

PHILOSOPHY, POLITICAL MORALITY, AND HISTORY: EXPLAINING THE ENDURING RESONANCE OF THE HART-FULLER DEBATE

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This Article argues that the historical, moral, and political dimensions of the Hart-Fuller debate deserve much credit for its continuing appeal and should prompt a reconsideration of Hart's own claims about the universality of analytical jurisprudence. The debate illuminates the sense in which conceptual analysis needs to be contextualized and, in so doing, demonstrates the importance of clarity and rigor in legal theorizing. Moreover, the debate's power to speak to us today is a product of its connection with pressing political issues. In analyzing the postwar development of international criminal law, this Article argues that Hart's modest realism, pitched against Fuller's more ambitious optimism, speaks to us in compelling ways.

INTRODUCTION

Revisiting the Hart-Fuller debate, it is worth reflecting on the remarkable fact that it still speaks to us so powerfully today.¹ In an increasingly professionalized academic world driven by the imperatives of “research production,” we have grown accustomed to regarding articles and even books as of ephemeral significance. Even in philosophy—where the classic status of certain texts has survived to a greater extent than in many other disciplines—articles, let alone debates, thought to be of sufficient significance to justify conferences half a century after their initial publication are exceptionally rare. Admirers of Hart and Fuller will of course keep their eyes peeled for announcements of workshops considering *The Concept of Law*,² the Hart-Devlin debate,³ and *The Morality of Law*,⁴ each of which will

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¹ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). This Article develops some of the arguments sketched in Nicola Lacey, *H.L.A. Hart's Rule of Law: The Limits of Philosophy in Historical Perspective*, 36 QUADERNI FIORENTINI 1203 (2007).

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

³ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

reach its fiftieth birthday within the next few years. But the debate between Hart and Fuller occupies a special place—even within these two scholars' substantial contribution to twentieth-century legal and political philosophy. In this Article, I accordingly set out to explain how, and why, the debate has spoken consistently to its readers over the last five decades—and seems likely to do so for many decades to come.

The obvious explanation—the intrinsic and outstanding intellectual merit of the two articles that constitute the debate—is tempting but, at best, incomplete. It is certainly true that both Hart and Fuller were in excellent form. Fuller's response to Hart's arguments articulated the key points of his natural law theory more economically and hence, perhaps, to greater effect than his subsequent book, *The Morality of Law*.⁵ Hart also honed in on the essence of his position, encapsulating his distinctive genre of legal positivism.

Other, less purely intellectual factors have also been conducive to the warmth of the debate's reception and to its lasting salience. First, there is the sharp joinder of issue. This was certainly fed by a prickly relationship between the protagonists. But more significantly, it was underpinned by the debate's attention to the vivid and poignant Case of the Grudge Informer in Nazi Germany⁶ at a time when memories of the Second World War remained painfully fresh. The debate also produced prescient analyses of several issues that have come to dominate postwar public international law. With its references to the "stink" of oppressive, slave-owning societies remaining "in our nostrils,"⁷ and a "Hell created on earth by men for other men,"⁸ Hart's article in particular has a striking rhetorical force unmatched in his writing other than *Law, Liberty and Morality*.⁹ There is also the debate's publication in an influential and widely read journal:¹⁰ These things, after all, do matter. A final reason for the debate's endurance is its manageable compass. Generations of students inclined to study jurisprudence through the convenient, if intellectually compromising,

⁴ LON L. FULLER, *THE MORALITY OF LAW* (1964).

⁵ *Id.*

⁶ See *infra* notes 30–32 and accompanying text (discussing debate's focus on Grudge Informer Case).

⁷ Hart, *supra* note 1, at 624.

⁸ *Id.* at 616.

⁹ HART, *supra* note 3.

¹⁰ By contrast, a number of Hart's other important papers were buried in relatively inaccessible sources until collected together in the 1980s. See, e.g., H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983); H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* (1982) [hereinafter HART, *ESSAYS ON BENTHAM*].

medium of “text and materials” books, which Hart referred to in the debate as “those curiously English and perhaps unsatisfactory productions—the omnibus surveys of the whole field of jurisprudence,”¹¹ have encountered Hart’s positivism and mid-twentieth-century natural law theory as it was articulated in the 1958 *Harvard Law Review*. In the case of Hart’s article, this effect was reinforced by his refusal to allow the reproduction of extracts from *The Concept of Law*.

But the enduring appeal of the debate also has to do with the way in which it brings into dialogue issues traditionally treated separately in analytical jurisprudence—especially those of a positivist temper. Within the debate, implicitly and sometimes explicitly, historical and institutional issues, as well as moral and political issues, stand in an intellectually intriguing relationship with the conceptual issues that occupied the driving seat of Hart’s legal philosophy. In this Article, I want to explore these unusually intimate relationships in Hart’s account. I suggest that Hart’s willingness in the Holmes Lecture to explore not only the moral case for positivism but also some of its political and institutional implications in a particular historical context underpins the appeal of the debate—particularly for students—by bringing into sharp focus a sense of why conceptual questions, and clarity about them, matter.¹²

In making this argument, I am admittedly running counter to Hart’s own conception of his enterprise. Hart’s approach to legal theory was distinctively analytic rather than historical. Though keenly aware of the power of political circumstances in shaping ideas, he was skeptical of more general claims about the contextual dependence of theories. Accordingly, in his contribution to the debate, he noted the relevance of the French and American Revolutions in shaping Bentham’s thinking¹³ but roundly dismissed the idea that legal positivism was the logical product of the emergence of highly organized

¹¹ Hart, *supra* note 1, at 599.

¹² On the moral and intellectual importance of clarity and of “plain speech” in Hart’s argument, see Hart, *supra* note 1, at 594–601, 621–24. See also Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170, 1177–84 (2008) (analyzing Hart’s advocacy of veracity about law and clear understanding of meaning of law in tradition of Austin and Bentham). For further discussion, see Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945, 960–63 (2006).

¹³ See HART, *ESSAYS ON BENTHAM*, *supra* note 10, at 53–104 (discussing effects of French and American Revolutions on Bentham’s theory of positivism and his criticism of both revolutions’ reliance on theories of natural rights); Hart, *supra* note 1, at 597 (“Bentham was especially aware, as an anxious spectator of the French Revolution, that . . . the time might come in any society when the law’s commands were so evil that the question of resistance had to be faced . . .”).

states.¹⁴ And much of the force of Hart's argument comes from his insistence on the moral and practical importance of separating conceptual from moral questions about law. But though he emphasized the independent importance of "a purely analytical study of legal concepts," as distinct from "historical or sociological studies," Hart equally acknowledged that "of course it could not supplant them."¹⁵ He also acknowledged that "jurisprudence trembles . . . uncertainly on the margin of many subjects."¹⁶

Though a profound admirer of Hart's work, I take the view that philosophical analysis of key legal and political concepts needs to be understood both historically and institutionally and that Hart's relative lack of interest in this sort of contextualization marks a certain limit to the insights provided by his legal and political philosophy.¹⁷ For me, the Holmes Lecture remains Hart's most compelling statement of his legal philosophy precisely because he framed it in such a way as to enhance our grasp of the relationship between the conceptual and historical analyses that he usually kept separate. This understanding of the lecture implies a more contextual, practical, and morally purposive approach than he himself was willing to acknowledge and anticipates the development of what Jeremy Waldron has called "normative positivism."¹⁸

In what follows, I will set out what I take to be the main points of contention between Hart and Fuller before moving on to consider the factors that explain the lasting resonance of the debate. First, I will suggest that the precise nature of what I shall call the "complementarity" between analytic, historical, and moral enterprises in legal theory is more complex, and of greater intellectual interest, than Hart was willing to concede. The way in which Hart's contribution to the debate with Fuller illuminates this complementarity is a key factor underpinning the debate's continuing fascination. Second, I will suggest that the debate both illuminates the sense in which conceptual analysis needs to be contextualized and should prompt a modification

¹⁴ See Hart, *supra* note 1, at 594 n.4 (stating that little evidence exists as to whether analytical positivism or certain political conditions came first).

¹⁵ *Id.* at 601.

¹⁶ *Id.* at 594.

¹⁷ See generally Lacey, *supra* note 12 (examining relationship between analytical and sociological approaches to legal theory in light of Hart's work and arguing in favor of increased reliance on historical and sociological approaches to understanding nature of law).

¹⁸ JEREMY WALDRON, LAW AND DISAGREEMENT 33 & n.33 (1999) [hereinafter WALDRON, LAW AND DISAGREEMENT]; Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT 411, 411 (Jules L. Coleman ed., 2001) [hereinafter Waldron, *Normative (or Ethical) Positivism*]. See generally TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM (1996) (providing overview of "ethical positivism").

of Hart's own claims about the universality of analytical jurisprudence. I will further argue that the debate's power to speak to us today is a product of its connection with pressing political issues, notwithstanding the fact that this connection may be, as a matter of logic, contingent rather than necessary. One particular focus of my interpretation is the way in which Hart's argument paradoxically points us toward a compelling case for the modest, positivist view of law within a world in which the "law's empire"¹⁹—law's significance as a tool of not merely nation but international regulation—has increased exponentially since the Nuremberg Trials, which provide such an eloquent implicit context to the debate. The moral and practical upshot of different conceptions of law—in particular, of "the rule of law"—is accordingly now a matter of even greater significance, given the expanding ideal of legality in international regulation.²⁰ As international criminal law develops apace, though its reach and regulatory potential remain under question, Hart's modest realism, pitched against Fuller's more ambitious optimism, speaks to us in compelling ways.

I

REREADING THE DEBATE: HART AND FULLER ON THE RULE OF LAW

Hart's *Positivism and the Separation of Law and Morals*²¹—originally delivered as the Holmes Lecture at Harvard in 1957—was destined to become one half of the debate, due to Fuller's demand for a "right to reply."²² But the lecture itself marks an important moment in the twentieth-century history of analytical jurisprudence. From the podium of a law school deeply influenced by the realism of Holmes and the sociological jurisprudence of Roscoe Pound, Hart grasped the theoretical challenge with both hands and confidently mapped out his agenda as the intellectual successor to the legal positivism of Jeremy Bentham and John Austin. In particular, he defended their brand of analytical jurisprudence against the charges laid by the two groups of legal theorists whom he saw as positivism's main antagonists. He rejected the charge, current in much American realist jurisprudence of

¹⁹ This phrase is borrowed from RONALD DWORKIN, *LAW'S EMPIRE* (1986).

²⁰ See generally GERRY SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* (2007) (exploring increasing emphasis on legality in international law).

²¹ Hart, *supra* note 1.

²² For an account of the history and aftermath of the debate—which, ironically, saw the inception of a warmer relationship between the two protagonists—see NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 196–202* (2004).

the first half of the twentieth century, that legal positivism provides a mechanistic and formalistic vision of legal reasoning—with judges simply grinding out deductive conclusions from closed sets of premises. And in response to the claim of modern natural lawyers, Hart defended the positivist insistence on the lack of any necessary, conceptual connection between law and morality and denied that this betrayed an indifference to the moral status of laws. Hart insisted on the propriety of Bentham’s distinction between descriptive, “expository” jurisprudence and prescriptive, “censorial” jurisprudence.²³ Indeed, he claimed that there are moral advantages to making a clear separation between our determination of what the law is and our vision of what it ought to be.²⁴

One useful way of looking at the debate is as an extended dialogue on the contours and significance of the rule of law—a topic curiously neglected in analytical jurisprudence, including in Hart’s own work.²⁵ Certainly, the Holmes Lecture gives us Hart’s most elaborate consideration of the topic, though as Jeremy Waldron has noted, a strong commitment to the principle of legality underpins both Hart’s “fair opportunity” view of punishment and his swingeing critique in *Law, Liberty and Morality* of the *Shaw v. Director of Public Prosecutions*²⁶ decision.²⁷ If we look at the debate in this way, we might assume—leaving aside the fact that his was the initial, agenda-setting article—that Hart started with a certain advantage. For one might see the very project of legal positivism as an essential plank in the intellec-

²³ HART, *Bentham and Beccaria*, in *ESSAYS ON BENTHAM*, *supra* note 10, at 41, 41 (sharing Bentham’s admiration for this distinction, which in Beccaria’s thought, accompanied refusal to “pretend[] that the reforms which he advocated were already, in some transcendental sense, law or ‘really’ law”).

²⁴ See, e.g., *supra* notes 13–15 and accompanying text (describing Hart’s insistence upon division between conceptual and moral questions about law).

²⁵ For honorable exceptions, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–76 (1980), discussing the rule of law and its limits, JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 210–29 (1979), analyzing the importance of the rule of law, WALDRON, *LAW AND DISAGREEMENT*, *supra* note 18, at 94–101, evaluating various arguments regarding positivism and the rule of law, and Jeremy Waldron, *Positivism and Legality: Hart’s Equivocal Response to Fuller*, 83 *N.Y.U. L. REV.* 1135, 1146, 1156 (2008), claiming that Hart alluded to principles of legality rather infrequently in his work except for significant mentions in a few instances.

²⁶ [1962] A.C. 220 (H.L.) (appeal taken from Eng.) (U.K.).

²⁷ See HART, *supra* note 3, at 8–12 (claiming that judges in *Shaw* sacrificed principle of legality requiring clear definition of criminal offense); H.L.A. HART, *Punishment and the Elimination of Responsibility*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 158, 181–82 (1968) (defending principle of legality in discussion of criminal liability); see also Waldron, *supra* note 25, at 1137–38 (contending that while Hart acknowledged existence of principles of legality, he often equivocated with respect to their role in determining law). For further discussion of these issues, see Lacey, *supra* note 12, at 960–63, 969–75.

tual and practical infrastructure of the rule of law. After all, the central aspiration of positivism is to provide conceptual tools with which law can be identified in terms of criteria of recognition and, hence, distinguished not only from brute force or arbitrary exercises of power but also from other prevailing social norms deriving from custom, morality, or religion. Such a process of identifying law might be seen as an essential precondition to any view of law as entailing limits on power—a view equally appealing to Fuller.

Moreover, Hart's distinctive version of legal positivism²⁸ might be seen as having yet closer affinities with the rule of law tradition. In moving from the early positivist notion of law as a sovereign command to the notion of law as a system of rules, Hart arguably produced a theory that spoke to the social realities of law in a secular and democratic age. After all, the concept of law as a system of rules fits far better with the impersonal idea of authority embedded in modern democracies than does the sovereign command theory of the early positivists John Austin and Jeremy Bentham. Hart's theory of law therefore expressed a modern understanding of the ancient ideal of "the rule of law and not of men"²⁹ and provided a powerful and remarkably widely applicable rationalization of the nature of legal authority in a pluralistic world. It offered not only a descriptive account of law's social power but also an account of legal validity that purported to explain the (limited) sense in which citizens have an obligation to obey the law. Notwithstanding its claim to offer a universally applicable account—a claim to which we shall return below—it seems likely that the extraordinary success of Hart's jurisprudence derives, at least in part, from these resonances with features of political structure and culture in late-twentieth-century democracies—in particular, with contemporary images of the rule of law.

Hart and Fuller's articles quickly became, and still remain, a standard scholarly reference point and teaching resource for the opposition between legal positivism and natural law theory and for our conception of the rule of law. The sharp joinder of issue between the

²⁸ See generally HART, *supra* note 2.

²⁹ The ancient roots of the rule of law concept are discussed by Simon Chesterman: Plato held in the *Republic* that the best form of government was rule by a philosopher king, but allowed that rule by law was a second option warranted by the practical difficulties of locating an individual with the appropriate qualities to reign. Aristotle . . . conclud[ed] in *The Politics* that "the rule of law" was preferable to that of any individual, a position later quoted by John Adams on the eve of the American Revolution as the definition of a republic: that it is "a government of laws, and not of men."

Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 333–34 (2008) (citations omitted).

two men was thrown into relief, given poignancy, and made immediately accessible by the fact that it took place in the shadow of debates about the legitimacy of the Nuremberg Trials. The debate also centered on the vivid example of the Grudge Informer: a woman who, during the Third Reich, had relied on prevailing legal regulations to denounce her husband for criticizing Hitler, leading to his conviction of a capital offense.³⁰ After the war, the woman was charged with a criminal offense against her husband.³¹ The question, as Hart presented it,³² was whether her legal position should be governed by the law prevailing during the Third Reich—a law now regarded as deeply unjust—or by the just law prevailing before and after the Nazi regime. In short, the case raised, in direct and striking form, the question of whether law's validity and normative force are dependent on its moral credentials.

Hart defended the view that since the woman had committed no crime under the positive law of the time, the only legally valid way of criminalizing her conduct would be by retroactive legislation.³³ Although this was, on the face of it, an unjust solution, it might nonetheless be the morally preferable thing to do: the lesser of two evils. This solution had the distinctive advantage that it avoided blurring the distinction between what the law *is* and what the law *ought to be*.³⁴ Some sacrifice of justice was, under the circumstances, inevitable, but in Hart's view, the positivist position was both more consistent with a proper understanding of the rule of law than its naturalist alternative and more sophisticated in recognizing that a respect for legality is not the only value in our morally complex world.³⁵ Indeed, Hart would have agreed with Joseph Raz's argument that the rule of law's "virtue" is a relatively modest one, oriented primarily toward transparent and effective communication of the law's demands, putting citizens on fair notice of what is legally required of them.³⁶ The rule of law is hence contingently, rather than conceptually, related to virtue in the substantive sense. The Nazi regime was of course guilty of regular breaches of the rule of law even in this modest sense, but in

³⁰ Fuller, *supra* note 1, at 652–58; Hart, *supra* note 1, at 618–20.

³¹ Hart, *supra* note 1, at 618–20.

³² For a more careful reading of the case, see H.O. Pappé, *On the Validity of the Judicial Decisions in the Nazi Era*, 23 MOD. L. REV. 260, 261–63 (1960). See generally David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000 (2008) (analyzing Hart-Fuller debate on Grudge Informer Case).

³³ See Hart, *supra* note 1, at 619–20 (arguing that explicitly retroactive law and punishment of woman would have merit of candor).

³⁴ *Id.* at 620.

³⁵ *Id.*

³⁶ RAZ, *supra* note 25, at 213–14.

Hart's formal conception of the rule of law, the informer laws were not an instance of such a breach, notwithstanding their substantive injustice.³⁷

It is worth pausing here to note how much Hart and Fuller shared in relation to their understanding of the rule of law. Though the two men of course took very different views about the substantive implications of procedural constraints on legal power, Fuller's overall conception of law as the enterprise of "subjecting human conduct to the governance of rules,"³⁸ with procedural norms generating constraints on the substantive exercise of power,³⁹ was a natural law theory that looked as much like positivism as could possibly be. Fuller's work overlapped substantially with—and presumably informed—Hart's terse discussion in Part V of the lecture⁴⁰ (and later, in Chapters VIII and IX of *The Concept of Law*⁴¹) of the distinctive principles of justice. Hart saw these principles—natural justice, judicial impartiality, and legality—as the kernels of insight in the natural law tradition.⁴²

Yet, the (understandable) focus on the two men's joinder on the key question—how far moral criteria are implicated in the identification of valid law—has diverted attention from other issues that divided the two men just as starkly. These include Fuller's disappointment about Hart's exclusive reliance on philosophical methods and his distance from the social science approaches of which Fuller had been one of Harvard's key advocates—approaches that he may have hoped Hart would endorse, given the descriptive tenor of Hart's theory. Additionally, Fuller thought that Hart's positivist approach exacerbated what he saw as the key failing of Harvard students: their steadfast lack of interest in the ethical implications of legal arrangements.⁴³

³⁷ See Hart, *supra* note 1, at 619 (describing informer laws as "established" and characterizing support for German court's disregard of them as "hysteria").

³⁸ FULLER, *supra* note 4, at 46.

³⁹ See *infra* note 62 and accompanying text (discussing such constraints).

⁴⁰ Hart, *supra* note 1, at 621–24.

⁴¹ HART, *supra* note 2, at 155–212.

⁴² *Id.* at 157–67, 206–07. Hart made a more sympathetic incorporation of part of Fuller's conceptual apparatus in his later review of Fuller's book. H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1284–85 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)) (conceding that Fuller's discussion of principles of legality was valid and novel); see also Waldron, *supra* note 25, at 1141–43 (describing importance of principles of legality to believers in natural law like Fuller).

⁴³ LACEY, *supra* note 22, at 184.

II

THE COMPLEMENTARITY OF CONCEPTUAL, EMPIRICAL, AND MORAL ARGUMENT: A MORAL CASE FOR POSITIVISM?

We have seen that Hart's argument is presented, for the most part, as an analytic truth about the concepts of law and legality. But is this an accurate characterization of the argument that Hart in fact makes? In this Part, I aim to establish that on the contrary, Hart's argument is implicitly concerned not merely with the elaboration of a descriptive, positivist account of law but also with the moral recommendations of such an approach. My departure point is the claim that Hart's argument is founded not so much in an analytic as in a substantive moral claim,⁴⁴ the appeal of which itself depends in important part on a cluster of empirical claims. According to Hart, it is morally preferable—not least in the sense of its being more honest—to look clearly at the variety of reasons bearing on an ethically problematic decision rather than to close off debate by arguing that something never was the law because it ought not to have been the law.⁴⁵ In a later confrontation with his Oxford successor, Ronald Dworkin, Hart similarly criticized Dworkin's suggestion⁴⁶ that judges might sometimes be morally justified in lying about what the law requires in order to avoid an unjust conclusion.⁴⁷ Hart characterized Dworkin's approach as an entirely unnecessary and obfuscating distortion of a conceptually straightforward, if morally problematic, issue.⁴⁸

The straightforward conceptual point, in Hart's view, is that a standard may be identified as law according to clear positivist criteria. The complex question is what practical conclusions judges and other actors should draw from this identification when the standard is mor-

⁴⁴ See also CAMPBELL, *supra* note 18, at 1 (“[T]he belief in the amorality . . . of Legal Positivism is profoundly mistaken.”); Liam Murphy, *The Political Question of the Concept of Law*, in HART'S POSTSCRIPT, *supra* note 18, at 371 (“[I]t is somewhat misleading of Hart to say that his account is morally neutral.”); Liam Murphy, *Better To See Law This Way*, 83 N.Y.U. L. REV. 1088, 1096 (2008) (discussing Hart's recognition of moral value in clarifying distinction between what law is and what law ought to be); Liam Murphy, *The Concept of Law*, 36 AUSTRALIAN J. LEGAL PHIL. 1, 10 (2005) (arguing that “a nonpositivist concept of law leads to quietism, a noncritical attitude to the state and its directives,” and hence that positivism's moral value lies in preventing quietism); Waldron, *Normative (or Ethical) Positivism*, *supra* note 18, at 411 (discussing normative positivism); Waldron, *supra* note 25, at 1151 n.58 (arguing that Hart raises possibility that hard positivism is responsive to principles of legality such as principle of certainty).

⁴⁵ See, e.g., Hart, *supra* note 1, at 619–20 (“[T]he thing to do with a moral quandary is not to hide it.”).

⁴⁶ RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* app. at 326–27 (1978).

⁴⁷ HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM*, *supra* note 10, at 127, 150–51.

⁴⁸ *Id.*

ally dubious or clearly iniquitous. The key point about the Hart-Fuller debate is that—unusually in Hart’s jurisprudence—these questions are drawn together in a juxtaposition intended to undermine Fuller’s view that a positivist stance necessarily dulls a sensitivity to ethical issues. Indeed, Hart’s lecture as a whole is written with profound moral energy and opens with an extended defense of the moral seriousness of Austin’s and Bentham’s positivism.⁴⁹

In Hart’s engagements with both Fuller and Dworkin, his jurisprudential position is clearly informed by his political philosophy. There is a strong liberal aspect to his argument: It is up to citizens (as well as officials) to evaluate the law and not merely to assume that the state’s announcement of something as law implies that it ought to be obeyed. He even goes so far as to imply—and this was of course no more a mere characterization than it was a compliment—that the natural law position is illiberal.⁵⁰ The law’s claims to authority are, in Hart’s view, strictly provisional. But there is also a utilitarian strand to Hart’s position, an implication that, in terms of resistance to tyranny, things will turn out better if citizens understand that there are always two separate questions to be confronted: First, is this a valid rule of law? Second, should it be obeyed?

Characteristically, Hart adduced no evidence in support of the empirical assumption that underpinned the utilitarian case for his position: the prediction that citizens’ enhanced conceptual understanding would yield increased resistance to tyranny. Indeed, it is not clear if Hart intended to make an empirical claim. However, within the utilitarian ethic to which the first part of the lecture gives substantial endorsement, moral propositions must ultimately answer to the tribunal of fact.⁵¹ Furthermore, this empirical issue had a piquancy not only because it gave Hart’s position a further moral dimension but also because the famous German jurist, Gustav Radbruch, had argued influentially that the experience of the Third Reich should turn us all into natural lawyers.⁵² In direct opposition to Hart’s view—and anticipating Fuller’s unease about the implications of student positivism—

⁴⁹ Hart, *supra* note 1, at 593–600. A key part of Hart’s argument was that the early positivists’ various analytic claims needed to be distinguished not only from one another, *see id.* at 601, but also from their political and moral utilitarianism. But Hart’s own tendency in the lecture was to speak in terms of utilitarianism as much as positivism, and this confuses the issue he himself was trying to clarify. On the moral case for the positivist disposition toward law’s authority, see HART, *supra* note 2, at 207–12.

⁵⁰ *See* Hart, *supra* note 1, at 618 (criticizing jurist Gustav Radbruch’s argument for natural law as “only half digest[ing] the spiritual message of liberalism”).

⁵¹ *See id.* at 596–97 (discussing utilitarian ethic).

⁵² *See id.* at 615–18 (discussing Radbruch’s conversion from positivist to proponent of natural law).

Radbruch argued that the positivist position was associated with the unquestioningly compliant “might makes right” attitude widely believed to have assisted the Nazis in their rise to power.⁵³

Fuller, picking up on Radbruch’s claim, argued that the Nazi law under which the Grudge Informer had acted was so evil that it could not even count as a valid law.⁵⁴ In his view, law—the process of subjecting human conduct to the governance of rules—was informed by an “inner morality” of aspiration.⁵⁵ Unlike the theological traditions, Fuller’s was not a dogmatic, substantive natural law position; rather, it was a position built on certain valued procedural tenets widely associated with the rule of law. These included the requirements that laws be coherent,⁵⁶ prospective rather than retrospective,⁵⁷ public,⁵⁸ possible to comply with,⁵⁹ reasonably certain in their content,⁶⁰ and general in their application.⁶¹ Fuller’s distinctive contribution was both to provide a more nuanced conceptual elaboration of the principle of legality and to make a link between form and substance: In his view, conformity with these procedural tenets over time would “work the law pure” in a substantive sense.⁶² It was this universal “inner morality of law”—not the “external” or substantive morality, which, as Hart was perfectly content to acknowledge,⁶³ infused the content of law in different ways in different systems⁶⁴—that provided the necessary connection between law and morality. When followed to an adequate degree, this “inner morality” guaranteed a law worthy of “fidelity,” underpinned the existence of an obligation to obey the law, and marked the distinction between law and arbitrary power.⁶⁵

Furthermore, Fuller claimed, Hart’s own position could not consistently deny some such connection between law and morality. In his

⁵³ *Id.* at 617.

⁵⁴ Fuller, *supra* note 1, at 649–50; *see also supra* notes 30–32 and accompanying text (describing woman who denounced her husband under Third Reich law).

⁵⁵ FULLER, *supra* note 4, at 46.

⁵⁶ *Id.* at 63–65.

⁵⁷ *Id.* at 51–62; Fuller, *supra* note 1, at 650–51.

⁵⁸ FULLER, *supra* note 4, at 49–50.

⁵⁹ *Id.* at 70–79.

⁶⁰ *Id.* at 79–81.

⁶¹ *Id.* at 46–49.

⁶² *See, e.g.*, Fuller, *supra* note 1, at 643 (“In so far as possible, substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things.”).

⁶³ *See, e.g.*, Hart, *supra* note 1, at 621–24 (recognizing that developed legal systems contain certain fundamental principles); HART, *supra* note 2, at 185 (acknowledging that law has generally been “profoundly influenced [by] . . . conventional morality”).

⁶⁴ For Hart’s discussion of the connection between justice and law, and the relation between legal and moral rules, *see* HART, *supra* note 2, at 155–212.

⁶⁵ Fuller, *supra* note 1, at 659–60.

argument about the open texture of language, Hart claimed that judges deal with “penumbral” cases by reference to a “core” of settled meaning.⁶⁶ This, Fuller argued, suggested that legal interpretation in clear cases amounted to little more than a cataloguing procedure. Yet even in a very simple case, such as a rule providing that “no vehicles shall be allowed in the park,” the idea that judges could appeal to a “core” meaning of the single word “vehicle” was problematic.⁶⁷ In deciding whether a tricycle or an army tank put in the park as a war memorial breached the rule, the core meaning of “vehicle” in ordinary language would be next to useless in judicial interpretation; rather, judges would look to the purpose of the statute as a whole. And these questions of purpose and structure would inevitably introduce contextual and evaluative criteria into the identification of the “core.” The inevitably evaluative dimension of these purposive criteria of judicial interpretation provided a further link to Fuller’s ideal of fidelity to law.

The engagement between Hart and Fuller therefore raised issues that went to the core of their overall legal philosophies. Furthermore, this joinder of issue anticipated what was to become the central preoccupation of the analytical jurisprudence of the next half-century: the precise sense in which moral criteria are implicated in the identification of valid laws and the way in which legal reasoning is a species of moral reasoning.⁶⁸ This preoccupation has been fed by another fascinating, yet somewhat inchoate,⁶⁹ debate: the confrontation between Hart and another powerful interlocutor whose approach was arguably shaped to a significant extent by Lon Fuller—Ronald Dworkin.⁷⁰

⁶⁶ *Id.* at 662.

⁶⁷ *Id.* at 662–64. For a persuasive discussion and refinement of this aspect of Fuller’s critique, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1124–29 (2008).

⁶⁸ For an exhaustive consideration of the various ways in which law and morality are related, see generally Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035 (2008).

⁶⁹ On the unfinished debate between Hart and Dworkin, see LACEY, *supra* note 22, at 330–38, 348–54. The debate has continued beyond Hart’s death. See generally Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004) (responding to postscript of Hart’s *The Concept of Law*, *supra* note 2); H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 982–87 (1977) (discussing Dworkin’s “noble dream”).

⁷⁰ On the analogies between Fuller’s “inner morality” leading to a law worthy of fidelity and Dworkin’s conception of “law as integrity,” see LACEY, *supra* note 22, at 332–33. See also ROBERT S. SUMMERS, *LON L. FULLER 14* (Jurists: Profiles in Legal Theory, William Twining ed., Stanford Univ. Press 1984) (noting Fuller’s influence on Dworkin).

III

HISTORICIZING THE RULE OF LAW: WHAT DIFFERENCE
DOES CONTEXT MAKE TO MEANING?

In this Part, I turn to another methodological issue raised by the debate, one that continues to resonate in contemporary jurisprudence: whether conceptual analysis is properly and exclusively concerned with an invariant “core” or whether even core concepts take part of their inflection from the historical circumstances and institutional context in which they operate. Is the striking contrast between natural law and positivist positions that forms the centerpiece of the Hart-Fuller debate best understood as a philosophical disagreement? Or is it rather—or equally—a moral and practical disagreement about which institutional arrangements are likely to maximize the realization of valued social ends or ideals under specific social and historical conditions? Does the debate between Hart and Fuller center on a timeless conceptual distinction? Or is the debate’s lasting significance due to the vivid context in which it framed one of the most pressing moral and political questions confronting post-Enlightenment constitutional democracies: how to develop legal arrangements capable of constraining abuses of power and of addressing such abuses?

These may seem to be false dichotomies. Philosophical debates—particularly those in legal, moral, or political philosophy—do, after all, confront pressing practical issues and not merely conceptual disagreements. But the distinction directs us to an important component of the debate, one that is sometimes obscured within philosophical analysis: the importance of the context in which the debate is framed in illuminating not merely the concept of the rule of law but also its point, purpose, function, and social role. To put this loosely, in the terms of the linguistic philosophy by which Hart was influenced,⁷¹ contextualizing the debate helps us to look to the “use” rather than the “meaning” of the concepts in which we are interested and to ask questions about the preconditions under which particular conceptions of the rule of law are able or likely to take hold.⁷² For the question of whether a positivist or a naturalist attitude toward law would best equip a society to resist tyranny is itself historically contingent to some degree. In an intensely hierarchical and unequal society, for example, Hart’s liberal vision would be simply unfeasible. In this context, it is instructive that in early modern societies, political and legal dissent

⁷¹ LACEY, *supra* note 22, at 142–44.

⁷² For an illustration of the sort of approach I have in mind, see generally the examination of the connection between social conditions and the rule of law in ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* (1976).

was so frequently framed in terms of religion or other matters of conscience. In such societies, Fuller's natural law vision may be a more practical way of encouraging resistance to abuse of power.

To take this argument further, let us consider how an historical analysis focused on the "use," rather than the "meaning," of the rule of law might modify our view of its contours and significance. At its most basic level, we find the concept of the rule of law reaching back into classical philosophy, with the Ancient Greek idea of "the rule of law and not of men."⁷³ A thin concept of the rule of law as signifying regular constraints on political power and authority plausibly, then, might be seen as the paradigm or "central case" of the concept.⁷⁴ But if we look at thicker, richer conceptions of the concept—the different ways in which, and purposes for which, the rule of law has been invoked—historical circumstance quickly enters the picture. Let us take a few examples. In a politically centralized and authoritarian system such as the monarchy of early modern England, it is not clear that the operative concept of the rule of law implied the universal application of law, reaching even to the sovereign. This idea—central to modern notions of the rule of law—was the object of long political contestation and took centuries to be established institutionally. Even at a conceptual level, after all, we see Bentham still working to articulate a coherent notion of limited sovereignty, with Hart finishing the job in a characteristically elegant way in *The Concept of Law*.⁷⁵

We can surely acknowledge that the eighteenth-century conception of the rule of law in England was different from that of the twelfth century without concluding that, in the latter, no such conception existed. Indeed, it existed, in part, as a critical conception that informed some of the political conflicts that shaped modern constitutional structures. In other words, the conception of law's universality is itself tied up with the emergence of a certain idea of limited government. The interpretation of the requirement that laws should be reasonably susceptible of compliance has similarly changed in tandem with shifting notions of human autonomy and entitlements. Right up to the early nineteenth century, English law, while priding itself on its respect for the rule of law and for the "rights of free-born Englishmen," included a variety of provisions (notably those on vagrancy) that, in relation to certain social groups, manifestly violated

⁷³ See *supra* note 29 (discussing ancient roots of rule-of-law concept).

⁷⁴ See HART, *supra* note 2, at 4–6, 15–16 (analyzing central or standard cases of phenomenon of law); see also *id.* at 212–37 (discussing same with regard to international law).

⁷⁵ HART, *supra* note 2, at 50–78 (providing post-Austinian analysis of sovereignty).

today's conception of possible compliance.⁷⁶ This was not just a question of a practical inability to match up to acknowledged ideals; it was also a matter of whether this was seen, normatively, as a problem.⁷⁷

In other cases, it is not so much the development of political ideas as the practical preconditions for realizing them that underpins their changing contours. An example here would be the tenet—widely shared in today's constitutional democracies—that the law should be publicized and intelligible.⁷⁸ Even today, this ideal is difficult to realize. But the ideal would have been far more distant in societies with very low levels of literacy and without developed technologies of communication such as printing.

A further example relates to the ideal that official action should be congruent with announced law.⁷⁹ It seems obvious that this tenet must have a significantly different meaning in today's highly organized, professionalized criminal justice systems than in a system like England's prior to the criminal justice reforms of the early nineteenth century. England in the eighteenth century had a system in which criminal justice enforcement mechanisms were vestigial, with no organized police force or prosecution and with much enforcement practice—and indeed adjudication—lying in the hands of lay prosecutors, parish constables, and justices of the peace.⁸⁰ There was no systematic mechanism of law-reporting (and hence of communicating the content of legal standards to those responsible for their enforcement), nor was there any systematic process of appeals that could test and establish points of law.⁸¹

⁷⁶ See J.M. BEATTIE, *POLICING AND PUNISHMENT IN LONDON, 1660–1750: URBAN CRIME AND THE LIMITS OF TERROR* 51–57 (2001) (discussing contemporary lack of attention to and concern with way in which crime was fostered by social conditions); PETER KING, *CRIME, JUSTICE AND DISCRETION IN ENGLAND 1740–1820*, at 77–78, 184–87 (2000) (discussing enforcement of vagrancy laws).

⁷⁷ See generally Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 *MOD. L. REV.* 350 (2001) (exploring changes in conception of responsibility within English criminal law since eighteenth century).

⁷⁸ See, e.g., Fuller, *supra* note 1, at 651 (“The extent of the legislator’s obligation to make his laws known to his subjects is, of course, a problem of legal morality that has been under active discussion at least since the Secession of the Plebs.”).

⁷⁹ *Id.* at 651–52 (discussing problem of administrative execution of published laws according to unpublished regulations).

⁸⁰ See Lacey, *supra* note 77, at 363 (describing “the changing relations between individual citizens and the nation state and its institutions”). See generally NICOLA LACEY, *WOMEN, CRIME AND CHARACTER: FROM MOLL FLANDERS TO TESS OF THE D’URBERVILLES* 7–8, 12–23 (2008) (describing elements of England’s eighteenth-century criminal justice system).

⁸¹ My sketch of eighteenth-century criminal justice here and in the next paragraph draws upon a range of sources. See PETER KING, *CRIME AND LAW IN ENGLAND, 1750–1840: REMAKING JUSTICE FROM THE MARGINS* 10–14 (2006) (describing transforma-

These institutional features of eighteenth-century English criminal justice also had significant implications for the law's achievement of coherence. While the system of precedent of course conduces to both substantive coherence and even-handedness in enforcement, the relatively disorganized mechanisms for appeal and law reporting made significant regional variations inevitable—particularly in relation to criminal adjudication handled by lay justices rather than assize judges.⁸² To get a sense of the relative scales here, in the mid-eighteenth-century, there were an estimated five thousand justices, as opposed to just twelve assize judges.⁸³ Again, standards associated with today's rule of law played an important role in underpinning the modernizing reform movement from the late eighteenth century on. But the fact is that for many decades, these sorts of discretionary arrangements, inimical to our view of adequate levels of coherence and congruence, were regarded not merely as acceptable but as entirely consistent with respect for the rule of law. For the rule of law was, at that time, embedded within a highly personalized model of

tion of English criminal procedure during era); KING, *supra* note 76, at 1 (discussing judicial process for property crimes in England whereby “the administration of the eighteenth-century criminal justice system created several interconnected spheres of contested judicial space in each of which deeply discretionary choices were made”); JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 243 (2003) (“Lawyerization had the long-term effect of putting pressure on the bench to turn discretionary practice into rule . . . because lawyers were a force for consistency in practice among the different judges before whom they appeared.”); J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 *LAW & HIST. REV.* 221, 221–26 (1991) (discussing era's lack of criminal trial procedure and impact of lawyers on criminal courts); Nicola Lacey, *Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law*, in *MODERN HISTORIES OF CRIME AND PUNISHMENT* 14, 21 (Markus D. Dubber & Lindsay Farmer eds., 2007) (“[W]ith character evidence dominating both trial and pretrial processes, those with bad reputations were much more likely to be prosecuted and almost certain to be convicted”); Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 *J. POL. PHIL.* 249, 256 (2001) (“English criminal law of the eighteenth century had neither a comprehensive Code nor even a systematic process of case reporting”); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 *U. CHI. L. REV.* 263, 263–64 (1978) (“[P]rosecution and defense counsel cannot be called regular until the second half of the eighteenth century.”); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 *U. CHI. L. REV.* 1, 56 (1983) (describing “justice of the peace” as “an amateur, a citizen rendering part-time and largely uncompensated service in law enforcement and other matters of local government”).

⁸² See sources cited *supra* note 81.

⁸³ See KING, *supra* note 81, at 47–50 (discussing twelve assize judges drawn from Westminster courts); Bruce Lenman & Geoffrey Parker, *The State, the Community and the Criminal Law in Early Modern Europe*, in *CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500*, at 11, 32 (V.A.C. Gatrell et al. eds., 1980) (discussing estimated five thousand lay justices).

sovereign authority—one in which the discretionary power of mercy was a core, rather than penumbral, feature.⁸⁴

Does this imply that the rule of law in eighteenth-century England was an empty ideological form, merely an aspect of the rhetoric of those in power? This would be too quick a conclusion. While the popular, as much as the elite, association of the rule of law with the distinctive virtues of the English legal system stabilized an essentially hierarchical political order, the norms associated with the ideal did pose genuine constraints on official power. The rule of law, in other words, is double-edged: It plays a role in both constraining and legitimizing power. We therefore need to assess *both* its status as a modern ideal of democratic governance *and* its changing role in legitimizing and constraining certain forms of state power. In reflecting on the relationship between the rule of law and the perceived legitimacy of legal systems, one should therefore consider the capacity of the rule of law *under certain social and historical conditions* simultaneously to structure political power and yet to legitimize laws that might be regarded as fundamentally unjust.

The delicate balance between legitimacy and power is well illustrated by E.P. Thompson's famous study of the Black Act of 1723.⁸⁵ This statute, which dealt with poaching, enacted broad offenses with draconian penalties.⁸⁶ It was a piece of legislation that, in Thompson's words, "could only have been drawn up and enacted by men who had formed habits of mental distance and moral levity towards human life—or, more particularly, towards the lives of the 'loose and disorderly sort of people.'"⁸⁷ Yet Thompson's study also testifies as to the sense in which the rule of law genuinely constrained political power. As Thompson famously put it, in terms resonant both with Hart's positivist conception and with Fuller's inner morality of law:

It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity. It is true that certain categories of person may be excluded from this logic (as children or slaves), that other categories may be debarred from access to parts of the logic (as women, or, for many forms of eighteenth-century law, those without certain kinds of property), and that the poor may often be

⁸⁴ See Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 40 (Douglas Hay et al. eds., 1975) ("The prerogative of mercy ran throughout the administration of the criminal law, from the lowest to the highest level.").

⁸⁵ E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975).

⁸⁶ *Id.* at 21–24 (discussing passage of Black Act and its harsh penalties, including capital punishment for many kinds of poaching).

⁸⁷ *Id.* at 197.

excluded, through penury, from the law's costly procedures. All this, and more, is true. But if too much of this is true, then the consequences are plainly counterproductive.⁸⁸

Eighteenth-century rulers—like their successors today—“traded unmediated power for legitimacy.”⁸⁹ But the form this mediation takes has varied substantially over time and space. In Europe, the quest for modern limited government realized itself in the great legal codes of the nineteenth century, in which the principle of legality was a key symbol of progress and modernity.⁹⁰ In the United States and in many European countries, judicial review of both executive and legislative action under a strong constitution became the benchmark of limited government.⁹¹ Yet this institutional arrangement became acceptable in Britain only with the passage of the Human Rights Act at the start of the twenty-first century, and then only in highly attenuated form.⁹² The first steps toward institutionalizing an international rule of law emerged only in the twentieth century, and the vision of an ambitious, human rights-oriented, moralized international law only after the Second World War.⁹³ All conceptions of the rule of law are born of their environment: The ideal takes its complexion both from perceived problems—whether arising from war, revolution, atrocities, or ideological struggles—and from perceived institutional capacities.

Eighteenth-century English criminal justice looks to us like both a chaotic system and one that violated key precepts of the rule of law. But in the context of the highly personalized system of authority prevailing up to the late eighteenth century, discretionary arrangements

⁸⁸ *Id.* at 262–63.

⁸⁹ John Brewer & John Styles, *Introduction* to *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 11, 14 (John Brewer & John Styles eds., 1980).

⁹⁰ See, e.g., LINDSAY FARMER, *CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT* 6 (1997) (discussing linkage between “principle of legality” and “the great penal codes of the Enlightenment”).

⁹¹ See, e.g., FRANK R. STRONG, *JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER* 12 (1997) (noting that judiciary serves to limit governmental power through judicial review process).

⁹² For a discussion of the passage of the Human Rights Act of 1998, which provides the courts with a power to declare legislation incompatible with European Convention on Human Rights standards but not to invalidate it, and of its consequences for adjudication in Britain, see ANDREW ASHWORTH, *HUMAN RIGHTS, SERIOUS CRIME AND CRIMINAL PROCEDURE* 4 (2002). See also CONOR GEARTY, *CAN HUMAN RIGHTS SURVIVE?* 93–98 (2006) (discussing rights guaranteed by Act and characterizing judicial declarations of incompatibility with Act as “courteous requests for a conversation, not pronouncements of truth from on high”).

⁹³ See Stephen C. Neff, *A Short History of International Law*, in *INTERNATIONAL LAW* 31, 50–51, 55 (Malcolm D. Evans ed., 2003) (discussing formation of League of Nations, movement to codify international law after World War I, and emphasis on human rights in late twentieth century).

such as the prerogative of mercy constituted a guarantee of law's authority. Hence, such arrangements may be regarded, paradoxically, as an aspect of the eighteenth-century conception of the rule of law. Similarly, the—to our eyes, extraordinary—reliance on hearsay evidence about character and reputation represents a set of institutional capacities unthinkable to contemporary systems of criminal justice: the ability to draw, within a lay-dominated process located in a relatively immobile and stratified world, on local knowledge.

This is not to make any normative evaluation of the eighteenth-century system. It is simply to point out that the system's capacities and needs for legitimation were appreciably different from those of our criminal processes today. These differences shaped normative concepts such as the rule of law significantly, affecting the ways in which the system was rationalized and ultimately reformed. Within certain limits, the definitions of clarity, certainty, or arbitrary power shift over space and time. To the extent that we can make sense of the idea of timeless and invariant core concepts that are the particular object of philosophical analysis, this core is a very modest one. What would such a core of the rule of law look like? Arrangements with the dual capacity to constrain or temper and hence legitimize power, perhaps.

IV

THE FACTS OF THE MORAL MATTER: TWENTY-FIRST-CENTURY PERPLEXITIES ABOUT LEGALITY

In this final Part, I extend my argument that the way in which the Hart-Fuller debate was framed—its use of a particular instance to draw general theoretical conclusions—points up some ambiguities in Hart's general position, illuminating an interesting play in his work between analytic, universal claims and empirical, contingent ones. As is often remarked, one of the distinctive features of Hart's legal philosophy is its pretension to universality.⁹⁴ He offers us not "A Concept of Law" but "*The* Concept of Law"—a model purportedly applicable to legal phenomena whenever and wherever they arise, the intellectual power of which is independent of the resonance between legal positivism and secular liberal democracy.

As the argument of the previous Part would suggest, this methodological aspect of Hart's work has generated lively, occasionally heated, controversy. "Critical" and socio-legal scholars have suggested that under the cover of offering a neutral and descriptive

⁹⁴ See, e.g., HART, *supra* note 2, at 239–40 (claiming to provide theory of law that is not tied to any particular legal system or culture).

theory, Hart in fact gives us a highly normative account: a rationalization of the hierarchical and centralized structure of the modern constitutional state as the acme of civilized achievement. This reading has been fuelled by the occasionally (and uncharacteristically) incautious way in which Hart combines apparently historical claims with conceptual claims. Consider the fable of secondary rules of recognition, adjudication, and change emerging to “cure the defects” of a system composed exclusively of primary rules.⁹⁵ This account, it has been argued, implicitly evaluates other sorts of legal orders—customary systems, for example—as less advanced or civilized.⁹⁶ Even the “central case technique”—the idea that we can identify penumbral cases like international law that share some of the features associated with the central case of law without banishing such phenomena to another discipline—carries a sort of evaluative loading. “Central” cases may be understood as ideal types in an implicitly normative sense, while “non-focal” cases like international law, though properly regarded as legal by association, are nonetheless regarded as “primitive” in their lack of core features of law such as elaborated enforcement mechanisms or a powerful legislature. According to this view, Hart’s legal theory should have been combined with an explicit statement, and defense, of the particular political morality that underpins it, as well as of the point of view from which it is constructed and to which it accords theoretical priority—something that Hart comes tantalizingly close to doing in the debate with Fuller, without ever quite acknowledging it.⁹⁷

Hart’s comments on “primitive” and “developed” systems are arguably insignificant asides—pedagogic strategies obtusely interpreted as theoretical claims by unsympathetic readers. But it is hard to write off the similarly evaluative implications of the empirical assumptions implicit in his debate with Fuller in this way. For here, as I argued above in Part II, an empirical claim appears to underlie the normative position that Hart defends and depicts as key to the recom-

⁹⁵ See *id.* at 81 (discussing secondary rules).

⁹⁶ *Id.* at 91–99 (setting out fable of law’s origins); PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 183–210 (1992) (analyzing and criticizing Hart’s fable of law’s origins).

⁹⁷ See FINNIS, *supra* note 25, at 14–18 (discussing normative nature of Hart’s supposedly purely descriptive account of law). Hart’s more elaborate statements are to be found in his explicitly normative works. For another example of his inclination to maintain a distinction between conceptual and moral questions, see HART, *supra* note 3, at 1–4, separating analytical questions from moral questions in determining the proper relationship between law and morality, and HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 27, at 4, stating that “the beginning of wisdom . . . is to distinguish similar questions and confront them separately.”

mendations of positivism. The debate with Fuller therefore provides a particularly interesting context in which to consider the relationship in Hart's work between avowed universality and unacknowledged locality, between avowed neutrality and half-acknowledged normativity.

As we saw, Hart's position is informed by analytic claims: Law and morality are distinct, the rule of law is served by observing this distinction, and the rule of law on occasion requires difficult tradeoffs between incommensurable and potentially conflicting values. Yet the debate is, as we also saw, located in a very specific context: the postwar struggle to come to terms with the horrific Nazi episode and, in particular, the effort to do so in legal terms that did not reproduce some of the abuses of legality marking the Nazi regime. Importantly, the force of the debate turns, in part, on an implicit empirical disagreement about what sort of disposition toward law—a positivist or a naturalist one—will best equip a society to resist tyranny. It is worth examining in more detail how this context affects the implications of Hart's and Fuller's arguments for contemporary legal policy.

Let us take Hart's argument first. It is made up of an interesting combination of optimism and modest realism about the power of law. On the one hand, Hart seems persuaded that resistance to tyranny would not be discouraged by a positivist disposition to maintain a clear separation between law and morality. Though this empirical question is not addressed positively, he roundly dismisses the "extraordinary naïveté" of Radbruch's converse empirical "view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality."⁹⁸ Hart notes that positivist views elsewhere have gone hand in hand with "the most enlightened liberal attitudes."⁹⁹ But this empirical disagreement is secondary to an argument of political morality, itself presented as a conceptual claim: As Hart puts it, "surely the truly liberal answer to any sinister use of the slogan 'law is law' or of the distinction between law and morals is, 'Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.'"¹⁰⁰

The positivist implication that laws can be evil thus goes hand in hand with a liberal political theory in Hart's work that accords supreme importance to individual liberty. The appropriate posture of

⁹⁸ Hart, *supra* note 1, at 617–18.

⁹⁹ *Id.* at 618.

¹⁰⁰ *Id.*

the liberal citizen vis-à-vis the law in the passage just quoted is one that combines both a willingness to attend to the claims of legitimate authority and, crucially, a recognition of an individual responsibility to assess or evaluate that legitimacy. Liberal citizenship, in other words, implies a reservation of both the right and the responsibility to question authority—and to disobey it if morally necessary. But the utilitarian tinge of Hart's political philosophy implies the relevance of a latent empirical question about the likely effects of particular jurisprudential dispositions. So it seems hard to resist the conclusion that in Hart's view, it is not merely that a positivist attitude is consistent with resistance to tyranny but further that the concomitant disposition, particular to liberal citizenship, to reserve judgment about the law's moral claim to obedience best equips a society to resist the domination of political tyranny and abuses of legal power.

Furthermore, we should note the way in which Hart's simplified presentation of the Grudge Informer Case led to distortions that are persuasively analyzed by David Dyzenhaus in his contribution to this volume.¹⁰¹ Hart not only misstated the precise nature of the legal issue but also, more significantly for my purposes, omitted from his account any discussion of the particular (role-based) responsibilities falling on the judiciary as opposed to the citizen. Hart provided little analysis of the way in which the judicial opinion depended on the cultural knowledge and attitudes of the contemporary population. This, in turn, complicated the normative issue in interesting ways, illustrating the interaction between the conceptual, factual, and moral issues to which I have drawn attention in this Article.

On the other side of the coin, Hart's position might be seen as modest, when compared with that of natural lawyers like Fuller. A standard's bearing the imprimatur of law is no guarantee of its substantive justice; indeed, the need to maximize the chances of resistance to tyranny militates toward precisely this modest view of law's moral claims. In thinking about how to use law to address the past injustices perpetrated by the Nazis—including the oppressive informer laws under consideration in the debate—Hart's view is a pragmatic one. Law can indeed be used to right, in part, the wrong done in law's name. But this occurs at the cost of sacrificing a presumptive component of the rule of law: the principle of non-retroactivity—itsself key to the predictability of the state's exercise of

¹⁰¹ Dyzenhaus, *supra* note 32; see also Pappé, *supra* note 32, at 261–63 (analyzing Hart and Fuller's discussion of Grudge Informer Case).

its coercive power—which Hart saw as fundamental to liberal freedom.¹⁰²

Fuller's naturalist view of law's role in confronting past injustice is less complex in one sense, more ambitious in another. It is less complex in that on the naturalist view, the past injustice never had true legal authority—hence one need not concede retroactivity. The Nazi system was so shot through with breaches of law's inner morality that it had lost any claim to fidelity or legal authority. But the naturalist position implies an ambitious role for law, one that places a great deal of faith in the symbolic, as much as the instrumental, power of what we might call "a rule of law culture." Furthermore, in light of Fuller's assertion of a link between formal "inner morality" and substantive justice, this ambitious view implies a rather different take on the problem of retroactivity itself. This is most strikingly exemplified by the Nuremberg Laws, which created (or discovered) the concept of crimes against humanity, the moral credentials of which were seen as overriding the apparent injustice of their retroactive application to those atrocities committed during the Second World War.¹⁰³ Indeed, the substantive moral appeal of these laws diverted attention from arguable breaches of the principle of legality in ways that went beyond their retroactivity—notably the fact that German lawyers had to defend their clients within a framework that was both unfamiliar to them and uncongenial to the civilian tradition of procedural justice. This is another reminder of the "open texture" of the rule of law.

The moralized strand of international law has, of course, grown apace since Nuremberg, underpinning a range of developments in the fields of human rights, "humanitarian intervention," war-crimes tribunals, and the massive extension of international criminal law.¹⁰⁴ And in both international and domestic law, the idea of human rights has become ever more influential since the Second World War. This arguably betokens a shift in prevailing conceptions of the rule of law. One aspect of this shift is the way in which, in a burgeoning array of inter- and trans-national jurisdictions, judges in many countries are being called upon to engage in the interpretation of very broadly drafted treaties and charters of rights and freedoms. This encourages

¹⁰² See Hart, *supra* note 1, at 619 (discussing choice between punishing past wrong through retroactive legislation and leaving wrong unpunished).

¹⁰³ See Antonio Cassese, *International Criminal Law*, in INTERNATIONAL LAW, *supra* note 93, at 721, 722 ("Statutes of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East were adopted in 1945 and 1946 respectively, laying down new classes of international criminality, these being crimes against humanity and crimes against peace." (abbreviations omitted)).

¹⁰⁴ For a discussion of these broad developments, see generally SIMPSON, *supra* note 20.

a style of adjudication focused on the assessment and balancing of broad, open-ended moral and political values—a style that resonates powerfully with Ronald Dworkin’s vision of law as a species of moral interpretation. But this may not always be an advantage, according to Hart’s, or even Fuller’s, modest, formal conception of the rule of law. As in the case of the Nuremberg Trials, a moralized view of law may overshadow any concern with formal legality with a more wide-ranging, evaluative judicial style implying a lessened judicial disposition to be sympathetic to claims of breaches of the principle of legality.

An analysis of case law may bring this issue into focus. Take, for example, the decision of the European Court of Human Rights (Court) in *C.R. v. United Kingdom*.¹⁰⁵ In this case, a man convicted of raping his wife challenged the decision of the English House of Lords that the marital rape exemption was no longer law. The husband claimed that the decision violated the principle of legality enshrined in the European Convention of Human Rights (Convention) in that it expanded the criminal law’s prohibition and applied it retroactively. Dismissing this argument in rather summary fashion, the Court took a line reminiscent of the rationale for the Nuremberg Laws: To have sexual intercourse with someone, whether married to them or not, without any belief in their consent, is very obviously wrong. Thus, the defendant was precluded from claiming that he had been treated unfairly, even though he had no notice that his behavior would be regarded as a criminal offense.

The terms in which the Court dismissed the appeal imply that criminal law has an immanent capacity to adapt itself to prevailing social standards within a broad framework provided by the Convention. The argument draws on an idea of “manifestly” wrongful acts, which is reminiscent of Fletcher’s account of ideas of “manifest criminality” underpinning the early common law:¹⁰⁶ Crime is that which would be readily recognized by all members of the community as wrongful.¹⁰⁷

¹⁰⁵ App. No. 20190/92, 335-C Eur. Ct. H.R. (ser. A) (1995); see also *S.W. v. United Kingdom*, App. No. 20166/92, 335-B Eur. Ct. H.R. (ser. A) (1995) (finding husband punishable for marital rape despite his claim that he had no notice of potential criminal liability).

¹⁰⁶ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 76–90 (1978) (discussing manifest criminality in context of common law larceny).

¹⁰⁷ For further discussion on the recent challenges to the marital rape exemption in English law, see generally Stephanie Palmer, *Rape in Marriage and the European Convention on Human Rights: C.R. v. U.K. and S.W. v. U.K.*, 5 *FEMINIST LEGAL STUD.* 91 (1997). For a discussion regarding domestic law on this issue, see generally Marianne Giles, *Judi-*

This approach to constitutional adjudication might well be characterized as resonating with natural law theory. But the approach resonates equally with the ancient common law practice of courts declaring broad offenses, such as “conspiracy to corrupt public morals,” in their role as “guardians of social morality.” This would be deeply uncongenial to liberal critics of that practice such as Hart, who resoundingly condemned the judicial pretension to such a role in *Law, Liberty and Morality*.¹⁰⁸ The line between interpretations that meet the rule of law’s fair-notice requirement and ones in which courts essentially arrogate to themselves a legislative role (which implies retroactive application) is, under any circumstances, a fine one: Innovative judicial interpretations—a not unusual feature, after all, of appellate cases in common law jurisdictions—imply a risk that litigants will feel that they lacked fair notice of the law’s requirements. In the context of moral outrage about particular issues, it is tempting for legislatures to enact provisions drafted so broadly as to render any such distinction yet more tenuous. But there is nonetheless an issue of context-dependence here, for the line becomes yet more blurred as societies become more heterogeneous and pluralistic. Concepts of “obvious wrongfulness” and “manifest criminality” are easier to invoke in stable, homogeneous societies. This makes their reemergence in contemporary transnational legal culture somewhat ironic. This irony, I suspect, would not have been lost on Hart.

One of the most striking things about the debate, as we look back at it half a century on, is the way in which it frames the dawning of an ambitious idea of an international rule of law, oriented toward holding states and state officials to universal human rights standards. The lessons of the next fifty years of international legal development provide some interesting tests for both Hart’s and Fuller’s arguments. In one sense, natural law theory appears to have history on its side. The idea that, however complete the formal imprimatur of actions as legitimated within a state legal order, a person—even, or perhaps especially, a head of state—can be held to account in the international legal arena resonates with the idea of a universal morality of law. On the other hand, the positivist position still resonates: Indeed, as Hart would have been quick to point out, many of the atrocities committed by means of state power could be—indeed, often are—framed within formally legitimate authority, and in this context, the legitimating imprimatur of legality can be dangerous indeed.

cial Law-Making in the Criminal Courts: The Case of Marital Rape, 1992 CRIM. L. REV. 407.

¹⁰⁸ HART, *supra* note 3, at 1–24.

Another influential (and more substantive) natural lawyer, John Finnis, has tried to shore up this apparent vulnerability in Fuller's argument.¹⁰⁹ Finnis asks why any tyrannical ruler not motivated by the common good of his or her subjects would respect the often costly or otherwise inconvenient constraints represented by Fuller's eight canons of the inner morality of law.¹¹⁰ Within the *realpolitik* of international relations, however, the answer to Finnis's question is clear: Meeting formal criteria of legitimacy—whether by signing treaties and conventions or by observing elaborate legal procedures—can provide a crucial gateway to international recognition and hence to all sorts of material benefits, economic aid not the least among them. In the face of the need to keep “members of the international community” on board—at least ostensibly playing the game of international legality and good citizenship—contemporary legal practice has developed flexible mechanisms that make the highly discretionary eighteenth-century English criminal justice system seem positively rigid and legalistic. One of the most significant of these is the capacity of states, while ostensibly conforming to international legal standards, to evade the constraints of the rule of law at key moments through a range of devices—for example, by declaring states of emergency or by using executive powers to engage in or facilitate practices such as “extraordinary renditions” or the creation of extraterritorial institutions of detention and adjudication such as Guantánamo Bay. Another such device is the mechanism that allows states to ratify treaties subject to exclusions or reservations. One striking illustration of the upshot of this flexible mechanism is the fact that Afghanistan, in the era of the Taliban, became a signatory to the progressive Convention on the Elimination of All Forms of Discrimination Against Women.¹¹¹

My surmise is that Hart would have regarded these practices as clear evidence of the pitfalls of making too ambitious a claim for both law and the progressive potential of the rule of law. The formal aura of legality and universality is, after all, not a sufficient guarantee of a rule of law worth the name—a rule of law located within institutional arrangements with a real capacity to constrain power. Given the dual significance of the rule of law—its role in not only constraining but also legitimizing power—an incautious expansion of its claims into the international arena runs the risk of lending arrangements the aura of legitimacy while failing to subject them to any robust constraints.

¹⁰⁹ FINNIS, *supra* note 25, at 270–76.

¹¹⁰ *Id.*

¹¹¹ For further discussion, see Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, in *GENDER AND HUMAN RIGHTS* 13, 53–55 (Karen Knop ed., 2004).

So even leaving aside the capacity of global superpowers to ignore international law or to subvert it by subjecting it to creative interpretations that serve national rulers' interests, the recent history of the international rule of law gives some support to the modest, positivist position that Hart defended against Fuller. It reminds us of the crucial importance of keeping in view the two faces of the rule of law: its capacity not only to constrain but also to legitimize power. The lessons of this recent history also remind us of the need to contextualize our analysis of normative concepts within an understanding of the broader institutions within which they function: nation-states and criminal justice systems at the national or international level. Just as *The Concept of Law* resonated with a modern, impersonal model of authority, so does the huge moral, political, and cultural diversity of the inter- and trans-national legal terrain—in which we now expect the rule of law to operate—underpin the continuing resonance of the case for a modest and formal conception of the rule of law.

CONCLUSION

Conceptions of the rule of law have played an important role in both the legitimation and the coordination of criminalizing power. At its thinnest conceptual baseline, the rule of law has always stood for the notion that power is constrained by law. But the nature and extent of these constraints have, inevitably, varied over time. This has not been a story of inexorable progress—a “Whig” history of the gradual realization of a “full” conception or “central case” of the rule of law through the era of legal modernization and political democratization. As forms of political power change, and as the balance between political, economic, and legal power shifts, the forms taken by the rule of law shift too. Rich conceptions have to be informed by a sense of context and purpose; they are historically and institutionally specific. One of the many things to which the Hart-Fuller debate speaks so eloquently is the project of subjecting states and state actors to an international rule of law. A newly emerging context can pose complex practical questions about what counts as fair procedure—questions that themselves throw up new conceptual as well as moral issues. But this does not mean that particular conceptions of the rule of law are beyond critique, and of course philosophical analysis has a key role to play in that critical process.

I have argued that it is helpful to reflect both on the reasons underlying the continuing resonance of the Hart-Fuller debate and on some of its contemporary implications. It is worth excavating the half-acknowledged political morality that underpins Hart's argument: His

analysis of the rule of law is, in part, an astute, historically grounded assessment of the (modest) institutional capacity of law to tame power in the modern world. It is only through a dialogue—one between conceptual, philosophical analysis and socio-historical interpretation of the conditions of existence and the potential use of ideas—that a rounded understanding of the rule of law's potential, and limits, can be approached. The debate between Hart and Fuller stands out amid the history of twentieth-century analytical jurisprudence as inviting precisely this sort of polyvalent interpretation.

It seems appropriate to conclude an article that perhaps has given Hart more than his fair share of attention with a point that surely would have been congenial to Fuller. Above all, the debate speaks to us, and to our students, in its direct engagement with two questions of genuinely timeless relevance: those of how far, and under what circumstances, law can be invoked to constrain political power and of how far we can expect it to be a force for good, or evil, in our complicated social world.