

# SYMPOSIUM

## THE GRUDGE INFORMER CASE REVISITED

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*This Article explores a decision by a German postwar court—the Case of the Grudge Informer—which was central to the 1958 debate between H.L.A. Hart and Lon L. Fuller. The author argues that Fuller’s presentation of the problem in the case is better than Hart’s both as a descriptive matter and as a matter of promoting a morally responsible resolution—not least because Hart’s method of candor falls short of illuminating the complexities inherent in such cases. In particular, Hart’s positivist conception of law does not appreciate how judges in such cases have to contend with a connection between the doctrinal level and the fundamental level. At the former, judges have to resolve issues of substantive law such as the issues of criminal law in the Grudge Informer Case. At the latter, judges confront the question of what Fuller called their “ideal of fidelity to law,” since they are faced with questions about what legality—the principles of the rule of law—requires. The confrontation between such ideals is not, as Hart suggested, one that takes place in an extralegal political space. Rather, it is firmly within the scope of both law and the philosophy of law.*

### INTRODUCTION

One of the points of contention in H.L.A. Hart and Lon L. Fuller’s 1958 debate<sup>1</sup> was a decision by a German postwar court: the Case of the Grudge Informer. Even those who have forgotten the details of the debate usually remember the drama of this case. How-

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<sup>1</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

ever, the exchange between Hart and Fuller about the Case of the Grudge Informer garnered little attention.<sup>2</sup>

This is a pity, as Hart's treatment of the case is a rare example of his engagement with an actual problem of adjudication. Hart generally did not consider problems of judicial interpretation of the law an appropriate topic for philosophy of law, which he viewed as a largely descriptive analysis of the conceptual structure of law. It follows from that analysis that judicial interpretation of the law largely takes place outside of law, in that judges ultimately have to exercise a discretion based on their own sense of what law ought to be, rather than on what law currently is. Under this view, how judges should go about exercising their discretion is thus a matter for prescriptive political theories and is outside the scope of philosophy of law.

Hart did think that his preferred brand of legal theory—legal positivism—has some important implications for theories of adjudication. As we will see, a cardinal virtue for Hart is candor, not just as an intellectual virtue, but also as a moral one. Candor requires that both scholars and judges acknowledge that the correct description of judicial interpretation of the law is that judges are exercising discretion, a kind of quasi-legislative act. They should acknowledge this not only because it is true but also because such acknowledgment will lead to more responsible adjudication.

Similarly, Hart claims that when citizens are faced with the question of what they should do when confronted by unjust laws, candor requires that they recognize the laws as valid but then see that nothing follows—morally speaking—from that fact. Citizens are then better able to make morally responsible decisions. They can decide whether to obey the law on grounds of conscience, unconfused by any thought that merely because *X* is a valid law, *X* should be given any moral weight in one's deliberations. Hart considers this claim to be distinctive of the positivist tradition—in particular of positivism's "Separation Thesis"—which holds that there is no necessary connection between law and morality.<sup>3</sup>

Thus, philosophers of law have long been puzzled by Fuller's claim that Hart had articulated in his article a positivist "ideal of

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<sup>2</sup> But see Thomas Mertens, *Radbruch and Hart on the Grudge Informer: A Reconsideration*, 15 *RATIO JURIS* 186, 186 (2002) (contending Hart failed to address Radbruch's primary concern); David Dyzenhaus, *The Dilemma of Legality and the Moral Limits of Law*, in *THE LIMITS OF LAW* 109, 110 (Austin Sarat et al. eds., 2005) (contending that Hart's "Separation Thesis" oversimplifies dilemmas faced in cases like the Grudge Informer).

<sup>3</sup> Hart, *supra* note 1, at 622.

fidelity to law”<sup>4</sup>—an ideal that could guide participants in legal practice—that made it possible for other legal theories to engage with legal positivism on the terrain of rival articulations of fidelity. At most, Hart seemed to be mapping the conceptual contours of the political terrain in which rival articulations of ideals of fidelity to law could contest their merits.

Put differently, Hart’s legal positivism describes the space in which judges decide contested points of law as an extralegal space in which judges’ own views as to right and wrong, and not the law, will determine their decisions. But precisely because legal positivism’s conceptual analysis shows that the space is one in which political and not legal considerations are determinative, so it shows that the contest within that space is for political and not legal theories.

I will argue that the Case of the Grudge Informer demonstrates that, contrary to received wisdom, Hart and Fuller were engaged in a real debate about fidelity to law. My argument does not, however, eliminate the puzzle; rather, it shifts the onus for its creation to Hart. As we will see, Fuller’s analysis of the kind of problem presented by the case does better than Hart’s both as a descriptive matter and as a matter of promoting a morally responsible resolution, not least because Hart’s method of candor falls short of illuminating the complexities inherent in such cases. In particular, Hart’s positivist conception of law does not allow him to appreciate how judges in such cases have to contend with a connection between what I call the doctrinal level and the fundamental level. At the former, judges have to resolve issues of substantive law, such as the issues of criminal law in the Grudge Informer Case. At the latter, judges confront the question of the ideal of fidelity to law, since they are faced with questions about what legality—the principles of the rule of law—requires.

My argument goes further, however, than showing that Hart’s conception of law and his method of candor do not have the virtues he claimed. Hart’s map of the terrain pivots on a claim that cases in which either citizens or judges confront unjust laws are best understood in terms of a clean clash between legal and moral duty. But that claim not only turns out to be the basis for how the judges who decided the actual Grudge Informer Case engaged in a flawed exercise of legal reasoning but also threatens to collapse Hart’s position into the one that he most vehemently rejected—that put forward by the German philosopher of law, Gustav Radbruch, who argued after

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<sup>4</sup> Fuller, *supra* note 1, at 632.

the Second World War that the legal experience of Nazism supported a thesis that laws that are extremely unjust are not law.<sup>5</sup>

I will finish by sketching some implications of my argument for the debates that continue to preoccupy legal philosophy today, in particular the debate concerning the role of judicial interpretation that Ronald Dworkin has made central. As I will note, there is a sense in which the kind of creative role for judges that Fuller—and later, Dworkin—endorsed is in some sense fully endorsed by Hart. Indeed, Hart's 1958 account of judicial interpretation as discretion or legislation is one that obviously requires creativity, as Hart was to emphasize in his last words on the debate between himself and Dworkin.<sup>6</sup> Thus the question of whose theory produces the morally best outcome, all things considered, might seem to turn simply on the issue of whether one agrees with Hart that morally responsible interpretation is promoted by judges who acknowledge that they are exercising discretion.

However, just as Hart's idea of a clean clash between legal and moral duty threatens a collapse of his position into Radbruch's, so Hart's idea of discretionary interpretation threatens a collapse into Fuller's conception of the judicial role. For I will argue that the mark of fundamental cases, such as the Grudge Informer Case, is that answers at the doctrinal level are partly determined by answers at the fundamental level. This leads to the conclusion that morally responsible interpretation is also legally responsible interpretation—interpretation appropriately disciplined by law. Put in the spatial terms used earlier, the terrain on which rival legal theories contest ideals of fidelity to law is, as Hart suggested, political, but that fact does not make it in any way extralegal. This conclusion requires that the activity of interpretation, however complex and creative, and at whatever level, be treated as falling within both the limits of law and the scope of philosophy of law.

## I

### HART AND THE CASE OF THE GRUDGE INFORMER

At the time of their 1958 debate, neither Hart nor Fuller had a correct understanding of the Grudge Informer Case. However, Hart's understanding of the case and his reaction to it are important for an analysis of his general position. According to Hart, a German court in 1949 had to decide a case in which a woman was prosecuted for the

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<sup>5</sup> E.g., Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* [*Statutory Lawlessness and Supra-Statutory Law*], 1 SÜDDEUTSCHE JURISTEN-ZEITUNG [SJZ] 105, 105–08 (1946) (Ger.), translated in 26 OXFORD J. LEGAL STUD. 1, 7 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006).

<sup>6</sup> H.L.A. HART, *THE CONCEPT OF LAW* 272–75, 306 n.272 (2d ed. 1994).

offense of illegally depriving her husband of his liberty—a crime punishable under the German Code of 1871 that had remained in force during the Nazi era.<sup>7</sup> In 1944, she had denounced her husband to the authorities for insulting remarks he had made about Hitler while on leave from the army, because, it seems, she wanted to get rid of him because she was having an affair.<sup>8</sup> Under Nazi statutes (henceforth the “informer statutes”), it was “apparently,”<sup>9</sup> Hart says, illegal to make such remarks, though the wife was under no legal duty to report him. The husband was found guilty and sentenced to death (though it seems that he was sent to the front in lieu of execution).

When the postwar government prosecuted his wife for her deed, her defense was that she had acted in accordance with the law—the informer statutes—and so had not committed any crime. But the Court of Appeal, despite the fact that the husband had been “sentenced by a court for having violated a statute,” found her guilty of the offense of deprivation of liberty because the statute was “contrary to the sound conscience and sense of justice of all decent human beings.”<sup>10</sup> Hart reports that the reasoning was followed in many cases, and these were “hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism.”<sup>11</sup> But, he retorts, “[t]he unqualified satisfaction with this result seems to me to be hysteria.”<sup>12</sup>

Hart’s point is that even if one applauds the objective of punishing the woman for “an outrageously immoral act,” one should see that to achieve this a “statute established since 1934” had to be declared “not to have the force of law,” and, Hart argues, the “wisdom of this course must be doubted.”<sup>13</sup> There were two other choices available to postwar Germans: leave the wife unpunished or introduce “a frankly retrospective law . . . with a full consciousness of what was sacrificed in securing her punishment in this way.”<sup>14</sup> He comments:

Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the

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<sup>7</sup> Here I mostly paraphrase Hart, *supra* note 1, at 618–20, though without quotation marks except when Hart’s choice of language is noteworthy.

<sup>8</sup> Although Hart did not mention the affair, the actual judgment noted that “after her husband’s conscription into the army, she had turned toward other men and had conceived the desire to divorce him.” See *infra* Appendix p. 1032.

<sup>9</sup> Hart, *supra* note 1, at 619.

<sup>10</sup> *Id.* (internal quotation marks omitted).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. . . . [T]here is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of the ordinary case.<sup>15</sup>

Hart emphasizes that it is not a mere matter of form whether one leaves it to a court to invalidate the statute in the way in which the Court of Appeal did—that is, by pretending that the court was merely interpreting the law with no sacrifice of principle—or requires that a statute be invalidated by a retroactive statute. For if we adopt the Court of Appeal’s course and assert that “certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism.”<sup>16</sup> Rather, we should “speak plainly” and say that “laws may be law but too evil to be obeyed.”<sup>17</sup>

Hart took this point to undermine Gustav Radbruch’s famous claim that legal positivism contributed to the failure of lawyers in prewar Germany to respond adequately to the Nazis’ abuse of the legal order. In his reaction to this failure, Radbruch had concluded in a short article in 1946 that one should adopt the view that extreme injustice is not law.<sup>18</sup> Thus, statutes lack the force of law when they contravene fundamental principles of morality and, as Hart described Radbruch’s position, “should not be taken into account in working out the legal position of any given individual in particular circumstances.”<sup>19</sup>

Hart accuses Radbruch of “extraordinary naïvety” for supposing that “insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality.”<sup>20</sup> Hart does recognize that the positivist slogan “law is law” might have had a different history in Germany, acquiring a “sinister character” in contrast to its English history, where it “went along with the most enlightened liberal atti-

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<sup>15</sup> *Id.* at 619–20.

<sup>16</sup> *Id.* at 620.

<sup>17</sup> *Id.*

<sup>18</sup> See Radbruch, *supra* note 5, at 7 (arguing that extreme injustice “lacks completely the very nature of law”).

<sup>19</sup> Hart, *supra* note 1, at 617.

<sup>20</sup> *Id.* at 617–18.

tudes.”<sup>21</sup> But even if that is the case, “latent in Radbruch’s whole presentation of the issues to which the existence of morally iniquitous laws can give rise” was “something more disturbing than naïvety.”<sup>22</sup> For he had only “half digested the spiritual message of liberalism which he [was] seeking to convey to the legal profession.”<sup>23</sup> Everything Radbruch says, according to Hart, depends on an “enormous overvaluation of . . . the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, [were] conclusive of the final moral question: ‘Ought this rule of law to be obeyed?’”<sup>24</sup> Instead, one should adopt the “truly liberal answer” and not let the fact that *X* is the law determine the issue of whether *X* should be obeyed.<sup>25</sup>

Hart was well aware that the harshness of his own judgment could only be accentuated by the fact that Radbruch and others—“like Ulysses or Dante”—testified from the experience of a descent into Hell, from where they brought a “message for human beings.”<sup>26</sup> He was also aware that Radbruch’s criticism of positivism involved an exercise of self-criticism, for Radbruch, before the Nazi ascent to power, had put forward a basically positivist view of law.<sup>27</sup> However, it was precisely the power of the experience from which Radbruch spoke that bothered Hart, because that made Radbruch’s appeal “less an intellectual argument” than a “passionate appeal.”<sup>28</sup> Accordingly, Hart describes Radbruch’s turn against positivism in religious terms as a “conversion” and a “recantation.”<sup>29</sup>

For Hart, the only way to avoid talking “stark nonsense” is to adopt the view of his positivist predecessors, Jeremy Bentham and John Austin, that the validity of particular laws does not depend on their moral content.<sup>30</sup> Rather, if “laws reach[ ] a certain degree of iniquity then there [is] . . . a plain moral obligation to resist them and to withhold obedience.”<sup>31</sup> He quotes with approval Austin’s example of the man who is convicted of a crime punishable by death when the act committed was in fact trivial or even beneficial. The man objects to the sentence on the grounds that it is “contrary to the law of God,”

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<sup>21</sup> *Id.* at 618.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 615.

<sup>27</sup> *Id.* at 616.

<sup>28</sup> *Id.* at 615.

<sup>29</sup> *Id.* at 616.

<sup>30</sup> *Id.* The phrase is quoted from JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 185 (1954), but Hart clearly adopts it as his own.

<sup>31</sup> Hart, *supra* note 1, at 617.

but the “inconclusiveness” of his reasoning, Austin says, is demonstrated by the “court of justice” in “hanging [him] up, in pursuance of the law of which [he had] impugned the validity.”<sup>32</sup>

Shortly after the 1958 debate between Hart and Fuller, H.O. Pappé pointed out that the reasoning of the Court of Appeal in the Grudge Informer Case had been misrepresented. In fact, Pappé explained, the court, and other courts that explicitly dealt with the same or similar issues, did not adopt a “higher law” argument, preferring to focus instead on interpretation of the law. They concentrated on matters such as the absence of a duty to inform and the privacy in which the insulting remarks had been made in order to sustain the conclusion that there had been an illegal deprivation of liberty under the 1871 law.<sup>33</sup>

In 1961, Hart mentioned Pappé’s article in an endnote to his major work in legal philosophy, *The Concept of Law*.<sup>34</sup> There he addressed the respects in which, on Pappé’s account, he had the facts of the case wrong, most pertinently:

[The court,] after accepting the theoretical possibility that statutes might be unlawful if they violated Natural Law, held that the Nazi statute in question did not violate it; the accused was held guilty of an unlawful deprivation of liberty since she had no duty to inform, but did so for purely personal reasons and must have realised that to do so was in the circumstances “contrary to the sound conscience and sense of justice of all decent human beings.”<sup>35</sup>

Hart said that Pappé’s “careful analysis . . . should be studied.”<sup>36</sup> But he did not seem to think that it had implications for his own account of what can be thought of as the dilemma of legality—the problem that judges, lawyers, and those subject to the law face when the law is used as an instrument of injustice. Instead, Hart stated that the Grudge Informer Case, as he had understood it, could be treated as a “hypothetical” one.<sup>37</sup>

Hart’s response, though, is inadequate. It shows that Hart failed to appreciate that the problems Pappé exposed went well beyond the facts of a hypothetical case. Pappé did not merely correct Hart’s account of the case but, as I will argue in the next Part, made a profound jurisprudential point about Hart’s understanding of legality

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<sup>32</sup> *Id.* at 616 (quoting AUSTIN, *supra* note 30, at 185).

<sup>33</sup> H.O. Pappé, *On the Validity of Judicial Decisions in the Nazi Era*, 23 MOD. L. REV. 260, 263 (1960).

<sup>34</sup> HART, *supra* note 6, at 303 n.208.

<sup>35</sup> *Id.* at 304 n.208 (citation omitted).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

that is largely consistent with Fuller's 1958 response to Hart. As we will see there and in Part IV, Hart's method of candor obscures not only the judge's situation but also that of the citizen.

In addition, because Hart does not attend to the problem of interpretation faced by judges in a wicked legal system, he cannot appreciate how cases like the Grudge Informer Case pose the question of how to interpret wicked laws in such a way as to preserve legality. These cases do so because they form a very important subcategory within the category Ronald Dworkin terms "hard cases": cases in which lawyers reasonably disagree about what the law requires as a purely doctrinal matter, so that the matter is left to judges to resolve.<sup>38</sup> These cases are what I call "fundamental cases," in which lawyers reasonably disagree about the appropriate outcome not only because they disagree about legal doctrine but also because their disagreement is influenced by their views about legality.

## II

### FUNDAMENTAL CASES AND THEIR IMPACT ON HART'S POSITIVISM

#### A. *The Court of Appeal Decision*

In the actual Case of the Grudge Informer, the Bamberg Court of Appeal overturned the decision of the trial court that the wife had not illegally deprived her husband of his liberty. The trial court reasoned that the wife's report and the subsequent detention of her husband were the results of his having violated a valid law and that the detention was accomplished through a "properly carried out judicial process."<sup>39</sup> This decision, the Court of Appeal held, erred by inferring the legality of the informer's report from the legality of the court-martial that found the husband guilty. The trial court had failed to appreciate that the accused had used the court-martial as a mere instrument to bring about the criminal act. Her act was thus one of *indirect perpetration*, while the act of the instrument that directly brought about the illegal result—the court-martial that found the husband guilty—was one that simply interpreted and applied the law and so could not be deemed illegal.

The salient difference for the Court of Appeal was that the accused was not under any legal duty to bring about the result, whereas the court-martial was under a legal duty to decide as it did once her report was brought to its attention. The court-martial was

<sup>38</sup> RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81, 81 (1978).

<sup>39</sup> See the Appendix, *infra*, to this Article for my translation of the Court of Appeal's decision.

simply applying the positive law as it was intended to be applied.<sup>40</sup> In contrast, the accused knew, the Court of Appeal reasoned, that her report would lead inexorably to a certain range of results—the least harmful of which was a year’s imprisonment and the worst of which was death. She thus deliberately made use of laws that most Germans knew were designed to terrorize the population and that many, even at the height of Nazi domination, also knew to be immoral.

The court emphasized that its reasoning did *not* depend on a claim that the informer statutes at issue violated the laws of nature. The laws, while grossly unfair, did not reach that point because they did not command any positive conduct, only an omission—to make no public remarks of a certain sort.<sup>41</sup> The court did imply, however, that if the statutes had commanded people to do something immoral and had made it an offense not to do so, the court would have found it illegal for a court-martial to have imprisoned an individual who failed to carry out this positive duty.<sup>42</sup>

It is clear from the court’s reasoning that it was determined to reach a conclusion that the woman was guilty. Since it did not think that the informer laws reached a pitch of injustice sufficient to invalidate them, and since it regarded the court-martial judges simply as having performed their legal duty, the court had to resort to a doctrinal argument viewing the court-martial judges as a passive instrument in the woman’s hands. That is, the doctrine of indirect perpetration requires that the court-martial judge be regarded as akin to a dog set on someone by its owner.<sup>43</sup> There is something odd, even contrived, about the court’s reasoning at the doctrinal level. But while contrived, the reasoning is distinctly legal: All the reasons the court offered are legal reasons, and it organized those reasons into a chain of justification for the result it wished to reach.

Moreover, the legal reasons operate at two rather distinct levels: first, the fundamental level of reasoning about legality and the role of judges in maintaining it; and second, the doctrinal level at which ques-

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<sup>40</sup> See *infra* Appendix p. 1034 (“Unlike the judge, [the citizen] does not carry out a *duty* that is imposed upon him because of his particular submission to authority, one which actively requires the realization of the national socialist state’s right to punish grounded in these provisions.”).

<sup>41</sup> See *infra* Appendix p. 1033–34 (“For these laws did not prescribe any affirmative conduct which is prohibited per se by divine or human law in the opinion of all civilized nations. The provisions rather commanded on pain of punishment an omission, namely to keep silent.”).

<sup>42</sup> Thus, like Radbruch, *supra* note 5, the court does envisage that if the statutes had reached a pitch of injustice sufficient to violate the laws of nature, they would be invalid.

<sup>43</sup> See, e.g., ROBERT ALEXY, *THE ARGUMENT FROM INJUSTICE* 59 (2002) (describing use of “controversial criminal law construction” by court to find woman guilty even though Nazi court acted legally).

tions of substantive law are at stake. At the fundamental level, the court faced the question of what to make of judges who are under a duty to interpret positive laws that are morally obnoxious but, in its view, not so obnoxious that one can make a natural law argument that they are invalid. At the doctrinal level, the court had to consider how its sense of an answer to the first question meshed with its sense of how best to interpret the substantive law. Assume that at both levels judges regard themselves as being under a duty to find an answer that coheres with the animating principles of that level—respectively, the fundamental principles of legality and the principles of the substantive body of law. Because the Grudge Informer Case required the court to take a view not only of doctrine but also of the nature of the judicial role, it is a fundamental case.

At the fundamental level, the court assumed that a judge is in a different position from a citizen when the law requires a morally obnoxious result, but unlike the judge who is under a legal duty to apply the law, the citizen has no legal duty to bring the result to the attention of the state. That is because judges are, by virtue of their office and their submission to authority, required to apply the law as it exists on the statute books. The court thus assumed that the judges in the court-martial had no option but to decide as they did, which was the difference between the judges and the informer. But it follows that if the statutes *had* imposed a duty on citizens to report such remarks, the informer would have been able to rely on the statutes to absolve her of the crime of illegal deprivation of liberty. Hence, the court's distinction between the role of the judge and the role of the citizen turns out, despite some suggestions to the contrary, to depend not on any special judicial responsibilities but on contingent facts about the meaning of the statutes.<sup>44</sup>

There are two problems with the court's reasoning. The first occurs at the doctrinal level, since, as we have seen, in order to get to the result it wanted, the court had to resort to the doctrine of indirect perpetration in a way that looks rather contrived. Hart surely would have regarded this problem as further evidence in favor of his proposal that, in such cases, candor demands that one refrain from smug-

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<sup>44</sup> There is a tension in the court's reasoning on this point. Suppose the informer statutes did impose a duty on people in the wife's position to inform and that the death sentence was either mandatory or customary. On the court's understanding of natural law, the statutes would then be strong candidates for invalidation, and thus the wife would not be able to rely on them in her defense. But her legal position would in many respects be similar to the court-martial judges in the actual case, since the court assumed both that they were under a legal duty to find the husband guilty and that the death sentence was a legally permissible option.

gling one's desire to have the informer punished into claims about what the law requires—whether through the Radbruch Formula (laws that introduce extreme injustice are not law) or through bending the doctrines of positive law. Indeed, it seems to show that the hypothetical case Hart considered was in fact not very different from the actual case; he could still say that the superior legal solution, *if* one resolved the moral dilemma in favor of punishing the informer, was a statute that retroactively invalidated the informer statutes.

The second problem is at the fundamental level. The Court of Appeal did not appreciate the complexity of the moral and legal situation of the court-martial judges, since it assumed that the judges were under a legal duty to decide as they did. It thus assumed, much as Hart did in 1958, that the court-martial judges were faced with a clean clash between legal and moral duty. It was this assumption that seemed to leave postwar courts with the option of, on the one hand, letting the informer go unpunished or, on the other hand, if they were determined to find the informer guilty, resorting to either the Radbruch Formula (as in Hart's understanding of the decision in 1958) or contrived doctrinal reasoning (as in the actual decision).

In fact, as I will now show, postwar courts faced with grudge informer cases were not confined to these options. They could reach the same conclusion as the Bamberg Court of Appeal by finding the informers guilty of complicity in illegal deprivation of liberty, though that also required finding the court-martial judges culpable not as a mere instrument but as the direct perpetrator. As we will see, this route does not appear as contrived because it demonstrates a more complex understanding of the fundamental level. In other words, it was the Bamberg Court of Appeal's simplistic understanding at the fundamental level—the thought that there was a clean clash between legal and moral duty—that produced the peculiarities at the doctrinal level.

### *B. The Federal Supreme Court Decision*

This alternative approach was adopted by the Federal Supreme Court of Germany in a second Grudge Informer Case in 1952 with very similar facts to the first case.<sup>45</sup> This court quashed a lower court's acquittal of an informer and remanded it for reconsideration. As Pappe explains, the court reasoned that the informer could not be found guilty if the court-martial had acted legally, which it had not.

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<sup>45</sup> Pappe, *supra* note 33, at 265 & n.16 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] July 8, 1952, 3 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 110 (F.R.G.)).

There was no need to rely, however, on a claim that the informer statutes were incompatible with suprapositive law because the court-martial had not properly interpreted the statutes or the established principles of German criminal law.

As Pappe describes it,<sup>46</sup> the Federal Supreme Court emphasized, in regard to the statutes, that the offensive remarks about the Nazi regime had to be made in public. While superior courts during the Nazi era had developed a very broad interpretation of publicity such that “the public” included the smallest and most intimate circle, there remained a requirement of an expectation that the remarks might be repeated elsewhere. The court thus required a finding that the husband had *mens rea* in regard to a possible breach of confidence that could not be assumed absent special circumstances in the context of a relationship of extreme intimacy like that between husband and wife. Because the court-martial had not made such a finding, it had erroneously based its conviction on an arbitrary and unlawful interpretation of the informer statutes.

Second, the death sentence handed down violated established principles of German criminal law. Though the court-martial had a great deal of discretion regarding sentencing, a death sentence was clearly disproportional given that the offensive remarks were made between spouses, while the interest supposedly protected by the informer statutes was the military morale of the German people—which was, at most, minimally impacted by the remarks. The court-martial essentially had decided not on the basis of the positive law but in response to administrative pressure to suppress all criticism of the regime.

As a result, the accused was an accessory before the fact to the crimes of unlawful deprivation of liberty and attempted homicide. She was guilty because she had the intention to get rid of her husband by using the unlawful procedure of the court-martial. The jury in the trial court had accepted her defense that she trusted in the legality of the court-martial and that, as a woman without higher education, she could not be expected to recognize violations of the rule of law. However, the court held that such a defense was available only in normal times, when independent judges guarantee the liberty and dignity of the individual. The Nazi era, it thought, was very different because court practices often failed to deliver due process. Pappe comments:

This insight was well within the ken of an ordinary member of the public. There was, despite the warped judgment of wide circles

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<sup>46</sup> The next three paragraphs summarize the discussion in Pappe, *supra* note 33, at 265–68.

during the Nazi period, a lively awareness in the population that administrative and legal authority could be abused for the purpose of intimidation and suppression of opposition views. Sentences, which served the purpose of political terror rather than the realisation of the law, had actually led to a heightened popular sense of right and wrong rather than stifling it. This assumption was accepted by the Supreme Court as a matter of common knowledge; it had also been found to be correct by the jury. A mistaken belief in the legality of the court-martial procedure would be a defense only for a person who could not be expected to share the insights of ordinary members of the public. However, the facts of the case, as found by the jury, indicated that the accused, far from acting to reveal the crime, just wished to make use of the best means to get rid of her husband so that she could continue her adulterous way of life.<sup>47</sup>

Pappe went on to outline the ways in which common law judges could arrive at the same result as the Federal Supreme Court using the ordinary resources of their legal orders.<sup>48</sup> This exercise underlines his emphasis on the fact that the court, though using a different route from that of the Bamberg Court of Appeal, reached its conclusions without having to rely on allegedly suprapositive legal principles.

### C. Hart's View of the Judicial Role

The fact that these doctrinal interpretations diverged prepares the way for Pappe's profound observation about a little-noticed aspect of Hart's 1958 article—that Hart relied on the Case of the Grudge Informer in his argument about judicial interpretation of particular laws. Because, says Hart, men were sentenced to death for criticism of the Nazi regime, one should see that the “choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's tyranny effectively.”<sup>49</sup> A “decision on these grounds would be intelligent and purposive, and from one point of view the decision would be as it ought to be.”<sup>50</sup> But, Hart asserts, that “ought”

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<sup>47</sup> *Id.* at 267–68. Note that the presiding judge at the court-martial warned the informer that “she was not obliged to give evidence under oath, that the accused was under threat of capital punishment, and that, without her sworn evidence, proof was likely to be insufficient.” *Id.* at 265. However, she insisted on going ahead. Pappe points out that the Federal Supreme Court's finding does not inevitably lead to the conclusion that the judges at the court-martial have to be punished, since they could claim a defense of intimidation under the Criminal Code. However, he also notes that this defense would not be that convincing, as judges who fell out of favor usually saved their skins simply by resigning. *Id.* at 268.

<sup>48</sup> *Id.* at 268–70.

<sup>49</sup> Hart, *supra* note 1, at 613.

<sup>50</sup> *Id.* at 614.

is immoral, and thus we know that it cannot sustain a claim that the distinction between “law as it is and law as *morally* it ought to be” is false.<sup>51</sup>

Hart’s claim that “from one point of view the decision would be as it ought to be” is aimed specifically at an earlier work by Fuller, which argued that judges who interpret the law appropriately do not legislate their views of right and wrong into the law; rather, they decide what the law is in terms of moral purposes that are already “latent” within the law.<sup>52</sup> Hart’s response is that if the court-martial’s decision were correct as a matter of interpretation of the law because it sought intelligently to further a value latent within the Nazi legal order for interpreting this kind of statute, the fact that the value is morally obnoxious shows that there is no necessary connection between law and morality.

However, as Pappé observes, “to regard [such] intimidation in the interest of the ruling party as the declared purpose of the German criminal law . . . [is] an arbitrary assumption.”<sup>53</sup> His point is that German criminal law during the Nazi era could not be reduced to Nazi statutes since it included not only the 1871 law on illegal deprivation of liberty but also a large part of pre-Nazi criminal law. Moreover, the judges, who were supposed to be independent, chose “between applying the criminal law as established by statute, interpretation and precedent, and, on the other hand, obeying the shifting and often contradictory administrative directives of the government of the day.”<sup>54</sup> Finally, it has to be taken into account that a dictatorial government can make laws to achieve its ends but cannot easily change the body of preexisting law wholesale. What dictatorial governments really desire is the ability to decide arbitrarily. But they are unlikely to reveal this goal by enacting a statute declaring that courts should follow government orders regarding the “definition and punishment of crime,” since such a statute would “obviously not be law, even in Hart’s sense.”<sup>55</sup> It is thus unsurprising, Pappé concludes, that the postwar courts “should . . . have concentrated on questions of judicial interpretation and procedure rather than on that of the validity of statutory law.”<sup>56</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 612. Hart has in mind Lon L. Fuller’s *Human Purpose and Natural Law*, 53 J. PHIL. 697, 703 (1956), as Hart makes clear in his more elaborate discussion of this point in HART, *supra* note 1, at 628–29.

<sup>53</sup> Pappé, *supra* note 33, at 271.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 271–72.

As Pappé suggests, the issue here is not simply that the value of political tyranny is morally obnoxious. It is also legally obnoxious—an “ought” that, we might say, clashes with the ought of legality, since it cannot be justified from the perspective of a judge who regards his role as one of maintaining legality rather than acting as a minion of the regime.<sup>57</sup>

Hart never says in so many words that judges have a duty to maintain legality. But in later work, he made it clear that judges must be committed to applying the criteria of legality in the most fundamental rule of legal order if a legal order is to exist.<sup>58</sup> Since his account of that rule, and judges’ role in maintaining it, takes place at what I have called the fundamental level, it has profound implications for Hart’s legal theory, in particular for his assertion that his theory illuminates the predicament of individuals faced with unjust laws. Because Hart’s theory tells them that the certification of law as valid is not conclusive of the question of obedience, it seems to have no easy application to the judges who decide grudge informer cases, since (even in Hart’s own understanding) the judges did not have to decide whether to obey the law. Rather, they had to decide how best to interpret it.

As we know from *The Concept of Law*, Hart does not think that what judges do with regard to the fundamental level can be captured in the language of obedience to commands. Judicial duty has nothing to do with obedience and everything to do with judges’ accepting that their “rule of recognition”—the fundamental rule of legal order—provides them with “a public, common standard of correct judicial decision.”<sup>59</sup> In other words, judges do not obey their rule of recognition or the rules that the rule of recognition picks out as valid. Rather, judges accept that it is the right thing for them to do to continue to apply both the rule of recognition and the rules that it certifies as valid.

So if a rule is picked out as valid by the rule of recognition, the judge, from the point of view of his legal order, has to apply it. It is hardly stretching Hart’s analysis, despite his claim that he was

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<sup>57</sup> See Dyzenhaus, *supra* note 2, at 116 (endorsing Fuller’s rejection of Hart’s solution); Mertens, *supra* note 2, at 203 (discussing “problem of morally iniquitous laws” for judges); see also O. Kahn-Freund, Correspondence, 23 MOD. L. REV. 603, 604 (1960) (rejecting defense of inevitable death as justification for judges’ failure to resign in face of Nazi legislation).

<sup>58</sup> HART, *supra* note 6, at 116–17 (discussing “acceptance by officials of secondary rules as critical common standards of official behaviour” as existence condition for legal systems).

<sup>59</sup> *Id.* at 116.

engaged in an exercise in “descriptive sociology,”<sup>60</sup> to say that the judge is under a duty to apply the rule because that is what he is required to do in his role as judge. For a judge to decide not to apply a rule merely because it is immoral is to cease being a judge, since the fundamental rule of legal order depends on the judge continuing with the practice of applying valid rules.

A judge who has to interpret an immoral law is thus faced with a situation far more complex than can be captured by what we can attribute to Hart as his likely response to the Radbruch Formula: the “Hartian Formula” that citizens should disobey extremely unjust laws. Hart’s analysis of the Grudge Informer Case shows that, at least when it comes to the judges charged with the maintenance of the most fundamental rule presupposed by his idea of legal order, the Hartian Formula obscures, rather than illuminates, the judges’ position when they are faced with an unjust law.

Further, as I have already suggested, the Hartian Formula is no less obscuring when applied to the situation of the postwar courts. That the Bamberg Court of Appeal and the Federal Supreme Court reached the same result by different doctrinal routes could be thought to be evidence of the fact that the judges were determined to reach a result that was not determined by the law and so were exercising discretion in Hart’s sense. But a much more plausible explanation is that both courts, at the fundamental level, thought it imperative for legality’s sake to demonstrate to the German people that there is a difference between legality and the Nazi administrative regime. The opinion of the Bamberg Court of Appeal has much more difficulty in this regard. As we saw, its sense that the court-martial judges were faced with a stark choice between legal and moral duty, but not so stark as to overcome their legal duty, led to a less than satisfactory piece of reasoning at the doctrinal level.

In contrast, the opinion of the Federal Supreme Court has far less difficulty with this goal because its idea of legality, implicit in its reasoning at the fundamental level, combines two elements: first, an understanding of judicial interpretation that requires judges to interpret doctrine by taking a wide view of the relevant positive law in order to reach the best possible conclusion; and second, an understanding of legality that consists of principles, including the principle that a court that decides matters affecting significant individual inter-

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<sup>60</sup> *Id.* at vi; see also *id.* at 240 (“My account is *descriptive* in that it is morally neutral and has no justificatory aims . . .”).

ests is radically different from an arm of executive government that exists simply to carry out the orders of higher officials.<sup>61</sup>

This second component is itself justified by a court's service to the interests of the individual. It may also be that one could convincingly argue that the two components form part of an overarching theory of legality. However, I wish to make a more limited point: The court-martial judges failed to adhere to the principle of legality with respect to both components. The informers failed by turning their husbands over to a body, counting on the fact that it would act—not as the court of law it was presented as being but as a cog in a vicious administrative regime.

To sum up, Hart shared with the Bamberg Court of Appeal the sense that the court-martial judges were faced with a clean clash between legal and moral duty. Unlike the court, however, he did not accept the possibility that a Nazi law more unjust than the informer laws should be invalidated on the grounds of extreme injustice. He also would not accept the way in which the court presented its interpretive solution to the problem—that is, as a conclusion determined by law. At most, he would hold that reaching this solution, like the one reached by the Federal Supreme Court, was a quasi-legislative act. Candor would require that the courts acknowledge that their conclusions were not determined by the law but rested ultimately on the judges' sense that it was morally desirable to convict the informers. But in fact, it is much more likely that Hart would regard both of these decisions as, in substance, a judicial invalidation of past laws disguised as interpretation. That is, had he known in 1958 the details revealed by Pappé about these two grudge informer cases, he would have said that the decisions in these cases were not acts of quasi-legislation—judicial discretion in cases where the law was uncertain. Rather, they were legislation in the fullest sense and thus inappropriate for judges. I will come back to these issues once I have briefly sketched Fuller's 1958 position.

### III

#### FULLER'S RESPONSE

In contrast to Hart, Fuller's 1958 article provided a theoretical framework sensitive to the complexities of the situation later revealed by Pappé to have actually faced the postwar courts. In Fuller's view, the legal theory debate was best understood as one about different ideals of fidelity to law at the fundamental level. At that level, one

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<sup>61</sup> See Pappé, *supra* note 33, at 267–68 (arguing that German public appreciated distinction between abuse of administrative and legal authority and its proper use).

had to take into account the principles of what Fuller called the “internal morality of law,” the “inner morality of law,” or the “implicit morality” of legal order.<sup>62</sup>

Fuller argued that attention to the internal morality of law would have helped German lawyers and judges before the war maintain their fidelity to the ideal of law because it would have alerted them to the abuse by the Nazis of the form of law.<sup>63</sup> After the war, German judges could have dealt better with cases like that of the Grudge Informer had they focused on the deterioration of legality. Therefore, the debate at the fundamental level was one that had direct practical implications, not least because a judge faced with a certain kind of case would also be faced with a choice between these ideals. This choice, under Fuller’s view, does not amount to an exercise of discretion determined by factors external to law because it is a choice about how best to interpret the law in a way that sustains legality.

For Fuller, in other words, the question of the appropriate interpretive stance of judges is one that can only be answered at the fundamental level. Judges must come to conclusions about the appropriate meaning of particular laws in light of their purposes; this requires attention to other relevant law and ultimately to the purposes of the legal order, including the principles of legality. Hence, Fuller claims that in interpretation, the judge cannot understand his duty to determine what law is other than in terms of what law ought to be.<sup>64</sup>

It is because Fuller acknowledges that the doctrinal and fundamental levels are in play—and that there is a direct connection between them in judicial interpretation—that he both sees that the informer statutes could not be said to compel the result that the husband was guilty and sees the implications of this fact for the informer’s defense that she acted in accordance with the law.

In contrast, Hart, in analyzing the case, did not see that its characterization was a matter of interpretation that had to account for the complexity of the situation of a judge, whether during the Nazi era or after the war. He also could not appreciate such complexity since, for

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<sup>62</sup> Fuller, *supra* note 1, at 645, 659. Fuller’s later list of the principles is that law should be general (generality), that law should be promulgated or public (publicity), that there should not be abuse of retroactive law (nonretroactivity), that law should be understandable (clarity), that law should not be contradictory (noncontradiction), that law should not “require conduct beyond the powers of the affected party” (possibility of execution), that law should not be so frequently changed that the “subject cannot orient his action” (constancy), and that “actual administration” should be congruent with the “rules as announced” (congruence). LON L. FULLER, *THE MORALITY OF LAW* 46–91 (rev. ed. 1969).

<sup>63</sup> See Fuller, *supra* note 1, at 659 (“The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges.”).

<sup>64</sup> See *id.* at 661–72 (critiquing Hart’s penumbral theory of interpretation).

him, issues of interpretation do not fall within the scope of descriptive legal theory but are instead fit topics for prescriptive political theory.<sup>65</sup>

In this regard, Fuller rejected Hart's statement of the dilemma the postwar courts faced because Hart's solution—the judge should hold that the law is too evil to be obeyed—is wrong-headed, at least if it is offered to judges, since “moral confusion reaches its height” when a court “refuses to apply something it admits to be law.”<sup>66</sup> As Fuller recognized, Hart meant for this solution to be deployed not by a court but by a legislature. But Hart, Fuller says, did not take into account the situation of “drastic emergency”<sup>67</sup> in which the courts and Radbruch were living: If the courts had waited for legislation, people might have begun taking the law into their own hands;<sup>68</sup> “Germany had to restore both respect for law and respect for justice,” and the attempt to “restore both at once” necessarily created “painful antimonies.”<sup>69</sup>

It is important to note that Fuller, despite his better appreciation of the complexities, also preferred the solution of a retroactive statute, and, as he pointed out, Radbruch had the same preference. But Fuller was anxious to state that his reason for this preference was not the positivist one—that the statute would be “the most nearly lawful way of making unlawful what was once law.”<sup>70</sup> Rather, the statute would symbolize a “sharp break with the past,” enabling the judiciary to “return more rapidly to a condition in which the demands of legal morality could be given proper respect.”<sup>71</sup> In addition, Fuller expressed some doubts in his 1964 book, *The Morality of Law*, about Pappé's argument, on the basis that it was both odd for postwar courts to interpret Nazi statutes in the light of their own standards and “out of place” to strain over questions of interpretation when the informer statutes were so full of “vague phrases and unrestricted delegations of power.”<sup>72</sup>

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<sup>65</sup> A common response to any critique of Hart's legal positivism on the basis of a hard case is that his theory is one of law, not adjudication, and that one cannot draw implications from an exercise of judicial discretion for legal theory in general, and for legal positivism in particular. However, the Grudge Informer Case shows how problematic this response is. See *infra* notes 94–97 and accompanying text (discussing Dworkin's contention that positivism must become political theory of law).

<sup>66</sup> Fuller, *supra* note 1, at 655.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 657.

<sup>70</sup> *Id.* at 661.

<sup>71</sup> *Id.*

<sup>72</sup> FULLER, *supra* note 62, at 40 n.2. These doubts were clearly anticipated in 1958 in Fuller, *supra* note 1, at 655.

Thus, Fuller too preferred the option of legislative invalidation if informers were to be punished but recognized that the result might have to be reached by judges. In that case, he advocated neither the Radbruch Formula nor the interpretive option. Rather, as is revealed by the following passage, he offered not a formula but a suggestion that the postwar courts could regard the informer laws as not binding on them, given the defects both in the laws and in the Nazi social order as a whole:

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.<sup>73</sup>

Put differently, Fuller thought that the postwar judges legitimately could reach a conviction of the informers without invalidating the laws on the basis of their extreme injustice, judged against the standards of a morality external to law. Rather, the judges could conclude from the fact that the informer laws failed so comprehensively to live up to standards of legality—the internal morality of law—that the laws had no legal relevance for judges in the postwar period.

Fuller, in my view, clearly had the better of the exchange with Hart, because Hart seems unable to appreciate the moral and legal complexity of situations in which judges are faced with unjust laws. As I suggested earlier, Hart's inability may not be confined to the situation of the judge. One can infer from Pappé's analysis of the Federal Supreme Court's reasoning that the court supposed that a *law*-abiding citizen of the Third Reich would have some basic understanding of the fundamental level—of the requirements of the rule of law—and so would not consign someone to a system presided over by the court-martial judges for making remarks about Hitler. She would not do so because she would know that the accused would not be tried according to law—by impartial judges who give an appropriate inter-

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<sup>73</sup> Fuller, *supra* note 1, at 660. Fuller initially casts the point as one about the grounds for invalidating a statute but makes clear on the next page that there is no issue of invalidity, since the artifact that makes a claim to be law fails to sustain that claim. That is, there is no law to be invalidated. *Id.* at 661.

pretation of the law. For such a citizen, the moral and *legal* issue was thus too complicated for a theory that can only deal with a clean clash between a substantively bad law and one's conscience.

As I will now show, Hart's return to the Grudge Informer Case in *The Concept of Law* only strengthens Fuller's position. However, I will also suggest that Fuller's dismissals of the Federal Supreme Court's reasoning and of Pappé were too hasty. He failed to see that there are two kinds of cases within the category of fundamental cases: On the one hand, there are cases like the Grudge Informer Case in which complexity arises because the judge has to deal with the connection between issues at the doctrinal and the fundamental levels; on the other hand, there are cases in which the judge has to focus almost exclusively on the fundamental level.

#### IV

##### INTERPRETATION OR INVALIDATION?

As we saw, in 1958 Hart seemed to envisage only three options in regard to the Grudge Informer Case: (1) leave the informer unpunished; (2) have the legislature enact a frankly retroactive law; or (3) use judicial employment of the Radbruch Formula to invalidate the problematic informer laws on the basis of their extreme injustice. If the informer were to be punished, Hart clearly preferred the retroactive statute.

However, in *The Concept of Law*, Hart more directly contemplated another possibility for transitional situations in which a nation is engaged in a journey away from an authoritarian past: Punishment for acts that were lawful in terms of the immoral laws of the authoritarian regime might be considered "socially desirable"—and thus permitted—in circumstances in which the legislature is unwilling or unable to act, perhaps because a retroactive law would be considered "morally odious."<sup>74</sup> In these circumstances, judges might feel compelled to act, and, Hart said, natural law arguments to the effect that the unjust laws were simply invalid might seem tempting. But, he insisted, we should refuse the "invitation"<sup>75</sup> presented by this option. So Hart in 1961 envisaged both the private citizen and the official faced with an unjust law as following the method of candor and saying "[t]his is law; but it is too iniquitous to be applied or obeyed."<sup>76</sup> By direct implication, he also contemplated that a judge might be justified in finding the informer guilty by simply refusing on moral grounds to

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<sup>74</sup> HART, *supra* note 6, at 207–08.

<sup>75</sup> *Id.* at 208.

<sup>76</sup> *Id.*

give legal effect to the immoral informer statutes that would otherwise prevent that result.

Recall that Fuller, in 1958, had seen that the method of candor should open up this option from Hart's perspective but thought that no judge could adopt it, since when a court "refuses to apply something it admits to be law," then "moral confusion reaches its height."<sup>77</sup> Fuller's point can be both elaborated and strengthened by adverting to his claim in 1958 that German indifference to the internal morality of law persisted in Radbruch's new position after the war. Fuller suggested that Radbruch's resort to notions of "higher law"—a morality that transcends positive law but that functions as a test for the validity of law—may itself be "a belated fruit of German legal positivism."<sup>78</sup> Someone with a positivist mindset might think that the only way to "escape one law is to set another off against it, and this perforce must be a 'higher law.'"<sup>79</sup>

Fuller's claim seems to be that, despite Hart's vehement critique of Radbruch, there is a deep similarity between their positions. Both Hart and Radbruch resort to the idea of a higher moral law in order to deal with the problems created by past legal injustice. For them, the higher law is a law that has the power or force to invalidate another law. Thus they both in fact prefer the legal solution to come in the form of a frankly retroactive fix. In 1958, the difference between Hart and Radbruch was only that Radbruch was prepared to allow judges to do what the legislature had not done or would not do. But since a judge, unlike a legislature, has to rely exclusively on legal reasons, Radbruch had to find an argument that permitted him to portray judges' retroactive rulings as legal. Thus he argued that the prohibition on extreme injustice is a kind of higher *legal* law.

Hart's failure to apply the method of candor to judges might, as I have suggested, indicate that in 1958 he agreed with Radbruch that judges have no option but to apply valid law. This means that his rejection of the Radbruch Formula for candor's sake requires that the legislature act. But by 1961, perhaps influenced both by Fuller and Pappé, he understood better why in a transition it might seem imperative for judges to act, which is why he then offers judges the method of candor.

That offer, in one sense, almost eliminates the distance between Radbruch and Hart. All that keeps them apart is a slight difference in the description of what judges legitimately might do. For Radbruch,

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<sup>77</sup> Fuller, *supra* note 1, at 655.

<sup>78</sup> *Id.* at 660.

<sup>79</sup> *Id.*

judges are legally entitled to invalidate extremely unjust laws, while for Hart judges are morally entitled to refuse to apply them. But if a judge *qua* judge has to carry out his legal duty, then, as we saw Fuller suggest, the judge *qua* judge cannot refuse to apply valid law. This refusal to obey makes sense for a citizen, though I have indicated why the Grudge Informer Case shows that the role of citizen can be more legally and morally complex than is indicated by the method of candor. However, the refusal makes no sense for a judge in his role as an official of the system. He would, at the moment of decision, have to step out of his judicial perspective and adopt the citizen's perspective, which is to say that he could not legitimately decide the matter.

It is worth recalling that in 1961, Hart did not think that the interpretive option offered by the Federal Supreme Court was worth discussing, remarking in a note only that "Dr. Pappé's careful analysis" of the case "should be studied."<sup>80</sup> There are two possible reasons for this omission.<sup>81</sup>

First, as I have suggested, Hart likely thought that both the Bamberg Court of Appeal and the Federal Supreme Court were disguising their retroactive invalidation of the informer laws as an exercise in judicial application of the law, thus making the Radbruch Formula the only real alternative to legal positivism's method of candor. Second, however, we know that just as the method of candor counsels a citizen to consider the issue of disobedience to unjust laws in light of the Separation Thesis, that method also counsels judges to acknowledge that, in most cases in which the issue turns on interpretation of the law, they are, as Hart described things in 1958, in a "penumbra" of legal uncertainty.<sup>82</sup> In the penumbra, in contrast to the "core" where law is certain, judges have to exercise discretion and make law in accordance with what they think is morally best.<sup>83</sup> So it might be the case that Hart's remarks about Pappé indicate that he took from Pappé's argument that there was a genuine issue of interpretation for the postwar courts—that is, he saw that the judges were in the penumbra. There would then be no reason for Hart to discuss Pappé's argument in a work of legal philosophy, since how judges

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<sup>80</sup> HART, *supra* note 6, at 304 n.208.

<sup>81</sup> A third reason might be that Pappé's article appeared too late (1960) in the process of producing *The Concept of Law* (1961) for Hart to devote more time to it. But the fact that Hart later added almost exactly the same note to the reprint of *Positivism and the Separation of Law and Morals*, reprinted in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 75 n.43 (1983), suggests that he did not consider interpretation to be a serious option.

<sup>82</sup> Hart, *supra* note 1, at 607.

<sup>83</sup> *Id.* at 607–08.

should exercise their discretion in the penumbra is a matter for prescriptive political theory.

Nevertheless, from the perspective of positivist philosophy of law, Hart can say two things about the cases. First, legal positivism not only countenances but also highlights the fact that, in the penumbra, judicial interpretation of the law is a highly creative exercise. Second, as a matter of both correct description and of promoting morally responsible adjudication, judges and others should recognize that such creativity is not ultimately determined by legal reasons but by a judge's sense of morality. Thus we should refuse, as Hart said of Fuller's theory of interpretation in 1958, any "invitation" to regard judges' conclusions in penumbral cases as determined by moral resources already latent within the law.<sup>84</sup>

Here we see that Hart's position collapses into Fuller's, much as his position on judicial candor collapsed into something like Radbruch's theory of "higher law." The difference between legal positivism's account of judicial interpretation and that offered by Fuller seems in some sense miniscule: They are different ways of describing how legal actors can get to a morally desirable result, just as Hart was later to describe the difference between legal positivism and Dworkin's account.<sup>85</sup> However, Hart's account of interpretation encounters exactly the same problem faced by his suggestion that judges might refuse to apply morally bad law.

The problem is not that Hart's account fails to be creative; it is that it is too creative, since ultimately the judge is disciplined by his sense of morality, not law. In addition, if the case is a penumbral one, the judge is by definition making law retroactively, which means that the judge is invalidating the former laws in order to reach what he considers to be the morally right result. In contrast, just as Radbruch, on my account, wants his Formula to function as a legal argument because only such an argument is deployable by judges, so Fuller wants judicial interpretation of law to be a legally determined exercise, one in which judges must rely only on legal reasons and must deploy those reasons so as to make out the best possible justification for their conclusion.

In providing accounts in which judges are limited to the legal argument that they present as legally determinative of their conclusions, Fuller and other like-minded legal philosophers are not merely

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<sup>84</sup> *Id.* at 614. Hart's use of the "invitation" may be significant in that he seems to want to convey that the theoretical contest turns on what understanding of law produces the morally best results.

<sup>85</sup> HART, *supra* note 6, at 272–75, 306 n.272.

catering, as Hart suggested in 1958,<sup>86</sup> to some psychological need of judges to hide their moral subjectivity behind a mask of legal objectivity. They are instead seeking to make philosophical sense of a conception of the judicial role, which is as old as law itself and which is often reflected in judicial oaths of office under which judges administer justice “according to law.” This conception requires both that judges render justice and that they do so in the way that law requires. Thus, the interpretation of unjust laws presents a particular problem. Moreover, it is important from the perspective of legality that judges approach such a problem through the mode of interpretation and not through an act of retroactive invalidation, since, as Hart rightly pointed out in 1958, retroactive invalidation—if it is to take place at all—is within the province of legislation, not adjudication.

Fuller’s special contribution to the conception of judges doing justice according to law is to point out that the problem of interpreting an unjust law becomes extremely acute for judges when the clash is not simply between moral standards external to the law and the law in question but between the law and the moral standards internal to law—the internal morality of legal order.<sup>87</sup> In such a situation, there is no clean clash between law and morality because the question of what the law is in such situations is itself morally and legally complex.

However, Fuller did not see clearly enough the implications of his conception for the Grudge Informer Case in the wake of Pappé’s corrective article. His remark that it was odd for postwar courts to interpret Nazi statutes in the light of their own standards is insensitive to the complexity of the legal order during the Nazi period in a way that is surprising given his general view about that complexity.<sup>88</sup> Thus, he does not take into account that there was a point to the postwar courts’ attempts to show that the German legal order persisted into the Nazi era: They provided both a set of standards against which the activity of officials and citizens could be evaluated and a basis for legal reconstruction. Further, Fuller’s remark that it was “out of place” to strain over questions of interpretation when the informer statutes were so full of “vague phrases and unrestricted delegations of power”<sup>89</sup> is not consistent with his own legal theory. In particular, it fails to take into consideration the many places in his work in which he suggests that it is precisely the task of judges to strain to find interpretations of the law that cohere with their understanding of law’s

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<sup>86</sup> See Hart, *supra* note 1, at 611 (calling it fiction to say that judges find, and do not make, law).

<sup>87</sup> See *supra* Part III (outlining Fuller’s response to Hart).

<sup>88</sup> See Fuller, *supra* note 1, at 653–55 (discussing statutes at issue).

<sup>89</sup> FULLER, *supra* note 62, at 40 n.2.

purposes, informed ultimately by their understanding of the ideal of fidelity to law.<sup>90</sup>

I suspect that these problems stem from the fact that Fuller did not clearly see a distinction between two kinds of fundamental cases: on the one hand, cases such as the Grudge Informer Case, in which the unjust law at issue requires an interpretation at the doctrinal level that implicates the fundamental level; and, on the other hand, cases in which interpretation has to take place exclusively, or almost exclusively, at the fundamental level because there is no interpretive issue at the doctrinal level.

As we know, Fuller thought that the Grudge Informer Case fell into the category of cases in which interpretation had to take place at the fundamental level in order to reach the conclusion that a morally problematic law did not stand in the way of the result the judge should reach. Judges should resolve such cases not by deploying the Radbruch Formula but through an inquiry into whether the laws that seemed to obstruct the desired result were so legally defective—defective in terms of the internal morality of law—that they did not have to be taken into account.

However, a case probably fits better in the exclusively fundamental subcategory not when, as Fuller saw the Grudge Informer Case, the unjust law at issue is difficult to interpret; rather, it will fit in this subcategory when the law is *easy* to interpret. Of course, the question of whether a fundamental case falls into one or the other of the two subcategories is itself an interpretive question, one that can, as Fuller himself would advocate, be settled only by debate about what best serves the ideal of fidelity to law.<sup>91</sup>

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<sup>90</sup> See, e.g., *id.* at 81–91 (describing how impossibility of ascertaining single legislative intent renders interpretation a creative task).

<sup>91</sup> Just this kind of interpretive question arose in Germany after reunification. Some German courts found border guards from the former German Democratic Republic (GDR) guilty of manslaughter for having killed East Germans attempting to cross the border that separated the two Germanies even though the guards had, as they understood things, complied with their duties under the provisions of the Border Guard Law. The courts seemed to adopt two rather different modes of getting to this result: reliance on the Radbruch Formula and interpretation of the Border Guard Law. In the latter mode, the courts reasoned that the guards could be said neither to have complied with a fundamental legal principle of proportionality nor with the fundamental requirement that they regard life as the “most prized legal value,” which was endorsed by the West German legal order at the time of the killings and by the whole of Germany after reunification. For discussion, see Robert Alexy, *A Defence of Radbruch’s Formula*, in *RE-CRAFTING THE RULE OF LAW* 15, 19–22 (David Dyzenhaus ed., 1999), and Julian Rivers, *The Interpretation and Invalidation of Unjust Laws*, in *RE-CRAFTING THE RULE OF LAW*, *supra*, at 40, 49–53. Note that reliance on the Radbruch Formula seemed out of place because the Border Guard Law, which allowed the use of lethal force only as a last resort to prevent illegal border crossings, did not seem on its face to be extremely unjust. That is, what was unjust was not the

By contrast, if the unjust law is indeed easy to interpret and stands in the way of what would otherwise be the just legal conclusion, judges have to find some legal resource to deal with that law other than a strained interpretation at the doctrinal level. Thus, they are required to resort to either the Radbruch Formula or a Fullerian argument about the law's failure to comply with legality. While I will not go into this question here, it might be that the latter is more satisfying as a legal argument because it is about factors intrinsic to legal order, not about the judge's sense of the pitch of the sheer immorality of the law.<sup>92</sup>

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law in itself but the regime whose borders it protected. However, Alexy objects also to the interpretive mode on grounds similar to Fuller's objections to the actual decisions in the grudge informer cases, namely that by interpreting the "former law of the German Democratic Republic in the light shed in the present by principles of the rule of law is [to pursue] a covert kind of retroactivity which is worse than an open one." Alexy, *supra*, at 21. But as Rivers points out, courts that pursued the line of argument that Alexy condemns did try to put that argument on a basis that had a legal toehold in the GDR; in particular, they appealed to the fact that the GDR had committed itself to upholding human rights by binding itself to the International Covenant on Civil and Political Rights, which contains "pertinent rights to life and free movement." Rivers, *supra*, at 50–51.

<sup>92</sup> A clear example of a case in which interpretation had to take place at the fundamental level is the *Chinese Canadian Head Tax Case*. As discussed in David Dyzenhaus, *The Juristic Force of Injustice*, in *CALLING POWER TO ACCOUNT: LAW, REPARATIONS, AND THE CHINESE CANADIAN HEAD TAX CASE* (David Dyzenhaus & Mayo Moran eds., 2005), Chinese immigrants had to pay a very onerous and explicitly racist tax in order to immigrate to Canada from 1885 until 1923, when legislation was enacted prohibiting their immigration altogether. Surviving head-tax payers, and their descendants, sought reparations and an apology from the Canadian government. The main argument made by their lawyers was that the government was under a legal obligation to disgorge the taxes collected because it had been unjustly enriched by the tax.

That there was enrichment was clear but, in *Mack v. Attorney General of Canada*, first the Ontario Superior Court of Justice and then the Ontario Court of Appeal found against the Chinese Canadians on the basis that the claim of unjust enrichment could not succeed because the statute under which the tax was collected clearly was valid during the time when it was in force. [2002] 217 D.L.R.4th 583 (Can.), *aff'g* [2001] 55 O.R.3d 113 (Can.). Thus, it constituted a "valid juristic reason" for the enrichment. *Id.* at 601.

The courts recognized that the law was valid by the tests for validity at the time. It had been enacted by the federal parliament, which had clearly acted within the scope of its jurisdiction. Because it was enacted at a time when Canada had no bill of rights, the federal parliament was considered to be supreme within its jurisdiction.

Since the law clearly mandated collecting the tax, the lawyers relied on the Radbruch Formula to argue that the statute was so unjust that it should not be considered valid law. Like the Bamberg Court of Appeal, the Ontario courts recognized the grave injustice of the law but did not invalidate it. Unlike that court, they did not say *obiter* that statutes that were even more unjust might be invalid for that reason. And since it was common cause that the statute, if valid, constituted a valid juristic reason, thus blocking a claim in unjust enrichment, the Ontario courts found that the claim disclosed no reasonable cause of action so that the matter need not proceed to a full trial.

As I have suggested in the text, it might have been better for the lawyers to focus on their alternative argument, which did not claim that the statute was invalid because it was extremely unjust but claimed that the statute had no legal effect beyond the time when it

There is another reason, however, why Fuller might not have been able to appreciate the potential for judicial interpretation in circumstances such as those faced by the courts in grudge informer cases. It may be that such appreciation is possible only after Dworkin's own special contribution to philosophy of law—his theory of law as constructive interpretation.

## V

### DWORKIN'S IMPACT ON THE DEBATE

Dworkin has argued that in order for philosophers of law to make sense of interpretation at the doctrinal level, they have to understand what is involved in the judicial commitment to finding a legally determined answer to the questions judges face. In Dworkin's view, judges perform their role appropriately when they attempt to find answers that cohere with the principles that best justify the law generally considered relevant to the questions they face. In doing so, they also attempt to show law in its best moral light by employing the "soundest theory of the law" that can justify the law of their legal order.<sup>93</sup> The principled basis of the law that is exposed through such constructive interpretation will, Dworkin claims, display the liberal value that requires that each individual be treated with equal concern and respect.<sup>94</sup>

Of course, there are elements of this theory of interpretation in Fuller's work, as there have to be in any theory that takes the justice-seeking conception of the judicial role seriously. But where Dworkin has gone much further than Fuller is in articulating a complete theory of interpretation at the doctrinal level and, more importantly, in showing that debate about such theories is one that takes place at what I have called the fundamental level. In particular, Dworkin has shown that his position on interpretation does not merely articulate, in Fuller's term, an ideal of fidelity to law that can then compete with others on the extralegal terrain Hart marked out in 1958—one divided between the penumbra of legal uncertainty and the core of certain law. This is because Dworkin's account of judicial responsibility threatens the very distinction between core and penumbra. He argues

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was in force because, by the standards not only of contemporary Canada but also of the time of its enactment, it was legally suspect in terms of the internal morality of law. Hence, this argument relies on reasons that are intrinsic to legality and not on moral factors external to the law. See Dyzenhaus, *supra*, at 258.

<sup>93</sup> RONALD DWORKIN, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 38, at 46, 66.

<sup>94</sup> This theory is fully developed in RONALD DWORKIN, *LAW'S EMPIRE* 406 (1986) ("Our root ambition of treating ourselves as a community of principle itself recommends a special role for justice.").

that what Hart deems to be the core of certainty is simply the temporary and contingent product of convergence between competing ideals.<sup>95</sup> He has also argued that if legal positivism is to make sense of legal practice, it is faced with the choice between relevance and irrelevance.<sup>96</sup> To be relevant, positivism must become a political theory of law and take a stance on issues such as how judges should interpret hard cases or whether there are certain issues that should be the sole preserve of the legislature. Irrelevance arises through continuing to insist that legal philosophy is a descriptive enterprise. Such an insistence will require consigning the prescriptive issues that arise within legal practice to other domains of inquiry, and the more such issues are consigned, the less of legal practice legal positivism can purport to describe. In sum, Dworkin, much more than Fuller, has provided a challenge to the philosophical premises of legal positivism.

Only recently, however, has Dworkin clearly recognized that there are more issues that arise at the fundamental level than the issue of the best way for judges to interpret doctrine. Put differently, it is only recently that he has seen that the issue for judges is not simply the soundest theory of the law of their legal order but also the issue of the soundest theory of legality. In part this is because, from one of his earliest publications<sup>97</sup> to the work in which his recognition of legality is most prominent,<sup>98</sup> he has accepted, along with legal positivists, that Fuller's conception of legality does not preclude the enactment of morally bad laws or, as Hart famously put it, that Fuller's conception of legality is "compatible with very great iniquity."<sup>99</sup>

But Fuller does not need to deny that particular laws are enacted as instruments of the powerful or that the powerful might use the law to enact evil policy in order to sustain his claims about legality. Indeed, he can turn against legal positivists a version of what they consider to be a knockdown argument against Dworkin's position—that Dworkin's doctrinal focus conflates explaining law with giving an account of how judges decide *the* law of a particular jurisdiction. That

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<sup>95</sup> See *id.* at 87–90 (noting that many forces contribute to convergence).

<sup>96</sup> *Id.* at 90–91.

<sup>97</sup> See Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668, 672 (1965) ("Good purposes are not intrinsically easier to describe than bad ones . . .").

<sup>98</sup> See RONALD DWORKIN, *JUSTICE IN ROBES* 2–3 (2006) (distinguishing "doctrinal" from "sociological" concept of law).

<sup>99</sup> HART, *supra* note 6, at 206–07. And we can recall here that in Hart's critique of Radbruch, he did say that the principle against retroactive punishment is a "very precious principle of morality endorsed by most legal systems." Hart, *supra* note 1, at 619. For an insightful discussion of Hart's remarks, see N.E. SIMMONDS, *LAW AS A MORAL IDEA* 70–76 (2007).

is, positivists wrongly infer from the fact that the law—especially the statutory law—of any jurisdiction is used as an instrument of the policy of the powerful that law itself is to be explained as an instrument.

That this is a mistake is reflected in European languages except for English in that, following the Romans, the generic term for law contains an element of right (*ius/Recht/droit*), in contrast with the morally neutral words for particular laws (*lex/Gesetz/loi*)—a fact, we should note, that rather puzzled Hart.<sup>100</sup> Moreover, it is reflected in English in that we speak of the rule of law, not the rule of particular laws. The debate about the necessary connection between law and morality is thus not only about whether there is a connection between the particular laws of a jurisdiction and morality. It is also, and perhaps even more importantly, about the connection between law—that is, legality or the rule of law—and morality.

This mistake, in my view, has had an unfortunate impact on philosophy of law, in particular on the way in which Fuller's challenge to legal positivism—a challenge about conceptions of legality—was almost wholly displaced by a debate between positivists and Dworkin about the best way to understand judicial interpretation of the law. Of course, the fact that particular laws can be used as instruments of evil throws into question any claim that legality evidences a necessary connection between law and morality. But, as the *Grudge Informer Case* shows, the kinds of questions raised by such laws are not well answered by legal positivism.

Moreover, the cases show to those who occupy what we can think of as the “secular natural law camp” within philosophy of law that both the fundamental and doctrinal levels have to be taken seriously if problems highlighted by unjust laws are to be properly addressed. An even bolder claim is that such problems differ from problems of interpretation raised by morally benign or even morally sound laws in the way that Dworkin claimed that hard cases relate to easy cases.<sup>101</sup> That is, just as hard cases make explicit the problems of interpretation that remain implicit in easy cases, so morally bad laws make explicit the importance of the fundamental level, which can often remain hidden when laws are morally benign or sound.<sup>102</sup>

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<sup>100</sup> See HART, *supra* note 6, at 208 (discussing “moral implications latent in the vocabulary of the law”). Hart did not explicitly say that the Europeans’ linguistic usage was wrong.

<sup>101</sup> See generally DWORKIN, *supra* note 38, at 81–130 (developing theory of adjudication for hard cases based on process of reasoning from underlying principles).

<sup>102</sup> I suspect that attention to the fundamental level will allow Dworkin to escape from the trap he set for himself when he suggested that judges faced with an unjust law might

## CONCLUSION

My conclusion is not that we should abandon the Hart-Dworkin debate because all of the action is in the Hart-Fuller debate. Recall that my argument started with a case to which Hart paid unusual attention because he thought it supported positivism. My argument that it does not invoked both Dworkinian and Fullerian themes. Moreover, once the Fullerian fundamental level comes into view, one might be able to understand Dworkin's theory better as the kind of overarching argument alluded to earlier—one that connects the fundamental and the doctrinal levels through an account of law's aspiration to treat each individual with equal concern and respect. If that were right, then the terrain would be properly opened up for a much more fruitful confrontation than the one between Dworkin and the descriptive legal positivism espoused by many of Hart's followers after the 1958 debate. The terrain is political, but that does not, as Hart seemed to think, make it extralegal. Arguments within its space are political arguments about what law requires, arguments that are most fundamentally about the requirements of legality, as exemplified in the confrontation between Dworkin's position and the kind of political positivism represented by Jeremy Waldron.<sup>103</sup> So my final conclusion on Fuller's behalf is that his understanding of legality marks out the political-legal terrain on which such confrontations will and should take place.

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have to make the difficult choice to "lie" about what the law requires. Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1240 (1977).

The trap arises because, as Hart argued, to suppose that the decision to lie is difficult is to presuppose a basis for moral obligation in wicked law. But if in a wicked legal system the soundest theory of the law is composed of repugnant moral principles, then explanation and justification should part company. Thus, Hart thinks that wicked legal systems raise "insuperable difficulties" for Dworkin's claim that a judge always has a moral reason to apply the soundest theory of law. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 81, at 9. For Hart's extended argument on this point, see H.L.A. HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM* 127, 150-53 (1982). Dworkin has suggested in reply that it is a mistake to take wicked legal systems as a "crucial test" for his theory. Ronald Dworkin, *A Reply by Ronald Dworkin*, in *RONALD DWORGIN AND CONTEMPORARY JURISPRUDENCE* 260 (Marshall Cohen ed., 1983). In addition, he has mentioned, as we saw Fuller and Radbruch note, that there might be a pitch of wickedness such that a legal system ceases to be capable of being a source of legal rights and duties. *Id.* For a discussion of these four authors' views on the relationship between legality and the moral character of law, see DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 15-24 (1991).

<sup>103</sup> See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (arguing for recognition that people disagree about matters of principle and against, for example, Dworkin's theory of rights as "trumps," which assumes people agree about what rights we have).

APPENDIX  
TRANSLATION OF THE COURT OF APPEAL'S GRUDGE  
INFORMER CASE\*\*

*Original English translation by David Dyzenhaus\*\*\**

1. A judge does not act unlawfully who judges on the basis of the so-called "Treachery Act" or any other manifestly unfair national-socialist criminal law. In contrast, it is an unlawful act when one freely decides to report to the police the act of another that fulfills the requirements for an offence in terms of such a law. The informer is considered the indirect perpetrator of the result that the judge brings about lawfully through his judgment.

2. Despite the fact that an act is done in accordance with the authority of a positive law, it is unlawful in terms of § 239 Penal Code when it grossly offends the sense of fairness and justice of all decent people.

In October 1944, the accused informed on her husband to the local leader of the NSDAP [National Socialist German Workers' Party] responsible for her area. In 1940, after her husband's conscription into the army, she had turned toward other men and had conceived the desire to divorce him. Her husband visited her for a day when he was en route to his reserve unit and made derogatory remarks about Hitler and other national socialist political leaders. He expressed his regrets "that Hitler did not go to the devil on the 20th of July 1944." The accused reported this to the local group leader because she believed that "a man who says such things is not fit to live among humans." The report came to the attention of the district leader and led to a trial by court-martial. She repeated her incriminating testimony as a witness in the proceeding, which culminated in her husband being sentenced to death. After more than a week in custody, he was placed on probation and sent to the front, and so the death penalty was not carried out.

The trial court held that there was no doubt that the act of the accused did not constitute an illegal deprivation of liberty [under § 239] because it appeared that "the report and thus the detention of

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\*\* Oberlandesgericht Bamberg [OLG] [Bamberg Provincial High Court and Court of Appeal] July 27, 1949, 5 *Süddeutsche Juristen-Zeitung* [SJZ] 207 (207-10), 1950 (Ger.) (judgment in criminal matter applying *Strafgesetzbuch* [StGB] [Penal Code] § 239 (1871), which criminalized undue deprivation of liberty).

\*\*\* I thank Philipp Socha for preparing a preliminary first draft of this translation and for comments on my own subsequent retranslation. I also thank Markus Dubber for many suggestions that improved my own translation, including a complete rewrite of one of the key sentences. A copy of the original case is on file with the *New York University Law Review*.

her husband were the result of his violation of valid legal provisions and within the framework of a properly carried out judicial process.” It is, however, a fundamental mistake to presume, as the trial court did, that the legality of the process and findings of a court-martial, which resulted in the husband’s conviction, confers the character of legality on the report of the accused that led to the initiation and prosecution of this process.

In informing, the accused put in place the first precondition of her husband’s detention. However, she did not cause the detention directly. Rather, the detention came about through the independent decision of the prosecuting authority and the deciding court. This is a case of deprivation of liberty by indirect perpetration. Admittedly, it is said in the literature that there is no such thing as a punishable indirect perpetration when the direct perpetrator acts lawfully (see in particular *Mezger* in ZStrW Bd. 52, 529 ff.). However, following *Ebermeyer-Rosenberg* (6th edition, comment 9 baa to § 47 Penal Code), the Court of Appeal concludes that one can commit a criminal offense by indirect perpetration even when the proscribed result is directly caused by an instrument to whom a particular justification is available, provided this particular justification, on the one hand, carries sufficient legal weight to deprive the act of its continuing unlawfulness from the point of view of the instrument’s particular position, but, on the other hand, cannot confer legality upon the result caused by the justified instrument. The very case at hand exemplifies the possibility of an act of criminal conduct by indirect perpetration with an intermediary who acts lawfully.

Those criminal courts—either civil special tribunals or courts-martial with jurisdiction over soldiers’ offenses—which, during national socialist rule, adjudicated matters to do with utterances that constituted an offense under the so-called “Treachery Act” of December 20, 1934 or even of § 5 of the Decree Regarding Special War Penal Law of August 11, 1938, applied the positive law of these provisions in fulfilling their judicial duty in terms of § 1 of the Court Act. These provisions explicitly served only the protection of the national socialist rulers and unquestionably were grossly unfair statutes. The largest part of the German people perceived these as terror statutes, particularly because of the criminal sanctions the laws threatened which permitted harsh punishments that could in the individual case be cruel. Nevertheless, these laws cannot be labeled as laws that violate the law of nature (which would compel the inference that the judge who applies them acts unlawfully himself and is thus culpable). For these laws did not prescribe any affirmative conduct which is prohibited per se by divine or human law in the opinion of all

civilized nations. The provisions rather commanded on pain of punishment an omission, namely to keep silent. By this omission, commanded by the national socialist legislator under pain of criminal penalty, no one violated a duty to act over and above this statute. Thus, even when a judge renders judgment and punishes on the basis of such typically national socialist laws, he does not act unlawfully. This accusation could and should be made when he implements laws that are manifestly against the law of nature.

But one may not therefore conclude that the person is justified who, in the absence of a positive legal prescription, informed of his own free will against another in regard to “treacherous” utterances and thereby set in motion the application of these statutes. Unlike the judge, he does not carry out a *duty* that is imposed upon him because of his particular submission to authority, one which actively requires the realization of the national socialist state’s right to punish grounded in these provisions. He acted instead by virtue of an *authority* to make a report that is granted to every citizen—an authority with no corresponding duty. Someone who intentionally made a report in awareness of its certain or probable serious consequences for its subject, especially in cases where the reported utterances spoke the truth, was condemned by the opinion of ethics and decency that survived among wide swaths of the German people even during national socialist rule. His report was unlawful in terms of the moral, solely authoritative, opinion of the people, which contradicted the interpretation propagated by those in power. It was thus also illegal in terms of § 239 German Penal Code. An act is illegal in the terms of this offense even when it arises through an exercise of formal positive authority, provided the exercise of this authority has consequences so serious for another that it violates the sense of justice and fairness of all decent people.

Moreover, the accused acted intentionally. She knew from common experience that informing on her husband would lead to a punishment of at least imprisonment. At the least, she consciously took the risk of these consequences into account. Indeed, the conviction she expressed as the reason for her report—“a man who says such things is not fit to live among humans”—reveals that her intent was directed at the punishment of her husband. It thus supports the conclusion that she acted with a specific intent thereby to cause the deprivation of her husband’s liberty, if not his death.

Thus, her acts constitute all the elements of the crime of deprivation of liberty in terms of § 239 Penal Code.