

POSITIVISM AND LEGALITY: HART'S EQUIVOCAL RESPONSE TO FULLER

JEREMY WALDRON*

Lon Fuller, in his response to H.L.A. Hart's 1958 Holmes Lecture and elsewhere, argued that principles of legality—formal principles requiring, for example, that laws be clear, general, and prospective—constitute the “internal morality of law.” This Article contends that Hart never offered a clear response. Fuller's claim supposes that observance of the principles of legality is both fundamental to law and inherently moral. In different writings, Hart seems variously to affirm and to deny that legality is a necessary criterion for the existence of law. Likewise, he sometimes suggests and elsewhere scorns the idea that legality has moral significance. This Article proposes that Hart's apparent inconsistency might actually reflect the complexity of the terms. Some degree of legality might be a prerequisite of law, while some failures of legality might not condemn it. Principles of legality might have contingent rather than inherent moral value, might have moral value that is severable from their legal value, or might have both positive and negative moral effect. The Article argues, furthermore, that even the conclusion Hart strains to avoid—that legality inevitably links morality and law—is compatible with Hart's positivism and opens a promising field for positivist jurisprudence.

INTRODUCTION

One of the most telling observations that Lon Fuller made in his 1958 response to H.L.A. Hart's Holmes Lecture ¹ concerned Hart's apparently blinkered view of the evils of rule by Hitler and the Nazi party in Germany from 1933 to 1945. Fuller said this: “Throughout his discussion Professor Hart seems to assume that the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman.”² Of course there was no disagreement between Hart and Fuller about the odiousness of the ends that the Nazis pursued and also the wicked means

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¹ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595–96 (1958).

² Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 650 (1958).

through which they pursued them: national aggrandizement, racial supremacy, aggressive war, genocide, and the use of murder, terror, torture, and reprisals as routine modes of political control. Every decent person recoils from the memory of these horrors.

But for Fuller there were also aspects of Nazi misrule that deserved the special attention of legal philosophers. One was the fact that along with the substance of the murderous Nazi tyranny came sustained violations of principles of legality—for example, violations of principles requiring prospectivity, publication of laws, elementary legal process, and legal restraints upon agencies of the state. Fuller thought that this particular aspect of the Nazi tyranny, which (in the first instance) concerned forms and procedures rather than ends and purposes, ought to be of special concern for jurisprudence because, he said, it might affect our willingness to describe Nazi rule as rule by law:

When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.³

In addition, Fuller thought it worth exploring the possibility that these formal and procedural violations might have a substantive moral significance—a significance that encouraged him to describe what I have called “principles of legality” as principles of “the morality of law itself,”⁴ law’s “own implicit morality,”⁵ “the internal morality of law,”⁶ and “the inner morality of law.”⁷ Fuller reminded his readers that governance in Germany in those years was not uniformly afflicted by these formal and procedural defects; private law was not affected in the same way or to the same extent. It was in the area of race laws and laws governing the operation of the political system (such as it was) that there was this tendency toward secrecy, retroactivity, and the repudiation of legal restraints:

It was in those areas where the ends of law were most odious by ordinary standards of decency that the morality of law itself was most flagrantly disregarded. In other words, where one would have

³ *Id.* at 660.

⁴ *Id.* at 644.

⁵ *Id.* at 645.

⁶ *Id.*

⁷ *Id.* at 650.

been most tempted to say, "This is so evil it cannot be a law," one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law." I think there is something more than accident here, for the overlapping suggests that legal morality cannot live when it is severed from a striving toward justice and decency.⁸

And so Fuller thought it worth entertaining the hypothesis that a system that abides by principles of legality is less likely to be committed to the sorts of odious ends that the Nazis pursued—or, if it is committed to those ends, is less likely to be able to pursue them as thoroughly as the Nazis did.

Fuller's reflections on these matters suggest a twofold agenda for jurisprudence. It might be worth asking, *first*, "What exactly is the relation between the principles of legality and the categories *law* and *legal system* that we use to characterize systems of rule?" And it might be worth asking, *second*, "What exactly is the relation between principles of legality and norms like justice, rights, and the advancement of the common good that we use to evaluate systems of rule?" Fuller's 1958 response to Hart's Holmes Lecture argued that these questions were worth asking for the sake of a subtler jurisprudential dissection of the Nazi horror than Hart seemed willing to undertake. But they might also be worth asking about legal systems and systems of rule in general. Fuller thought that asking and answering these questions promised to enrich the categories used in legal and political philosophy. But legal positivists have shied away from this suggestion out of fear that it might open the boundaries between legal and political philosophy and complicate our sense of the separability of law and morality. Indeed, this seems to have been the response of H.L.A. Hart. For although Hart acknowledged that what I have called the principles of legality formed an interesting and distinctive subset of the principles deployed in legal and political philosophy,⁹ he never openly and unequivocally addressed the two questions I have identified above for fear that the answers might undermine one of the distinctive pillars of his own jurisprudence.

I think Hart was inclined to see a preoccupation with legality and the rule of law as a source of confusion in jurisprudence; often one gets the impression that Hart thought that if anyone offered to talk about it, the responsible thing to do was to say something palliative and then shut down the discussion as quickly and firmly as possible. Principles of legality, Hart implied, may be among the principles we

⁸ *Id.* at 661.

⁹ See *infra* Part II.

should use for the evaluation of law, but their study is not part of the philosophical discipline that tries to tell us what law essentially is.

I do not mean that Hart was hostile to the rule of law as a political ideal. Neil MacCormick once became very indignant about a suggestion made by Fuller to the effect that Hart embraced a “managerialist” approach to law.¹⁰ Professor MacCormick said this in response:

Nobody who gave five minutes' cursory thought to Hart's various but largely self-consistent reflections about the moral relevance of positive law . . . could suppose that he is any less an enthusiast than L.L. Fuller for promoting the vision of a society in which freely communicating individuals willingly collaborate in their common social enterprises and freely grant each other friendly tolerance in their more particularistic or individual activities, and in which the resort by officials to means of mere coercion is minimized. Nobody could deny either the reality of his concern for justice or the firmness of his contentions that a precondition of justice as defined within his critical morality is the existence of a well working legal system and that a consequence of a just legal system's existence is the establishment of a network of mutual moral obligations of respect for law among the citizens within that jurisdiction.¹¹

It is not Hart's personal enthusiasm for the rule of law, however, that one misses in his jurisprudence. What one seeks is an elucidation of it and some basis for concluding that legality is a topic worthy of jurisprudential analysis. And what one finds is mostly equivocation.

In this Article, we will attempt to pin down what exactly Hart thought about legality. In Part I, we will sharpen our understanding of the two questions that Lon Fuller's comments on legality suggest for Hart's jurisprudence. In Part II, we will see that Hart certainly acknowledged the existence of principles that were generally called “principles of legality,” though it is not clear whether he himself was comfortable calling them that. In Part III, we shall look in detail, piece by piece, at what Hart said about these principles (whatever one calls them). In Part IV, we shall examine more systematically what appear to be inconsistencies in Hart's treatment of legality. And in Part V, we shall consider whether those inconsistencies are real or whether the semblance of inconsistency conceals a deeper coherence in his position.

As we shall see, Hart's comments about Fuller were rather dismissive. But apart from his dismissive tone, there is considerable

¹⁰ NEIL MACCORMICK, H.L.A. HART 157–58 (1981) (citing LON L. FULLER, *THE MORALITY OF LAW* 207–13 (rev. ed. 1969)).

¹¹ *Id.*

uncertainty about what Hart wanted to say in response to the questions that Fuller's discussion raises and what he would have said had he been willing to confront these questions explicitly.

I

TWO QUESTIONS ABOUT LEGALITY

I said above that Fuller's comments raised two important questions. The first is about the relation between legality and law:

Is there an important relation between the principles of legality and the concepts of *law* and *legal system*?

The second question is about the relation between legality and morality:

Is there an important relation between the principles of legality and morality?

The questions are important both individually and as a pair. Individually, they help us to understand the concept of legality (and the principles of legality). They are important as a pair because an affirmative answer to both might suggest, by transitivity, a connection between law and morality that would be of major importance (or major concern) from the point of view of modern analytical jurisprudence.

But the questions need to be sharpened a little. First, we should clarify their domain. They are questions about organized systems of rule—that is, about social or political systems in which human conduct is governed in one way or another. It is important to understand that a system of rule may or may not be a system of law (or rule by law), and that the concepts *law* and *legal system* pick out some systems of rule and distinguish them from others. I do not mean this to beg any questions. All participants in the jurisprudential debate recognize that some human societies organize themselves (or are organized, dominated, or exploited) on some basis other than law. In *The Concept of Law*, Hart talked, for example, about prelegal societies.¹² Of course, jurists may differ radically on the parameters of the class of nonlegal systems of rule. Those who give an affirmative answer to the first question—Is there an important relation between the principles of legality and the definition of a legal system?—may believe that it is a much larger class than those who give a negative answer are willing to acknowledge. For those who give an affirmative answer to the first question, the class of nonlegal systems of rule includes all those systems that call themselves “legal systems” but suffer from significant and pervasive failures of legality.

¹² H.L.A. HART, *THE CONCEPT OF LAW* 91–94 (2d ed. 1994).

A second point is that the term “important relation” is not well defined. Under its broadest definition, the answer to the first question is an easy “yes.” Of course there is *some* logical connection between principles of legality and the concept of law. Laws are what principles of legality are designed to evaluate; perhaps principles of legality are (as John Finnis argues) principles for keeping legal systems in good shape;¹³ or principles of legality may be designed (as Joseph Raz seems to think) to remedy or mitigate evils that only law makes possible.¹⁴ But the particular connection between law and legality that interests me in this Article is the possibility that Fuller raised: A system of rule might depart so far from the principles of legality as to undermine its claim to be called either a system of law or a legal system.¹⁵ Fuller is suggesting that the principles of legality might be related *criterially* to the concepts *law* and *legal system*; in other words, they may be among the necessary criteria for the proper application of these concepts to a system of rule. So the version of the first question that I want to consider is this:

(1) Is observance of the principles of legality among the necessary criteria for the application of the concepts *law* and *legal system* to a system of rule?

Question (1) is still quite loose inasmuch as it leaves open both the extent to which the principles of legality must be observed and the appropriate place of this criterion among all the other criteria for the application of the concepts *law* and *legal system*. Obviously, observance of the principles of legality is not a sufficient condition for the application of these concepts (except to the extent that the principles already embody reference to other criteria by mentioning rules, courts, etc.). Fuller considered the possibility that the observance of legality—or as he called it, the “internal morality of law”¹⁶—is a necessary condition for a system of rule to be regarded as a legal system. But Fuller also acknowledged that observance of legality is a matter of degree for several of the principles it includes. Also, legality, on his account, has several dimensions; the various requirements of legality are not utterly independent of one another but can vary independently up to a point. In his later formulations, Fuller seemed to suggest that nothing less than a comprehensive failure in at least one of

¹³ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270 (1980) (“The name commonly given to the state of affairs in which a legal system is legally in good shape is ‘the Rule of Law’ . . .”).

¹⁴ JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 224 (1979).

¹⁵ Fuller, *supra* note 2, at 660.

¹⁶ *Id.* at 645.

these dimensions should lead us to withhold the term *law* from the resulting system of rule.¹⁷ We might adopt a tighter or a looser view than this. Also, we should pay attention not just to the extent of the failure in the case of a particular norm or prescription (leading us perhaps to withhold the term *law* from that norm or prescription in extreme cases) but also to the percentage of the norms or prescriptions within the system that were affected in this way.

In the discussion that follows, however, I will not try to pin things down any more than this. We have already sharpened the first question enough to make it a matter of open controversy between, say, modern positivists and their opponents. We can imagine some modern positivists—Hart may well be among them—saying that whether something is a legal system is one thing, and the extent to which it satisfies the criteria of legality is another. Such a position requires a negative answer to (1), whether the question is about Fuller's particular view about the criterial connection or about a somewhat looser view than his. Beyond these observations, there may also be some additional indeterminacy in what individual principles of legality actually mean; I will deal with those issues as they arise in our survey and evaluation of Hart's response to question (1).¹⁸

Having noted these considerations, we can imagine two positions that a legal philosopher might adopt in response to question (1). The first is a position close to Fuller's:

(1a) Observance of the principles of legality is among the necessary criteria for the application of the concepts *law* and *legal system*. There comes a point in a system's failure to observe the principles of legality where we would have to say that it does not really count as a legal system or a system of law at all.

And the second is the position that some positivists might adopt:

(1b) Observance of the principles of legality is not among the necessary criteria for the application of the concepts *law* and *legal system*. Whether a system of rule counts as a legal system is determined independently of whether or to what extent that system observes the principles of legality.

I shall argue that, in different places, Hart adopts both of these positions.

We now turn to the second question: Is there an important relation between the principles of legality and morality? This needs less in the way of fine-tuning. The bland reference to "morality" requires

¹⁷ LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) ("A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all . . .").

¹⁸ See *infra* Parts IV–V.

a little more specification, because we do not want Lon Fuller answering “yes” to the second question simply on account of his stipulative use of the phrase “internal morality of law” to describe the principles of legality.¹⁹ “Morality” in the second question refers to moral values like justice, rights, liberty, dignity, and advancement of the common good—values that we use in the substantive evaluation of systems of rule. If Fuller (or, for that matter, Hart) wants to argue for the moral significance of legality, he must show a connection between the principles of legality that characterize the operation of a given legal system and the substantive moral quality of that legal system. In other words, the second question asks whether observance of the principles of legality makes a positive difference to the moral quality of rule in a given system—e.g., makes it more just, more respectful of rights, or better attuned to the common good. So we might reformulate the question as follows:

(2) Does observance of the principles of legality make an affirmative difference to the moral quality of a system of rule?

As with question (1), we might be tempted to try to pin down the extent of the observance of the principles of legality that is supposed to trigger a difference in moral quality. It could be that very small variations make little or no difference, whereas gross variations are quite significant. I prefer to leave this issue open.

Fuller is famous for having offered a very strong affirmative answer to question (2). He suggested that systems of rule that observe the principles of legality are much less likely to be wicked, unjust, or tyrannical. Maintaining that “coherence and goodness have more affinity than coherence and evil,”²⁰ that “when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness,”²¹ and that “even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law,”²² Fuller believed in a significant correlation between legality and justice. This is a very strong position. But those of us who are less confident in these premises or in Fuller’s conclusion may still give a *moderately* affirmative answer to question (2):

(2a) Observance of the principles of legality tends to make a positive moral difference to a system of rule.

¹⁹ See FULLER, *supra* note 17, at 4 (first appearance of phrase).

²⁰ Fuller, *supra* note 2, at 636.

²¹ *Id.*

²² *Id.* at 637.

The basis for this moderate affirmative response might be that respect for the principles of legality is a way of respecting human dignity or of making important concessions to liberty—that is, to people's ability to control important aspects of their own lives in a meaningful way.

A negative response to question (2) might be motivated either by a denial that the principles of legality make any moral difference or by a belief that the moral difference may in some cases be negative, so that one cannot count on legality's making things better. The negative response might be as follows:

(2b) No reliable generalization can be made about the moral difference that observance of the principles of legality makes to a system of rule.

In addition, there might be some who think that observance of the principles of legality tends, reliably and systematically, to make matters worse, morally speaking. This more extreme position may have been the position of leftist critics of the rule of law in the past. Thus Morton Horwitz once remarked:

I do not see how a Man of the Left can describe the rule of law as "an unqualified human good"! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.²³

Horwitz was reviewing a book in which an English Marxist, E.P. Thompson, adopted a surprising position—certainly surprising to Horwitz—akin to (2a):

[T]here is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.²⁴

Thompson's understanding of the rule of law may be a little more expansive than Hart's and Fuller's understanding of legality;

²³ Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L.J.* 561, 566 (1977) (reviewing DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975), and E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975)).

²⁴ THOMPSON, *supra* note 23, at 266.

Thompson seems to adopt a substantive view of the rule of law that actually identifies it directly with the desirable restraint of power.²⁵ Substantive conceptions of the rule of law are very controversial.²⁶ Fortunately, the idea of a substantive conception of the rule of law is not at issue in this Article. As we shall see in Part II, it is common ground between our two protagonists—Hart and Fuller—that legality is best understood in the first instance in formal/structural or procedural terms. It is the *further* moral significance that those formal/structural or procedural principles may have that is at issue in question (2); to give an affirmative answer to (2) does not mean that one has adopted a substantive version of the rule of law.

II

HART'S USE OF THE TERM "PRINCIPLES OF LEGALITY"

What did Hart understand the "principles of legality" to mean? Hart's most extensive discussion of them may be found in a little-known essay—*Problems of Philosophy of Law*—that he wrote in 1967 for Paul Edwards's *Encyclopedia of Philosophy*.²⁷

The *Encyclopedia* essay is divided into three parts: The first part deals with "Problems of Definition and Analysis,"²⁸ the second with "Problems of Legal Reasoning,"²⁹ and the third with "Problems of the Criticism of Law."³⁰ After discussing substantive criteria of evaluation of legal systems, Hart goes on to say the following:

Laws, however impeccable their content, may be of little service to human beings and may cause both injustice and misery unless they generally conform to certain requirements which may be broadly termed procedural These procedural requirements relate to such matters as the generality of rules of law, the clarity with which they are phrased, the publicity given to them, the time of their enactment, and the manner in which they are judicially applied to particular cases. The requirements that the law, except in special

²⁵ For example, Thompson cites torture and the use of troops against crowds as examples of violations of the rule of law. *Id.* at 265.

²⁶ See, e.g., B.Z. Tamanaha, *The Tension Between Legal Instrumentalism and the Rule of Law*, 33 SYRACUSE J. INT'L L. & COM. 131, 141 (2005) (characterizing Enlightenment as having "undermined the very idea that law had or could have any kind of immanent substantive content or integrity"); Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91, 91 (2007) (arguing that substantive conceptions of rule of law are "needlessly cynical" about capacity of formal/procedural rule of law criteria to constrain power).

²⁷ H.L.A. Hart, *Problems of Philosophy of Law*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 264 (Paul Edwards ed., 1967).

²⁸ *Id.* at 264–68.

²⁹ *Id.* at 268–72.

³⁰ *Id.* at 272–75.

circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality. The principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute are often referred to as rules of natural justice. These two sets of principles together define the concept of the rule of law³¹

The taxonomy may be a little confusing, as there is no universal standard for parsing these concepts. I would call the principles that deal with generality, clarity, prospectivity, and the like *formal* principles rather than procedural principles; the truly procedural principles are those to which Hart refers as “principles of natural justice”³² (or, as American lawyers redundantly say, “procedural due process”). But the general picture is pretty clear. There are principles about the form that legal norms should take (formal principles), and there are principles about the broad character of the procedures that should be used in their application (procedural principles). Together, those principles of legality and due process add up to what is sometimes called the rule of law.³³

The first set of principles—the formal ones, which Hart called “principles of legality”³⁴—are roughly what Lon Fuller referred to as the “inner morality of law.”³⁵ Hart’s comments in the *Encyclopedia* essay—made without any explicit reference to Fuller—are about as close as Hart ever came to acknowledging the importance of Fuller’s contribution.

Is it of any interest that Hart seems reluctant actually to *use* (as opposed to mentioning) the term “principles of legality”? Mostly, he attributes its use to others. In the *Encyclopedia* essay, he speaks of

³¹ *Id.* at 273–74.

³² For a discussion of the idea of natural justice in this procedural sense, see generally GEOFFREY A. FLICK, *NATURAL JUSTICE: PRINCIPLES AND PRACTICAL APPLICATION* (2d ed. 1984), and PAUL JACKSON, *NATURAL JUSTICE* (2d ed. 1979).

³³ For important discussions of the rule of law, see FINNIS, *supra* note 13, at 270–76, JOHN RAWLS, *A THEORY OF JUSTICE* 235–43 (1971), and RAZ, *supra* note 14.

³⁴ Hart, *supra* note 27, at 274.

³⁵ FULLER, *supra* note 17, at 42. Incidentally, I find it odd that Fuller said so little about the procedural side of the rule of law in chapter two of *The Morality of Law*, especially in view of his own very intense and focused interest elsewhere in the forms and limits of adjudication. *Id.* at 33–94. In fact, Fuller also made the mistake of calling the formal principles procedural, as though everything that is not substantive is procedural. For an example of Fuller’s interest in genuinely procedural issues, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

principles that are “usually referred to as the principles of legality,”³⁶ while in *The Concept of Law*, Hart speaks—all too briefly—of “the requirements of justice which lawyers term principles of legality.”³⁷ It is not clear why he does this. It is as though he could not bring himself to use the term in his own voice, for fear that “legality” would connote a more intimate connection between these principles and the very idea of law than he was comfortable with. In his 1965 review of *The Morality of Law*, Hart says that although “principles of legality” is Fuller’s term, he (Hart) certainly prefers it to the phrase “the inner morality of law” (for reasons we shall explore in a moment).³⁸

Hart was less coy about the term in his book *Law, Liberty and Morality*.³⁹ There, he considered the 1961 English decision in *Shaw v. Director of Public Prosecutions*,⁴⁰ in which the House of Lords revived the old common law offense of conspiracy to corrupt public morals. Hart said this about the ruling:

[The House of Lords] seemed willing to pay a high price in terms of the sacrifice of other values for the establishment . . . of the Courts as *custos morum*. The particular value which they sacrificed is the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not.⁴¹

This is the single exception to Hart’s habit of not using the phrase “principles of legality” himself when he could avoid it. I would not attach any significance to these purely terminological issues, were it not for Hart’s equivocal response to the substance of the concerns that he said others had assembled under the auspices of this term.

³⁶ Hart, *supra* note 27, at 274 (emphasis added).

³⁷ HART, *supra* note 12, at 207 (emphasis added). For a similar locution for “natural justice”—“the procedural standards known to English and American lawyers as ‘Natural Justice’”—see *id.* at 206.

³⁸ H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1284 (1965).

³⁹ H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963). This book, Hart’s contribution to the debate with Lord Patrick Devlin about the use of law to enforce conventional morality, was a response to Lord Devlin’s 1958 British Academy Maccabean Lecture, *Morals and the Criminal Law*, later reprinted in PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 1 (1965).

⁴⁰ [1962] A.C. 220 (H.L.) (appeal taken from Eng.) (U.K.). This was the “Ladies’ Directory” case, in which the Law Lords dredged up a nonstatutory common law crime of conspiracy to corrupt public morals and used it to convict a man who had published a directory advertising the services of prostitutes. See *id.* at 266–68.

⁴¹ HART, *supra* note 39, at 12.

III

WHAT DOES HART SAY ABOUT LEGALITY?

What, apart from taxonomy and terminology, did Hart actually say about the principles variously referred to as principles of legality or the rule of law? “Rather little” is the answer, and though much of what he did say is suggestive, very little of it is consistently presented or rigorous by the standards of other aspects of Hart’s legal philosophy. In this Part, I will review the record of Hart’s comments in various writings on this matter. In Part IV, I will substantiate my complaint about its inconsistency.

A. *Hart’s 1958 Holmes Lecture*

In his Holmes Lecture, Hart first mentioned the principles of legality in an effort to defend Jeremy Bentham against the charge of indifference to the evaluation of law:

One by one in Bentham’s works you can identify the elements of the *Rechtstaat* and all the principles for the defense of which the terminology of natural law has in our day been revived. Here are liberty of speech, and of press, the right of association, the need that laws should be published and made widely known before they are enforced, the need to control administrative agencies, the insistence that there should be no criminal liability without fault, and the importance of the principle of legality, *nulla poena sine lege*.⁴²

The most striking thing about this paragraph is the way that it runs together, in a rather casual way, a variety of ideals. Some of them are political ideals, such as free speech and freedom of assembly, separable and distinct on almost any account from the idea of law; some, like the requirement that laws be published and the principle *nulla poena sine lege* (no punishment without law), are arguably (though not indisputably) connected to the concept of law; and some, like control of administrative agencies and the principle of no liability without fault, fall in between.

Hart links all of these and uses them, along with some observations about Bentham’s opposition to slavery, as evidence for the general proposition that Bentham was not a “dry analyst[] fiddling with verbal distinctions while cities burned, but . . . the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws.”⁴³ The implication of running all these together is that the principles of legality—as much as the principle of free speech or opposition to slavery—are simply

⁴² Hart, *supra* note 1, at 595–96.

⁴³ *Id.* at 596.

moral criteria for better laws (i.e., what the law ought to be) and that they have little or nothing to do with the concept of law itself. The principles of legality are all associated without distinction in this passage with “principles for the defense of which the terminology of natural law has in our day been revived.”⁴⁴ And the assortment of principles that Hart assembled under this heading reinforces Fuller’s observation that when law is distinguished from morality in positivist jurisprudence, “the word ‘morality’ stands indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law.”⁴⁵

Another point in the 1958 lecture at which Hart touched on these issues was his discussion of Nazi rule in Germany. Hart alluded to the principles of legality in a suggestion he made concerning the Grudge Informer Case, in which the question arose of punishing a woman in 1949 for having denounced her husband to the authorities in 1944 under oppressive Nazi statutes.⁴⁶ Hart took the position that, instead of declaring the Nazi statutes to have been nullities, it would have been better to enact a statute after 1945 and apply that statute retroactively in order to punish the woman’s vindictive action:

Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.⁴⁷

Here, the principle of prospectivity is treated as just another moral principle, albeit “a very precious principle of morality.” It is “endorsed by most legal systems” but is not spoken of as being tied in any special way to the concept of law.

Principles of legality are sometimes thought to include the requirement that laws be general rather than in personam or ad hoc. Hart also addressed the significance of this requirement in his 1958 lecture:

If we attach to a legal system the minimum meaning that it must consist of general rules—general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals—this meaning connotes the principle of

⁴⁴ *Id.* at 595.

⁴⁵ Fuller, *supra* note 2, at 635.

⁴⁶ Fuller gives a good account of this case, *id.* at 652–57, setting out the statutes, *id.* at 653, 654. Hart’s discussion of the case is in *Positivism and the Separation of Law and Morals*. See Hart, *supra* note 1, at 618–21; see also David Dyzenhaus, *The Grudge Informer Revisited*, 83 N.Y.U. L. REV. 1000 (2008).

⁴⁷ Hart, *supra* note 1, at 619.

treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law. So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.⁴⁸

In this passage, generality (as a principle of legality) *is* associated explicitly with the concept *law* or at any rate with the concept of a *legal system*. It is part, Hart says, of the “minimum meaning” of the latter, and it does have some limited moral significance. This statement is about as close as Hart ever came to considering, together and consistently, the two questions that I said earlier Fuller had put on the agenda of jurisprudence.

It is interesting, finally, that in the same passage Hart also associated generality with his discussion of what he referred to as “natural justice” (or what we might call procedural due process) as a moral or quasi-moral principle related to the concept of a legal system:

Natural procedural justice consists . . . of those principles of objectivity and impartiality in the administration of the law which implement just this aspect of law [treating like cases alike] and which are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequalities in this sense.⁴⁹

This may underestimate somewhat the tasks of procedural due process, which go beyond ensuring the consistency that genuine generality requires. Still, it is, for Hart, an important early concession.

B. *Hart's Book: The Concept of Law*

In many respects, Hart's 1958 lecture adumbrated more extensive arguments about generality and its connection to due process as addressed in his magisterial 1961 work on jurisprudence, *The Concept of Law*.⁵⁰ Chapter VIII of *The Concept of Law* is devoted to a discussion of various aspects and meanings of morality (which Hart's positivism strives to distinguish from law);⁵¹ the section most relevant here is devoted specifically to justice. Hart argues that justice—as a dis-

⁴⁸ *Id.* at 623–24.

⁴⁹ *Id.* at 624.

⁵⁰ HART, *supra* note 12.

⁵¹ In *The Concept of Law*, Hart provides the following definition of legal positivism: “Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality” *Id.* at 185–86.

tinctive segment of morality—often involves ideas of equality and treating similar cases in a similar way:

[I]t might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice. This close connection between justice in the administration of the law and the very notion of a rule has tempted some famous thinkers to identify justice with conformity to law. Yet plainly this is an error . . . for such an account of justice leaves unexplained the fact that criticism in the name of justice is not confined to the administration of the law in particular cases, but the laws themselves are often criticized as just or unjust.⁵²

Hart goes on to argue, fairly convincingly, that this more critical use of justice cannot be accounted for in terms of any background idea that justice (in a more limited sense) and generality, as a legalistic ideal, might share.⁵³

Legality is sometimes associated with the twin principles that laws should be clear and that it should be clear which norms have the status of law and which norms do not. Hart discusses both of these ideas in *The Concept of Law* and generally takes the position that, although they are important principles, they are not the be-all and end-all of legal morality. So far as primary rules (i.e., rules governing basic conduct) are concerned, he maintains that we have to balance the need for certainty—“the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance”—against the need to leave certain issues open so that they can be settled as they arise in concrete cases.⁵⁴ The reference to safety in regard to the principle of certainty is key here: Many defenders of the rule of law have emphasized exactly this sort of safety.⁵⁵

Hart discusses the issue of clarity with regard to the recognition of law—clarity as to which norms are law and which are not—in the “Postscript” to *The Concept of Law*, added by the editors of that book’s second edition in 1994.⁵⁶ Hart had originally argued that the

⁵² *Id.* at 161. Note that “some famous thinkers” is not an allusion to Lon Fuller but rather to some obscure views of Thomas Hobbes and John Austin. *Id.* at 299–300 n.161. See also *id.* at 206 (briefly discussing generality as “the germ at least of justice”).

⁵³ *Id.* at 161–67.

⁵⁴ *Id.* at 128–30 (“[W]e 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.”).

⁵⁵ For a recent example, consider the use of the image of law as a safe causeway in Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 *GEO. J. INT’L L.* 353, 354 (2006).

⁵⁶ HART, *supra* note 12, at viii–x, 238–76.

rule of recognition served the need of every system of social control for “certainty” in people’s understanding of which rules are going to be coercively enforced by society with the centralized social and physical pressure that it coordinates.⁵⁷ But, in the “Postscript,” Hart argued once again that the need for certainty is not an absolute. He associated this playing-down of certainty with his willingness, at the end of his life, to have his work characterized as a form of “soft positivism”:

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. . . . 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. . . . Only if the certainty-providing function of the rule of recognition is treated as paramount and overriding could the form of soft positivism that includes among the criteria of law conformity with moral principles or values which may be controversial be regarded as inconsistent.⁵⁸

Apart from this argument about generality and uncertainty, Hart’s most important discussion of legality in *The Concept of Law* is also his briefest. In the course of a discussion of the various ways in which law might be related to morality, Hart invites us to consider

what is in fact involved in any method of social control . . . which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey,

⁵⁷ See *id.* at 94 (“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.’”).

⁵⁸ *Id.* at 251–52. I regard Hart’s willingness to entertain soft positivism as an issue mostly distinct from the implications of his equivocal views about legality. I will develop a related analogy at the end of this Article. See *infra* note 116 and accompanying text. But it is interesting that he sees a possible negative connection: The more one emphasizes principles of legality requiring certainty in the law, the more one might be driven toward a harder form of positivism. I have sometimes wondered whether hard positivism might not be associated naturally with normative positivism—that is, with views like Thomas Hobbes’s that give substantive moral reasons for requiring a clear distinction between law and morality. See Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 411, 412–13 (Jules L. Coleman ed., 2001); THOMAS HOBBS, *LEVIATHAN* 183–200 (Richard Tuck ed., Cambridge Univ. Press 2000) (1651) (asserting that law’s function—to promote peace by settling or preempting moral disputes—would be undermined by need to engage in tendentious moralizing in order to identify law). Hart raises the alternative possibility that, leaving aside substantive values like peace, hard positivism is more responsive to formal and procedural principles of legality such as the principle of certainty.

and in general they must not be retrospective, though exceptionally they may be.⁵⁹

Hart said that “[p]lainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality.”⁶⁰ (Again, note the *oratio obliqua* use of that phrase.) But, in *The Concept of Law*, Hart had no further interest in explicating what “principles of legality” might mean. His main interest seemed to be squelching any inference that might lead from an acknowledgment of the value of the principles of legality to a position like Fuller’s about law’s overall moral potential. Hart alluded briefly to Fuller’s own view of these principles—“one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality”⁶¹—but made no comment of his own except to say, acidly, that these formal requirements are “unfortunately compatible with very great iniquity.”⁶² That, he seemed to indicate, was more or less all that needed to be said. In his mind, it seemed that the crucial thing was to protect the separability thesis.⁶³ According to Hart, Fuller was wrong in thinking that the imposition of the requirements of legality guaranteed that the laws would not be evil. Once that was established, the principles of legality were of little interest for jurisprudence.

C. *Hart’s Encyclopedia Essay: Problems of Philosophy of Law*

In his essay for Paul Edwards’s *Encyclopedia of Philosophy*, Hart again raised the point that the principles of legality were “compatible with very great iniquity.” Even if principles of legality are very important, he said, we must not infer that “it will always be reasonable or morally obligatory for a man to obey the law when the legal system provides him with [the] benefits [of principles of legality and natural justice], for in other ways the system may be iniquitous.”⁶⁴ This is somewhat less dismissive than his comments in *The Concept of Law*. For one thing, it acknowledges that there *are* important moral values underpinning the principles of legality (even though they may be outweighed by this ubiquitous “iniquity” that he harps so heavily upon). Later in this Article, we will have to address the difference between saying (i) that nothing of moral significance follows from the fact that a system conforms (or fails to conform) to principles of legality, and

⁵⁹ HART, *supra* note 12, at 206–07.

⁶⁰ *Id.* at 207.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *supra* note 51 for Hart’s clearest summary of the separability thesis.

⁶⁴ Hart, *supra* note 27, at 274.

(ii) that nothing of *conclusive* moral significance follows from the fact that a system conforms (or fails to conform) to principles of legality.⁶⁵ In the *Encyclopedia* essay, Hart clearly seems to be saying (ii), whereas it is not clear which of these positions he was asserting in *The Concept of Law*.

Even if Hart acknowledges that the principles of legality have affirmative moral significance, such significance still may have many dimensions. We still must ask how much conformity to the principles of legality affects the substantive value or justice of the rules, and how much the absence of such conformity contributes to substantive injustice and iniquity in the law.

Another dimension, mentioned by Hart in the passage just quoted, is our obligation to obey the laws. Hart says that we must not infer anything about *political obligation* from the fact that laws conform to legality.⁶⁶ Again, this may be for two reasons, partly analogous to (i) and (ii) in the previous paragraph. It may be wrong to infer obligation from legality, (i*), because considerations of legality make no contribution at all to the question of our moral obligation to obey the laws (whether or not they make any contribution to the question of the substantive justice of the norms) or (ii*) because, although considerations of legality make *some* contribution to the question of our moral obligation to obey the laws, they do not conclude or settle that question. Hart's account prompts us to make these distinctions, though Hart himself shows little interest in exploring them.

In the *Encyclopedia* essay, Hart also talks about the efficiency implications of the principles of legality. He says that "general rules clearly framed and publicly promulgated are the most efficient form of social control."⁶⁷ He is describing efficiency from the point of view of the ruler. But then he immediately goes on to say that "from the point of view of the individual citizen, they are more than that."⁶⁸ Conformity with these principles is "required if [the individual citizen] is to have the advantage of knowing in advance the ways in which his liberty will be restricted in the various situations in which he may find himself, and he needs this knowledge if he is to plan his life."⁶⁹

Hart also says that generality helps the individual citizen because it gives him information about what others will be held to, which "increases the confidence with which he can predict and plan his

⁶⁵ See *infra* Part V.

⁶⁶ Hart, *supra* note 27, at 275.

⁶⁷ *Id.* at 274.

⁶⁸ *Id.*

⁶⁹ *Id.*

future.”⁷⁰ Efficiency may still be involved here, but it is no longer efficiency from the point of view of the ruler. It is respect by the ruler for the conditions of efficiency considered from the point of view of the citizen. Insistence upon such respect is almost certainly going to be a moral requirement, for it asks the ruler to facilitate the pursuit of interests other than his own even when doing so conflicts with his own interests.

D. *Hart's Review of The Morality of Law*

This distinction between the different ways in which efficiency might feature in lawmaking may also help in our assessment of a comment that Hart made in his review of Fuller's book: Hart said that Fuller's "insistence on classifying these principles of legality as a 'morality' is a source of confusion both for him and his readers."⁷¹ They may, said Hart, be "principles of good legal craftsmanship,"⁷² but that does not make them into a morality. In a vivid analogy, Hart asked whether a set of craft principles for poisoners would qualify as a "morality" of poisoning:

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," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") 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.⁷³

Now, this analogy depends on seeing the principles of legality simply as principles for the efficient pursuit of the lawmaker's purpose, and some of what Fuller says in his analogy about craftsmanship and carpentry does encourage that reading.⁷⁴ No doubt, if the principles of legality were just principles of efficiency from the lawmaker's point of view—i.e., "How To Do Things with Rules"—then it *would*

⁷⁰ *Id.*

⁷¹ Hart, *supra* note 38, at 1285.

⁷² *Id.* at 1286.

⁷³ *Id.*

⁷⁴ See FULLER, *supra* note 17, at 96, 155–56. Fuller also presents these ideas in *Positivism and Fidelity to Law*, *supra* note 2, at 644–45, and encourages this instrumentalist view. But in the *Reply to Critics* added to the revised edition of *The Morality of Law*, Fuller adopted a much more nuanced position in which he indicated that the most important requirements of legality should not be viewed in this way and attacked his critics for "maintaining the view that the principles of legality represented nothing more than maxims of efficiency for the attainment of governmental aims." FULLER, *supra* note 17, at 214. See generally *id.* at 200–24.

be inappropriate to call them a morality, at least (as Hart said) without showing that “the purpose of subjecting human conduct to the governance of rules, no matter what their content” was “of ultimate value in the conduct of life.”⁷⁵

But later in the review, Hart seems to equivocate in an attempt to respond more defensively to Fuller’s characterizations of legal positivism. Fuller suggested that legal positivism was insufficiently concerned with legality—that positivists (in Hart’s words) “‘cannot even explain what would be wrong with a system of laws that were wholly retroactive,’ and that we cannot give any adequate explanation of why normally legal rules are general.”⁷⁶ In response, Hart contends that it is perfectly possible to develop an account of what would be wrong with such a system. And, though he does not say so explicitly, he intimates that such an account would be firmly located within the realm of the moral. His response takes us back to one of the earliest passages we considered in the Holmes Lecture:⁷⁷

Why, to take the simplest instances, could not writers like Bentham and Austin, who defined law as commands, have objected to a system of laws that were wholly retroactive on the ground that it could make no contribution to human happiness and so far as it resulted in punishments would inflict useless misery? Why should not Kelsen or I, myself, who think law may be profitably viewed as a system of rules, not also explain that the normal generality of law is desirable not only for reasons of economy but because it will enable individuals to predict the future and that this is a powerful contribution to human liberty and happiness?⁷⁸

Hart goes on to imagine that Fuller might complain that Hart’s own use or Bentham’s use of these principles is not really moral, because it is just oriented to human happiness; Hart wrote that the principles of legality “are valued so far only as they contribute to human happiness or other substantive moral aims of the law,”⁷⁹ and Fuller might characterize this position as implying that those principles are not really moral in themselves. Hart regards that quite rightly as a distinction without a difference.⁸⁰ But given Hart’s insistence here on the moral character of his own use of principles of prospectivity and generality in the evaluation of law (or Bentham’s, or Kelsen’s), it is now difficult to see why Hart thought himself entitled

⁷⁵ Hart, *supra* note 38, at 1287.

⁷⁶ *Id.* at 1290 (quoting FULLER, *supra* note 17, at 147).

⁷⁷ See *supra* note 42 and accompanying text.

⁷⁸ Hart, *supra* note 38, at 1290–91.

⁷⁹ *Id.* at 1291.

⁸⁰ *Id.*

to say that Fuller's insistence on the moral character of these principles is like talking about the morality of poisoning.

E. *Hart's Book: Punishment and Responsibility*

Apart from the passage on *Shaw v. Director of Public Prosecutions* that I cited earlier,⁸¹ the only other significant mention of (or allusion to) the principles of legality in Hart's work is in his book on the jurisprudence and policy of the criminal law, *Punishment and Responsibility*.⁸² In an important passage in that book, Hart considered what would happen if Barbara Wootton's proposal—that strict liability should comprehensively replace ordinary criminal liability—were to prevail:⁸³

Among other things, we should lose the ability which the present system in some degree guarantees to us, to predict and plan the future course of our lives within the coercive framework of the law. For the system which makes liability to the law's sanctions dependent upon a voluntary act not only maximizes the power of the individual to determine by his choice his future fate; it also maximizes his power to identify in advance the space which will be left open to him free from the law's interference.⁸⁴

Hart presented the same point in a more sustained way in a 1965 review of Wootton's book:

In a system in which proof of *mens rea* was no longer a necessary condition for conviction the occasions for official interferences in our lives would be vastly increased. . . . [E]very blow, even if it was apparent that it was accidental or merely careless . . . would in principle be a matter for investigation under the new scheme. This expansion of police powers would bring with it great uncertainty for the individual citizen and, though official interference with his life would be more frequent, he will be less able to predict their incidence if any accidental breach of the criminal law may be an occasion for them.⁸⁵

Hart here makes no reference, explicit or implicit, to the phrase "principles of legality." But it is clear that he is invoking such principles and indeed values and concerns traditionally associated with the rule

⁸¹ See *supra* notes 40–41 and accompanying text.

⁸² H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968).

⁸³ For Baroness Wootton's views, see generally BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (2d ed. 1981).

⁸⁴ HART, *supra* note 82, at 181–82. For bringing this passage to my attention, I am grateful to the excellent discussion in Hamish Stewart, *Legality and Morality in H.L.A. Hart's Theory of Criminal Law*, 52 SMU L. REV. 201, 204 (1999).

⁸⁵ H.L.A. Hart, Book Review, 74 YALE L.J. 1325, 1330 (1965) (reviewing BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963)).

of law. And he shows no reluctance to say that these can be used as genuine policy-based or moral critiques of legislative proposals; that is, they are not just instrumentalist critiques to the effect that a lawmaker who set up a Wootton-type scheme would be frustrating his own purposes.

* * * *

To my knowledge, what I have set out in this Part is the sum total of H.L.A. Hart's observations on legality, natural justice (procedural due process), and the rule of law—and their relation to morality, on the one hand, and the concepts *law* and *legal system*, on the other. In the next Part, I will analyze the consistency of all of this.

IV

HART'S INCONSISTENCY

I implied at the outset that Hart's discussion of legality is equivocal.⁸⁶ It often seems to be motivated by a desire to say nothing more than is necessary to dispatch Lon Fuller's critique—and, if what is necessary to refute Fuller in one discussion is inconsistent with what is necessary to refute Fuller in another context, Hart seems to rest his hopes of prevailing on the fact that many of his readers will be more interested in Fuller's discomfiture than in the (in)consistency of Hart's refutation. It is, I think, a shabby episode in the history of modern positivist legal philosophy—the more so since Hart, even according to Fuller, is supposed to hold the high ground as far as standards of analytic clarity are concerned.⁸⁷ Hart's treatment of Fuller gives standards of analytic clarity in legal philosophy a bad name.

The basic contradiction in Hart's account of the principles of legality lies in the answers he gives to the two questions that I said at the outset were suggested by Fuller's reflections on the case of Nazi Germany:

- (1) Is observance of the principles of legality among the necessary criteria for the application of the concepts *law* and *legal system* to a system of rule?; and
- (2) Does observance of the principles of legality make an affirmative difference to the moral quality of a system of rule?

To question (1) Hart says two things, corresponding roughly to the possible answers (1a and 1b) we imagined in Part I. Following the

⁸⁶ See *supra* text accompanying note 9.

⁸⁷ See Fuller, *supra* note 2, at 630 ("Professor Hart has made an enduring contribution to the literature of legal philosophy. I doubt if the issues he discusses will ever again assume quite the form they had before being touched by his analytical powers.").

reasoning of (1b), he suggests that principles of legality are to be grouped among those principles and values clearly distinguished from the concept of law by the positivist's separability thesis. They are not criteria for calling something *law* or a *legal system*. Instead, they are to be grouped among "the principles for the defense of which the terminology of natural law has in our day been revived . . . [like] liberty of speech, and of press" and also like the principle forbidding slavery.⁸⁸

But Hart's position also sounds like (1a) when he contends that the principles of legality are in fact very closely related to the ideas of *law* and a *legal system*. He says of the principle of generality, for example, that "we attach to a legal system the minimum meaning that it must consist of general rules."⁸⁹ Moreover, toward the end of *The Concept of Law*, he associates Fullerian principles with the viability of any efficacious method of social control.⁹⁰ That last point may not exactly involve a logical connection to the morality of the method of social control,⁹¹ but it does seem to resemble a fundamental criterial connection of the kind that makes up the tissue of other aspects of Hart's jurisprudence (such as the connection between law and the idea of secondary rules or the specification of the two existence conditions for a legal system).⁹²

The apparent inconsistency of Hart's responses to the first question, resembling both (1a) and (1b), might be resolved by reference to the carelessness of Hart's formulations, were it not for the fact that it matches an inconsistency in the way he answers the second question. For, in response to question (2)—which asks about the relation between the principles of legality and moral values like justice, rights, and the common good—Hart also returns two quite different answers. Following (2a), on the one hand, he groups the principles of legality among the criteria of substantive justice. We saw this in his 1958 discussion of Bentham,⁹³ in his treatment of the Grudge Informer Case,⁹⁴ and in his discussion of *Shaw v. Director of Public Prosecutions*.⁹⁵

⁸⁸ See Hart, *supra* note 1, at 595–96.

⁸⁹ *Id.* at 623.

⁹⁰ See *supra* notes 59–60 and accompanying text.

⁹¹ But as the controversy about Dworkin's "semantic sting" has shown, logical connections are not really the issue. See RONALD DWORKIN, *LAW'S EMPIRE* 45–46 (1986) (characterizing positivist theories as "semantic" theories that cannot accommodate reality of theoretical disagreement about law); HART, *supra* note 12, at 244–48 (refuting Dworkin's characterization and asserting openness of positivism to such disagreement).

⁹² See HART, *supra* note 12, at 91–99 (discussing secondary rules); *id.* at 110–17 (discussing existence conditions).

⁹³ Hart, *supra* note 1, at 594–600; see also *supra* note 42 and accompanying text.

⁹⁴ Hart, *supra* note 1, at 618–20; see also *supra* notes 46–47 and accompanying text.

⁹⁵ HART, *supra* note 39, at 12; see also *supra* notes 39–41 and accompanying text.

Recall that in the Grudge Informer Case, he referred to the principle prohibiting retroactive laws as “a very precious principle of morality endorsed by most legal systems.”⁹⁶ This is not just idle talk. Hart gives a brief but substantive account of why the principles of legality have moral value. He says, in his review of Fuller’s book, that laws “that were wholly retroactive . . . could make no contribution to human happiness and so far as [they] resulted in punishments would inflict useless misery”⁹⁷ And in his review of Baroness Wootton’s proposal, he suggests that the element of fair warning and predictability that clear, published, and prospective laws require is beneficial to citizens’ ability to exercise freedom and plan for the future.⁹⁸

On the other hand, when he is confronting Fuller’s claim that we should pay particular attention to the moral significance of legality, Hart beats a hasty retreat from such characterizations. In those contexts, his position follows (2b): He denies that that the principles of legality have any particular moral significance. He says not only that their observance is “compatible with very great iniquity”⁹⁹ but also that he is utterly puzzled about why Fuller would refer to them using the term “morality.”¹⁰⁰

It is a distressing picture. Hart’s honest inclination seems to be to answer “yes” to both of our questions, at least when they are posed separately. He really does seem to acknowledge a criterial connection between the idea of a legal system and at least some of the principles of legality, most evidently in his remarks on generality. Additionally, he seems to want to insist that when Bentham and others applied principles of legality to the evaluation of law, they were applying criteria that had genuine moral significance.

However, the combination of these two positions—(1a) and (2a)—looks likely to cause problems for the distinctive positivist thesis of the separability of law and morality, because it implies that one of the criteria for calling something a legal system has genuine moral significance. So Hart takes care to separate his assent to question (1) from his assent to question (2). The assents tend to occur in different writings; when they occur in the same article (as in the review of Fuller’s book), he makes sure that there are a few pages separating them.¹⁰¹ That way, he can give the impression that when

⁹⁶ Hart, *supra* note 1, at 619; *see also supra* note 47 and accompanying text.

⁹⁷ Hart, *supra* note 38, at 1291; *see also supra* note 78 and accompanying text.

⁹⁸ Hart, *supra* note 85, at 1330.

⁹⁹ HART, *supra* note 12, at 207.

¹⁰⁰ Hart, *supra* note 38, at 1286–87.

¹⁰¹ *Id.* at 1286–87, 1290–91.

he assents to question (2), he is conjoining this with a negative answer to question (1), and vice versa.

But for anyone who is willing and able to sustain their attention from page to page or from article to article, Hart’s position is all over the place. In any given instance, he seems to be combining his answer to one of our questions with whatever answer to the other question is necessary to make Fuller’s position look untenable. Because Fuller’s position has two parts, Hart achieves this by variously maintaining all four of the possible answers that we have outlined, hoping that we do not notice that two of them, when taken in combination, are incompatible with positivism as he seems to understand it.

FIGURE 1

(1) Is observance of the principles of legality among the necessary criteria for the application of the concepts <i>law</i> and <i>legal system</i> to a system of rule?			
		(1a) YES	(1b) NO
(2) Does observance of the principles of legality make an affirmative difference to the moral quality of a system of rule?	(2a) YES	(NOT OK w/ positivism)	(OK w/ positivism)
	(2b) NO	(OK w/ positivism)	(OK w/ positivism)

The position looks like Figure 1 above. Hart answers “yes” and “no” to both of the questions but wants us, at any given time, to focus only on the combination of “yes” to question (1) and “no” to question (2) or on the combination of “no” to question (1) and “yes” to question (2). Both combinations are acceptable from a legal positivist point of view. Negative answers to both questions would also be acceptable for a positivist, but affirmative answers to both would not. Yet Hart seems to have committed himself, over time, to each of these options (including “yes” to question (1) and “yes” to question (2), which is not a combination that is acceptable to most positivists).

V

PLEAS IN MITIGATION

A. *Reconciling Opposite Answers*

I have said some hard things about Hart’s inconsistency. It is time now for pleas in mitigation. The contradictions in Hart’s position would be mitigated somewhat if we could somehow reconcile (1a) with (1b), and/or (2a) with (2b).

On question (1)—asking if there is a criterial connection between principles of legality and the concepts *law* and *legal system*—there certainly does seem to be some room in between a strongly affirma-

tive and a flatly negative answer. For one thing, the principles of legality are several in number, and although Hart is willing to say that law might logically connote generality,¹⁰² he may not be willing to say anything like that for all or even any of the other principles of legality. Furthermore, even Fuller acknowledges that the criterial relation between *law* and *legal system*, on the one hand, and the principles of the inner morality of law that he identifies, on the other, is quite loose. For example, although Fuller suggests that general and widespread use of retroactive decrees would undermine the claim of a system of rule to be called rule by law, he acknowledges that “in England and America it would never occur to anyone to say that ‘it is in the nature of law that it cannot be retroactive.’”¹⁰³ He says something similar about secrecy: An inadvertent failure to publish some set of regulations may not be incompatible with a system’s claims to be a system of rule by law, but widespread and deliberate use of secret decrees may be.¹⁰⁴

Clearly there is some room for looseness here, and one could imagine an honorable attempt to rescue Hart’s position from the clutches of inconsistency by arguing that when he said (1a)—that legality did have a criterial relation to law—he imagined a very loose relation, and that when he said (1b)—that legality did not have a criterial relation to law—he meant only that a simple failure of legality did not result in an immediate failure of the application of other legal predicates. Hart himself, however, did not think these possibilities worth exploring in relation to the various positions he held concerning the answer to question (2).

As for the possibility of reconciling Hart’s opposite answers to question (2), I have said a number of times that a person who believes that legality has moral significance need not also believe that legality conclusively determines the issue of the moral quality of a given law.¹⁰⁵ Certainly, he need not believe that legality conclusively determines the political obligation implied by such a law.

Thus, while Hart does seem to believe that conformity to the principles of legality is compatible with great iniquity, this claim could survive an affirmative answer to (2)—that legality does have moral significance—if, for example, that significance was just one among a number of factors that might enter into a law’s overall moral value. Indeed, this position would be consistent with quite a strong version of (2a): We might say that conformity to the principles of legality

¹⁰² Hart, *supra* note 1, at 595–96.

¹⁰³ Fuller, *supra* note 2, at 650.

¹⁰⁴ *Id.* at 651.

¹⁰⁵ See *supra* Part I (refining and discussing question (2)).

always makes things better, even though it is not necessarily capable of rescuing a law from the gross iniquity of its content. On this account, we might say, for example, that even if Nazi rule did not satisfy the principles of legality, other forms of iniquitous rule *might* do so—for example, South African apartheid law or antebellum American slave law. In those cases, iniquitous legal systems would have been even worse had the principles of legality not been observed. That is one possible way of rescuing Hart from inconsistency. It requires paying attention to the plurality of considerations that enter into the overall evaluation of any law or legal system.

There exists an even more intriguing possibility. We might say that, quite apart from other substantive moral factors, legality itself might work in two directions. On the one hand, conformity to the principles of legality does tend to mitigate certain aspects of injustice that might otherwise be present, even if it fails to entirely redeem the law in question. On the other hand, that very same conformity to the principle of legality might also have the potential in some cases to aggravate injustice. The same factor—legality—may work both ways. Hart comes close to saying this in the section of *The Concept of Law* in which he deals most explicitly with the separability thesis. He says that our reflections on the role of secondary rules in improving law's certainty and knowability bring us face to face with "a sobering truth":

[T]he 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 organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized 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.¹⁰⁶

The very efficiency and centralization that give people their assurance that they know where they stand vis-à-vis the law also give the state the means to oppress and exploit them more effectively than would otherwise be the case. Hart goes on to say that it is "[b]ecause this risk has materialized and may do so again"¹⁰⁷ that we should be very wary of any attempt to show that law as such is necessarily moral. Notice how different this is from any analytic version of the separability thesis. The claim now is that legality contributes to the moral quality of the law in some ways and detracts from the moral quality of

¹⁰⁶ HART, *supra* note 12, at 202.

¹⁰⁷ *Id.* I have discussed this also in Jeremy Waldron, *All We Like Sheep*, 12 CANADIAN J.L. & JURISPRUDENCE 169, 174–75, 179 (1999).

the law in other (often very similar) ways—and there is no telling how things will fall out overall. This is a very complex denial (or combination of denials) of the separability thesis, not a version of it.¹⁰⁸

There remains one other possibility for reconciling Hart's inconsistencies. We noticed earlier that some of Hart's denials of the moral significance of legality are not about the moral quality of the laws but about the presence or absence of a link between legality and political obligation.¹⁰⁹ We might easily reconcile a denial that legality generates political obligation with an acknowledgment that legality makes an affirmative difference to the overall moral quality of a law. For example, a consent theorist of political obligation would believe that, unless consent is present, the moral quality of a law is irrelevant to the political obligation to obey it.¹¹⁰ It could be the most just law imaginable (and legality might have made a considerable contribution to its justice), but the consent theorist would still require consent for obligation. So that is another way of reconciling a version of (2a) with a version of (2b).

As a matter of fact, however, few political theorists take the view that obligation is wholly detached from the question of justice in this way. Some follow John Rawls and say that we have an obligation to support just institutions and laws precisely because they are just.¹¹¹ In that case, the contribution of legality to justice (whatever it may be) could not be separated from the obligation aspect in the way that consent theory indicates, though it might still be true that legality alone

¹⁰⁸ I owe this point to Tom Campbell, Professor and former Dean of Law at the Australian National University, in discussion from the floor during a legal theory conference at the University of Sydney in September 2002.

¹⁰⁹ See Hart, *supra* note 27, at 274–75 (noting that adherence to principles of legality may not compel obligation to obey law where legal system is otherwise iniquitous); see also *supra* notes 64–66 and accompanying text (discussing Hart's argument that conforming to legality does not guarantee obligation to obey laws). Consider also the way Hart runs these issues together in the following passage (addressed to Gustav Radbruch's repudiation of positivism):

[E]verything that [Radbruch] says is really dependent upon an enormous over-valuation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: "Ought this rule of law to be obeyed?"

Hart, *supra* note 1, at 618; see also Hart, *supra* note 27, at 275 ("It seems clear that the mere existence of a legal system, irrespective of the character of its laws, is not sufficient in any intelligible theory of morality to establish that a person ought morally to do what its laws require him to do.").

¹¹⁰ For the consent theory of political obligation, see A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 57–74 (1979).

¹¹¹ See RAWLS, *supra* note 33, at 115 ("[T]he duty of justice. . . requires us to support and to comply with just institutions that exist and apply to us."); Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3, 3 (1993) (defending and elaborating theory "that we have a *natural* duty to support the laws and institutions of a just state").

does not determine the issue of justice to which Rawls's theory of political obligation is responsive. Others have toyed with principles of integrity or fairness as the basis of political obligation—take Ronald Dworkin's theory of integrity, for example, or Hart's own commitment to the principle of fair play.¹¹² These accounts of political obligation are not bound to the justice of a law as tightly as Rawls's theory is, but neither are they wholly detached from it. Some aspects of justice are certainly relevant to integrity and to the sort of reciprocity that fair play requires, and it is interesting—though there is no space to trace the argument here—that these relevant aspects of justice are the aspects of justice to which legality also has some important relation (generality, for example).¹¹³

So once again, one can imagine an honorable rescue effort trying to dispel the appearance of inconsistency as between the answers—(2a) and (2b)—that Hart gave to question (2). It is worth noting, however, that for most positivists, the separability thesis would still be in tension with even weak versions of (2a) when they are conjoined with (1a). For, as I understand it, the separability thesis is not only supposed to deny that whether or not a norm is law has *conclusive* moral implications; it is also supposed to deny that it has any *prima facie* moral significance. The separability thesis is certainly not satisfied by showing that although a norm's being law has some moral implications, those implications are not strong enough to settle the question of political obligation.

It is a pity that Hart did not himself explore any of this. Just in reviewing his work, we have uncovered an array of possibilities that would generate an interesting and nuanced set of relations—affirmative and negative—between the principles of legality and the positivist thesis of the separability of law and morality. Hart's work is suggestive of all these possibilities, and it would have been very helpful had he or his followers seen fit to pursue them.

B. Reconciling Affirmative Answers

So far, we have dealt with various possible ways of reconciling Hart's versions of (1a) and (1b) and various possible ways of recon-

¹¹² See DWORKIN, *supra* note 91, at 190–216 (describing integrity as basis of political obligation); H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77, 85–87 (Jeremy Waldron ed., 1984) (defending position that those who benefit from others' contributions have reciprocal obligation to contribute themselves).

¹¹³ See Waldron, *supra* note 107, at 184–85 (exploring relationship between justice and Hart's principle of fair play); see also Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 23–26 (2004) (describing connection between integrity and legality).

ciling Hart's versions of (2a) and (2b). The problem for Hart, though—at least from the point of view of the separability thesis—is the combination of (1a) and (2a). If one holds both that legality is among the criteria for the existence of law *and* that legality has inherent moral significance, it looks as though the criteria for the existence of law include moral criteria. Yet this is exactly what positivists have often denied.¹¹⁴

There are a couple of ways in which the embarrassment of this combination might be mitigated. Some positivists have acknowledged that the criteria for the existence of law or a legal system may be criteria that, as it happens, have moral significance. Joseph Raz observes that the characteristic positivist claim “that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral merit.”¹¹⁵ If (2a) were held to be true simply because the properties of a system of rule associated with observance of the principles of legality happened to be properties that *other* moral principles made morally significant, then a legal positivist might be willing to live with that. We can call this *contingent moral significance*.¹¹⁶ If, on the other hand, the moral significance of the principles of legality were not coincidental, if it were such that the principles of legality themselves embodied certain moral principles or moral values, then the embarrassment to the positivist of combining (2a) with (1a) would be greater. We can call this *noncontingent moral significance*. On this account, legality would be a thick moral predicate—like courage or honesty—and its criterial connection with law would make law into a matter of partial moral assessment.

I am not sure how we should read Hart's embrace of (2a). Sometimes he seems to be saying, in consequentialist fashion, that it happens to be a matter of fact that failures of legality, such as retroactivity, can harm human happiness. This seems to accord contingent moral significance to the requirement of prospectivity.¹¹⁷ But at other times he seems to go much further than that—when, for instance, he describes the requirement of prospectivity as “a very pre-

¹¹⁴ See, e.g., JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 163–70 (3d ed. 1999) (arguing against natural law claims of necessary connection between law and morality).

¹¹⁵ JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW*, *supra* note 14, at 37, 38–39.

¹¹⁶ An analogy might be something like this: Secondary rules make possible the keeping of detailed archives; the keeping of detailed archives is a good thing, in the light of the moral value of historical knowledge; therefore, secondary rules have moral significance.

¹¹⁷ Hart, *supra* note 27, at 274.

cious principle of morality.”¹¹⁸ That sounds more like noncontingent moral significance, and combining this version of (2a) with (1a) does pose some difficulty for the separability of law and morality.

Another way of looking at the relation between (1a) and (2a) is to ask whether the features or aspects of legality that are criterially tied to law are also the very features or aspects of legality that have moral significance. I do not mean to repeat the point I made at the beginning of this Part—that there are many principles of legality, and some may be tied criterially to law and others not, while some are morally significant and others not. Even if the *same* principle of legality is both tied to law and accorded moral significance, there is the further question of whether the ways in which it is tied to law match up with—or indeed literally *are*—the ways in which it is morally significant. Consider the principle of generality, for example, which requires that all particular legal orders be based on general rules or standards. One can imagine the following versions of (1a) and (2a) for generality:

(1a/ gen) Generality is criterially connected with law inasmuch as law cannot practicably operate without general rules. Our concept of a legal system must be the concept of a system that can work, and without general rules a legal system cannot work.

(2a/ gen) Generality tends to make a positive moral difference to a system of rule inasmuch as it associates law with something like Kantian universalizability.

Juxtaposing these two claims may pose little embarrassment for the separability thesis, because the pragmatic aspect of (1a/ gen) does not really match up with the moral aspect of (2a/ gen). There are points in *The Concept of Law* at which Hart comes close to embracing (1a/ gen).¹¹⁹ In other places in that book, however, his account of generality’s criterial link with law is not so distant from his account of its moral significance; this is particularly true in his discussion of the “peculiarly intimate connection” between the idea of law and the idea of “treating like cases alike” and in his suggestion that the latter idea contains “the germ at least of justice.”¹²⁰ In this discussion, Hart seems to be clearly focused on exploring the possible moral signifi-

¹¹⁸ Hart, *supra* note 1, at 619.

¹¹⁹ *E.g.*, HART, *supra* note 12, at 21 (“[N]o society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do. . . . Legal control is therefore primarily, though not exclusively, control by directions which are . . . *general*.”); Hart, *supra* note 27, at 274 (“[N]o society could efficiently provide the number of officials required to make them a main form of social control.”).

¹²⁰ HART, *supra* note 12, at 157–67, 206.

cance of the very ways in which law presents itself in terms of generality.

With the other principles of legality, the case for a connection between (1a) and (2a) is even clearer. Many (if not all) legal positivists regard it as definitional that the function of law is to guide conduct.¹²¹ That law cannot, in general, guide human conduct unless its directives are clear, public, prospective, practicable, and relatively constant relates directly (as Fuller noticed¹²²) to the moral ideal of respecting the human capacity for responsible agency and self-monitoring. The idea that, if one is to rule human beings, one should work *with* this capacity—rather than short-circuiting it through manipulation or terror—is an idea of considerable moral significance; a system of rule is better if humans are ruled in this rather than in some other way. Of course, a ruler may have reasons of his own for trying to guide the conduct of his subjects (rather than galvanizing it in some other way), and those reasons need not themselves involve moral respect for the dignity of human agency. No one is denying that rulers may have nonmoral reasons for abiding by the principles of legality. But that does not deprive the principles of their moral significance, nor does it mean that their criterial connection with law is purely a result of rulers' characteristic opportunism. Law itself may be an enterprise unintelligible apart from the function of treating humans as dignified and responsible agents capable of self-control; unscrupulous rulers must make what they can of that fact when they decide, for reasons of their own, to buy into the "legal" way of doing things.

CONCLUSION

I have two conclusions. The first is to insist that Lon Fuller's 1958 response to H.L.A. Hart's Holmes Lecture remains importantly suggestive for modern jurisprudence. Hart may have tried to create the impression that Fuller's response and his later book were hopelessly confused, but Hart himself—when he thought that no one was looking—toyed with many of the positions that Fuller held. And the

¹²¹ See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 206 (2001) (referring to importance of law's guiding function). For a discussion of the significance of this necessary feature of law with regard to the rule of law, see JOSEPH RAZ, *supra* note 14, at 210, 218.

¹²² FULLER, *supra* note 17, at 162:

Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.

record we have uncovered of his toying with these positions suggests that there is a lot more fruitful work to be done in this area.

The other conclusion is that jurisprudence—particularly positivist jurisprudence but, perhaps, the jurisprudence of its opponents too—is disfigured and diminished by an obsession with the separability thesis, particularly when the separability thesis is stated in a very dogmatic and broad-brush form. The major achievements of Hart's legal philosophy—particularly his attack on sovereignty¹²³ and the command theory,¹²⁴ and his own insight into the practice theory of rules,¹²⁵ the internal aspect of rules,¹²⁶ and the distinctive structures of a legal system¹²⁷—would be intact even if he had felt it necessary to abandon the position that none of the aspects of social life that determine whether a society has a legal system can have any inherent moral significance. In the hands of Jules Coleman and others, positivist jurisprudence has made great progress in exploring various possibilities that are not ruled out by Hart's own very particular formulation, in *The Concept of Law*, of the separability thesis (“[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality . . .”).¹²⁸ Coleman has shown that this formulation leaves open various “soft positivist” possibilities and that this openness is quite fruitful for jurisprudence.¹²⁹

The present Article has worked in a somewhat different direction, exploring possible connections between law and morality via legality (rather than via the contingent characteristics of particular rules of recognition or practices of interpretation). But the same general point may apply. The combination of what I have called position (1a)—that there is some criterial connection between legality and law—and position (2a)—that principles of legality do have moral significance—certainly challenges a very broad version of the separability thesis. It does not, however, challenge the exact formulation

¹²³ See, e.g., HART, *supra* note 12, at 50–78 (discussing failings of Austin's doctrine of sovereignty).

¹²⁴ See, e.g., *id.* at 18–25 (rejecting command theory).

¹²⁵ See, e.g., *id.* at 254–59 (discussing and addressing criticism of practice theory).

¹²⁶ See, e.g., *id.* at 56–58 (distinguishing internal aspect of rules from “habit of obedience”).

¹²⁷ See, e.g., *id.* at 79–91 (introducing primary and secondary rules); *id.* at 91–99 (positing primary rules of obligation and secondary rules of recognition, change, and adjudication as characteristic elements of legal systems).

¹²⁸ *Id.* at 185–86; see also, e.g., Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 148–49 (1982) (“The separability thesis survives [if] not every conceivable legal system has in its rule of recognition . . . a clause [setting] out conditions of legality for some moral principles, or if it has such a clause, there exists at least one conceivable legal system in which no principle satisfies [it].”).

¹²⁹ See COLEMAN, *supra* note 121, at 67–68, 103–19, 151–52.

that Hart used in *The Concept of Law*—that is, the combination of (1a) and (2a) does not imply that laws necessarily “reproduce . . . [the] demands of morality,”¹³⁰ though it does imply that some aspects of what it takes to be a law do have moral significance. I think this is not just a verbal difference but a genuine openness in the otherwise dogmatic commitments of legal positivism.¹³¹ And I hope that my fellow legal philosophers will think it worth taking advantage of this openness to continue, perhaps more profitably, Lon Fuller’s consideration of the connections between the concept and the rule of law.

¹³⁰ HART, *supra* note 12, at 186.

¹³¹ See the fine discussion in John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 210 (2001). Gardner points out that positivists are not debarred from thinking that “uncertainty, uncertainty, retroactivity, ungenerality, obscurity and so forth are demerits of a legal norm”; he also says that legal positivists are “not debarred from agreeing with Fuller that these values constitute law’s special inner morality, endowing law with its own distinctive objectives and imperatives.” *Id.*