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## *FOREWORD*

### FIFTY YEARS LATER

In April 1957, the English legal philosopher H.L.A. Hart, Professor of Jurisprudence at Oxford, delivered the annual Oliver Wendell Holmes Lecture at Harvard Law School. Hart's topic was "Positivism and the Separation of Law and Morals," and he intended his lecture, offered at a "law school deeply influenced by the [legal] realism of Holmes and the sociological jurisprudence of Roscoe Pound," to be provocative as well as informative.<sup>1</sup> The focus of Hart's lecture was a core tenet of traditional legal positivism—that there is no necessary connection between law and morality. This was a proposition that would later be defended in detail in Hart's masterwork, *The Concept of Law*, published in 1961. Hart's lecture sought to explain, clarify, and elaborate the positivist account of the relation between law and morality, while at the same time defending legal positivism against the accusation that it was complicitly silent on the evil of oppressive legal regimes.

That attack was still felt very keenly in 1957, a time when the entire world recalled vividly the atrocities committed only a decade earlier by Nazi Germany and a time when, as Hart put it in the Holmes Lecture, "the stink of such societies [was] still in our nostrils."<sup>2</sup> German jurists like Gustav Radbruch blamed the philosophy of legal positivism both for weakening the resistance of German jurists and lawyers to Nazism and for undercutting any basis on which

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<sup>1</sup> Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1063 (2008).

<sup>2</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624 (1958).

the debasement of German legal values could be described as an attack upon law itself.<sup>3</sup> Hart wanted to respond to such charges.

The world's recent experience with murderous tyranny masquerading as law was not the only issue on Hart's mind. He also faced a widespread belief that legal positivism of the sort that had become dominant in England under the influence of Jeremy Bentham and John Austin was incapable of explaining the work of courts in interpreting and elaborating the law. The judicial role required a judge to be sensitive to the purposes and values that lay behind the black-letter terms of legislation. The judge's role was not just a matter of identifying what a sovereign legislature had enacted and applying it mechanically to the case at hand; the role required an intelligent sensitivity to the legislature's purpose, a sensitivity that did not seem to fit well with the adamant separation of law and value that the positivists trumpeted. So on this terrain, too, Hart's position was a provocation to the more judge-oriented jurisprudence dominant at Harvard.

At the time of Hart's lecture in 1957, the most formidable legal philosopher at Harvard was Lon L. Fuller, the Carter Professor of General Jurisprudence. The philosophical and temperamental differences between Fuller and Hart were considerable. Hart was a positivist looking for a clear demarcation between law and morality, whereas Fuller was preoccupied with the immanence of moral values in the law. In Nicola Lacey's biography, Hart is said to have described Fuller as "testy":

He couldn't keep his cool in arguments. . . . [H]e thought I was a radically mistaken positivist. The word positivist had a tremendously evil ring. I remember hearing somebody say, "You know he's a positivist, but he's quite a nice man."<sup>4</sup>

That was the atmosphere in which Hart presented his lecture. It is a tribute to Hart that, even in such an environment, he was able to drive home—for the first time to an American audience—the tremendous advances in clarity and crystalline moral awareness that the positivist's distinctions made possible. Hart's long-term impact on jurisprudence in the United States is perhaps an even greater tribute to the English legal philosopher: There are now many more followers of Hart than followers of Fuller in American legal philosophy.

We are told that during the Holmes Lecture, Lon Fuller listened with a "pained expression" and began pacing "back and forth at the

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<sup>3</sup> For a summary of Radbruch's critique, see *id.* at 616–18. Hart observes that a translation of Radbruch's remarks had been circulated at Harvard in mimeographed form by Professor Lon Fuller. *Id.* at 617 n.42.

<sup>4</sup> NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 181 (2004) (quoting H.L.A. Hart).

back of the lecture hall like a hungry lion,” eventually leaving halfway through the question-and-answer session.<sup>5</sup> Though Hart had already debated with Fuller in their discussion group at the law school—Hart was visiting Harvard for the 1956–1957 school year—Hart’s lecture drove Fuller to demand a right of reply from the *Harvard Law Review*, which published both Hart’s lecture and Fuller’s reply in its February 1958 volume.<sup>6</sup>

Fuller’s response stands on its own as a major piece of modern jurisprudence. Just as Hart’s lecture offered a glimpse of a greater work still to come, Fuller’s response offered a preview of his own masterpiece, *The Morality of Law*. Fuller’s claim, in response to Hart, was that legal regimes are inextricably linked with morality. According to Fuller, “law” is not a value-free concept but instead contains its own inner morality, which defines effective, functioning legal systems. The requirement that laws be general, the rule against retroactivity, the requirement of publication, and the discipline of consistency are all part of this inner morality. Systems of government that repudiate these requirements, according to Fuller, do not qualify as legal systems at all. In a crucial and controversial argument (and one against which Hart would repeatedly target his most acerbic attacks<sup>7</sup>), Fuller suggested that the internal morality of law has an important connection to morality in general and that good legal systems will tend to also possess the characteristics of the internal morality. Goodness has more affinity than evil with the sort of coherence that law demands:<sup>8</sup>

[E]ven in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law[.] And is it not clear that this hesitancy itself derives, not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?<sup>9</sup>

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<sup>5</sup> *Id.* at 197 (attributing description of Fuller’s pacing and his early departure from lecture room to political philosopher Joel Feinberg).

<sup>6</sup> This almost did not happen. Hart complained (in a letter to Fuller) that “[t]he L. Rev. boys ha[ve] mutilated my article by making major excisions of what they think is irrelevant or fanciful. They have made a ghastly mess of it . . . .” Hart appealed to Fuller to “induce them to be sensible,” saying that “they must not publish it under my name with these cuts which often destroy the precise nuance.” Fuller visited the President of the *Law Review*, and Hart’s original was restored. LACEY, *supra* note 4, at 200.

<sup>7</sup> H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1287–88 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

<sup>8</sup> Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

<sup>9</sup> *Id.* at 637.

Hart, for his part, thought this argument question begging and obscure but noted caustically that Fuller's "piece of logomachy will appear in the Harvard Law Review shortly."<sup>10</sup>

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That was fifty years ago. On February 1 and 2, 2008, the New York University School of Law and the *New York University Law Review* commemorated the publication of Hart and Fuller's great debate by hosting the Symposium on the Hart-Fuller Debate at Fifty, organized primarily by Jeremy Waldron, University Professor at New York University School of Law, and Benjamin Zipursky, Professor at Fordham Law School. Waldron and Zipursky invited some of the most prominent figures in the world of jurisprudence to join them in making presentations at the Symposium: Professors Jules Coleman of Yale Law School, David Dyzenhaus of the University of Toronto, Leslie Green of Balliol College at the University of Oxford, Nicola Lacey of the London School of Economics, Liam Murphy of New York University School of Law, and Frederick Schauer of the University of Virginia School of Law.

The discussion at the Symposium, in keeping with the debate it honored, was marked by a lively and intense exchange of ideas before a capacity audience. It was a fine occasion, matching in many ways the atmosphere of the original debate: a large audience, vigorous engagement among the speakers, a passionate exchange of ideas, and sparks of both intellectual tension and collegial good humor. It helped that the issues on which the presenters engaged one another are as relevant now as they were fifty years ago. Each of the presenters was thus able to address this debate from the center, rather than the periphery, of his or her current work. True, jurisprudence has not stood still in the meantime: There are many issues debated now that were barely understood then, and there are new ways of understanding the questions with which Hart and Fuller grappled.<sup>11</sup> Even so, it is remarkable—as Nicola Lacey points out in her article—how powerfully the Hart-Fuller debate speaks to us today and thus maintains a special place in our understanding of legal and political philosophy.<sup>12</sup> The fact is that the exchange between Hart and Fuller

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<sup>10</sup> LACEY, *supra* note 4, at 198.

<sup>11</sup> See particularly the discussion of different forms of positivism in Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982), distinguishing between versions of legal positivism that say simply that it is *possible* to imagine law without any connection to morality and versions of positivism that say that law can only properly be grasped as law when it is separated from morality.

<sup>12</sup> Lacey, *supra* note 1, at 1059–60.

really did set the agenda for modern jurisprudence: the separation of law and morality, the place of values in interpretation, and the relation between the concept of law and the values associated with the rule of law. The articles that follow, representing most of the presentations at the conference, celebrate this agenda while challenging and developing in new directions the ideas Hart and Fuller set out fifty years ago.

In *The Grudge Informer Case Revisited*, David Dyzenhaus explores one of the issues that lies at the core of the debate about positivism's response to evil laws. This is the Case of the Grudge Informer, a decision by a post-World War II German court dealing with a German woman who had taken advantage of Nazi laws to rid herself of her husband by reporting disparaging remarks he had made about the Führer. The Grudge Informer Case was a central bone of contention between Hart and Fuller. Dyzenhaus argues that Fuller's account of this case is descriptively better than Hart's and that Fuller provides a more fulfilling explanation for the decision of the judges in that case. As Dyzenhaus notes, confrontations between questions of substantive law and of fidelity to law are not, as Hart suggests, resolved in an extralegal, political space but are among the core questions that any court needs to resolve in a case like that of the Grudge Informer.

Entitled *Positivism and the Inseparability of Law and Morals*, Leslie Green's article goes to the core of the philosophical dispute between Hart and Fuller, arguing that Hart's separability thesis—which denies any necessary connections between law and morality—is false. According to Green, there are a number of philosophically important connections. Among these, Green notes, is not only Fuller's internal morality of law—the virtues of legality—but also an immorality of law that Hart himself identified—the vices of legalism. More important, however, are some of the negative connections between law and morality. In its very nature, Green argues, law is a morally fallible and morally risky enterprise. If this argument supports Hart's thesis that the term "law" does not necessarily indicate any virtue in a legal doctrine or enactment, it supports it in a way that is quite different from the purely conceptual argument of the positivists.

Nicola Lacey, Hart's biographer, offers an account in *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate* of why the Hart-Fuller debate continues to possess such tremendous appeal, particularly in an era during which doubt has been cast upon the universalist pretensions of analytic jurisprudence. Lacey takes as her focus the postwar development of inter-

national criminal law. She argues that this body of law maintains important connections with the issues debated by Hart and Fuller, connections that are as much moral and political as philosophical. The modest realism of Hart's lecture, in particular, offers a clear way through some of the tangled issues that criminal law theorists and lawmakers have no choice but to confront.

Hart's Holmes Lecture and his book *The Concept of Law* both defended the separability thesis in terms of the moral clarity that it made possible. In *Better To See Law This Way*, Liam Murphy considers whether this moral clarity gives Hart's account any real advantage over Fuller's. Murphy suggests that Hart and Fuller *both* offer compelling moral reasons to see law from their respective points of view and that both accounts are notable for how successfully they highlight the ethical and political stakes of the debate over the concept of law. But moral arguments in favor of a jurisprudential account presuppose that all or most of the users of a concept can be induced to change their way of looking at the world in order to reap the moral advantages to which the argument points. Murphy doubts whether this is realistic. The most that these arguments can explain is why legal philosophers have been so invested in positivism or in the opposing position. But the social world itself—including the conceptual understandings that it comprises—is not susceptible to direct moral argument of this kind.

Frederick Schauer's article takes us from the separability thesis to the disagreement over rules and language that was also a major theme in the Hart-Fuller debate. Jurists have long used the fictional "No Vehicles in the Park" rule as a paradigm for examining issues of vagueness, open texture, and under- and over-inclusiveness. In *A Critical Guide to Vehicles in the Park*, Schauer describes how Hart and Fuller used this hypothetical as a focus for their argument about the importance of purposiveness in the law and explains the significance this might have for our understanding of the relation between law and value. Schauer argues that on a deeper level, however, this debate reflected a disagreement about the formality of law in different legal systems. He presents the debate as a major contribution to our understanding of the role of formal language in the workings of the law. In this regard, says Schauer, the Hart-Fuller debate takes us well beyond the confrontation between legal positivism and natural law.

In *Positivism and Legality: Hart's Equivocal Response to Fuller*, Jeremy Waldron assembles and evaluates the various observations that Hart made on the relation between law and legality. The idea of legality is obviously connected to our modern ideal of the rule of law and is also connected to what Fuller said about law's inner morality.

Waldron argues that Hart offered inconsistent responses to Fuller's core claims that the observance of the requirements of legality is both fundamental to law and inherently moral. The inconsistency seems to have been strategic: Hart would adopt whatever position was needed to refute Fuller on a given occasion, even if his position contradicted what was necessary to refute Fuller on another occasion. Waldron does consider whether Hart's inconsistency might reflect the complexity of the rule of law and the variety of connections it might have with substantive morality, but he laments that Hart and his followers have not explored these complexities and have chosen instead to dismiss the idea of legality from serious jurisprudential consideration.

Lastly, Benjamin C. Zipursky returns to the theme of the separation of law and morality in *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*. Zipursky argues that Hart's separability thesis was designed as a practical rule about the necessity of distinguishing what law is from what it ought to be, and about the importance of candor in determining what the law actually says and where it needs to be repealed or improved. In Hart's view, the various theories opposed to positivism, including legal realism and natural law theory, were forms of "practical perfectionism": They were invitations to decisionmakers to substitute talk about what the law should be for candid talk about what it really is. Hart's "practical positivism," as Zipursky calls it, was intended as an antidote to this tendency: "Ought" is no substitute for "is." We need both, and therefore we first need a clear-headed sense of the law that is uncontaminated by any sort of moral wishful thinking. Zipursky shows that this issue between practical positivism and practical perfectionism is alive today in the various schools of legal interpretation that are the descendants of both Hart's and Fuller's positions.