

# The Grudge Informer Case Revisited

David Dyzenhaus<sup>1</sup>

## INTRODUCTION

One of the points of contention in HLA Hart's and Lon L. Fuller's 1958 debate<sup>2</sup> was a decision by a German postwar court, the Case of the Grudge Informer. Even those who have forgotten the details of the debate usually remember the drama of this case. However, the exchange between Hart and Fuller about it garnered little attention.<sup>3</sup>

This is a pity, as Hart's treatment of the case is a rare example of engagement with an actual problem of adjudication—it shows, contrary to received wisdom, that he and Fuller were engaged in a real debate. As I will argue, it is a debate about judicial obligation in light of a connection between what I call the doctrinal and the fundamental levels--the level of judicial interpretation of legal doctrine and the level of judicial interpretation of what legality itself requires. Indeed, I hope to show that the exchange supports Fuller's claim, one which has puzzled readers for fifty years, that Hart's argument brought within the dispute between natural law and positivism the issue of "fidelity to law".<sup>4</sup> I will also show that this connection helps to advance the broader issues of legal philosophy involved in the later Hart-Dworkin debate, one that has tended to eclipse the Hart-Fuller exchange, and which is often thought also not to display real engagement. I will begin with Hart and then move through an analysis of the case and Fuller's response to Hart to the broader issues of legal philosophy.

## HART AND THE GRUDGE INFORMER CASE

According to Hart, a German court had in 1949 to decide a case where a woman was prosecuted for the offence of illegally depriving her husband of his liberty – a crime punishable under the German Code of 1871, which had remained in force during the Nazi era.<sup>5</sup> In 1944, she had denounced her husband to the authorities for insulting remarks he had made about Hitler while on leave from the army. She wanted to get rid of him because she was having an affair. Under Nazi statutes, it was “apparently”,<sup>6</sup> Hart says, illegal to make such remarks, though the wife was under no legal duty to report him. The husband was found guilty and sentenced to death, though it seems that he was not executed but sent to the front.

The wife’s defence was that she had acted in accordance with the law – the statutes – and so had not committed any crime. But the Court of Appeal, despite the fact that the husband had been “sentenced by a court for having violated a statute”, found her guilty of the offence of deprivation of liberty, because – quoting from the judgment – the statutes were “contrary to the sound conscience and sense of justice of all decent human beings.”<sup>7</sup> Hart reports that the reasoning was followed in many cases, and these were “hailed as a triumph of the doctrines of natural law and as signaling the overthrow of legal positivism”. But, he retorts, “the unqualified satisfaction with this result seems to me to be hysteria”.<sup>8</sup>

Hart’s point is that even if one applauds the objective of punishing the woman for “an outrageously immoral act”, one should see that to achieve this a “statute established since 1934” had to be declared “not to have the force of law” and, Hart argues, the “wisdom of this course must be doubted”. There were two other choices available to postwar Germans– leaving her unpunished or the “introduction of a frankly retrospective law ... with a full consciousness of what was sacrificed in securing her punishment in this way”. He comments:

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. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. ... [T]here is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of the ordinary case.<sup>9</sup>

Hart emphasizes that it is not a mere matter of form whether one leaves it to a court to invalidate the statute in the way it did, that is, by pretending that it was merely interpreting the law with no sacrifice of principle, or one requires that a statute be invalidated by a retrospective statute. For if we adopt the Court's course, and assert that "certain rules cannot be law because of their moral iniquity", we "confuse one of the most powerful, because it is the simplest, forms of moral criticism". Rather, we should "speak plainly" and say that "laws may be laws but too evil to be obeyed".<sup>10</sup>

Hart took this point to be a knock down one, the "truly liberal answer", to Gustav Radbruch's famous claim that legal positivism contributed to the failure of lawyers in prewar Germany to respond adequately to the Nazis' abuse of the legal order. ". In his reaction to this failure, Radbruch had concluded in short articles in 1945 and 1946,<sup>11</sup> that one should adopt the view that "extreme injustice is no law". Thus, statutes lack the force of law when they contravene fundamental principles of morality and "should not be taken into account in working out the legal position of any given individual in particular circumstances".<sup>12</sup>

Hart accuses Radbruch of “extraordinary naivety” for supposing that “insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality.” Hart recognises that the positivist slogan “law is law” might have had a different history in Germany, acquiring a “sinister characteristic” in contrast to its English history, where it “went along with the most enlightened liberal attitudes”. But even if that is the case, Radbruch had “latent” in his “whole presentation of the issues to which the existence of morally iniquitous laws can give rise” “something more disturbing than naivety”. For he had only “half digested the spiritual message of liberalism which he is seeking to convey to the legal profession.” Everything Radbruch says, according to Hart, depends on an “enormous overvaluation 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 question: ‘Ought this rule of law to be obeyed?’”.<sup>13</sup> Instead, one should adopt the “truly liberal answer” and not let the fact that X is the law determine the issue whether X should be obeyed.

Hart was well aware that the harshness of his own judgments could only be accentuated by the fact that Radbruch and others, “like Ulysses or Dante”, testified from the experience of a descent into Hell, from which they brought a “message for human beings”. He was also aware that Radbruch’s criticism of positivism involved an exercise of self-criticism, for Radbruch, on his own account, had before the Nazi advent to power put forward a basically positivist view of law.<sup>14</sup> However, it was precisely the power of the experience from which Radbruch spoke that bothered Hart, because that made Radbruch’s appeal “less an intellectual argument” than a “passionate appeal”. So Hart describes Radbruch’s turn against positivism in religious terms - a “conversion” and a “recantation”.<sup>15</sup>

For Hart, the only way to avoid talking “stark nonsense”<sup>16</sup> is to adopt the view of his positivist predecessors, Jeremy Bentham and John Austin, and see that the question of the validity of particular laws does not depend on their moral content. Rather, if “laws reached a certain degree of iniquity then there [is] ... a plain moral obligation to resist them and to withhold obedience”. He quotes with approval Austin’s example of the man who is convicted of a crime punishable by death when the act he did was in fact trivial or even beneficial. The man objects to the sentence that it is “contrary to the law of God”, but the “inconclusiveness” of his reasoning, Austin says, is demonstrated by the “court of justice” by “hanging [him] up, in pursuance of the law of which [he had] impugned the validity”.<sup>17</sup>

Shortly after the 1958 debate between Hart and Fuller, HO Pappé pointed out that the case on which they focused had been misrepresented. In fact, Pappé explained, the Court and other courts which dealt with either the same or similar issues explicitly did not adopt a “higher law” argument, preferring to focus on interpretation of the law. They concentrated on matters such as the absence of a duty to inform and the privacy in which the remarks had been made in order to sustain the conclusion that there had been an illegal deprivation of liberty in terms of the 1871 law.<sup>18</sup>

Hart added a footnote to the reprinted version of “Positivism and the Separation of Law and Morals” in which he summarised the respects in which, on Pappé’s account, he had the facts of the case wrong, most pertinently because the Court,

after accepting the theoretical possibility that statutes might be invalid if in conflict with natural law held that the Nazi statutes in question could not be held to violate it; the accused was guilty of unlawfully depriving her husband of liberty, since she had no duty to inform against him but did so for purely personal reasons and must have

realised that to do so was in the circumstances “contrary to the sound conscience and sense of justice of all decent human beings”.<sup>19</sup>

Hart said that Pappé’s “careful analysis should be studied”. But he did not seem to think it had implications for his own account of what we can think of as the dilemma of legality—the problem that judges, lawyers and those subject to the law face when the law is used as an instrument of injustice. For he said that the case as he had understood it could be treated as a “hypothetical one”.<sup>20</sup>

This is an inadequate response. It shows that Hart failed to appreciate that the problems Pappé exposed went well beyond the facts of a hypothetical case. Pappé did not merely correct Hart’s account of the case but made profound jurisprudential points which are largely consistent with Fuller’s 1958 response to Hart.

As we will see, Hart’s method of candour obscures not only the judge’s situation, but also the citizen’s. In addition, because Hart does not attend to the problem of interpretation faced by judges in a wicked legal system, he cannot appreciate how cases like that of the Grudge Informer pose for judges the question of how to maintain the legal order “legally in good shape”.<sup>21</sup> They do so because they form a very important sub-category within the category Dworkin terms hard cases. They are “fundamental cases”, where lawyers reasonably disagree about the appropriate outcome, not only because they disagree about legal doctrine, but also because their disagreement is influenced by their views about the very foundations of legal order.

## FUNDAMENTAL CASES

In the actual Case of the Grudge Informer, the Bamberg Court of Appeal overturned the decision of the trial court. The latter found that the informer had not illegally deprived her husband of his liberty because her report and the subsequent detention of her husband came about because he had violated a valid law and through a “properly carried out judicial process”.<sup>22</sup> This decision, the Court of Appeal held, erred in that it inferred the legality of the informer’s report from the legality of the court-martial which found the husband guilty. The court of first instance thus failed to appreciate that the accused had used the court-martial as a mere instrument to bring the criminal act. Her act was thus one of indirect perpetration. But the act of the instrument which directly brought about the illegal result—the court-martial which found the husband guilty--was an act which simply interpreted and applied the law, so could not be said to be illegal.

The salient difference, for the Court of Appeal, was that the accused was not under any legal duty to bring about the result, whereas once her report was brought to the attention of the court-martial, it was under a duty to decide as it did. The court-martial was simply applying the positive law as it was intended to be applied. She knew, the Court of Appeal reasoned, that her report would lead inexorably to a certain range of results, the least harmful of which was a year’s imprisonment, the worst death. She thus deliberately made use of laws that most Germans knew were designed to terrorize the population and which many, even at the height of the Nazi domination, also knew to be immoral.

The Court emphasized that its reasoning did *not* depend on a claim that the Nazi statutes in issue violated the laws of nature. The laws, while grossly unfair, did not reach that point because they did not command any positive conduct, only an omission—making no public remarks of a certain sort. The Court did, however, imply that if the statutes had, for example, commanded that people do something immoral and made it an offence not to do

so, it would have found that a court-martial that caused the detention of an individual who had failed to carry out this positive duty would itself act illegally.

It is clear that the Court was determined to reach a conclusion that the woman was guilty without incriminating the judges who were her instrument and its determination in this regard gives its reasons a rather contrived quality. But while contrived, the reasoning is distinctly legal, by which I mean that all the reasons the Court offers are legal reasons, and it organizes those reasons into a chain of justification for the result it wished to reach. Moreover, the legal reasons operate at two rather distinct levels—the fundamental level of reasoning about legal order and the role of judges in maintaining it and the doctrinal level at which at stake are questions of substantive law.

At the fundamental level, the Court faces the question about what to make of judges who are under a duty to interpret positive laws that are morally obnoxious but, in its view, not so obnoxious that one can make a natural law argument that they are invalid. At the doctrinal level, the Court has to consider how its sense of an answer to the first question meshes with its sense of how best to interpret the substantive law. Assume that at both levels judges regard themselves as under a duty to find an answer that coheres with the animating principles of that level, respectively, the fundamental principles of legal order and the principles of the substantive body of law. Because the Grudge Informer Case requires the judge to give an answer at both levels, it is a special sub-category within the general category of hard cases--the category of fundamental cases.

In this fundamental case, the Court assumes that judges are in a different position from citizens when the law requires a morally obnoxious result but there is no legal duty on the part of the citizen to bring that result to the attention of the state. That is because judges

are in virtue of their office—their submission to authority—required to apply the law as it exists on the statute book.

The Court thus assumes that the judges on the court-martial had no option but to decide as they did, and that is what marks the difference between the judges and the informer. But it follows that if the statutes *had* imposed a duty on citizens to report such remarks, the informer would also be able to rely on the statutes to absolve her of the crime of illegal deprivation of liberty. Thus, the Court's distinction between the role of the judge and the role of the citizen turns out, despite some suggestions to the contrary, to depend not on any special judicial responsibilities but on contingent facts about the meaning of the statutes.

The Court does enter a reservation, however, which is exactly Radbruch's. If these statutes had reached a pitch of injustice sufficient to violate the laws of nature, the court-martial judges would be guilty of a crime, as by implication the informer would be even if the law in question required her to do the criminal act.

There are two problems with the Court's reasoning which, in conjunction, create a problem for Hart. First, the Court's stance on the fundamental level means that in order to get to the result it wanted it had to resort to a criminal doctrine in a way that not only looks too contrived, but is also suspect as a piece of reasoning about the criminal law.<sup>23</sup> In other words, its stance at the fundamental level introduced distortions at the doctrinal level.

Hart would surely regard this problem as further evidence in favour of his proposal that in such cases candour demands that one refrain from smuggling one's desire to have the informer punished into claims about what the law requires, whether one does this through the "Radbruch Formula" that extreme injustice is no law or through bending the doctrines of the positive law. Indeed, it seems to show that the hypothetical case Hart considered was

in fact not very distant from the actual case. Thus he could say that the superior legal solution *if* one resolved the moral dilemma in favour of punishing the informer was a statute which retrospectively invalidated the Nazi statutes.

However, the second problem is one which affects Hart's position and the Court's with equal force and, as we will see, it makes the first problem one for Hart as well. It results from the assumption that the court-martial judges were under a legal duty to decide as they did, which left postwar courts with the option of, on the one hand, letting the informer go unpunished or, on the other hand, if they were determined to find the informer guilty, resorting to either the Radbruch Formula or distorted doctrinal reasoning.

In fact, postwar courts faced with grudge informer cases were not confined to these options. They could get to the same conclusion as the Bamberg Court of Appeal through finding the informers guilty of complicity in illegal deprivation of liberty, though that required also finding that the court-martial judges were culpable—not a mere instrument, but the direct perpetrator. This option was adopted in 1952 by the Federal Supreme Court in a very similar case, in which the Court quashed an acquittal of an informer by a lower court, and referred the matter back for decision in light of its view of the law.<sup>24</sup>

As Pappé explains, the Federal Supreme Court found that the informer could not be found guilty if the court-martial had acted legally, which it had not. There was no need to rely, however, on a claim that the Nazi statute was incompatible with supra-positive law, as the court-martial had not properly considered the statute or the established principles of German criminal law.

First, in regard to the statute, the Court emphasized that the remarks had to be made in public. While superior courts during the Nazi era had developed a very wide interpretation of publicity, to the point where the public included the smallest and most intimate circle,

there remained in place a requirement relating to the expectation that the remarks could be repeated elsewhere. The Court thus held that the husband would have had to have had mens rea in regard to a possible breach of confidence, which could not be assumed absent special circumstances in the context of the relationship of extreme intimacy between husband and wife. The court-martial thus derived its finding from an arbitrary and unlawful interpretation of the law.

Second, the death sentence violated established principles of German criminal law. The court-martial had a great deal of discretion when it came to sentence and a death sentence was clearly disproportional given that the remarks were made between spouses and that the interest supposedly protected by the statute was the military morale of the German people, which was at most minimally impacted by the remarks. The court-martial decided then, not on the basis of the positive law, but in response to administrative pressure to suppress all criticism of the regime.

Third, the accused was, as a result, an accessory before the fact to the crime of unlawful deprivation of liberty and of attempted homicide. She was guilty because, fourth, she had the intention to get rid of her husband by using the unlawful procedure of the court-martial. The jury in the trial court had accepted her defence that she trusted in the legality of the court-martial and, as a woman without higher education, she could not be expected to recognise violations of the rule of law. However, the Court held that such a defence was available only in normal times, when independent judges guarantee the liberty and dignity of the individual, and the Nazi era was very different, since court practice often failed to deliver due process. Pappe comments:

This insight was well within the ken of an ordinary member of the public. There was, despite the warped judgment of wide circles during the Nazi period, a lively

awareness in the population that administrative and legal authority could be abused for the purpose of intimidation and suppression of opposition views. Sentences, which served the purpose of political terror rather than the realisation of the law, had actually led to a heightened popular sense of right and wrong rather than stifling it. This assumption was accepted by the Supreme Court as a matter of common knowledge; it had also been found to be correct by the jury. A mistaken belief in the legality of the court-martial procedure would be a defence only for a person who could not be expected to share the insights of ordinary members of the public. However, the facts of the case, as found by the jury, indicated that the accused, far from acting to reveal the crime, just wished to make use of the best means to get rid of her husband so that she could continue her adulterous way of life.<sup>25</sup>

Pappe went on to outline the ways in which common law judges could arrive at the same result as the Federal Supreme Court, using the ordinary resources of their legal orders.<sup>26</sup> This exercise underlines his emphasis on the fact that the Court, though using a different route from that of the Bamberg Court of Appeal, reached its conclusions without having to rely on allegedly supra-positive legal principles. And that prepares the way for his profound observation about a little noticed aspect of Hart's 1958 article--that Hart relied on the Case of the Grudge Informer in the context of his argument about judicial interpretation of particular laws.

Because, says Hart, men were sentenced to death for criticism of the Nazi regime, one should see that the "choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's tyranny effectively". A decision "on these grounds would be intelligent and purposive, and from one point of view the decision would be as it ought to be". But, Hart asserts, that "ought" is immoral and thus we know that it cannot

sustain a claim that the distinction is false between “law as it is and law as morally it ought to be”.<sup>27</sup>

Pappe observes that to regard such intimidation “in the interests of the ruling party as the declared purpose of the German criminal law ... is ... an arbitrary assumption”. Not only was the 1871 law on illegal deprivation of liberty in existence, but also the large part of pre-Nazi law. Moreover, the judges were supposed to be independent and they had to choose “between applying the criminal law as established by statute, interpretation and precedent, and, on the other hand, obeying the shifting and often contradictory administrative directives of the government of the day”. Finally, it has to be taken into account that a dictatorial government can of course make laws to achieve its ends, but cannot change the body of preexisting law wholesale. What it really desires is the ability to decide arbitrarily. But it is unlikely to reveal its character by enacting a statute declaring that courts should follow government orders regarding the “definition and punishment of crime”, since such a statute would “obviously not be law, even in Hart’s sense”. It is thus unsurprising, Pappe concludes, that the postwar courts should “have concentrated on questions of judicial interpretation and procedure rather than on that of the validity of statutory law”.<sup>28</sup>

In order to appreciate the implications of Pappe’s observation, we have to recall that these remarks of Hart were made in the course of his argument against the Legal Realist claim that one can demonstrate a connection between law and morality from the fact that when judges interpret particular laws they must rely on their own moral convictions. Hart argued that this claim was far from impugning the positivist Separation Thesis that there is no necessary connection between law and morality. First, reliance on values is not equivalent to reliance on morality; second, in the hard cases on which the Realists rely there was often

even usually no answer determined by law. In other words, at most the Realists had shown a necessary connection between law and value, not law and morality. But in fact they had failed to show even this, since in the cases where judges had to rely on value, the reason for such reliance was often that the law could not be said to supply an answer. The judge is in the penumbra of personal choice or discretion, rather than in the core of legal certainty.<sup>29</sup>

Hart's claim that "from one point of view the decision would be as it ought to be" could thus mean two different things. He could mean that the court-martial's decision was correct as a matter of interpretation of the law, because it sought intelligently to further a value mandated by the legal order for interpreting this kind of statute. However, that the value is morally obnoxious shows that there is no necessary connection between law and morality. Alternatively, he could mean that the court-martial had to exercise a discretion, engaging in an intelligent, value-based exercise of interpretive judgment; but one cannot infer a connection between law and morality from this because of the obnoxious nature of the value. The second option is perhaps more likely,<sup>30</sup> but it throws into doubt the assumption Hart shares with the Bamberg Court of Appeal that the law required the court-martial judges to decide as they did.

In addition, even if one were to accept that the best way to characterize the court-martial's situation is to say that its judges had a discretion, it seems, as Pappé points out, odd to suppose that the value of intimidation in the interests of the regime is one a judge may adopt and still be recognized as performing his office. The issue here is not simply that the value is morally obnoxious. It is that the value seems radically inconsistent with the point of view of legal order, which I think we can assume is the point of view to which Hart refers when discussing the Legal Realists. It cannot, that is, be justified from the perspective of a

judge who regards it as part of his role to maintain legal order in good shape legally speaking, rather than acting as a minion of the regime.<sup>31</sup>

Hart never says in so many words that judges have a duty to maintain their legal orders in good shape legally speaking. But his later account of the internal point of view which judges have to adopt in order for legal order to function at all surely amounts at the least to such a claim. Since that account takes place at what I called earlier the fundamental level, it has profound implications for Hart's legal theory, for, in particular, his assertion that his theory illuminates the predicament of individuals faced with unjust laws since it tells them that the certification of law as valid is not conclusive of the question of obedience. For, when more closely examined in light of the Case of the Grudge Informer, the assertion seems to have no application to judges.

As we know from *The Concept of Law*,<sup>32</sup> Hart does not think that what judges do in regard to the fundamental level can be captured in the language of obedience to commands. Judicial duty has nothing to do with obedience and everything to do with judges' accepting that their "rule of recognition"—the fundamental rule of legal order-- provides them with "a public, common standard of correct judicial decision".<sup>33</sup> So if a rule is picked out as valid by the rule of recognition, the judge has, from the point of view of legal order, to apply it. It is hardly stretching Hart's analysis, despite his claim that he was engaged in an exercise in descriptive sociology,<sup>34</sup> to say that the judge is under a duty to apply the rule, because that is what he is required to do *qua* judge.

It follows for Hart that the court-martial judges were either under a duty from the point of view of legal order to find the husband guilty or, from that same point of view, could legitimately exercise their discretion by finding him guilty. Of course, Hart can emphasize that the duty, like the possible exercise of discretion, has to be weighed against

the option of not finding the husband guilty, and it might seem obvious that there is no contest here. But in either case Hart's account leads to obscurity, not light.

In the first place, for a judge to decide not to apply a rule merely because it is immoral is to cease being a judge. For Hart, the fundamental rule of legal order depends on the judge continuing with the practice of applying valid rules. The judge is thus faced with a situation far more complex than can be captured by what we can think of as the Hartian formula: citizens should disobey extremely unjust laws. Moreover, it would be somewhat contradictory for Hart to suppose that a Nazi-era judge should morally speaking have not applied morally obnoxious law, but also that this same stance was morally inappropriate for postwar judges.

Matters become even more puzzling if the situation is one which requires an exercise of discretion. It unclear why Hart supposes that there was any sort of "ought" in play that should inform such an exercise. For a judge to decide as he did either because he wanted to help the Nazi state in its program of intimidation or because he was himself intimidated into doing so is also to cease to be a judge. To find the husband guilty was, as the Federal Supreme Court reasoned, to turn the office of judge into a cog in the machinery of a vicious administrative regime and not to play a role in maintaining the *Rechtsstaat*. That is, the issue was not merely that that finding was immoral, but that it undermined what we may think of as the "ought" of legality.

Common then to the puzzles raised by either description is Hart's conception of legal order. His idea of legality—of the normative structure of legal order—is that normativity is what it takes to maintain a system of valid rules. But his analysis of the Grudge Informer Case shows that, at least when it comes to the officials charged with the maintenance of the most fundamental rule presupposed by his idea of legal order, his idea

obscures rather than illuminates the officials' position when they are faced with an unjust law.

Further, as I have already suggested, Hart's idea is no less obscuring when applied to the situation of the postwar courts. That the Bamberg Court of Appeal and the Federal Supreme Court got to the same result by different doctrinal routes could, I suppose, be thought to be evidence of the fact that the judges were determined to reach a result that was not determined by the law, and so were exercising a discretion in Hart's sense. But much more plausible is that both Courts thought it imperative for legality's sake to demonstrate to the German people that there is a difference between legality and the Nazi administrative regime. The Court of Appeal has much more difficulty in this regard. Its idea of legality, which seems to have much in common with Hart's, suggests that the court-martial judges were faced with a stark choice between legal and moral duty, but not so stark as to overcome their legal duty. And that in turn led to a less satisfactory piece of reasoning at the doctrinal level.

In contrast, the Federal Supreme Court has far less difficulty, because its idea of legality, implicit in its reasoning at the fundamental level, combines two elements: first, an understanding of judicial interpretation which requires judges to interpret doctrine by taking a wide view of the relevant positive law and to seek to reach conclusions that, to use Dworkinian language, shows the law in its best light; second, an understanding of legal order that is committed to an idea of legality that consists of principles, including the principle that a court that decides matters that affect significant individual interests is radically different from an arm of executive government that exists simply to carry out the orders of higher officials.

This second component is itself justified by its service to the interests of the individual and it may be that one could convincingly argue that the two components form part of an overarching theory of legality. However, I wish to make a more limited point. It is that the court-martial judges failed legality in respect of both components, while the informer failed in that she turned her husband over to a body counting on the fact that it would act, not as the court of law it was presented as being, but as a cog in a vicious administrative regime.

#### FULLER'S RESPONSE

In contrast to Hart, Fuller's 1958 essay provided a theoretical framework sensitive to the complexities of the situations faced by both the Nazi-era and the postwar courts. In Fuller's view, the debate between contending positions in legal theory was best understood as one about different ideals of fidelity to law at the fundamental level. At that level, one had to take into account what Fuller called the "internal morality of law" or "inner morality of law".<sup>35</sup> He argued that attention to the internal morality would have helped German lawyers before the war maintain their fidelity to the ideal of law. After the war, German judges could have dealt better with cases like that of the informer, had they focused on the deterioration of legality. Thus, the debate at the fundamental level was one which had direct practical implications, not least in that a judge faced with a certain kind of case would also be faced with a choice between these ideals. Such a choice does not amount to an exercise of discretion determined by factors external to law, since it is a choice about how best to interpret the practice in a way that sustains legality.

It is because Fuller sees that both levels are in play and that there is a direct connection between them in judicial interpretation that he also notices both that the Nazi statutes could not be said to compel the result that the husband was guilty and the implications of this fact for the informer's defense that she acted in accordance with the law. In contrast, Hart, in analyzing the case, not only did not see that its characterization was a matter of interpretation that had in part to take into account the interpretive complexity of the situation of a judge, whether during the Nazi era or after the war. He also could not appreciate such complexity, since for him issues of interpretation do not fall within the scope of descriptive legal theory; rather, they are fit topics for normative political theory.<sup>36</sup>

In this regard, Fuller rejected Hart's statement of the dilemma the postwar courts faced because its solution – say that the law is too evil to be obeyed – is wrong-headed, at least if it is offered to judges, since when a court “refuses to apply something it admits to be law” “moral confusion reaches its height”. As Fuller recognized, Hart did not mean this solution to be deployed by a court but by a legislature. However, Hart does not, Fuller says, take into account the situation of “drastic emergency” in which the courts and Radbruch were living. If “legal institutions were to be rehabilitated in Germany it would not do to allow the people to begin taking the law into their own hands, as might have occurred while the courts were waiting for a statute”.<sup>37</sup> Germany had “to restore both respect for law and respect for justice” and the attempt to “restore both at once” necessarily created “painful antimonies”.<sup>38</sup>

Even more important is that the Grudge Informer Case could come into Hart's view only as one in which there is a stark confrontation between justice and valid law. In this respect, there is little difference between his and Radbruch's positions. Indeed, Fuller thought that the German indifference to the internal morality of law persisted in Radbruch's

new position after the war. For Radbruch's resort to notions of "higher law" – a morality that transcends positive law but which functions as a test for the validity of law – may itself, Fuller says, be "a belated fruit of German legal positivism". Someone with a positivist mindset might feel that the only way to "escape one law is to set another off against it, and this performance must be a 'higher law'".<sup>39</sup>

Fuller's thought seems to be that, despite Hart's vehement critique of Radbruch, there is a deep similarity between their positions. Both Hart and Radbruch resort to the idea of a higher moral law in order to deal with the problems created by past legal injustice. For them the higher law is a law which has the power or force to invalidate another law. Thus they both in fact prefer the legal solution to come in the form of a frankly retroactive ruling. The only difference is that Radbruch is prepared to allow judges to do what the legislature has not done or will not do, which also means that he finds himself compelled to present what they are doing as legal. Thus he argues that the prohibition on extreme injustice is a kind of higher *legal* law.

What Hart and Radbruch therefore seem to share is an inability to appreciate the moral and legal complexity of the situation of judges faced with an unjust law. As I suggested earlier, this inability may not be confined to the situation of the judge. One can infer from Pappé's description of the Federal Supreme Court's reasoning that the Court supposed that a *law*-abiding citizen of the Third Reich would not consign someone to a system presided over by the courts-martial for making remarks about Hitler because she would know that the accused would not be tried according to law--by impartial judges who give an appropriate interpretation of the law. For such a citizen, the moral and *legal* issue was thus too complicated for a theory that can only deal with a clean clash between what the law requires and conscience.

In sum, the Case of the Grudge Informer supports Fuller's position rather than Hart's. Moreover, as I will now suggest, one can draw some implications from this case for the Hart-Dworkin debate. While that debate has largely been conducted in terms of the appropriate stance for legal theory when it comes to judicial interpretation of particular laws, my analysis of the Case of the Grudge Informer suggests that Fuller's terrain of legality—that is, debate at the fundamental level—will likely prove more fruitful.<sup>40</sup>

## THE HART-DWORKIN DEBATE

Dworkin has recently provided an analytic grid for understanding debates in philosophy of law.<sup>41</sup> His own work, he says, is mainly about law in the *doctrinal* sense—it explores the “concept of ‘the law’ of some place or entity being to a particular effect”, that is, what is involved in “claims about what the law requires or prohibits or permits or creates”.<sup>42</sup>

The doctrinal concept must not be confused, Dworkin asserts, with a *sociological* concept of law, the concept used when we “name a particular type of institutional social structure”. While such concepts have their uses in historical or social scientific inquiries, it is not helpful to argue about whether some group “*really* had a legal system”.<sup>43</sup> The sociological concept of law is an “imprecise criterial concept”, where we share some criteria that make it possible to use the same concept but not enough that the answer to such questions can be determined.<sup>44</sup> As a result, the “argument, once much beloved of legal philosophers, whether the Nazis had a legal system is bootless for that reason”.<sup>45</sup> The issue is not that the sociological concept lacks boundaries, since the doctrinal concept “figures among the boundaries of the sociological concept in the following way: nothing is a legal system in the sociological sense unless it makes sense to ask what rights and duties the system

recognizes.”<sup>46</sup> However, the relationship is not reciprocal since we can deny that the Nazis had a legal system in the same way that we can deny that a game is a legal system, while answering the question what rights and duties “the putative Nazi law” or the game recognize. “So the availability of the doctrinal concept underdetermines the sociological concept”.<sup>47</sup>

There is also what Dworkin calls a *taxonomic* concept of law, one which supposes that a community that has law in the sociological sense “also has a collection of discrete rules and other kinds of standards as opposed to moral or customary or some other kinds of standards”.<sup>48</sup> But he sees no point to a debate about whether moral standards really are legal standards, since in such a debate the important issue is the doctrinal one of “whether and how morality is relevant to deciding which propositions of law are true”.<sup>49</sup>

Finally, there an *aspirational* concept of law, “which we often refer to as the ideal of legality or the rule of law”. A “great deal”, he says, “turns on what we take to be the correct conception of the aspirational concept”, whether we take it to be “purely formal”—“legality is fully secured when officials are required to and do act only as established standards permit” or “more substantive”—“legality holds only when the standards that officials accept respect certain basic rights of individual citizens”.<sup>50</sup> In his view, “any adequate account of the aspirational concept—of the values of legality and the rule of law—must give a prominent place to the ideal of political integrity, that is, to the principle that a state should try to govern so far as possible through a coherent set of political principles whose benefit it extends to all citizens. Recognizing and striving for that dimension of equality is, I think, essential to the legitimization of state coercive power”.<sup>51</sup> He does recognize that one might think that the political and social value of legal order lies in another ideal: “the ability of that order to facilitate citizens’ planning and coordinate their activities in the interests of

individual and collective efficiency”.<sup>52</sup> This view describes one version of what Dworkin calls “political positivism”.<sup>53</sup>

On this grid, Hart’s position is taxonomic, though with traces of political positivism,<sup>54</sup> whereas Fuller’s is sociological because of his claim that for there to be law, certain minimal requirements of procedural justice have to be met.<sup>55</sup>

However, the idea that at the most fundamental level debates in philosophy of law are about the political point of law was not only put forward by Fuller in the 1958 essay; in *The Morality of Law*, he used, perhaps even coined, the term “aspirational” to express that idea.<sup>56</sup> Moreover, he made it clear in 1958 and in later work that the role of judges was to promote “integrity” in the law.<sup>57</sup>

Fuller and Dworkin agree, then, about the methodology of philosophy of law—it is a political inquiry which has direct practical implications for legal officials in that it should inform, among other things, the judiciary’s decisions about how best to answer questions about what the law requires. They differ mainly about the level on which the inquiry should focus—sociological for Fuller, doctrinal for Dworkin.

Dworkin’s choice might be thought to be vindicated because the procedural principles which Fuller identified as constituting the internal morality of law are, as Hart put it, “unfortunately compatible with very great iniquity”.<sup>58</sup> Indeed, Dworkin joined in the first wave of positivist critique of Fuller’s *The Morality of Law*, arguing that Fuller’s failure in this regard indicated that a critique of legal positivism has to start with a focus on its “unacceptable logic of legal standards”,<sup>59</sup> that is, at the doctrinal level.

However, to the extent that positivists have made any concessions to their critics, these have not been at the doctrinal level.<sup>60</sup> At this level, they have responded to Dworkin’s argument about the way that moral principles figure in adjudication in two ways. Either they

say that he is correct but only contingently so, since everything depends on whether such principles necessarily are included or incorporated into the legal materials of every legal order. Or they say that even when a legal order requires judges to resort such moral principles, their decisions are not fully determined by law. Both responses are united by the thought that Dworkin's theory is not a theory of law but a parochial account of adjudication. They differ only in that the second response regards Dworkin's account of adjudication as incorrect even where it is thought to be most at home—the United States of America.

In contrast, positivists have arguably made a concession to Fuller, as indicated by Hart's remark in *The Concept of Law* that the formal features of governance by rule are “closely related to the requirements of justice which lawyers term principles of legality” and that if this is what is meant by the “necessary connection of law and morality, we may accept it.” And the concession holds despite Hart's point about the compatibility of legality with “with very great iniquity”.<sup>61</sup>

For Fuller does not deny that particular laws are enacted as instruments of the policy of the powerful, nor that the powerful might use the law to enact evil policy. Indeed, he can turn against legal positivists a version of what they consider to be a knockdown argument against Dworkin's position—that Dworkin's doctrinal focus conflates explaining *law* with giving an account of how judges decide *the law* of a particular jurisdiction. That is, positivists wrongly infer from the fact that *the law*, especially the statute law, of any jurisdiction is used as an instrument of the policy of the powerful, that *law* itself is to be explained as an instrument.

That this is a mistake is reflected in European languages except for English in the fact that, following the Romans, the generic term for law contains an element of right, *ius*/Recht/droit, in contrast with the morally neutral words for particular laws,

lex/Gesetz/loi. Moreover, it is reflected in English in the fact that we speak of the rule of law, not the rule of particular laws. The debate about the connection between law and morality is thus not, as positivists wrongly suppose, about whether there is a connection between the law—the particular laws of a jurisdiction--and morality but about the connection between law, that is, legality or the rule of law, and morality.

This mistake, in my view, has had an unfortunate impact on philosophy of law, in particular on the way in which Fuller's challenge to legal positivism, a challenge about conceptions of legality, was displaced by a debate between positivists and Dworkin about the best way to understand judicial interpretation of *the* law. Of course, the fact that particular laws can be used as instruments of evil throws into question any claim that legality evidences a necessary connection between law and morality. But, as the Grudge Informer Case shows, the kinds of question that are thrown up by such laws are not well answered by legal positivism.

Moreover, those questions cannot be answered other than by a close attention to legality, to the need to maintain legal order so that it is in good shape legally speaking. Fuller's claim about a legal order not being so unless certain minimal requirements of procedural justice are met is about this issue; more accurately, it is a claim about the formal attributes of a legal order, attributes that require procedures for their realization.<sup>62</sup>

This clarification helps to show that Dworkin is mistaken that the relationship between doctrinal conceptions of law and sociological concepts is one way. Recall that he says that the doctrinal concept determines, though far from fully, the boundaries of the sociological concept, but the relationship is not reciprocal since we can deny that the Nazis had a legal system in the same way that we can deny that a game is a legal system, while

answering the question what rights and duties “the putative Nazi law” or the game recognize.

However, as the Case of the Grudge Informer shows, in cases where the issues reach to the foundations of legal order, the clash will be between different sociological conceptions of legal order.<sup>63</sup> Moreover, the choice between sociological conceptions will in fact help to determine the conclusions judges reach at the doctrinal level, and determine in the fullest possible sense available in moral argument, just the sense on which Dworkin relies in his one right answer thesis. Where Dworkin goes wrong is in supposing that the aspirational concept of law is distinct from the sociological concept.

When we identify a “particular type of institutional social structure”, we do more than “name” it. We also set out what we take to be its most fundamental formal characteristics, and, in so doing, we describe its aspirations. This is as true of Weber, as it is of Fuller, and it involves an exercise not in “descriptive” but in normative sociology.<sup>64</sup> As we have seen, at stake in fundamental cases is not just the doctrinal question of how to make the law into the best it can be, but also the question of how best to sustain the project of law, otherwise known as legality or the rule of law. At this level, Hart and Fuller side against Dworkin in supposing that the sociological level is significant, even of prime interest, to philosophy of law, though Fuller sides with Dworkin both in supposing that philosophy of law inquires mainly into the normative, that is, political and moral point of law, and that, at the doctrinal level, when judges differ most fundamentally, they do not at that point step beyond law’s limits.

Thus when Fuller said that a legal order might “so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system”,<sup>65</sup> he was not engaged in a bootless argument. It was, as we have seen, a serious question for postwar

German courts, whether there was legal order during the Nazi period. Neither of the two postwar courts we have encountered could properly attend to the question they had to answer without engaging that fundamental issue, as well as the doctrinal issue which in part turned on it. From this, we can draw several conclusions.

First, the relationship between the fundamental level, the level which Dworkin would deem sociological, and the doctrinal level is not one way but reciprocal. Answers to questions at the fundamental level partly determine answers at the doctrinal level.

Second, the fundamental level makes possible the doctrinal level. Recall Dworkin's description of the doctrinal level—it pertains to “claims about what the law requires or prohibits or permits or creates”. That way of putting things neglects the question of how not “the law” but “law” makes it possible for such claims to come into being and to be properly adjudicated. Crucial here is the distinction mentioned earlier between the formal characteristics of Fuller's account of legality--publicity, generality, prospectivity, congruence of official actions with law, and so on—and the procedures that pertain both to the making, the fiat of law, and to law's interpretation, the reason or justification of the law.<sup>66</sup>

This distinction could explain why both domestic law and international law are both law despite the fact that they do not have in common certain procedural mechanisms, for example, an independent judiciary with authority to interpret the law. Indeed, how law or legality makes it possible for doctrinal issues about rights and duties in international law to be resolved might actually tell us more about the nature of law than the same issue in domestic law, since in the latter domestic mechanisms exist that obscure the question. Similarly, theories that seek to demote judges from their prominent role in constitutional or rights adjudication might wish to engage more not only at the fundamental level, but within that level more with formal criteria than procedural criteria, in order to make the case that

certain procedural mechanisms are not important, or not as important as, say Dworkin thinks, to the project of legality.

Third, as I already suggested, a challenge at this fundamental level may be more troubling to legal positivism since it is the level at which it attempts primarily to operate. So the challenge does not offer it the opportunity legal positivism has seized in regard to Dworkin of redefining taxonomically what happens at the doctrinal level in order to maintain its commitments at the fundamental level.

My final conclusion is not, however, that we should abandon the Hart-Dworkin debate because all the action is in the Hart-Fuller debate. Recall that my argument started with a case, one to which Hart paid unusual attention, because he thought it supported positivism. My argument that it does not invoked both Dworkinian and Fullerian themes. Moreover, once the Fullerian fundamental level comes into view, one might be able to understand better Dworkin's theory, as the kind of overarching argument alluded to earlier, which connects the fundamental and the doctrinal levels via an account of law's aspiration to treat each individual with equal concern and respect. If that were right, then the terrain would be properly opened up for a much more fruitful confrontation than the one between Dworkin and the conceptual legal positivism espoused by many of Hart's followers, and perhaps by Hart himself after the 1958 debate. I mean here the confrontation between Dworkin's position and political positivism, as for example, represented by Jeremy Waldron. So my final conclusion on Fuller's behalf is that his understanding of legality marks out the terrain on which that confrontation will and should take place.

---

<sup>1</sup> Professor of Law and Philosophy, University of Toronto. I thank those who attended a philosophy seminar at McMaster University and a graduate seminar in the Law Faculty of the University of Toronto for comments on drafts of this paper, Mark Bennett for extensive written comments and Kristen Rundle for several illuminating discussions.

<sup>2</sup> HLA Hart, “Positivism and the Separation of Law and Morals”, reproduced in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49, hereafter “Hart”; Lon L Fuller, “Positivism and Fidelity to Law- A Reply to Professor Hart”, (1958) 71 *Harvard Law Review* 630, hereafter “Fuller”.

<sup>3</sup> However, see Thomas Mertens, “Radbruch and Hart on the Grudge Informer: A Reconsideration” (2002) 15 *Ratio Juris* 186 and my “The Dilemma of Legality and the Moral Limits of Law” in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds., *The Limits of Law* (Stanford: Stanford University Press, 2005) 109.

<sup>4</sup> Fuller, 632.

<sup>5</sup> Here I follow Hart, 75-7, pretty well verbatim, though without quotation marks except when I want to emphasize Hart’s choice of language.

<sup>6</sup> *Ibid.*, 76.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, 76-7.

<sup>10</sup> *Ibid.*, 77.

<sup>11</sup> Gustav Radbruch, “Statutory Lawlessness and Supra Statutory Law”, (2006) 26 *Oxford Journal of Legal Studies* 1; “Five Minutes of Legal Philosophy” (2006) 26 *Oxford Journal of Legal Studies* 13.

---

<sup>12</sup> Hart, 74.

<sup>13</sup> Ibid., 74-5.

<sup>14</sup> Ibid., 72-3.

<sup>15</sup> Ibid., 72-4.

<sup>16</sup> Ibid., 73. The phrase is John Austin's, quoted from Austin, *The Province of Jurisprudence Determined* (Library of Ideas edn., 1954) 185, but Hart clearly adopts it as his own.

<sup>17</sup> Hart, "Positivism and the Separation of Law and Morals", again quoting from Austin.

<sup>18</sup> HO Pappe, "On the Validity of Judicial Decisions in the Nazi Era", (1960) 23 *Modern Law Review* 260, hereafter "Pappe".

<sup>19</sup> Hart, note 43 at 75.

<sup>20</sup> Ibid.

<sup>21</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) 272.

<sup>22</sup> See the Appendix to this Article.

<sup>23</sup> See, for example, Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford: Oxford University Press, 2002) 59.

<sup>24</sup> See Pappe, 265-8.

<sup>25</sup> Ibid., 268-9. Note that the presiding judge at the court-martial warned the informer that "she was not obliged to give evidence under oath, that the accused was under threat of capital punishment, and that, without her sworn evidence, proof was likely to be insufficient." However, she insisted on going ahead; *ibid.*, 265. Pappe points out that the Federal Supreme Court's finding does not inevitably lead to the conclusion that the judges at the court-martial have to be punished, since they could claim a defence under the Criminal

---

Code of intimidation, although he also notes that this defence would not be that convincing, as judges who fell out of favour usually saved their skins simply by resigning; *ibid.*, 268.

<sup>26</sup> *Ibid.*, 268-9.

<sup>27</sup> Hart, 69-70, at 70.

<sup>28</sup> Pappé, 271-2.

<sup>29</sup> Hart, 62-72.

<sup>30</sup> If only because Hart's remarks are in the middle of his discussion of the penumbra of uncertainty; *ibid.*, 612-14. However, his amplification of certain points in this discussion at 627-9 shows that Hart thought that his point about wicked oughts applied also to decisions in the core.

<sup>31</sup> See Mertens, "Radbruch and Hart on the Grudge Informer: A Reconsideration" and my "The Dilemma of Legality and the Moral Limits of Law" for more detailed argument on this point. See further Otto Kahn-Freund's correspondence on Pappé's article—(1960) 23 *Modern Law Review* 603, at 604.

<sup>32</sup> HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, second edition).

<sup>33</sup> *Ibid.*, 116.

<sup>34</sup> *Ibid.*, v, and see the Postscript, 240.

<sup>35</sup> Fuller, 645, 659.

<sup>36</sup> A common response to any critique of Hart's legal positivism on the basis of a hard case is that his theory is one of law, not adjudication, and that one cannot draw implications from an exercise of judicial discretion for legal theory in general, and in particular for legal positivism. However, the Grudge Informer Case shows how problematic this response is.

<sup>37</sup> Fuller, 655.

---

<sup>38</sup> Ibid., 657.

<sup>39</sup> Ibid., 660.

<sup>40</sup> Fuller also preferred the solution of a retroactive statute. But he was anxious to state that his reason for this preference was not the positivist one that the statute would be “the most nearly lawful way of making unlawful what was once law”. Rather, the statute would symbolize a “sharp break with the past”, enabling the judiciary to “return more rapidly to a condition in which the demands of legal morality could be given proper respect”; *ibid.*, 661.

I disagree with Fuller. There was a point to the post-war courts trying to show that the German legal order persisted into the Nazi era, providing both a set of standards against which the activity of both officials and citizens could be evaluated and a basis for legal reconstruction. See also Fuller’s doubts about Pappé’s argument in *The Morality of Law* (New Haven: Yale University Press, 1969, revised edition) note 2 at 40, on the basis that it was odd for postwar courts to interpret Nazi statutes in the light of their own standards and that it was “out of place” to strain over questions of interpretation when the statutes were so full of “vague phrases and unrestricted delegations of power”. (These doubts are clearly anticipated in 1958, in Fuller at 655.) However, once one takes into account the first point, that the standards were not exclusively postwar standards but standards that persisted into the Nazi era, Fuller’s doubts look rather out of place.

<sup>41</sup> Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), especially “Introduction: Law and Morals” and “The Concepts of Law”.

<sup>42</sup> *Ibid.*, 2.

<sup>43</sup> *Ibid.*, 3, his emphasis.

<sup>44</sup> *Ibid.*, 3-4, and 223-4.

---

<sup>45</sup> Ibid., 224

<sup>46</sup> Ibid., 4.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., 4-5.

<sup>50</sup> Ibid, 5.

<sup>51</sup> Ibid., 13.

<sup>52</sup> Ibid., 13.

<sup>53</sup> Ibid., 171-83, 240.

<sup>54</sup> Ibid., 30.

<sup>55</sup> Ibid., 3.

<sup>56</sup> Fuller, *The Morality of Law*, chapter 1.

<sup>57</sup> Fuller, 670; Lon L. Fuller, *Anatomy of the Law* (Westport: Greenwood Press, 1976) 19, first published in 1968.

<sup>58</sup> Hart, *The Concept of Law*, 206-7.

<sup>59</sup> Ronald Dworkin, “Philosophy, Morality, and Law: Observations Prompted by Professor Fuller’s Novel Claim”, (1965) 113 : *University of Pennsylvania Law Review* 672, at 687.

<sup>60</sup> Unless one considers inclusive legal positivism as a kind of wholesale capitulation to Dworkin.

<sup>61</sup> Hart, *The Concept of Law*, 206-7. And we can recall here that in Hart’s critique of Radbruch he did say that the principle against retroactive punishment is a “very precious principle of morality endorsed by most legal systems”; see text to note XX. For insightful discussion of

---

Hart's remarks, see Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), 70-6.

<sup>62</sup> I owe this important observation to Jeremy Waldron, though I put it somewhat differently than he.

<sup>63</sup> Hart says of such cases that in them “nothing succeeds like success”, thus giving up the hope of control by law; Hart, *The Concept of Law*, 153.

<sup>64</sup> For this reason, Nigel Simmonds suggests that we rely on the idea of a legal “archetype”-- *Law as a Moral Idea*, 51-6.

<sup>65</sup> Fuller, 630.

<sup>66</sup> See Lon L Fuller, “Reason and Fiat in Case Law” (1945-1946) 59 *Harvard Law Review* 376.

Kenneth I Winston has pointed out that Hart's legal theory addresses only one mark of legal authority – the final determination of the content of the law. Hart thus misses the other mark of authority, its congruence with legal principles. Attention to this other mark – ordinarily, the province of the judge – brings one almost inevitably into an internal perspective on law which is out of kilter with positivist claims about discretion and the Separation Thesis. See Winston, “Introduction”, Winston, ed., *The Principles of Legal Order: Selected Essays of Lon L. Fuller* (Durham, NC: Duke University Press, 1981) 16-23. Compare Frederick Schauer, “Fuller's Internal Point of View”, (1994) 13 *Law and Philosophy* 285, for an apparent concession that there is this second mark and that attention to it has these effects, all the time arguing that it is still important to maintain a positivistic, external point of view.