence, in contemplation of law, until it determines according to its own terms or to some valid act or rule of repeal… rules of law regulate not only the creation, administration, and adjudication of such rules, and the constitution, character and termination of institutions, but also the conditions under which a private individual can modify the incidence or application of the rules… [The law] brings what precision and predictability it can into the order of human interactions by a special technique: the treating of… past acts… as giving, *now*, sufficient and exclusionary reason for acting a way *then* 'provided for'… this technique is reinforced by the working postulate… that every present practical question or co-ordination problem has, in every respect, been so 'provided for' by some past juridical act or acts…"

Finnis reminds us again of the distinction between mere acts of positing law, and laws that conform to moral norms:[295]

> The tradition of 'natural law' theorising is not characterised by any particular answer to the questions: 'Is every "settled" legal rule and legal solution settled by appeal exclusively to "positive" sources such as statute, precedent, and custom? Or is the "correctness" of some judicial decisions determinable only by appeal to some "moral" ("extra-legal") norm? And are the boundaries between the settled and the unsettled law, or between the correct, the eligible, and the incorrect judicial decision determinable by reference only to positive sources or legal rules?' The tradition of natural law theorising is not concerned to minimise the range and determinacy of positive law or the general sufficiency of positive sources as solvents of legal problems. Rather, the concern… has been to show that the act of 'positing' law (whether judicially or legislatively or otherwise) is an act which can and should be guided by 'moral' principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere 'decision'…

These additional points of information, however, do not shake off Finnis' theory's seeming reliance on good leadership in the community. In other words, the leaders (or officials, whichever terminology is preferred) are the still the ones who make the law,[296] and if they make good law, such law will be authoritative and will advance the common

---

[293] *Ibid* at 266 and 268.
[294] *Ibid* at 268 to 269 (emphasis in original).
[295] *Ibid* at 290.
[296] It is important to remember the distinction between making policies and guidelines for the entire community, and winning trivial battles over the content of a limited space like an article or project page.

good of the community; a law is also most easily identified by citizens when it bears certain marks of pedigree. Still, his scenario, ideal or otherwise, does not really contemplate the community to play the role of the government and lawmaker.[297] And it is unlikely that anyone should be surprised at this: anthropologically and historically, men have always been led and governed by a select group of leaders. Laws may bind the lawmakers as well,[298] but there has been always a distinct top-down, hierarchical dimension to societies in that the citizen is not exactly simultaneously the government (a more horizontal dynamic to the relationship between government and citizen).[299] So one will necessarily be hard-pressed to blame Finnis for couching a positive truth (leadership is needed in all societies) as a normative ideal.

At any rate, the main point to take away from this is that maybe the (theoretical) lawmaking processes of Wikipedia are still consistent with his conception of the common good. Applying the most generous interpretation possible, these processes can be said to represent the pinnacle of "empowerment of the people", democracy,[300] or even equality – equality being a value that Finnis certainly considers as a subset of the common good.[301] Another facet to this interpretation may be that good leadership should not be viewed as an end (or a good on its own), but simply an instrument and a means to an end. If a community is somehow able to reach a stage where the absence of rigid rules[302] nevertheless enables it to fulfill the pursuit of the 7 basic goods on the basis of the 9 basic requirements of practical reasonableness, then we may be in the clear if we are in the business of mapping Finnis' theory successfully. But Finnis does not suggest anywhere alternative embodiments of the law other than rules, and does not suggest anywhere alternative embodiments of the maker and promulgator of rules other than distinct bodies of leaders.[303]

(d) Law enforcement, unjust laws and dispute resolution

As they are all closely related issues, it is best if we consider how the Wikipedia community regards the questions of law enforcement, unjust laws, and dispute resolution

---

[297] *See also supra, Natural Law and Natural Rights*, note 25 at 351 to 352: "The ultimate basis of a ruler's authority is the fact that he has the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community's co-ordination problems… Normally, though not necessarily, the immediate source of this opportunity and responsibility is the fact that he is designated by or under some authoritative rule as bearer of authority in respect of certain aspects of these problems… In any event, authority is useless for the common good unless the stipulations of those in authority (or which emerge through the formation of authoritative customary rules) are treated as exclusionary reasons, i.e. as sufficient reason for acting notwithstanding that the subject would not himself have made some stipulation and indeed considers the actual stipulation to be in some respect(s) unreasonable, not fully appropriate fr the common good…"; and *infra*, VI(d)(2).

[298] Unless one buys into Austin's command theory: *supra*, note 106.

[299] To be clear, there is every possibility and it has been the case for the most part that many Wikipedians do not avail themselves of their lawmaking powers. But this should not detract from the fact that they possess what seems to a rather unique power.

[300] Again, however, Wikipedia has said it is not supposed to be a democracy: *supra*, note 20.

[301] *E.g.*, *supra, Natural Law and Natural Rights*, note 25 at 173 to 175.

[302] And, extending the reasoning trajectory, the absence of strong leadership as well as centralised lawmaking.

[303] *See also supra, Natural Law and Natural Rights*, note 25 at 359 to 360.

as one single issue. Let us take examine the Wikipedia positions on the 3 sub-issues *in seriatim*.

The Wikipedia page on the enforcement of the regulations makes this proclamation in no uncertain terms:[304]

> Enforcement on Wikipedia is similar to other social interactions. If an editor violates the community standards described in policies and guidelines, other editors can persuade the person to adhere to acceptable norms of conduct, over time resorting to more forceful means, such as administrator and steward actions. In the case of policy pages, they are likely to resort to more forceful means fairly rapidly. You'll need to do some pretty fast talking to get away with not adhering to the consensus within policy pages, though this is not impossible, if you somehow happen to know something that many years of collective wisdom hasn't discovered yet. This means that individual editors (including *you*) enforce and apply policies and guidelines. In cases where it is clear that a user is acting against policy (or against a guideline in a way that conflicts with policy), especially if they are doing so intentionally and persistently, that user may be temporarily or indefinitely blocked from editing by an administrator.

Thus, sanctions may not always befall a violator of the regulations: fellow editors may take the "soft" route of persuading the editor to be more cooperative, or they may report his behaviour straightaway to the "authorities". When that happens, it is not always clear how much sanctions will be meted out, or if at all. The officials have considerable discretion in many instances, with the amount of discretion usually being inversely proportionate to the seriousness of the regulation violated. It may also not be immediately clear how this situation tallies with the assertion made in the extract above ("individual editors… enforce and apply policies and guidelines."), since only the officials hold the power to deliver sanctions such as blocking. What the extract probably means though is that it is the editors who shape policy (so they apply the law indirectly) and it is the editors who report unacceptable behaviour (so they "enforce" the law this way; they can post "warnings" on talk pages as well but such warnings do not truly serve any practical purpose).

As for "unjust" regulations, Wikipedia does not have a specific page on that or anything to that effect; presumably, it is implied that either unjust regulations will be internally resolved by the community itself,[305] or one can seek redress by going to the officials. That is from the perspective of consequence/conclusion of course. From the perspective of premise, we may either infer that unjust regulations simply do not even exist on Wikipedia (perhaps on the assumption that the community will naturally remove them or gravitate towards morally sound or community-accepted policies), or the issue of unjust regulations is not worth addressing at all by the community (at least not in the form of a dedicated policy page where the issues can be thrashed out). Editors who feel they have been unfairly treated by administrators are at liberty of course to: (1) avail themselves of

[304] *Supra*, *Wikipedia: Policies and guidelines*, note 19 (emphasis in original).

[305] That is, editors will be the drivers for reform, using any of the available platforms for "consensus" building.

the various dispute resolution procedures, including the most drastic option of arbitration; (2) lodge a report at the administrators' notice board where other officials can intervene if necessary; or (3) submit a request for comment regarding the use of administrator privileges.[306] Similarly, there are a number of policy pages that deal with how to avoid administrator tools/privileges being abused, and what happens when such abuse takes place.[307] But all these pages only touch on the unfair application of the regulations, and not unfair regulations *per se*. Even so, this produces a different corollary from a situation where a citizen in a municipal legal system faces an unjust law. In the eyes of the law in the latter, a citizen cannot refuse to recognise (other than through his own moral convictions in which such convictions do not act as a legal defence for disobedience) an unjust law as a binding law. He may try to have a court strike down the law as unconstitutional, but before all of that can happen, the law is still the law and non-conformity can lead to sanctions or legal consequences. In Wikipedia, the door is seemingly left open for an editor to disregard a regulation as binding *ab initio*, on the basis that the regulation is unjust, makes no "sense", contradicts "consensus", or anything along those lines. Sanctions or legal consequences can be avoided if the editor makes a legitimate enough argument. And all of this is in tandem with and in the spirit of "we are not governed by rules" and "ignore all rules".[308]

Lastly, with regard to dispute resolution (*vis-à-vis* unfair treatment, as well as disputes with other editors either over article content or the application of regulations), there is an established 4-step process which editors are expected to follow: (1) first, consider if "positive methods" exist for helping avoid the dispute (*e.g.*, discussion with the other party); (2) if those methods do not help, consider getting help in resolving the dispute (*e.g.*, asking for a third opinion,[309] or seeking mediation); (3) if the situation is urgent and quicker measures are required, administrators can be notified (*e.g.*, oversight requests,[310] or reporting sock-puppetry); and (4) if all reasonable steps have already been taken to resolve the dispute, and the dispute is not about article content, arbitration can be requested.[311] There appears to be sufficient regulations in place to ensure that disputes are resolved in a procedurally fair manner. For example, the procedures for investigating and

---

[306] *Supra*, *Wikipedia: Administrators*, note 68.

[307] *Id*. *See also* Wikipedia: Administrators' how-to-guide – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Administrators%27_how-to_guide (last visited December 24, 2010); and Wikipedia: Administrators' reading list – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Administrators%27_reading_list (last visited December 24, 2010).

[308] *Supra*, VI(a), VI(b) and VI(c).

[309] Wikipedia: Third opinion – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Third_opinion (last visited December 24, 2010).

[310] Wikipedia: Requests for oversight – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Requests_for_oversight (last visited December 24, 2010).

[311] Wikipedia: Dispute resolution – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Dispute_resolution (last visited December 24, 2010).

defending against sock-puppetry accusations are fairly clear and detailed.[312] In arbitration – the highest and most complex form of dispute resolution in Wikipedia – there is similarly quite a high degree of accountability in the process and also when the decision is rendered.[313] However, no guarantees as to substantive fairness are made. It bears repeating as well that editors are expected to exhaust local remedies before they should turn to the officials for help; and it is only in the most extreme cases that arbitration is convened.

(1) Measuring against Hart

The initial impression is that there is not much to comment about law enforcement in Hart's world. In a generally efficacious and authoritative legal system, the rules confer the power on officials to act when citizens breach their legal obligations. The citizens recognise that the officials are empowered to do so. Likewise in Wikipedia, the regulations make it clear to the editors as to who possess the *real* powers of enforcement (the officials; so much for power to the editor). Where the difference sets in is perhaps in the role of the editor leading up to sanctions being imposed on the offender. To illustrate, imagine an editor is in a dispute with another over whether a biography contains sufficient coverage of a person's "negative aspects", like scandals and controversies in the person's life (thus calling for an interpretation of WP:BLP).[314] The dispute will primarily involve issues of referencing, weight, and maybe edit-warring. In more extreme cases, there may be issues of sock-puppetry, conflicts of interest, and threatening incivility. As all editing behaviours are logged, the editor who wishes to put the other in his place will be using these logs as the bases of his complaint to the administrator. He then becomes the gatherer of evidence and the advocate at the same time. He takes a much more active (albeit still indirect) role in law enforcement than in Hart's world, where presumably a citizen will at most lodge a complaint and testify for the prosecution. Another difference is that for Hart, there is much more certainty in outcomes in law enforcement. The citizen is usually aware of the legal consequences of his actions, and his conduct is restrained accordingly (the efficiency and efficacy of the law enforcement agency being a separate issue). In Wikipedia, a society populated mostly by civil and educated people, law enforcement can be very arbitrary and politically driven. You may

---

[312] Wikipedia: Sockpuppetry investigations – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Sockpuppet_investigations (last visited December 24, 2010).

[313] Wikipedia: Arbitration/policy – Wikipedia, the free Encyclopedia, https://secure.wikimedia.org/wikipedia/en/wiki/Wikipedia:Arbitration_policy (last visited December 24, 2010): "During deliberations, the [Arbitration] Committee will construct a consensus opinion made out of principles (general statements about policy), findings of fact (findings specific to the case), remedies (binding decrees on what should be done), and enforcements (conditional Decrees on what can further be done if the terms are met). Each part will be subject to a simple-majority vote amongst active non-recused Arbitrators – the list of active members being that listed on Wikipedia:Arbitration Committee. Dissenting votes for and opinions on parts that pass will be noted. Arbitrators who abstain from a particular part will be treated as having recused from that part of the decision, which may lower the majority needed to pass that part. In the event of no options for action gaining majority support, no decision will be made, and no action will be taken." Presumably, when no rules are found to apply to the dispute at hand, "common sense" will be used.

[314] *Supra*, *Wikipedia: Biographies of living person*, note 42.

be let go if you are a regular (immediately recognisable or otherwise), if you are a friend of many of the administrators, if you are in breach of less regulations than the other offender involved in the same dispute, or if a dispute is a highly sensitive one that lends itself easily to emotional arguments. Sometimes, you are simply presumed guilty because of your past conduct (which will all be logged). Again, this is not taking place in some primitive society with unsophisticated rules; and all this is without mentioning the unpredictability of the applicability of rules to begin with.

For unjust laws, Hart is very upfront about positivism's approach when faced with them: "it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law".[315] In *The Concept of Law* at least, he does not believe it is the place or role of legal positivism to offer us any resources or guidelines on how we can reform and respond to unjust laws, although he does have a theory on the minimum content of natural law.[316] It is a bigger question mark if his theory accommodates the rather unique Wikipedia notion of a citizen disregarding a law *ab initio*, on the basis that it is unjust, makes no "sense", or contradicts the prevailing community sentiments ("consensus") on the issue. On the one hand, if everybody in a society were to behave like this, Hart will claim that the legal system has ceased to exist, for there is, *inter alia*, a total shift in the internal point of view (although it will be a curiosity as to how the officials will react in such a situation). On the other hand, certainly not everybody on Wikipedia behaves like this (nor has it ever happened before), and as I should repeat the actual situation: most people obey most of the regulations most of the time, and there is little to suggest, despite many grievances that can be and have been levelled against the project, that this is set to change anytime soon. Yet theory and reality should not be analytically divorced all the time if one is to be principled. That being the case, there will be a gap in the account. One way out is to consider unjust laws from the perspective of objectivity rather than subjectivity, but the escape will still not be complete because Hart does not even try to head anywhere in that direction. It is unclear if such an imposition will have been palatable to him anyway.

Hart's theory on dispute resolution focuses more on judicial adjudication. Specifically, he believes that adjudicators are rationally constrained to rely on rules for the most part (the "core" cases), and when the rules run out (the "penumbral" cases), they have a much larger measure of discretion to exercise.[317] The reason he offers for this is that many words have a settled meaning such that when rules are formulated, people do not have real problems understanding what they require. As a subset of this, many cases will not get to be adjudicated because people are able to predict what and how the adjudicators will decide. There are 3 obvious criticisms that can emerge and they will be quickly mentioned here. First, uncertainty in rules is not confined to uncertainty in singular words, but is also found in phrases, sentences, and contexts, of which rules comprise. Uncertainty often manifests as spokes radiating from the centre of a wheel. Second, and again on the ground of limited dimension, Hart does not account for the fact that the choice to be made is not just as between different interpretations of a rule, but also as

[315] *Supra*, *The Concept of Law*, note 25 at 212. *See also supra*, IV(e).
[316] *Supra*, IV(d).
[317] *Supra*, IV(f).

between competing norms.[318] If competing norms are read broadly, all are applicable; if norms are read narrowly, there are gaps in the law. Third, many cases do not get adjudicated not simply because of the ease of prediction of outcomes. A case may not be adjudicated because a person lacks the resources to pursue such a long-drawn battle; a case may also not be adjudicated because it is in the human nature, for many at least, not to take every dispute to a litigious and adversarial setting. Despite these criticisms, Hart's rules of adjudication have decent mileage in explaining how officials are authorised to decide disputes in Wikipedia. Furthermore, the internal point of view and secondary rules are helpful in explaining the editors' acceptance of the outcomes of the disputes as binding (and final in some instances). In deciding cases in an unjust manner (substance over form), however, Hart, as he would for unjust laws, has no objections and believes the enterprise of criticising such laws is and should be separable from legal positivism. Perhaps too, he believes judges will be constrained by rules more often than not, and that the margin for injustice in the penumbra is an acceptable one. With a further incorporation of the minimum content of natural law, the likelihood of an eminently unjust system becomes slightly more remote.

(2) Measuring against Finnis

Finnis' account of law enforcement has to be analogous as opposed to direct, and we will see a repetition of the points made in his take on authority and obedience.[319] We saw earlier on that "the more likely it is that the participants themselves will think of themselves as a group, and look about for practices, usages, conventions, or 'norms' for solving their coordination problems, and/or for someone with authority to select among available solutions. Such norms will then be though of as norms *of* and *for* the group, and the leader(s) will be thought of as having authority *in* and *over* the group."[320] So for Finnis, persons who have the ability to "co-ordinate" participants in a group have the moral authority to lead; presumably, flowing from such authority is the appointment of executive agencies to enforce the law. We know of course that enforcement on Wikipedia has a different meaning than what Finnis is saying here; but if we characterise both the premise and conclusion of Finnis' theory of law to be the pursuit of the common good, the difference may be narrowed if we can further demonstrate, for instance, that pro-activity on the part of the editor on enforcing regulations comports with an amenable conception of the common good. Such demonstration, however, while clearly to be done within the analytical framework of the 9 basic goods and 7 basic requirements of practical reasonableness, does not clearly yield a straightforward application. The morass of all these ideals postulated by Finnis needs a consolidating and unifying force. Moreover, we get the same feeling as we did for Hart that a clearer (though not expressly in absolute terms) separation of powers and responsibilities was envisioned by Finnis, in the sense that it is neither realistic nor ideal for citizens to play a significant role in law enforcement.[321]

---

[318] As is the case in real life litigation, a dispute on Wikipedia can involve competing norms, all of which can apply with considerable relevance to the issue at hand.
[319] *Supra*, VI(b).
[320] *Supra*, note 256 (emphasis in original).
[321] *See also infra*, note 322.

On the issue of unjust laws, Finnis helpfully identifies 4 different types of injustice in law:[322]

> First, since authority is derived solely from the needs of the common good, a ruler's use of authority is radically defective if he exploits his opportunities by making stipulations intended by him not for the common good but for his own or his friends' or party's or faction's advantage, or out of malice against some person or group… Secondly, since the location of authority is normally determined by authoritative rules dividing up authority and jurisdiction amongst separate office-holders, an office-holder may wittingly or unwittingly exploit his opportunity to affect people's conduct, by making stipulations which stray beyond his authority. Except in 'emergency' situations… an *ultra vires* act is an abuse of power and an injustice to hose treated as subject to it… Thirdly, the exercise of authority in conformity with the Rule of Law normally is greatly to the common good… it is an important aspect of the commutative justice of treating people as entitled to the dignity of self-direction… and of the distributive justice of affording all an equal opportunity of understanding and complying with the law… Fourthly, what is stipulated may suffer from none of these defects of intention, author, and form, and yet be substantively unjust. It may be distributively unjust… commutatively unjust…"

Finnis says that the foregoing injustices have an effect on our obligation to obey the law. There are 4 senses to the phrase "obligation to obey the law", and it is the third sense that is relevant to us: "Given that legal obligation presumptively entails a moral obligation, and that the legal system is by and large just, does a particular unjust law impose upon me any moral obligation to conform to it?"[323] Finnis provides 3 answers to this question:[324]

> Notoriously, many people (let us call them 'positivists') propose that this question should not be tackled in 'jurisprudence' but should be left to 'another discipline'… Firstly, the proposed division is artificial to the extent that the arguments and counter-arguments which it is proposed to expel from jurisprudence are in fact… to be found on the lips of lawyers in court and of judges giving judgment… One will not understand either the 'logic' or the 'sociology' of one's own or anyone else's legal system unless one is aware… how both the arguments in the courts, and the formulation of norms by 'theoretical' jurists are affected, indeed permeated, by the vocabulary… of the 'ethics' or 'political philosophy' of that community… [secondly] a jurisprudence which aspires to be more than the lexicography of a particular culture cannot solves its theoretical problems of definition or concept-formation unless it draws upon at least some of the considerations of values and principles of practical reasonableness which are he subject of 'ethics'… [thirdly, the works of positivists] are replete with more or less undiscussed assumptions such as that the formal features of legal order contribute to the practical reasonableness of making, maintaining, and obeying law; that these formal features have some

[322] *Supra*, *Natural Law and Natural Rights*, note 25 at 352 to 354.
[323] *Ibid* at 357.
[324] *Ibid* at 357 to 359 (emphasis in original).

> connection with the concept of justice and that, conversely, lawyers are justified in thinking of certain principles of justice as principles of *legality* [footnote omitted]; and that the fact that a stipulation is *legally* valid gives some reason, albeit not conclusive, for treating it as *morally* obligatory or *morally* permissible to act in accordance with it [footnote omitted].

We have already clarified that Finnis accepts the difference between a focal theory of law and a mere theory of law,[325] but in contradistinction to Hart, it is apparent that Finnis was more prepared to countenance the scenario of disobeying a regulation *ab initio* without necessarily having to pay a price in terms of legal consequences.

Finally, we come to dispute resolution. Finnis devotes considerable length to expounding the concept of the rule of law, and there is every indication that under his theory (in the focal sense), legislators and adjudicators alike are excepted to uphold some substantive sense of the rule of law.[326] He also explains:[327]

> Consider the act of the judge in giving judgment. The subject-matter of his judgment may be a matter of distributive justice… or again the subject-matter for adjudication may be a matter of commutative justice. But, whether the subject-matter of his act of adjudication be a problem of distributive or commutative justice, the act of adjudication itself is always matter for distributive justice. For the submission of an issue to the judge itself creates a *common* subject matter… which must be allocated between parties, the gain of one party being the loss of the other. The biased or careless judge violates distributive justice by using an irrelevant criterion… in apportioning the merits and awarding judgment… But, finally, we can also consider the judge's duty simply in so far as it is a duty to apply the relevant legal rules; in this respect his duty is one of commutative justice: faithful application of the law is simply what is fitting and required of him in his official dealings with others.

We have seen that for the more complex dispute resolution procedures in Wikipedia, the regulations are designed to ensure at least procedural fairness or a procedural conception of the rule of law. That much Finnis has covered. For substantive fairness, Wikipedia does not devote much resources to what it means, save to imply that the constant engagement of reason as between editors will produce fair and equitable regulations and decisions. Finnis on the other hand suggests that engagements on such a horizontal plane will be less fruitful than if we have distinct legislative and adjudicative bodies that have moral authority vested in them.

VII. Conclusion

Despite its claim that it is not a society governed by rules and that self-government is central to its identity, Wikipedia is still highly dependent on editor-conformity to its whole plethora of regulations to be a sustainable project. Indeed, the distinct features of

[325] *Supra*, V(b).
[326] *E.g.*, *supra*, *Natural Law and Natural Rights*, note 25 at 270 to 279, 286 to 290.
[327] *Ibid* at 179 to 180.

the project, insofar as the relevant socio-legal questions are concerned, merit reiteration as we conclude: (1) there are many different types of regulations, ranging from mere etiquette to sanction-warranting offences; (2) regulations may or may not apply when disputes arise, with the applicability being potentially pitted against the invocation of "common sense" or the prevailing "consensus" on the issue;[328] (3) although there are officials among the editors who possess the sole power to deliver sanctions and adjudicate over disputes, lawmaking (and the shaping of right about any regulation) is an activity that every editor can theoretically be a direct and active part of; (4) regulations can be made and/or changed by any editor at any time if there is no real objection; (5) old editors leave the project perhaps as often as new ones join the project, but there is always an "elite" core of editors who have that extra stamina and appetite to run the system (*i.e.* shaping policies and determining the direction of articles); (6) most of the editors adhere to most of the regulations most of the time,[329] but there is a distinct pattern of avoiding violations of egregious offences while taking greater chances and pushing the envelope with less egregious offences;[330] (7) regulations surrounding the more egregious offences are more nuanced and complex; (8) the development of the system of regulations in Wikipedia finds a modern parallel in various facets and trends of international law; and (9) perhaps most importantly, instead of a rigid insistence on rules or embarking on the impossible task of formulating all rules in advance, *community members are expected to reason with one another in all interactions* and it is only when that fails, that a stronger insistence on rules is called upon.

Hart did claim his theory covered most appropriately municipal legal systems.[331] Even so, there are obviously many aspects of his theory that help explain the social phenomenon of law as a wider concept. His conception of rules – how to separate legal rules from non-legal rules, the internal point of view, what happens when rules run out, and the connection between rules and morality – is able to account to a significant extent how regulations on Wikipedia work. His theory is not so successful in accounting for the Wikipedia system in the following ways: (1) even the secondary rules do not sit comfortably with two key policies of Wikipedia, *i.e.*, "ignore all rules" and "anybody can make the rules"; (2) his theory on obedience and authority does not seem to have contemplated the sort of self-governing societies like Wikipedia; (3) his theory on lawmaking also does not seem to have contemplated self-governing societies, and it is submitted, inaccurately assumes that anything that does not resemble a municipal legal system is less sophisticated; (4) his theory of secondary rules has no answer to arbitrary

[328] Incidentally, Ronald Dworkin's separation of rules and principles may have considerable explanatory effect in this context: that principles are not applied in an all-or-nothing fashion; are not treated as valid/invalid; merely state a reason to argue in a particular direction; and possess a dimension of weight or importance.

[329] We pay homage here to the well-known quote on international law made by Professor Henkin in Louis Henkin, How Nations Behave, (1979) at 47: "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

[330] One very plausible reason as to why greater tolerance of the breach of rules is exercised towards editing disputes is that in cyberspace, with the cloak and shield of anonymity and the lack of face-to-face confrontation, it is inevitable that people dare to do things they would not in real life (such as name calling and behaving belligerently).

[331] *Supra*, note 25.

and politically driven law enforcement in what is otherwise a longstanding and stable legal order; (5) his theory does not permit a citizen's disregarding a law *ab initio* on normative grounds without legal consequences; and (6) his theory of the core and the penumbra does not go far enough in explaining more complex disputes. In so doing, the core may be smaller and the penumbra larger as he might have conceived.

As for Finnis, insofar as the predominant ethos of Wikipedia is the use of reason and logic to bridge differences and bind people together, we find resonance of this in Finnis' conception of the common good (which is supposed to be a powerful end product of reason). The main point of divergence is that Finnis (and Hart as well) imagines a world where leaders (such as legislators and judges) are required to "co-ordinate" society – to provide moral leadership. This is not so much imagination perhaps, because such social structures are have been a mainstay in many societies anyway. Other aspects of the socio-legal structure of Wikipedia that Finnis' theory is unable to speak much to include: (1) whether the common good is compatible with the aforementioned policies of "ignore all rules" and "anybody can make the rules"; (2) whether the common good can be pursued at the level Finnis imagines it when the community is self-governing, self-legislating, and to a lesser extent, self-judging. It seems that good moral leadership is integral to key areas of his theory; and (3) whether the common good is compatible with the concept of proactive law enforcement on the part of editors who are not officials.

In analysing Wikipedia from a socio-legal viewpoint, we see familiar and unprecedented elements. In its own sort of way, it may or may not portend a future of global governance, global citizenship, and how new ideals of freedom may be obtained through constant reasoning processes (instead of strict application of rules) – only time will tell if these can be transplanted into the "real" world. Hart and Finnis, in their positivistic and normative accounts (which purportedly can be combined analytically) of how to identify the law and what the law should be, have commendably laid the foundations for us. The socio-legal model of Wikipedia demonstrates that under the right circumstances, certain societies rely greater on the constituents' internal calibration towards a sense of collective good (through reasoning), rather than an insistence on clear signs on what the law is and is not, and what the law should be and should not.

Bibliography

Legal philosophy

1. John Austin, The Province of Jurisprudence Determined, General Books, 2009
2. Michael Dohorty, Jurisprudence: The Philosophy of Law, 2nd Ed, Old Bailey Press, 2001
3. Ronald Dworkin, Law's Empire, Harvard University Press, 1986
4. John Finnis, Natural Law and Natural Rights, Oxford University Press, 1980
5. Lon Fuller, The Morality of Law, Yale University Press, 1969
6. H.L.A. Hart, The Concept of Law, 2nd Ed, Oxford University Press, 1994
7. Ian MacLeod, Legal Theory, 4th Ed, Palgrave Macmillan, 2007
8. Denise Meyerson, Understanding Jurisprudence, Routledge Cavendish, 2007
9. John Rawls, A Theory of Justice, Belknap Press, 2005
10. Raymond Wacks, Understanding Jurisprudence, 2nd Ed, Oxford University Press, 2009

Sociology

1. Bryan Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies, Princeton University Press, 2008
2. Andrew Dalby, The World and Wikipedia, Siduri Books, 2009
3. Susan Jacoby, The Age of American Unreason, Vintage, 2009
4. Andrew Lih, The Wikipedia Revolution: How a Bunch of Nobodies Created the World's Greatest Encyclopedia, Hyperion, 2009
5. James Surowiecki, The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations, Anchor, 2005
6. Jonathan Zittrain, The Future of the Internet – And How to Stop it, Yale University Press, 2009