

Legal Positivism and a Dynamic Picture of the Law

Introduction

In his 1958 essay, “Positivism and the Separation of Law and Morals”, H.L.A. Hart develops a nuanced account of the doctrine of legal positivism, upholding the ‘Separation Thesis’ developed by his utilitarian predecessors, which denies a necessary connection between law and morality. In defending this doctrine, Hart presupposes that legal theory should examine the law through the positivist core/penumbra framework. Briefly, the core is the settled meaning of the law, whereas penumbral cases are those where the meaning of the law has not yet been settled. Such a framework paints a ‘static’ picture of law, in which judges adjudicating penumbral cases do not rely on the principles of legal theory underpinning the law, but rather must look outside the law in order to make a decision about what the law requires. Furthermore, Hart presupposes that even if judge’s *do* refer to values located within the core of settled meaning to make their decision, such values needn’t be moral ones: again, the Separation Thesis holds. In this essay, I critically examine Hart’s presupposition, rooting my discussion in two Grudge Informer Cases that were brought to German courts post-World War II. These cases bring to light a scenario in which the law has become a rulebook of immoral actions; hence, my discussion of Hart’s legal positivism is at its heart a discussion of how we must practice legal philosophy in order to critically examine legal realities. Ultimately, I will argue that if Hart had begun his construction of legal positivism with the question ‘*why do we care about law?*’, his static picture of the law would have come to resemble something much closer to a dynamic one. I will argue that this dynamic picture makes it harder for Hart’s legal positivism to uphold the utilitarian Separation Thesis.

Where it All Began: The Initial Hart-Fuller Debate in Light of the Grudge Informer Cases

Both Hart and Fuller relied on a summary of a Grudge Informer case given by the Harvard Law review, which stated the facts as such: in 1944, the defendant sought to get rid of her husband by alleging that he made ‘derogatory remarks’ about Hitler. After reporting these remarks to Nazi authorities, the defendant’s husband was put through a trial court and ultimately sentenced to death: his actions had violated two Nazi statutes which made it a crime to insult Hitler and the Nazi regime. Following the war, the defendant and the judges who sentenced her husband were accused of violating Section 239 of the German penal code, which makes it a crime to illegally deprive someone of liberty. The case was brought to a court of appeals, wherein it was concluded that “the sentencing judge should be acquitted, but that the wife is guilty since she utilized... a Nazi ‘law’ which is contrary ‘to the sound conscience and sense of justice of all decent human beings’ to bring about the death or imprisonment of her husband” (Pappe 262).

From this summary, Hart inferred that the post-war German appeals court effectively concluded that the Nazi statutes which the husband was said to have violated were so immoral that they cannot be said to have been valid law. There are five parts to Hart’s paper, three of which I will outline here to contextualize his response to this decision.

Hart believes that his own doctrine of legal positivism brings the issues of the Grudge Informer case to light in a clearer manner. Historically, legal positivism endorses three doctrines, developed by Hart’s predecessors, Bentham and Austin. These are: the Separation Thesis, the Command Theory of Law, and the theory that legal philosophy is best done through analysis of legal concepts. The Separation thesis argues that there is no necessary connection between law and morality. To establish a connection between law and morality puts one in danger of either

becoming a reactionary—concluding that because X is a law X must be moral; or an anarchist—concluding that if X is not moral it cannot be a law. Hart believes that endorsing the separation thesis avoids these criticisms, providing a lens through which we can recognize legal systems to be immoral and criticize them as such.

Hart goes on to reject the Command theory of law, and develop his own theory of core and penumbra. Following this section, Hart addresses what course of action legal positivism prescribes to cases in the core, where the core is clearly immoral: this is where the Grudge Informer case finds its footing. Hart believes the result of the Grudge Informer case is reminiscent of Gustav Radbruch's legal theory, which he takes to support the natural law claim that there is a necessary connection between law and morality. Hart interprets Radbruchian legal theory to claim that law is law except when law reaches a certain point of extreme injustice. Citing Austin, Hart points out that to claim that immoral law is not law is "stark nonsense"; one will still be subject to the same degree of punishment if one chooses to act against an immoral law (*Positivism and the Separation of Law and Morals* 42). To come to this conclusion is to hide behind natural law doctrine which appeals to a morality that turns out to be external to the law itself, while pretending to adjudicate within the legal core. This masks the fact that in punishing the Grudge Informer, the courts are violating an important principle of morality that finds its way into most legal systems: the principle of non-retroactivity. What the post-war appeals court should have done was to pass off the task of creating legislation that recognized the German law as valid law to the German legislature. The legislature then could have enacted a retroactive statute invalidating the Nazi statutes that made it a crime to insult Hitler's regime. Legal positivism for Hart would have allowed the German courts to avoid moral confusion, and moreover, would have forced the legislature to do their dirty work out in the open, being

transparent about the fact they had to make a choice between two competing moral principles: non-retroactivity and sentencing under immoral statutes.

Fuller wrote “Positivism and Fidelity to Law— A Reply to Professor Hart” as a reply to Professor Hart. In it, he endorses the doctrine of natural law theory, which posits that there *is* a necessary connection between law and morality. For Fuller, this connection comes in the form of eight legal principles which make up a morality internal to the functioning of law itself. These principles are, “generality, publicity, non-retroactivity, clarity or intelligibility, non-contradiction, possibility of compliance, constancy through time, and congruence between declared rule and official action” (Fuller 67-68). In thinking about legal order as a whole, Fuller argues that Hart failed to recognize that necessary for the functioning of law are these eight moral principles, which, for Hart, might serve as ‘commands for the commander’. For Fuller, the non-retroactivity that Hart speaks of is not only an important *moral* principle but an important legal one.

Fuller argues that the Nazi legal order violated several conditions that make up this internal morality of law. Firstly, the Nazi legal order made retroactive laws. Secondly, they made laws that were not broadcasted to the public—hence they were secretive laws— and thirdly, it was not consistent with what laws were applied when. Furthermore, Fuller suggests that the Grudge Informer case presents a specific actualization of the Nazi legal order’s violation of the principles of legality. He considers both the 1934 and the 1938 statutes under which the husband was first sentenced. These statutes specify that the utterances must be made in public. They list a range of punishments, out of which the death sentence is the most extreme. Fuller’s eight desiderata leaves his theory open to arguing that in sentencing a man to death, the most severe punishment possible, for criticizing the Nazi regime in just about the most private interaction one

might conceive— between himself and his spouse in the privacy of their own home— the Nazi courts were violating the important principles of congruence between rule and action, and possibility of compliance.

Hence, Fuller's internal morality of law, which demands that law generally comply to the eight desiderata listed above, gives him a space to critically examine the law using a criterion that, unlike what Hart takes Radbruch's approach to be, remains internal to the law itself. In situating this case within the legal core, Hart is barred from evaluating the validity of the Nazi statutes pertaining to the Grudge Informer case. Namely, Hart fails to recognize the complexity of the Grudge Informer case because he fails to consider the complexity of the criteria that legitimize the law itself.

Part Two: The Inaccurate Summary, Pappe, and an Analogous Supreme Court Decision

As it turns out, Hart and Fuller's interpretation of the Grudge Informer case was inaccurate. The courts did not use what Hart would call 'Radbruchian reasoning' to invalidate the Nazi statutes. Rather, the court found that the informer was guilty of illegally depriving her husband of liberty through indirect perpetration: putting in place the preconditions for the crime and using another human being as the instrument of one's own will. The defendant knew that if she reported her husband's utterance the Nazi judges would be compelled to address it. Furthermore, she was aware that reporting her husband would result in his death sentence. However, the Nazi judges were acting under a *legal* duty to carry out a judgment based on Nazi policy. The informer was under no such duty: the particular Nazi statute at play here was *not* reminiscent of extreme injustice, because it did not require any form of positive action from the German people; rather, it merely required an omission, which was to keep silent (Bamberg Court of Appeal 2). Thus the judges, as the perpetrators of an illegal result, were acting legally. The

informer was not: she was under no legal duty “imposed on her by authority” (2) to report her husband. In fact, her act of informing was contrary to the “opinion of ethics and decency” (2) among the German people throughout the period of the Nazi rule, and was thus illegal.

In response to this decision, Hart might plausibly argue that the court’s finding that a *legally brought about result* was illegal still relies on a Radbruchian argument: in claiming that the informer’s actions were contrary to the “opinion of ethics and decency” (2), the court paints the defendant’s actions as extremely unjust. Thus, Hart would conclude from this judgment that the principle of non-retroactivity remains masked by the “stark nonsense” of claiming that immoral law is not law at all (*Positivism and the Separation of Law and Morals* 42).

I think that Fuller would join Hart in disagreeing with the court’s reasoning. He would argue that the court should have examined the way the Nazi courts applied the relevant statutes, and the Nazi legal order as a whole, in light of the eight moral-legal principles he lists. Through employing this kind of analysis, the court may find that Nazi law was not law, not because it went against the sound conscience of most German people, but instead because it violated the very morality internal in the law itself.

Interestingly, a parallel Grudge Informer case was brought to the Supreme Court in 1952, outlined by Pappé in “On the Validity of Judicial Decisions in the Nazi Era”. Like the German Court of Appeals, the Supreme Court didn’t find the Nazi statutes to be invalid, but they did not rely on the doctrine of indirect perpetration. Instead, the Supreme Court reasoned that the Grudge Informers knew that their act of informing would result in an illegal, not a legal, trial process. This is because there was no due consideration of the Nazi statute and principles established in the German law. The statute required that the remarks were made in public; here the meaning of ‘public’ was stretched beyond due recognition. Moreover, there is a requirement in German legal

order of proportionality; the punishment has to fit the crime. The death sentence was disproportionately harsh. The court found both informer and judge guilty of illegally depriving the husband of his liberty with reference to section 239 of the German Penal code of 1871 (Pappe 262).

The Supreme Court Judgment is highly reminiscent of Fuller's own argument, and illustrates that Hart should have been more cautious in assuming that the Nazi court's legal process was entirely legal. In appealing to legal principles underpinning German law, the Supreme Court arrived at the conclusion that the Nazi Court's process was not a legal process at all. Thus, I think that Fuller's eight desiderata succeed in making sense of the same kind of factors the Supreme Court judges relied on.

Part Three: Legal Positivism's Reluctant Transition to The Dynamic Picture of the Law

In "Positivism and Legality: Hart's Equivocal Response to Fuller", Jeremy Waldron clarifies how Fuller's eight desiderata demand a necessary connection between law and morality. Waldron, in fact, quotes Fuller's answer to his second question: "the normal generality of the law is desirable ... because it will enable individuals to predict the future ... this is a powerful contribution to human liberty and happiness" (Waldron 1155). In other words, law that complies with Fuller's eight desiderata holds moral authority over its subjects in so far as it enables them to predict the future. Thus, out of Fuller's work we get two questions:

- 1) must it be the case that legal systems comply with principles of legality in order to be legal systems?
 - 2) If there are such principles of legality, are these principles necessarily moral ones?
- (Waldron 1139).

Waldron argues that Hart's responses to Fuller's internal morality of law are evasive, because he consistently answers yes to the first question, no to the second, or vice versa: he never addresses Fuller's position directly, which answers yes to both of these questions (1160).

At first glance, it might seem plausible to conclude that Hart's theory is able to adopt Fuller's eight desiderata without stepping outside the bounds of legal positivism. Hart could support Fuller's conditions of validity, while arguing that these conditions should not be called moral ones: answering 'yes' to Waldron's first question and 'no' to the second. Hart's prized positivist pupil Joseph Raz provides a suggestion very similar to this. In "The Law's Own Virtue", Raz upholds that the law must consist in a set of principles that closely resemble Fuller's eight desiderata, which make up the rule of law.¹ He is thus providing a clear answer, 'yes', to Waldron's first question. Raz also provides what looks like an answer, 'no' to Waldron's second question, arguing that in complying with the rule of law, law's content need not be moral. While law that complies with the rule of law is *necessary* for humans to live lives of dignity and autonomy, it is far from *sufficient*. Compliance with the rule of law allows law to function like a "sharp knife", wherein the law simply becomes more efficient in serving its ends, whether such ends are moral or not (Rundle 775).

Such a concession would open Hart's theory to a Fullerian-like evaluation of validity of Nazi law, while upholding the Separation Thesis. The fact that the Nazi law was immoral in content remains irrelevant to the process by which the post-war judges can convict the woman of illegal deprivation of liberty. The legal positivist could conclude that the law in light of Fuller's eight desiderata simply adds a further complication to the content of the positivist core, but it does not entail a necessary connection between law and morality.

¹ These principles include the law being "reasonably clear, reasonably stable, publicly available" and that it includes "general rules and standards that are applied prospectively and not retroactively" (Raz, "The Law's Own Virtue, 3).

Thus far, it appears that Raz is providing two clear answers to Waldron's questions, maintaining the Separation Thesis through arguing that compliance with the rule of law is not sufficient for law to have moral content. However, Raz's theory is in fact much more complex, as Kristen Rundle illustrates in "Form and Agency in Raz's Legal Positivism". Rundle begins with arguing that for Fuller, there is a connection between legal form and substance. She ties Fuller's answer to the second question to a picture of the legal subject: in complying with his eight desiderata, law necessitates the lawgiver to adopt a "distinctive ethos", which treats legal subjects as "responsible agent[s]" (771). If the lawgiver fails to adhere by Fuller's internal morality of law, the subject is thus entitled to noncompliance, because the law is no longer treating her as "an agent and bearer of dignity" (771).

Rundle then goes on to illuminate Raz's understanding of law as a body of authority. Such authority must, in the very least, appear to be legitimate; the reasons it gives to its subjects for compliance are reasons which already apply to the subjects, in the sense that these are the reasons upon which subjects should act, whether or not they are operating within a legal system. Law's authority, then, arises from the fact that law provides us with reasons for our actions that are better than we might come up with ourselves (784). Thus, Raz's theory of authority "turn[s] towards the legal subject" in a very similar way as Fuller's, for it appears that law's authority is reliant upon treating the legal subject in a way that benefits her (785). Here, Raz appears to concede to natural law theory more than he admits: his saving grace here is that in "The Rule of Law and its Virtues", Raz holds that law need not adhere to the rule of law in order to maintain its status as a legal system (775). In addressing his conception of legal authority separately from his conception of law that complies with the rule of law as being like a very sharp knife, Raz thus falls into the same trap as Hart, failing to answer Fuller's questions consistently.

Ebbinghaus' essay, "The Law of Humanity and the Limits of State Power" draws on the notion of the legal subject, proposing a substantive moral constraint that he takes to be necessary for the law that appeals to human nature. Ebbinghaus argues that the law maker is subject to legal regulation that *includes* important moral values. From his essay one can draw the conclusion that understanding the law as something that is legally regulated entails more of a concession to natural law theory than what Hart and Raz suggest. Instead of beginning his theory as Hart begins "Positivism and the Separation of Law and Morals", asking '*what is law*', Ebbinghaus begins with the question, '*why do we need law in the first place*'? For Ebbinghaus, what law is meant to make "a truly universal order of liberty" possible (Ebbinghaus 15). From this follows a "two-fold precept", that is, one mustn't "reduce [oneself] to another man's power... nor other men to objects of [one's] own arbitrary power" (16). Thus, authority of the state, including that of the law-maker, is not unlimited authority, but rather it rests on the condition that the substantive content of the law treats all of those it retains authority over as legal subjects. Ebbinghaus thus concludes that "if those who have the power to make law make it the case that those who are subject to the law are unable to act as legal subjects, then that law will fail to be law for that reason" (21). This is what Ebbinghaus titles his "principle of humanity" (16).

The final section of Hart's 1958 essay addresses legal order as a whole, answering the question that Ebbinghaus' piece begins with. In it, Hart concedes that there are several conditions a legal order must satisfy which hang loosely in line with justice, but which are not sufficient to make a valid legal order a just one. Namely, law must seek to meet the conditions necessary for basic human survival, and it must seek to maintain the moral principles of objectivity and impartiality by "treating like cases alike" (*Positivism and the Separation of Law and Morals* 49).

Echoing the last parts of his earlier essay, Hart's book *The Concept of Law* points out that law operates based on reasons, and in order to function this way, it must take into account certain natural facts about human beings. Namely, the law must account for "human vulnerability" ("Law and Morals" 194), "approximate equality" (195), our "limited altruism" (196), "limited resources" (196), and "limited understanding of strength and will" (197). Because law must respond to a natural necessity, it must address these facts about human beings. What Hart argues here is that law, in order to be law, does, in fact, include a minimum moral content.

Hart himself concedes that law which fails to cater to natural facts about human individuals "would sink to the status of a set of meaningless taboos" (*Positivism and the Separation of Law and Morals* 50). Ebbinghaus suggests that the purpose of law necessarily entails a moral assumption— to ensure humans are not subject to arbitrary power. Ebbinghaus' theory thus seems compatible with parts of Hart's work, but it simultaneously points towards a powerful objection to the Separation Thesis. Hart, however, has a plausible reply to Ebbinghaus, which concludes his chapter, "Law and Morals" from *The Concept of Law*. It is true that for Hart, in order for law to be valid, it must cater to natural facts about human individuals. This is what allows Hart to move away from his predecessors' Command Theory of law. Hart believes that the law must not merely be a "gunman situation writ large" (*Positivism and the Separation of Law and Morals* 32) but rather must exhibit some positive authority over its population. However, for Hart, as long as *some* of the population are benefiting from the law, the law can be called valid law, retaining its authority while still upholding the Separation Thesis; not all of the legal subjects may be benefiting from the law.

Hart's positivism runs into further issues when one considers his conception of the role of the judge in light of his rejection of Command Theory. Pappé illuminates Hart's assumption that

it was part of the Nazi-era judicial duty for a judge to virtually ignore the law and decide a case like the Grudge Informer cases in such a way to further policy of maximum intimidation of the German population. To assume that Nazi judges were behaving as judges in these cases is to ignore that we have a sense of what a judge's legal role is; a role that requires them to take the principles underlying the law seriously and conduct a trial fairly. In light of this consideration, it seems arbitrary to conclude that the Nazi military courts were just doing their duty. If, instead of framing the issue as a 'rotten core', Hart asked what a *judge* must do if she is faced with a case that demands an interpretation the law—where a plausible interpretation is one that should cause the judge to ask whether it fits with her understanding of the law's purposes—it seems like his own work may provide an alternative angle for analysis of cases like the Grudge Informer ones.

In "Radbruch and Hart on the Grudge Informer: A Reconsideration", Thomas Mertens argues that Radbruch's piece is best understood as a comment on the role of the German post-war judges. Like Ebbinghaus, Radbruch's "Statutory Lawlessness and Supra-Statutory Law" argues for a substantive moral constraint on the law. Radbruch's notion of extreme injustice is in fact much more nuanced than Hart gives him credit for. Radbruch argues that law must live up to three ideals: legal certainty, purposiveness, and justice. As long as legal certainty is upheld, positive law continues to be valid, "even when its content is unjust and fails to benefit the people" (Radbruch 7). It is only when statutory law "reaches such an intolerable degree [of injustice] that the statute [becomes lawless]" (Radbruch 7). For Radbruch, such an intolerable degree can perhaps best be understood as something like Ebbinghaus' Principle of Humanity.² Mertens aims to illuminate that adopting Radbruch's theory would allow German post-war

² The only decisive guarantor of extreme injustice that Radbruch provides is the notion of equality, which for Radbruch, "lies at the core of justice" (Radbruch 7). Here he differs from Ebbinghaus; law that betrays *equality* is extremely unjust law (7).

judges to adopt a dynamic conception of law, in which they first asked what purposes or ideals their legal order should strive towards, and then, in facing cases like the Grudge Informer ones, they would be equipped to make their decisions in light of these purposes. It isn't the case that the kind of tensions that Hart points us to in his analysis of the Grudge Informer Cases—upholding the principle of non-retroactivity, for example—go away, but rather that they manifest themselves as legal tensions within a legal order; tensions that judges have to navigate as they try to maintain that order as an authoritative one rather than a gunman situation writ large.

Hart does, in fact, address the role of the judge, suggesting in his later book *The Concept of Law* that there are several “judicial virtues” which, by their label, seem to allude to what Hart’s picture of a ‘good judge’ might be. Namely, he believes judges must exhibit “impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision” (“Laws and Morals” 205). I suggest here that the name judicial “virtues” implies two things: firstly, these are not necessary characteristics of a judge, and secondly, that they *are* suggested characteristics. However, if doing the judge’s job well for Hart includes, for example, a “consideration for the interest of all who will be effected” (205), it seems as if the good judge does indeed have to appeal to certain values within legal theory in order to make a decision that appeals to the kind of reasoning Hart thinks is necessary for the law to maintain itself as a body of authority. In denying that such “virtues” are, in fact, duties, Hart makes a move that echoes Waldron’s critique of evasiveness.

To conclude, in this essay I have shown that putting Hart into conversation with Waldron provides a segue for considering his theory beside Ebbinghaus’, and illuminates Pappé’s concern

about the role of the judge. If one examines Hart's theory as if it stemmed from Ebbinghaus' question—why do we have law in the first place? — Hart's legal positivism moves into the realm of a dynamic picture of the law: the excerpt from his book at least *recommends* that judges pull from values underlying the core in order to adjudicate penumbral cases well. Put in Waldron's terms, it seems as if Hart does, in fact, suggest that there is a necessary connection between law and the consideration of legal principles, which makes his static picture of the law look much more like a dynamic picture. While his discussion of judicial virtues appears only to be a recommendation of things a good judge might consider, these recommendations perhaps veer us towards a moral picture of the law. As a judge adjudicating the Grudge Informer Cases in post-war Germany, upholding the authority law holds over its subjects, and having consideration for the interest of all who will be affected by her decision suggests the judge must consider the purposes of the German law, and whether or not the Nazi courts treated the informer's husband as a legal subject. Thus, moving into the dynamic picture of the law makes it increasingly harder for Hart himself to hold onto his prized Separation Thesis while denying the Command Theory.

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