

## Dworkin and Unjust Law

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### 1. IS THERE A PUZZLE REGARDING UNJUST LAW?

In the short chapter ‘Law’ in *Justice for Hedgehogs*, Ronald Dworkin says that ‘the puzzle of evil law’ has had a ‘prominent place in seminars on legal theory’ despite the fact that it is of ‘almost no practical importance’.<sup>2</sup> In his view, the puzzle is primarily about cases where judges find themselves faced with the problem of enforcing such a law. Should we say that the judges should not enforce it because it is unjust, or that they should not enforce it because it is not law? Since we are agreed on the practical outcome—judges should not enforce it—Dworkin claims that the ‘ancient jurisprudential problem is close to a verbal dispute’.<sup>3</sup>

Dworkin was driven to confront the dispute in earlier work because his position is a natural law one in that he denies the Separation Thesis of legal positivism that there is no necessary connection between law and morality.<sup>4</sup> Since natural law positions seem committed to the proposition that a law that violates the connection between law and morality is likely invalid, at the least legally suspect, the existence of unjust law confronts them with a stark problem. To use the classical formula, Dworkin has to be committed in some important sense to the proposition, *lex injusta non est lex*-- an unjust law is not law—which means he has to face the predicament for his theory created by the sheer facticity of unjust laws and illegitimate legal systems.

Indeed, in *Justice for Hedgehogs*, Dworkin seemed to strengthen his natural law commitments by deeming it a pervasive mistake for legal theory, one which he himself had made, to suppose that the issue is whether there is a connection between ‘two different intellectual domains’ or ‘systems:’ (i) law, which ‘belongs to a particular community’, and (ii) morality, which does not, because ‘it

consists of a set of standards that have imperative force for everyone'. Law, on this mistaken view, is 'made by human beings' and it is a contingent fact what its content is, whereas morality is 'not made by anyone ... and it is not contingent on any human decision or practice'.<sup>5</sup>

Dworkin suggested that we should replace the 'two-systems' picture of legal theory with a 'one-system picture'.<sup>6</sup> 'Legal rights are political rights, but a special branch because they are properly enforceable on demand through adjudicative and coercive institutions without need for further legislation or lawmaking activity'.<sup>7</sup> Moreover, in the manuscript version of *Justice for Hedgehogs*, though not in the book, Dworkin said that it would be counterintuitive to think that 'most of the subjects of most of the political communities over history had no moral duty to obey the laws of their community'.<sup>8</sup>

The puzzle of unjust law faces natural lawyers because they accept that among the most important determinants of law are social facts—facts about the criteria in a particular legal order for the validity of law, whether legislation, judge-made law, administrative rule-making, even customary law. When, as a matter of fact, individuals or groups with the authority to do so act in accordance with these criteria, law comes into existence. Only this aspect of law can explain why, for example, we distinguish between the law of the United States of America and the law of Canada and why we do not suppose that we can find out the law of either by asking what kind of law would it be morally best for either jurisdiction to have made.

Natural lawyers, however, can be understood as supposing that in addition to social facts, morality necessarily plays a role as a legal determinant, indeed, that ultimately the authority of law is grounded in moral facts.<sup>9</sup> Consider that Dworkin's 'interpretivism' holds that in a 'hard case', the ideal judge decides the case by extracting a theory from the relevant positive law that shows the law, and the legal order as whole, in its best moral light. Whatever answer the theory gives to the legal question posed by the case is the 'right answer', the answer that the judge is under a legal and moral

duty to give. Dworkin's position is thus plausibly understood as claiming that the authority of law (as he would put it, law's ability to justify coercion) is grounded by that moral theory.

We shall see below that Dworkin came to reject this understanding of law's authority because it leaves him vulnerable to the following kind of objection. In an illegitimate legal system, one dedicated overall to extreme injustice, the best explanation of the law will surely be that it is the product of a morally repugnant ideology. Dworkin must thus suppose that a judge is under a legal duty to apply the repugnant ideology in hard cases since that ideology grounds the authority of the law in that order. It was on this basis that in 1984 a South African law professor, and adherent of Dworkin's interpretivism, urged the liberal judges on the South African bench to resign. He argued that at that stage in apartheid a judge had no choice but to see that the best theory of the law was a white supremacist ideology that the judge was under a legal duty to use to resolve questions about what the law required.<sup>10</sup> And critics of Dworkin's position used the apartheid legal order as an example that showed why Dworkin's interpretivism had to be rejected.<sup>11</sup>

We shall also see below that Dworkin's response to this objection landed him in a dilemma between the natural law position that very unjust laws are invalid and the legal positivist position that if they are valid we should say that the laws are so unjust that they should be disobeyed. I have indicated that he sought to draw the sting from this dilemma by saying that it did not matter which limb one embraces because all will agree on the practical outcome—the judge should not apply such laws. But the obvious positivist response is that the limb that requires the judge to deny that a valid law is law replicates the mysteries of the natural law tradition, one that ultimately precludes 'the possibility of morally illegitimate legal systems'.<sup>12</sup> In contrast, legal positivism, with its focus on law as a matter of social facts, can support the limb that permits the judge unmysteriously to say, 'This law is valid but too unjust to apply'. Moreover, since positivism denies in its Separation Thesis that there is any necessary connection between law and morality,<sup>13</sup> it does not face any puzzle.

If this conclusion were so easily reached, there would be no puzzle about unjust law for philosophy of law and philosophers of law would all be positivists. Seminars in legal theory would not have to discuss the merits of natural law positions, unless the seminars were focused on the history of legal thought. In that case, natural law could be brought out briefly from the dustbin of debunked theories, in much the same way as the command theory of HLA Hart's utilitarian predecessors Bentham and Austin gets a cursory glance in such seminars, usually through the lens of Hart's summaries of their position. And just as Dworkin suggested that the problem of unjust law is an unproductive distraction, at times legal positivists suggest that legal theory is needlessly distracted by natural law positions, since these are not general theories of law, but projects for legal reform or (the charge against Dworkin) parochial theories of adjudication suited to one jurisdiction.

But even if one accepts that there is no puzzle of unjust law for legal positivism, positivists have been much preoccupied with unjust law. Hart in *The Concept of Law* devoted considerable space to explaining just why legal positivism's 'wider concept of law', one which includes the study of valid legal rules with an unjust content, is to be preferred to the 'narrower concept' of the natural law tradition, which he thought must deem such rules not to be law and thus not fit for jurisprudential analysis.<sup>14</sup> And positivism's facility with dealing with unjust law, exemplified in the Nazi legal system, is the motif of much of Hart's 1958 article 'Positivism and the Separation of Law and Morals' that set the stage both for that book and for debates in legal philosophy in the latter half of the last century. Hart is best understood as arguing that positivism should be accepted because it has the correct theory of the nature of law and that an additional distinct advantage of the theory is its facility with clarifying the moral issues raised by unjust law.<sup>15</sup> But his preoccupation with unjust law could lead one to suppose that one should adopt legal positivism because of that facility.<sup>16</sup> Indeed, Scott Shapiro complains in his impressive attempt to redirect legal positivism that,

Whether trying to debunk the law's pretensions to authority, or constructing a general theory of law, legal positivists have spent an excessive amount of time focusing on morally inadequate systems and tailoring their theories to fit those regimes. Their obsession with the Nazis and the Problem of Evil, however, has blinded them to a basic jurisprudential truth; a wicked regime is a botched legal system, much as 'the Earth is flat' is a failed scientific theory.<sup>17</sup>

Shapiro is not admitting here that legal positivism has a problem responding to unjust law. Rather his point is that we should take as our paradigm for understanding law not law as the instrument of injustice, but law when it is doing what we think law in its nature does; in Shapiro's view, establishing plans that make it possible to solve pressing moral problems in complex societies that only the institution of law can solve. Like Dworkin, Shapiro regards unjust law as a distraction from what should be the main project of philosophy of law, though unlike Dworkin, he regards the existence of unjust law as a refutation of any natural law position, because the content of the legal plan can just as well be apartheid ideology as, say, liberal democracy.<sup>18</sup>

However, as I shall argue below, and as Shapiro acknowledges, a different problem does arise for legal positivism.<sup>19</sup> Recall that the problem of unjust law seems to arise directly for natural law positions because for them morality is a determinant of law. On the other side of the ledger, their claim about morality makes it easier for them to explain that law is not only a matter of social facts, but also something that has authority over its subjects. Legal authorities have or at least claim the right, we might say, to tell subjects what to do.<sup>20</sup> And we can plausibly suppose, as I suggested in my sketch of Dworkin's interpretive theory, that if law had the moral basis to it that a natural law position claimed, that basis would ground law's claim to authority.

Legal positivists accept that philosophy of law must explain law's authority. Consider that in *The Concept of Law*, Hart identified as one of the three 'recurrent issues' of legal philosophy the fact

that both moral and legal rules share a vocabulary of obligation—‘they withdraw certain areas of conduct from the free option of the individual to do as he likes’. Moreover, Hart said that ‘one idea’, ‘that of justice ... seems to unite both fields’ and that justice ‘is both a virtue specially appropriate to law and the most legal of virtues. We think and talk of “justice *according* to law’ and yet also of the justice or injustice *of* the laws’.<sup>21</sup>

These facts alone, Hart said, ‘suggest the view that law is best understood as a “branch” of morality or justice’ which leads to the assertion that ‘an unjust law is not a law’. But that assertion, he continued, has the ‘same ring of exaggeration and paradox if not falsity, as “statutes are not laws” or “constitutional law is not law”’. And it has that ring because of the important differences between legal and moral rules.<sup>22</sup> Not least among these differences, he noted later in the book, is that moral rules and principles are immune ‘from deliberate change’; hence, ‘the idea of a moral legislature with competence to make and change morals, as legal enactments make and change law, is repugnant to the whole notion of morality’.<sup>23</sup> In other words, Hart argued for a two-systems picture, according to which law is contingent and subject to deliberate change by the body empowered to make that change, whereas morality is not.

Yet Hart also warned against overreacting to natural law in a way that reduces law to facts that require no explanation of the vocabulary of obligation that law and morality share.<sup>24</sup> He rejected the command model of law—law is comprised of the commands of a legally unlimited sovereign backed by threats—in part because, as he famously put it, ‘Law is surely not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion’.<sup>25</sup> And such acknowledgement faces legal positivism with its own puzzle—how to generate the ‘ought’ of legal authority from the ‘is’ of social facts. Positivism sets itself the task of showing that the social facts of law are somehow also normative facts, but in a way that does not make the mistake of supposing that the obligations that arise from these facts are moral in nature.

I shall argue in Section 2 that one puzzle does lead to the other, that Hart's incorporation of a specifically legal idea of authority into philosophy of law raises very starkly for legal positivism the kinds of problems that we shall in Section 3 see also plague Dworkin's position. Indeed, the problem of unjust law, whether it manifests itself in the relation between legal subject and law or judge and law, serves mainly to point to a deeper problem about how to reconcile our intuitions that law is both a matter of fact and a matter of authority. That deeper problem manifests itself when a judge has to apply such a law to an individual. Sections 4 and 5 sketch how a modified version of Dworkin's theory, one that is enhanced with Lon L. Fuller's account of legality, might respond to the problems, thus illuminating the path forward for legal philosophy.

Three preliminary points help to frame the overall argument. The first is methodological. In my own work, I adopt a method of 'integrative jurisprudence' that combines inquiry into politics, morality and history.<sup>26</sup> As I understand it, this method takes seriously the pragmatist claim that all inquiry must be answerable to experience. Philosophy of law's answerability requires a mix of painstaking attention to actual legal experience, as well as painstaking attention to the minutiae of debates within legal philosophical positions that attend to the relevant aspects of the experience. This chapter is an exercise in the latter mode of analysis with the former side relied on in a summary of past work towards the end.

The second point is terminological. I shall use the term 'unjust' rather than 'evil' to describe the kind of law that creates the problem that is my focus. No natural law position argues for the anarchist claim that law is not law merely because it seems unjust to me. Rather, law is not law only when it is extremely unjust by some objective standard, and I shall use 'unjust' in this sense. Moreover, as I shall argue below, that standard has to be internal to law. Law ceases to be law only when it fails by its own moral standards, which have to do with maintaining the equal status as persons of the individuals law addresses. In other words, a natural law position holds that there is a

moral order immanent in the law as we find it, in social facts about the law as it is, and this moral order responds to the problem of extremely unjust laws. The legal positivist tradition that Joseph Raz describes as ‘realist and unromantic’<sup>27</sup> in its outlook on the law would be part of an opposing tradition that does not think that the legal world as we find it has the resources to respond to such injustice, so it consigns the problem elsewhere; we might say, from the legal to the moral system. The difference between using ‘unjust’ (and therefore manageable by law) and ‘evil’ (and therefore unmanageable by law) as the description of such laws should therefore indicate which tradition one belongs to, though as we have seen with Dworkin, actual debate is not precise in this way.<sup>28</sup>

The final point is about the implications of the debate about unjust law, which often seems to those observing it strange because it is a debate about law in distant places or times.<sup>29</sup> However, as I shall argue below, the debate does matter to those who think that their legal orders are more or less just, or at any rate not unjust, because it helps to alert them to problems of injustice that might be otherwise hard to detect. Indeed, law itself helps in this regard in that the commitment to governing through law helps to bring injustice to the surface as a problem that the legal order needs to solve in order to maintain itself in good legal shape.

## 2. THE PUZZLE FOR LEGAL POSITIVISM

In Part IV of his 1958 essay ‘Positivism and the Separation of Law and Morals’, Hart addresses the topic of unjust law in an engagement with Gustav Radbruch, the German philosopher of law. After the war, Radbruch, in reaction to the horrors of Nazism and what he regarded as German lawyers’ complicity, advanced what became known as the ‘Radbruch Formula’: extreme injustice is no law.<sup>30</sup> Hart vehemently rejects Radbruch’s claim that law’s role as an instrument of Nazi evil should undermine the positivist commitment to the Separation Thesis. In particular, he was affronted by Radbruch’s suggestion that the German legal profession’s commitment to a positivist view of law



had contributed to the horrors because the “positivist” slogan ‘law is law’ caused their failure to ‘protest against the enormities they were required to perpetrate in the name of the law’.<sup>31</sup> Hart accuses Radbruch of ‘naïveté’ because he had only ‘half digested the spiritual message of liberalism’, the message in fact delivered by legal positivism: that ‘law is law’ tells us that law ‘is not morality’, hence, should not be thought to ‘supplant morality’.<sup>32</sup>

Hart seems to think that the point is sufficiently made by quoting a paragraph in which Austin imagines a law that makes punishable by death an ‘act innocuous, or positively beneficial’. I am tried and condemned for committing this act and object that it is ‘contrary to the law of God’, that is, to natural law. Austin says that ‘the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity’.<sup>33</sup> Hart appears to endorse Austin’s claim that this example shows that those who say that human laws cease to be law if they conflict with ‘the fundamental principles of morality’ are talking ‘stark nonsense’.<sup>34</sup> Rather, they should ‘speak plainly’ and say ‘that laws may be law but too evil to be obeyed’.<sup>35</sup>

But Hart suggests that he can add support for his position by going beyond a ‘mere academic discussion’ to a problem of legal practice, the issue raised by the Grudge Informer Case. In this case, as he understood things, a postwar German court found that a woman was guilty of the crime of illegal deprivation of liberty for turning in her husband for making derogatory remarks about Hitler. Such remarks were considered a crime under two Nazi statutes, and so the woman claimed that what she did was not illegal. Thus the court had to rely on the Radbruch Formula in order to claim that the Nazi statutes were not really law.<sup>36</sup>

Hart’s argument is that the Radbruch Formula obscures the moral dilemma raised by the case: should one leave the woman unpunished or should one ‘sacrifice a very precious moral principle endorsed by most legal systems’, the principle against retroactive punishment?<sup>37</sup> The

formula does so because it requires the judges to pretend that valid law was not really law. The only way for the dilemma to be candidly faced if one thinks that the woman should be punished is, Hart asserts, for the legislature, fully conscious of the moral sacrifice involved, to ‘enact a frankly retroactive law’.<sup>38</sup>

Hence, Hart supposes that a correct moral appreciation of this difficult practical problem is facilitated by the Separation Thesis and that the Thesis is an important corrective to the sense in Germany that the decisions of postwar courts that deployed the formula signaled the triumph of natural law over legal positivism, a reaction that Hart describes as ‘hysteria’.<sup>39</sup> Legal positivism, in contrast to natural law, permits us to ‘speak plainly’ by using ‘a moral condemnation which everybody can understand’ and which ‘makes an immediate and obvious claim to moral attention’. In contrast, an assertion that ‘these evil things are not law’ is one ‘many people do not believe’ and it raises ‘a whole host of philosophical issues before it can be accepted’.<sup>40</sup>

Most participants in the debate that followed Fuller’s response to Hart failed to notice that Hart implicitly relied on a difference between two perspectives in play in Part IV. There is the perspective of a citizen confronted by an unjust law and thus with the question of the moral evaluation of law’s claim that he is under a duty to *obey* the law. And there is the perspective of a judge confronted by the same unjust law, but with a question that has at least to be framed differently, even if we suppose that the answer is no different. For the judge’s question is whether she is under a duty to *apply* the law to whomever it affects, thus facing the affected subjects with the first question.

It might seem that Hart should suppose that his own formula—‘Disobey unjust law, but don’t deny its validity’-- needs only a slight adaptation for the situation of judges—‘Do not apply unjust law, but don’t deny its validity’. But both Austin in the paragraph Hart quoted and Hart himself in his analysis of the Grudge Informer case reject this adaptation. Notice Austin’s deliberate

use of the phrase ‘court of *justice*’. His point is that the justice the law demands might be something we should morally condemn; as Hart put it in the next section of the essay, the ‘justice in the administration of the law’ is ‘not justice of the law’.<sup>41</sup> But it seems that the judge qua judge is not entitled to refuse to apply the law and Hart commits himself to the same view in reserving the authority to retroactively invalidate the Nazi statutes to the legislature. For while Hart’s main point is that something goes wrong when one pretends that a valid law is not law, in 1958 he did not appear to think it permissible for a judge to engage in an exercise of frank retroactive invalidation of unjust law or to refuse to apply it.

Now we might think that the question of whether judges have the authority to invalidate retroactively is to be resolved by looking at facts about the jurisdiction and that Hart is making the likely unproblematic assumption that postwar German judges did not have such authority. But why does he deny to judges the option of refusing to *apply* unjust law if ‘law is law’ in the way that the Separation Thesis insists we understand that slogan?

One possible answer is that the judge qua judge is under both a moral and a legal duty to apply the law as she finds it. She is thus precluded from considering the moral considerations external to law that the citizen should rely on when it comes to the question of obedience, or from confronting the kind of moral dilemma that Hart thought was at stake in the Grudge Informer Case. It would follow that unjust law does confront judges with a moral dilemma, since (to use Fuller’s terminology) judges subscribe to an ‘ideal of fidelity to law’ that requires them to uphold the law, whatever its content. In other words, the standing legal/moral duty for judges anywhere to apply the law whatever its content does face them with moral problems when the content is unjust, but the legal/moral duty side always overrides the purely moral duty side. Alternatively, one might say that judges are under a moral and legal duty to apply the law whatever its content, but that in the case of unjust law, they may weigh the moral costs of not doing their legal/moral duty against the moral

costs of doing it.

Indeed, the dilemma becomes even more complex if one characterizes, as might seem more intuitive, the ‘very precious principle’ against retroactivity as a principle of *legality* endorsed by all legal orders. Such a characterization is not meant to contrast legality with morality, but, as Fuller argued, in order to point out that there are some moral principles that are intrinsic to legality. That Hart chose to describe the principle against retroactivity as ‘moral’ rather than ‘legal’ is significant, a point I shall come back to below. For the moment, I want to note that Hart, in my view, would have rejected both the alternatives set out in the last paragraph with the attendant moral complexity they raise. But that rejection is problematic in light of the elaboration of and changes in his position with the publication in 1961 of *The Concept of Law*.

Hart argues there that ‘obedience’ misleadingly describes what judges do when they apply the law since one can obey the law without supposing that this is the ‘right thing’ to do; for example, because one fears punishment. In contrast, courts have to adopt the ‘internal point of view’ according to which the ‘rule of recognition’—the ultimate rule of the legal order that certifies the validity of particular rules—provides ‘a public, common standard of correct judicial decision’.<sup>42</sup> Indeed, if judges do not adopt that internal point of view, one of the ‘two minimum conditions necessary and sufficient for the existence of a legal system’ no longer obtains.<sup>43</sup> Hence, it seems that judge are indeed under a standing obligation of some sort to apply the law of their jurisdiction whatever its content, which distinguishes their normative situation from the citizen’s.<sup>44</sup> For the law does create a legal obligation for the citizen, and thus faces him, in certain situations, with a clash between legal and moral duty. But since the legal duty seems morally inert on Hart’s view, we could say that the citizen is in a purely prudential dilemma—obey an unjust law or be punished. In contrast, the judge’s legal duty to apply the law seems normatively different from the morally inert, legal obligation of the citizen to obey, yet Hart remained anxious to insist that there is no moral

component to it.

However, one has also to take into account that in *The Concept of Law* Hart seems to have changed his mind about the situation of the judge faced by unjust law. When he returns to the issues of Radbruch and the Grudge Informer Cases, he revises his own formula to read: ‘This is law; but it is too iniquitous to be applied or obeyed’.<sup>45</sup> And Hart emphasizes that while he still thinks that the Separation Thesis helps to clarify the moral issues to which the existence of unjust law gives rise, one has to appreciate that the problem of morality and justice for a person who had to decide whether to obey an unjust law is ‘very different’ from the problem that the postwar courts faced.<sup>46</sup> Thus in 1961 Hart clearly has in mind that the dilemma the courts faced was the moral dilemma he described in 1958 between letting the woman go unpunished and sacrificing the principle of *nulla poena sine lege*. But matters have to be more complicated, as I indicated, if only because the court that decides to punish the Grudge Informer has to say: ‘As a judge it is my duty to apply the law; the law requires that you not be punished; but I am going to punish you, because that is what my moral duty requires.’ The question remains how we give content to the idea of a duty to apply the law as found, if the law is morally inert as Hart seems to suggest in advocating the Separation Thesis.<sup>47</sup>

Notice that if the Separation Thesis does not help to respond to such complexity, one of the reasons Hart advances for adopting the ‘wider’ or positivist concept of law that regards unjust law as morally but not legally problematic, is undermined, because the wider concept fails to assist ‘our moral deliberations’.<sup>48</sup> Does that leave intact the other reason—that positivism is superior to natural law theories because of the way it assists ‘our theoretical inquiries’? Hart thinks that it does. Natural law’s ‘narrower’ concept of law excludes from legal philosophy rules that are legally valid, but are beyond the moral pale; and it is the task of legal philosophy to ‘group and consider together as “law” all rules which are valid by the formal tests of a [legal] system . . . , even though some of them offend against a society’s own morality or against what we may hold to be an enlightened or true morality’.<sup>49</sup>

The natural lawyer can respond to Hart's claims about both moral deliberation and theoretical inquiry in the following way. Hart's concept of law fails to bring to light the moral complexity caused by the existence of unjust law because that concept cannot explain why a judge faced with such law is troubled in a way not reducible to the clash between two moral values that Hart detected in the Grudge Informer Case. And Hart cannot do so because his commitment to the Separation Thesis precludes him from supposing that the legal duty of the judge has any necessary moral quality to it.

Indeed, as we saw, Hart declines to call even the moral principle against retroactivity a legal principle, which is odd because the principle is not a free-standing moral principle, but one which has a place only within the institutional structure of a legal order. If he had said it was both legal and moral that would go some way to explaining why the postwar judges had both a moral and legal duty to apply the law as found that was not dependent on a contingent fact about their legal order. Rather, the judges would have a duty to uphold principles of legality, including the principle against retroactivity, because the internal point of view of judges anywhere requires a commitment to such principles. They are among the 'conditions necessary and sufficient for the existence of a legal system'.

Notice that this point suffices to make the issue more than a failure to account for moral complexity. Hart's theory of law might be seen as narrower than that of natural law because it does not include whatever feature of law gives law the moral quality that gives rise to such complexity, for example, a legal/moral principle such as the principle against retroactivity, or whatever might ground a standing obligation for judges to apply the law. Of course, Hart could respond as he did in Part V of the 1958 essay, and was to do more elaborately in his later critiques of Fuller, that even if such principles are necessary features of law, compliance with them is 'unfortunately compatible with very great iniquity'.<sup>50</sup>

Hart was, however, rather and perhaps deliberately ambiguous about this response. He might have meant that no important connection between law and morality emerges out of the fact that law has to conform to principles of legality to be law, because even though the principles of legality are moral, the moral quality they give to law is so weak that it is easily outweighed by other moral considerations. But, as he sometimes indicated, and as Raz was to argue in an important essay on the rule of law,<sup>51</sup> on the positivist view, such principles are not moral. They serve only to make law into a more effective instrument of the goals enacted into law, so that one's moral focus can be that of the citizen on the moral merits of the content of the law. But if that argument is correct, we are still left with the question of what feature of law makes it authoritative.

Perhaps more importantly, Hart's objection to natural law theory that it narrows the scope of philosophy of law by consigning the study of unjust laws to some other discipline than philosophy of law has to be matched with an objection that positivism consigns all moral questions that arise about unjust law to other disciplines, thus impoverishing philosophy of law. To say with Austin that '[t]he existence of law is one thing, its merit or demerit another',<sup>52</sup> is to assert that the other thing—the question of obedience to law—is a matter for moral, not legal philosophy.

Similarly, Hart argued in 1958 that in cases where it is controversial what the law requires, judges have to legislate by deciding the matter in accordance with their view of what law ought to be. He offered two reasons why one should not infer from the necessity of such judicial reliance on 'oughts' that there is a necessary connection between law and morality. First, this kind of decision takes place in the 'penumbra' of uncertainty about what the law requires, in contrast to the determinate 'core' of settled law.<sup>53</sup> Hence, all philosophy of law can say about such decision-making is that it amounts to an act of discretion or judicial legislation based, at least ultimately, on extra-legal considerations. Second, the judicial sense of the appropriate ought will be contingent not only on the judge but also on the legal order, so we should see that the oughts operative in the penumbra

might be highly immoral.

Hart offered as an example an ought that he thinks might have informed the interpretation of the Nazi judges who convicted and sentenced to death the husband of the Grudge Informer: 'What sentence would both terrorize the public at large and keep the friends and family of the prisoner in suspense so that both hope and fear would cooperate as factors making for subservience?'<sup>54</sup> Hart notes that the 'prisoner of such a system would be regarded simply as an object to be used in pursuit of these aims', but, he says, this would 'still be an intelligent and purposive' decision and 'from one point of view the decision would be as it ought to be'.<sup>55</sup>

The first reason is for Hart the more important one. The second is offered as a kind of *ad hominem* refutation of those who might 'invite' us to accept a different description, one offered by a Dworkinian account of adjudication whose main features Hart succinctly and presciently outlined in 1958.<sup>56</sup> In other words, the first reason is that 'legislation' accurately describes what judges do in such cases, whereas the other reason points out that those who suggest that there are values inherent in the law that determine morally and legally right answers are committed to supposing absurdly that the immoral point of view Hart sketches in his example can tell the judge what he morally speaking ought to do.

Hart appears to think that the kind of ought in his example is legally unproblematic. Consider, however, the point of view of the prisoner who has to regard himself as, in Hart's own words, 'an object to be used in pursuit of these aims'. Why may the prisoner not draw on the resources of Hart's legal positivism and say that he is the victim of a gunman situation writ large, not a legal order that purports to exercise authority over him? Put differently, it is one thing for Austin to say that the execution of the condemned man in the example Hart quotes in refutation of Radbruch proves the man's mistake in saying that the law was no law, since Austin's theory of law is that law is the commands of an uncommanded commander backed by threats. But it is altogether



another thing for Hart, who rejects that theory, to say of the person objectified in this way that he should regard as authoritative the directive that consigns him to prison and execution--that he should regard the directive as having changed his normative situation, however undeniably it changed his physical situation.

Moreover, a law that told judges to impose the harshest sentence possible in a bid to intimidate the population, no matter what the criminal law of their land directed them to do, would be a very odd law, legally speaking. It would tell judges to act arbitrarily in violation of part of the law directly relevant to their decision. As HO Pappe pointed out, the law did not in fact tell judges to act so, since large parts of pre-Nazi German law survived into the Nazi period, including the law under which the Grudge Informer was prosecuted.<sup>57</sup> That point is subject to a challenge that the presence of such resources for judges was entirely contingent, and I shall come back to this issue in Section 4. But we should note that Pappe also argued that one should be a little slower than Hart in getting to the conclusion that such an ought—one from ‘a point of view’ that made the wishes of party officials the standard—could be made into a legal standard, another issue I shall return to.<sup>58</sup>

Hence, the question of the role of legal oughts in the interpretive process, which Hart thinks he can put aside when he deals with Radbruch and the Grudge Informer Case, potentially complicates his assumption that the problem is how to respond to law that is clearly law and clearly unjust. For there is a prior question in the situation of unjust law about both whether there is law at all and if there is, what its content is. But even to see that question requires a concept of law that does not suppose that law can have any content whatsoever, and it is only because Hart makes that supposition that he can compartmentalize the different criticisms of the Separation Thesis and pick them off one by one.

Consider that in Part V of the 1958 essay Hart mentions ‘the normally fulfilled assumption that a legal system aims at some form of justice colours the whole way in which we interpret specific

rules in particular cases, and if this normally fulfilled assumption were not fulfilled no one would have any reason to obey except fear (and probably not that) and still less, of course, any moral obligation to obey'.<sup>59</sup> He goes on to say that if there were not some group that received the benefit of protection from the law, the system would 'sink to the status of a set of meaningless taboos' and 'no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt'.<sup>60</sup>

Now Hart in Part V is anticipating a Fullerian position that law has to comply with principles of legality to be law and that such compliance imparts a moral quality to the law. He concedes that legal orders do all overlap with morality in that they afford morally valuable protections to individuals, for example, in criminal law and property law. He also concedes that 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, ...'. Generality, Hart says, requires '[n]atural procedural justice' which consists of 'principles of objectivity and impartiality in the administration of the law' and 'which are designed to ensure that rules are applied to only to what are genuine cases of the rule or at least to minimize the risks of inequalities in this sense'.<sup>61</sup> But such concessions do not, Hart claims, undermine the Separation Thesis. The protections do not have to be afforded to everyone, and laws 'that are hideously oppressive' can be applied with 'pedantic impartiality'.<sup>62</sup>

However, this claim leaves in place and indeed sharpens the question raised by Part II of the 1958 essay. Why should we think that law, on the assumption that it more than the gunman writ large, governs the lives of those in the group that gets no protection and who are deprived of it by hideously oppressive commands backed by force? And the concessions complicate Parts III and IV because if there are legal reasons for thinking that in the normal case 'some form of justice colours the whole way in which we interpret specific rules in particular cases', it seems to follow that judges confronted by an unjust law face a legal problem, not merely a clash between legal and moral duty.

Such a problem requires them to ask, 'Does the law really have that content despite the fact that the legislature seems in fact to have stipulated exactly it?' And if their answer to the question is 'Yes', they are driven by legal duty to confront the Radbruch Formula, since if they apply that content to the oppressed group they are carrying out the gunman's commands, not implementing law.

The deep issue here is the question of the role of authority in Hart's conception of law. If a central feature of law that any philosophy of law has to explain is law's authority, legal positivism is faced with the puzzle of unjust law. If the commands of the powerful are incapable of sustaining a claim to be exercised with right on those subject to their power, the commands lack authority, and therefore lose any claim to legal status.

Hart would, of course, think that this argument merely reproduces Radbruch's 'naïveté'. And in *The Concept of Law*, he describes 'an extreme case' in which 'the internal point of view with its characteristic use of normative legal language (This is a valid rule) might be confined to the official world'. Such a society, he goes, on, might be deplorably sheeplike; the sheep might end in the slaughter-house.' But, he adds, 'there is little reason for thinking that it could not exist or for denying it the title of legal system'.<sup>63</sup> Hart's point is that if there is a rule of recognition and that rule certifies other rules as valid, the other rules have authority, whatever their content. But if the only reason those outside the official group follow the rules is that they are sheeplike, that is, they think that the fact that a rule has been validly made is reason enough to obey it, they are making the rather large mistake, on Hart's own argument, of only 'half digesting' the message of legal positivism. Moreover, the source of their mistake is in thinking that a 'secondary' rule of recognition imparts full legal authority to 'primary' rules, whatever their content, whereas in a 'primitive society' in which there are only primary rules, recognition as authoritative is content-dependent: 'the rules must be widely accepted as setting critical standards for the behaviour of the group'.<sup>64</sup>

From a natural law perspective, the mistake is to suppose that rules have full legal authority,

whatever full legal authority means, as long as the rules have been certified as valid. In contrast, a natural law position that argues that law's authority is grounded on some moral basis beyond such certification will not make it so easy for individuals to become sheep. Nor, despite positivists' claims to the contrary, need such a position lead to 'obsequious quietism'<sup>65</sup> because individuals are asked to accept that law has a moral quality. Rather, the individuals have to weigh their legal/moral duty to obey the law against the dictates of conscience. This is a morally complex situation, the complexity of which can only be appreciated by a natural law position that explains why law has some moral quality to it that makes plausible law's authority.

When Hart's position is viewed through the lens of his responses to the issue of unjust law, we can appreciate not only why unjust law presents a puzzle for his version of legal positivism, but also why important developments within his tradition of legal philosophy make the puzzle more acute. I have in mind here primarily Raz's argument that it is in the nature of law that law must claim legitimate authority and that judges are committed to endorsing that claim.<sup>66</sup>

On this kind of argument, which seems to build moral aspirations into the concept of law, it is even more difficult to see how X could be law if it were unjust. It also becomes difficult to see how these are not developments in legal positivism that begin to blur the divide between it and natural law. It is for such reasons that, in my view, Hart in an essay followed an attack on Dworkin I shall sketch in the next section with vigorous resistance to Raz's early thoughts along these lines.<sup>67</sup> But my argument in this section has been that Hart himself blurred that divide and confronted legal positivism with the puzzle of unjust law the moment he made the idea of authority central to the positivist account of the nature of law.

### 3. THE PUZZLE FOR DWORKIN

When Dworkin put judge Hercules at center-stage of his interpretivism, he both reconfigured the debate about unjust law and made himself vulnerable. On the one hand, he reconfigured the debate because the issue of unjust law had traditionally been seen as one about the appropriate stance of the individual—the legal subject--faced with such a law. On the other hand, because the moral quality seemed to come from the fact that correct answers to hard cases were those constructed in light of the best theory of the positive law, it also seemed that Dworkin made interpretivism hostage to facts about the positive law.

Consider that, on Dworkin's view, interpretation has two dimensions, that of 'fit'--'What range of answers is plausibly consistent with as much as possible of the relevant positive law?', and of 'justification', 'What answer is given by the theory that best justifies that law?' Dworkin was clear that justification is the more important dimension. A more sound justification should be preferred to a less sound one that fits more of the relevant positive law. But it seemed that if, on the dimension of fit, the social facts about the law of a jurisdiction overwhelmingly pointed to an underpinning immoral ideology of which the positive law was the instrument, on the other dimension the theory that best 'justified' the law would be one that showed it in a very bad moral light.

In his first response to this kind of challenge, Dworkin contemplated that a situation might arise where the 'institutional right is clearly settled by established legal materials ... and clearly conflicts with background moral rights'.<sup>68</sup> The institutional right, he said, 'provides a genuine reason, the importance of which will vary with the general justice or wickedness of the system as a whole, for a decision one way, but certain considerations of morality present an important reason against it'. In this situation, he concluded, the only options open to the judge are to lie, by saying that 'the legal rights are different from what he believes they are', or to resign, which will 'ordinarily be of little help', or to stay in office and hope 'against odds, that his appeal based on moral grounds will have the same practical effect as a lie would.' Dworkin also said that he agreed with Hart's argument for

candour in the 1958 essay that it would be ‘unwise to make this lie a matter of jurisprudential theory’. Hence, the ‘accurate description’ is ‘that legal and moral rights here conflict’. And that description, Dworkin went on, applies to both easy and hard cases, so that ‘in spite of the influence that morality must have on the answer in a hard case’, ‘jurisprudence must report the conflict accurately, leaving to the judge both the difficult moral decision he must make and the lie he may be forced to tell’.<sup>69</sup>

Hart seized on this set of remarks, as well as a passage in which he reports Dworkin’s concession that in a wicked legal system the “‘soundest theory of the law’” would include morally repugnant principles sanctioning an absolutist dictatorship or morally odious policies like ‘blacks are less worthy of concern than whites’.<sup>70</sup> In Hart’s view, these concessions ‘surrender the idea that legal rights and duties are a species of moral right and duties’, leaving Dworkin’s theory with the ‘truism’ that there will be a moral justification for good law but not for evil law, i.e. with a position ‘indistinguishable from legal positivism’.<sup>71</sup>

The only answer Dworkin could have to this criticism, Hart thought, is the ‘last-ditch’ and ‘hopeless’ defense that individuals in a wicked legal system have a moral right that judges treat like cases alike, whether this is a matter of deciding a case by reference to settled law or by reference to the least bad principles underpinning unsettled law when the law is indeterminate. Since there can be no moral reason for repeating ‘past evil’, Hart concluded that this defence failed when it came to settled law. Dworkin’s moral terminology here amounted ‘an idle but confusing decoration to the positivist simple conclusion’. And he added that when the law is unsettled, there can be no moral reason for extending principles merely because they are the least morally odious available.<sup>72</sup>

Dworkin gave a two-part answer to what he regarded as the ‘uncharacteristic vehemence’ of Hart’s criticism,<sup>73</sup> and the structure of that answer remained constant through to *Justice for Hedgehogs*. The first part was *an hominem* criticism which I will not spend much time on here, both because

Dworkin did not elaborate it, and because my detailed account of Hart in the last section was intended in part to explain why the criticism is on the mark. It is that if positivists wish to claim that legal philosophy clarifies how law makes the situation of a judge faced with applying an unjust law morally complex, they must suppose that the fact that there is law supplies a moral reason of some kind to the judge to apply the law. The fact that there is law either affects the moral situation, something Dworkin's theory seeks to explain, or it is morally inert, as Hart seemed to insist, in which case the judge is not in a moral dilemma.<sup>74</sup> The contribution of the last section is thus in part to show that Dworkin was right to claim that legal positivism finds itself in a dilemma on this issue. But, as I now explain, that contribution also prepares the way for seeing why Dworkin cannot on his own escape a similar dilemma.

Dworkin's new argument confronts the situation of a judge starkly faced with a clearly unjust law, though he did, we should note, express doubts that such situations will easily arise.<sup>75</sup> It supports a different set of options for the judge, replacing the previous three—lie, resign, apply the law and make a moral protest—with two. The judge declares the law invalid because it so unjust, not merely because of the injustice of the particular law, but because the law partakes of the pervasive injustice of a wholly illegitimate system. Alternatively, the particular law is unjust but the system is on the whole legitimate, or at least not altogether illegitimate, in which case the judge should recognize the law as valid, but refuse to apply it.

Dworkin's argument uses the analogy of an ill-advised and vague promise. For example, I promise a friend who is also my employee to fire another employee.<sup>76</sup> Suppose that the best interpretation of the promise is that it was made out of a flawed conception of friendship that required the employee be fired even if she had done nothing wrong. If one thinks there is any kind of moral reason to keep such a promise, that reason cannot depend on the principles that figured in working out its content; rather, it must have its source in the 'morality of promise-keeping'.<sup>77</sup>

On this analogy, one should see that it is a mistake to suppose with Hart that Dworkin's account of 'how legal rights are identified in hard cases' supplies the reasons for supposing that those rights, 'once identified, have some claim to be enforced in court'.<sup>78</sup> In terms Dworkin coined later, Hart had mistaken the question that is the legal philosopher's focus, the question of the 'grounds of law'—the circumstances in which particular propositions of law should be taken to be sound or true—with the political philosopher's question about the 'force of law'—'the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance'.<sup>79</sup>

At least two questions arise from this set of claims. First, what could make it the case that an unjust legal system creates moral reasons? Second, does the answer to that question tell us why morally decent legal systems create moral reasons or does it apply only in the 'exceptional circumstances' of an unjust legal system?<sup>80</sup>

Dworkin argues that if an unjust legal system is a source of moral reasons for judges to apply its laws that arises from the fact that there is a 'general political situation' such that 'the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens have in fact done so'.<sup>81</sup> But his point is only that if there were such reasons, the situation would be the source of the reasons, not that the fact that there was such a situation supplied reasons. Indeed, in *Justice for Hedgehogs*, he says that since the Nazi order was wholly illegitimate it faced judges with a 'prudential' rather than a moral dilemma, because there was no force to Nazi edicts. In contrast, in the antebellum situation of American judges from northern states faced with a duty by constitutionally authorized Fugitive Slave Acts to return escaped slaves to their situation of slavery, there was a moral reason. The American legal order, Dworkin thinks we may assume, 'was sufficiently legitimate so that its enactments generally created political obligations'.<sup>82</sup>



The structuring fairness principles that make law a distinct part of political morality—principles about political authority, precedent, and reliance—gave the slaveholders' claims more moral force than they otherwise would have had. But their moral claims were nevertheless and undoubtedly undermined by a stronger moral argument of human rights. So the law should not have been enforced.<sup>83</sup>

Hence, it is better to say in this situation 'what most lawyers would say that the Act was valid law but too unjust to enforce'. For that 'expresses nuances' that the claim that there was no law there 'smothers'. 'It explains why the judges confronted with the Act faced, as they said, a moral dilemma and not simply a prudential one'.<sup>84</sup>

But there is something else that helps to explain why judges in both the Nazi era and in the antebellum American order faced a dilemma, however described, as long as they had moral convictions that condemned the injustice of the content of the *artifact* that confronted them. I use this term for the moment in an attempt not to prejudge whether the Fugitive Slave statutes were law and whether there were legal rights, because for one side in the debate to call something 'law' implies that it supplies a special kind of moral reason to judges to enforce it, while for the other side nothing of the sort is implied, since law is morally inert.

The artifact confronts the judges because it is produced in accordance with whatever formal procedures their political order recognizes to mark the distinction between, on the one hand, the rights people think they should have, and, on the other, whatever it is they have in virtue of the artifacts that have in fact been produced. As Dworkin says, such a distinction can only be made 'in a community that has developed some version of what Hart called secondary rules: rules establishing legislative, executive, and adjudicative authority and jurisdiction'.<sup>85</sup> And it is rights of the latter sort--institutional rights--that 'people are entitled to enforce on demand, without further legislative intervention, in adjudicative institutions that direct the executive power of sheriff or police'.<sup>86</sup>

Now despite my attempt to keep the description clean of talk of rights, it has crept in, as it does for Dworkin in the passage quoted above where he talks about the slaveholders' 'weak moral claims'. The problem is that he has at times insisted that there is law in these situations only in the 'preinterpretive sense'.<sup>87</sup> But there is then law in this sense across a political continuum of legal orders. These orders range from liberal democrat to liberal but not democratic to democratic but not liberal to thoroughly illegitimate. But there is a continuum because they all have secondary rules that make the distinction possible between law in this sense and the rights people should have. Of course, not all political orders have such rules, in which case they have no claim to be legal orders. But since Dworkin concedes that the presence of secondary rules gives rise to the distinction, he appears to concede everything to positivism, as Hart had argued. Dworkin seems then stuck with the truism that in good legal systems, those in which principles of enlightened morality have contingently been incorporated, legal duties are also moral duties.

Note that in response to a paper in a symposium on the manuscript of *Justice for Hedgehogs*, Dworkin said that the legitimacy of a legal order is 'a matter of degree' and that while it is possible to say in the abstract what a perfectly legitimate government would be, one that treats all citizens in accordance with the best moral conception of equal concern and respect, it is 'harder to state a floor beneath which any purported government is wholly illegitimate'. He suggested that 'a government is illegitimate in respect to a particular person it claims to govern if it does not recognize, even as an abstract requirement, the equal importance of his fate or his responsibility for his own life'.<sup>88</sup> In an illegitimate legal system it follows that the government has 'no legitimacy' for those in the oppressed group—'they have no political obligation at all'. But the rest are in a 'morally complex and difficult situation'. They might consider disobedience. But they still have an obligation to their fellow citizens to obey 'those laws, fair in themselves, that maintain civil society ...'<sup>89</sup>

It thus follows from Dworkin's concession that he is faced with the kind of 'theoretical dilemma' he diagnosed for Hart: the dilemma between saying that there is law for the oppressed group despite the fact that law supplies them with no moral reasons and saying that there is no law for that group because it fails to give them such reasons.<sup>90</sup> That theoretical dilemma becomes a practical dilemma for judges who have to consider applying an artifact that they must see as legal to individuals who the judges know should not consider the artifact as legal. And given that, unlike both Hart and Raz, Dworkin supposes that law generally does supply moral reasons, as well as his embrace in *Justice for Hedgehogs* of the one-system picture of law and morality, the problem of unjust law might seem even sharper for his position than it is for theirs. Moreover, his responses to that problem at times seem to place him on the wrong side of the positivist/natural law divide in that he consigns the problem of the injustice of unjust law to morality, thus presupposing the two-systems picture of the relationship between law and morality that he wished to reject. I shall now sketch a way forward for Dworkin, one whose outline he had seen. However, he did not take it, in my view, because it requires combining his position with one that he thought he had good reason to reject—Fuller's position that there is an internal morality of law.

#### 4. FULLER REVISITED

Recall that Dworkin expressed some doubt that the situation of a judge starkly faced with a clearly unjust law would easily arise. In a long footnote to that claim, Dworkin said that he needed to distinguish more sharply than he had in his earlier work between 'explanation' and 'justification'.<sup>91</sup> In his view, an explanation does not 'provide a justification of a series of political decisions if it presents, as justificatory principles, propositions that offend our ideas of what even a bad moral principle must be like'.<sup>92</sup> He also said that he has more confidence than he had in earlier work in

what he called the ‘screening power of the concept of a moral principle’. He claimed that the requirement his theory imposes on judges—that they provide an argument that shows the legal record in its best moral light—will tend to screen out or exclude morally unacceptable principles.<sup>93</sup>

However, Dworkin did not pursue this line of inquiry, other than by offering hypotheticals in an illegitimate system like the Nazi one in which a judge could and should resist reasoning by analogy from an explicitly unjust law. For example, in a private law dispute, an Aryan claims that in tort law Jews are subject to strict liability while Aryans are not, because in contract law a statute stipulates that only Aryans have remedies available to them in disputes with Jews. In such examples, it seems clear that the case is hard because a discriminatory ideology evidently explains or fits one area of private law, and perhaps much of the law of the system, but in the area in which the dispute occurs, it is still possible to claim that individuals are entitled to equal concern and respect.<sup>94</sup>

However, the resource of a screening principle in tort law seems removable by a stroke of a legal pen, whether by a discriminatory statute or by a ‘Dworkinian’ judgment that finds that Aryan ideology overwhelmingly explains the rest of Nazi private law, not to mention public law, and hence requires that in a hard case a judge should extend that ideology. At that point, or before, one should, as we have seen Dworkin in Section 3 advise of a system that is arguably wholly illegitimate, decide that the artifacts of the political system supply no moral reasons and are therefore not law.

We are thus returned to the positivist point from Section 2 that the existence of moral resources in the law that make genuine justification possible is contingent. However, neither the positivists nor Dworkin inquire into what happens to *legal order* when particular laws are used to consign a whole group to second class status, since they assume that the dispute is, as Dworkin liked to say, about law in the ‘doctrinal’ sense: what makes claims true or false about what the law of a particular place requires.<sup>95</sup>

But, as we have seen, it is the combination of the assumption that the debate is doctrinal with the assumption that philosophy of law must explain law's authoritative nature that leads to the puzzle of unjust law. To move forward, we should return to a modified version of one of the alternatives for a judge faced with an unjust law that Dworkin discarded under fire from Hart: the judge who stays in office, applies the law under explicit protest, hoping, 'against odds, that his appeal based on moral grounds will have the same practical effect as a lie would.' But we must substitute 'legal grounds' for 'moral grounds' and to do this we need to see that there were more differences between Nazi Law and, say, American law than that the Nazis used their laws to achieve ends that are odious to an American.<sup>96</sup>

Fuller identified eight desiderata of the rule of law: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and, the one which he took to be the most complex, congruence between official action and declared rule.<sup>97</sup> A system that fails completely to meet one of these requirements, or fails substantially to meet several, would not, in his view, be a legal system. It would not qualify as government under law—as government subject to the rule of law. Fuller's claim is that compliance with the principles imbues law with an 'inner' or internal' morality that makes a positive moral difference to all legal systems. Even a tyrant who wanted to govern through the medium of law would have to comply and this would preclude rule by arbitrary decree and secret terror, which, Fuller says, is the most effective medium for tyranny.<sup>98</sup> However, Dworkin and the positivists argued both that only prudential reasons prevent a tyrant from making his unjust aims altogether explicit in the law at his command and that compliance only serves to make those commands more effective, not, as Fuller argued, to exert a moral discipline on law that provides a *legal* obstacle to such aims.<sup>99</sup>

Notice, however, that Fuller's legal theory presents a kind of one-system picture since the morality in question is internal, or already immanent in the law. In addition, Fuller's morality is not

at the level of positive law, but at the level of formal criteria of legality. Indeed, Fuller could be taken to agree with Hart against Dworkin that a general philosophy of law has to address this formal level.<sup>100</sup> There are ‘minimum conditions necessary and sufficient for the existence of a legal system’.<sup>101</sup> And we should recall that Hart at times seemed to suggest that Fuller’s criteria were among such conditions, though he then hastened to add that they exert no moral discipline on the content of the law.

Dworkin and legal positivists overlook the possibility that if law has to comply with such criteria to a significant degree, it will in fact be the case that an interpretive model of the kind Dworkin advocates will have significant traction in the positive law of any particular legal order. Moreover, that model will not produce the perverse results that Hart thought undermined Dworkin’s position, because, as Dworkin himself suggested, one should have more confidence in the ‘screening power’ of moral principles. The basis for that confidence is that the principles are not merely moral, but also legal: they are the principles of legality with which law must comply. Hence, if legislators follow the ethos of law-making set out by the principles, the law that they make will be interpretable by judges in a way that treats the individual subject to the law as someone with ‘dignity as a responsible agent’.<sup>102</sup>

These are theoretical claims, but I have elsewhere marshaled considerable evidence in favour of them: studies of the apartheid legal order,<sup>103</sup> of the legal order of Weimar,<sup>104</sup> and of legal responses to the threat of terrorism in the post 9/11 era.<sup>105</sup> These studies of legal experience show that legislators who wish to address the individuals subject to their power as lacking ‘dignity as a responsible agent’ have to adopt one of two strategies. Either they can explicitly state that aim, or they can delegate power to officials that permit the officials to achieve the same end, not because this end is explicitly stated in the empowering statute, but because official implementation of the statute is explicitly stated to be unreviewable by judges.

Both strategies use law to place individuals or groups of individuals beyond the reach of the law. But they do so in a way that does not comply with law's form, in the first case by negating generality and its implicit commitment to formal equality before the law, in the second case by ensuring that there is no law with which official action has to be congruent. If the legislators adopt one or both of the strategies in not altogether explicit fashion, judges are under a duty to treat the law the legislators make to the extent possible as if it were intended to comply with their legislative ethos. As a result, if the form of law is to some extent respected, to that extent it will be interpretable in a way that respects the 'dignity as a responsible agent' of those subject to the law.

This conclusion shows why the principle of publicity exercises a moral discipline on the content of the law, and thus, as Fuller argued, why a tyrant who wishes to govern through law will find himself both legally and morally constrained. In addition, it helps to show why it is not merely a contingent fact that where law is present, so there will be interpretive resources available to judges of the sort Pappé found to exist in the Nazi era.

I also show in these studies that even in a legal order where there is no entrenched bill of rights, such defects in form can provide the legal basis for a judicial conclusion that the law is void<sup>106</sup> or support treating an explicit provision in a statute as a legal nullity.<sup>107</sup> Finally, the studies show that even when it is not the case that a judge has the legal resources available to declare invalid a statute that offends principles of legality, or to interpret the statute in such a way that the offence is either mitigated or removed, this does not mean that the statute is legally speaking unproblematic. Such a statute might be formally speaking valid in that it complies with rule-of-recognition type tests. But it will offend against legal form in another sense--the sense of the principles of legality, observance of which gives law a particular form. If the judge finds that she has to uphold this statute, she can stay in office and take up Dworkin's third option from his initial response to the

challenge of a judge faced with applying an unjust law. She can make an explicit protest, but not only on moral grounds, since it is on grounds that are legal as well as moral.

Such a protest is quite powerful. Consider that an analogue of it is effective under the United Kingdom's Human Rights Act (1998), which in section 3 requires that judges strain to interpret statutes to make them compatible with the human rights commitments of the statute, and in section 4 requires judges to make a declaration of incompatibility of the statute with the human rights commitments, if they cannot find an interpretation under section 3. If a section 4 declaration is made, a Minister of the Crown may in terms of section 10 of the Act amend the statute. And of course the legislature may amend it, or do nothing, though doing nothing puts the state in violation of its international legal commitment to the European Convention on Human Rights, a matter on which the European Court of Human Rights will eventually pronounce. But while I think it significant that in one jurisdiction such declarations have received positive responses from the legislature, more significant is why there have been such responses. On my view, the responses have much to do with the message otherwise sent to those affected by the offending statute that they are not fully within the moral community constituted by the legal commitments of the political and legal order to which they are subject.

To be both within the community for some purposes and without for others is to occupy a highly problematic legal status, that of second-class subject or citizen.<sup>108</sup> Second-class status is much more legally problematic in one sense than the status of slavery, as long as slaves are relentlessly consigned to the status of objects or things.<sup>109</sup> For if one is legally recognized as having status as a responsible agent for some purposes but not for others, the parts of the law that seem to relegate one to second-class status are thrown into doubt by those that do not in any case in which a challenge is brought to the former. It was on precisely this basis that human rights lawyers during the apartheid era put their challenges to the laws of apartheid. It is worth remarking that such



lawyers claimed Dworkin's theory as a source of inspiration for their work in the standard example of the legal order that was often claimed by legal positivists to refute interpretivism.<sup>110</sup> But my argument in this section has been that we need Fuller to understand how Dworkin's theory could so serve.

Of course, the parts of the law that seem to relegate one to second-class status can be used to throw into doubt those parts that do not, to the point where second-class status for a group is so entrenched that the group is put beyond law's reach. But then we need Fuller too, in order to understand that an illegitimate legal system is a 'botched legal order',<sup>111</sup> first, because it will fail to solve the moral problems that only law can solve. But, second, it is also botched legally-speaking. It is on the path to becoming something other than legal order, the order of a 'prerogative state'<sup>112</sup> in which arbitrary power reigns. Fuller was not, then, so 'naïve' when he suggested that there is 'a considerable incongruity in any conception that envisages a possible future in which the common law would "work itself pure from case to case" toward a more perfect realization of iniquity'.<sup>113</sup> Fuller might, however, seem naïve or simply wrong-headed in another respect, since his one-system picture of law and morality seems to presuppose a view that we work out what our morals are at the same time as we work out what the law is. But, as I shall now briefly suggest, that view has much to commend it.

## 5. LAW'S LABORATORY

I have argued that the puzzle of unjust law complicates the division in legal theory between natural law and legal positivism. The central figure here is the judge because of the obligation of judges to apply law that is based on facts that are contingent and may not be morally good. How can we square what seems like a standing judicial obligation to apply the law with the idea that that law has

no guarantee to be something that ought to be applied? Hart tries to get out of the problem by minimizing the account of law's authority so that there is no moral requirement to apply it, and Dworkin tries to get out of it by subordinating the factual dimension of law to the moral one and arguing that the criteria in the moral dimension determine the law. But the difficulties each encounters have the result that both are tempted to stray to the other side of the positivism/natural law divide.

In the last section, I suggested that the solution to the puzzle has to do with how principles of legality condition the content of law in a way that makes more plausible Dworkin's claim that an argument that shows the legal record in its best moral light will not include morally unacceptable principles. But this suggestion seems to entail that what gets left in after the screening process is done is moral. It would follow that there is such a thing as 'a moral legislature with competence to make and change morals, as legal enactments make and change law', an idea which Hart said is 'repugnant to the whole notion of morality'.<sup>114</sup>

I am not so sure that a version of this idea is at all repugnant, as long as we are prepared to adopt a certain kind of pragmatist view of moral inquiry, and in *Justice for Hedgehogs*, Dworkin endorsed the Peircean pragmatist view of inquiry as aimed at getting right answers.<sup>115</sup> True or rational beliefs in any field of inquiry are those that survive the tribunal of experience, against the background of our current beliefs and principles. The settled beliefs that arise from this process of inquiry or deliberation are always provisional since they must be left vulnerable to revision in light of further experience.

I suspect, though, that Dworkin was not willing to embrace fully the implications of his endorsement of the idea that morals are an appropriate subject matter for inquiry.<sup>116</sup> He rejects, in my view, the important pragmatist idea that our compulsory public morality--the morality that we feel is settled and important enough that it be put into law--is simply a subset of the set of

judgments that have survived the tribunal of experience and inquiry. My claim here is that philosophy of law can help to show why that idea is plausible, as it shows us how fundamental principles of legality shape our inquiry. That is, our confidence in these compulsory moral judgments is in part built upon the principles contained in the institutional make-up of law.

I have in mind, first, the principle that requires that individuals have the right to ask an independent official for reasons why the law applies to them in a way that addresses them as beings with dignity as responsible agents, second, the principles that underpin legal mechanisms for changing law in a way that makes the judgments embedded in the law revisable in light of further experience. It is these kinds of principle that make it both possible for those who find themselves relegated by the law to second-class status to ask a judge, ‘But how can that be law for me?’, and for an internal legal imperative to kick in that requires reform.<sup>117</sup>

Fuller is again helpful at this point in his emphasis on the importance of impartial adjudicators in a rule-of-law order, in which the issues submitted to the adjudicators ‘[tend] to be *converted* into a claim of right or an accusation of guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function’.<sup>118</sup> ‘The process of reasoned argument requires the person making the argument to present it as more than a ‘naked demand’. It has to be presented as a ‘claim of right’, that is, as ‘supported by a principle’. And that has the consequence that ‘issues tried before an adjudicator tend to become claims of rights or accusations of fault’.<sup>119</sup> Thus Fuller regards courts and other adjudicative institutions as ‘essential to the rule of law’. The ‘object of the rule of law is to substitute for violence peaceful ways of settling disputes. Obviously peace cannot be assured simply by treaties, agreements, and legislative enactment. There must be some agency capable of determining the rights of the parties in concrete situations of controversy’.<sup>120</sup>

But notice that for this adjudicative conversion process to take place, the law has to be

convertible and that requires a prior conversion process. Legislation requires the reduction of a political program to the explicit terms of a statute and thus a conversion of policy into public standards, which produces a kind of legal surplus value. By this I mean that the legitimacy of official action in compliance with the statute is not simply that of compliance with a political policy that the demos or polis has determined to be appropriate. It is also the case that this conversion process adds value because it brings into being a particular type of *public* standard, one that permits the operation of the principles identified by Fuller as the desiderata of the inner morality of law, and which enables claims of right based on legal principle to be adjudicated. If the law is not convertible in this way, a problem is raised that is internal to legal order and that requires that those charged with maintaining the legal order in good shape consider reform.

Once law and legal order are understood in this way, an interesting relationship between law and background culture—the culture of what Hart called ‘positive morality’<sup>121</sup> -- comes into view. Consider that in nineteenth century Britain women were not wholly consigned by the law to second-class status. Those bits of the law that recognized their formal equality made problematic those bits that did not. It was just this kind of issue that led to debate and legislation in Britain, I think, about whether ‘he’ in statutory language was gender-neutral, an issue that resurfaced in Canada and in the Privy Council in the *Persons* case, about whether women counted as ‘persons’ appointable to the Senate.<sup>122</sup> Looking back at the history of the subordination of women should make us more aware of the possibility of injustice in our present situation that we find difficult to see. And here legality can be useful against law, as it were. We might be able to detect moral problems that we should address because of inconsistencies and tensions in our legal treatment of groups.

These ideas require moving away both from a Dworkinian philosophical idiom in which law contains (or does not contain) moral principles that screen out repugnant ideologies and from a positivistic one that sees law as a mechanism that can, but need not, be used to transmit moral facts

to legal subjects. It requires a move to an idiom that describes law as a process that in part constitutes our inquiry about what moral judgments we should make. One reason to make this move is that the new idiom accurately describes the way that we mostly talk about the law. The law is a part of our moral fabric. It may require revision, even overthrow, as experience dictates. But this does not distinguish it from other beliefs and theories interwoven into that moral fabric. Moreover, it seems to me that it is only within that idiom that we can describe perspicuously what otherwise seem to be two intuitions that are at war with each other in situations of legalized injustice—that law is both a matter of fact and of authority.

Dworkin should therefore have retained in the final version of *Justice for Hedgehogs* the thought from the manuscript that it is counterintuitive to suppose that ‘most of the subjects of most of the political communities over history had no moral duty to obey the laws of their community’.<sup>123</sup> The pulling apart of moral duty from legal duty is only apt when massive revision or revolution is being undertaken. In the absence of the need for such revolution, our moral and legal lives are completely and utterly intertwined. It is in that intertwinement that the redemptive power of the law—its capacity to reform itself from within—resides.

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<sup>1</sup> Professor of Law and Philosophy, University of Toronto. I thank members of my ‘Introduction to Legal Philosophy’ class in the Fall semester of 2013 at New York University for the barrage of challenges and questions that have shaped much of its analysis and Steve Coyne, Candice Delmas, Cheryl Misak, Hillary Nye, Hamish Stewart and Kenneth Winston for many helpful suggestions about how to clarify its argument. In addition, I thank audiences at the McMaster Dworkin conference and at workshops at Fordham Law, Michigan Law, New York University Law, and Vanderbilt Philosophy for discussion, as well as Steven Ascheim, Moshe Halbertal, Stephen Holmes, Mattias Kumm, Liam Murphy and Bernhard Schlink for illuminating conversations about its themes. My greatest thanks are due to Ronald Dworkin for patient and generous supervision of my doctoral thesis between 1984 and 1988, and for the questions he posed for me then that I am still struggling to answer to this day. Earlier versions of sections 1 and 2 of this chapter, as well as portions of sections 4 and 5 were published as ‘Unjust Law in Legal Theory’, in Ralf Poscher, Henner Wolter and Jakob Nolte, eds., *Festschrift für Bernhard Schlink zum 70. Geburtstag* (Heidelberg: C.F. Müller Verlagsgruppe Hüthig Jehle Rehm GmbH).

<sup>2</sup> Ronald Dworkin, *Justice for Hedgehogs* (Harvard: Harvard University Press, 2011), 410.

<sup>3</sup> *Ibid*, 412.

<sup>4</sup> HLA Hart, ‘Positivism and the Separation of Law and Morals’, (1958) 71 *Harvard Law Review* 593. Prominent legal positivists these days deny that Hart proposed this thesis or that legal positivism is committed to it, for example, Leslie Green, ‘Positivism and the Inseparability of Law and Morals’, (2008) 23 *New York University Law Review* 1035. I shall come back to this issue in Section 5.

<sup>5</sup> Dworkin, *Justice for Hedgehogs*, 412.

<sup>6</sup> *Ibid*, 402.

<sup>7</sup> *Ibid*, 407.

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<sup>8</sup> Quoted in Susanne Sreedhar and Candice Delmas, ‘State Legitimacy and Political Obligation in *Justice for Hedgehogs: The Radical Potential of Dworkinian Dignity*’ (2010) 90 *Boston University Law Review* 737, 746.

<sup>9</sup> I borrow the language of ‘determinants’ from Jules Coleman, ‘The Architecture of Jurisprudence’ (2011) 121 *Yale Law Journal* 2. I say ‘can be seen as’ because, as I shall suggest in Section 5, the idea of moral facts acting as determinants is in itself rather positivistic.

<sup>10</sup> Raymond Wacks, ‘Judges and Injustice’ (1984) 101 *South African Law Journal* 266.

<sup>11</sup> As Joseph Raz wrote in 1985, Dworkin’s position would seem to ‘require a South African judge to use his power to extend Apartheid’; Joseph Raz, ‘Authority, Law, and Morality’, in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press: 1994) 194, 208. For extended discussion of this claim, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010, second edition), the revised version of my Oxford thesis with Dworkin.

<sup>12</sup> Scott Shapiro, *Legality* (Harvard: Harvard University Press, 2011), 49.

<sup>13</sup> Hart, ‘Positivism’, 620.

<sup>14</sup> HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, second edition), 209-12.

<sup>15</sup> I agree on this point with Leslie Green, ‘The Morality in Law’ in Luis Duarte D’Almeida, James Edwards and Andrea Dolcetti, eds., *Reading HLA Hart’s The Concept of Law* (Oxford: Hart Publishing, 2013) 177, at 203-7.

<sup>16</sup> Liam Murphy, ‘Better to see Law this Way’ (2008) 23 *New York University Law Review* 1088.

<sup>17</sup> Shapiro, *Legality*, 391.

<sup>18</sup> See my ‘Legality Without the Rule of Law? Scott Shapiro on Wicked Legal Systems’ (2012) 25 *Canadian Journal of Law & Jurisprudence* 183 for a discussion of Shapiro’s claims in this regard.

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<sup>19</sup> Shapiro, *Legality*, 49.

<sup>20</sup> There is an important difference between saying that law has authority and that it claims authority, as I shall explain below.

<sup>21</sup> Hart, *Concept of Law*, 6-7. His emphasis.

<sup>22</sup> *Ibid*, 8.

<sup>23</sup> *Ibid*, 175, 177.

<sup>24</sup> *Ibid*, 8. Hart mentions here Holmes's dictum that 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law', but he clearly has in mind as well Bentham's and Austin's command model of law.

<sup>25</sup> Hart, 'Positivism', 603.

<sup>26</sup> See Harold J Berman, 'Towards an Integrative Jurisprudence: Politics, Morality, History' (1988) 76 *California Law Review* 779. Berman attributes coinage of the term to Jerome Hall.

<sup>27</sup> Raz, 'Authority, Law, and Morality', 194.

<sup>28</sup> In making such claims, natural law positions join what Susan Neiman in her illuminating work on evil in modern thought calls the theodistic tradition, which holds that God's works in the world as we find it are for the best, according to some intrinsic moral order; Susan Neiman, *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton: Princeton University Press, 2002). Neiman suggests that an atheistic position can also fit within this tradition. Consider, first, that in the debate I am about to describe Hart rejected natural law positions because they share a 'romantic optimism that all the values that we cherish ultimately will fit into a single system, that not one of them has to be sacrificed or compromised to accommodate another.' And he quoted the following lines as an expression of the optimism he rejected:

All Discord Harmony not understood



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All partial evil Universal Good.

These lines are from Alexander Pope's philosophical poem, *Essay on Man*, as Neiman shows, a central text in the theodistic tradition. See Hart, 'Positivism', 620; Neiman, *Evil in Modern Thought*, 31-6. Consider, second, that Lon Fuller in his response to Hart thought that the fundamental difference between them boiled down to Hart's assumption that 'evil aims may have as much coherence and inner logic as good ones', whereas Fuller expressed a belief he recognized might seem 'naïve' that goodness and coherence were more likely to go together because

when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions towards goodness, by whatever ultimate standards of goodness there are. Accepting these beliefs, I find a considerable incongruity in any conception that envisages a possible future in which the common law would 'work itself pure from case to case' toward a more perfect realization of iniquity.

Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 636. See further, Shapiro, *Legality*, 49: 'Just as theologians have struggled to explain how evil is possible given the necessary existence of God, the natural lawyer must account for the possibility of evil legal systems given that law is necessarily grounded in moral facts. Positivists, on the other hand, have no such difficulties'.

<sup>29</sup> See Dworkin's comment in note XX [80] below.

<sup>30</sup> Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law', (2006) 26 *Oxford Journal of Legal Studies* 1.

<sup>31</sup> Hart, 'Positivism', 617.

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<sup>32</sup> Ibid, 618. See Roger Cottrell, ‘The Role of the Jurist: Reflections Around Radbruch’ (2013) 24 *Ratio Juris* 510 for a nuanced treatment of Radbruch.

<sup>33</sup> Hart, ‘Positivism’, 616.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, 620.

<sup>36</sup> Both Hart and Fuller relied on a flawed report of the case, as HO Pappé pointed out in ‘On The Validity Of Judicial Decisions In The Nazi Era’, (1960) 23 *The Modern Law Review* 260. The court did not invalidate the laws but came to the conclusion that the woman was guilty because she was the ‘indirect perpetrator’ of the crime of illegal deprivation of liberty. For my own discussion as well as my translation of the case, see David Dyzenhaus, ‘The Grudge Informer Case Revisited’ (2008) 23 *New York University Law Review* 1000. In *Concept of Law*, 304, Hart said that Pappé’s analysis should be ‘studied’, but did not himself take the time to confront it, in my view, because of the assumption I discuss in the text that the law can have any content.

<sup>37</sup> Hart, ‘Positivism’, 619-20.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid, 619.

<sup>40</sup> Ibid, 620.

<sup>41</sup> Ibid, 624.

<sup>42</sup> Hart, *Concept of Law*, 116-17.

<sup>43</sup> Ibid. See Thomas Mertens, ‘Radbruch and Hart on the Grudge Informer: A Reconsideration’ (2002) 15 *Ratio Juris* 186, 202-4, for careful discussion of these issues, although I disagree with him on the question whether Hart failed to see that the judicial perspective requires a different analysis.

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<sup>44</sup> Joseph Raz suggested to me at the McMaster Conference that Hart might have supposed that judges are under such a duty because of their oath of office. But my argument is that Hart thought there was such a duty even if the absence of an oath.

<sup>45</sup> Hart, *Concept of Law*, 208.

<sup>46</sup> *Ibid*, 211.

<sup>47</sup> See Fuller, 'Positivism and Fidelity to Law', 656. It does not help to put the matter into a kind of *oratio obliqua*. Raz, for example, offers the suggestion that we might consider the judge's duty here as in the same light as we consider such statements as, 'As a Catholic, my duty is ...' But he also argues that judges must consider their legal duty to apply the law as a duty from the moral perspective. See Raz, 'Incorporation by Law', (2004) 10 *Legal Theory* 1.

<sup>48</sup> Hart, *Concept of Law*, 209.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*, 207.

<sup>51</sup> Joseph Raz, 'The Rule of Law and its Virtue', from Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1983) 210. For discussion of Hart's changing position, see Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller', (2008) 83 *New York University Law Review* 1135.

<sup>52</sup> Hart, 'Positivism', 596.

<sup>53</sup> *Ibid*, 607-15.

<sup>54</sup> *Ibid*, 613-14.

<sup>55</sup> *Ibid*, 614.

<sup>56</sup> *Ibid*, 612.

<sup>57</sup> Pappé, 'On the Validity', 271.

<sup>58</sup> *Ibid*, 271-72.

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<sup>59</sup> Hart, 'Positivism', 622.

<sup>60</sup> Ibid, 624.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Hart, *Concept of Law*, 117.

<sup>64</sup> Ibid.

<sup>65</sup> Bentham's phrase, see Hart, 'Positivism', 598.

<sup>66</sup> While Raz took the features of authority that he identified to be exemplified in legal practice, the direction of the argument is from the nature of authority to the nature and limits of law. See Raz, 'Authority, Law, and Morality'. On that account, an entity that is capable of claiming authority, which satisfies the 'non-moral conditions' for being an authority, is one that can communicate a judgment to others on what the balance of reasons that applies to them requires; *ibid*, 199-202. The entity thus not only claims authority but also justified authority. But whether or not it has such authority will depend both on whether its judgment is right and whether those subject to it would in fact better serve their own interests by following the authority's judgment than by following their own. The entity has to satisfy the conditions set by the 'normal justification thesis', *ibid*, 198. On this account, judges in telling parties what the law is that applies to them are committed to endorsing law's claim to legitimate authority.

The implications of this account are not that easy to settle. Here are some candidates:

(a) If law does not live up to the normal justification thesis, one possibility is that since the law is illegitimate, it lacks authority, and therefore is not law. That is, if the moral conditions for having authority are set by the normal justification thesis, and if satisfying those conditions is necessary for law to have authority, then satisfying the non-moral conditions does not suffice for an artifact to be law.

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(b) Another possibility is that the de facto authority of the law is one thing, established by satisfying the non-moral conditions, but legitimate authority is another, since it requires satisfying the moral conditions. But then Raz's account would be no different from Hart's, with his claim about a moral component to judicial duty no more than, as Hart said of Dworkin's theory, an 'idle decoration', Hart's charge against Dworkin in Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) 127, 152.

(c) Yet another possibility is that somewhat like Robert Alexy, Raz thinks that among the non-moral conditions that have to be satisfied is that the law must claim to have legitimate authority and officials must endorse that claim. See Alexy, 'On Necessary Relations Between Law and Morality', (1989) 2 *Ratio Juris* 167, 176-77. Thus the Nazis had law as long as Nazi officials made such claims, and despite the fact that Nazi law was wholly illegitimate. But that seems to make a legal order's existence turn not on the rule of recognition, various institutions, etc. Instead, it turns on a very formal claim that will always be satisfied—that at least the officials will claim and likely think that the order they serve is legitimate. See further Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) 8-9.

Note that Hart, unlike Raz, can say that the law *has* authority, not merely that it *claims* authority. And Hart can say this because, on his view, the authority law has is morally inert. Hence, for Hart the legitimacy of law depends on some source external to law, for example, liberal morality. (Though in an interview in 1988, Hart distinguishes between legal legitimacy and moral legitimacy and seems to suggest that the law always has the former. See 'Answers to Eight Questions', in D'Almeida, Edwards, and Dolcetti, eds., *Reading HLA Hart's The Concept of Law*, 279, at 283-4.) He disagrees with the command theorists in that, as he understands them, they do without a theory of law's authority. The command theory is compatible with a claim that *the* law has authority, for example,

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when the gunman is a democratic legislature. But then the authority of the law comes from a source external to law, which requires an argument about the legitimacy of making decisions about the public good democratically. But law as such has no claim to either authority or legitimacy and we do not need the idea of authority to explain the nature of law. Notice that if one adopts this option, there is no problem in saying that if the law has authority, the authority it has is justified, because these two judgments are one and the same and purely external.

<sup>67</sup> Hart, *Essays on Bentham*, 153-61.

<sup>68</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978, second edition) 326-7, responding to Kent Greenawalt, 'Policy, Rights and Judicial Decisions' (1977) 11 *Georgia Law Review* 991.

<sup>69</sup> Dworkin, *Taking Rights Seriously*, 326-27.

<sup>70</sup> HLA Hart, 'Legal Duty and Obligation' in Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) 127, 150, quoting from Dworkin, *Taking Rights Seriously*, 343.

<sup>71</sup> Hart, *Essays on Bentham*, 150-51. Hart adds that there cannot in any case be any individual expectations when the law is indeterminate, that is, because (at least on the positivist account) the law supplies no answer in such cases.

<sup>72</sup> *Ibid*, 152-3.

<sup>73</sup> Ronald Dworkin, 'A Reply by Ronald Dworkin' in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) 257.

<sup>74</sup> Dworkin, *Taking Rights Seriously*, 327. 'A Reply', 259. Fuller, 'Positivism and Fidelity to Law', 656, made exactly this criticism.

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<sup>75</sup> Dworkin, 'A Reply', 299, note 4.

<sup>76</sup> Dworkin, 'A Reply', 257-58.

<sup>77</sup> Ibid, 258. For the most elaborate account of this point, see Dworkin, *Justice for Hedgehogs*, 407-9.

<sup>78</sup> Dworkin, 'A Reply', 257.

<sup>79</sup> Ronald Dworkin, *Law's Empire* (London: Fontana, 1986) 110.

<sup>80</sup> An additional reason for not taking the puzzle of unjust law seriously Dworkin once advanced is that it is 'not very important... from the practical point of view, because the judgments we make about foreign wicked legal systems are rarely hinged to decisions we have to take'; Dworkin, 'A Reply', 260. Indeed, in the line preceding the claim about the 'practical point of view' he said that wicked legal systems 'should be treated ... like hard cases that turn on which conception of law is best rather than easy cases whose proper resolution we already know and can therefore use to test for any particular conception for adequacy'; *ibid.* (See also Dworkin, *Law's Empire*, 108, 'The question of wicked legal systems ... is not one but many questions, and they all arise, for legal theory, at the level where conceptions compete'.) But that claim despite the qualification that followed seems to make wicked legal systems quite important. After all, for Dworkin hard cases—cases in which lawyers reasonably disagree about what the law requires—provide the resource for working out both the content of rival conceptions of law and for adjudicating between their substantive merits. One might say that the 'hard case' of legitimacy in a wicked legal system provides us with an insight into the 'easy case' of the legitimacy of a morally decent system.

<sup>81</sup> Dworkin, 'A Reply', 258.

<sup>82</sup> Dworkin, *Justice for Hedgehogs*, 411,

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 411.

<sup>85</sup> *Ibid.*, 405.

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<sup>86</sup> Ibid.

<sup>87</sup> Dworkin, *Law's Empire*, chapter 3.

<sup>88</sup> Ronald Dworkin, 'Response', (2010) 90 *Boston University Law Review* 1059, 1075-76, responding to Sreedhar and Delmas, 'State Legitimacy and Political Obligation'.

<sup>89</sup> Dworkin adds 'while they work to improve the state's legitimacy', Dworkin, 'Response', 1076.

This addition might seem to be a rider that builds democracy into Dworkin's account of when this situation prevails, since he seems to presuppose that the law accords the people in the privileged group the space to work against the system's injustice. But it is clear that he considers that an undemocratic society can be legitimate as long as its laws are not too substantively unjust, so that illegitimacy is measured across two dimensions, corresponding to fit and soundness, the lack or absence of democracy, and the substantive content of the law. These two dimensions are united by the principle of equal concern and respect, or as Dworkin was to term it in *Justice for Hedgehogs*, 264-67, the 'Kantian principle of dignity'.

<sup>90</sup> TRS Allan, Law, 'Justice and Integrity: The Paradox of Wicked Laws', (2009) 29 *Oxford Journal of Legal Studies* 705.

<sup>91</sup> Dworkin, 'A Reply', 299, note 4.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid. Compare Dworkin, *Law's Empire*, 105-8.

<sup>95</sup> Ronald Dworkin, *Justice In Robes* (Harvard: Harvard University Press, 2006), 2. Dworkin identified a second, 'sociological' concept, which he took to be Fuller's. Such a concept seeks to set out precisely 'what kind of social structure count as a legal system' but he says that it would be 'silly' to ask whether a system that had a lot of ex post facto law '*really*' is a legal system; *ibid*, 3, his emphasis.



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He identifies, in addition, a ‘taxonomic’ concept, which asks questions such as whether moral principles can count as principles of law, which he attributes to Raz and rejects as a ‘scholastic fiction’. He does endorse a third conception of law, the ‘aspirational’ conception, ‘which we often refer to as the ideal of legality or the rule of law’. This is a politically contested concept, with the lines drawn between more substantive rights-based conception and more positivist, ‘formal’ conceptions; *ibid*, 13. Notice that Fuller’s ‘sociological’ conception seems excluded from this contest, despite the fact that Fuller presented his theory as one about the rule of law and legality and dubbed it ‘aspirational’. See Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, revised edition) 41. In my view, Dworkin’s division of conceptions has the same effect as Hart, ‘Positivism’, of unhelpfully compartmentalizing problems that need to be addressed together.

<sup>96</sup> To adapt Fuller’s acute charge against Hart in Fuller, ‘Positivism and Fidelity to Law’, 650.

<sup>97</sup> These are set out in detail in Fuller, *Morality of Law*, chapter 2.

<sup>98</sup> *Ibid*, 157-59.

<sup>99</sup> Ronald Dworkin, ‘Philosophy, Morality, and Law: Observations Prompted by Professor Fuller’s Novel Claim’ (1965) 113 *University of Pennsylvania Law Review* 672; Hart, *Concept of Law*, 206-7. See further, Raz, ‘The Rule of Law and Its Virtue’, 223-26.

<sup>100</sup> See Hart’s remark in *Concept of Law*, vii, that the book is an exercise in ‘descriptive sociology’.

<sup>101</sup> Hart, *Concept of Law*, 116-17.

<sup>102</sup> Fuller, *Morality of Law*, 162. Kristen Rundle, ‘Form and Agency in Raz’s Legal Positivism’ (2013) 32 *Law and Philosophy* 767, especially at 771, where Rundle sets out two dimensions of Fuller’s argument, the ‘distinctive ethos of legislation’ that requires law to take a particular form and the way in which that form ‘presupposes the legal subject’s status as a responsible agent’. My argument adds

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a third dimension, implicit in the combination of the first two, that the law has to be interpretable in a way that vindicates that presupposition. (Rundle also provides an illuminating analysis of a tension between Raz's account of authority, which has the rational agent at its heart, and his account of the rule of law that argues that the rule of law serves only to make law into a more effective instrument of policy, including policies that deny agency, for example, by enslaving people.)

<sup>103</sup> Dyzenhaus, *Hard Cases in Wicked Legal Systems*.

<sup>104</sup> David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997).

<sup>105</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

<sup>106</sup> Consider the common law view that a bill of attainder is void.

<sup>107</sup> Consider how judges in the common law world have sidestepped or read down privative clauses that strip them of review power of official action.

<sup>108</sup> See Julius Ebbinghaus, 'The Law of Humanity and the Limits of State Power', (1953) 3 *The Philosophical Quarterly* 14.

<sup>109</sup> 'As long as the class of people is relentlessly consigned ...' is, it must be emphasized, a big proviso. For slave-owning societies, societies in which the institution of slavery is constituted by law, usually experience immense difficulty in maintaining the enslaved group in a status beyond morality and law and therefore beyond dignity. See, for example, WW Buckland, *A Text-Book of Roman Law From Augustus to Justinian* (Cambridge: Cambridge University Press, 1932) 62–6. Consider also the difficulties our society experiences with maintaining non-human animals—cows, dogs, pigs etc.—in the status of things, while giving them some legal protection against various kinds of bad treatment

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because we recognize that they share certain attributes with us human animals, including the capacity to suffer. In contrast to a society that manages relentlessly to consign a group of people to the status of things, apartheid-era South Africa was a legal nightmare from the perspective of the rule of law, concerned with what it takes to maintain a society ‘in good shape’, legally speaking. (See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) 270.) And it was so because the ideal that all South Africans were equal before the law—the specifically legal ideal of human dignity—was maintained as an abstract ideal of the legal order throughout the period, even as the particular apartheid laws made it ever clearer that the animating political ideology of the ruling party was one of white supremacy. The reality of that nightmare was lived on a daily basis by black South Africans, as well as the other ‘non-white’ groups who were accorded privileges that put them somewhere in between black and white South Africans. The nightmare played out in the law: in the convoluted attempts in statute law to ensure that the statutes would be interpreted in a fashion more consistent with the political ideal of white supremacy than with the legal ideal of human dignity; in the actual administration of the law by officials; and in the efforts by judges who took seriously the legal ideal of dignity to interpret the law in light of that ideal. But that the nightmare was played out within the law had the occasional advantage for those who used the law to challenge the law that sought to embed the political ideology of white supremacy.

<sup>110</sup> See François Du Bois, ‘Preface’, in Du Bois, ed., *The Practice of Integrity: Reflections on Ronald Dworkin & South African Law* (Cape Town: Juta, 2004) xi. This collection contains the proceedings of a conference held in Cape Town to honour Dworkin’s contribution to human rights lawyering during the apartheid era. Dworkin’s Keynote in that volume is an early statement of the one-system account. (The collection is also published in the journal, *Acta Juridica*.)

<sup>111</sup> Shapiro, *Legality*, 391.

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<sup>112</sup> See Ernest Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Octagon Books, 1969).

<sup>113</sup> Fuller, 'Positivism and Fidelity to Law', 636.

<sup>114</sup> Hart, *Concept of Law*, 175,177.

<sup>115</sup> In *Justice for Hedgehogs*, Dworkin describes his account of truth as 'pragmatist' since he argues with CS Peirce, that 'truth is the intrinsic goal of inquiry'; 177. And in his work on moral inquiry, he seems to argue, with pragmatists, that the test for the objectivity of our judgments is that they are the best we can achieve for the time being in light of our experience, at the same time as we insist that inquiry be kept open in case we should revise those judgments. (See, for example, Ronald Dworkin, 'Law from the Inside Out', (2013) 60, number 17, *New York Review of Books*, November 7, 54.)

<sup>116</sup> Dworkin qualifies his endorsement of pragmatism by saying that pragmatism as an abstract account of truth can recommend 'not pragmatic' less abstract modes of inquiry for particular domains; *Justice for Hedgehogs*, 178; and I do not suppose that he would agree with the claims in this section as they might seem to make morality hostage to facts in the same way as we have seen his legal theory can seem hostage. Fuller preferred to think of himself as a pragmatist rather than a natural lawyer. See Kenneth Winston, 'Is/Ought Redux: the Pragmatist Context of Lon Fuller's Conception of Law' (1988) 8 *Oxford Journal of Legal Studies* 329. But there is no need to accept this dichotomy—see Philip Selznick, 'Sociology and Natural Law' (1961) 6 *Natural Law Forum* 84.

<sup>117</sup> For exploration of similar ideas, with reliance on Fuller, see Jeremy Waldron, 'How Law Protects Dignity', (2012) 71 *Cambridge Law Journal* 200. On my account, the judge is under a standing legal and moral obligation to apply the law and the citizen should recognize that she has a legal moral/duty to obey, but one that may be outweighed by the moral pull of considerations that make her contemplate civil disobedience. This account might well help to understand the legal/moral

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complexity of the Civil Rights Movement in the USA, the Suffragettes in the UK, and that stage in the struggle against apartheid when the liberation movements engaged in massive ‘Defiance’ campaigns.

<sup>118</sup> Lon L Fuller, ‘The Forms and Limits of Adjudication’ in Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing 2001) 101, 111 (emphasis added). Hart presented very much the same picture in chapter 9 of *The Concept of Law*, ‘Laws and Morals’. As I suggested in note XX above, it is significant that Hart’s position is that philosophy of law has to explain the authority law has, not (as Joseph Raz has suggested) the authority that law claims. Hart does not allow, in other words, that law can fail to have authority. In this respect, Hart is more like Fuller and Dworkin than like Raz and differs from Fuller and Dworkin only in that he holds that the reasons that legal authority gives to both officials and subjects need not be moral reasons. The nature of reasons is itself a matter of philosophical controversy as is the nature of morality and Hart expressed at times a desire to keep philosophy of law away from such matters. But I think it is safe to say that it is he thought that legal reasons have a normative force that goes beyond the force of prudence— the kind of reason offered by ‘Your money or your life’.

<sup>119</sup> Fuller, ‘Forms and Limits’, 111.

<sup>120</sup> Ibid, 114.

<sup>121</sup> HLA Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1981) 17.

<sup>122</sup> *Edwards v. Canada (Attorney General)* [1930] A.C. 124.

<sup>123</sup> Quoted in Sreedhar and Delmas, ‘State Legitimacy and Political Obligation’, 746.