

## EFFECT PRECEDES CAUSE: KANT AND THE SELF-IN-ITSELF

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Mention the concept of judgment to a lawyer and she will describe (perhaps unintentionally) the concept in Kantian terms. To be sure, that to which this lawyer will be referring is the synthesis performed by a judge in deciding whether the plaintiff in a lawsuit should or should not prevail. But in describing what a judge does in judging, the lawyer will inevitably sound at least some Kantian chords.

Implicated in this description I am predicting is a very performative act, but one that purports to be otherwise. In deciding for one party or the other, the judge claims to be reporting a preexisting reality, but she actually constitutes that reality by conceptualizing it. Our legal interlocutor, however, would add something of which Kant would not approve. We lawyers think that the judge in a legal case has what Kant would call an intellectual intuition. This is the perfect unity of thinking and being.<sup>1</sup> A legal state of affairs exists precisely because the judge has seen what the law requires and has proclaimed what legally *is*. As anyone schooled in the common law knows, legal reality never precedes the perception of it.<sup>2</sup> But nevertheless the judge announces to us what the law will have demanded prior to her judgment. Law always speaks in the future anterior sense.<sup>3</sup>

Kant assures us that ordinary mortals do not have intellectual intuitions. Ordinary mortals at best have amphibolies—the mistaken view that they have perceived the unmediated thing-in-itself.<sup>4</sup> But within the

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1. Kant,

contrasts the discursive or conceptual knowledge of which human beings are capable with the problematic conception of an intuitive intellect. Such an intellect is thought to grasp its object immediately, without the need for any conceptualization and without being affected by the object. For the latter reason it must also be characterized as archetypal or creative rather than ectypal: its act of intuition literally produces its object. This is, of course, precisely the kind of cognition generally thought to pertain to God.

HENRY E. ALLISON, KANT'S TRANSCENDENTAL IDEALISM: AN INTERPRETATION AND DEFENSE 65 (1983) [hereinafter ALLISON, TRANSCENDENTAL IDEALISM] (footnote omitted).

2. See Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 886–91 (1989).

3. David Gray Carlson, *The Traumatic Dimension in Law*, 24 CARDOZO L. REV. 2287 (2003).

4. Although Kant regards the conception of such an intellect as problematic, he nonetheless uses its bare conceivability heuristically in order to underscore his central claim that human cognition is not the only (logically) possible kind of cognition. This, in turn, enables him to drive a “critical”

context of the law, the judge is no ordinary mortal. She is empowered to have intellectual intuitions. Accordingly, one may not go behind a judgment and show that it was a mistake or a hallucination. Judgments have *res judicata* value, a lawyer would say. Judgments, once issued, are final (if they survive on appeal).

Kant, on the other hand, recognizes that there are hallucinations—false impressions proceeding from a heat-oppressed brain. This is where the brain misapplies the categories to sense data. The human judgments that schematize sense data<sup>5</sup> are denied *res judicata* status at all times, precisely because we can never go behind them and verify they are correct. We can only bet that a judgment—the synthesis of sensual data—is correct.

And of course if we go behind the legal mythology of the omniscient judge with the power to create legal realities, we find judges who are doubting human beings, by no means sure that their judgments are correct.<sup>6</sup> For, unlike sovereigns whose judgments are incapable of being correct or incorrect, judges are law-abiding. Judicial personnel do not judge from a sense of arbitrary negative freedom. They swear oaths that they will follow the law in their judgments—that their judgments will be strictly what the law requires.

In Kantian terms, the legal judgment in law is the product of transcendental freedom.<sup>7</sup> In Kant's view, as expressed in the Third Antinomy, the judge has a foot in two worlds. Both of the worlds are ruled by causality. One of the worlds is where everything happens solely according to the laws of nature. This is a world in which there is no freedom<sup>8</sup>—the world of heteronomy. The other world is also a world of causality, but the causality of transcendental freedom. This is the noumenal world of autonomy. Autonomy is “the *principle of volition* in accordance with which the action is done without regard for any object of

wedge between the conditions of human or discursive knowledge and conditions of things in themselves. ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 1, at 66.

5. “Schematized” means infused with space and time. See ANGELICA NUZZO, IDEAL EMBODIMENT: KANT'S THEORY OF SENSIBILITY 62 (2008) [hereinafter NUZZO, IDEAL EMBODIMENT].

6. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 538 (1987) (“Kant concedes that neither the actor nor an observer can ever be sure if the action proceeds out of duty alone”).

7. Transcendental freedom is defined as the “faculty of beginning a state *from itself*.” IMMANUEL KANT, CRITIQUE OF PURE REASON A533/B561, at 533 (Paul Guyer & Allen W. Wood eds. & trans., 1998) [hereinafter KANT, PURE REASON]. Speculative reason requires transcendental freedom “in order to escape the antinomy into which [reason] inevitably falls, when in the chain of cause and effect it tries to think the *unconditioned*.” IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 13 (Thomas K. Abbott trans., 1996) [hereinafter KANT, PRACTICAL REASON].

8. See ANGELICA NUZZO, KANT AND THE UNITY OF REASON 53 (2005) [hereinafter NUZZO, UNITY OF REASON].

the faculty of desire.”<sup>9</sup> In this world of autonomy, reason exercises “an *immediate* and *effective* causality on the will. The category of *causality* lends the first meaning to the practical use of reason.”<sup>10</sup> Reason’s causality is why one can say that Kant has a theory of *positive* freedom, in which freedom has an effect in the world.<sup>11</sup> The will, then, is the middle ground between reason and the act.<sup>12</sup>

What is autonomy for Kant? It is simply what is left over after heteronomy is suppressed. “[A]n action from duty is to put aside entirely the influence of inclination and with it every object of the will; hence there is left for the will nothing that could determine it except objectively the *law . . .*”<sup>13</sup> It is from this position that the moral law is pronounced.

Therefore the law judge—or any ordinary mortal—must suppress heteronomy in order to be faithful to the object. In the case of the law judge, heteronomy would include prejudice, greed for glory or bribes, or tiredness at the end of a long day. All of these things must be suppressed. If the judge succeeds in this task, the pure objective law tells him what to do. In this magical Delphic state, the judge is pure oracle.<sup>14</sup> The God of law speaks through the mouth of the judge, whose judgment is entirely objective in nature. With subjectivity suppressed, objectivity is able to shine forth through the subject.<sup>15</sup>

There is a paradox here. The judge is most free when the judge is most bound. This is the paradox of transcendental freedom. Such a freedom only exists when heteronomy is entirely suppressed. So freedom is won by this austere, quite impossible<sup>16</sup> starvation of the natural self. Yet what emerges, if this struggle for autonomy is successful, is the law from which the judge is quite unfree. We should not forget that, etymologically,

9. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 4:399–400, at 13 (Mary Gregor ed., 1997) [hereinafter KANT, *GROUNDWORK*]. The faculty of desire is defined as the “*faculty of becoming by means of its ideas the cause of the actual existence of the objects of these ideas.*” KANT, *PRACTICAL REASON*, *supra* note 7, at 19 n.2.

10. NUZZO, *IDEAL EMBODIMENT*, *supra* note 5, at 144.

11. *See id.* at 156.

12. *See id.* at 188.

13. KANT, *GROUNDWORK*, *supra* note 9, at 4:400, at 13–14.

14. ARTHUR SCHOPENHAUER, *ON THE BASIS OF MORALITY* 79 (E.F.J. Payne trans., 1965) (“From its dark sanctuary oracular sentences infallibly proclaim, alas! not what *will*, but what *ought* to happen.”).

15. This is basically the heart of Dworkin’s theory of legal interpretation, which I describe in David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. MIAMI L. REV. 505 (2006).

16. “[F]reedom, though it must be assumed both for theoretical and practical purposes, is nevertheless inexplicable and even incomprehensible.” Allen W. Wood, *The Antinomies of Pure Reason*, in *THE CAMBRIDGE COMPANION TO KANT’S CRITIQUE OF PURE REASON* 245, 262 (Paul Guyer ed., 2010) (citations omitted). *See also* KANT, *GROUNDWORK*, *supra* note 9, at 4:459, at 63 (“[Freedom] can never be comprehended or even only seen.”) (footnote omitted).

“autonomy” means “giving oneself laws.”<sup>17</sup> In this respect, as always, the theory of the subject is not different from Kant’s theory of objects in general. As Adorno writes, “a thing is nothing other than the laws that underlie the individual phenomena, the individual data of my consciousness.”<sup>18</sup> Law is “an indispensable precondition without which something like an organized consciousness, a consciousness that is logically consistent and coherent, and hence an organized, logically consistent world of objects, is not conceivable.”<sup>19</sup> Law (i.e., causality) is indispensable “as a condition of all empirical judgments, and so of experience as such.”<sup>20</sup>

But here is precisely where Kant reveals himself to be the Great Destroyer, the consummate philosopher noir.

*La philosophie noire* is a phrase designed to invoke film noir,<sup>21</sup> the consummate example of which is *Chinatown*, directed by Roman Polanski. In this film, Jack Nicholson is a detective who thinks he sees the case-in-itself. At first, he is sure that he has been retained by a jealous wife in a routine domestic dispute with a philandering husband. But then the case is re-interpreted to be one concerning a corrupt real estate deal. Finally, it is a case of rape and incest involving a corrupt real estate tycoon. Every step along the way, the rug is pulled out from under Nicholson, who constantly learns that things are not what they seem—that he is simply not in control of the situation.

This is precisely what Kantian philosophy does to the empirical self who imagines that he “has the phallus,” as Lacan would say.<sup>22</sup> Having the phallus is an amphiboly in which the empirical self imagines himself to be whole, unmediated, unmolested and not castrated. Such a self imagines himself to be in the autonomous position—in a position to know the law that causes him to act. Such a being acts and thinks at the same time. He

17. THEODOR W. ADORNO, KANT’S *CRITIQUE OF PURE REASON* 54 (1959); see also KANT, *GROUNDWORK*, *supra* note 9, at 4:440, at 47 (autonomy is “the property of the will by which it is a law to itself . . .”) (footnote omitted).

18. ADORNO, *supra* note 17, at 92.

19. *Id.* at 96.

20. NORMAN KEMP SMITH, A COMMENTARY TO KANT’S *CRITIQUE OF PURE REASON* 376 (1962).

21. Not wishing to claim wit that is not my own, I have borrowed this phrase from Slavoj Žižek, but I can no longer find the reference in his burgeoning work. I seem to recall that he used the phrase in connection with Malebranche.

22. JEANNE L. SCHROEDER, *THE VESTAL AND THE FACES: HEGEL, LACAN, PROPERTY, AND THE FEMINE* 80, 87–94 (1998).

has complete mastery of himself.<sup>23</sup> Kant dashes this conceit to bits. In the *Groundwork*, Kant writes:

It often happens that in the keenest self-examination, we find absolutely nothing except basic moral duty that could have been powerful enough to move us to this or that good action . . . . But it cannot be ruled out with certainty that in fact some secret impulse of self-love, under the mere pretense of this idea, has been the real determining cause of the will. For this we gladly flatter ourselves by falsely appropriating a nobler motivational ground. But in fact, even the most strenuous probing of our hidden motives yields absolutely nothing, because when the issue is moral worth, it is not about the actions one sees but rather about their internal principles that one does not see.<sup>24</sup>

This is Kant's way of making the Lacanian point that we are all castrated. The most intimate part of our selves is in fact beyond ourselves. No one has the phallus. Fans of *Chinatown* will remember that Nicholson's nose is sliced open (by the director Roman Polansky, no less), symbolizing the loss of the phallus.<sup>25</sup>

In his highly engaging lectures on *The Critique of Pure Reason*, Theodor Adorno states that Kant has become the favorite philosopher of those who are reflective only on Sunday mornings while at church, people for whom a nonreflective existence can be enjoyed six and a half days a week.<sup>26</sup> But Adorno is quick to add that this adaptation of Kantian principles to bourgeois existence is quite contrary to Kant's intent. Adorno sees that Kantian theory is noir all the way down, if it is properly understood.

The reason that it is noir is that the autonomous state is a quite impossible one. If our judicial officer reflects about his position in the Kantian style, the judge is doomed in advance to experience the doubt that, no matter how sincerely she tried to do the right thing, she has not succeeded in shutting out all aspects of heteronomous influence. The

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23. In Lacanian terms, this is called the "masculine" position. Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 504-05 (1998). "In contrast, the feminine position is the part of personality that accepts the fact of castration. The feminine subject recognizes that her lack is self-constituting." Jeanne L. Schroeder, *Can Lawyers Be Cured? Eternal Recurrence and the Lacanian Death Drive*, 24 CARDOZO L. REV. 925, 943 (2003).

24. KANT, *GROUNDWORK*, *supra* note 9, at 26; *see also* IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 7 (J.H. Bernhard trans., 2000) ("[I]t is left undetermined whether the concept which gives the rule to the causality of the will[] is a natural concept or a concept of freedom").

25. I owe this observation about *Chinatown* to Rudolph Makkreel.

26. ADORNO, *supra* note 17, at 186-87.

slightest taint of heteronomy means that the positive law by which the judge is bound did not govern the judgment but some illegal inclination or prejudice did. Thus, “in the case of the principle that every event has a cause, transcendental logic does not say *what* this cause is or *which* among the many possible causes is the real cause in the specific case.”<sup>27</sup>

What are the conditions under which a judge could be sure that the judgment conformed to a pre-existing law that was not hallucinated by the judge? The required condition is what Kant would call amphiboly—“a confusion of the pure object of the understanding with the appearance.”<sup>28</sup> A judge must perceive herself not just as appearance but as she is in herself. But in truth, being a mortal, she can never know herself as such. She can only know the appearances of herself—that which is given in experience.<sup>29</sup> As Kant says,

Those transcendental questions, however, that go beyond nature, we will never be able to answer, even if all of nature is revealed to us, since it is never given to us to observe our own mind with any other intuition [than] that of our inner sense. For in that lies the mystery of the origin of our sensibility. Its relation to an object, and what might be the transcendental ground of this unity, undoubtedly lie too deeply hidden for us, who know even ourselves only through inner sense, thus as appearance, to be able to use such an unsuitable tool of investigation to find out anything except always more appearances, even though we would gladly investigate their non-sensible cause.<sup>30</sup>

One of the surprising things about Kant’s philosophy is that the structure is uniform, whether the subject is synthesizing quotidian objects around her such as houses or ships sailing down a river, or whether the subject is synthesizing her own empirical self.<sup>31</sup> In neither case can the subject intuit the thing-in-itself. The subject can only synthesize the object from a passive receptivity of sense data—whether it be stimulation of the ocular or aural nerves. One can never know the thing-in-itself but only the appearances. But the subject’s own self is an object. Like all objects, the

27. NUZZO, UNITY OF REASON, *supra* note 8, at 172 (citation omitted).

28. KANT, PURE REASON, *supra* note 7, at A270/B326, at 371 (footnote omitted).

29. See ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 1, at 106.

30. KANT, PURE REASON, *supra* note 7, at A278/B334, at 375–76 (footnotes omitted).

31. ADORNO, *supra* note 17, at 54, 205.

subject knows this self only through the appearances. Psychology cannot be separated from the theory of knowledge generally.<sup>32</sup>

Furthermore, there is a sense in which, whether synthesizing objects or synthesizing herself as an object, the subject is in control of neither. Appearances are taken in from the outside. At the level of sensibility, the perceiving subject is passive and requires an object to work upon her. This object is the cause of the appearance within the brain of the subject. Hence Kant's notorious doctrine of the thing-in-itself, which we cannot know but only infer from reflection on the concept of "appearance," which is after all a binary relation between that which is subjectively experienced and that which is objectively imposed upon us externally.<sup>33</sup>

If receptivity of the senses is truly passive, then the thing-in-itself must be active and beyond the control of the subject. It must be the *cause* of the sense data that are synthesized into an object.<sup>34</sup> Yet the self of the subject is itself an object and subject to the same rules.<sup>35</sup> The self-in-itself causes the act. The empirical self passively drinks it in:

[F]or the cognition of ourselves, in addition to the action of thinking that brings the manifold of every possible intuition to the unity of apperception, a determinate sort of intuition, through which this manifold is given, is also required . . . . I therefore have *no cognition* of myself *as I am*, but only as I *appear* to myself. The consciousness of oneself is therefore far from being a cognition of oneself . . . .<sup>36</sup>

32. *Id* at 100.

33. In Hegelian terms, appearance is an *essential* relation that simultaneously refers to itself and to its other. G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC 500 (A.V. Miller trans., 1969) [hereinafter HEGEL, SCIENCE OF LOGIC] (Appearance is "equally immediately a sheer *positedness* which has a *ground* and an *other* for its subsistence").

34. KANT, PURE REASON, *supra* note 7, at A251–52, at 348 ("[S]omething must correspond to [appearance] which is not in itself appearance, for appearance can be nothing for itself and outside of our kind of representation . . . the word 'appearance' must already indicate a relation to something the immediate representation of which is, to be sure, sensible, but which in itself . . . must be something, i.e., an object independent of sensibility"). What Kant meant by this claim of the thing that causes its own representation is the source of endless controversy. See ALLISON, TRANSCENDENTAL IDEALISM, *supra* note 1, at 237–46.

35. Julian Wuerth, *The Paralogisms of Pure Reason*, in THE CAMBRIDGE COMPANION TO KANT'S *CRITIQUE OF PURE REASON* 210, 212 (Paul Guyer ed., 2010) ("We can have knowledge of ourselves through empirical apperception, or inner sense, but because the states of inner sense are all located in time and are thus merely phenomenal . . . inner sense provides us with knowledge of ourselves merely as we exist as phenomena.").

36. KANT, PURE REASON, *supra* note 7, at B157–158, at 359–60.

And so the Kantian self is deeply divided within itself:

Yet the human being, who is otherwise acquainted with the whole of nature solely through sense, knows himself also through pure apperception, and indeed in actions and inner determinations which cannot be accounted at all among impressions of sense; he obviously is in one part phenomenon, but in another part, namely in regard to certain faculties, he is a merely intelligible object . . . .<sup>37</sup>

The Kantian self is not self-identical and for this very reason is capable of movement and motility.

Self-division is not a contingent fact of human existence but is logically required. And this can be seen from the very structure of judgment. Indeed the German word for judgment (*Urteil*, or “original partition”) presages this.<sup>38</sup> Traditionally, judgment is divided into three components—subject, copula and predicate. Judgment is usually represented by the form “A is B.” But, as Hegel emphasized in the introduction to the *Science of Logic*, “A is B” confesses identity *and* difference. “Judgment is an *identical* relation between subject and predicate,” Hegel writes.<sup>39</sup> For example, “the rose is red,” or “being and nothing are identical.” But these judgments fail to capture the whole truth:

[T]he subject has a number of determinatenesses other than that of the predicate, and also that the predicate is more extensive than the subject. Now if the content is speculative, the *non-identical* aspect of subject and predicate is also an essential moment, but in the judgement this is not expressed.<sup>40</sup>

In other words, the rose is many things other than red, yet this “speculative content” is not expressed. Many things are red besides roses, but this too is not expressed. To quote Adorno, “only when the *knowing subject* is identical with the *object known* can we conceive of knowledge as being free of contradiction . . . .”<sup>41</sup> But since *judgment* is at stake, this is hardly possible. Properly, as Adorno pointed out, if we are to consider self-

37. *Id.* at A546/B574, at 540 (footnotes omitted). Intelligibility implies noumenality for Kant. *Id.* at A494/B522–23, at 512–13, A538/B566, at 535–36.

38. G.W.F. HEGEL, HEGEL’S LOGIC: BEING PART ONE OF THE *ENCYCLOPAEDIA OF THE PHILOSOPHICAL SCIENCES* (1830) 231 (William Wallace trans., 1975) (“The etymological meaning of the Judgement (*Urtheil*) in German goes deeper, as it were declaring the unity of the notion to be primary, and its distinction to be the original partition. And that is what the Judgement really is.”).

39. HEGEL, *SCIENCE OF LOGIC*, *supra* note 33, at 90.

40. *Id.* at 90–91.

41. ADORNO, *supra* note 17, at 83.



knowledge, we should speak of *psychosynthesis*, not *psychoanalysis*.<sup>42</sup> Judgment is a synthesis, a re-membering,<sup>43</sup> of that which is originally dismembered.

Thus, a subject knows the predicates of her self as appearances, which arise when the subject acts. Yet, if there is to be a uniform metaphysics of apperceived objects and of morals,<sup>44</sup> these acts must be beyond the control of the actor. The actor is simultaneously up on the stage acting, but also in the audience passively witnessing and interpreting this act from which she is fundamentally alienated.<sup>45</sup>

Can this actually be Kant's position, you ask? Do we sit passively in the audience while a puppet with our name and wardrobe cavorts on the stage? Consider that the self has a heteronomous side and an autonomous side. From the heteronomous side, nature causes us to act. On the heteronomous side, there is no freedom.<sup>46</sup> From the autonomous side, however, reason causes us to act. "[P]ractical reason manifests itself through its effects in—and on—human sensibility."<sup>47</sup> This seems to exhaust the possibilities. Either way, we are not in control of the performance. The performance is caused by something outside ourselves. There is no unity of thinking and being. Furthermore it is commonplace of at least Hegelian thought, and probably of Kantian theory as well,<sup>48</sup> that "human action cannot be motivated by reason but only by passions . . . . Accordingly, the will's act (deliberation or choice) is nothing but its

42. *Id.* at 188.

43. JOHN W. BURBIDGE, *REAL PROCESS: HOW LOGIC AND CHEMISTRY COMBINE IN HEGEL'S PHILOSOPHY OF NATURE* 136 (1996).

44. ADORNO, *supra* note 17, at 54, 205.

45. Žižek thus writes of the act as a foreign body or intruder in the subject, and why the actor must always keep a distance from her own acts. SLAVOJ ŽIŽEK, *THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY* 374 (1999).

46. Kant writes:

Thus every human being has an empirical character for his power of choice, which is nothing other than a certain causality of his reason, insofar as in its effects in appearance this reason exhibits a rule, in accordance with which one could derive the rational grounds and the actions themselves according to their kind and degree, and estimate the subjective principles of his power of choice. Because this empirical character itself must be drawn from appearances as effect, and from the rule which experience provides, all the actions of the human being in appearances are determined in accord with the order of nature by his empirical character and the other cooperating causes; and if we could investigate all the appearances of his power of choice down to their basis, then there would be no human action that we could not predict with certainty, and recognize as necessary given its preceding conditions. Thus in regard to this empirical character there is no freedom . . . .

KANT, *PURE REASON*, *supra* note 7, at A549-550/B577-79, at 541 (footnotes omitted).

47. NUZZO, *IDEAL EMBODIMENT*, *supra* note 5, at 161.

48. See HENRY E. ALLISON, *KANT'S THEORY OF FREEDOM* 39 (1990) [hereinafter ALLISON, *FREEDOM*].

mechanical response to the stimulation of the passions.”<sup>49</sup> And so this means precisely that we are spectators (in the spectral sense) to the ghastly Grand Guignol performance in which we ourselves are the poor players who strut and fret on the stage, imitating humanity so abominably.

The fact that we are not in perfect control of our acts is a function of the fact that our acts are caused by a thing-in-itself beyond the subject and by the fact that our subject has two natures—one natural and one noumenal, or one evil and one holy. Which of these two entities acted? Only amphibolous powers can assure us of the answer either way. But these are quite impossible. Freedom “is the foremost example of an object of thought that can never be known theoretically since it does not meet the conditions of our sensibility.”<sup>50</sup> So we are constituted as doubting beings. And this doubt is the very condition for the possibility of freedom.

Doubting that our acts are our own means that we are constitutionally incapable, without help, of synthesizing the object that is our self. Any such synthesis would have subjective validity only. What we require is objective validity.

This leads directly to Hegel’s theory of recognition. In Hegel’s view, we are not constituted to recognize ourselves objectively. We require others to bestow upon us our own sense of self. But this recognition needs to be from another self that is very much an equal self. So we must give to the other precisely what we cannot give to ourselves, which is recognition that the other is indeed a substance—an enduring entity worthy of moral respect. Only after we recognize the other as an enduring self capable of recognizing us can we be assured that our own self is indeed a self.<sup>51</sup>

The ethics of recognition Hegel locates in the logic of judgment itself. In the *Science of Logic*, the judgment that is analyzed in the Subjective Logic is self-judgment. “Judgment is ‘the omnipotence of the Notion’ (662)—the tool by which the Notion reestablishes reality *as its own*, after abstract objectivism imploded upon itself in the first two-thirds of the Logic.”<sup>52</sup> In the logic of judgment, “the Notion restores for itself a reality that had been canceled in Actuality.”<sup>53</sup> The restoration rehearses, for the benefit of the Notion, the entire logical progression that had earlier been cancelled. The judgment of existence corresponds to the logic of being.

49. *Id.* at 141. Hegel’s oft-quoted dictum is that “nothing great in the world has ever been accomplished without passion.”

50. NUZZO, UNITY OF REASON, *supra* note 8, at 28.

51. See David Gray Carlson, *How to Do Things with Hegel*, 78 TEX. L. REV. 1377 (2000).

52. DAVID GRAY CARLSON, A COMMENTARY TO HEGEL’S *SCIENCE OF LOGIC* 460 (2007), *citing* HEGEL, *SCIENCE OF LOGIC*, *supra* note 33, at 590.

53. *Id.* at 463. Actuality was the last, third segment of the logic of essence. See *id.* at 391.

Two of the four judgments correspond to double-natured essence. Finally, judgment objectivizes itself in the judgment of the notion. But this objectivization is by its nature ambiguous. The judgment of self at the end of the day (the Apodeictic, or certain, judgment) is simply the disjunctive point that the subject is *either* objective (i.e., notional) *or* subjective.<sup>54</sup> The subject cannot decide for itself. What the subject must do is build its predicate up so that the predicate is notional, so that two notions “recognize” the permanence—the *objectivity*—of their other. In short, the subject needs another subject to assure it of its permanence. This reciprocity is what Hegel names “absolute idea.” Absolute idea is the “*self-knowing Notion that has itself . . . for its subject matter.*”<sup>55</sup>

The doubting subject needs another subject to assure it of its objectivity. And this leads to the theme of imputation, the capacity for which is the very definition of personhood for Kant. Criminal law is keenly interested in the state of mind with which an act is committed. For example, a person shoots his friend in a hunting accident. If the shooter is indicted for attempted murder, the prosecution must prove *mens rea*. This element of the crime is entirely un-empirical in nature—it involves something that cannot be observed. Of necessity, the prosecutor can resort to empirical evidence from which the defendant’s mental state can only be inferred. Spectral evidence, once popular in witch trials, is no longer allowed. For example, the prosecutor might present evidence that the defendant was the principal legatee in the victim’s will or was involved in an affair with the shooter’s wife. The jury is then invited to judge the *mens rea* of the defendant. Kant might suggest that the jury is every bit as competent as the defendant himself to find this causing ground of the will. The defendant himself has no more access to his inner motive than does the jury. As with the jury, the defendant has only the evidence that he can sense—the visible act of holding a gun in the direction of the victim and the sensation that the gun has gone off. As Kant writes:

The real morality of actions (their merit and guilt), even that of our own conduct, therefore remains entirely hidden from us. Our imputations can be referred only to the empirical character. How much of it is to be ascribed to mere nature and innocent defects of temperament or to its happy constitution (*merito fortunae*) this no

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54. HEGEL, SCIENCE OF LOGIC, *supra* note 33, at 661 (“When the problematic element is thus posited as the problematic element of the *thing*, as the thing with its *constitution*, then the judgement itself is no longer problematic, but *apodeictic*.”); see CARLSON, *supra* note 52, at 491–92.

55. HEGEL, SCIENCE OF LOGIC, *supra* note 33, at 826.

one can discover, and hence no one can judge it with complete justice.<sup>56</sup>

With the jury, the effects of malice aforethought precede the cause. Causation is, for Kant and for Hume, a story that is told after the fact to explain the empirical act. And this is not just true with juries;<sup>57</sup> it is true with ourselves, in our never-ending task of explaining ourselves to ourselves (and to others). As Kant emphasizes, reason's causality is not temporal in nature. Here is the key passage from the *Critique of Pure Reason*:

[A]ction, insofar as it is to be attributed to the mode of thought [*Denkunsart*] as its cause, nevertheless does not follow from it [*Denkunsart*] in accord with empirical laws, i.e., in such a way that it[, the action,] is *preceded* by the conditions of pure reason, but only their [the conditions'] effects in the appearance of inner sense *precede* it. Pure reason, as a merely intelligible faculty, is not subject to the form of time, and hence not subject to the conditions of the temporal sequence. The causality of reason in the intelligible character *does not* arise or start working at a certain time in producing an effect. For then it would itself be subject to the natural law of appearances, to the extent that this law determines causal series in time, and its causality would then be nature and not freedom. Thus we could say that if reason can have causality in regard to appearances, then it is a faculty *through* which the sensible condition of an empirical series of effects first begins. For the condition that lies in reason is not sensible and does not itself begin. Accordingly, there takes place here what we did not find in any empirical series: that the *condition* of a successive series of occurrences could itself be empirically unconditioned.<sup>58</sup>

What I think Kant is saying in this difficult passage is that our acts are never mechanically caused, as is true in the empirical world or in nature.

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56. KANT, PURE REASON, *supra* note 7, at A551/B579, at 542 n. (footnotes omitted).

57. Kant,

agrees here with Hume in not ascribing causality to things-in-themselves, that is, he does not conceive of causes naturalistically. In contrast to Hume, however, he believes that an ordered knowledge, a lawful succession of events, is only possible in the context of this form. Thus, whereas Hume would say that causality is merely *subjective*, Kant would reply, indeed, it is merely subjective, but this supposedly subjective element is the necessary precondition without which *objectivity* cannot come into being.

ADORNO, *supra* note 17, at 91.

58. KANT, PURE REASON, *supra* note 7, at A551-53/B579-81, at 542-43.

Rather, every act is a free act and can be described as caused by reason. This is so whether the act is, upon due reflection, attributed to heteronomy or to the moral law.<sup>59</sup> Whatever rule or maxim caused the act, this cause can never be observed in nature. “In other words, I can no more observe myself deciding than I can observe myself judging, although in both cases I must be conscious of what I am doing.”<sup>60</sup> For this reason, we never know if our acts are the result of respect for the moral law, precisely because this kind of causality cannot be observed. Yet we experience ourselves as free to follow the moral law.

Once the act is accomplished, we must account for it. And others (including juries) must account for it. The act is observable, but the motive is not. Motive must be inferred from the circumstantial evidence. And for that reason, human beings do not follow rules. This impinges on their freedom if the rules are absolutely prior to the act—if human beings are subject to algorithm. Rather the opposite is true. The rule follows from the inscrutable acts that we commit. The rule narrates the moral universe in which our acts can be comprehended.

I leave off with a recurrent theme of Kant, both in the first and third *Critique*: The Kantian subject is a world-builder. To quote Angelica Nuzzo:

We begin to orient ourselves in the labyrinth of nature, which is thereby progressively transformed into a systematic whole. . . . [W]e become [an] integral part of nature. Reflection reconciles us with the object we are judging and unifies us with it; our experience of the object is an experience of ourselves.<sup>61</sup>

In the context of my current theme, what Professor Nuzzo says is doubly true—the self is an object. We know the self only from experience and we reflect upon what universals this particular experience must embody. We attribute to this self-object a purposiveness which expresses nothing about this object’s constitution but rather expresses a subjective mode of apprehending this object.<sup>62</sup>

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59. ALLISON, FREEDOM, *supra* note 48, at 40 (“[F]or Kant an inclination or desire does not of itself constitute a reason for acting. It can become one only with reference to a rule or principle of action, which dictates that we ought to pursue the satisfaction of that inclination or desire.”).

60. *Id.*

61. NUZZO, IDEAL EMBODIMENT, *supra* note 5, at 242.

62. *Id.* at 139–40.