



## **Hart on Legality, Justice, and Morality (2010)**

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# Hart on Legality, Justice, and Morality

JOHN GARDNER \*

## 1. 'No necessary connection'

In his beautifully written and consistently illuminating *Law as a Moral Idea*, Nigel Simmonds attempts to re-associate H.L.A. Hart with the transparently false thesis that there is no necessary connection between law and morality.<sup>1</sup> It is not entirely clear why he does so. What has Simmonds to gain from lumbering Hart with this old chestnut? Perhaps the answer is that Simmonds' ideas about law are in the main so eminently sensible that he needs to manufacture some heavyweight opposition, a foil of distinction, to motivate and animate his work.

I say that Simmonds attempts to 're-associate' Hart with the 'no necessary connection' thesis because, notwithstanding his repeated flirtations with it,<sup>2</sup> many have come to doubt whether Hart ever endorsed it. Not only is its falsity transparent enough that a thinker of Hart's acuity could scarcely have failed to spot it; there are also important passages in which Hart appears to have gone to some lengths to draw attention to its falsity. Best known of these is the long section at the end of chapter 9 of *The Concept of Law*<sup>3</sup> where Hart reviews various suggested necessary connections between law and morality. He complains that the

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<sup>1</sup> Simmonds, *Law as a Moral Idea* (2007), 69ff.

<sup>2</sup> The most important: 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958), 593; *The Concept of Law* (1961), ch 9; 'Commands and Authoritative Legal Reasons', in his *Essays on Bentham* (1982); and 'Introduction', in his *Essays in Jurisprudence and Philosophy* (1983).

<sup>3</sup> Hereafter *CL*. All page references are to the second (1994) edition.

suggestions, as presented in the literature, are often unclear or confusing.<sup>4</sup> But he does not brand them all as false. A number of them, indeed, he attempts to rescue from their unclarity or confusingness. His main aim in doing so, it seems to me, is to cut them down to size. The suggestions may be true – they may point to authentic necessary connections between law and morality – but they do not have the large implications that are often hoped for and gestured towards by their originators. None of them, in particular, suffices to rule out the possibility, or indeed the very widespread reality, of gravely immoral laws that add up, in some cases, to yield gravely immoral legal systems.

That fact in itself reveals a necessary connection between law and morality. It reveals that law is the kind of thing that can be judged by moral standards and found wanting. (Compare fish, arthritis, colour, gravity, and spelling, all of which can be judged by standards, but not by moral ones.) Do we have here a trivial necessary connection between law and morality? No. It is so important that all the other suggestions reviewed by Hart presuppose it. And Hart plainly asserts it. Some important moral ideals, says he, have ‘obvious relevance in the criticism of law.’<sup>5</sup> This is already enough to show, without further ado, that Hart did not endorse the ‘no necessary connection’ thesis.

One moral ideal relevant in the criticism of law and considered by Hart in chapter 9 is the ideal of the rule of law, made up (as Hart puts it) of ‘the requirements of justice which lawyers term principles of legality.’<sup>6</sup> Lon Fuller had famously claimed that nothing could qualify as a legal system except by (largely) meeting these requirements. Hart quite rightly denied

<sup>4</sup> *CL*, 202.

<sup>5</sup> *CL*, 206. As he says at 205, ‘[s]ome may regard this as an obvious truism; but it is not a tautology.’

<sup>6</sup> *CL*, 207.

this in an earlier exchange with Fuller,<sup>7</sup> and he continues to deny it in *The Concept of Law*. But Hart had always agreed with Fuller, again quite rightly, that there are such requirements for law to meet, and in his chapter 9 survey he reaffirms the point:

If social control of the [law's] sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey. ... [O]ne critic of positivism [sc. Fuller] has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality, and suggested that they be called 'the inner morality of law'. ... [I]f this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.<sup>8</sup>

Simmonds argues that this passage should be given what he calls an 'ironic reading', according to which it does not assert the necessary connection between law and morality that it seems to assert at the end.<sup>9</sup> Instead, on this reading, the passage merely reports Fuller's pallid use of the word 'morality' to do work that Hart himself would not dignify with that name. Simmonds contrasts this with a 'concession reading' in which the passage is held to embrace the Fullerian usage, pallid though it may be, and hence to assert the same necessary connection between law and morality that Fuller asserted (while continuing to cast doubt on several of the larger implications that Fuller saw in it).<sup>10</sup>

<sup>7</sup> Hart, 'Positivism and the Separation of Law and Morals', above note 2, to which Fuller responded in 'Positivism and Fidelity to Law – a Reply to Professor Hart', *Harvard Law Review* 71 (1958), 630.

<sup>8</sup> *CL*, 207

<sup>9</sup> *Law as a Moral Idea*, above note 1, at 74.

<sup>10</sup> *Ibid*, 70.

Simmonds mentions me in connection with the concession reading.<sup>11</sup> He is right to think that this is how I would tend to interpret, and indeed have interpreted,<sup>12</sup> the passage. On the other hand I am not averse to the ironic reading. The ironic reading, I will suggest, is possible. However, in seeing how it is possible we will also see that it does not reveal any philosophical disagreement between Hart and Simmonds. Even read ironically, Hart is still not the foil that Simmonds is looking for.

There is a significant textual obstacle to the ironic reading, and it is found in the already-quoted words with which Hart introduces the brief reminder of his quarrel with Fuller. He says, to repeat, that this quarrel concerns ‘the requirements of justice which lawyers term principles of legality’. While one could see implicit scare-quote marks around ‘principles of legality’ in this remark, there is no credible way of placing them around ‘requirements of justice’. What are principles of legality according to lawyers are requirements of justice according to Hart himself. If they are requirements of justice, are they not by that token also moral requirements? Isn’t justice part of morality? And if they are also the same requirements ‘which lawyers term principles of legality’ are they not in turn necessarily (because conceptually<sup>13</sup>) connected to law? If these questions are as rhetorical as they seem, there is the following chain of necessary (because conceptual) connection between law and morality:

law ↔ the ideal of legality or the rule of law ↔ justice ↔ morality

<sup>11</sup> Ibid, 73.

<sup>12</sup> I made some brief remarks on the passage in ‘The Legality of Law’, *Ratio Juris* 17 (2004), 168 at 181.

<sup>13</sup> I will be restricting my attention to conceptually necessary connections. I should stress, however, that this is only part of Hart’s topic in chapter 9 of *CL*. He also discusses, earlier in the chapter, various possible connections which are humanly rather than conceptually necessary, i.e. which are inevitable given only inevitable aspects of the human predicament.

Where, in interpreting Hart, are we to break the chain to make room for the ironic reading? Are we to say that, according to Hart, there is no conceptual connection between law and legality? Or, in spite of the already-quoted remark, no conceptual connection between the ideal of legality and justice? Or no conceptual connection between justice and morality? I will be considering all three possibilities in turn.

## *2. From law to legality*

Hart's views about the connection between law and the ideal of legality are made a little harder to unpack because of his conspicuous distaste for that particular way of branding the ideal, well-illustrated in the remark just quoted in which he attributes that way of talking to 'lawyers'. It is tolerably clear what gives rise to his distaste. Hart fears that people will assume that legality is a property necessarily possessed by all law, and hence that, if legality is an ideal, all law necessarily lives up to it. That is the confusion that Hart plausibly attributes to Fuller. In spite of Hart's resulting drive for terminological hygiene, it is a confusion that has since been perpetuated in, for example, the work of Ronald Dworkin. In Dworkin's view it would be

nonsense to suppose that though the law, properly understood, grants [P] a right to recovery, the value of legality argues against it. Or that though the law, properly understood, denies her a right to recovery, legality would nevertheless be served by making [D] pay.<sup>14</sup>

There is a way to read Dworkin as dishing up a mere tautology here, by deeming the expression 'properly understood' to mean 'understood to conform to the value of legality'. Inasmuch as a

<sup>14</sup> Dworkin, 'Hart's Postscript and the Character of Political Philosophy', *Oxford Journal of Legal Studies* 24 (2004), 1 at 25.

proposition is tautological it is of course nonsensical to deny it. But if 'properly understood' is seen for the distracting verbiage it more probably is, the tautology disappears and with it goes the nonsense. It is not nonsense to suppose that there is such a thing as illegal law. It is law that fails to live up to the ideal of the rule of law and there is, as Hart potently argued against Fuller, plenty of conceptual space for it. Seeing the ease with which Dworkin occludes that space, however, we should not be surprised that Hart shied away from using the word 'legality' to explain it.

It has to be admitted, though, that Hart himself contributed to the same occlusion at some points in his work. In chapter 5 of *The Concept of Law*, for example, Hart tells his brilliant and seminal fable of the emergence of a legal system (differentiated by its secondary rules of recognition, adjudication, and change) from an imagined pre-legal or proto-legal arrangement of customary primary rules alone. As a way of making such a development rationally intelligible, his narrative emphasises the gains in efficiency and predictability that these secondary norms bring with them. Unfortunately, to the lasting confusion of many readers, he thereby makes it sound like he is extolling the virtues of the transformation from proto-law to law. Not surprisingly, he is therefore taken to task by some critics for attempting to smuggle in a political ideology under cover of his supposedly ideology-neutral explanation of the nature of law.<sup>15</sup> And that political ideology seems to many, not implausibly, to be none other than the ideology of the rule of law. That is why it is so easy for Dworkin to represent Hart's chapter 5 elucidation of certain aspects of the nature of law instead as a defence of a

<sup>15</sup> See e.g. Malcolm Wood, 'Rule, Rules and Law' in Philip Leith and Peter Ingram (eds), *The Jurisprudence of Orthodoxy* (1988), 27 at 30-1; Peter Fitzpatrick, *The Mythology of Modern Law* (1992), ch 6; Roger Cotterrell, *The Politics of Jurisprudence* (2nd ed, 2003), 94-5.

certain version of the ideal of legality (a 'conventionalist' version of which, as is well known, Dworkin disapproves).<sup>16</sup>

For all its brilliance, then, Hart's fable is afflicted by severe and damaging presentational flaws. The secondary rules, Hart should have made clear, do not automatically bring with them the rule of law and, even for believers in the rule of law, their arrival is not necessarily to be welcomed. For life without any law at all might well be better than life with law but without the rule of law. The arrival of a legal system makes some forms of oppression possible, and others easier, and there is a further step to be taken to help protect people against such law-enabled and law-facilitated oppression, namely the step from merely having a legal system to having a legal system under the rule of law. That there are two steps here, and not just one, is essential to the success of Hart's critique of Fuller. If there were only one step then Fuller would be right that nothing qualifies as a legal system except by largely conforming to what he calls 'the inner morality of law', which is what Hart repeatedly and rightly denies.

That Hart does not identify having a legal system with living under the rule of law should not lead us to suppose, however, that he sees no conceptual connection between the two. How could he? As the previous comments show, although it is possible for there to be a legal system without the rule of law, it is not possible for there to be the rule of law without a legal system. And it is not possible because the rule of law is, at its simplest, the ideal of being ruled by law, and (as Hart emphasised) there is no law, ruling or otherwise, where there is no legal system. So what we have here is already a conceptual connection between law and legality, which explains the naming of the ideal. Hart was

<sup>16</sup> Dworkin, 'Hart's Postscript', above note 14, at 28, summarising a position staked out at length in *Law's Empire* (2006). Hart does not help to dispel Dworkin's confusion with his own confused response to the *Law's Empire* critique in his posthumously published 'Postscript' (*CL*, 249-50).



aware of this connection: his objection to Fuller was only that law is insufficient for legality, not that it is unnecessary.

That is not all. In what is perhaps a more striking concession to Fuller, Hart draws attention to a second conceptual connection between law and the ideal of legality. The connection is hinted at in the chapter 9 passage quoted above. According to Hart, recall, the rule of law is needed '[i]f social control of the [law's] sort is to function'. What is the relevant 'sort' of social control? Hart says it is 'control by rule', which

consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction.<sup>17</sup>

Now laws, as Hart explains, are rules. This much is determined by the nature of law. But there is more than one way for laws to function as instruments of social control, and not all involve laws functioning *as* rules. Laws need not be used to guide; they can also be used to subdue, intimidate, overwhelm, or more generally, as Hart puts it in *Punishment and Responsibility*, to 'goad' those who are subject to them.<sup>18</sup> We live under the rule of law, for Hart, to the extent that law is used to guide us, not to goad us, and this condition is not met in all legal systems. In some legal systems, as Hart explains at length in chapter 6 of *The Concept of Law*,<sup>19</sup> the law only guides, and maybe is only set up to guide, a small elite of officials; the ordinary folk are then (legally) at the mercy of those officials and inhabit what Hart calls, in *Punishment and Responsibility*, 'an economy of threats'.<sup>20</sup> Here there is law, to be sure, but without the rule of law. It is in that

<sup>17</sup> CL 207.

<sup>18</sup> Hart, *Punishment and Responsibility* (1968), 44. Hereafter *PR*. Page references are valid for both the 1968 edition and the 2008 edition.

<sup>19</sup> *CL*, 112-17.

<sup>20</sup> *PR*, 40.

respect (although perhaps not in all respects) degenerate law. The rules are not, in Aristotelian terms, fulfilling their *telos* as rules, which is to guide – to *rule* – those who are subject to them.

So here we have a second conceptual connection between law and the rule of law that Hart concedes and indeed emphasises in the passage under scrutiny: the nature of legal systems (as systems of rules) brings with it a properly legal way of functioning (as a source of guidance) which nevertheless some legal systems may abjectly fail to realise. In such systems there may be lots of law and yet a conspicuous shortage of legality.

This already suggests the existence of a third conceptual connection between law and legality. Perhaps one does not fully master the concept of law until one grasps the properly legal way of functioning, and in particular until one grasps the *telos* of rules, which is to rule. Perhaps, to put it another way, it is part of the very nature of law that law should live up to the ideal of the rule of law (even though it depressingly often fails to do so). I think this much is true, but it is doubtful whether Hart agrees. He continues his chapter 9 discussion by reflecting on the distinction (drawn in many European languages other than English) between *ius*, *Recht*, *diritto*, *derecho*, or *droit* on the one hand and *lex*, *Gesetz*, *legge*, *ley*, or *loi* on the other. The former terms for law, Hart says, ‘are laden with the theory of Natural Law’<sup>21</sup>; they carry, as we might put it in less sectarian terms, an implication of conformity to (at least) the ideal of legality. He continues:

[W]hat is really at stake is the comparative merit of a wider [*lex*] and a narrower [*ius*] concept or way of classifying rules, which belong to a system of rules generally effective in social life. ... The wider of these two rival concepts of law includes the narrower.<sup>22</sup>

<sup>21</sup> *CL*, 208.

<sup>22</sup> *CL*, 209.

So Hart holds that there are ‘two rival concepts of law’ in play here whereas I hold, under the influence of subsequent work by John Finnis<sup>23</sup> and Joseph Raz<sup>24</sup>, that there is just one concept of law, but with central cases (*ius*) as well as limit cases (*lex* that is not *ius*).<sup>25</sup> And it seems to me, but apparently not to Hart, that one doesn’t fully grasp *lex* at the limit unless one understands that it ought, by its nature as *lex*, to be *ius*. In other words a full mastery of the concept of law requires an understanding of law complete with its built-in aspiration of legality, just as, for example, a full mastery of the concept of football or cricket requires an understanding of football or cricket complete with its built-in aspiration to sportsmanship (however rarely that aspiration may be realised in actual games of football or cricket).

So here, perhaps, is a conceptual connection between law and the ideal of legality that Hart denies. Where I see a single concept with limit cases and central cases, he seems to see a ‘wider’ concept extending to (what I would call) the limit cases and another ‘narrower’ concept extending only to (what I would call) the central cases. Or does he? There is some conflicting evidence in *Punishment and Responsibility* where he accuses those who miss law’s aspiration to legality of holding a ‘conception of the law’ that is ‘inadequate and misleading.’<sup>26</sup> He may have held different views on this point at different times. But this does not affect what appears to be a more consistent commitment, on his part, to the following two conceptual connections between law and the ideal of legality that we noted earlier in this section. First, to live up to the ideal of legality – to live under the rule of law – a society must, by conceptual necessity, have a legal system. Second, the ideal of legality or the rule of law is an ideal for law

<sup>23</sup> *Natural Law and Natural Rights* (1980), ch 1.

<sup>24</sup> *The Authority of Law* (1979), ch 1.

<sup>25</sup> On this point Dworkin has lately, and quite amazingly, sided with Hart. See his *Justice in Robes* (2006), ch 8.

<sup>26</sup> *PR*, 44.

because there is a conceptually necessary feature of a legal system, namely that it is a system of rules, which entails that it has a proper way of functioning as a legal system, namely by guiding or (as we also put it) by *ruling* those who are subject to it.

### 3. From legality to justice

Hart, as we know, regarded the principles of legality, the ones that go to make up the ideal of legality, as 'requirements of justice'. This may at first seem surprising, since he also regarded them as requirements of legal efficiency, or legal functioning. Efficiency is sometimes contrasted with justice. But there is no reason to doubt that principles of efficiency can also be principles of justice. In *Punishment and Responsibility* Hart explains how, in his view, the two can come together. A principle of justice, Hart claims, is simply a principle 'concerned with the adjustment of claims between a multiplicity of persons'.<sup>27</sup> Legal efficiency, meanwhile, is efficiency at guiding people, or efficiency (as he also puts it) in a 'choosing system'.<sup>28</sup> People can only be guided by the law, says Hart, if they have 'the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.'<sup>29</sup> And this in turn yields the principle that they should not be held in breach of the law, and so not subjected to the legal consequences of such a breach, if they lack those capacities and opportunities. That principle, says Hart, is a 'principle[ ] of Justice which restrict[s] the extent to which general social aims may be pursued at the cost of individuals.'<sup>30</sup> In this light,

<sup>27</sup> *PR*, 21.

<sup>28</sup> *PR*, 44, 49.

<sup>29</sup> *PR*, 152.

<sup>30</sup> *PR*, 17.

[r]ecognition of excusing conditions [by the law] is ... seen as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law respects the claims of the individual as such, or at least as a choosing being, and distributes its coercive sanctions in a way that reflects this respect for the individual. This surely is very central in the notion of justice.<sup>31</sup>

All of this belongs to the 'notion of justice' because it concerns the adjustment of claims between a multiplicity of persons (viz. between each one of us and the rest). And it belongs to the ideal of legality because it contributes to the law's properly legal way of functioning (viz. functioning as a guide, not a goad).

Hart did not get all of this exactly right. For a start, he was wrong to think that all principles of justice are 'concerned with the adjustment of claims between a multiplicity of persons'. There are also principles of justice with no competitive, and hence no inevitably interpersonal, dimension.<sup>32</sup> Probably (*pace* Hart) the principles of criminal excuse are better accommodated under that heading. Hart was right, on the other hand, to think that all principles 'concerned with the adjustment of claims between a multiplicity of persons' are principles of justice. And he was right to notice a particular implication of this proposition. Principles of justice may be justified instrumentally, by pointing exclusively to the good consequences of having them, following them, or conforming to them. In the case of the principles of justice making up the ideal of legality, thought Hart, the relevant good consequences are consequences for human freedom. Legality 'maximizes individual freedom within the coercive framework of law'.<sup>33</sup> People are better able to steer their lives so

<sup>31</sup> *PR*, 49.

<sup>32</sup> See Joel Feinberg, 'Noncomparative Justice', *Philosophical Review* 83 (1974), 297; Jeremy Waldron, 'The Primacy of Justice', *Legal Theory* 9 (2003) 269 at 286.

<sup>33</sup> *PR*, 48

as to avoid unwelcome collisions with the law (punishments, taxes, etc) and so as to make use of the law's helpful devices (contract, marriage, etc) when it suits them to do so. To reprise a point that we already encountered, conformity with the rule of law, on this Hartian view, helps to protect people against law-enabled and law-facilitated oppression, against the various modes of unfreedom (such as heavy-handed policing, show trials, and the use of influence to get above the law) that the existence of a legal system otherwise tends to open up and encourage.

Here is another thing that Hart did not get entirely right. In talking of 'the requirements of justice which lawyers term principles of legality', he suggests that the principles of the rule of law are all of them principles of justice. This is not true. The principles of natural justice (*audi alterem partem*, *nemo in sua causa iudex*) clearly belong to the ideal of the rule of law (as Hart explains) and are equally clearly principles of justice.<sup>34</sup> But compliance with the rule-of-law requirements of stability, prospectivity, generality and clarity is a public good which does not or at least need not constitute an 'adjustment of [anyone's] claims'. It is plausible to think that breach of these requirements can *give rise to* injustice, but not that it *constitutes* injustice. It is more plausible to think, in other words, that there are further principles of justice (lying outside the ideal of legality) that may tend to be breached when these principles of legality are breached. To that extent, the link between justice and legality is partly a conceptual contingency rather than a conceptual necessity. But in other respects it is, to repeat, a conceptual necessity. And Hart, whose views we are considering here, plainly thought and repeatedly asserted that it is a conceptual necessity across the board, i.e. that all the principles of the rule of law are alike in being principles of justice.

<sup>34</sup> *CL*, 160.

One reason why Hart may have thought it a conceptual necessity across the board is because of his well-known view that ‘we have, in the bare notion of applying a general rule of law, the germ at least of justice.’<sup>35</sup> Why does he hold this view? Because that bare notion, to his mind, already entails ‘the precept “Treat like cases alike”,’ which, to his mind, belongs distinctively to ‘the structure of the idea of justice.’<sup>36</sup> So for Hart ‘[t]he connection between this aspect of justice and the very notion of proceeding by rule is obviously very close.’<sup>37</sup> If this connection between law and justice exists it is a conceptual one, and one that short-circuits the more convoluted conceptual connection via the ideal of legality that we have been exploring. As we now know, the more direct connection does not exist. Hart’s argument to the effect that it does has been exposed as multiply fallacious elsewhere.<sup>38</sup> Hart’s attachment to the idea<sup>39</sup> would, however, help to explain his thought that the principles of the rule of law are all of them principles of justice. For they are all principles governing what he calls ‘the administration of the law’ and for Hart this administration necessarily – by virtue of the mere fact that laws are rules – invites an evaluation in terms of justice. This shows that in some ways, contrary to the tenor of Simmonds’ discussion, Hart took the conceptual connections among law, legality and justice to be more tightly woven than they really are. As well as holding (rightly) that law is connected to justice *via* its

<sup>35</sup> *CL*, 206

<sup>36</sup> *CL*, 160.

<sup>37</sup> *CL*, 161.

<sup>38</sup> David Lyons, ‘On Formal Justice’, *Cornell Law Review* 58 (1973), 833 at 848ff; John Gardner, ‘The Virtue of Justice and the Character of Law’, *Current Legal Problems* 53 (2000), 1 at 14-6; Leslie Green, ‘The Germ of Justice’, unpublished manuscript.

<sup>39</sup> It is introduced in ‘Positivism and the Separation of Law and Morals’, above note 2, and advanced twice in *CL* (159-61, 206). However, by the time of his 1983 ‘Introduction’, above note 2, at 18, Hart was ‘clear that [the] claim requires considerable modification’ in the light of criticisms by Lyons.

connection to legality, he held (wrongly) that law is connected to legality *via* an independent connection to justice.<sup>40</sup>

#### 4. *From justice to morality*

Without a doubt, Hart thought that law is conceptually connected to legality, and that legality is conceptually connected to justice. We are left with the last link in the chain. Did he also think that justice is conceptually connected to morality? Here the evidence is more confusing and in some ways more surprising.

To be sure, one could hardly imagine a clearer statement than the one that introduces the topic in chapter 8 of *The Concept of Law*. 'Justice' writes Hart, 'constitutes one segment of morality.'<sup>41</sup> He goes on to point out that not all moral criticism of the law is 'made in the name of justice'<sup>42</sup> even though, for him, 'justice [has] special relevance in the criticism of law'.<sup>43</sup>

Elsewhere, however, Hart's thinking on the matter seems to go in a quite different direction. In his 1965 critical notice of Fuller's *The Morality of Law*, Hart complains:

The difference between [Fuller] and those he criticizes in this matter is that the activity of controlling men by rules and the principles designed to maximise its efficiency are not valued by the latter for their own sake, and are not dignified by them with the title of a 'morality'. They are valued only insofar as they contribute to human happiness or other moral substantive aims of the law.<sup>44</sup>

<sup>40</sup> There is an independent connection between law and justice, but not the one that Hart thought there was. See Gardner, 'The Virtue of Justice and the Character of Law', above note 38, 18-21.

<sup>41</sup> *CL*, 167.

<sup>42</sup> *CL*, 168.

<sup>43</sup> *CL*, 167.

<sup>44</sup> *Harvard Law Review* 78 (1965), 1281 at 1291, reviewing Lon Fuller, *The Morality of Law* (1964).



Among those Fuller criticizes, Hart lists himself. So presumably Hart is among those who would not dignify the principles of the rule of law, Fuller's 'inner morality of law', with the title of a 'morality'. And presumably this is for the reason stated, viz. that the principles of the rule of law 'are not valued [by Hart] ... for their own sake.' That Hart does not value them for their own sake we already know. He values them as instruments of maximal freedom against what would otherwise be the oppressive might of the law. And that – maximal freedom – counts as a 'moral aim' because freedom, unlike the rule of law, is presumably something that Hart does indeed value 'for [its] own sake'. These ideas hang nicely together. But they do not hang together with what Hart says in *The Concept of Law*. For one startling implication of them is that at least some principles of justice are not moral principles. So justice can't be 'one segment of morality' after all. Recall that the principles of the rule of law are also, for Hart, principles of justice. If they should not be dignified with the title of moral principles *qua* principles of the rule of law, nor should they be dignified with that title *qua* principles of justice.

This result seems odd to say the least.<sup>45</sup> Is there any way to avoid it? Maybe we can read what Hart says in his review of Fuller a bit more charitably. Maybe he is not saying that the Fullerian principles do not qualify as moral principles at all, but rather that they qualify as moral principles only when they serve moral aims. Unfortunately, this doesn't help to explain Hart's thinking. For Hart agrees that the Fullerian principles, the principles of the rule of law, always do serve moral aims. Even when the law is otherwise immoral, argues Hart, the fact that the rule of law is observed helps us to preserve some freedom in the face of the law's immorality, and that is an invariant contribution that observance of the rule of law makes to the moral aim of

<sup>45</sup> Although it has one brave defender in the form of Matthew Kramer. See his 'Justice as Constancy', *Law and Philosophy* 16 (1997), 561.

maximising freedom. This *leitmotif* from *Punishment and Responsibility* is perfectly consistent with the point, of which Hart makes so much in his review of Fuller, that observance of the rule of law may also help a regime to achieve (other) immoral aims through the law. The lesson of all this is simply that the rule of law is a moral ideal that can be subverted. Even as it bestows its blessings, it may also be used to smooth the path of evil. This is true of moral ideals in general. (Consider the general problem of ‘moral hazard’ much discussed by economists.) So it couldn’t possibly explain Hart’s refusal, in the passage just quoted, to classify legality’s admitted blessings as moral ones.

Or maybe that is not quite what he is doing. Maybe he is granting that the rule of law is a moral ideal, bestowing its own moral blessings, while declining to classify it, by that token alone, as a morality, even a morality of law. Hart’s scare-quote marks, on this reading, should surround the word ‘a’ as well as the word ‘morality’. For the rule of law is at most *part* of a morality of law. There must, for Hart, be further moral principles, requirements, aims, or ideals that make up the rest. Why must there be? Because the law can be used to pursue (almost) any aim. The rule of law is an ideal that limits only how it does so. Before there can be or needs to be adherence to the rule of law, there needs to be some law, used to pursue some aims apart from that of the rule of law. These are the aims that Hart (I think unhelpfully<sup>46</sup>) calls

<sup>46</sup> ‘Unhelpfully’ because the opposite of ‘substantive’ is ‘procedural’, and not all the principles of the rule of law are procedural. For example, as Hart showed (*PR*, 44-50), the principles of the rule of law include the principle *actus non facit reum nisi mens sit rea*, which belongs to the substantive criminal law, not to criminal procedure. It is also hard to understand in what sense a principle of legal stability or legal generality is ‘procedural’.

Maybe this is an opportune moment to add that the principles of the rule of law are also not conspicuously ‘formal’, i.e. concerned with the form of law as opposed to its content. For example, they include the principle of easy public access to the courts which, like easy public access to hospital treatment, normally requires redistributive public funding and laws to secure it. The

‘substantive’ aims. Why must these ‘substantive’ aims be moral aims? Actually, they need not be. Law can be used with the sole aim of making the emperor rich or shoring up the privileges of the ruling class. But, as Hart notices, the aims of the law *can* be moral aims. They can include the minimisation of suffering or the maximisation of freedom or the punishment of the deserving,<sup>47</sup> etc. It follows that there is more to a (complete) morality of law than the ideal of the rule of law. For a complete morality of law also determines which ‘substantive’ moral aims law is to have. (Note that such a morality of law may mention freedom twice: once as constituting a moral aim for law in its own right and again as setting moral limits on the means by which that aim, or others, are to be pursued by law.)

I tend to think that this is the thought, or the main thought, that Hart is trying to convey in his review of Fuller. If so, then we may be inclined towards a partly ironic reading of Hart’s remarks about Fuller in chapter 9 of *The Concept of Law*. Hart is upbraiding Fuller for conjuring up the fancy label ‘the inner morality of law’. This is not, however, because Hart denies that the rule of law is a moral ideal. Rather it is because he denies that it is a moral ideal self-sufficient enough to be regarded as a (let alone *the*) morality of law. The twist in the tale, however, is that Fuller never claimed differently. It was Dworkin who tried to persuade us, much later, that law’s inner morality (viz. the ideal of legality) is its *whole* morality. Fuller, by contrast, thought that

principles of clarity, prospectivity and generality are also principles bearing on the content, not the form, of the law. A clear rule has different content from an unclear one; thinking of this as a difference of form comes of confusing the rule with its formulation. The entrenchment of this confusion can be traced back to Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework’, *Public Law* [1997], 467. Craig ranges views about the rule of law along a spectrum from ‘formal’ to ‘substantive’ when they are really ranged along a spectrum from modest to ambitious.

<sup>47</sup> In spite of Hart’s own doubts about the soundness of this particular aim he admits it as a possible moral aim for the law in *PR*, 8-9.

law is also subject to the rest of morality, the same morality that binds the rest of us. He regarded the law's 'inner' morality as an addition to, not a replacement for, the long list of ordinary moral requirements, principles, aims, and ideals to which the law is also answerable. We know that Fuller thought this because he famously claimed that a failure by a legal system to observe the principles of law's inner morality would tend to bring with it other moral failures on the part of that legal system, and *vice versa*.<sup>48</sup> This claim is extremely implausible, for (as Hart rightly insisted) law's inner morality can also smooth the path of evil. Implausible or not, however, the Fullerian claim shows that Fuller regarded law as subject to moral requirements, principles, aims, and ideals beyond those of its inner morality. A failure by a legal system to observe the principles of law's inner morality cannot possibly bring with it other moral failures on the part of that legal system unless other moral failures on the part of legal systems are possible, and other moral failures on the part of legal systems are possible only if law answers to some moral standards apart from those of its inner morality. So calling the rule of law 'the inner morality of law' clearly isn't intended by Fuller to suggest that it is anything like a complete morality of law. If Hart is being ironic, in *The Concept of Law*, about the inflation of the moral ideal of legality to a whole morality of law, he has the wrong opponent in his sights, for on this (as on so many other issues) he and Fuller are quite clearly on the same side.

So perhaps – to make the irony bite – we have to return to the proposal that Hart really does not regard legality as a moral ideal. That proposal would incontrovertibly drive a wedge between Hart and Fuller. But the only way to sustain it, as we saw, is to read Hart as advancing the peculiar thesis against Fuller that sound principles of justice, which by Hart's own admission include the principles of legality, need not be moral principles. If

<sup>48</sup> *The Morality of Law*, above note 44, 153-5.

we go with this reading, then we plainly have to attribute to Hart a great deal of ambivalence about the nature of morality. For on this reading he makes justice officially part of morality in chapter 8 but puts some of it outside morality in chapter 9. That degree of ambivalence would not be a surprise, since Hart is plagued by a wide range of anxieties and doubts about the nature of morality. Indeed it would not be an overstatement to say that Hart's treatment of morality – by stark contrast with his treatment of law – is a mess. But that should only make us wonder, once again, why we would attach such interpretative weight as Simmonds attaches to Hart's repeated flirtations with the thesis that there is no necessary connection between law and morality. If Hart was ambivalent about the very nature of morality then these flirtations are not to be trusted, and not only because they are only ever flirtations, but also because they touch an idiosyncratically and obscurely Hartian nerve. ('When I hear the word "morality",' Hart might have been tempted to joke in an echo of Hanns Johst, 'I reach for my revolver.')

So we can accept, with Simmonds, an ironic reading of Hart's remark about Fuller in chapter 9. But to repeat a question I raised at the start: why should we want to do so? Isn't it enough, to put an end to any authentically philosophical difference of opinion between Hart and Simmonds, that Hart found multiple necessary connections between law and justice, never mind that it was somehow stressful for him to classify these as necessary connections between law and morality? Simmonds himself seems entirely content to treat justice as a department of morality. He says, for example, that in a 'moral inquiry' we might 'deepen our understanding of values such as justice.'<sup>49</sup> And he speaks, to take a second example at random, of 'substantive moral reflection upon law's justice'.<sup>50</sup> If Hart were to come out

<sup>49</sup> *Law as a Moral Idea*, above n1, 6.

<sup>50</sup> *Ibid*, 57.

and say, as his views clearly commit him to saying, that there are various necessary connections between law and justice, would Simmonds still be able to use Hart as a philosophical foil? I think not. So we still need to know what issue, leaving aside issues about the connotations of the word ‘morality’ and its cognates, Simmonds finds between himself and Hart under the heading of ‘necessary connections between law and morality.’

This is not to say that there are no real issues dividing Simmonds and Hart. There are plenty of them. Among them are several that also divide Hart and Fuller, or in some cases Hart and Dworkin, and that were touched on under that description above. On some of these issues Simmonds has the better view, and Hart the worse; on other issues it is the other way round. However I did not make it my business to set out or assess Simmonds’ own views on any of these issues. Instead I have focused exclusively on Hart’s views, and on Simmonds’ explanation of them. Why? Because, according to Simmonds

the main focus of this book [is] upon contemporary legal theory, and in particular upon the work of H.L.A. Hart, who played such a large part in establishing the basic categories and assumptions in terms of which jurisprudential debate is now generally constructed. ... My object is not to change the subject by ‘changing the subject’, so to speak, but to undermine a current orthodoxy by direct opposition.<sup>51</sup>

Simmonds is too modest. He does much more in his book than undermine an orthodoxy. He also makes important and (what I think will be) lasting original contributions to his subject. On the other hand, he also does less than undermine an orthodoxy. For he fails to show that the so-called orthodoxy he sets out to undermine – that there is no necessary connection between law and morality – is subscribed to by anyone, least of all by Hart.

<sup>51</sup> *Ibid*, 4.