

**Positivism and Legality:
Hart's Equivocal Response to Fuller¹
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I

One of the most telling observations that Lon Fuller made in his 1958 response to H.L.A. Hart's Holmes Lecture 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.³

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 they used to pursue 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 special attention from legal philosophers. One was the fact that, along with the substance of the murderous Nazi tyranny, there were sustained violations of principles of legality—for example, principles requiring prospectivity and the publication of laws, elementary principles of legal process, and principles upholding legal restraint upon all the elements and agencies of the state. Fuller thought that these particular aspects of the Nazi tyranny, which (in the first instance) concerned forms and procedures rather than ends and

¹ An earlier and much shorter version of this paper was presented at a conference on “The Legacy of H.L.A. Hart,” at Cambridge University in August 2007.

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³ Lon Fuller, Positivism and Fidelity to Law: A Reply to Hart, 71 HARVARD LAW REVIEW 630 (1958), p. 650.

purposes, ought to be of special concern for jurisprudence because, he said, it is arguable that they should 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.⁴

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,” law’s “own implicit morality,” “the internal morality of law,” and “the inner morality of law.”⁵ Fuller reminded his readers that governance in Germany in those years was not uniformly afflicted by these formal and procedural defects; private law, he said, 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) and public control that there was this was this tendency towards 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 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.⁶

⁴ Ibid., p. 660.

⁵ For these four formulations, see *ibid.*, pp. 644, 645, 651, and 659, respectively.

⁶ *Ibid.*, p. 661.

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

Fuller's reflections on these matters suggest a two-fold agenda for jurisprudence. It might be worth asking, first: what exactly is the relation between the principles of legality and categories law and legal system which we use to characterize systems of rule? And it might be worth asking, secondly: what exactly is the relation between the principles of legality and the norms like justice, rights, and the common good which 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 of legal and political philosophy. But the prospect that asking and answering them might at the same time open the boundaries between legal and political philosophy and complicate our sense of the separability of law and morality has led many legal positivists to shy away from them. And this seems to have been the response of H.L.A. Hart. For although, as we shall see, 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,⁷ he never openly and unequivocally addressed the two questions I have indicated 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; and he often gave the impression that if anyone offered to talk about this in a philosophy of law class, 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 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 got very indignant about a suggestion made

⁷ See *infra* note 10 and accompanying text..

by Fuller to the effect that Hart embraced a managerialist approach to law. 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.⁸

But it is not Hart's personal enthusiasm for the Rule of Law that one misses in his jurisprudence; what one misses is an elucidation of it and Hart's setting in train a sense among his followers that legality is a topic worthy of jurisprudential analysis. That is what one looks for. And what one finds is mostly equivocation.

II

Hart's most extensive discussion of the principles of legality may be found in a little-known essay— "Problems of the Philosophy of Law"—which Hart wrote in 19__ for Paul Edwards's *Encyclopedia of Philosophy*.⁹

The encyclopedia piece was divided into two parts: the first part dealt with "Problems of Definition and Analysis" and the second with "Problems of the Criticism of Law." The second part dealt for a while with substantive criteria of evaluation, but then Hart went 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

⁸ NEIL MACCORMICK, H. L. A. HART (1981), pp. 157-8.

⁹ H.L.A. Hart, Problems of the Philosophy of Law, reprinted in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1983), Ch. 3.

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 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 law....¹⁰

The taxonomy is a little confusing, though I guess everyone has their own way of dividing things up in this area. I would call the principles that deal with generality, clarity, prospectivity, etc., *formal* principles rather than procedural principles; the procedural ones are the principles Hart refers to as principles of natural justice¹¹ (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 and there are principles about the broad character of the procedures that should be used in their application to particular cases: and together those principles of legality and due process add up to what people sometimes call the Rule of Law.¹²

The first set of principles—the formal ones, the ones that Hart called “principles of legality”—are roughly what Lon Fuller referred to as the “inner morality of law.” (Incidentally, I find it odd that Fuller said so little about the procedural side of the Rule of Law in Chapter 2 of *The Morality of Law*, especially in view of his own very intense and focused interest

¹⁰ Ibid., p. 114.

¹¹ **Add a comment on this term.**

¹² For important discussions of the Rule of Law, see: Joseph Raz, The Rule of Law and its Virtue, in JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY ____ (1979); JOHN RAWLS, A THEORY OF JUSTICE ____ (1971); and John FINNIS, NATURAL LAW AND NATURAL RIGHTS ____ (1980).

elsewhere in the forms and limits of adjudication.¹³ In fact, Fuller also made the mistake of calling the formal principles procedural, as though everything which is not substantive is procedural.) Be that as it may, the formal principles that Hart mentions are roughly what Lon Fuller referred to as the “inner morality of law,”¹⁴ and these comments in the Encyclopedia essay—made of course 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 mention) the term “principles of legality”? He seems to want to attribute its use to others. In the Encyclopedia essay, he speaks of principles which are “usually referred to as the principles of legality,”¹⁵ while in his book The Concept of Law Hart speaks—all-too-briefly in my opinion—of “the requirements of justice which lawyers term principles of legality.”¹⁶ I am not sure why he did this. It is as though he couldn’t 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 Fuller’s book, 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 go into in a moment).¹⁷ Hart was less coy about the term when he alluded to these principles in his little book Law, Liberty and Morality (Hart’s contribution to the debate with Lord Patrick Devlin about the use of law to enforce conventional morality).¹⁸ There, Hart considered the 1961 English decision in Shaw v DPP in which the House of Lords

¹³ LON L. FULLER, THE MORALITY OF LAW ____ (Revised edition, 1969). For Fuller’s interest in procedural issues, see Lon Fuller, Forms and Limits of Adjudication, 92 HARVARD LAW REVIEW 353 (1978).

¹⁴ See supra note 5 and accompanying text.

¹⁵ Hart, Problems of the Philosophy of Law, supra note 9, at ____.

¹⁶ H.L.A. HART, THE CONCEPT OF LAW 207 (Second Edition, 1994). There is a similar locution for “natural justice”—“the procedural standards known to English and American lawyers as ‘Natural Justice’”—at *ibid.*, p. 206.

¹⁷ H. L. A. Hart, Book Review: “The Morality of Law”, 78 HARVARD LAW REVIEW 1281 (1965). (This was also reprinted in HART, ESSAYS IN JURISPRUDENCE AND POLITICAL PHILOSOPHY, supra note 9. But subsequent page references will be to the Harvard Law Review version.)

¹⁸ H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963), responding to Lord Devlin’s lecture ____, later reprinted in PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).

revived the old common law offense of conspiracy to corrupt public morals.¹⁹ Hart said this about the decision in Shaw:

[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 beforehand what acts are criminal and what are not.²⁰

But this is a single exception to Hart's habit of not using the phrase "principles of legality" himself when he could help it. I would not attach any significance to these purely terminological issues, were it not for the fact of Hart's equivocal response to the substance of the concerns that he said others assembled under the auspices of this term.

III

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 it is suggestive, very little of it is consistently presented or well-thought-through by the standards of other aspects of Hart's legal philosophy. In this section, I will review the record; and in section IV substantiate my claim about its inconsistency.

Hart's 1958 Lecture

In his Holmes Lecture, Hart first mentioned the principles of legality in an effort to defend Bentham against the charge of being uninterested in 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

¹⁹ *Shaw v. Director of Public Prosecutions* [1962] A.C. 220. This was the "Ladies' Directory" case, where the Law Lords dredged up a non-statutory common law crime of conspiracy to corrupt public morals to convict a man who published a directory advertising the services of prostitutes.

²⁰ HART, LAW, LIBERTY, AND MORALITY, *supra* note 18, at p. 12.

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.²¹

The most striking thing about this paragraph is the way that it runs together in a rather casual way a variety of political ideals. Some of them are ideals, such as free speech and freedom of assembly, that are separable and distinct on almost any account from the idea of law; some of them, on the other hand, like the requirement that laws be published and the principle nulla poena sine lege, that are arguably (though not indisputably) connected to the concept of law; and some of the ideals fall in between, such as control of administrative agencies and the principle of no liability without fault. Hart runs all these together 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." The implication was that the principles of legality as much as the principle of free speech or non-slavery were firmly on the side of criteria of better laws—what the law ought to be—and had little or nothing to do with the concept of law itself. They are all associated indifferently with "principles for the defense of which the terminology of natural law has in our day been revived." And the miscellany of the principles assembled under this heading reinforces an observation by Fuller to the effect 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."²²

Another place in the 1958 lecture where Hart touched on these issues was in his discussion of Nazi rule in Germany. Hart alluded to the principles of legality in a suggestion he made concerning the Grudge Informer case, a case in which the question arose of punishing a woman in 1949 for having denounced her husband to the authorities in 1944 under preposterously

²¹ H. L. A. Hart, Positivism and the Separation of Law and Morals, 71 HARVARD LAW REVIEW 593 (1958), at 595-6 (footnotes omitted).

²² Fuller, Positivism and Fidelity to Law, supra note 3, at p. 635.

oppressive Nazi statutes enacted in 1934 and 1938 respectively.²³ Hart took the position that instead of declaring the Nazi statutes to have been nullities, it might have been better to enact a statute after 1945 and apply that statute retroactively to the informer's case to punish her:

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.²⁴

The principle of prospectivity here is treated as just another moral principle, albeit “a very precious principle of morality.” It is “endorsed by most legal systems” but it is not spoken of as 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. He said:

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 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.²⁵

²³ Fuller gives a good account of this case, *ibid.*, pp. 652-7; the statutes are set out *ibid.*, at pp. 653 and 654. Hart's discussion of the case is in Positivism and the Separation of Law and Morals, *supra* note 21, at pp. 618-21. See also David Dyzenhaus's discussion in this symposium.

²⁴ Hart, Positivism and the Separation of Law and Morals, *supra* note 21, p. 619.

²⁵ *Ibid.*, p. 623.

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

It is interesting, finally, that in the same passage Hart also associated natural justice (procedural due process) with generality as a moral or quasi-moral principle associated with 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.²⁶

This may underestimate somewhat the tasks of procedural due process, which in my view go beyond ensuring the consistency that genuine generality requires, but it is an important early concession.

Hart’s book, The Concept of Law (1961 and 1994)

In many respects, Hart’s 1958 lecture adumbrated the more extensive arguments of his magisterial work on jurisprudence, The Concept of Law published in 1961.

There was, first of all, a somewhat more extensive discussion of the generality point and its connection to due process in The Concept of Law than there had been in the Holmes lecture. 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),²⁷ and the section of that chapter that is relevant here is a section devoted specifically to justice. Hart’s position is that justice—as a distinctive segment of morality—often involves ideas of equality and treating cases that are relevantly similar in a similar way. And he says:

²⁶ Idem.

²⁷ See also Hart’s definition of “legal positivism” in HART, CONCEPT OF LAW, supra note 16, at pp. 185-6: “Here we shall take Legal Positivism to mean that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality....”

The connection between this aspect of justice and the very idea of proceeding according to a rule is obviously very close. Indeed it 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 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.²⁸

And 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.²⁹

Legality is sometimes associated with the twin principles that the laws should be clear and that also it should be clear what is the law and what isn't. Hart discusses both these ideas in The Concept of Law and the gist of his discussion is that although these are important principles, they are not the be-all and end-all of legal morality. So far as primary rules are concerned, 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"—and the need to leave certain issues open so that they can be settled not abstractly in advance but as they arise in concrete cases.³⁰ (The reference to safety in regard to the principle of certainty is an interesting one: it is exactly his sort of safety that many defenders of the Rule of Law have been so insistent upon.)³¹ Hart says that

²⁸ Ibid., p. 161. See also the brief discussion of generality as "the germ of justice" at the bottom of *ibid.*, p. 206. Notice that the "some famous thinkers" in this passage is not an allusion to Lon Fuller. In an endnote, Hart explains it is an allusion to some obscure views of Thomas Hobbes and John Austin (see *ibid.*, pp. 299-301).

²⁹ Ibid., pp. 161-7.

³⁰ Ibid., p. 130.

³¹ For a recent example consider the use of the image of law as a safe causeway (from ROBERT BOLT, A MAN FOR ALL SEASONS 152-3 (1962)) in Jeffrey Kahn, The Search for the Rule of Law in Russia, 37 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 353 (206).

this second point—our uncertainty in advance of concrete cases about how we should want certain matters to be settled—explains why “we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case always settled in advance.”³²

The issue of clarity with regard to the recognition of law—clarity as to what norms are law and what norms are not—is discussed by Hart in his “Postscript” to The Concept of Law, added by the editors of that book's second edition in 1994. Hart had originally argued that the rule of recognition served the need which every system of social control had for “certainty” in people’s understanding of which rules are going to be enforced by the society with the centralized social and physical pressure which it coordinates.³³ But in the “Postscript,” Hart argued once again that the need for certainty is not an absolute, and he associated this down-playing 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-promoting 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.³⁴

(I should say at this point that I regard Hart’s willingness to entertain soft positivism in this way as an issue mostly distinct from the implications of his equivocal views about legality.³⁵ But it is interesting here 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 towards a harder form of positivism. I have sometimes wondered whether hard positivism

³² HART, CONCEPT OF LAW, supra note 16, at p. 128.

³³ Ibid., p. 94.

³⁴ Ibid., p. 252.

³⁵ I will develop a sort of analogy at the very end of the paper: infra text accompanying notes 79-80.

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.³⁶ Hart raises a possibility in between: it is the 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. The two possibilities come closer together, of course, the more “substantive” one’s account of the Rule of Law.)

Hart’s most important discussion of legality in The Concept of Law is also the briefest. In the course of a discussion of various ways in which law might be related to morality, Hart invited 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, and in general they must not be retrospective, though exceptionally they may be.³⁷

Of these requirements, Hart said: “Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality.”³⁸ (Again note the oratio obliqua use of that phrase.) But in The Concept of Law Hart had no interest in explicating what “principles of legality” might mean. His main interest was to squelch any inference from the principles of legality to a position like Fuller’s about law’s overall moral potential. He 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”—but he made no comment of his own except to say, acidly, that these formal requirements are “unfortunately compatible with

³⁶ See Jeremy Waldron, Normative (or Ethical) Positivism, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO 'THE CONCEPT OF LAW' (Jules Coleman ed., 2001), 411, at _____. See also HOBBS, LEVIATHAN (Richard Tuck ed., 1988), p. ____; Hobbes position is that law’s function is to settle or preempt moral disputes in the interests of peace; and that function would be undermined if we had to engage in tendentious moralizing in order to find out what the law was.

³⁷ HART, CONCEPT OF LAW, supra note 16, at pp. 206-7.

³⁸ Ibid., p. 207.

very great iniquity.” That, he indicated, was more or less all that needed to be said. The crucial thing was to protect the separability thesis. According to Hart, Fuller was wrong in thinking that the imposition of these requirements necessarily placed any limits on the evil that could be done under the auspices of the rule of law. Once that was established, the principles of legality had little interest for jurisprudence.

Hart’s Encyclopedia essay, “Problems of Legal Philosophy” (19__)

Hart said something similar—“compatible with very great iniquity”—about the principles of legality in the Encyclopedia essay too; but there he said it much less dismissively. In the essay, Hart said that, even if these principles are very important, 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.”³⁹ That is much less dismissive. 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 essay,⁴⁰ 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 (ii) that nothing of conclusive moral significance follows from the fact that a system conforms (or fails to conform) to principles of legality. In the Encyclopedia article, Hart clearly seems to be saying (ii); whereas it is not clear which of these positions is being asserted in the passage from The Concept of Law mentioned in the previous paragraph.

Even affirmative moral significance may have many dimensions. One question is how far conformity to the principles of legality affects the substantive value or justice of the rules, and how far the absence of such conformity contributes to laws’ substantive injustice iniquity. That is one dimension of assessment, and it is certainly true that many factors may be involved in such assessments of substantive justice or injustice of which conformity to legality may be just a subset. There is also another dimension which Hart mentions in the passage just quoted, which is the dimension of our having an obligation to obey the laws. He says we must not infer political obligation from the fact that laws conform to legality. Again, this

³⁹ Hart, Problems of the Philosophy of Law, supra note 9, at pp. 115-6.

⁴⁰ See Section V infra.

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 moral contribution at all to the question of our moral obligation to obey the laws (whether or not they make any contribution to the questing of the substantive justice of the norms), or (ii*) because although considerations of legality make some moral contribution to the question of our moral obligation to obey the laws, they do not conclude or settle that question. Hart's account is suggestive of these distinctions, though Hart himself shows little interest in exploring them.

In the Encyclopedia article, Hart talks also 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."⁴¹ That is efficiency from the point of view of the ruler. But then Hart goes on immediately to say that "from the point of view of the individual citizen, they are more than that." 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.⁴²

Hart says also 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 plan his future."⁴³ 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 from the point of view of the citizen.

Hart's review of Fuller's book, The Morality of Law (1965)

This distinction between the different regards in which efficiency might feature in a law-maker's performance of his craft may also help in our assessment of something that Hart said in his review of Fuller's book in the Harvard Law Review. There Hart said that he was puzzled by Fuller's association of the word "morality" with the principles of legality; he said

⁴¹ Hart, Problems of the Philosophy of Law, supra note 9, at p. 115.

⁴² Idem.

⁴³ Idem.

“the author’s insistence on classifying these principles of legality as a ‘morality’ is a source of confusion both for him and his readers.”⁴⁴ They may, said Hart, be “principles of good legal craftsmanship,” but that does not make them into a morality. In a vivid analogy, Hart said if we were to come up with a set of craft principles for poisoners, that wouldn’t be 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.⁴⁵

Now this analogy depends on seeing the principles of legality simply as principles for the efficient pursuit of a given purpose. (And some of what Lon Fuller says about craftsmanship and carpentry in an analogy that he uses in The Morality of Law does encourage that reading.)⁴⁶ No doubt, if the principles of legality were just principles of efficiency from the law-maker’s point of view—How to Do Things with Rules—then it would 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.”⁴⁷

But then a little later in the review, when Hart wants to respond more defensively to Fuller’s characterization of legal positivism as insufficiently concerned with legality, when he wants to respond to Fuller’s accusation 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,”⁴⁸—when Hart wants to respond to that, he says that it is perfectly possible to develop an account of what would be wrong with such a system.

⁴⁴ Hart, Book Review (Fuller), supra note 17, at p. 1285.

⁴⁵ *Ibid.*, p. 1286.

⁴⁶ Cite to FULLER, MORALITY OF LAW, supra note 13, at p. ___.

⁴⁷ Hart, Book Review (Fuller), supra note 17, at p. 1287.

⁴⁸ *Ibid.*, p. 1290, quoting FULLER, MORALITY OF LAW, supra note 13, at p. ___.

And, though he does not say this, the account that he intimates is firmly located within the realm of the moral. In a way that takes us back to one of the earliest passages we considered in the Holmes Lecture,⁴⁹ Hart says:

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?⁵⁰

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: the principles of legality "are valued so far only as they contribute to human happiness or other substantive moral aims of the law"; they are not really moral in themselves.⁵¹ Hart I think regards that—quite rightly—as a distinction without a difference.

So: given Hart's insistence here on the moral character of Bentham's, Kelsen's, or his own use of principles of prospectivity and generality in the evaluation of law, it is now quite difficult to see why Hart thought himself entitled to say that Fuller's insistence on the moral character of these principles is like talking about the morality of poisoning.

Hart's book, Punishment and Responsibility (1968)

Apart from the passage on Shaw v DPP which I cited earlier,⁵² 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. In an important passage in that book Hart considered what would happen if Barbara Wootton's proposal that strict

⁴⁹ See supra text accompanying note 21.

⁵⁰ Hart, Book Review (Fuller), supra note 17, at pp. 1290-1.

⁵¹ Ibid., p. 1291. Check out: EJP 357

⁵² See text accompanying note 20, supra.

liability should comprehensively replace ordinary criminal liability were to prevail:⁵³

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.⁵⁴

The same point was presented in a somewhat more sustained way in a review of Wootton's book that Hart published in 1965.

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 is so because the possibilities of a curable condition would have to be investigated and if possible treated. No doubt under the new regime prosecuting authorities would use their common-sense; but a very great discretion would have to be entrusted to them to sift from the mass the cases worth investigation for either penal or therapeutic treatment. 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.⁵⁵

⁵³ For Baroness Wootton's views, see BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST* (Second edition, 1981).

⁵⁴ H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968), pp. 181-2. 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 LAW REVIEW* 201 (1999) for bringing this passage to my attention.

⁵⁵ H.L.A. Hart, Review: "Crime and the Criminal Law" by Barbara Wootton, 74 *YALE LAW JOURNAL* 1325, 1330 (1965).

Hart does not here even mention, let alone use the phrase “principles of legality.” But it is clear that he is invoking such principles, and invoking indeed values and concerns traditionally associated with the Rule of Law. And he shows no reluctance to say that these can be used as genuine policy-based or moral critiques of legislative proposals, and that they are not just instrumentalist critiques to the effect that a lawmaker who set up the Wootton-type scheme would be frustrating his own purposes, like an incompetent carpenter or poisoner.

To my knowledge, what I have set out in this section 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 section, I will proceed to analyze the consistency of all of this.

IV

I implied at the outset that Hart’s discussion of legality is equivocal. Often it seems to be motivated by a desire to say nothing more than is necessary to see off 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 a discussion of something else, Hart seems to rest his hopes of prevailing in the jurisprudential struggle on the fact that many of his readers will be more interested in Fuller’s discomfiture than in the inconsistency of the refutation. It is, I think a shabby episode in the history of modern positivist legal philosophy—the more so since it is done from a reputational platform in which Hart is supposed to hold the high ground (and is generously acknowledged by his opponent to hold the high ground) so far as standards of analytic clarity are concerned.⁵⁶ 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 consists 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. I said it was worth asking, (1) what exactly the relation was between the principles of legality and categories like law and legal system which we use to

⁵⁶ See Fuller, Positivism and Fidelity to Law, supra note 3, at p. 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.”

characterize systems of rule. Actually I want to pin question (1) down a little more precisely than this. It may be common ground among many participants in this debate that 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; or principles of legality are (as John Finnis argues) principles for keeping legal systems in good shape, according to their specific virtues; or principles of legality may be designed (as Joseph Raz seems to think) to remedy or mitigate evils that only law makes possible.⁵⁷ In another context I might want to contest that last point, but it is not the issue here.⁵⁸ The particular connection between law and legality that interests me in this paper is the possibility that Fuller raised in a passage quoted earlier, to the effect that a system of rule might depart so far from the principles of legality as to undermine its claim to be called a system of law or a legal system.⁵⁹ Fuller is raising the possibility that the principles of legality might be related criterially to the concepts law and legal system: they may be among the criteria for the proper application of these concepts. So the version of question (1) that I want to consider is this: is there any sort of criterial connection between the principles of legality and the application of the concepts law and legal system?

And I said it was worth asking, (2) what exactly the relation was between the principles of legality and the norms like justice, rights, and the common good which we use to evaluate systems of rule? Does legality contribute to the justice or value of a law, legal system, or order? Or is it morally neutral?

⁵⁷ Raz, The Rule of Law, supra note 12, at pp. 223-4, and FINNIS, NATURAL LAW AND NATURAL RIGHTS, supra note 12, at pp. ___.

⁵⁸ Cf. Jeremy Waldron, "The Concept and the Rule of Law," unpublished manuscript on file with author and also available at <http://www.law.nyu.edu/clppt/program2006/readings/Concept%20and%20Rule%20of%20Law%20WALDRON.pdf> (arguing that principles of legality are targeted not just at laws but at any system of rule; indeed their aim is to transform systems of rule into systems of rule by law).

⁵⁹ Fuller, Positivism and Fidelity to Law, supra note 3, p. 660: "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." (See text accompanying supra note 4.)

To question (1)—the question of a possible criterial relation between the principles of legality and categories like law and legal system—Hart says two things. (1a) He suggests that principles of legality are to be grouped among principles and values clearly distinguished from the concept of law by the positivist’s separability thesis. 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.⁶⁰ But Hart also says (1b) that the principles of legality are closely related to the idea of law and a legal system. He says, for example, of the principle of generality that “we attach to a legal system the minimum meaning that it must consist of general rules”⁶¹ and towards the end of The Concept of Law he associates Fullerian principles with the viability of any efficacious method of social control.⁶² That last point may not exactly be a logical connection;⁶³ but it does seem to be something very like 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).⁶⁴

The apparent inconsistency of (1a) and (1b) might be resolved by reference to the carelessness of Hart’s formulations in (1a), were it not for the fact that this inconsistency matches another inconsistency in the way he answers the second question.

For, in response to the second question—the relation between the principles of legality and moral values like justice, rights, and the common good—Hart also returns two quite different sorts of answer. (2a) On the one hand, he groups the principles of legality amongst the criteria of substantive justice. We saw that he did this in his 1958 discussion of Bentham,⁶⁵ in his

⁶⁰ See Hart, Positivism and the Separation of Law and Morals, supra note 21, p. __

⁶¹ HART, CONCEPT OF LAW, supra note 16, p. __. (See supra text accompanying note __.)

⁶² *Ibid.*, pp. 206-7. (See supra text accompanying note __.)

⁶³ But as the controversy about Dworkin’s semantic sting has shown, logical connections are not really the issue. See RONALD DWORKIN, LAW’S EMPIRE (1986). See HART, CONCEPT OF LAW, supra note 16, pp. 244-8 (Postscript).

⁶⁴ HART, CONCEPT OF LAW, supra note 16, pp. 91-99 (secondary rules) and 110-17 (existence conditions)

⁶⁵ Hart, Positivism and the Separation of Law and Morals, supra note 21, p. __; see supra note __ and accompanying text.

treatment of the Grudge Informer case,⁶⁶ and in his discussion of Shaw v DPP.⁶⁷ (In the Grudge Informer case, he referred to the principle prohibiting retroactive law as “a very precious principle of morality endorsed by most legal systems.”)⁶⁸ Nor is this just happy talk. Hart gives a brief but substantive account of why the principles of legality have moral value. He said, in his review of Fuller’s book, that laws “that were wholly retroactive could make no contribution to human happiness and so far as it resulted in punishments would inflict useless misery?”⁶⁹ 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 important for people’s planning and the exercise of their freedom.

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 these characterizations. In those contexts, his position is quite different: (2b) he denies that the principles of legality have any particular moral significance. Not only does he say that their observance is “compatible with very great iniquity,” but he also says in his review of Fuller’s book that he is utterly puzzled why Fuller would use the term “morality” to refer to principles like these.

It is a distressing picture. Hart’s honest inclination seems to be to answer “yes” to both 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. This is clearest in his remarks on generality. And he really does seem 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. But 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 the combination implies that one of the criteria for calling something a legal system has genuine moral significance. Hart is afraid of being embarrassed by this. So he takes care to

⁶⁶ Ibid., pp. __; see supra note __ and accompanying text.

⁶⁷ HART, LAW, LIBERTY, AND MORALITY, supra note 18, p. __; see supra note 20 and accompanying text.

⁶⁸ Hart, Positivism and the Separation of Law and Morals, supra note 21, p. __; see supra note __ and accompanying text.

⁶⁹ Hart, Book Review (Fuller), supra note 17, at p. __; see supra note __ and accompanying text.

separate his assent to question (1) from his assent to question (2). They happen in different writings or when (as in the review of Fuller’s book) they occur in the same article, he makes sure there is a few pages separating them. That way he can give the impression that when he assents to question (2), he is conjoining this with a negative answer to question (1), and he can also give the impression that when he assents to question (1) he is conjoining this with a negative answer to question (2).

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, and the only reliable guide to it is that, in any given instance, he is combining his answer to one of our questions with whatever is necessary in the way of an answer to the other question to make Lon Fuller’s position look untenable. Because Fuller’s position has two parts to it, Hart does this, by more or less maintaining all four of the possibilities we have outlined, hoping that we would not notice that two of them in combination are incompatible with positivism as he seems to understand it.

Fig. 1

		(1) Are the principles of legality criterially connected to the concepts <u>law</u> or <u>legal system</u> ?	
		(1a) YES	(1b) NO
(2) Do the principles of legality have moral significance?	(2a) YES	√	√ (OK w/ pos.)
	(2b) NO	√ (OK w/ pos.)	√ (OK w/ pos.)

So the position looks like this (see Figure 1 above). Hart answers “yes” and “no” to both of the four questions, but he wants us at any given time to focus either 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 of which combinations are acceptable from a legal positivist point of view. Of course, negative answers to both questions would also be acceptable from a positivist point of view. But affirmative answers to both would not be acceptable. And Hart seems to have committed himself, over time, to all of these options.

V

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

(1) Certainly there does seem to be some room in between a strongly affirmative and a flatly negative answer to our first question, the question of whether there is a criterial connection between principles of legality and the concepts law and legal system. For one thing, the principles of legality are several in number and, although Hart is willing to say that law might logically connote generality,⁷⁰ he may not be willing to say anything like that of all or even any of the other principles of legality. For another thing, 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 he 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.'"⁷¹ And he says something similar about secrecy.⁷² 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. So 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 meant a very loose one, and that when he said (2a) 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 believe that it is conclusive of the

⁷⁰ HART, CONCEPT OF LAW, supra note 16, p. ___; see supra note ___ and accompanying text.

⁷¹ Fuller, Positivism and Fidelity to Law, supra note 3, p. 650.

⁷² Idem.

issue of the moral quality of a given law and certainly he need not believe that it is conclusive of the issue of political obligation so far as a given law is concerned.

Thus, Hart does seem to believe that conformity to the principles of legality is compatible with great iniquity, and this claim could survive legality's being found to have moral significance if, for example, that significance was prima facie or just one moral factor among a number of factors that might enter into a law's overall value. Indeed this combination of positions would be consistent with quite a strong version of (2a); we might say that conformity to the principles of legality always makes things better even though it is not necessarily capable of rescuing a law from the 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 satisfy those principles—examples could be South African apartheid or antebellum American slave law—in which case those iniquitous legal systems would have been even worse if the principles of legality had not been observed. That is one possibility. It involves paying attention to the plurality of considerations that enter into the overall evaluation of any law or legal system.

An even more intriguing possibility might be the following. We might say that quite apart from substantive non-legality 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 doesn't redeem the law in question totally); on the other hand, that very same conformity to the principle of legality might also have the potential in some cases to aggravate injustice. One and the same factor—legality—may work both ways. Hart comes close to saying something like this in his remarks at the beginning of the section in Chapter IX of The Concept of Law, where 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 brings us face to face with "a sobering truth":

the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally 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.⁷³

The very efficiency and centralization that give people their assurance that they know where they stand so far as law is concerned, also gives the state the means to oppress and exploit them more effectively than they could have been oppressed and exploited without the sources of certainty and efficiency that the principles of legality seem to require. Hart goes on to say, in the same passage, that it is “[b]ecause this risk has materialized and may do so again”⁷⁴ that we should be very wary of any attempt to show that law as such is necessarily moral. Notice now how different this is from any analytic version of the separability thesis. The claim now is that, in some ways legality contributes to the moral quality of the law and in some ways (often very similar ways) legality detracts from the moral quality of the law 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.⁷⁵

One other possibility. We noticed earlier that some of Hart’s denials of the moral significance of legality have to do not with the moral quality of the laws but with the presence or absence of political obligation.⁷⁶ We might easily reconcile a denial that legality generates political obligation with an affirmation that legality makes an affirmative difference to the overall moral quality of a law. Suppose one was a consent theorist about political obligation. Then one would believe that unless consent is present, the moral quality of a law is irrelevant to the political obligation to obey it. It could be the most just law imaginable and legality might have made a considerable contribution to its justice; but still there would be a further question about

⁷³ HART, *CONCEPT OF LAW*, supra note 16, p. 202.

⁷⁴ Idem. I have discussed this also in Jeremy Waldron, *All We Like Sheep*, 12 *CANADIAN JOURNAL OF LAW AND JURISPRUDENCE* 169, at p. ___ (1999).

⁷⁵ **[Refer to Tom Campbell’s Sydney paper on this.]**

⁷⁶ Hart, *Problems of the Philosophy of Law*, supra note 9, at pp. 115-6. See supra note 38. Consider also the way these various issues are run together in the following passage (addressed by Hart to Gustav Radbruch’s repudiation of positivism): “[E]verything that he [Radbruch] says is really dependent upon an enormous overvaluation 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, *Positivism and the Separation of Law and Morals*, supra note 21, p. 618).

consent and 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.⁷⁷ In this case the contribution of legality to justice (whatever it is) could not be separated off from the obligation aspect in the way the consent theory indicates, though it might still be true that legality doesn't conclude the issue of justice that the Rawls's theory of political obligation is responsive to. Others have toyed with principles of integrity or fairness as the basis of political obligation—Ronald Dworkin's theory of integrity, for example, and Hart's own commitment to the principle of fair play.⁷⁸ These accounts of political obligation are not bound to the justice of a law as tightly as Rawls's theory is; but they are also not wholly detached from it. Some aspects of justice are relevant to integrity and certainly relevant 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 aspects of justice to which legality also has some important relation.⁷⁹

So once again, one can imagine an honorable rescue effort to try to dispel the appearance of inconsistency as between 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 even with weak versions of (2a) when conjoined with (1a). For, as I understand it, the separability thesis is not supposed to block only conclusive moral implications of something's being or not being law. It is also supposed to block the suggestion that something's being or not being law has prima facie moral significance. And the separability thesis is certainly not satisfied by showing that something's being or not being law has moral implications, only not implications that settle the question of political obligation.

⁷⁷ See JOHN RAWLS, *A THEORY OF JUSTICE* ____ (1971) and also Jeremy Waldron, Special Ties and Natural Duties, 22 *PHILOSOPHY AND PUBLIC AFFAIRS* 3 (1993).

⁷⁸ See DWORKIN, *LAW'S EMPIRE*, supra note 62, at pp. ____ (integrity as the basis of political obligation) and H.L.A. Hart, Are There Any Natural Rights? in *THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984), 77, at pp. ____.

⁷⁹ See Waldron, All We Like Sheep, supra note 72, at ____ . See also Dworkin's connection of integrity and legality in Ronald Dworkin, Hart's Postscript and the Character of Political Philosophy 24 *OXFORD JOURNAL OF LEGAL STUDIES* 1, at pp. ____ (2004)

The pity is that Hart did not himself give the impression that any of this was worth exploring. 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—as 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. How helpful it would have been had he or his followers seen fit to explore them.

VI

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 that Fuller’s response and his later book were hopelessly confused, but Hart himself toyed with many of the positions that Fuller held (when he thought that no one was looking). And the 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 too obsessive a concern 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 sovereignty and the command theory and his own insight into the distinctive structures of a legal system—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 of the separability thesis in The Concept of Law:⁸⁰ I mean Hart’s formulation to the effect that “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality....”⁸¹ Coleman has shown that various “soft positivist” possibilities are left open by that formulation and that this openness is quite fruitful for jurisprudence. The present paper has worked in a somewhat different direction, exploring possible connections between law and morality via legality (rather than via

⁸⁰ Jules Coleman, Negative and Positive Positivism, 11 J. LEGAL STUD. 139, 148-49 (1982)

⁸¹ HART, CONCEPT OF LAW, *supra* note 16, at pp. 185-6.

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)—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. But, as it happens, it does not challenge the exact formulation 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,” 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.⁸² And I hope 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.

⁸² See also the fine discussion in John Gardner, Legal Positivism: Five and a Half Myths, 46 AM. J. JURIS. 199 (2001). Gardner points out not only 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.” (Ibid., 210)