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Another Look at Hart's Account of Wicked Legal Systems

by

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Abstract

This thesis argues that some wicked legal systems are problematic instances of law because these systems often fail to generate a *prima facie* obligation to obey them. Positivists argue that because wicked legal systems possess essential structural features they are central instances of law, despite their immorality. Hart's view of the "internal aspect of rules" develops an account of legal obligation that is integral to the normal functioning of a legal system, but is often absent in wicked legal systems. An account of legal evil that does justice to the complexities of this phenomenon must take into consideration the fact that evil legal systems claim to have the authority of law and thus marshal respect for their immoral aims. Finally, it is confirmed that a system that generates obligations to obey it by "guiding by rules" provides no evidence that law and morality are conceptually indistinguishable.

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INTRODUCTION

A soldier returning home from the German front spoke unfavourably to his wife about Hitler and the Nazi government. The soldier, informed upon by his spouse to the police, found himself facing charges of treason, a crime punishable by death. Convicted of treason, the soldier escaped execution only to be returned to the front. Cases like this would later raise difficult philosophical questions for the post-Nazi German courts. These courts were asked to decide whether the woman who had acted lawfully in the Nazi system should be punished by law under the new German regime. The post-war German courts, then, were faced with difficult questions about how to deal with the aftermath of the Nazis' laws. The woman was in fact punished by the post-war courts, a decision that seemed to confirm the idea that a law may be overridden by morality. This decision raises the difficult question, "Did the Nazis have a legal system *at all*?"

The philosophical point in the wake of this decision was whether it is necessary for a law to uphold moral principles. The Nazi laws were undeniably immoral, but positivists warn that adherence to morality is not a criterion for the existence of a legal system. That is, if law and morality are conceptually distinct, then it stands to reason that the moral character of the statutes provides no grounds upon which to doubt the existence of any law. We may agree that the Nazi's laws were highly immoral, but this fact, in and of itself, does not undermine their status as law. Favouring this line of thought, H.L.A. Hart proposed

that the post-war courts did not invalidate the Nazi's previous statute when they decided to punish the woman, but chose to enforce a retroactive statute. He defends this decision in this way:

> Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour...Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are .

In such a case, the courts must decide whether to enforce morality or law, but they cannot deny that they are in fact *choosing* between law and morality.

The idea that the Nazi statute was invalid as law, however, appealed to many. This line of argument requires one draw a necessary connection between law and morality, a position championed by natural law theorists. For some, this nexus becomes clear if we look closely at the purpose of a legal system. Law exists in order to allow political society to realize certain moral goods: justice, fairness, or "the common good." Others argue that the daily functioning of a legal system provides strong evidence that moral principles are a necessary element of any legal order. A legal system places moral constraints upon participants at every level, including legislators, judges, and officials.[1] To say, then, that we must choose between law and morality is a false dilemma. When a statute is so iniquitous

that it is not a source of morally obligatory behaviour, the correct way to deal with it is not to manufacture a contrast between our "legal" and "moral" obligations.

The view that morality is not a necessary condition of legal validity rests on the theory that there are certain essential structural characteristics of a legal system. Studying law from the perspective of a scientific observer yields a morally neutral definition of the phenomenon investigated. However, it is arguable that an abstract structural account of law is simply not sufficient to tell us what is most important about law as a living social phenomenon. Lon Fuller has this to say about what is required of a definition of law:

> When it is said, for example, that law simply represents that public order which obtains under all governments – democratic, Fascist, or Communist – the order intended is certainly not that of a morgue or a cemetery. We must mean a functioning order, and such an order has to be at least good enough to be considered as functioning by some standard or other .

Fuller's direct attack here is not against the idea that law and morality are conceptually distinct, but the claim that any accurate account of what law is can exclude questions of how the law functions.

This debate was taken up in the 1950's by Hart and Fuller. In his paper, "Positivism and the Separation of Law and Morals," Hart takes these informer cases as an opportunity to expound his own view that "law is one thing, morality another." In "Positivism and Fidelity to Law—A Reply to Professor Hart," Fuller argues that the German Informer cases demonstrate that Hart completely misunderstands the relationship between law and morality. A law exists, Fuller argues, when it establishes a moral duty to obey it and so to talk about a discernable distinction between a legal and a moral obligation is nonsensical.

In the wake of some of the ideas discussed in the Postscript to *The Concept of Law*, contemporary positivists have begun to revisit the question of iniquitous legal systems. This thesis focuses specifically on two such recent contributions: Jeremy Waldron's "All We Like Sheep" and Matthew Kramer's "Requirements, Reasons, and Raz: Legal Positivism and Legal Duties" . Both Waldron and Kramer build upon the claims Hart develops in his debate with Fuller to reveal how a legal system may be used with equal and impartial efficiency to pursue just or unjust policies.

This conclusion rests upon the claim that the essence of a legal system lies in its structural features. Though it is indisputably the case that most wicked legal systems possess the structural elements central to Hart's positive definition of law, *The Concept of Law* provides several compelling reasons to consider wicked legal systems abnormal or dysfunctional instances of law. Hart not only admits that the complexities of the modern

legal system cannot be fully captured by structural characteristics, but also expounds a view of how the law normally functions as a "method of social control" within a society. A legal system typically generates a *prima facie* obligation to obey it because people generally accept the rules as standards of behaviour. I argue that if we look at how many wicked legal systems establish their power over others, we find that they do not possess this obligatory element and should, therefore, be considered less than central instances of law.

How this thesis proceeds

Each chapter develops Hart's account of legal obligation as it applies to various questions about wicked legal systems. The claim that a structural definition of law is sufficient to evaluate wicked legal systems is challenged. The final chapter revisits the Hart-Fuller debate and finds that even if Hart's positive definition of law is supplemented by a functional account of rules, he need not surrender the claim that law and morality are conceptually distinct.

The first chapter of this thesis examines Jeremy Waldron's recent article on Hart's view of wicked legal systems in *The Concept of Law*. The core claim of Waldron's piece is that, based on Hart's version of the separation thesis and his positive definition of a legal system, wicked legal systems are in fact "unproblematic" or "central" instances of law. I present evidence that Hart's claims on the subject of wicked law in *The Concept of Law* are

more modest. I find that neither Hart's version of the separation thesis nor his positive definition of a legal system are sufficient to determine whether or not wicked legal systems are "normal" instances of law, though the latter clearly establishes that the structural features that define Hart's model of a legal system are indeed found within many instances of wicked legal systems. However, beyond identifying such cases as "law," I find that Hart provides good reason to think that many wicked legal systems are in fact "unhealthy" instances of law. Thus, Waldron's claim that Hart's positive definition of law entitles positivists to make any evaluative appraisals of law within wicked legal systems is unfounded.

The second chapter of this thesis turns to examine a recent view of "legal evil" expounded by Matthew Kramer. Using Hart's positive definition of a legal system, Kramer argues that "legal evil" is best understood as a system of general, stable, and durable norms that are iniquitous. I argue that this definition of "legal evil" is too simplistic and broad. The problem with this account of wicked legal systems is that it does not take into consideration the criteria Hart uses to discriminate between "healthy" and "unhealthy" instances of law described in chapter one. Though Hart argues that some wicked legal systems may generate the authority of law particular to healthy legal systems because the laws in these cases are "voluntarily accepted" by a sufficient portion of the population, this account of "legal evil" is much more complicated than Kramer's. Furthermore, Hart's reliance on the claim that even wicked legal systems must generate authority undermines

the assumption that Hart thinks merely establishing a pattern of behaviour is sufficient to determine whether a legal system actually exists amongst a given population. Hart's account of "wicked legal systems" makes certain implicit assumptions about how the legal rules function as "a mechanism of social control" within any society ruled by law.

Contemporary investigations like Waldron's and Kramer's leave important elements of the Hart-Fuller debate unexplored. In the third chapter of this thesis I return to that debate to investigate further Fuller's claim that that there is a link between law and morality. I argue that despite Hart's powerful criticism of some elements of the Fullerian view, contemporary positivists have under-appreciated Fuller's thesis that law, if it is to guide behaviour by rules, should function in a manner that generates at least a prima facie obligation to obey it.

Recognizing that guiding by rules is also an important element of Hart's account of law, the third chapter returns to reassess Fuller's initial challenge to Hartian positivism. Fuller charges that by committing himself to an account of law as a species of social rule, Hart must also accept that the process of making law is a moral enterprise. Fuller argues that though Hart in effect says that law must "guide behaviour" in order to generate legal obligation, he does not appreciate the moral constraints this goal imposes upon a legal system. Thus, Fuller argues that Hart fails to appreciate fully the "pathology" suffered in wicked legal systems; that iniquitous laws are the product of a deterioration of the

procedural morality of law which in turn results in a diminished sense of moral obligation to obey the law.

Though this thesis is able to scratch just the surface of many aspects of wicked legal systems that deserve closer attention, its chief purpose is to shift the debate about immorality in the law away from the defence of the separation thesis. Twentieth century positivist scholarship, especially Hart's work in *The Concept of Law*, has a great deal to contribute to our knowledge of the wicked legal system phenomenon. It is the aspiration of this thesis to point to where Hart's account of rules, obligation, and authority may be used to begin a more detailed discussion about the dynamics of legal oppression.

THE OVINE SOCIETY REVISITED

Hart argues that the danger inherent within a legal system is that it may use its power oppressively, without regard for the well-being of the community or those it commands. This is one of the most important themes developed in *The Concept of Law*. Some positivists have thus understandably endeavoured to explicate and expand upon Hart's claims about the morally unsavoury potentials of law. Jeremy Waldron's recent account of Hart on wicked legal systems argues that in illuminating the "costs" of a legal system, Hart is in fact trying to show how it is that a legal system *may well* be unjust. Waldron further argues that it follows that many wicked legal systems should be considered "central" or "unproblematic" instances of law . I argue that this conclusion is not supported by Hart's view of positivism. Though Hart's account of the separation thesis and legal validity allows that an unjust law may be valid, he also suggests that within a "healthy" system of law the rules will be generally accepted as standards of criticism. I argue that this standard of healthy functioning must be taken into account before deciding whether any legal system, wicked or otherwise, is a "central" instance of "law."

This chapter proceeds as follows: a brief account of Hart's positive definition of a legal system is given, and then Waldron's account of how this definition of "law" shapes Hart's ideas about the status of wicked legal systems is explored and criticised.[2] I argue that Hart's account of the separation thesis entitles us to conclude *only* that it is logically

possible that an unjust legal system may turn out to be valid. Furthermore, Hart's account of legal validity does not take important functional elements into consideration. Upon closer examination, it is revealed that Hart provides good reason to believe that these systems might be less-than-central instances of law in so far as it is unlikely that the rules would be generally accepted within the community. General acceptance of the law as a set of social norms is crucial to establish a *prima facie* obligation to obey the law. A system in which there is no such obligation cannot be considered a "central" instance of law.

A Brief Introduction to Hart's Concept of Law

The Concept of Law argues that a legal system is comprised of two logically distinct types of rules. According to Hart, a legal system is essentially a system of primary and secondary rules with established tests of validity. Before discussing how these features of law influence Hart's discussion of wicked legal systems, it is first necessary to provide some explanation of primary and secondary rules and why Hart argues that the combination of these two rules is the "key to the science of jurisprudence" .

Let us begin our discussion of rules, as Hart does, by detailing the role of primary rules of duty within a given society.[3] Every society will have some primary rules of duty that establish acceptable and unacceptable conduct. These primary rules, however, need not be officially recognized or written down. They may simply exist as widely accepted

norms within a society, much like our own rules of social etiquette. Primary rules need not have any "rule-book existence" because the existence of the primary rules is entirely dependent on their being widely practiced within the community (Waldron 1999, p. 173). For example, it is an accepted social rule in Canadian culture that one should not belch while eating in public. However, if it became widely popular to belch in restaurants, then it would be wrong to say that the rule against this practice remained in existence.

One of the most important distinguishing features between a society ruled by law and the "primitive" society detailed above is that the primary rules within a legal system may exist regardless of whether or not they are practiced. A society where the existence of the rules is wholly contingent upon their being widely practiced within the community will, Hart argues, suffer from certain "defects" (ibid, p. 90); uncertainty, inefficiency, and a total lack of control over altering the rules in a conscious fashion. Hart claims that the remedy for this situation is "a procedure or the acknowledgement of either authoritative text or persons involv[ing] the existence of rules of a type different from the rules of obligation" (ibid).[4] The different type of rules to which Hart here refers are what he calls secondary rules of recognition, change, and adjudication. Each of these types of secondary rules enables the society to develop a system of rules[5] that is much better equipped to function within a large, complex society.

Hart argues that the foremost distinguishing feature of a society ruled by law is that the society's primary rules of duty are deemed valid by a secondary rule of recognition (ibid, p. 92). That is, the rule of recognition establishes the criteria by which to determine whether a rule is legally valid. In Canada, for example, there is an intricate web of rules of recognition, which enable us to identify when a bill has been passed into law. Some rules of recognition may refer to moral principles, as in Canada, where rules are deemed legally invalid if they conflict with the rights laid down in The Charter of Rights and Freedoms. For Hart, however, it is not crucial that the rule of recognition entail any reference to moral principles. Whether it includes reference to moral principles or not, Hart argues that a rule of recognition is absolutely crucial to the existence of a legal system. For without an ultimate rule of recognition, there would be no definitive way to differentiate legal rules from moral rules and social customs.

In addition to the rule of recognition, Hart argues that there are also secondary rules of change and adjudication. The rules of change enable a society to alter the rules as demands on the legal system change. These rules thus ensure the system a good deal of flexibility and control over shaping the law . The rules of adjudication are likewise important, for they enable judges to determine when and how a law has been breached (ibid, pp. 94-95). These secondary rules of recognition, adjudication, and change are, then, the distinguishing features of a society ruled by law.

This definition of a legal system contains no mention of moral principles in its description of the foundations of law. Rather, Hart develops a concept of law that tries to explain legal systems in terms of the existence of secondary and primary rules. Indeed, Hart thinks that this concept of law is not only precise, but also explanatorily fecund: "[o]ur justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a dictionary, but that they have great explanatory power" (ibid, p. 150). This definition of law has much to commend it in that it establishes a model by which to clearly identify legal systems.

However, the degree to which this structural definition of law reaps fruitful explanations of the features a legal system depends a great deal upon which features of a legal system one is trying to explain. Critics of positivism have long pointed out that a structural definition of a legal system does not sufficiently explain certain important characteristics of law, like the nature of legal authority and obligation. As John Finnis claims:

> [Positivists'] works are replete with more or less undiscussed assumptions such as that...these formal features have some connection with the concept of justice and that, conversely, lawyers are justified in thinking of certain principles of justice as principles of legality; and that the fact that a stipulation is legally valid gives some

> reason, albeit not conclusive, for treating it as morally obligatory or morally permissible to act in accordance with it (Finnis, 77).

Finnis clearly thinks that expounding a connection between law and morality is necessary in order to explain why the law often garners the respect and force it does. Regardless of whether one accepts his explanation of legal authority and obligation, Finnis raises imperative concerns about the limitations of a structural account of a legal system as an explanation of what "law" is.

Though I ultimately disagree with Finnis' claim that adherence to certain moral principles is crucial to our understanding of law, I share his concerns that we are stretching the structural definition of law too thinly if we expect it to expound an entire theory of law. However, I think that this worry is also evident in Hart's work, though it has been under-appreciated in contemporary scholarship. I now turn to explore Jeremy Waldron's "All We Like Sheep," an examination of Hart's account of immoral or unjust legal systems. My chief criticism of Waldron's account of Hart's discussion of wicked legal systems is that I think Hart's work does not warrant the conclusion that a legal system may lend itself *equally* well to immoral or moral goals. On the contrary, I find much evidence within the *Concept of Law* to suggest that a legal system suffers serious distortions when made an accomplice to wickedness.

A contemporary reading of Hart

As one reads through *The Concept of Law*, one cannot help but notice that Hart's account of the potentials of a legal system becomes increasingly grimmer. Perhaps the point at which it becomes most clear that his account of law is not biased towards law as we know it in liberal democracies, is Hart's statement that even an extremely ovine society might qualify as a legal system:

> In an extreme case...only officials might accept and use the system's criteria of legal validity. The society in which this is so might be deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system (Hart 1961, p. 114).

In these brutal terms, Hart confronts his reader with the possibility that the advent of a legal system is not necessarily synonymous with increased freedom and respect for individual citizens. The ovine society reveals in uncompromising terms that a legal system need not protect the best interests of those it commands.

Jeremy Waldron argues that Hart's account of a legal system allows us to conclude that the ovine society is a normal instance of law. Keeping in view Hart's claim that law is not morality, Waldron argues that Hart would accept the following proposition:

> [O]ne should not exclude a system of norms, S, for the extension of the term "legal system" on account of S's failure to satisfy the demands of justice. Indeed, positivism entails not only the conclusion that one should not exclude S on this ground, but also that the injustice of S is not even a reason for regarding S as a problematic or marginal or less-than-central case of "law" .

Following this line of reasoning, Waldron goes on to argue that Hart provides no reason to doubt that the extremely ovine society is a "central" instance of a legal system.

There are various junctures in *The Concept of Law* where it seems that Hart recognizes wicked legal systems as unproblematic specimens of law. "[S]o long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population," Hart writes, "this is surely all the evidence we need in order to establish that a given legal system exists" . Later on, Hart confirms that a legal system may bring about good or evil ends: "So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. *Wicked men will enact wicked rules which others will enforce*" (ibid, p. 206). Comments

such as these lead us to believe that "law" may be reconciled readily with both wickedness and goodness.

It is further evident that Hart thinks wicked legal systems are more than a mere conceptual possibility. Hart writes that "[i]t is plain that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope, and often they have not done so" and goes on to suggest that both the Nazi regime and South Africa under apartheid were live examples of such regimes (ibid, p. 196). There can be little doubt, Hart argues, that wicked legal systems are both conceptually and practically possible. If Hart is right that these systems possess the central or essential features of a legal system, then it is both dishonest and confusing to deny them the "title of law."

Waldron's analysis of Hart's claims about wicked legal systems goes much further, arguing that Hart provides insights into why "law" is *equally* impartial to good and evil ends. Given Hart's positive account of a legal system, Waldron claims that we are left with the possibility that a legal system "*may well*" turn out to be either just or unjust . A definition of law that makes it possible to explain "both these potentials" of a legal system, would "leave open" the question "whether a system satisfying [the positive definition] is good or unjust" (ibid, p.171). Ironically, "leaving open" the possibility that a legal system *may well* be unjust seems to answer an important question about the nature of a legal

system; that a system of law might exist *and function* equally well in the pursuit of justice or injustice (ibid).

Waldron argues that this conclusion follows from the thesis that law is distinct from morality. As we shall see, however, the separation thesis as Hart describes it allows us to conclude that it is logically possible that a legal system might turn out to be grossly unjust, but allows for no further evaluative claim as to whether an unjust system of law is a "central" or "unproblematic" instance of "law."

Hart's version of the separation thesis

One sentence suffices to sum up the "central tenet" of positivism as Hart understands it. "[W]e shall take legal positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" . That is, positivists argue that if adherence to moral principles is not a necessary condition of legality, then a wicked legal system is as likely as benign systems to possess all of the characteristics of law. This conclusion is too strong. At most, the separation thesis allows us to conclude safely that a system of rules may not be denied the status of law solely on the basis that it is rife with immoral laws and policies. This conclusion, however, is a very far cry from the claim that a wicked legal system may well fulfill all of the requirements of law.

Hart's "simple" statement has caused a great deal of contention within legal theory, especially the implications it is generally understood to have on our understanding of wicked legal systems. For example, in his response to Hart, Fuller characterizes the separation thesis as the view that "law must be strictly severed from morality" and that law and morality "exist in wholly different worlds." Even more dramatically, Fuller claims that positivism "present[s] us with opposing demands that have no living contact with one another, that simply shout their contradictions across a vacuum" . Similarly, Gustav Radbruch argues that positivism is completely preoccupied with a "law is law" formalism , by which he means that positivists are indifferent to the complicated ways in which law is influenced by morality. If these remarks characterized the separation thesis at all accurately, then there would be good reason to dismiss this central positivist claim as inaccurate, if not absurd. Law and morality have always influenced one another and counter-examples to this caricature of positivism abound.

In order, then, not to reduce the separation thesis to absurdity, it is necessary to assess carefully the limits of the thesis. Hart flatly denies that the separation thesis makes any causal claims whatsoever: "[I]t cannot be seriously disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and the ideals of particular groups, and also by forms of enlightened moral criticism" . When Hart says that it is in no sense a *necessary* truth that law conform to morality, he makes a strictly logical claim.[6] That is, the separation thesis claims that law

can be defined without any reference to moral principles like social justice or the common good. The problem with Fuller's account of the separation thesis is that it mistakes a logical statement for a causal claim. While it is true that Hart's version of the separation thesis says that there is a sharp logical distinction between "law as it is and law as it ought to be," it does not hold that law and morality exist in wholly discrete "vacuums." Thus, the separation thesis is a conceptual claim *only*. It allows us to conclude that it is not logically impossible for a legal system to realize immorality or injustice.

It should also be emphasized that the separation thesis makes only a negative claim. The thesis tells us that morality is *not* a necessary condition of legality, but the further question about what the necessary conditions of a legal system actually are is left entirely open. Further arguments must be offered in order to conclude that a wicked legal system might readily satisfy the necessary and sufficient conditions of "law." It is important to keep in view the fact that the separation thesis makes only a negative claim; it tells us that adherence to moral principles is not a necessary measure or requirement of legal validity.

This narrow reading of the separation thesis is, it should be noted, sufficient to establish Hart's conclusions about the ovine society. The separation thesis entitles us to conclude that it is not a logical impossibility that a system as morally obnoxious as the ovine society could exist. More than this, Hart's phrasing of the separation thesis reinforces the fact that even though a legal system might exist in tandem with "slaughterhouse" politics, we may not conclude that the validity of the system is

jeopardized solely on account of these iniquities. But we have yet to see how the separation thesis entitles us to conclude that such a system qualifies as an "unproblematic" instance of "law."

The separation thesis, though an important aspect of any work of legal positivism, is only one aspect of Hart's theory. I shall now turn to examine his discussion of legal validity in order to underscore that Hart's positive definition of law does not entail the claim that a legal system is necessarily a "central" or "unproblematic" instance of law.

A closer look at legal validity

"Legal validity," as Hart employs the term, applies to particular laws, rather than to the status of a legal system as a whole. The presence of these tests of validity is indisputably a crucial element of any legal system and any account of law would be remiss to omit a theory of how rules earn the mark of law. But the function of these tests of validity is still relatively narrow. It allows us to talk about the laws in terms of truth or falsity. For example, it is a true proposition of law that Canadians are legally required to drive on the right-hand side of the road. The tests of validity are, thus, immeasurably important to judges when they must determine what the law requires and to lawyers when deciding how to argue a case. To a lesser extent, the tests of validity impact the lives of ordinary citizens, in that it allows them to know precisely what the law requires.

Given Hart's definition of "law," there can be little doubt that the Nazi's had a legal system. According to Hart's "wide" definition, any set of norms is a legal system if it contains a system of primary and secondary rules with established tests of validity,[7] though it must also meet some general test of efficacy as well.[8] The emphasis here, however, is on the fact that it is possible to identify a subset of social rules as either valid or invalid laws.

Though the exclusive focus on legal validity seems extremely narrow, what Hart establishes about the nature of "law" *qua* a system of valid norms is sufficient for his purposes. Hart directs his efforts in his chapters, "Justice and Morality" and "Law and Morality" towards disproving the views of a particular strain of natural law theory. Hart explicitly prefaces his arguments in these two chapters, which contain most of his comments about wicked legal systems, with the claim that he is particularly concerned to usurp the Thomist tradition of natural law. Even more specifically, Hart says that he is arguing against two of the central tenets of the Thomist legal philosophy: the first is the idea that there are "certain principles of true morality or justice, discoverable by human reason without the aid of revelation"; the second is the claim that the positive laws are invalid when they conflict with the divine law. Thinkers like Aquinas argue that systems of law which are unjust are not really legal systems at all, but rather "instruments of violence" (257).[9]

Given that this is the opposition Hart explicitly argues against, it makes sense that he emphasizes so heavily that a legal system might well satisfy the necessary conditions of legal validity even though it flaunts moral principles. Hart establishes that legal validity, understood as a matter of institutional fact, casts considerable doubt on the Thomist account of law. In the first instance, we have seen how Hart's definition of the rule of recognition establishes that the mechanism by which norms are identified as law might be established without any reference to moral principles. But Hart also hopes to show that even in those instances where moral principles have influenced the law, this has not always resulted in a system that reflects a "true" or "enlightened" morality. Practices that "critical morality" deems repugnant – slavery, racism, and sexism – have all been justified by various moral "viewpoints." Thus, Hart's morally-neutral definition of a legal validity suffices to shed considerable doubt on the Thomist doctrine that the positive law must necessarily reflect the divine law. Pointing to examples like the Nazi regime and South Africa under apartheid, Hart argues that the formal characteristics of a legal system were indisputably present within these systems, despite their lack of moral scruples.

Though the view that an unjust law is no law at all continues to hold some sway,[10] this very strong position has become must less prevalent in contemporary incarnations of natural law theory. Neo-natural law Theorists take a position that is, at least in some respects, more modest than the stronger view commonly associated with traditional natural law theory.[11] For example, Bryan Bix argues that "reasonable interpretation of statements

like 'an unjust law is no law at all' is that unjust laws are not laws *in the fullest sense*" . Bix further explains what he means by a law that fails in "the fullest sense":

> [W]e might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: 'she's no lawyer' or 'he's no doctor'. This only indicates that we do not think that the title in this case carries with it all the implications that it usually does (ibid).

Ronald Dworkin also argues there is an available sense in which wicked legal systems may be considered "law," at least to the extent that we understand what someone means when they say that the Nazis had law (Dworkin 1986, p. 103).

This may look like an important concession to Hart's analysis of law. [12] However, this change in emphasis raises new and difficult challenges for contemporary defenders of positivism. The problem is that Hart's vociferous arguments in favour of the claim that the Nazi legal system was valid as law do not provide any indication of how one might begin to assess the substantive flaws commonly found in such systems of law. Though Hart's arguments in favour of applying the term "law" in the Nazi case have proven a persuasive counter-argument on one level, the separation thesis itself provides no indication of what the next move should be. However, antagonists of positivism argue that Hart's arguments about the appropriate usage of the term "law" can only go so far and insist that it is now

time to start asking more substantive questions about the nature of law within wicked legal systems.

The problem is that Hart's tests of legal validity leave unanswered many of the most important questions about the nature of law. They do not, for instance, provide any explanation of how a legal system gains authority and generally earns the respect of its subjects. Nor do tests of validity explain why legal rules generate obligations to obey them. The fact that a system of norms is recognized as valid tells us little about how it is that the presence of a legal system so fundamentally alters how a society functions. And yet, we find within Hart's work an explicit acknowledgement that a legal system changes the very foundations of any given society: "[T]he introduction into society of rules enabling legislators to change and add to the rules of duty, the judges to determine when rules of duty have been broken is," Hart writes, "*a step forward as important to society as the invention of the wheel*" (emphasis my own, Hart 1961, p. 41). It is, thus, an injustice to this important analogy to suggest that Hart's definition of a legal system confines itself narrowly to a set of existence conditions. Just as the wheel fundamentally refashioned how we live, Hart argues that the introduction of a legal system changes the nature of social organization in a similarly foundational manner. The separation thesis, and its connection to legal validity, should be kept in perspective.

Though Hart argues that the mechanisms by which the tests of legal validity are established are the "essence" of a legal system, no set of existence conditions may be expected to provide a full account of the phenomena they identify. As Leslie Greene puts it:

> A good set of existence conditions should turn up rules when practiced, and not otherwise, but it need not itself tell us everything, or even much, about the nature of rules any more than a litmus test for the presence of an acid will tell us much about what acids are .

When Hart says that we may well find the "essence" of a legal system within a wicked legal system, this is not the same as saying that these systems are in fact "central" cases of law. At most it tells us that they belong to a certain class of things in the world, but provides no insight as to how these particular instances of law fare comparatively within their class. This is consistent with Hart's claim that: "[T]he justification for the use of the word 'law' for a range of apparently heterogeneous cases is a secondary matter which can be undertaken when the central elements have been grasped" .

If we revisit Hart's example of the ovine society with the above arguments in mind, we see that neither the separation thesis nor the tests of legal validity are sufficient to establish whether or not this might qualify as a "central" or "unproblematic" instance of law. But more than this, Hart's arguments are intended to underline that the Thomist

tradition errs in its claim that adherence to morality is the essential test of legal validity. It has not been disputed here that a rule of recognition need not incorporate any reference to moral principles. What is questionable, however, is how much of Hart's concept of law rests upon this single factor. Perhaps the best evidence we have to accept that the definition of a legal system is not exhausted by the rule of recognition and its relationship to the primary rules is Hart's own "warning" to legal theorists:

> [T]hough the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, this cannot by itself illuminate every problem. The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate...elements of a different character (ibid, p. 96).

Hart here explicitly states that law, understood as a system of primary and secondary rules will only elucidate *certain* features of the modern legal system. The model will need to be adapted and expanded upon in order to answer questions beyond whether the forms of a legal system exist in a particular case.

This explicit warning to legal theorists is not heeded in Waldron's analysis of wicked legal systems. He claims that the positive definition of law alone provides insight into the "normal" functioning of legal systems. This is demonstrated by Waldron's insistence that the following passage is "key" to the separation thesis, and thus, assumes that it is also crucial to understanding why a legal system may well turn out to be unjust:

> [T]he step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not .

Hart is referring to the existence of secondary rules *only* and acknowledging that they will generate a puissant instrument of social power. The idea that law may be used to further immoral ends is a poor way to assess many questions that arise in the wake of wicked legal systems because it tells us nothing about whether "those whose support" the regime may "dispense with" are in fact ruled by law.

If there is a passage that is "key" to Hart's views about wicked legal systems, it occurs in the midst of the discussion of why we should consider immoral laws instances of "law." Consider the following passage in which Hart argues against adopting a "narrow" concept of law:[13]

> It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept...If we adopt the wider concept of law, we can accommodate within it whatever *special features* morally iniquitous laws have, and the reaction of society to them. Hence the narrower concept here must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules. *Study of its use involves study of its abuse* .

Though Hart is anxious to move beyond "the proprieties of linguistic usage," his writing betrays an assumption that more detailed analysis of wicked legal systems cannot be attempted until we are able to define confidently the essence of law. This passage says that wicked legal systems are "abuses" of law and possess "special features" that are worthy of examination. At the same time, Hart affirms that these abuses of legality cannot be

fruitfully explored unless we first agree that an iniquitous system of "law" is a live possibility. That is, we cannot begin to discuss a breakdown of legality unless we at least agree that we are dealing with an instance of "law." Beyond the conclusion that it is not incorrect to call a wicked legal system "law," Hart indicates that he would consider wicked legal systems to be less-than-satisfactory, indeed "abusive," instances of law.[14]

Throughout this discussion I have argued that Hart's discussion of why a wicked legal system may be legitimately given "the title of law" is too limited to be able to make any evaluative claims about these cases. Not only is this conclusion unwarranted by the separation thesis, but it will be shown in the following section that there are important aspects of Hart's account of law which strongly suggest that wicked legal systems *may well fail* to satisfy many of the characteristics of a society ruled by law.

Though Waldron's assessment of wicked legal systems delves into questions about the use of coercion as a method to secure compliance, his analysis yields no reasons to doubt that any system that meets Hart's positive definition will qualify as law. In particular, Waldron argues that a legal system functions with the proper authority so long as people "participate" in it. This interesting, though ultimately misleading, turn in Waldron's argument requires careful examination.

Is participation enough?

We have established that if wicked legal systems suffer from any breakdown in legality, their deficiencies are not often found in the system's formal or structural features. Their failings lie elsewhere. Jeremy Waldron argues that we may determine whether a set of rules functions as a legal system by asking whether people "participate" in the system. Not only is Waldron's definition of participation found to be extremely minimal, but it is also not the standard Hart employs when differentiating between "healthy" and "unhealthy" systems of law. Rather, Hart argues that within a "healthy" legal system, people will accept the law and use it as a standard of criticism. I argue that general acceptance of the law is an extremely important aspect of Hart's account of how legal rules ought to function within any given society and may be employed usefully as a standard by which to judge the form of "legal pathology" suffered within many wicked legal systems.

Despite Hart's claim that all we need in order to establish that a legal system exists is that the laws are generally obeyed , Waldron argues that a legal system requires more than mere effective means of application to survive. It is Waldron's view that there is a crucial difference between situations in which a group forces its wishes upon an unwilling population and the settled situation of law. For instance, Waldron claims that an invading army would fail to satisfy Hart's requirements of a legal system, despite the fact that it would likely possess an "organizational apparatus" involving secondary rules (Waldron

1999, p.174). According to Waldron, the reason that an invading army would fail in practice is that the general population would not "participate"[15] in the system:

> [S]urely it is part of the existence conditions of a legal system among a given population that all the members of that population *participate* in some sense in the practices that the system comprises. It is not enough that there be some whose lives are *affected* by the system in question. If coercion is simply force, then we may talk perhaps of a legal system among coercers and their troops: but it will be misleading to say that a system of law exists among the coercers, their troops, *and* those who feel nothing but the sharp ends of their bayonets" (ibid).

Thus, Waldron recognizes that tests of validity are not a sufficient basis upon which to establish the existence of a legal system and encourages analysis of how the rules function within the society.

Waldron explains that the importance of the participation test lies in its ability to establish the boundaries of a system's authority (ibid). That is, he claims that this test enables us to determine why the United States did not share a legal system with the Vietnamese in the 1960's. We could confidently say that the American government exercised a good deal of power over the Vietnamese people during this time, though we

would not say that the American legal system existed in Vietnam. It is Waldron's contention, then, that the United States failed to institute a regime of law in Vietnam because the bulk of the Vietnamese population did not participate in the system.

Upon closer examination, however, Waldron's definition of "participation" is too weak to do the term justice. He reasons that though it would be inappropriate to say that a person participates when they abide by the rules only "to the extent that their physical behaviour is actually forced into conformity by leashes, chains, muzzles, kicks, etc.," nonetheless people are participants even if they comply only "through fear, or compliance for the sake of some pathetic scrap of reward, or compliance based on habit, prejudice, ideology, or false consciousness" (ibid). The only real difference on this account, then, between a participant and a non-participant is that the former is not physically forced to comply with the rules. This account of participation captures some rather unlikely "participants." For example, we would have to say that victims of emotional abuse are participants in the abuse. On a larger scale, many critical legal theorists and feminist scholars argue that the coerciveness found within many legal systems is so insidious because it does not oppress people by using physical force to manipulate them. However, this does not mean that the oppression experienced is any less coercive than if they were physically constrained.[16] At the very least, it seems that in instances such as these, Waldron's definition of participation empties the concept of a participant.

Most importantly, however, participation is not the criterion Hart suggests might best enable us to evaluate the overall well-being of any particular system of law. Like Waldron, Hart would agree that the American legal system did not exist in Vietnam during the 1960's. However, Hart would arrive at this conclusion on different grounds. Acceptance of the rules of the regime, not merely participation in it, is Hart's requirement of any "healthy" legal system. "In a healthy society," Hart argues that the average citizen "accepts [legal rules] as common standards of behaviour and acknowledges an obligation to obey them" . The criteria of acceptance employed here enables one to differentiate not only between "healthy" and "unhealthy" instances of law, but also sheds light on why we can determine conclusively that the American legal system did not exist in Vietnam. The average Vietnamese person did not accept the American's authority and had no *prima facie* obligation to obey United States' law.

Examining law from the inside

There are reasons to believe that Hart's account of "the modern legal system" relies heavily on the notion of acceptance. Though Hart does not think that general acceptance is necessary for a legal system to meet the "minimal" conditions of law ,[17] he nonetheless assumes that a "healthy" or "normal" system will gain widespread acceptance amongst both officials and the population. Hart does not deny that in "extreme circumstances" a majority

of the population might not accept the secondary rules of the system at all, but his reservations here do not necessarily apply to general acceptance of the law's authority.

Widespread ignorance of the secondary rules is also not necessarily an impediment to general acceptance of the system. Though Hart claims that most people will not be able to understand the secondary rules of the system, he refers to the rule of recognition exclusively: "In an extreme case the internal point of view with its characteristic normative language ('This is a valid legal rule') might be confined to the official world. In a more complex system, only officials might accept and use the system's *criteria of legal validity*" It may well be the case that the average Canadian does not understand how a bill becomes law, but this does not necessarily mean that people do not accept the system in some sense. Moreover, the way Hart uses acceptance here suggests that it is necessary to have some intimate knowledge of the rule in order to accept it. Intimate knowledge of the rules is necessary for officials and they will thus be in a much better position to make informed decisions about whether to accept the law or not. Thus, while this definition of acceptance marks the difference between officials' and private citizens' interactions with the legal system, this does not mean that citizens might not still have some reasons for accepting the system and its use of power overall. Even so, it may not be concluded that the average citizen need not accept the rules at all.

Hart argues that someone who does not view the law from the perspective of the "rule-dependent notions of obligation or duty" will think of the rules very differently from someone who views the law as a system of rules. The difference, as Hart sees it, is that the "external observer" will only be able to account for why people obey the rules in terms of a prediction:

> [The external observer's] view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come (ibid, p. 88).

Hart goes on to say that an observer who view the law strictly from this "external point of view" will inevitably come up short in their account of how the rules function within that society:

> He will miss out on a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in

> conformity to rules which make stopping when the light is red a standard of behaviour and obligation (ibid).

The predictive theory of obligation overlooks entirely what social rules typically mean to the people who live under them. For those who adopt the internal perspective, the rules function not merely as *signs* of how things will be done, but as meaningful *signals* of how people *ought* to behave. The complexity of the "internal aspect" cannot be exhausted in a single analogy, though the above example captures what is significant about this element of Hart's concept of law for my present purposes.[18]

Though Hart argues that every society will contain some individuals who do not share in the "internal" point of view, the groups he has in mind are likely to be fairly marginal. Hart recognizes that the "criminal element" and "social dissidents" are unlikely to adopt the rules as standards of right conduct because, for various reasons, the rules are not meaningful significations of acceptable behaviour. However, it is difficult to imagine that many people within a complex, modern society would accept the system out of fear alone. Only extreme anarchists might view the law as nothing more than set of rules that establish a pattern of behaviour rather than regarding the law as a standard of criticism. Further, few criminals are likely to snub the entire mass of legal rules altogether. In effect, the criminal element particularly appreciates the average citizen's obligation to obey the rules and is able to break the law only because there are those who view themselves as

obligated to follow it. With very few exceptions, then, even social dissidents and malefactors will accept the scheme of legal authority, at least to some extent.

It is remarkably clear that general acceptance of the rules is the primary source of legal obligation for Hart. Austin is content to explain obligation solely in terms of fear of threat, but Hart argues that the rules generate legal obligations only when "demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great" . Further, it becomes evident that Hart thinks that the social pressure to generate legal obligation occurs when people view the rules as setting an important "standard of behaviour" (ibid, p. 96). This, in turn, occurs only in those instances where people accept the law's scheme of authority and the normative language shared only by those who view the law from an internal perspective is practiced widely.

One might argue that the "internal aspect" really entails that the laws are viewed as morally justified. People are unlikely to take the laws as a "standard of behaviour" if the rules conflict with moral principles or if they believe that the existing law is not the best possible set of laws. But these need not be the only explanation of why people accept law's authority. Hart provides one way in which we might fruitfully conceive of the average citizen's reasons for accepting the law that involves no reference to morality. For example, he suggests that the ordinary subject of the law will obey it when the rules are "believed to be necessary for the maintenance of social life or some highly prized feature of it" (ibid, p. 85). That is, people will generally lend their support to the system on the assumption that

its laws generally tend to preserve values necessary for the well-being of the society. People may believe certain laws are not morally defensible, but nonetheless accept them as necessary in order to preserve their society.

Thus, Hart's account of legal obligation requires some justifications for the law, though it would be an exaggeration to say that every law must have an explicit justifying reason. Obedience to certain laws, like driving on the right-hand side of the road, are obeyed quite habitually. People almost never question or contest driving on one side of the road or another. But these straightforward co-ordination problems aside, Hart acknowledges that not all laws will be enmeshed with social practices so readily: "[W]here the law runs counter to strong inclinations as, for example, do laws requiring the payment of taxes, our eventual compliance with them, even though regular, has not the unreflective, effortless, engrained character of habit" (ibid, p. 51). In these instances, people will look for and require justifications for the existence of the rule before deciding whether they have any genuine obligation to obey it. This justificatory element is, therefore, a crucial component for any legal system that successfully generates a *prima facie* obligation to obey it.

This account of general acceptance of the law is consistent with Hart's claim that obedience to law is not necessarily a moral obligation. General acceptance, on Hart's theory, rests only on whether or not the laws are viewed as justified by those who are called upon to obey them. People are likely to generate all sorts of non-moral reasons as to why

they are obligated to obey the law: selfishness, ignorance, or political ideology may all be reasons that fuel the acceptance of the legal system within a given society. A sense of moral obligation is, then, only one of a myriad of reasons why people might believe that the laws of their society are justified in their demands.

The normative dimension of a legal system forges a relationship between those who make the rules and those who must follow them. Waldron argues, however, that it is a mistake to confuse the "internal aspect" of rules with the development of "a critical attitude" as that term is normally understood. He explains: "Though Hart refers to the internal aspect as 'a reflective, critical attitude' to a certain pattern of behaviour, he clearly agrees with Winch in insisting that such an attitude does not presuppose explicit reflection in the sense of a specifically *propositional* attitude" (178). Waldron means that the "internal attitude" does not necessarily make the law any more accessible to the average citizen or amenable to her needs: "As secondary practices of deliberation, interpretation and rule-change becomes established in the community, both those practices and the primary rules they validate may begin to seem increasingly distant from ordinary people's ways of life" (178). Waldron is right that most of the serious deliberation about law will happen at the level of officials, but it is difficult to conceive a society in which primary rules of obligation do not at times cause people to reflect upon the soundness of what the law requires them to do.

What then of Hart's claim that the bulk of a population might obey the law for "any reasons whatsoever"? Hart elaborates on this point later in the book, where he says that allegiance to a legal system may be grounded in a number of competing motivations, including: "disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do" (ibid, pp. 198-9). It is significant that fear is not mentioned as a reason for why people obey the law, and it is also clear that Hart thinks that the average citizen will have some fear-independent reasons and motivations for obeying the law. Also, like so much of *The Concept of Law*, Hart's comments are best understood within the explicit theoretical concerns contemporary with the work. In this instance, Hart explicitly argues against the Thomist claim that a legal duty is necessarily a moral one (ibid, p. 199). By surveying the gamut of competing motivations people might have for obeying the law, Hart hopes to convince his reader that reasons for obedience are not nearly so single-minded, virtuous, or straightforward as the natural law Theorist presupposes.

Before leaving this aspect of Hart's theory, I think it important to point out that this reading of the role of acceptance in *The Concept of Law* provides a more sophisticated response to why the following passage provides an inaccurate account of the differences between Hart's and Austin's views of law:

> For Austin the proposition that the speed limit in California is 55 is true just because legislators who enacted that rule happen to be in control there; for Hart it is true because the

> people of California have accepted, and continue to accept, the scheme of authority in the state and national constitutions .

Dworkin's account of Hart's work is crude not because it highlights the element of general acceptance in *The Concept of Law*. Rather, the deficiency of Dworkin's account lies in its failure to recognize that Hart thinks that the element of general acceptance, while immensely important for the health of a legal system, is not actually present in every instance of "law." However, by the same token, it would be equally negligent to suggest that a legal system in which general acceptance of the rules was confined to officials alone is a "healthy" instance of law.

Exploration of this aspect of Hart's work provides a real answer to Radbruch's foremost concern with positivism. Though Hart never denies that a legal system is a coercive force in any society, he does not equate law with coercion. When Hart writes that the introduction of secondary rules is as crucial to society as the development of the wheel, he refers to the advent of a whole new way of conceiving a system of law as a method of social control. That is, a legal system for Hart is a system of rules that manages to "guide" behaviour, not merely coerce people into doing what they are told.

Hart's account of a legal system is not limited to the examination of the formal features of "law." Nor does he conclude that it is enough for the citizens to be controlled effectively by the law. A legal system is "healthy," Hart argues, when the law gains some

acceptance within society at large and its use of coercion is generally viewed as justified. This requires that people "participate" in the system to a much greater extent than Waldron argues is necessary; the system will not be healthy if the majority of the population obeys the law out of fear, false consciousness or other forms of manipulation. Of course, an unhealthy legal system might satisfy Hart's minimal conditions, but such a system could hardly be said to satisfy the conditions required in order to be considered a "central" or "unproblematic" instance of law.

Conclusions

Thus far I have endeavoured to show that Hart's theory of law is not concerned only with the forms of law. Though Hart focuses a great deal on his structural account of a legal system and its implications for how one determines legal validity, this aspect of Hart's theory ought not to be taken as the "key" to the problem of wicked legal systems. The reason for this conclusion is that Hart's positive definition of a legal system provides us with a relatively reliable set of existence conditions by which to test for the forms of law, but it must be buttressed with some account of why legal rules are accorded a special status within any society in order to satisfy fully our demands for an explanation of what law is. These are questions which Hart treats as "secondary" issues in *The Concept of Law*, but they are not altogether excluded. Hart argues that a legal system functions properly within

a society when the rules are generally accepted within the society. We have seen that general acceptance, as Hart understands it, requires that people have some reasons, either prudential or moral, to view the law as a justified use of authority. Only then will the rules function as a normative standard of behaviour within the society. Hart's account of legal obligation depends upon the idea that the laws are accepted by at least some of the population.

It is abundantly clear that the ovine society is compatible with Hart's formal definition of a legal system. It is inappropriate to conclude on these grounds that it matters little in our assessment of this system by what means it achieves its objectives. Yet, this is the conclusion at which Jeremy Waldron arrives:

> [P]rimary rules come to have a presence in the lives of those subject to them that is quite different from their role in pre-legal society. On the one hand, ordinary people will not necessarily have the intimate familiarity with the rules that they used to have; they will be, in that sense, alienated from the rules. And the rules will begin to impact on their lives as much through a dedicated apparatus of coercion as through the normative to-and-fro of a shared internal attitude, perhaps even more so .

Rather, it is clear that when there are people who obey laws that they have no reason to accept, the rules will fail to function in the proper manner. We should regard instances where the law alters behaviour only through "a dedicated apparatus of coercion" as unhealthy instances of law. Their pathology lies squarely in their failure to guide behaviour effectively by rules. The ovine society might have the form of law, but precious little of the characteristics of a society ruled by law.

The question still confronting us is how this account of Hart's concept of law really influences our understanding of wicked legal systems. In the next chapter I take up another recent paper that extrapolates from Hart's claims in *The Concept of Law* in order to construct an account of "legal evil." I now turn to examine this positivist account of legal wickedness.

THE HALLMARKS OF LEGAL EVIL

In the previous chapter, we saw that Hart's account of law invites the live possibility that wicked legal systems are pathological legal systems. We have yet, however, to discover the nature of this pathology and how it might affect the normal functioning of a given legal system. The purpose of this chapter, then, is to examine the nature of "legal evil" and in what ways it leads to a deterioration of legality. Expanding on the idea that a legal system requires voluntary acceptance of at least some of those it purports to control, I will argue against the view that "legal evil" is as simple as imposing the desires of a ruling class upon an emasculated population.

Matthew Kramer argues that the designation "x is a legal system" should be granted regardless of whether it is accompanied by any claim-to-moral-authority . Kramer tries to topple Joseph Raz's contention that the only way to distinguish between the coercive force exercised by a gunman over his victim and a legal system over its subjects is that the latter "presents itself as justified and demands not only the obedience but the allegiance of its subjects" . Kramer then develops an account of "legal evil" that allows absolutely no possibility that the power exercised is considered morally justified by either the system's officials or its citizenry. Kramer claims that this picture of legal evil is perfectly compatible with Hart's concept of law and the account of wicked legal systems developed therein. I argue that Kramer's account of legal authority is not compatible with Hart's

theory of law, nor does it accurately capture the concept of "legal evil" implicit in Hart's account of immoral legal systems. The difference between Kramer's account of wicked legal systems and Hart's is that the latter believes that legal norms must receive some voluntary acceptance at both the level of officials and citizens and that it is this element of general acceptance that best captures so much of what gives a legal system its authority and so makes it a potent instrument of legal power. This may make a legal system a dangerous force.

Two positivist views of legal authority

In *The Authority of Law*, Raz argues that the law establishes its authority on the basis of some claim to moral legitimacy. This claim, Raz argues, is a necessary condition of *de facto* authority:

> By normal usage mere *de facto* authorities, authorities who rule over their subjects but do not have a right to rule, are included among authorities. Many have seen this as proof that an authority cannot be distinguished from a gunman by reference to a right to rule, for both may lack it. This is a *non sequitur*. While both may lack it, *de facto authorities* are characterized by their claim to have it...it is the claim

> of legitimacy that is a condition of the possession of *de facto* authority" (quoted in Kramer, 390-1).

Kramer aims to show that one may develop an account of a legal system, albeit an evil one, in which no such claim-to-moral-authority is present but in which all of the "hallmarks" of a legal system are present.

Before turning to Kramer's account of "legal evil," however, it is first necessary to place his argument in the context of the debate between Raz and Hart. As we saw in the previous chapter, Hart argues that a legal system may be established in the absence of any coinciding claim of moral authority. In the strictest terms, the right to rule, as Hart understands it, is established by the rule of recognition and not by any claim-to-moral-authority. That is, the right to rule is the "notion of a rule defining what must be done to legislate; for it is only in conforming with such a rule that legislators have an official capacity and a separate personality to be contrasted with themselves as private individuals" (78). However, Hart repeatedly stresses that the reasons which both officials and citizens may have to act in accordance with the law may be wholly selfish and morally bankrupt, so that these do not require any positive judgment as to the moral soundness of the laws.

The conclusion that Kramer would have us draw from Hart's work is that there is nothing within Hart's conception of a legal system that provides any "conceptual impediments" to wicked legal systems. Further, it is Kramer's view that all of the required features of law that factor into Hart's account of law strictly amount to the means essential

to constructing a system of general, stable, and relatively flexible rules. Kramer sums up Hart's claim that the law is not a "gunman-writ-large" thus:

> the key difference pertains to the means by which the demands are articulated and imposed. Whereas a gunman almost always issues his orders to a highly limited set of people for a highly limited stretch of time, a system of governance that counts as a full-fledged legal regime will have imposed its requirements through various sorts of norms...that typically apply to indefinitely numerous people for long periods of time (392).

According to Kramer then, it matters only whether the rules establish an enduring pattern of behaviour amongst a population by means of a set of general norms. The nature of the norms, insofar as general acceptance is concerned, is of no real moral consequence.

Further, Kramer argues that once we eschew the idea that legal authority owes its existence to some claim to moral authority, we see that a legal system may in fact be composed of two types of norms. As it is necessary for officials to remain faithful to the system and act in accordance with the law, they will require some reason to accept the law as a standard of behaviour. Officials must view the law as something they "ought" to obey and so they must view the secondary rules as a set of prescriptive statements. But on Kramer's definition, a prescriptive "ought" or "should" statement may provide the

addressee with either moral or prudential reasons for compliance. In order to show that Raz is mistaken in his contention that officials must view the law as a source of moral obligation, Kramer argues that it is possible that the officials of a system might have purely prudential reasons for obeying the law.

Bearing in mind Hart's claim that only officials need accept the laws as a general standard of behaviour, Kramer claims that it may be that the general population has no reasons, moral or prudential, to accept the law at all. They may view the law as a set of strict imperatives, defined by Kramer as: "a requirement [that] is grounded not in morality and not essentially in the interests of the addressee but essentially or exclusively in the interests of the addressor" (Kramer 1999, p. 384). Though Kramer acknowledges that officials must have some reasons to accept the norms and use them as a general standard of behaviour, he argues that it is conceivable that a legal system might function adequately even if "the relationship between officials and citizens [is] one of stark imperatives and obedience" (ibid, p. 392). The only reason that the average citizen would obey the law is out of fear.

Kramer accepts that this account of legal evil leads to some rather "outlandish" examples of legal systems. Orders issued by a well-organized Mafia might well exemplify an instance of "legal evil," were it evident that their organization contained a system of primary and secondary rules and met some test of general efficacy. Kramer even goes so far as to suggest that warring factions within the former-Yugoslavia might also be

considered legal systems, if they too managed to establish a set of "norms that exhibit the indispensable characteristics of generality, durability, and regularity" (ibid, p. 395). Kramer is prepared to acknowledge that there is no *prima facie* reason to deny the possibility of a legally organized mob if we accept that a "claim-to-moral-authority" is not required in order to establish the coercive force of law.

These examples lead us to believe that the very idea of "legal evil" is exemplified in situations where the leaders act wholly selfishly and make no attempt to provide justifications for their actions. I think that this account of wicked legal systems may well over-simplify what "legal evil" means, especially in Hart's work. It is not simply that the Nazi's *Judenrechts* were deemed valid legal rules, but that they held the authority and title of laws. They were thus accorded a status and respect not only amongst party members, but also within the society at large. This is an extremely important aspect of legal evil that needs to be explained, not simply explained away as an inconsequential side effect of immoral laws. We shall see that Hart's account of the important role of general acceptance, developed in the first chapter, is intimately connected with his account of legal authority.

In what follows, I argue that there is a serious problem with Kramer's reading of Hart and his account of legal evil. That is, he adopts the "austere external point of view" that Hart thinks leaves out many important aspects of life under law. I shall employ Hart's thesis that an "internal point of view" should develop in tandem with the rise of a system of primary and secondary rules to re-evaluate "legal evil" from a positivist perspective.

Authorized wickedness

One of the essential features of Hart's concept of law is that the law provides not just a set of rules that are generally obeyed, but that these rules generate prima facie obligations to obey them. In the previous chapter, it was argued that it is only when rules develop an "internal aspect" that they become normative standards. The law is, in turn, treated as a system of obligatory action-guiding norms when they are generally accepted by those whose conduct they control. The element of general acceptance is not left out of Hart's account of wicked legal systems. Hart argues that one of the reasons a legal system may become an instrument of grave social injustices is because its immoral rules are accepted by a "sufficient" number of the population: "It is true...that if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established" . Even in the most wicked instances of legal systems, the element of authoritative use of power is required. The idea that law may exist in the absence of authority is fantastic.

Authority behind the use of legal coercive force is altogether absent in the gunman scenario. We have seen that this element of a legal system cannot be established simply by *any* set of norms that is general, stable, and durable, but arises only within situations where legal rules are viewed as reasons for acting in accordance with them. It will be shown that

"strict imperatives" are incapable of generating legal obligation because they fail to provide appropriate reasons to obey the law.[19]

The problem with Kramer's imagined coercive system of rules is that it fails to explain why citizens and officials of a system have any obligation to obey the law. Rather, obligation can only be explained on Kramer's model of "legal evil" by resorting to the predictive theory of obligation, which explains obedience to law soley in terms of the fear of threat and subsequent avoiding action. But Hart clearly rejects such a predictive theory of obligation as conceptually inadequate.

> The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of hostile reaction to deviation, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person's case falls under such a rule .

A legal system understood as a system of social rules, may not be comprised solely of "strict imperatives." For were this the case, people would view their obligation to the law as nothing more than an exercise of calculating the chances of being caught, rather than as a set of norms that factor importantly into how one "ought" to act.

Hart does not forget his account of legal obligation when he takes up the question of wicked legal systems. In his discussion of why the separation thesis is useful to the average citizen, Hart assumes immoral laws cause moral and legal obligations to conflict. Though the early positivists endorsed the separation thesis in order to prevent people from referring to their consciences instead of the written law, Hart argues that his predecessors overestimated the threat of anarchy. Instead, Hart argues that the real social utility of the separation thesis is that it enables individual agents to become clearer thinking moral agents.[20] But whether or not the law is immoral is not the only question Hart thinks confronts the average legal subject: "[B]esides this moral question of obedience (Am I to do this evil thing?) there is Socrates' question of submission: Am I to submit to punishment for disobedience or make my escape" (ibid, p. 206)? Within a normally functioning legal system, then, we may assume that evil laws not only raise questions of moral obligation, but also confront subjects with difficult questions of legal obligation.[21] This explains why Hart thinks that Bentham and Austin overestimate the danger that too much moral consideration of the laws will result in anarchy; rebellion is only a real threat if the laws mean nothing more substantive to the average citizen than the threat of sanction. That a norm is recognized as law by the rule of recognition and bears the "hallmarks" of law as Kramer defines them hardly begins to explain why an evil law should generate anything like the difficult decision-making process Hart assumes will occur for the average citizen. Hart is thus working with a concept of legal obligation that is much closer to moral

obligation than fear of threat. Though Hart carefully points out that legal obligation may stem from either moral or prudential reasons, he assumes that the laws will provide *some* reasons for compliance sufficient to generate legal obligations.

The idea that legal evil requires some level of acceptance within the community is consistent with the examples Hart discusses of wicked legal systems. The values influential in the iniquitous systems Hart discusses—slavery in America, South Africa under apartheid, and the Nazi regime—were not simply imposed upon the entire country. Rather, the values that drove the legal policies in these instances found some currency and acceptance within society at large. This is the point that Hart makes in his reference to the Huckleberry Finn example ;[22] within that community it was commonly accepted that blacks were not worthy of the same respect as whites.

Though fear of sanction provides a prudential reason for people to comply with the law, it is not sufficient to establish legal duties. For one thing, the normative language generally associated with law is born out of acceptance of the rules: "I ought to pay my taxes," "I have an obligation to pay my taxes," or "You have an obligation to pay your taxes" are ways of talking about the law that would not be used in the evil system Kramer describes. The Mafia might succeed in establishing a discernable pattern of behaviour, but nothing more. Fear of threat is incapable, on its own, of instantiating a coercive set of commands as a normative standard of behaviour.

The problem with the idea that a legal system might be composed of strict imperatives is that obligation would inevitably amount to little more than fear. This reduces the idea of "having an obligation" to an emotional state. As Hart points out, having an obligation is not the same thing as *feeling obliged* because obligations cannot be explained solely in terms of emotions . The rationale behind this claim may be clarified by an example: x may have an obligation to pay her taxes, but the acceptance of this obligation may not be accompanied by a particular set of beliefs or motivations about paying her taxes. She may think that the tax laws are unfair or even immoral, though she still recognizes her obligation to file a return every year. It is one of the important features of a legal system that it establishes identifiable legal obligations that may be justifiably enforced regardless of whether those to whom the law applies happen to feel so obliged. It is a fact of the matter that Canadian citizens are legally obligated to pay taxes, regardless of whether this requirement generates any feeling of obligation. Fear that we will be punished for not paying is also insufficient to establish a *prima facie* obligation to pay our taxes; we have an obligation to do so regardless of whether we are afraid of the penalty for disobedience. A legal system in which fear of sanction provides the *only* reason to conform will not create any obligation to obey it.

Pace Kramer, it seems that Hart makes explicitly clear the fact that if any sort of rules, including legal ones, are to function as "guides for action" within a society, they must provide their addressees, officials or "private citizens," with sufficient reasons for

compliance. The very idea that a legal system might compose a vast number of rules that provide no reasons, either moral or prudential, to obey them is at odds with Hart's account of how legal rules function within a "healthy society" as a set of social norms. Though it is abundantly clear that Hart thinks the mafia controlled system is highly compatible with his structural account of law, it is not likely to be consistent with his account of how laws ought to function within a society. The appropriate conclusion to draw from the fact that there is a possibility that the structure of a legal system might be used in so coercive a manner is not that it matters little to our understanding of a legal system by what means its rules gain efficacy within a society. It is clear that within a society where people are obeying rules solely out fear, they will also fail to function as social rules. We should, then, regard instances where the laws function in this way as "pathological" cases of law. But more than this, we may now confidently conclude that the nature of the pathology lies squarely in the fact that the laws fail to guide behaviour effectively by norms.

If we reflect on Kramer's account of "legal evil," then, we see that the internal aspect of rules Hart thinks crucial to the maintenance of a legal system is altogether lacking. Though it is undetectable from the external perspective whether or not the rules are functioning as rules of duty or obligation, the inclusion of this internal perspective is crucial to Hart's account of law: "One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of

view and not to define one of them out of existence" . To exclude the internal point of view from one's assessment of a legal system, wicked or benign, is to revert to a much less sophisticated notion of rule-guided behaviour that does not take into account the obligatory nature of social rules or law. Furthermore, Hart claims that it is the great failing of Austin's theory that it tries to develop a notion of legal obligation based upon the view that rules are simply orders-backed-by-threats.

Jeremy Waldron provides a picture of "legal evil" that is more akin to the sort of iniquity characteristic of "legal evil": "The advantages of law...accrue to those who already benefit from primary rules of obligation...Persons who are worse off as a result of existing primary rules are unlikely to become better off as the regime of rules is modernized" . Indeed, Waldron goes on to conclude that given the institutional dimensions of a legal system, the system may find it possible to inflict even greater injustices than is possible in a system of primary rules: "For it may present, in the mechanisms of specifically legal administration, new and efficient ways of subduing, exploiting, or otherwise maldistributing the benefits of social organization" (ibid). This is an important glimpse into the complexities confronting anyone who wishes to expound a view of "legal evil" that truly reflects the unique dimensions of the situation. This idea might be expanded upon in a number of interesting ways and from the perspective of different participants within the system. Officials, for example, may be more likely to undertake

immoral actions when demanded by law. So too does it seem plausible that ordinary citizens might be more tolerant of grossly immoral acts perpetrated in the name of "law."

To take note that the law might be used to augment social injustices is, however, only the first step in understanding the nature of legal coercion within wicked legal systems. Leslie Green makes the astute observation that "few" scholars "have given enough thought to the ways in which the specific character of law contributes to its power. It is not enough to remind us of the facts of class, hierarchy, patriarchy or disciplinary regimes". That is, there are difficult questions about the way power is used and manipulated within systems like the Nazi's or South Africa's under apartheid. These systems used the force of law in order to create categories of people, raising further questions about the law's "productive uses of power." As Green explains,

> classification systems... create subjects, kinds of people, who can then be regulated in other ways. Of course, the informal social order does this too, but when productive power becomes imbued with the authority of law it raises the stakes enormously .

As a purely structural account of a legal system leaves the questions of legal authority unanswered, it can provide no insight as to why we ought to be especially concerned when these social classifications and stratifications are supported, upheld, and diffused through the legal system. Exploitation of one population requires sympathy toward the exploiters;[23]

a legal system, with its power to garner authority for its demands, is thus frighteningly well-suited to pursue iniquitous aims.

There is one final point Kramer's analysis of legal evil overlooks. A legal system that lacks this internal aspect of rules is unlikely to endure as a stable system of rules for very long. Where the law is not conceived as a standard of behaviour, it is unlikely that people will remain faithful to the laws and encourage others to do so. Without a sense of obligation to the legal system, it will inevitably teeter on the edge of rebellion and collapse. The stability of a legal system, then, is not generated simply by the existence of secondary rules. Rather, the system becomes an entrenched social institution only when it earns the respect of at least some portion of the population.

Reflection on Kramer's account of "legal evil" reveals that the internal aspect of rules that is crucial to the maintenance of a legal system is absent. Kramer's examples of wicked legal systems demonstrate only that it is possible to employ Hart's structural model of law to establish a general pattern of behaviour. To exclude the internal point of view from one's assessment of a legal system is to revert to a much less sophisticated notion of rule-guided behaviour that does not recognize the importance of legal obligation. But to develop an account of "legal evil" without asking questions from the internal point of view is to ignore altogether one of the great challenges of post-Austinian positivism: "One of the difficulties facing any legal theory anxious to do justice to the complexities of the facts is to remember the presence of both [the internal and external] points of view and not to define

one of them out of existence" . Kramer's account of "legal evil" may be faulted, then, for not looking closely at wicked legal systems from the inside-out.

The above account of Hart's view of legal obligation goes well beyond the details given in his structural account of law. Rather it delves into an account of "descriptive sociology" in which the functions of a legal system are detailed. Yet it is this important functional aspect of Hart's concept of law that is altogether absent in Kramer's description of "legal evil." Reduction of law to its bare structural characteristics obscures many of the unique features of how a society ruled by law differs from one in which norms have no official presence in the community. Furthermore, it is only by eschewing the view that laws function simply as predictions of behaviour and reintroducing the concept of rules as norms that set standards of behaviour that Hart is able to develop his more sophisticated account of law as a system of primary and secondary rules.

Reinforcing this functional aspect of Hart's account of law enables positivists to defend his theory against the criticism that *The Concept of Law* fails to provide any substantive account of the rule of law. Fuller, for example, argues that Hart's theory misses the complex social aspects of a legal system by presenting the concept of law as an artificial and oversimplified structural model: "A basic error of method permeates," Fuller claims, "Hart's whole treatment of the rule of recognition. He is throughout attempting with the aid of that rule to give neat juristic answers to questions that are essentially questions of sociological fact" . However, we have seen that Hart's account of law as a system of

primary and secondary rules has much to commend it in terms of its explanatory power. Hart's account of how the secondary rule of recognition allows for the transfer of legal authority from one legislator to another without disrupting the entire system of rules, for instance, fits well with how legal power is transferred from one leading party to another in modern legal systems. But Hart's functional account of a legal system does not stop here. Rather, his entire concept of law is built on an account of social rules that ultimately explains why laws are, in most cases, viewed not simply as predictions of evil but as genuine sources of obligation, standards of criticism and evaluations of conduct.

Before turning to examine whether the rule of law is alive and well within wicked legal systems, however, I think it important to note that the account of legal authority discussed in *The Concept of Law* is much more complex than Kramer presumes. The rise of legal authority depends as much upon a particular set of social circumstances as it does upon the particular structural features of a legal system. Kramer's discussion of the Mafia usefully points out that the barest positive definition of Hart's account of law—a system of primary and secondary rules—is an organizational apparatus that is compatible with many forms of rule that do not easily fit with the "settled" situation we most readily associate with legal systems. It seems then not unreasonable to say that much of what makes Hart's version of this particular apparatus such a rich explanatory device is his discussion about how legal rules may be expected to function within a society.

I have to this point tried to develop Hart's view of law in a way that provides insight into wicked legal systems as pathological instances of law. By carefully circumscribing his account of the separation thesis and by revealing the limitations of his account of legal validity, I argued that Hart does not conclude that wicked legal systems are necessarily "central" instances of law. Further, I have tried to show that Hart's account of law rests upon a notion of social rules that palatably explains obligation to law in a manner that rests neither on a claim-to-moral-authority nor an account that reduces rules to commands-backed-by-threats. These two claims, taken together, ought to leave even loyal positivists with some reservations about the conclusion that wicked legal systems are central instances of "law."

Conclusions

This chapter has argued that Kramer's account of "evil legal systems" is insufficient. The difficulty with his model of "legal evil" is that it takes Hart's structural features as the *sole* measure of legality. It has been argued that, though Hart focuses a good deal on the structural features of a legal system, these features are not sufficient to establish what Hart considers a "healthy" system of law. The problem lies in Kramer's claim that the efficacy of the rules is the standard positivists think necessary to judge whether a legal system is actually functioning as a system of law or not. I have argued that Hart's view of how a system of rules ought to work revolves around his claim that the laws

will be regarded as a standard of criticism and generate obligations to obey them. The laws must be more than simply effective means by which to alter behaviour in order to function in the manner that Hart says rules ought to function. Rather, the laws must meet some test of general acceptance in order to be regarded as a standard of criticism and a genuine source of obligation. These two elements of Hart's account of law are not directly derived from his view that law is essentially a system of primary and secondary rules, but rather from his discussion of laws as a species of *social rules*. While it is undeniable that the Mafia might succeed in developing a set of rules that contains the forms of a legal system, it would not, in Hart's analysis, satisfy an important element of a normal legal system; for as Kramer himself claims, those who are called upon to obey the Mafia's "laws" will have no reason to accept them and thus no reason to view the laws as a justified standard of behaviour or as a source of obligation.

I have further argued that fear alone is not a sufficient reason for people to obey the law on Hart's account of a legal system. Though Hart argues that people may obey the law for a myriad of reasons, including selfish ones, he also argues that under normal conditions, the rules of a legal system will be viewed as more than mere predictions of punishment. Instead, Hart explains that the rules of a legal system will develop an "internal aspect" for average citizens as well as officials. This "internal aspect" of rules is crucial both to Hart's understanding of how officials interact with the secondary rules and his account of why primary rules of duty establish obligations to obey them. Given that this obligatory element

explains so much of the normative force typically associated with law, it has been argued that the complete lack of this "internal perspective" amongst a portion of the population is the legal defect caused by morally iniquitous laws. Given these claims, Hart's positive definition of a legal system should not be taken at face value. Hart's structural account of a legal system relies on claims about how legal rules ought to function under normal conditions. That is, under normal conditions, one expects to find the rules of a society functioning foremost as a standard of behaviour and only secondarily as a system of coercion. Just as Hart is concerned to demonstrate that "law is not morality," he also shows that "law is not coercion."

These functional elements of Hart's account of law have perhaps been underemphasized in discussions about wicked legal systems because functionalism is so heavily associated with natural law theory. Thus, it is tempting for a positivist to eschew any talk of "functionalism" because of the term's connection to Aristotle's notion of teleology that is celebrated by traditional natural law Theorists. It seems, then, that to discuss how the law ought to work is necessarily to admit that the definition of law is necessarily dependent on some view of morality. Aquinas and Finnis, for example, argue that it is the function of law to strive to achieve the "common good" and any legal system which does not serve this moral purpose lacks the essential character of law. Natural law theorists argue that law cannot be understood functionally without collapsing the distinction

of law and morality; a functionalist account of law dissolves, then, *the* central tenet of the positivist tradition.

However, this does not mean that one cannot proffer an account of how a legal system works without drawing on a teleological conception of the universe. Lon Fuller, for example, develops an account of how the law works without making any assumptions about the final ends or goals of a legal system.[24] Rather, Fuller argues that the purpose of a legal system is procedural rather than substantive; that is, the ultimate aim of a legal system is to "guide people by rules." More than this, Fuller claims that Hart is not only the first positivist to appreciate fully what is involved in "guiding" people's behaviour, but also claims that it is only with Hart's work that the discussion about "what law really is" finally "takes a new and promising turn" . And yet, Fuller expresses disappointment with Hart's improved account of legal positivism because he says that Hart fails to appreciate the moral implications of his own argument. This dispute about the functions of a legal system will be investigated in the next chapter.

GUIDING BY RULES, NOT MORALITY

This chapter returns to a question that arises out of the original debate between Hart and Fuller that has been overlooked in contemporary literature on wicked legal systems. I have concluded that Hart's account of law rests on the idea that within a "normal" system of law, people will generally accept the legal system and view it as a standard of behaviour. Fuller focuses intensely on this aspect of Hart's work in order to show that there is a practical connection between law and morality. The construction of a system of normative rules imposes inescapable moral duties upon those who make the law. Thus, Fuller's challenge to Hart may provide reasons to think that the separation thesis is mistaken.

Hart's account of a "healthy" legal system involves the idea that people generally accept the laws and use them as a standard of criticism. As a result, it has come to light that not just any system of primary and secondary rules that manages to establish a general pattern of behaviour will satisfy Hart's definition of a "normal" system of law. Fuller challenges Hart's contention that it is possible to develop a morally-neutral account of law that involves a normative account of legal rules. Fuller claims that even if we reject the traditional natural law theorist's contention that law must strive to achieve justice or "the common good" and instead focus on the inner-workings of a legal system, we will nonetheless be forced to concede that there is a connection between law and morality. In

short, Fuller hopes to show that a sophisticated account of how law functions as a mechanism of social control reveals that procedural morality is what makes law possible.

Though it is found that Fuller fails to show that the procedural principles necessary for making law constitute a morality, he nonetheless provides valuable insight into the significance of recognizing a legal system as fundamentally a system of action-guiding rules. It is Fuller's contention that guiding by rules requires that people have a moral duty to obey the law. However, "fidelity" to law will only occur if, Fuller argues, legislators recognize their obligations to make laws that adhere to certain procedural principles. This account of legal obligation relies heavily upon the relationship that develops between citizens and the law. Thus, Fuller argues that Hart fails to recognize the constraints that guiding by rules necessarily imposes upon those who undertake the "craft" of legislation.[25] Wicked men may succeed in using "the forms of law" to oppress others, but Fuller argues that they will inevitably fail to establish the rule of law. On this view, it is an empty claim that a wicked legal system has ever actually existed.

This chapter proceeds as follows: I explore Fuller's reasons for why procedural propriety constitutes an "inner morality of law." Hart's seminal criticism of Fuller's purposive account of law is then explored and critically evaluated. Hart's critique of Fuller's "internal morality" argument is found to be enlightening and persuasive in light of various iniquitous laws in both the Nazi and South African cases. Hart's arguments against Fuller's position, however, raise further questions about how important legal obligation is

to his positivist concept of law. Though Fuller's claim that the procedural elements of a legal system necessarily draw a connection between law and morality is indeed problematic, the idea that a legal system meets necessary functional requirements if it succeeds in creating a genuine obligation to obey it cannot be so easily dismissed. It will be shown that one may disagree with Fuller's claim that procedural requirements are *the* connection between law and morality without discrediting his claim that a necessary condition for the existence of a legal system is that the rules genuinely "guide" behaviour.

Fuller's challenge to Hart

Fuller claims that his view of law shares some common assumptions with Hart's concept of law. However, the differences between their theories are hardly subtle. Fuller's account of law is not conceptual, but rather based on practical insights about how a legal system works. Hart, by contrast, is primarily concerned with expounding a definition of the concept of law by determining necessary and sufficient conditions for the existence of a legal system. Most importantly, Hart argues that there is no connection between law and morality, while Fuller argues that law is essentially a "moral enterprise." It is thus not surprising that the idea that these two thinkers share any important views about the nature of law is dubious.[26]

However, the commonality between Fuller's and Hart's theories of law lies in the fact that both think that a unique feature of law is that it is capable of "guiding behaviour by rules." As we have seen in the preceding chapter, Hart's development of the "internal aspect" of rules relies heavily on the idea that laws are normative – they act as "guides to conduct" – and under "normal" circumstances, Hart argues, it is primarily because of this normative dimension that people obey the law. That is, people view the law as a set of guidelines that establish permissible and impermissible conduct. Like Hart, Fuller also says that the normative element of law is an extremely important aspect of any legal system and applauds Hart's efforts to undermine the idea that laws are merely orders-backed-by threats. Fuller argues, then, that both he and Hart agree that one of the hallmarks of a society ruled by law is that the law functions as a set of rules.

In spite of discovering this common ground between his work and Hart's, Fuller finds a serious fault in his opponent's account of law. According to Fuller, Hart's account of law fails to grasp fully what is required of officials and citizens in order for a legal system to guide behaviour by rules successfully. Fuller argues that rejecting the command theory should have pushed Hart in the following direction:

> I confidently expected [Hart] would go on to say something like this: I have insisted throughout on the importance of keeping sharp the distinction between law and morality. The question may now be raised, therefore, as to the nature

> of these fundamental rules that furnish the framework within which the making of law takes place. On the one hand, they seem to be rules not of law, but of morality. They derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary...On the other hand, in the daily functioning of a legal system they are often treated and applied as much as ordinary rules of law are. Here, then, we must confess there is something that can be called a 'merger' of law and morality....

Fuller argues that Hart does not draw the right conclusions from the claim that law is foremost a system of rules. To admit that law is composed of such "fundamental rules," not commands, is also to accept that there is no "sharp" distinction between law and morality.

Fuller makes the moral implications of "guiding by rules" abundantly clear in his analysis of why Austin clings so adamantly to the command theory:

> Over and over again teeters on the edge of an abandonment of the command theory in favour of what Professor Hart has described as a view that discerns the foundations of a legal order in 'certain fundamental

> accepted rules specifying the essential lawmaking procedures.' He does not take the plunge because he had the sure insight that it would forfeit the black-and-white distinction between law and morality (ibid, p. 73).

The claim that there is no necessary connection between law and morality cannot, Fuller argues, be salvaged if we accept that at the center of a legal system are "accepted rules" rather than simply unlimited political power. Law, understood as a system of *rules*, necessarily shares more than a contingent connection with moral principles.

This "merger" between law and morals occurs most obviously at the level of legislation. Once we realize that the purpose of a legal system is to "guide by rules," then certain practical constraints upon the "craft" of legislation begin to emerge. Taking guidance by rules as the ultimate purpose of a legal system, Fuller expounds an account of procedural constraints necessary in order for the law to achieve this purpose. If the ultimate purpose of a legal system is to create rules that are capable of guiding behaviour, then Fuller argues that there are eight procedural principles by which any successful legislator must abide. Together, Fuller claims that these principles constitute an "inner morality of law" or "the morality that makes law possible". Briefly stated, this "inner morality of law" is comprised of the following eight procedural principles:

1) generality
2) promulgation

3) prospectivity
4) clarity
5) consistency
6) reasonable in their demands
7) constancy
8) applied by officials in a manner that is congruent with the written or declared law

Fuller argues that these principles must be heeded in order for the rules to serve as effective guides of conduct within society. It stands to reason that people simply cannot follow laws that are retrospective, contradictory, secretive, or constantly changing. Thus, Fuller concludes that adherence to these eight procedural principles is necessary in order to construct a system of rules that will guide behaviour.

However, Fuller argues that these procedural principles deserve the title of a morality because they introduce moral constraints upon legislators. The goal of the legislator is not simply to produce a system of social order, but a particular mechanism of social control that guides rather than coerces behaviour. A system that guides behaviour, in turn, will be one that is worthy of not merely the citizen's obedience, but their "fidelity" . This leads Fuller to the conclusion that the very principles that make legal order possible will at the same time ensure that the system strives to achieve good or just ends: "As we seek to make our order good, we can remind ourselves that justice itself is impossible without order, and that we must not lose order itself in the attempt to make it good" (ibid, p.

80). In another passage, Fuller claims that there is an "affinity" between justice and order (ibid, p. 71), such that the construction of a social order is an important step toward ensuring that the order itself is just.

Though Hart acknowledges that a legal system imposes duties upon the citizen, he does not acknowledge that the rule of law imposes any corresponding duties upon those who make the law. In fact, one of the important distinctions Hart draws between primary and secondary rules is that the former imposes duties, while the latter confers certain powers upon officials. One of Hart's earliest definitions of primary and secondary rules explains the difference between the primary or "first type" and secondary rules thus: "Rules of the first type impose duties; rules of the second type confer powers, public or private" . As Hart's analysis of law progresses, it becomes ever clearer that this model of a legal system allows for no real substantial constraints on legislative powers. The best evidence of how little constrained Hart thinks lawmakers are is made transparent by his claims that even wicked men may use the forms of law and that the sheep might be led to the slaughterhouse *by* the legal system.

Fuller argues that slaughterhouse politics are absolutely incompatible with the rule of law. In his view, Hart reaches this outrageous conclusion only because he overlooks the safeguards that *do* exist within every legal system. What is most objectionable about Hart's account of secondary rules, Fuller claims, is not the idea that such rules exist, but that they might confer power only to make law without imposing any corresponding duties.

Fuller finds that this flaw surfaces most convincingly in Hart's discussion of "The Pathology of a Legal System". Fuller contests that: "All the situations [Hart] discusses under that heading involve either a conflict of ultimate authority or 'the simple breakdown of ordered legal control in the face of anarchy or banditry without political pretensions to govern'". This characterization of this aspect of *The Concept of Law* is accurate. Listed amongst the various diseases that Hart says may lead to the destruction of a legal system are: revolution, hostile invasion, the difficulties encountered when a previously colonized state takes its first awkward steps toward independence, or political schisms amongst legal officials . Missing in this account of legal pathology is any reference to systems where the laws fail to function as normative standards of behaviour. Fuller argues that this last sort of legal pathology is overlooked by Hart because he refuses to acknowledge that the fundamental rules of any legal system are both power-conferring *and* duty-imposing.

Fuller argues that when legislators act in dereliction of their duties, a legal system falls victim to the most important sort of deterioration it can suffer. The cause of this form of pathology is not structural, but rather lies in the ruler's dereliction of duty to uphold the law. Fuller charges that this is deeply problematic because it assumes that the existence of law ultimately hangs on the question, "Who's boss around here anyway?" (ibid). Hart claims that law is not simply a matter of determining whose commands are habitually obeyed, but Fuller argues that any account of a legal system that fails to appreciate the moral dimensions of making law cannot discriminate between a system of coercive orders

that are habitually obeyed and a system of law. Though Fuller thinks Hart is right that "law is not a gunman-writ-large," he argues that Hart does not acknowledge all of the aspects of a legal system that differentiate it from a gunman or a mob. Law is not a gunman, first and foremost, because gunmen do not have moral obligations towards those whose behaviour they seek to control.

Fuller finds that guiding by rules requires a reciprocal relationship between citizen and state. This relationship imposes duties upon both the citizen and the government. Fuller says that when legislators construct rules to guide behaviour, they in effect say to their subjects: " 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct'" . Thus, in exchange for providing the citizens with reliable and predictable rules, the government earns the respect and, indeed, "the fidelity" of those they govern. Fuller's conception of the relationship between rulers and ruled that makes governing by rules possible is, thus, very much a contractual model.[27] On this model of a legal system, both the legislator and the citizen have certain moral duties and obligations toward one another. It is because legislators have certain obligations toward their citizens that power-conferring secondary rules successfully guide behaviour.

On Fuller's view, the Nazi system suffered a "drastic deterioration in legality" precisely because it failed to construct a system of guiding norms (Fuller 1964, pp. 40-1). The Nazi government demonstrated time and again, Fuller argues, that they were not

interested in "giving the citizen rules by which to shape his conduct, but to frighten him into impotence" (ibid, p. 41). Thus, the Nazi officials were not unlike a machinist who continues to work on a project and demand payment, even though the other party backed out of the contract long ago. This leaves the legal subject, Fuller argues, in an utterly difficult situation: "[T]he German citizen under Hitler [was] faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror left intact" (ibid). This occurred, Fuller argues, because Hitler considered the law nothing more than a tool of political power, to be used at his (and high-ranking officials') discretion and entirely for his own purposes. In this sense, the Nazis were not so different from the lone gunman since they exercised power with little acknowledgement that they had any obligations to anyone other themselves. Thus, though their regime effectively altered people's behaviour, it did so in a manner that bore little resemblance to "guiding by rules." Thus, we may say that the Nazis had law only if we are willing to revert to Austin's claim that laws are essentially commands backed by overwhelming threat.

This is a potent strand of legal pathology that provides an account of why systems like the Nazi's might be considered to be something "less than law." The problem does not lie directly in the system's immoral aims, but rather in the manner in which the system functions as a mechanism of social control. That is, oppressive systems that rely heavily on threats of various sorts to persuade people to obey the "law," do not succeed in "guiding behaviour by rules." Rather, as we saw in the previous chapter, highly immoral regimes

often achieve results by frightening oppressed groups into doing what they are told. This cannot be called guiding by rules because it is not the rules that are effective in altering behaviour, but chiefly the hefty sanctions that are regularly enforced. Thus, in such instances it would be appropriate to say that people are governed by fear, not by rules.

Fuller argues that a legal system is fundamentally a "human enterprise" and so cannot be assessed in the definitive terms favoured by positivists. According to Fuller the question "is this law?" cannot be answered straightforwardly, but only in rather rough estimations of achievement and failure:

> The inner morality of law...confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it .

It is Fuller's contention that there is no such thing as a perfect system of law. As law is essentially a human enterprise, it must be evaluated in terms of how well the system functions in comparison to how we think a legal system ought to function ideally.

Fuller thus agrees with Hart that guiding behaviour by rules is clearly not the same as issuing commands. In his response to Hart, Fuller makes a great deal of the fact that Hart explicitly rejects Austin's command theory . If a legal system may not alter

behaviour by whatever means it finds most effective, then the means by which it does succeed in governing people's actions must be highly significant to our understanding of what law is. Though Fuller applauds Hart's emphasis on rules as the fundamentals of a legal system, he argues that Hart fails fully to appreciate the moral ramifications of recanting the command theory. It is Fuller's claim that if we take "guiding by rules" to be the purpose of the law, then it follows that there must be real constraints on the exercise of political power, and furthermore, that those constraints are not easily reconciled with gross iniquity. We shall see, however, that Fuller's unwavering determination to show that the constraints are wholly procedural is fraught with difficulty. I turn now to this discussion.

A critique of the "inner morality of law"

To a certain extent, Hart is sympathetic with Fuller's emphasis on the procedural aspects of a legal system. If the purpose of law is to guide people's behaviour by rules, then Hart, like Fuller, recognizes that there are certain "fundamental principles of lawmaking" that must be respected. For example, Hart argues that the principle of formal justice—treating like cases alike—is indispensable to the administration of the law. Though Hart goes so far as to concede that there is a "germ of justice" to be found within

the principle that like cases should be treated alike , he argues that respect for formal justice is not itself enough to ensure that the system as a whole will conform to moral standards of substantive justice. History demonstrates, Hart claims, that even strict adherence to the fundamental rules of lawmaking is highly "compatible with very great iniquity" (ibid).[28] More than this, it seems that faithfully heeding the procedural principles within an otherwise evil system of law may well serve to augment the misery of those who must live under its rules. Hart's criticism of Fuller amounts, then, to the potent observation that a "legal order" may in fact facilitate substantive *in*justice.

The problem with Fuller's purposive account of law, Hart argues, is that it confuses efficacy with a respect for morality. That is, Fuller's account of law is fundamentally flawed because it erroneously "blur[s] the distinction between the notion of efficacy for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned" (Hart 1965, p. 1284). Many enterprises, Hart points out, have a specific purpose and yet are morally abhorrent. To use Hart's example, poisoning is no less of a purposive enterprise than making law. And the crafty poisoner, like the legislator, must also observe certain fundamental procedural rules if he is to succeed. Thus, we find the element of purposiveness within an activity that has no positive moral value. The fact that one finds procedural principles in the law is not sufficient to establish a connection

between law and morality. There is no reason to believe that the principles necessary for one to be an effective legislator impose any moral constraints on the practice whatsoever.

Fuller's reply to this criticism is unsatisfactory. His response amounts to challenging his opponents to marshal evidence that "history does in fact afford significant examples of regimes that have combined faithful adherence to the internal morality of law with a brutal indifference to human justice and welfare" . It is Fuller's contention that neither the Nazi regime nor South Africa under apartheid were faithful to procedural principles, especially in those instances where the legal system aimed to achieve evil ends. As we shall see, however, there is much evidence that these regimes were faithful to Fuller's procedural principles in those very instances where the substance of the laws was most iniquitous.

The Nazi's system deteriorated as a system of law, Fuller claims, because there was flagrant abuse of procedural principles . It is undeniable that Hitler and his cronies often circumvented the procedural requirements of law while in power. Secret, retrospective, unclear, and onerous laws were all present within the Nazi regime. However, the Nazi example does not illustrate Fuller's grander conclusion that there is a causal or conceptual connection between procedural impropriety and substantive immorality in law. For example, the *Judenrechts* demonstrate that at least some of Hitler's commands were published, clearly written, and conscientiously enforced .[29]

The German Jews were subjected to a number of legislative acts which increasingly restricted their rights and eventually deprived them of their citizenship altogether. There were three waves of legislation concerning the Jews in Germany between 1933-1938. Each of the laws passed during this time served to inhibit the Jewish population from participating in their own society. These laws removed Jews from the public sphere, forced them to close down their businesses, drove them from their homes, and stripped them of their rights as German citizens.[30] Arguably, the most damaging laws were those which deprived German Jews of their citizenship. Two laws in particular, the 1935 Nurmburg Law, stripped Jews of their rights as Germans citizens and forbade marriage between Germans and Jews. As a result of these statutes, the Jews were further banned from the "Reichstag vote," and their property was expropriated by the state. The Jews were no longer considered German citizens, but merely its "subjects."[31] In effect, this meant that Jews were bound by whatever laws the government enacted on behalf of the German people, but the Jews were no longer considered a part of "The People." The Jews in Germany went from enjoying the rights of full citizenship to "alien" status. Within five years, the Jewish population in Germany was confined to ghettos and made to endure increasingly extreme hardship, humiliation, and degradation, all of which was legally sanctioned. Though not the only specimens of immoral laws, these Nazi laws are perhaps among the clearest examples of legalized wickedness within this regime.

Despite the blatant immoral character of these laws, a case can be made that they would withstand Fuller's procedural tests. There were no obvious procedural flaws in these statutes that rendered it impossible for people to act in accordance with them. The laws were clear, prospective, promulgated, possible to follow, and consistently enforced. If we wish to say that these laws failed some test of legality, we must look beyond Fuller's procedural account of legal morality. *Pace* Fuller, the existence of such morally abhorrent laws should lead us to question not whether procedural propriety is somehow connected to "doing things the (morally) right way," but why doing things "by the book" may be so highly desired when the outcome sought is morally obnoxious.

Fuller's attempt to demonstrate the veracity of his theory using the South African race laws is no more successful. These Race Laws, Fuller claims, blatantly violated the principle of clarity. "Race" is an elusive concept, Fuller claims, and thus a "race law" cannot be expressed "in intelligible terms" (ibid, p. 160). It is for this reason, Fuller argues, that these laws were the source of "serious difficulties in *interpretation*" within the South African regime even at the height of apartheid. While it is true that there was substantial debate about who should qualify as "white," "black," and so forth, these interpretational queries raised problems primarily for officials.[32] There is little indication that because they raised some interpretational puzzles for the courts that the race laws in South Africa failed "to guide people by rules."

This test is dubious because "clarity" is highly dependent upon cultural norms and expectations. In an earlier discussion about the principle of clarity, Fuller himself recognizes that "[s]ometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived outside of legislative halls" (ibid, p. 64). That is, the degree to which a term is viewed as contentious or vague depends a great deal on popular usage within a culture. Within a technologically developed country, for instance, it might seem obvious to the courts that a pram is not a "vehicle," while that very question raised difficult "intepretational issues" within the same court system a few decades earlier. Moreover, we would not say that a law prohibiting "vehicles" in the park was immoral because it contained a potentially contestable term. Why should we think that the same could not be true of words like "black," "white," "Jew," or "Christian"? Fuller says that it is not possible to be both evil and clear, but the meaning of these laws was certainly clear enough within a society already heavily divided along racial boundaries. As Fuller himself reminds us, we must not forget that the clarity of a law cannot be determined in a social vacuum. By the same token, then, we cannot determine that a law is inherently unclear on the grounds that we find it morally reprehensible.

A theory that claims the moral worth of law lies in its adherence to procedural principles must show that procedural propriety is the distinguishing feature of morally

better and worse instances of law. Consider the following example: Regime A has an excellent legal system in both its formal and substantive aspects. By contrast, Regime B has a body of law that is morally problematic in substance but yet maintains a relatively low level of procedural indiscretions. How are we to judge the merits of these two systems? Since the causal relationship between adherence to procedural principles and morally good law is highly questionable, it seems unlikely that the substantive differences between A and B may be wholly attributable to procedural flaws. It further seems that a good deal of the discrepancy in their relative moral values may be attributed to the differences in the substance of the rules.[33] We cannot predict which systems of law will establish a morally good order simply by assessing the degree to which Fuller's procedural principles are respected. This difficulty in Fuller's approach is particularly important to bear in mind when examining "wicked legal systems." The claim that the immorality of evil systems lies chiefly in procedural ineptitude tends to trivialize the gross iniquities that have been perpetrated through such systems. Thus, the onus Fuller places on the procedural principles fails to establish a reliable standard by which to gauge the moral value of any particular system of law.

Despite these concerns, adherence to the procedural principles strikes many theorists as morally significant in so far as it often seems to mitigate the evils that can be accomplished through a legal system. Though the procedural principles do not, perhaps,

constrain the content of the law in as direct a fashion as Fuller supposes, it is claimed that they nonetheless ensure that the existence of the rule of law is, on the whole, a morally good thing. For example, in response to the question whether there is any moral merit attached to following the Rule of law, Nigel Simmonds argues that where a government adheres to Fuller's eight procedural principles, the citizen is certainly better off because the legal system will at least "provide a degree of order and regularity which is the necessary framework for purposeful activity" (quoted in: Kramer 1998, p. 237). This defence of Fuller attempts to save his theory by appealing to the idea that it is better to live within a scrupulous, but hellish, State than to live in a society where evils are inflicted arbitrarily. At least then people are able to calculate how they might steer themselves clear of harm's way.

In a statement that Jeremy Waldron aptly describes as "hyperbolic" , Fuller argues that legislators are bound by the "internal morality of law" to respect every human being's right to determine how to live their own life. Part of demonstrating respect for this right is to allow everyone to accept responsibility for their decisions, including whether or not they obey the law. Fuller reasons as follows:

> To embark on the enterprise of subjecting human conduct
> to the governance of rules involves of necessity a
> commitment to the view that man is, or can become, a

> responsible agent, capable of understanding and following rules, and answerable for his defaults. *Every departure from the principle of law's inner morality is an affront to man's dignity as a responsible agent* .

According to Fuller, the entire project of subjecting human beings to the governance of rules is based on the presumption that we are equipped with certain capacities that enable us to be self-determining moral agents with the capacity to understand rules and to take responsibility for our actions.

Fuller's insistence that acknowledgement of cognitive capacities necessarily entails respect for a person's moral agency is problematic. This dangerously confuses the ability to determine one's own actions with the robust moral concept of self-determination. Though the ability to "understand and follow rules" distinguishes human beings from mere automata, respect for this ability does not necessarily show respect for the person *qua* moral agent . If a bank teller is ordered at gunpoint to hand over the money or die, is it not the case that the thief simultaneously takes for granted the teller's ability to understand the command while nonetheless failing to respect the teller's autonomy? In fact, the robber hopes that by making compliance to his commands the obvious lesser of two evils, the teller will do "the smart thing" and hand over the money. Thus, the robber must "respect"

another's cognitive ability in order to pull off the heist successfully, but in so doing utterly fails to respect the moral agency of those he commands.

This discovery has important implications for any further claims about the nature of wicked legal systems. According to this argument, the Nazi and South African governments were in fact upholding the rule of law in so far as they provided people with a clear and predictable framework of laws that enabled subjects to know what behaviour was legally permissible. It would seem, then, that these systems did have some moral worth, despite the fact that the social framework they fashioned was one in which many people knew with certainty that they were not permitted to participate fully in all the benefits their societies could offer. Whatever good might have been achieved by allowing people to know in advance what the laws demanded is cancelled out by the fact that what the law required was an insult to human autonomy and dignity in the moral sense.[34]

Fuller hopes to show that the function of "guiding by rules" leads to a collapse of the separation thesis. If we take into account all that is required of legislators and citizens in order to construct a set of social norms that influences behaviour without sacrificing their "human dignity," we will recognize that law is a moral enterprise. Fuller fails to show convincingly that a legal system that aims to govern by rules necessarily relies upon an "internal morality of law." All of the above criticisms of Fuller's work point to an underlying problem in his procedural account of law. We have seen that procedural

propriety, though a necessity for effectively instituting a legal system, does not provide any guarantees about the system's moral worth. However, Fuller's claim that the Nazi system suffered a "serious deterioration in legality" should not be abandoned altogether. The problem with wicked legal systems is not that the legislators sometimes fail to adhere to procedural principles, but that grossly immoral laws are rarely consistent with the claim that a legal system should "guide behaviour by rules."

A final look at legal pathology

It has been argued that Fuller's account of wicked legal systems is rife with difficulties. The foremost concern with Fuller's theory expressed in the previous section was the claim that procedural propriety might itself be the key determinant between qualitatively different instances of law. However, the flaws discovered in Fuller's attempt to pinpoint the source of the pathology in evil legal systems should not lead us to abandon the idea that it is in fact possible to discriminate between instances of law and, further, to entertain the possibility that there might be some correlation between iniquitous systems and legal degeneracy.

Positivists argue that a legal system is not degenerate simply because it contains unjust laws. They further argue that morality and legality are distinct concepts and that moral principles should not influence or bias our concept of law in any way. The danger here is that it tends to shift the study of determining whether wicked legal systems are acceptable or unacceptable instances of law wholly up to morality. For example, Hart tells us that a good legal system can *only* be determined by examining "those final judgments about activities and purposes with which morality in its various forms is concerned."[35] Positivists argue that the task of discriminating between various instances of law raises substantive moral questions and then argue that these sorts of moral considerations are extrinsic to the definition of a legal system.

Relying on his analysis of how participants will "normally" interact with a legal system, Hart argues that it is possible to discriminate between "healthy" and "unhealthy" systems of law. Once Hart turns to develop an account of the law from the participant's perspective, hard and fast determinations of legality quickly erode. Hart's own theory of law is supplemented by an account of legal obligation which requires that the law functions in a manner that is capable of establishing itself as a standard of criticism. In order to function in this way, we have seen that people must view the law as a source of obligation, which in turn rests on the idea that the laws must be accepted as more than mere predictions of sanction. Although Hart criticises Fuller for confusing morality and efficacy, it must

also be recognized that it takes more than efficacious regulations to generate the "internal aspect" of rules. The fact that the legal rules are generally efficacious might be enough for an external observer to conclude that a legal system does exist within a particular society, but such an observer will be unable to discern whether the system is a central or unproblematic instance of law until they know how the rules actually function within the community.[36]

Taking into account Hart's various comments about wicked legal systems, it seems that he ought to deem both South Africa under apartheid and the Nazi system as unhealthy or abnormal systems of law. Within each of these systems, there were substantial portions of the population that would not have accepted the system's use of its authority, who would have obeyed the law primarily out of fear of sanction, and would for whom the system would not likely have functioned as a system of action-guiding norms. It seems that, from this perspective, these systems ought to qualify as "unhealthy" or abnormal instances of law.

However, this is not the conclusion Hart draws. Not only does Hart say that these are valid legal systems, but he also indicates that they function normally. That is, Hart argues that so long as the rules are voluntarily accepted by some, the system generates legal authority. There is an assumption that the rules will function as laws for the society as a whole, despite the fact many people obey the law solely out of fear. It seems clear,

however, that within societies like South Africa under apartheid, the laws would not have functioned as social rules for a large portion of the population. The most apt description of a society such as South Africa is that it comprised a privileged society ruled by law and an oppressed society ruled by coercive power. In any event, we should not assume that simply because a system manages to meet the above definition of legal authority, the system will in fact generate legal obligation for the "majority" of the population.

It might be objected, however, that oppression is not so straightforward. In many instances where groups are systemically oppressed, the members of such groups come to view the law as justified in some sense. As mentioned earlier in chapter two, Waldron argues that people may have all sorts of distorted reasons for obeying iniquitous laws, including fear, the promise of some "pathetic scrap of reward," or compliance based on "habit, prejudice, ideology or false consciousness" . In these instances it will be more difficult to assess the extent to which the rules are functioning as a standard of behaviour and it seems only realistic that it may be a real, though dismal, possibility that the slave class genuinely believes that the system which oppresses them is justified in doing so. However, these still ought to be considered anomalous cases of law. Hart recognizes that obligation may be born out of any number of ignoble sources. But he also recognizes that obligations will have the most potent effects when they are grounded in a moral worldview that may "depend heavily on the operation of feelings of shame, remorse, or guilt" . But where these sorts of motivations are the key explanatory factors in why people obey the

law, this should give us pause to consider whether legal obligation, as Hart specifically understands it, is responsible for compliance to law at all.

Given his observations about the "internal aspect of rules," it is premature to stop short of acknowledging that the coercive force of law may affect people's lives very differently. Though Hart covers this point early in the book by allowing that there may be a few people who view the rules merely as predictions rather than as a standard of criticism, this typical situation is not very analogous to what has happened in situations like apartheid. Here the laws not only fail to give people reasons to accept them as a normative standard, but many of the laws of apartheid gave the oppressed population positive reasons to reject the entire system and its use of coercive force. Not only would the laws in such a situation fail to generate any sense of legal obligation for them, but every application of the law would strike them as a use of coercion.

Fuller's criticisms of Hart's view of law should not then be underestimated. Though Hart thinks legal obligation and authority can be explained without reference to moral principles, his account of the "internal aspect" of rules requires more careful analysis of how the rules function within a society than was previously acknowledged by positivists. This further means that Hart cannot leave his analysis of whether a system of law fully satisfies the definition of a legal system without some examination of how the rules function from the "internal perspective." This sort of analysis will not permit black and

white determinations of whether a legal system exists within a society, but will depend upon assessing the *degree* to which the legal system functions as a system of rules. Thus, Hart's internal perspective concedes an important aspect of Fuller's account of law; that law, understood as a system of functioning rules, must be evaluated in the same subjective terms in which all other human enterprises are judged.

Conclusions

This chapter has examined Fuller's challenge to Hart's account of law. It has found that Fuller fails to persuade that governance by rules is necessarily a moral enterprise for a variety of reasons. Neither the Nazi's *Judenrechts* nor the South African race laws demonstrate Fuller's claim that procedural propriety deserves to be called a morality. Procedural violations were either absent or highly contestable in many instances of iniquitous laws within each of these wicked legal systems. Adherence to the procedural principles were discovered to be unreliable indicators of a system's overall moral worth. It was also found that the claim that a legal system necessarily respects "human dignity" is deeply problematic. Moral agency and cognitive self-determination are distinct concepts. It was argued that the latter may be respected while the former is violated. These two arguments together undermine Fuller's claim that a lack of procedural propriety is the form of "legal pathology" suffered within wicked legal systems.

However, it was also found that Fuller's challenge to post-Austinian positivism raises further questions about Hart's own account of legal obligation. Hart abandons the external perspective in order to explain how laws will function normally within a society; thus, he cannot evaluate wicked legal systems without assessing whether rules function as guides for behaviour or merely as commands. I argued that according to Hart's internal aspect of rules, neither the Nazi system nor South Africa under apartheid ought to be considered "healthy" instances of law. This conclusion was reached on the basis that if an "internal perspective" of rules is necessary within the normal legal system, then it is relevant to our assessment of a particular legal system that a significant proportion of the population does not view the legal system as an obligatory force. Wicked men might be able to establish a system that guides their own and their cronies' behaviour by rules, but beyond this, their "legal system" exists in form *only*.

IN CONCLUSION

I hold that a Hartian positivist can plausibly deny that a wicked legal system is a "central" or "unproblematic" instance of law. In fact, I have shown there are good reasons for positivists to accept that some highly iniquitous legal systems are less-than-central instances of law, and that they may do so without jeopardizing the "core" positivist claim that morality is not a necessary condition of legality.[37] One need not revert to a natural law position in order to show that wicked legal systems are problematic instances of law, nor is it necessary to accept Fuller's claim that gross immoralities find their way into law due to a lack of respect for the "procedural morality" of law. The weaknesses in the examples of wicked legal systems discussed throughout this thesis lie in what means they employ to alter people's behaviour to conform to the system's demands. A normal legal system is one in which the average citizen generally accepts the system's authority and views the law as a source of *prima facie* obligation.

Hart defines a "healthy" system as one in which people generally accept the rules as a source of obligation and as a standard of criticism. When people generally view the rules in this light, the rules have what Hart calls an "internal aspect." This development in the life of the rules alters how they function within the society in the sense that the law ceases to be viewed merely as a set of coercive commands habitually obeyed out of fear of

threat, but is transformed into an accepted standard of conduct. Further, I have argued that Hart's account of law best fits the average "modern legal system" when the rules ordinarily function in this normative fashion. By contrast, then, an unhealthy system is one in which the law fails to acquire, or fully develop, this "internal aspect" and is obeyed more out of fear of sanction than out of any real sense of legal obligation.

By focusing on Hart's account of legal obligation, I have endeavoured to show that Jeremy Waldron's analysis of the discussion of wicked legal systems in *The Concept of Law* draws unwarrantedly strong conclusions. Though it is undoubtedly true that Hart thinks a wicked legal system will satisfy his positive, structural definition of a legal system, there is much evidence to suggest that the rules in these systems would be obeyed primarily out of fear of sanctions. Though this may be sufficient to establish an effective pattern of behaviour within a given society, it is not enough to generate an obligation to obey the law. It is because Austin's account of laws as orders-backed-by-threats fails to provide any explanation for the fact that a legal system makes certain actions obligatory that Hart undertakes to develop an account of legal rules that explains why laws are generally thought of as normative standards. It is to combat this oversight in Austin's theory that Hart includes the "internal aspect" of rules in his description of a legal system.

Waldron's claim that the separation thesis is at stake in the discussion of wicked legal systems is a provocative claim for positivists. However, we have seen that the

separation thesis, as Hart states it, makes a strictly logical claim. Further, there is good reason to object to the suggestion that the separation thesis entails a more substantial a claim than this. Hart straightforwardly denies that positivists think that morality does not influence law, as such a claim reduces the thesis to absurdity. Every legal system combines some "moral" claims into its legal system and positivists do not deny this.

Positivists disagree with the claim that a descriptive account of law entails any reference to morality. Hart's foremost concern is to develop a *concept* of law that makes no reference to moral principles. Hart's concept of law amounts to a structural model of a legal system that relies essentially on the existence of two logically distinct types of rules. Thus, a purely conceptual statement of the separation thesis is sufficient for Hart's purposes. Most important, however, was the discovery that this thesis does not provide an account of what law is or may become and so tells us very little about how to evaluate particular legal systems.

Matthew Kramer's article on positivism and legalized evil points out that within wicked legal systems the internal aspect of rules will likely be specific to the officials of the system. Kramer argues that the "hallmarks of a legal system" are just the features and benefits brought about by the secondary rules; regularity, stability, and durability. Thus, Kramer argues that any legal system which satisfies these conditions and meets some standard of efficacy might qualify as a legal system. This is misleading. Though Hart

argues that such a system would meet the "minimal" conditions of a legal system, this is not sufficient to establish that these systems are in fact law in any fuller sense of the term. We have seen that what would be missing within the Mafia-run "legal system" would be any sense of legal obligation beyond the mob members themselves. Such a system, then, would at best satisfy *only* the minimal existence conditions of a legal system. By Kramer's own admission, people within a Mafia-run legal system would obey the law strictly out of fear and, thus, they would fail to develop an "internal attitude" toward the system. Kramer's Mafia-run system satisfies Hart's definition of a legal system in only a limited sense because it ignores Hart's efforts to decry the view that habitual obedience out of a fear of sanction is key to understanding why people generally do what the law requires. Therefore, the conclusion a positivist ought to reach about the Mob's legal system is that it is, at the very least, an unhealthy system of law because its rules would not develop an "internal aspect" for a significant portion of the population.[38]

Contemporary positivists emphasize the "risks" Hart thinks are endemic to a legal system without taking into account the theoretical dangers of confining the examination of law to its structural features. The view that the "internal aspect" of rules need not factor into our account of legal evil was rejected because it left out too much of what is important to making Hart's view of law accurate. Hence, the debate about whether wicked legal systems really are instances of law may be as much a question about whether structural or

functional features of a legal system define the essence of law as whether morality is a necessary condition of legality.

Hart's descriptive account of law favours the approach of the natural sciences, and thus argues that the structural model of a legal system ultimately defines what law is. The benefit of Hart's structural model is that it allows for an unbiased standard by which to discern whether a legal system exists in particular instances. The risk of this approach is that it makes certain assumptions about other important features of a legal system that cannot be attributed to any structural characteristic of law; namely, the source of legal authority and the nature of legal obligation. Contemporary positivists' insights into whether wicked legal systems are law have thus tried to prove too much about the nature of law based on a set of existence conditions. Hart himself recognizes that there is only so much a structural definition can accomplish and explicitly warns theorists about the dangers of over-estimating the explanatory power of his positive definition of a legal system.[39] Contemporary positivists have not heeded this warning in recent discussions about wicked legal systems.

Hart's account of law draws on much more than purely structural characteristics in order to develop his account of the modern legal system. *The Concept of Law* includes a fairly detailed account of legal obligation that requires laws to function as a species of social rule. Though the structural features of a legal system may exist in the absence of this

obligatory element for the average citizen, it must nonetheless be conceded that such a system would fail fully to satisfy Hart's morally-neutral definition of a normal or healthy legal system. Even if this condition of normalcy is satisfied, Hart's functional account of law will still fail to satisfy any traditional natural law theorist, but not because he underestimates the importance of developing a sustainable and realistic account of how laws actually work from the perspective of a participant.

Fuller argues that the separation between law and morality is unsustainable once one begins to study law from the participant's perspective. If Hart is prepared to accept that under normal circumstances a legal system generates a sense of obligation, then, argues Fuller, Hart must also accept that people really obey the law out of a sense of moral duty or "fidelity" to the system. Fuller thinks that this state of affairs is only possible if the rules genuinely guide behaviour which entails that legislators accept that they have certain moral duties and obligations to those whose behaviour their rules purport to control. That is, Fuller thinks that certain procedural constraints necessarily exist within any system whose purpose or goal is to guide rather than coerce behaviour. On Fuller's account, then, Hart fails to pinpoint exactly where and why pathological breakdowns occur in wicked legal systems. Wicked legal systems exist because legislators have neglected to take the procedural morality of law seriously and, in so doing, create "laws" that utterly fail to serve their purpose.

It was argued that Fuller's procedural account of law does not elucidate the pathological features of wicked legal systems. The Nazi's *Judenrechts* and South Africa's race laws arguably satisfy Fullerian principles of procedural propriety. Thus, the immorality of these laws could not be traced back to any legislative improprieties of the sort Fuller thinks make wicked laws possible. But more than this, Fuller's claim that "guiding" behaviour entails respecting "human dignity" was shown to rely on an equivocation between cognitive and moral autonomy that is deeply problematic. Respect for the former does not necessarily entail respect for the latter and, further, cognitive autonomy may be valued at the expense of any respect for "human dignity" and moral self-determination. Thus, Fuller's procedural account of law fails to enable us necessarily to discern between morally better and worse legal systems. As a result, Fuller's internal morality argument does not provide a useful measure of why wicked legal systems so often suffer "deterioriations of legality."

Hart's internal aspect of rules gives us a way to measure how well a legal system is functioning within a society that does not draw any connections between law and morality. The internal aspect of rules requires that the laws instantiate themselves in the society as more than simply commands of superiors backed by overwhelming threats. Ironically enough, this morally neutral account of how laws ought to function enables us to begin to grasp why legal systems within grossly unjust societies lack important characteristics of a

society ruled by law. The pathology suffered is not simply that the society advocates immoral principles and instantiates them in its legal system. As Hart points out time and again, this is a futile attempt to discriminate between acceptable and unacceptable legal systems, for every culture has laws that will strike others as grossly immoral and unjust. The breakdown of legality in systems like South Africa and the Nazis' is that the rules failed to make conduct obligatory in a manner that is consistent with Hart's account of legal obligation. Hart requires that legal rules instantiate themselves as norms that represent an important standard of behaviour and neither the Nazi regime nor South Africa under apartheid would have met this criterion satisfactorily.

Perhaps the most fascinating and ambitious aspect of Hart's work is his endeavour to describe a legal system in a manner that will satisfy both conceptual and sociological questions about legal phenomena. In his introduction to *The Concept of Law*, Hart sums up the goal of the book as follows:

> [I]ts purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing improved analysis of the distinctive structure of a legal system and a better understanding of the

> resemblances and differences between law, coercion, and morality, as types of social phenomena .

Hart clearly thinks that these two theoretical questions can be answered together. Indeed, Hart's structural account of a legal system is preceded and introduced by a detailed discussion of different kinds of social rules and how laws may be considered a particular species of social rule. Yet, as Hart's structural account of a legal system develops, it becomes clear that the central elements of law he identifies are compatible with various "mechanisms of social control" at the level of primary rules, including Austinian-type commands. Hart's structural account of a legal system and his discussion of the nature of law *qua* a species of social rules, then, do not always go hand-in-hand.

In analysing wicked legal systems from a positivist perspective it is important to recognize this underlying tension in Hart's work. Though his structural definition of a legal system is often readily observable within many instances of wicked legal systems, there is also reason to believe that the laws within these systems fail to function as legal rules for a significant portion of the population. Thus, in these cases there is a system of law, but one that may not function as a system of obligatory social rules. I find no error in Hart's realistic claim that wicked men will use the "forms of law" to oppress others, but nonetheless think it a serious mistake to overlook the flaws that do exist within such systems. The formal features of a legal system are "central" to Hart's concept of law, but

they are not exhaustive. Positivists ought to confront and explore this tension in *The Concept of Law*, rather than diminish it. For until it is properly expounded, discussion of wicked legal systems cannot begin to explore what promises to be a fruitful and diverse discussion about the social dimensions of "legal evil."

Suggestions for future research

The nature of coercion has been underdeveloped in the philosophy of law, despite the fact that it is the coercive element of law that may well enable us to discern healthy from unhealthy instances of a legal system. Thus, I agree with Leslie Green that it is not enough to take note of the fact that law may be used by the powerful as an instrument of oppression.[40] If we agree with Hart that there are certain risks endemic to the development of a legal system, there is a need to understand better this rather unique social phenomenon on its own terms. Every legal system relies on coercion to some extent, but not all coercive acts are compatible with the existence of law. There seems to be a unique form of coercion that comes to the fore in discussions of legal evil; widespread domination of an oppressed group by one that is more powerful.

Though an area that deserves more critical attention from different schools of jurisprudence, the nature of legal coercion has been most explicitly confronted by feminist scholars. Feminist jurisprudence focuses on the ways in which the force of law has been used repressively to maintain successfully the subordination of women and also productively to enhance and entrench a patriarchal worldview. The feminist concern with the marginalization of a particular group is the same sort of oppression that penetrates and permeates the wicked legal systems with which mainstream legal theorists are preoccupied.

What is importantly different about the feminist take on legal coercion is the idea that coercive behaviour must be understood from the perspective of those who are oppressed. Feminist scholars argue that coercion cannot be fully understood from the perspective of the dominant group. We must look to those who suffer oppression to grasp fully the nature and force of the coercion. Thinkers like Patricia Smith, for example, argue that it is not enough to recognize that the stability of a legal system may be used to entrench immoral values. Such an approach fails to appreciate the particularly pernicious fashion in which a legal system inhibits its victims. Since the source of legal oppression comes largely from outside of the system, it is necessary to view the law within and as part of the larger social fabric and to recognize that the changes needed to alter the system are themselves systemic. The features Hart identifies as the "benefits" of a legal system—certainty, flexibility, and stability—make it particularly difficult to effect any systemic

change within the system. Further, Smith goes on to say that it is because a legal system encapsulates the values of a dominant culture that the law "is badly suited to deal with diversity in a truly open and equitable manner. Yet in a world of fast paced social change, pressing pluralism, and global diversity, these limits are serious" .[41] The idea that the existence of a legal system entails certain risks for non-dominant groups is one that Smith clearly shares with Hart, but she sees a potential to develop an account of legal oppression in a manner that makes explicit how the law may be used as an instrument of inequity from the perspective of the marginalized participant. Though Hart recognizes that a legal system may create marginalized groups, he does not attempt to view the system from the victim's viewpoint.

The study of wicked legal systems has long been dominated by a conceptual debate about the nature of law. However, wicked legal systems have the potential to reveal much more about the nature of law and legal power than just whether the definition of law entails any necessary connection to moral principles. Hart's work in *The Concept of Law* on the "internal" and "external" aspect of social rules has the potential to move the debate about wicked legal systems beyond a purely conceptual discussion. Legal power is a special sort of social power that is highly volatile; the potentials of this power when mixed with the authority of law deserve further examination. Wicked legal systems provide a diverse set of cases within which to conduct these important investigations.

ENDNOTES

[1] Natural law theorists tend to focus on only one of these groups of participants. Ronald Dworkin, for example, focuses primarily on the role of judges in *Law's Empire*, while Lon Fuller examines law from the perspective of the legislator.

[2] Waldron, J. (1999). "All We Like Sheep." *Canadian Journal of Law and Jurisprudence* 12 (January): 169-187.

[3] Hart begins his discussion of legal systems by looking first at rules as they exist within a "primitive" society. Within such a society, Hart argues that there would be only primary rules of obligation without any mechanisms by which to officially recognize, adjudicate, or change the social rules. *The Concept of Law*, especially pp. 89-92. It is further important to note that Hart does not use the distinction between "primitive" and "complex" societies in a manner that suggests the former type of society is a lesser type of social arrangement than the latter. For further commentary on this point, see: Green, L. (1996) "The Concept of Law Revisited," *Michigan Law Review* 94 (May): 1687-1717.

[4] Hart here explicitly refers to the advent of the rule of recognition, though it is also true that he thinks that the rules of adjudication and change are of a "type different from the primary rules of obligation or duty."

[5] Hart argues that the rules within a primitive society would not be a system, but will "simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts (ibid, p. 90).

[6] That the separation thesis makes a strictly logical claim is further emphasized in "The Postscript." Hart says: "I argue in this book that though there are many different contingent connections between law and morality there are no necessary *conceptual* connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles". H.L.A. Hart, *Postscript* (Oxford: Oxford University Press, 1994).

[7] Hart claims that law defined "widely" includes laws that are both just and unjust. By contrast, a "narrow" definition of law is one that recognizes only just laws as valid. The "narrow" definition of law, then, would characterize the position of classical Natural law Theorists, like Aquinas and Augustine, who argue that an unjust law is invalid as law.

[8] See Hart's two "minimum conditions necessary and sufficient for the existence of a legal system": "On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity must be effectively accepted as common public standards of behaviour and acknowledge an obligation to obey them...". H.L.A. Hart, *The Concept of Law*, First Edition ed. (Oxford: Oxford University Press, 1961).

[9] Aquinas here takes his cue from Augustine: "...as Augustine says *On Free Choice* (I, 5): 'That which is not just is evidently no law'". Thomas and Vernon Joseph Bourke, *The Pocket Aquinas : Selections from the Writings of St. Thomas* (New York: Washington Square Press, 1960).

[10] Michael Moore defends the claim than an unjust law is no law at all. See: Moore, M. (1992). "Law as a Functional Kind". In *Natural law Theory: Contemporary Essays*. R. P. George. Oxford, Clarendon Press: 188-244.

[11] Even John Finnis, whose work follows closely the principles of traditional natural law theory, resists the conclusion that an unjust law is not a law *at all*. Though Finnis argues that the goal of a legal system is to achieve the "common good," he decries the idea that a law may be rendered invalid solely because "it failed to meet, or meet fully, one or the other elements of the definition."

[12] Hart examines this issue in "The Postscript," arguing that Dworkin here merely concedes, rather than refutes the positivist case. The admission that wicked legal systems are law "in some sense," Hart claims,

"does little more than convey the message that while Dworkin insists in a descriptive jurisprudence the law may be identified without reference to morality, things are otherwise for a justificatory interpretive jurisprudence according to which the identification of the law always involves a moral judgment as to what best justifies the settled law". Hart, *Postscript.*

[13] See note 7.

[14] As to where these abuses of law might lie, Hart provides no explicit answer. However, one may extrapolate from some of Hart's earlier discussions about the nature of law in order to determine standards by which to assess various forms of legal pathology which are largely unrelated to questions of legal validity.

[15] The concept of participation is a difficult one that may well be ill-suited to the task Waldron proposes. I think participation requires that the participant has a clear understanding of the objectives and some impact on the outcome of the activity. Participation in something as complex and diffuse as a legal system is, then, difficult to fathom. Very few people will actually participate in passing laws and deciding cases. Even in democracies, where the people have a say in who will be elected, the electorate's involvement in most legislative and judicial decisions is too many steps removed from the decision-making process to say meaningfully that the average citizen "participates" in the legal system.

[16] This line of argument is particularly strong in: Catharine A. MacKinnon, "Toward Feminist Jurisprudence," in *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

[17] See note 5.

[18] Neil MacCormick, for example, provides many interesting insights into the idea that laws develop an "internal aspect" in his book on Hart's legal philosophy. In particular, see: Neil MacCormick, "Consequentialist Arguments," in *H.L.A. Hart* (Stanford: Stanford University Press, 1981).

[19] An appropriate or reasonable reason for obeying the law need not necessarily be moral.

[20] Wilfred Waluchow develops an interesting argument against this line of reasoning. Expanding on Hume's claim, "'tis not certain an opinion is false because 'tis of dangerous consequences," Waluchow argues that whether or not a theoretical claim has beneficial or harmful effects makes no difference to its truth value. See: Wilfrid Waluchow, "The Invalidities of the Causal/Moral Arguments for Legal Theories," in *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994). I am not here trying to defend the claim that accepting the separation thesis has positive social benefits, but merely to underline certain assumptions present in Hart's account of the argument.

[21] Lon Fuller argued that Hart "considers that a decision to disobey [Nazi laws] presented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favour of more fundamental goals". Lon Fuller, "Positivism and Fidelity to Law-a Reply to Professor Hart," in *Philosophy of Law*, ed. Hyman Gross Joel Feinberg (Belmont: Wadsworth Publishing Company, 1980). I discuss in chapter three some of the difficulties this interpretation of Hart's arguments about the nature of obligation raises.

[22] As Hart describes the following scene from Twain's famous work: "Huckleberry Finn, when asked if the explosion of a steamboat boiler had hurt anyone, replied, 'No'm: killed a nigger.' Aunt Sally's comment 'Well it's lucky because sometimes people do get hurt' sums up a who morality which has prevailed amongst men."

[23] See: Midgley, "The Mixed Community," in *Animals and Why They Matter* (Athens, Georgia: The University of Georgia Press, 1983).

[24] Fuller argues that his "procedural" account of law is importantly different from traditional law theory because a procedural account of law "is not concerned with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be." More than this, Fuller also distinguishes his view of "natural law" from that of traditional thinkers because, he claims, he is not concerned with espousing any claims about universal moral laws. The procedural principles, Fuller argues, "have nothing to

do with 'brooding omnipresence in the skies.' Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God's law. They remain entirely terrestrial in origin and application...They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it". Lon L. Fuller, *The Morality of Law, Storrs Lectures on Jurisprudence ; 1963* (New Haven: Yale University Press, 1964).

[25] Fuller frequently employs the metaphor that a "legal enterprise" is a human activity with a specific purpose and standard of excellence, just like any other "craft." For example, Fuller explains that the procedural principles are akin to the practice of medicine. Fuller argues that the following quote from Aristotle applies with equal force to the practice of legislation: "'It is an easy matter to know the effects of honey, wine, hellebore, cautery, and cutting. But to know how, for whom, and when we should apply these as remedies is no less an undertaking than being a physician.' So we in turn may say: It is easy to see that laws should be clearly expressed in general rules that are prospective in effect and made known to the citizen. But to know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver". Ibid.

[26] Commenting on Hart and Fuller's debate, Daniel Brudney remarks: "There is in fact an air of unreality to the Hart/Fuller exchanges, a sense that the two men never make contact". Daniel Brudney, "Two Links of Law and Morality," *Ethics*, no. January (1993).

[27] The reciprocity that exists between state and citizen under the rule of law is, Fuller claims, analogous to the following sort of straightforward contractual relationship: A and B enter into a contract whereby A agrees to build a machine for B in exchange for a prescribed sum of money. By entering into this contract, A and B now have certain duties to one another. If either party should overstep the boundaries of the contract, then they are in dereliction of duty. Fuller, *The Morality of Law*.

[28] Hart explains further: "This close connexion between justice in the administration of the law has tempted some famous thinkers to identify justice with conformity to law. Yet plainly this is an error unless 'law' is given some specially wide meaning...Indeed there is no absurdity in conceding that an unjust law forbidding the access of black persons to the parks has been justly administered, in that only persons genuinely guilty of breaking the law were punished under it and then only after a fair trial". Hart, *The Concept of Law*.

[29] There were over thirty laws passed by the Nazi government between 1933-1939 which pertained specifically to German Jews. These *Judenrechts* demanded, among other things, that Jews surrender their German citizenship, professions, and their property.

[30] The first "legal" action taken against the Jews after Hitler was elected Chancellor was an official boycott of Jewish businesses in April, 1933. In a public announcement to the German people, Goebbels proclaimed that the boycott was legal and requested that the people "permitted" it to be carried out effectively. The first wave of anti-Jewish legislation barred the Jews from holding public offices, professional posts, and restricted their businesses. This included laws which removed Jews from the Civil Service, the legal profession, tax consultancy, and drastically reduced the number of Jewish students attending German universities. Jews and other "non-Aryans" were prohibited from working for any German newspaper and were also banned from military service. By 1938 Jewish lawyers and physicians were also compelled to resign. John Mendelson, *Legalizing the Holocaust: The Early Phase 1933-1939*, 12 vols., vol. 1, 2 (New York: Garland, 1982).

[31] Nazi law officially legally defined "Jew" and "Part-Jew" in September 1935. Another law passed at about the same time demanded that Jewish people surrender their given names and adopt the appellations "Isreal" and "Sara." They were no longer individual persons, but simply male and female *Jews*.

[32] For further discussion see: Raymond Koen, "The Language of Racism and the Criminal Justice System," *South African Journal on Human Rights* 11 (1995).

[33] This is similar to Matthew Kramer's more detailed discussion of why the procedural principles fail to correctly locate the source of immorality within evil systems of law. Matthew Kramer, "Scrupulousness

without Scruples: A Critique of Lon Fuller and His Defenders," *Oxford Journal of Legal Studies* 18, no. Summer (1998).

[34] Joseph Raz spells out succinctly why any discussion of "respect for human dignity" is likely to lead to a definition of the rule of law that is so encompassing as to be almost meaningless. The 1959 International Congress of Jurist's revised definition of The Rule of law illustrates the dangers with which Raz is concerned. The definition requires that a legal system ensure not only the "recognition of...political and civil rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality." This definition of the rule of law equates law with almost every principle of moral and social justice so that law becomes synonymous with the definition of "a just society." However, a legal system, on its own, cannot be solely responsible for the development of a just society. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

[35] In similar vein, Kramer argues that "[t]ransgressions of Fullerian precepts, merely in their content-independent status as such transgressions, do not determine the relative moral positions of regimes. Substantive factors determine those relative positions". Kramer, M. (1998). "Scrupulousness without Scruples: A Critique of Lon Fuller and His Defenders." *Oxford Journal of Legal Studies* 18(Summer): 235-263, p. 243

[36] Fuller clearly thinks that frightening people into submission is not the same as "guiding behaviour by rules." However, this introduces a difficulty with the standard of "guidance by rules." People who obey unjust laws for prudential reasons, might still be said to be "guided by rules" even though they do not accept them or use them as a standard of criticism. It would be difficult in such a situation to determine whether people are being "guided by rules" in a manner that generates obligation, or whether their purely prudential motivations are such that they preclude an obligation to obey.

[37] This thesis only supports the qualified claim that some instances of wicked legal systems are less-than-central instances of law. I have argued that we may consider a system abnormal if a large portion of the population do not view the law from the "internal" perspective. However, it is possible to imagine a society in which there is widespread acceptance of a morally abnoxious worldview; the system would be viewed by most as a source of genuine legal obligation, despite its immorality.

[38] It could readily be argued that the Mafia's system is not really a legal system at all because it would lack the element of authority that is necessary to the existence of law.

[39] I refer here to Hart's claim that a primary and secondary rules are at the center of a legal system, but not the whole which is taken up in chapter one of this thesis. See: pp. 26-7.

[40] That is, Green argues that we must take this inquiry even further and ask how it is that the "forms of law interact with social power, both repressively and productively...". Green, L. (1996). "The Concept of Law Revisited." *Michigan Law Review* 94 (May): 1687-1717.

[41] This comment sums up a number of feminist and other critical legal theorists concern that the law is an expression of a dominant ideology. As such, that ideology comes to be accepted as "natural" and thus claims an objectivity to which it is not entitled. This means that the system caters to the interests of those favoured by the dominant ideology. The system thus becomes resistant to the demands of social criticism because the people who are in a position to affect change within are also the same people who have the most to lose by those changes. As Smith explains: "The dominant culture—those who hold power, make law and public policy, and influence institutional development—have no stake in solving these problems, and their training, background, and position militate against their being able to recognize such problems as central, to see them, let alone deal with them". Patricia Smith, "Feminist Jurisprudence," in *A Companion to the Philosophy of Law*, ed. Dennis Patterson (Oxford: Blackwell, 1996).

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