

The Morality of Legality

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The Nature and Limits of State Authority

A central question in both legal and political philosophy concerns the nature and limits of the authority of the state. According to Hans Kelsen, this question is answered by legal philosophy.

If one wants to find out what the state is, and at the same time the limits of its authority, one will look to the norms of the legal order in which the state is located. In finding out what the public or state officials of that order are authorized by those norms to do, one will at the same time answer the question of what the state is and the limits of its authority. Put differently, the state is constituted by law and the limits of the authority of public officials are set by the norms that authorize them to act in the name of the state.¹

Kelsen thought that these answers are delivered by a value neutral or scientific inquiry into the nature of law. Law's authority is explained by describing what he takes to be the normative structure of a legal system, in which the authority of all norms is ultimately traceable to the foundational norm of the system. A valid norm is one that has been enacted in accordance with the procedures authorized by a more basic norm, with the exception of the foundational or *Grund* norm, the validity of which has to be presupposed in order to ground the unity of a legal system. Moreover, when Kelsen says that the norm has authority because it is has been properly enacted, I take him to mean that it has authority in the full-blooded sense that it makes a justified claim to the obedience of those subject to the norm.

Put differently, the fact that the norm complies with legality—the procedures for proper enactment—makes it legitimate.²

According to Carl Schmitt, however, Kelsen's legal theory amounted to a last ditch and vain attempt by liberal political theory to subject the state to the discipline of individualistic values. That the attempt was presented as scientific or value free was not inconsequential since it precluded Kelsen from basing his account of legality on principles of political morality, with the result that 'legislative officials can empower themselves for anything if it is given the form of a statute'.³

Schmitt considered this claim 'improper and false' because it follows from it that the rule of law exercises no meaningful constraint on the state. But he also thought that the fact that Kelsen's legal theory had to endorse it buttressed his own argument that the state is prior to law in that the political sovereign is constituted politically not legally. The authority of the state comes from a foundational moment of 'constituent power', and whatever authority law has derives from the content of the decision taken in that moment. Thus for Schmitt law's authority comes from outside of legal order and is to be explained politically. Indeed, for Schmitt, law as such never has authority. It can only be the instrument of the authority located in the existential moment in which constituent power is successfully exercised by making the distinction Schmitt thought fundamental to the sphere of the political: the distinction between friend and enemy. That Kelsen supposes that compliance with the formal procedures for enactment of a norm might bestow authority in the full-blooded sense of legitimate authority on a norm shows, Schmitt argues, that liberalism has degenerated from a once robust natural law account of the legitimacy of law into a 'helpless formalism'.⁴

If Schmitt were right, then the choice would be between, on the one hand, an account of the state and law in which law is simply the instrument of the state's authority, wherever based, and, on the other, an account in which the state is no more than the authority bestowed by the law on public officials, but according to which officials have a virtually untrammelled discretion to act, as long as they comply with the criteria for legal validity of their legal order. Indeed, an authorization properly enacted that explicitly gave the officials an untrammelled discretion seems, on Kelsen's view, to endow what they do, whatever they do, with authority. It would follow that at best Kelsen's theory places a thin veneer of legality', to quote an English judge, over substantive arbitrariness and with that goes the aspiration of the rule of law.⁵

In my view, Schmitt is right in so far as Kelsen's Identity Thesis--the state is identical with the law of its legal order--is best understood as a political thesis and thus not as a legal scientific one. He is also right that in Kelsen's hands the Identity Thesis tends to produce the result that 'legislative officials can empower themselves for anything if it is given the form of a statute'. However, he is wrong that the Identity Thesis has to produce that result.

I will argue that if the Identity Thesis is properly reformulated as a fully normative political thesis, it shows precisely why rule by law, including rule by statute law, is subject to the moral discipline of rule-of-law principles. The version of the thesis I will articulate is normative in that it describes an ideal of political morality that the principles of the rule of law serve. But my argument is that all legal orders, all law-governed political orders, instantiate that ideal. It is a regulative ideal in that it is worked out by attending to actual practices of legality and at the same time it provides a standard for criticizing those practices, to the extent that they fail to live up to the ideal.

In sum, rule by law entails the rule of law: the rule of the moral/legal principles intrinsic to any regime of legality. It is these principles that form the basis of law's justified claim to authority. Putting things this way is course open to challenge, not least because of the normative recasting of a thesis of Kelsen's 'Pure Theory' of law.⁶ But the challenges on which I will focus arise from the 'Hartian perspective', the legal positivist perspective of HLA Hart and his followers.

First, Hartians reject the claim that law's authority is legitimate authority. Second, they do not accept that law to be such has to comply with the rule of law. Finally, they regard as dubious the thought that compliance with the rule of law exerts a moral discipline on law, since they argue that such compliance can make matters morally worse for those subject to the law.

I will argue that on closer inspection the challenges do not so much undermine my version of the Identity Thesis as expose ambivalences within this kind of legal positivism about both the authority of law and the rule of law. Moreover, once these ambivalences come into view, the way is cleared for the normative version of the Identity Thesis.

The Authority of Law

Like Kelsen, Hart regards philosophy of law as a social scientific inquiry and thinks that a central topic for that inquiry is the explanation of law's normativity—the way in which the law creates obligations for those subject to it.⁷ However, in contrast to Kelsen, Hart supposes that legal obligations have moral force only when these obligations would also be judged obligatory from the external standpoint of morality, or from some other external

standpoint; for example, the law makes possible a coordination of social activity that could not be had in the absence of a common standard.

The oddness of this position bedevils the attempt by Hartians to explain what they take to be the central concept in philosophy of law—law’s authority, that is, law’s capacity to prescribe mandatory norms to its subjects. In an influential essay on legal authority Joseph Raz, Hart’s most eminent student, argues that it is in the nature of all authorities that they claim to be legitimate and that a legal system is the kind of social institution that is capable of exercising authority, of being a *‘de facto’* authority. It follows that when ‘the law’ claims authority over those subject to it, it also necessarily claims ‘legitimate authority’.⁸

Raz’s account is in the spirit of the positivist tradition of which he says Hart was the ‘heir and torch-bearer’, one which rejects the ‘moralizing myths’ of the common and natural lawyers. Hart, Raz says, is the ‘heir and torchbearer’ of the legal theory founded by Jeremy Bentham, a ‘great tradition in the philosophy of law which is both realist and unromantic in outlook’. For Hart shares the ‘Benthamite sense’ of the ‘deleterious moral consequences’ of an ‘excessive veneration in which the law is held in Common Law countries’. Raz continues that ‘evident’ in Hart’s recent work is his ‘fear’ that legal theory has ‘lurched back’ in the direction of excessive veneration instead of continuing Hart’s project—the laying of the ‘foundation for a cool and potentially critical assessment of the law’. And while he is not named at this point in Raz’s essay, it is clear that Ronald Dworkin is the figure held responsible for the lurch.

Raz thus argues that the law’s claim to legitimacy is vindicated only when the content of the law meets an external, moral standard.⁹ Law will in fact have authority only if its content meets the requirements not of mere legal validity, but also of morality. These are the requirements set by the ‘normal justification thesis’¹⁰ that the law has authority only if its

subjects would in fact better serve their interests by complying with the law than by deciding for themselves. It follows that the law of a particular legal order has authority or not depending on conditions set by moral criteria that are external to law. Or does it?

The answer to this question depends on an ambiguity in Raz's account of authority that arises out of his distinction between *de facto* authority and legitimate authority.¹¹ Does legal theory explain the characteristics that make an order capable of claiming authority or in addition those characteristics that justify its claim to have legitimate authority? Notice that it would be odd to claim authority but to limit one's claim to saying 'I am capable of exercising authority because I fulfill the non-moral conditions for being a *de facto* authority and have commanded you to do X and therefore you are under an obligation to do X'. In short, a claim to authority is always a claim to legitimate authority.

So if it is an essential characteristic of law that it claims authority, and the success of the claim turns on moral criteria external to law, then if law's claim to authority fails by those criteria, we have not merely the failure of a claim made by the law, but a failure to be law. On this version of this theory, Raz would put forward perhaps the strongest version of natural law in the history of legal philosophy, much stronger, for example, than Gustav Radbruch's 'Formula' according to which extreme injustice is no law.¹² But the retreat to explaining the 'non-moral' characteristics that make an order capable of claiming authority does not help if legal theory must explain law's claim to have legitimate authority, and may even lead to the position that the mere possession of power to enforce one's commands begets such authority. Indeed, this last position formed the backdrop for the debates in seventeenth century England about whether the fact that X possesses effective power entails that those subject to his power must regard him as an authority. It may thus be the case that the fundamental distinction in debates about legal authority is not between *de facto* authority,

on the one hand, and legitimate or authority, on the other. Rather, it is a distinction between *de facto* political power and necessarily legitimate legal authority. That is, the question is whether might makes right, whether one who has effective political power so that his commands are by and large obeyed by those subject to his power has by definition legitimate legal authority.

The problem here is symptomatic of the deep ambivalence in Hartian legal theory about the location of authority. Does law's authority come from within or without the law? Hart himself may not seem as subject to this ambivalence as Raz, since he strongly resisted Raz's claim that to understand law's authority one has to see that a claim to authority is always a claim to justified or legitimate authority, which entails that legal officials at least pretend to endorse that claim.¹³ Hart's concern was that to make the idea of justified normativity central to an explanation of law's authority would undermine the moral clarity of a legal theory that tells both subjects and officials that the individual conscience must decide on whether to obey or apply the law, unimpeded by the erroneous thought that legal obligations have any intrinsic moral force.

But, we know, Hart thought that a weak version of that idea is essential to understanding the nature of law, since at least the officials of the legal order regard the fact that the rule of recognition certifies a law as valid as a sufficient reason—a complete justification—for regarding themselves as under an obligation to implement that law. As Raz argues, once that step is taken it is hard to resist the inference that the officials must believe, or at least pretend to believe, that the legal subjects who fall within the scope of that law have sufficient reason to obey it. That is, the weak idea of authority--the officials must consider themselves under a duty--becomes the strong idea of authority--they must assume that the legal subjects are also under a duty. And it must become so if legal subjects, rather

than legal officials, are to enter the scope of legal theory as the primary audience to which law is addressed. In this regard, Raz argues that Kelsen was right to take as the point of view of legal science the perspective of ‘the legal man’ who adopts ‘the law as his personal morality, and as exhausting all the norms he accepts as just’.¹⁴ Thus, ‘though Kelsen rejects natural law theories, he consistently uses the natural law concept of normativity, that is, the concept of justified normativity’.¹⁵

Raz also emphasizes that the legal scientist in adopting this point of view does not thereby endorse it. It is a ‘professional and uncommitted adoption’.¹⁶ Thus all that separates Hart and Raz is whether the internal point of view taken by those whose ‘voluntary co-operation’ ‘creates’ authority¹⁷ is one that regards the duty to apply and obey the law as a moral one. Notice though that they share the claim that only the officials need have the internal point of view. For while Raz’s argument is that the officials have to suppose or to pretend suppose that their duty to apply the law is a moral one because the law that is applied visits obligations on those to whom it is applied, this argument does not entail that the subjects of the law make any pretence at believing that they are under such a duty to obey the law.¹⁸ They could, that is, comply with the law simply because they fear the sanctions visited on non-compliance.

The area of disagreement between Hart and Raz is small but significant. Consider that Raz adds to his reflections on the way in which legal science may in a professional, detached fashion rely on Kelsen’s ‘natural law’ concept of justified normativity the following observation: ‘There is, after all, no legal science of normativity, but there is a specifically legal way in which normativity can be considered’.¹⁹ I take this to mean that there is no special kind of legal authority, an authority in virtue of X being legal, since law’s claim to authority is justified by the same considerations that would justify my claim to be a moral authority. All

that is special about law's claim is that the legal scientist can make professional detached statements about the law that the moral theorist cannot because law 'consists only of authoritative positivist considerations', and the latter are considerations 'the existence of which can be ascertained without resort to moral argument'.²⁰

But, as Raz is well aware, this was not Kelsen's view. Rather, for Kelsen a law's claim to authority is vindicated as fully justified as long as the law is valid. There is thus a special kind of legal authority that comes from compliance with what we might think of as the validity-producing mechanisms of a legal order. Hart and Raz cannot accept this because, with Schmitt, they do not think that the validity-producing mechanisms of a legal order can by themselves justify a claim to legitimate authority. But Schmitt, unlike Hart and Raz, regards the kind of legal theory that seeks to reduce the authority of law to validity as a degenerate form of a once robust natural law conception of law's authority. He, of course, also thinks that this degeneration was inevitable. But the insight is valuable that if legal theory must adopt the natural law concept of justified normativity, that concept cannot be situated within an account of law that reduces authority to validity without ascribing justified normativity to the norms in virtue of their being valid. In other words, the reduction of *Recht* to *Gesetz* has the result that legislative officials can rightfully or legitimately empower themselves for anything if it is given the form of a statute.

It is of some importance in this debate that English does not follow other European languages²¹ in adopting the Roman distinction between *ius* and *lex*. Hart who took his task to be an inquiry into the ordinary use of language by participants in legal practice was understandably troubled by this fact and remarked that *ius* and its cognates are 'laden with the theory of Natural Law', so that one who uses such terms shows a readiness to 'exploit the moral implications latent in the vocabulary of the law'.²² On his view, it must be a

felicitous feature of the English language that it has only one word for 'law', one that derives from the morally neutral side of the *lex/ius* distinction, since that it makes easier to avoid the natural law mistake of eliding legal and moral obligation.

Raz has warned that 'philosophers of law are not lexicographers' and that 'the explanation of the meaning of the word "law" has little to do with legal philosophy', in large part because 'law' is used in widely different contexts, for example, in physics.²³ Even if he is right about 'law', attention to related legal terms can prove useful, as I think it shown by Raz's decision to use the term 'legitimate' rather than the more traditional '*de jure*' as his contrast with *de facto* authority, thus avoiding the moral connotations of *ius*. But 'legitimate' does not, if this was Raz's intention, contrast cleanly moral authority and *de facto* legal authority. For 'legitimate' derives from *lex*, the root of the supposedly morally neutral 'law' and its primary English meanings elide 'lawful' and 'rightful' no less than *ius* or *Recht*. Thus to say of an authority that it is legitimate is not, as Raz could be taken to imply, to say only that its judgments are morally justified. Rather, we need to note the converse of Hart's observation of the 'moral implications latent in the language of the law'. This is the idea that there are legal presuppositions to the moral vocabulary of legitimacy, since 'legitimate' connotes that conduct in accordance with the law has a moral quality to it just in virtue of being in accordance with the law.

For this to be the case, there must be what Raz denies--'a specifically legal way in which normativity can be considered'. And while Raz does not think that an inquiry into the word 'law' can settle disputes in philosophy of law, he does suggest that an inquiry into 'legal' and 'legally' is more promising. These terms do set a constraint on legal theories since it is the case that all legal statements 'are stutable by the use of sentences of the form' 'legally, it is the case that ...'²⁴ However, since he points out that all leading legal theories are

consistent with this constraint, it by itself cannot settle disputes about the nature of law. Hence, Raz argues for the additional constraint that law consists only of authoritative positivist considerations.

What justifies this constraint? Perhaps Raz's answer is that the law claims authority and it is in the nature of authority that the content of an authoritative directive of any sort has to be determinable without resort to moral argument. In other words, since the concept of authority plays a central role in philosophy of law, we can achieve a grasp on that concept by getting right a concept that like 'law' figures in other contexts, but which unlike 'law' helps to explain the nature of 'law' in the 'legal' context. Hence, if one non-moral condition for a norm being authoritative is that its content can be determined by purely factual tests, that same condition must constrain our understanding of law in the legal context. Of course, that is not a sufficient condition since the addressee of the norm has to have an additional reason to suppose that he or she is under an obligation to comply with the content of that norm. For Raz, as we know, this additional reason is supplied by the normal justification thesis and not by the intrinsic qualities of law.

However, Hartians are ambivalent about this claim too. Consider that Hart thought, following Bentham and Austin, that natural law theory encourages two very different moral mistakes. First, there is the mistake of 'obsequious quietism' that follows the erroneous thought of according the law moral force because it is the law and thus of thinking that one is under a moral duty to obey or apply morally obnoxious laws. Second, there is the mistake of 'anarchism', of thinking the law is not the law when it fails to meet the standards of morality, and thus supposing that no issue of whether one is under a duty to obey or apply the law arises simply because there is no law.²⁵

If, however, the law has no intrinsic moral force it is difficult to see why this should be thought to be a moral mistake. Hart suggested that for Bentham and Austin the problem was the 'cost to society'. But it is not clear why that cost is any greater than that incurred in avoiding quietism, and Hart remarked that Bentham and Austin may well have 'overrated' the danger of anarchy.²⁶ The problem, Hart says, is more that natural law leads to an 'oversimplification' of the complex moral issues that arise in particular contexts where subjects or officials face the problem of how to respond to morally obnoxious laws.²⁷

However, as critics of legal positivism have pointed out,²⁸ the law cannot make our moral situation more complex if it is morally inert in the way Raz and Hart suggest. Hart at times seemed to recognize this fact. Consider his main criticism of Radbruch's 'Formula' that extreme injustice is no law. Hart thought that the practical payoff of the Formula was that judges could deploy it to refuse to recognize as law statutes that had authorized immoral conduct during the Nazi era, and which would have been illegal but for those statutes. That then cleared the way for prosecution of individuals for crimes that did not exist at the time of the conduct. Hart's criticism was that the Formula disguised a choice that legal positivism brought out between 'two evils'----leaving the immoral individuals unpunished and 'sacrificing a very precious principle of morality endorsed by most legal systems'.²⁹

But suppose that the principle against retroactive punishment is not merely endorsed by *most* legal systems, but is a principle that *any* legal order has to observe because it is one of the principles of legality. It is one of those principles that if violated throw into doubt the claim that 'Legally speaking, it is the case that ...'. Consider, for example, the statement that 'Legally speaking, it is the case that you may be punished for conduct that is not criminal at the time of your act'. Since this statement is false and the principle that makes it so is a 'precious principle of morality', we have in place a principle that makes it plausible that there

is 'a specifically legal way in which normativity can be considered'. That is, it is a condition of X being legal that it does not violate at least one morally valuable principle of legality.

Notice also that with this principle and any other candidates that we can come up with in place, we are not necessarily landed as Hartians suppose with either the problem of an 'oversimplification' of moral issues or the problem of an 'excessive veneration' of the law. This is because there is a rather large gap between excessive veneration and other positive attitudes. If a government that observed the rule of law had by that fact to observe certain moral constraints that improved the lives of those subject to the law, law would deserve our respect because of its moral qualities. And this would be so even if we recognized that particular bad laws might have in the end no moral claim on us because their immoral content so clearly outweighs the moral quality they necessarily have as law.

Of course, if there is reason to accord law moral weight just because it is law, that reason complicates our moral deliberations more than if law had no such weight. But if there is such reason, the conclusion that the law is too evil to be obeyed or applied is still perfectly open to us, as long as the reason does not lead to excessive veneration. We might even think there is such reason in the face of the fact that governments have used, and will no doubt in the future use, law as an instrument of quite systematic immoral policy. This fact would make us not want to venerate, let alone excessively venerate, law. But still we might think that when we condemn such immorality we do so because the overwhelming badness involved in a systematic use of law as an instrument of immorality easily outweighs the moral good that government under law must nevertheless do. We might even say that what has gone wrong is not only the institutionalization of evil, but the fact that law has been made the instrument of evil. Notice in this regard that we usually think it appropriate to speak of government *abusing* the form of law to promote immoral policies, and not of a simple use,

which implies that law's form is generally better suited to promoting something worthy of our respect.

I will now turn to exploring this thought and in particular a puzzle that arises out of the statement 'legally speaking, it is the case that you may be punished for conduct that is not criminal at the time of your act'. Notice that while that statement is false it is not clear that the following statement is: 'legally speaking, it is the case that the law requires that you be punished for conduct that was not criminal at the time of your act'. The second statement will be true if, to return to Hart's criticism of Radbruch, the legislature follows the course Hart thought suggested by a positivist appreciation of the complexity of the situation. Hart thought that if one decided that the immoral offenders had to be punished, the legislature must enact a statute stripping of their validity the statutes that authorized immoral conduct. Here, the legislature makes it legally speaking the case that the conduct is punishable.

However, while the two statements differ only by a switch in tense of the verb 'to be', much in the history of debate in legal philosophy in the last fifty years might turn on the necessity to make that switch for the statement to be true. So my thought is that we should be alert to the possibility of a more moderate position on the relationship between law and morality than one that would cause us to 'lurch' to a stance of excessive veneration of the law. As I will argue in the following two sections, just this more moderate position is to be found in an account of law's authority that locates its basis in principles of legality.

The Inner Morality of Law

The idea that there is a morality of legality is rightly associated with Lon L Fuller's work *The Morality of Law* and his fable of benevolent King Rex, whose good faith but bungled efforts to make law provide the basis for extracting the principles of law's 'inner morality': generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and congruence between declared rule and official action.³⁰ A legal order that fails completely to meet one of these requirements, or fails substantially to meet several, would not, in Fuller's view, be a legal system. It would not qualify as government under law—as government subject to the rule of law. Fuller's claim is that compliance with the eight principles imbues law with a moral quality. It follows for him that *de facto* legal authority is always *de iure* but this is because of law's intrinsic qualities, the special normativity of law that comes from compliance with the eight principles.

Together these principles suggest, Fuller says, 'distinct standards by which excellence in legality may be tested'.³¹ Here he adverts to the distinction with which he opens his book between a 'morality of duty' and a 'morality of aspiration'.³² His suggestion seems to be that the principles are more aspirational in nature, in large part because it is often difficult to define at what point there is a violation of one of the principles such that there is a complete failure of legality. They are not therefore best understood as providing criteria of validity of the sort envisaged by legal positivists.

However, Fuller is also clear that the inner morality of law 'embraces' both moralities, and he says that the principle of promulgation or publicity is easier to formalize, thus placing it within the morality of duty. In contrast, the principle against retroactivity cannot be formulated as an all-or-nothing rule because, for example, a retroactive law might be required in order to restore legality.³³ As Fuller points out, 'infringements of legal morality

tend to be cumulative' and so a neglect, for example, of 'clarity, consistency, or publicity might beget the necessity for retroactive laws'.³⁴

Fuller's account of law is thus rather complex. A legal order must observe the eight principles to some large extent. However, it is not clear what the status is of particular laws that violate one or more of the principles and a law that violates one principle for the sake of others might be considered as essential to preserve overall fidelity to legality.

Hartians have criticized the account in two ways. The first focuses on the more aspirational nature of the inner morality and the concomitant concession that there could be such a thing as an 'illegal law', a law that is perfectly valid but inconsistent with one or more of the principles. On this criticism, even if compliance with the eight principles does give law a moral quality, law does not have to comply to be law; hence, the eight principles are not intrinsic qualities of law and cannot explain law's authority. The second criticism starts by conceding that law must comply to some great extent with Fuller's eight principles, or some roughly equivalent set of principles of legality. But it then denies that such compliance gives the law any moral quality, since compliance with the principles simply makes the law into a more effective guide for conduct. While either of the two criticisms would, if right, succeed in fatally undermining Fuller's position, they are in contradiction with each other and the fact that Hartians make both of them thus imports that contradiction into their position.³⁵

While the criticisms contradict each other, they have a common root in an idea of law as 'the law', meaning the artifacts produced by the validity-producing mechanisms of a legal system the existence and content of which can be determined without resort to moral argument. On this view, the role of judges is simply to certify, first, when a matter falls within the scope of positivistically conceived, law-governed behaviour. For example, X is accused of assault and there is in fact a statutory provision that makes assault a crime.

Second, the judges must certify whether the legal question raised in the matter is in fact answered by the law, which means answered without the judges having to resort to moral argument. For example, given what X is proved to have done, what he did falls within the factually determined scope of that provision.

It follows, on the one hand, that anything we think judges should do beyond this role takes them out of the realm of legal duty and into the realm of aspiration, which is to say beyond the realm of legal philosophy. That is the Hartian criticism of Fuller.³⁶ But it also follows, on the other hand, that judges in saying what is legally speaking the case in accordance with this conception of role are maintaining legality, which is to say that the principles of legality are just those principles that judges must rely on in performing that role. Further, when judges properly perform their role they make the law a more effective guide to action for legal subjects by authoritatively declaring the determinate content of the law. But of course making the law more effective will only serve morality if the content of the law happens to be moral. That is the second Hartian criticism.

So, for example, in his major essay on the rule of law, Raz says that the rule of law is ‘an ideal’,³⁷ one well expressed in FA Hayek’s famous description of the rule of law:

stripped of all its technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.³⁸

Hayek’s claim here is that the rule of law requires that any exercise of public power has to be authorized in advance by a clear or a determinate law and that makes it possible for individuals to plan ahead, which is a moral good. Raz accepts this claim and adds that the ability to plan, and thus the rule of law, is essential to liberal democratic society. He also

agrees with Fuller that no legal system could violate ‘altogether’ ‘most of the principles of the rule of law’.³⁹

However, Raz says that the rule of law is a ‘standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically’⁴⁰ and he argues that a society can have the rule of law and be neither democratic nor liberal. He says that a ‘non-democratic legal system’, one ‘based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution’, may conform better to the rule of law than the legal systems of the ‘more enlightened Western democracies’.⁴¹ In addition, he points out that there are social goals that might be worth pursuing even though their pursuit is not compatible with the certainty secured by compliance with the rule of law.⁴²

Raz’s analysis of the rule of law is thus rather bewildering. First, there is the apparent concession that law has to conform at least to some significant extent to the rule of law and that such conformity is a moral good in that a political virtue is achieved, though one that has to compete with other political virtues. Rule by law requires some degree of conformity with the rule of law, a political and moral ideal. Secondly, there is the claim that the rule of law can make life morally worse for those subject to it. Thirdly, there is the thought that while there is always some moral value to compliance with legality, we have to keep in mind that the law to be law has to comply only minimally with the rule of law, indeed, might violate the rule of law ‘most radically and systematically’.

What makes this array of claims possible is that for Raz the principles of the rule of law are derived from the ‘basic intuition’ that, if the law is to be obeyed, ‘*it must be capable of guiding the behaviour of its subjects*’.⁴³

The principles of the rule of law are not then, on Raz's view, moral principles. Rather, they make the law into a more effective instrument for guiding the action of those subject to the law and the 'virtue' of the rule of law is exhibited through law living up to these principles. That virtue, Raz says, is like the virtue of the sharp knife. Whether it issues in moral goodness or not will depend on the purposes to which the instrument, law or the knife, is put.⁴⁴ The rule of law helps to make the law into a better vehicle or instrument for transmitting the actual judgments of those who have authority to make law. It also helps to ensure implementation of those judgments.

On this view of the rule of law, it provides to those in power a very effective instrument of rule. Hence, Raz argues that while the rule of law does reduce arbitrariness, the arbitrariness it reduces is the arbitrariness that law itself—rule by law—makes possible.⁴⁵ In other words, the abuse of law is an abuse of power that exists only because law makes such power—the centralized power effectively to guide action--available to those who are in a position to abuse it.

Raz makes a rather significant mistake here, one that has its origins in many of Hart's ambiguous remarks on the same topic, in particular when Hart focused on what he called the 'abuse' of law.⁴⁶ When one uses the expression 'abuse of ...' the implication is that the ordinary or normal use of that thing achieves something valuable. Thus, when one speaks of the 'abuse of law' the implication is that normally it is the case that using law conduces to morally valuable ends, but in this particular case the law is abused to bring about something bad. The thing is used, as it were, against its own nature. One would not, for example, say of a knife that is good because it is an effective or sharp knife that to murder someone with it is an abuse of knives. This is simply a use of a knife to an immoral end and thus does not create a pathology within the category of knives that are true to the specific virtue of knives.

But when we speak of the abuse of law, our point is that from the perspective of the specific virtues of law—the principles of the rule of law-- the use of law as an instrument of evil is pathological.

The mistake arises because of the Hartian ambivalence detected earlier about whether authority is located within or without legal order. If it is within, there must be some qualities intrinsic to legality that make law authoritative and that provide the perspective for making claims about the abuse of law. But if it is without, then law has authority only if it meets some external test, that is, it is the instrument of something external to law.

While this is a serious problem for Hartians, it does not help Fuller because it leaves open the possibility that one of the two criticisms might be correct. However, neither of them is correct because their common root is flawed—the idea of law as ‘the law’, meaning the artifacts produced by the validity producing mechanisms of a legal system the content of which can be determined without resort to moral argument. My argument here depends on seeing that the fact that there can be an illegal law does not tell in favour of legal positivism for the same reason that required the switch in tense to make the true statement about what was legally speaking the case in the example dealt with in the last section.⁴⁷ I will not, however, rely initially on Fuller to make this argument, though I will at times rely on some of his terminology. For my focus in the next section is Thomas Hobbes’s legal theory, a perhaps surprising source in the history of Western political and legal philosophy given Hobbes’s authoritarian reputation.

I do so for four reasons. First, Hobbes more clearly than Fuller helps to see what goes wrong in the Hartian conception of the judicial role, perhaps because he also seems to share some important features with legal positivism, as he is commonly supposed to have set out some of the main features of the Benthamite and Austinian picture of law as the

commands of an uncommanded commander that Hart reacted against. Second, Hobbes makes clearer than Fuller a particular methodology for understanding law and the rule of law, one that locates legal order within a political theory of legitimate authority. Third, Hobbes's conception of the point of legal order as service to a particular conception of liberty is more clearly stated than in Fuller's work. Finally, just because Hobbes considers democracy an inferior mode of government to monarchy, his focus on the virtue of the legality is not obscured by an explicit or implicit attempt to build democracy into his conception of the rule of law.

Hobbes and the Laws of Nature

Less well known than Fuller's story about King Rex is another version of the fable, in which he suggests that the principles emerge despite the fact that it is a tyrant who wishes to use law as an instrument of his tyranny. Fuller's point is that the tyrant's rule will be less tyrannical to the extent that he rules through law.⁴⁸ Even less well known is that Thomas Hobbes engaged in the same kind of thought experiment. In *Behemoth or the Long Parliament*,⁴⁹ a reflection on the civil war in the form of a dialogue where B is the young Hobbes and A the mature Hobbes, we find the following passage:

B: Must tyrants also be obeyed in everything actively? Or is there nothing wherein a lawful King's command may be disobeyed? What if he should command me with my own hands to execute my father, in case he should be condemned to die by the law?

A: This is a case that need not be put. We have never read nor heard of any King so inhuman as to command it. If any did, we are to consider whether that command were one of his laws. For by disobeying Kings, we mean the disobeying of his laws,

those his laws that were made before they were applied to any particular person; for the King, though as a father of children, and a master of domestic servants command many things which bind those children and servants yet he commands the people in general never but by a precedent law, and as a politic, not a natural person. And if such a command as you speak of were contrived into a general law (which never was, nor never will be), you were bound to obey it, unless you depart the kingdom after the publication of the law, and before the condemnation of your father.

In this passage, Hobbes expresses doubt that any sovereign would enact the law proposed in the question to him. This doubt is evidence of his optimism that sovereigns will not produce pathologies—situations that undermine legal subjects’ basis for obedience or continuing consent to sovereign rule. But Hobbes nevertheless thinks it is important openly to confront the pathology.

His first point is that we have to be careful about what counts as a law. There is a difference between, on the one hand, the commands of a father to his children or to his servants and, on the other, the commands of the same individual who happens to be king when he wishes to fulfill his political role as sovereign, as the artificial person who has ultimate legal authority in the legal order. In the latter case, his commands have to be issued as laws, with the result that no command has any effect until it is in proper form.

Hobbes’s second point is that proper form requires not only that the law precede any official act, but also that it be couched in general terms, and only then applied to particular circumstances. A law that commanded *me* to execute my father if *my* father were found guilty of a particular offence would not count as a law. Hobbes does, however, suggest that the sovereign could ‘contrive’ to put such a command into general form. Such a law would

have to set out a crime punishable by the death penalty and stipulate that if the convicted criminal happened to have a son of a certain age in the country, the son must take on the office of executioner. If the sovereign succeeded in doing this, I would be bound to obey, Hobbes says, unless I managed to get out of the country before the condemnation of my father. So while it would be difficult to wrestle legal form into a shape that would allow a law that Hobbes clearly regards as inhumane to be brought into existence, he admits that it could be done.

Notice that while Hobbes is bothered by the sheer inhumanity or immorality of the law, his analysis does not focus on that fact. Rather, his point is that there are certain kinds of substantive immorality that legal form resists. His earlier texts, in particular *Leviathan*,⁵⁰ make it clear that the basis for the resistance is the laws of nature, which are not only laws that are derivable from the right of nature but also principles internal to legal order.⁵¹ Once we set the passage from *Behemoth* in the context of that and other discussions in *Leviathan*, matters become even more complex.

First, in order to take advantage of the gap between publication of the law and the condemnation of my father, I would have to be pretty sure that he would be convicted despite the fact that he would have to be tried and found guilty by a judge. For only after such a finding had been made, could the judge issue the particular command that I execute my father.

This factor complicates matters because Hobbes has a much richer understanding of the judicial role than the one that is presupposed in the Hartian account. As we will see, the issue here does not have to do with contemporary debates about the legitimacy of judicial review and it is not susceptible to the Hartian charge against Dworkin of confusing a theory of adjudication, by which Hartians mean a theory of how to decide cases in which where

positivist consideration fail to determine an answer, with a theory of law. For Hartians suppose that the role of the judge in any legal order gives us a window into the nature of law. As Raz makes clear in his work on authority and elsewhere, Hartians regard the judge as providing such a window precisely because consent to arbitration of any sort is consent to abide by the arbitrator's decision, which precludes objecting to the decision on the ground that the arbitrator got things wrong. The parties agree to let the arbitrator's decision replace their reasons, since it was their disagreement about the reasons that brought them to arbitration.⁵²

Notice that the decision in order to do its job must be a positivist consideration in Raz's sense. Its existence must be determinable as a matter of fact and its content must be likewise determinable, else the parties are forced back into the conflict that brought them to arbitration. The only difference between all things considered arbitration and judging in a legal system, on this view, is that the judge has to take into account existing positivist considerations—those supplied by the legal system. Moreover, if these determine an answer to the question, he is under a legal duty to give that answer.⁵³

Hobbes agrees with the Hartians that in arbitration, and in a dispute before a judge in civil society, the parties must on pain of irrationality accept the decision as representing right reason, and hence that they are not permitted to return to the original conflict of reasons between them to contest the judgment. They must take, in other words, the decision as settling the dispute. Hence, a standard interpretation of Hobbes is that it matters more in a conflict that the conflict is resolved or settled by a definitive decision than how it is resolved. The principle of settlement is then what makes it altogether rational to submit to arbitration, and thus by parity of reasoning to the decisions of an all powerful political

sovereign, whatever the content of the decision of the arbitrator or the decisions of the sovereign.

If this interpretation captured the whole of Hobbes's argument, his solution to the problem of the state of nature would be wholly procedural, and his conception of an arbitrator in the state of nature and of the arbitrator's equivalent in civil society, the sovereign, would amount to no more than the person with authority to decide a dispute, however that person wanted to decide it. But even a quick perusal of the laws of nature tells us that it is far from the whole of Hobbes's argument.

Law 16 of the laws of nature makes it a duty on conflicting parties to submit to arbitration by a third party if they find themselves in conflict.⁵⁴ Once their consent constitutes an arbitrator, that person is not simply a natural individual but an artificial person in that he takes on a role in which at least four of the other laws of nature are implicated. Law 11 is the law of equity, that '*if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deal Equally between them*'.⁵⁵ And because, says Hobbes, 'every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause', which gives us law 17.⁵⁶ For the same reason, law 18 holds that no man is to be judge who '*has in him a natural cause of partiality*'.⁵⁷ Law 19 is that in controversies of fact, the judge must give credit to the witnesses.⁵⁸

These last four laws are both procedural and substantive in that they affect, without determining, the content of any decision by an arbitrator who is faithful to the moral discipline of his role. Moreover, when the parties submit a dispute to an arbitrator, they do so not only in the expectation that he will give a decision which provides a definitive resolution to the dispute, and so permits them to avoid fighting it out by whatever means

they choose, but also in the expectation that the decision will accord with the laws of nature which set out the moral discipline of the arbitrator's role.

The authority of the arbitrator comes, then, not only from the consent of the parties to abide by his decision, but also from the kind of decision that they are entitled to expect. A complaint by one of the parties that the decision is flawed because the arbitrator failed to act in accordance with these constraints of role is different in kind from the complaint that both Hartians and Hobbes rule out--that the party simply does not like the way the arbitrator settled the dispute over right reason.⁵⁹

Notice that the principles that condition the substance of the decision are principles that will figure on most, perhaps all lists of principles of legality or the rule of law. So if we move from the situation of an arbitrator in a state of nature to the situation of a judge in a civil society, we can put the point just made as follows. In Hobbes, the specific authority of law comes from not only from the fact that law provides an institutionally conclusive way of settling a dispute since it provides determinate conclusions about the obligations of legal subjects. Such authority also comes from the fact that conclusions about what the law requires will be based on sound reasons, reasons that include the principles of legality.⁶⁰

Of course, Hobbes does see differences between the situation of the arbitrator in the state of nature and the judge in a civil society since the legal order of civil society has to be staffed by subordinate judges because all laws require interpretation.⁶¹ Hobbes tells us that a good judge is one who, in interpreting the written law, relies first and foremost on his understanding of the unwritten law, the laws of nature.⁶² Moreover, one should not think, says Hobbes, that there is anything illegitimate in judges interpreting the positive law through the lens of the laws of nature because it would be a great insult if subordinate judges

were to attribute to the ultimate judge, the sovereign, an intention to flout the laws of nature.⁶³

As a result, the sovereign as ultimate judge is constrained by the laws of nature, not because he owes duties to his subjects, but because of the duties owed by judges to them. To use Fuller's term, their duty to the sovereign is exhausted by their obligation of 'fidelity' to law,⁶⁴ including the laws of nature. This duty, it must be emphasized, flows not to a natural individual even if the sovereign happens to be one natural individual. As the quote from *Behemoth* makes clear, from the judicial perspective the sovereign is the body that makes the written laws that judges must interpret. That is, the sovereign is a legally constituted sovereign: the person or body that has the authority to make laws provided that it complies with the public criteria recognized for certifying that a law is valid. I will call this the 'validity proviso'. But there is, following my account so far, a second 'legality proviso'—the laws the sovereign makes have to be interpreted, and so must be interpretable, in light of the laws of nature.

The validity proviso tells us that Hobbes was well aware of the existence of something like Hart's rule of recognition. Hart and Hartians after him have taken for granted Hart's claim that the rule of recognition corrected the mistake of his positivist predecessors Bentham and Austin in supposing that the sovereign is legally unlimited, a supposition that Hobbes is even more famous for making. But Hart did not perhaps have the best understanding of his tradition on this score. The better interpretation is that Hobbes, Bentham, and Austin did not mean by 'legally unlimited' that the sovereign could make law without complying with public criteria for law-making. Rather, they had in mind a legal order in which the sovereign may at will change any law as long as he complies with the criteria by enacting a law.⁶⁵

The legality proviso was, however, expressly rejected by Bentham and Austin after him. It suggests that it is not sufficient for an enacted law to comply with the public criteria. Its content must also be one that judges can interpret in such a way that the law at the least complies with the laws of nature, that is, does not violate them, at best, displays an attempt to meet the highest aspirations of the laws of nature. That of course raises the question of what happens when the sovereign, in full compliance with the public criteria, enacts a law that is either difficult to square with one or more laws of nature. Even more radically, the law might explicitly announce the sovereign's intention to violate one or more of the laws of nature. In sum, one way or the other, we get the example mentioned above of the illegal but perfectly valid law.

I pointed out that in the example from *Behemoth* Hobbes's analysis of the inhumane law focuses on the legally problematic aspects of the law rather than on its sheer inhumanity. That is, Hobbes focuses on the difficulties attendant on getting to the point where it is true that 'legally speaking, it is the case that you must execute your father'. But we need to recall that he does not rule out the possibility that the point can be reached. My excursus into his understanding of the role of a judge shows that the statement would have to follow not only the successful enactment of the general law, but also a full trial. That entails, on Hobbes's legal theory, that as a matter internal to law, from law's own perspective, the judge would have to take into account any argument that sought to show that a law of nature required him to interpret the law in a particular way, perhaps one that goes against what seemed at first the self-evident meaning of the law. For Hobbes is clear that judges must take the meaning of any particular law to be the one that complies best with the laws of nature, even when another interpretation would seem the more obvious one outside of the interpretive context provided by natural law.

Note that in the *Behemoth* situation, there is one law of nature that should give the judge pause. Law 7 forbids the infliction of punishment ‘with any other designe, than for correction of the offender, or direction of others’.⁶⁶ Now this law of nature actually makes the death penalty for any crime problematic.⁶⁷ But Hobbes must suppose that the death penalty may be inflicted when this would help to direct others by deterring them from certain crimes, even though it cannot ‘correct’ the offender. Thus, a judge might conclude, though the conclusion will be somewhat strained, that my knowing that my own son will have to execute me should I be found guilty of committing a particular crime could be regarded as a plausible interpretation of this law of nature because the very inhumanity of the law might have a great deterrent effect.

But while the judge might think he can make sense of his role in ordering that I execute my father, can he make sense of the claim that I am under a duty to do as he commands? While Hobbes does say in the passage from *Behemoth* that I will be ‘bound’ unless I escape the country before my father’s actual condemnation, *Leviathan* complicates our understanding of the sense in which I might be ‘bound’. For while I am permitted to agree in the covenant to obey the sovereign that he is entitled to execute me for disobedience to his laws, an agreement not to resist the sovereign when the actual punishment is imminent is void because the punishment undermines the end of self preservation for which I transferred to the sovereign my right to judge how best to preserve myself.⁶⁸

Hobbes extends this thought when, speaking of the ‘true liberty’ of the subject, he says that the words of the covenant that give the sovereign a complete authorization to govern cannot ‘by themselves’ bind a man ‘either to kill himselfe, or any other man’:

And consequently, that the Obligation a man may sometimes have, upon the Command of the Sovereign to execute any dangerous or dishonourable Office, dependeth not on the Words of our Submission; but on the Intention; which is to be understood by the End thereof. When therefore our refusal to obey, frustrates the End for which the Sovereignty was ordained; then there is no Liberty to refuse: otherwise there is.⁶⁹

Here the office is clearly dishonourable. I am going to have a hard time accepting that the end for which sovereignty was ordained, namely, the protection by the sovereign of his subjects, is served by requiring me to execute my father. And I will have this hard time even if I am the person Raz describes as the 'legal man' in Kelsen's legal theory, and hence I adopt the law as my personal morality, and as exhausting all the norms I accept as just.

Notice however that Hobbes's legal man is bound in this situation if and only if he, like the judge, can understand the law that requires him to kill his father as consistent with the end of sovereignty. Moreover, the point of view that he adopts in making this judgment is, like the judge's, wholly internal. He does not have to retreat a position external to the law to find the law in this case both morally and legally questionable. As Hobbes suggests, should the legal man stay in the country he might find this sort of reflection of little use to him. It might help him no more than Austin thought protestations would help the man who is convicted of a crime punishable by death when the act he did was in fact trivial or even beneficial. Austin has the condemned man object to the sentence that it is 'contrary to the law of God'. But the 'inconclusiveness' of the condemned man's reasoning, Austin says, is demonstrated by the 'court of justice' by 'hanging [him] up, in pursuance of the law of which [he had] impugned the validity'.⁷⁰

However, the legal man in Hobbes's example is entitled to doubt whether he is under a legal obligation for a reason that is excluded by Austin's equivalent figure. For to say to me that it is legally speaking the case that I must execute my father is morally problematic not only because it is in itself inhumane, but also because it undermines the basis for law's claim to authority over me.⁷¹

This basis is not reducible, as is commonly supposed, to my interest in security--a trade of protection for obedience--though even on those terms one might argue that the law undermines security. For Hobbes is clear that a civil society is not merely one in which there is centralized power, since what makes it civil is in large part that the power is exercised through law. To clamour for freedom from the law, he argues, is absurd because that it is to demand a return to the state of nature.⁷² This argument is rightly taken to be an attempt to debunk the claim that people may legitimately rise up against their leaders in the name of liberty. But it is not only that, for it is also an argument about the quality of civic liberty, a kind of liberty we can have only when a system of civil law is in place.

The basis for the law's claim to authority is that it serves our interest in civic liberty. This is the liberty one has when one enjoys the security of a stable order of laws, made by a lawgiver whose authority rests on the fact that his subject have authorized him so to act, and who has no interest in making law other than the provision of such security. In addition, the legal man knows that in cases where the law seems unreasonable because it does not accord with the laws of nature derivable from that interest, he may ask a judge for an authoritative interpretation of the law, which the judge will strive to ensure complies with the liberty-and equality-serving laws of nature.⁷³

For Hobbes the paradigmatic way for this authorization to come about is through sovereignty by institution, an agreement between free and equal individuals in the state of

nature.⁷⁴ Once the sovereign is instituted, the equality of the state of nature is preserved in law 11, the law of equity that requires that those who are ‘trusted to judge between man and man’ deal equally between them,⁷⁵ and in law 10, the law against arrogance, that ‘at the entrance into conditions of Peace, no man require to himselfe any Right, which he is not content should be reserved to every one of the rest’.⁷⁶ Law 10, says Hobbes, secures for men the liberty to do those things without which ‘a man cannot live, or not live well’ and it thus amounts to an ‘acknowledgment of naturall equalitie’.⁷⁷ In addition, liberty is preserved both through the institution of civic liberty and through the residual right to question whether ‘the End for which the Sovereignty was ordained’ is frustrated.

Now, except for the residual right of liberty, the ‘true Liberty of a Subject’, both liberty and equality are transformed in the transition from the state of nature to civil society through the way in which the conditions for both are determined through enacted law. But, as we have seen, just because it is the task of sovereignty to decide how to effect that transformation, subordinate judges are under a duty to try to ensure that the enacted law lives up to the principles it seeks to effect. Indeed, while it is crucial for Hobbes that when the subordinate judges perform this task they do so in an impartial fashion, that is, that they make an independent judgment about what the law (both enacted and natural) requires, they should not be seen as checking sovereignty. Rather they are completing the sovereign act of law-making as part of the artificial person of sovereignty. Judges are, as Hobbes tells us in ‘The Introduction’ the ‘artificall *Joynts*’ of the ‘Artificiall *Soul*’ of sovereignty.⁷⁸

In sum, liberty and equality are not smuggled into the laws of nature. Rather, they are built in, since one cannot make sense of the project of erecting the ‘firme and lasting edifice’⁷⁹ of a civil society—one in which subjects enjoy civic liberty-- in the absence of a legal order, which is to say an order of positive law that complies with the principles of

natural law. The principles are thus formal or structural in nature. They are the principles with which there has to be conformity in order to have a society in which the exercise of power through law has a plausible claim to the individuals subject to the law, such that they may be said to have authorized it. Hence, the task of ensuring that the positive law is interpreted in the light of these principles is inseparable from an inquiry about how the law serves both liberty and equality.

An illegal law is thus doubly suspect, from the perspective of both law and morality. Better put, it is suspect from the moral perspective of legality, the internal point of view of the legal man. The fact that sometimes such a law may survive as a valid law does not show that it is a sufficient condition for a law to have authority that it complies with the criteria of the validity producing mechanisms of a legal system. It does not even show that sometimes it is a sufficient condition for a law to have authority that it complies with these criteria. What it shows is that when the legality proviso cannot be met, other conditions may substitute for compliance with legality.

Consider Fuller's example in which a retroactive statute may be justifiable when the law serves legality by curing problems of illegality that would otherwise persist in the legal order. It is the ability to meet this further condition that tells us why the statement is false that 'legally speaking, it is the case that you may be punished for conduct that is not criminal at the time of your act', whereas the statement might be true that 'legally speaking, it is the case that the law requires that you be punished for conduct that was not criminal at the time of your act'. I suggested above that much in the history of debate in legal philosophy in the last fifty years might turn on the necessity to make that switch for the statement to be true, and the excursus into Hobbes's account of the role of a judge provides the basis for this claim.

Recall that for Hobbes the sovereign is the supreme judge. However, unlike subordinate judges, he does not only declare what the law is, but also has the authority to enact new laws. His freedom from the law is not, as I have already indicated, a freedom for the artificial person and its agents to act outside of the law, but a freedom to enact new laws that may override old laws. Hobbes here makes a great contribution to modern legal theory in beginning to set out an account of how a centralized political power is able to make judgments about the common good, that is, judgments that all legal subjects might reasonably be taken to own. In other words, he begins an account of the conditions for deliberate and legitimate legislative reform.

However, it is within this account that the validity proviso applies. That is, to state an obvious but important point, the validity proviso applies only to statutes and to exercises of law-making authority delegated to public officials by statutes. It is thus a necessary condition for an important class of legal statements to be true. But it is not, as Dworkin has argued for more than fifty years, a necessary condition for other statements of what is legally speaking the case to be true. It is, for example, not true about judgments about what the law requires that depend on the subordinate judge arriving at a conclusion about what is warranted by the best interpretation of fundamental legal and moral principles. Hobbes makes the same argument and differs from Dworkin and the common law tradition in general only because he is opposed to any doctrine of precedent.⁸⁰

Of course, Hartians dispute this claim.⁸¹ But it is important to see that they dispute it because they insist that all law has to be fitted into the mould of law as conceived by the validity proviso, and then on a very particular understanding of that proviso, the one affirmed by Raz when he stipulates that law ‘consists only of authoritative positivist considerations’, and that the latter are considerations ‘the existence of which can be

ascertained without resort to moral argument'. I suggested above that this insistence is based not on a view about the nature of law, but on a view about the nature of authority. And we are now at the point where we can see that it is in fact a view that is antithetical to the idea that law has authority. Rather, *the* law is an instrument for transmitting the content of the judgments of the powerful to those subject to their power. These judgments will have authority or not depending on whatever substantive tests one adopts for legitimate authority. Authority can, as it were, be poured into law. But it is not a quality that law ever possesses because of its intrinsic qualities.

This transmission account of law is the theory developed by Bentham that extracts from Hobbes the account of deliberate legislative change and makes that account into the whole of legal theory in a bid to imagine how law might be of service to a society run according to the principle of utility. One needs political institutions that are best suited for deciding on what utility demands and legal institutions that are best suited to transmitting those decisions. Judges are confined to the role of deciding what law is by reference only to positivist considerations, the existence and content of which can be ascertained without resort to moral argument. Issues about the legitimacy of the law are thus relentlessly externalized to the extent that Bentham's legal man does not think of the law in terms of authority, but only in terms of a calculation of the costs and benefits of disobedience. Austin continues this project with one significant amendment. He rejects Bentham's faith in democratic institutions and argues that we need a judicial elite to correct bad populist judgments. But because this amendment takes place within the contours of Bentham's project, the role that Austin accords to judges is conceived legislatively, that is, as deciding what law to make on the basis of moral criteria external to the law.

Hart's significant amendment to Austin is thus not the rule of recognition, since the idea that there is a rule of recognition is entailed in the transmission account of law. Rather, his significant amendment is that any plausible understanding of law has to take into account law's normativity, its claim to authority. But that understanding can be made to fit into Bentham's project only by reducing legitimacy to validity, *ius* to *lex*. Hence the profound ambivalence in Hartian legal theory.⁸²

I have already provided examples of this kind of ambivalence in Hart's response to Radbruch's and in Raz's treatment of the rule of law. But it is worth noting that this same ambivalence occurs when Hart acknowledges that there are judicial virtues that judges should 'display' in interpreting the law: 'impartiality and neutrality in surveying the alternatives; consideration for the interest of all those who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision'. Hart hastens to add, lest we think that he has undermined the Hartian claim that judges are legislating when they rely on moral argumentation, that it 'cannot be *demonstrated* that a decision is uniquely correct'.⁸³

If what Hart means by 'demonstrated' is 'proved in the way that a mathematical or logical theorem can be demonstrated to be correct', he is of course right. But if the bar is set lower, say at the bar that one would set for provisional correctness in moral, practical reasoning, things look quite different. A judge who provides legal reasons adequate to justify a conclusion as to what the law requires, where the criteria of adequacy include the judicial virtues Hart sketches, has shown in the sense appropriate for the rule of law that his or her conclusion is fully determined by law. If, for example, there is a panel of several judges who differ as to what that conclusion is, in one sense the answer is determined by the vote of the

majority; but the aspiration remains the same—that the best answer will attract the most votes because it best fulfils the promise of the rule of law.

Notice that Hart's brief but precise sketch of the judicial virtues also sets out clearly the dimensions of interpretation Dworkin would later elaborate: 'fit' in Dworkin is in Hart 'impartiality and neutrality in surveying the alternatives', and soundness or justification in Dworkin is in Hart 'consideration for the interest of all those who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision'. It also seems clear from this sketch that in Hart, as in Dworkin, the dimension of justification dominates, in that the choice between alternatives, perhaps even the choice as to what the alternatives are, must be conditioned by a reasoned decision as to what will at the same time serve the interests of legal subjects best and make best sense of the relevant law by displaying that a principle justifies the law. For an alternative that existed only in virtue of the fact that some bit of positive law could be interpreted to support it, but which could not be said to support a principle that both served the interests of all and provided an acceptable general principle, should be given less weight by the dimension of justification.

It would, of course, have been open to Hart to continue that even when such virtues are displayed no necessary connection between law and morality is demonstrated, because of the possibility of wicked laws and wicked legal systems. Yet in 1961 he chose not to adopt that tack, saying instead:

Yet if these facts are tendered as evidence of the *necessary* connexion of law and morals, we need to remember that the same principles have been honoured nearly as much in the breach as in the observance. For, from Austin to the present day, reminders that such elements *should* guide decision have come, in the main, from

critics who have found that judicial law-making has often been blind to social values, 'automatic', or inadequately reasoned.⁸⁴

The clear implication here is that if judges do exhibit these virtues, there will be a connection between law and morality. And if that is right, there *is* a connection, since Hart has conceded that when judges carry out their duty *qua* judge—their duty to maintain legal order—the connection exists. To suppose otherwise would be tantamount to saying that there is no such thing as enlightened morality because moral duties are honoured nearly as much in the breach as in the observance. Hart is here doing no more than following through on his insights, first developed in 1958, but fully elaborated in *The Concept of Law*, that if law is to be understood as a normative enterprise, one which creates genuine duties both for the officials of a legal order and for legal subjects, in respect of the former, at least, one has to understand legal practice from the 'internal point of view' of those whose activity is constitutive of the practice.

However, as Raz following Kelsen has argued, this point of view cannot be confined to judges. It is in fact the point of view of the legal subject or legal man. Hence, the judge must be able to justify to that man and indeed to legal subjects in general why he and they should consider themselves as under an obligation of obedience to law. The judge has to justify why the law has authority over them, which brings me to the topic of the rule of law and democracy.

The Rule of Law and Democracy

Hobbes's preferred mode of government is not democracy but monarchy, so he does not spend time developing an account of democratic rule. However, his idea that the authority of

the sovereign depends on the prior authorization of all those subject to his power imports an element into political philosophy that also lies at the heart of democratic theory. Because of Hobbes's antipathy to democracy he elaborates the idea in his legal theory, and it is precisely the idea that Raz calls justified normativity. I have argued that for Hobbes the basis for this justification is in the laws of nature, which amount to an idea of legality or the rule of law.

The idea of authorization creates what we can think of, following Max Weber,⁸⁵ as an elective affinity between the rule of law and democracy, the special character of each that creates a resonance between them that leads to a mutual attraction. The attraction is not exactly the same. One can't have democracy without the rule of law, but one can have the rule of law without democracy. However, and this is the point where Hobbes went awry, a non-democratic political system that fully observed the rule of law would experience great strain, indeed, a kind of internal or normatively-driven pressure to move towards democracy.⁸⁶ It is hard to drive a normative wedge between an argument that legal subjects must regard themselves as the ultimate authors of the law that governs them and the claim that they should be actual, not just virtual, participants in such authorship.

There is no dissonance, however, between a non-democratic political ideal and a system of power whose sole organizing principle is along the lines of the validity proviso, and so is designed to transmit decisions from top to bottom in such a way that the determinate content of the decisions is effectively implemented. Indeed, many non-democratic political ideals might require just such a system. If the nature of law is reduced to the criteria that meet the validity proviso, one must conclude with Raz that a 'non-democratic legal system' could conform better than the legal systems of the 'more enlightened Western democracies' to the rule of law, and that such a system could also be 'based on the denial of human rights, on extensive poverty, on racial segregation, sexual

inequalities, and religious persecution'. It would also follow, as Raz says, that this 'does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law'.⁸⁷ One might also want to conclude with Hart that there are important differences between law and morality that arise from the fact that morality, unlike law, is immune from deliberate change. Thus Hart says that 'the idea of a moral legislature with competence to make and change morals is repugnant to the whole notion of morality'.⁸⁸

But these conclusions are in tension with both Hart's emphasis on the fact that law and morality share a vocabulary of duty and obligation and with what Raz rightly takes from that fact--that law necessarily makes a claim to legitimate authority.⁸⁹ For while law can, has been, and no doubt will be used as an instrument to deny human rights, to impoverish groups, to implement racial segregation, to maintain sexual inequalities, and to persecute religious groups, this kind of use of the law is in tension with the claim. And I mean here not the tension on which Raz relies between immoral law and enlightened values external to law, but the tension internal to law because of its claim to authority and the principles of the rule of law on which that claim rests.

Any such law will have to be enacted in general terms, a fact Raz acknowledges, but which does not trouble him. He says that the requirement of generality is 'sometimes assumed' to be 'of the essence of the rule of law' and that 'the rule of law is particularly relevant to the protection of equality and that equality is related to the generality of law'. But, he asserts, this 'last belief' is 'mistaken. Racial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules.'⁹⁰ However, again the problem is that Raz is determined to show that principles of the rule of law are instrumental

to transmitting the content of particular valid laws. And that equation distorts the way in which such principles operate when judges fulfill their duty to uphold such principles.

Consider a judge who understands his role in terms of the judicial virtues Hart sketches and who is confronted by a law that is immoral in the way Raz indicates. That judge will, as a matter of legal duty, have to struggle to find an interpretation that displays both consideration for the interest of all those who will be affected and a concern to deploy some acceptable general principle as a reasoned basis for decision. But the reason it is a struggle is that a law that institutionalizes inequality on its face does not display such consideration and cannot be interpreted in way that displays some acceptable general principle. That creates a tension internal to the legal perspective of the judge, since among the norms that the legal man adopts are the judicial virtues as well as other principles of legality.

Recall Hobbes's example from *Behemoth* and his point that it would be difficult to contrive the substantive immorality in that example into legal form. Fuller made a similar point in 1964 when he said that it was common at that time to think of the apartheid government of South Africa 'as combining a strict observance of legality with the enactment of a body of law that is brutal and inhumane'. But, said Fuller, this view

could only arise because of the now inveterate confusion between deference for constituted authority and fidelity to law. An examination of the legislation by which racial discrimination is maintained in South Africa reveals a gross departure from the demands of the internal morality of law ...Even the judges who in his private life shares the prejudices that have shaped the law he is bound to interpret and apply, must, if he respects the ethos of his calling, feel a deep distaste for the arbitrary manipulations this legislations demands of him.⁹¹

In a book devoted to the implications for legal philosophy of adjudication during the apartheid era, I showed that the issue went far beyond distaste. Those apartheid-era judges who felt the ethos of their calling were able to temper the injustice of the statutes that either imposed racial segregation or repressed political opposition to apartheid. They did so by interpreting the statutes as though the legislature had enacted the law in the interest of all, and they based their interpretations on principles of the rule of law as well as principles of liberty and equality, both of which had an ample foothold in the common law and Roman-Dutch law traditions of South Africa.⁹²

The judges who did this were a small minority of the apartheid-era judiciary⁹³ and confined for the most part to the lower courts, with the result that they were consistently overruled either by other judges, or by the apex court of the land, or by the legislature. In the last regard, apartheid South Africa followed the Westminster system of parliamentary supremacy, and in the absence of an entrenched bill of rights the legislature could as long as it chose make completely explicit its intention to exclude these interpretations.

However, the very facts that made it possible for a determined government to use the law as a blunt instrument of highly oppressive policy supports the argument I have been trying to draw from Hobbes and Fuller about the principles of legality. There are three main methods available to a government with full command over the legislature and that wishes to make the law into an instrument of substantive injustice in a way that is, as it were, judge-proof in the sense of immune to interpretation in light of the principles of the rule of law.

The first method is to announce very explicitly in each statute the injustice of which the statute is the instrument. Such statutes would be more particular examples of Robert Alexy's powerful and Radbruch-inspired example of a constitutional assembly that adopts the following proposition as the first article of the constitution:

(1) X is a sovereign, federal, and unjust republic.⁹⁴

As Alexy argues, there is something defective about this article, which shows that a claim to justice is always implicit in claims to legal authority, such that an explicit denial of justice in a law introduces a doubt about whether it is law, in the case of this article a doubt that would extend to the whole of the legal order.⁹⁵

Consider in this regard that South African judges swore during apartheid an oath on taking office to ‘administer justice to all persons alike without fear, favour or prejudice, and as, the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa’.⁹⁶ The particular statutes that explicitly state their intention to be the instrument of injustice would thus make it impossible for judges to carry out their role. An example is a statute that gives to public officials an untrammelled discretion to make decisions setting aside areas of land for the exclusive occupation of one racial group and explicitly instructs the officials to ensure that their decisions reflect the apartheid ideology of inherent white supremacy, so that whites get not only most of the land but also the best of it. Judges would have no role to play under this statute.⁹⁷

The second method delegates to public officials the same discretion but without that explicit instruction. Instead, it inserts into the statute a draconian and very explicit privative clause, a provision that makes it clear that no decision taken by an official is reviewable in a court of law on any grounds whatsoever. Now of course there is something suspect from the point of view of justice in even permitting the division of land on racial lines. But let us suppose that ‘separate but equal’ is still an interpretation of Hobbes’s law of equity, albeit a suspect one, and of the principle of equality before the law. What this statute achieves is that officials sympathetic to the official ideology can achieve the same results as under the first statute, because there is no independent forum to which the victims of injustice can appeal.

They become a law unto themselves, and at least two principles of the rule of law are violated: first, the principle of publicity since the government is seeking to achieve its aims through law without making these explicit; second, the principle of congruence since there is no law with which official action can fail to be congruent.

The third method again delegates this discretion to public officials but this time without either the explicit instruction or the general privative clause. Instead, it inserts what I have called a 'substantive privative clause'.⁹⁸ Such a provision does not exclude judicial review in general, but only particular grounds of judicial review, in this example, the administrative law principle that officials must act reasonably in exercising their discretion, where one of the criteria of reasonableness is that they do not violate the principle of equality. Again, the same result is reached because the judicial role is made merely formal. Legal subjects may ask judges to review the decisions of the public officials. But the judges are precluded from relying on the appropriate grounds of review, the most relevant principles of legality.

In a way, this method might be the most interesting for legal philosophy. Consider its effect if it were writ large, so that, for example, in Hobbes's terms, a sovereign enacts as his first positive law an instruction to his subordinate judges that they are forbidden to interpret the written law of the sovereign in light of their understanding of the laws of nature, or in Fuller's terms, the statute forbids the judges to interpret the law in the light of the eight principles of legality. For Hartians, there is nothing wrong legally speaking with this law, but for Hobbes there must be.

For while Hobbes does not deal with this kind of example, he does remark that there are certain essential rights of sovereignty that the sovereign cannot grant away however explicit the grant, including the rights to make law and the right of 'Judicature'. Such a grant,

Hobbes says, is void, which entails that judges would be entitled to disregard it.⁹⁹ Similarly, he must suppose that this radical version of a substantive privative clause is void not simply because it is unjust, but because of the specifically legal kind of injustice it enacts. Not only is it the case that one could not be a judge in this context, but also there would be no sovereign, indeed, no legal order. Consequently, there would be no duty of obedience on legal subjects.

This point establishes one end of a continuum of illegality where an act that would, other things being equal, amount to a perfectly valid statute, fails to be such because the act seeks to abolish the legality proviso. The point is powerful because it shows that even in a legal order where there is no written constitution permitting judges to strike down acts that meet the validity proviso, judges are under a legal duty to refuse recognition to some acts that do meet that proviso. We can rely on Fuller's distinction between the morality of duty and the morality of aspiration and call this the 'duty end' of the continuum of legality. As one moves away from the duty end, one moves closer to the 'aspirational end', and matters become more complex.

The complexity arises, first, because when a statute is not clearly void but seems to undermine one or other principle of legality, the judge is under a duty to try to find an interpretation of the statute that will make it less problematic from the perspective of legality. In seeing this we can dispel a possible confusion about the distinction between the morality of duty and the morality of aspiration. The distinction is not one that pertains directly to the judicial role, though it has clear implications for judges; rather, it pertains directly to the role of the legislature. The duty end of the continuum of legality is the end at which the legislature has to conform in very particular ways with legality in order for its acts to be recognized as legislative acts. Correspondingly, when the legislature fails so to

conform, judges are under a duty to declare that the act fails to be law. As one moves away from this end, answers to the question of what legality requires will not be so clear, nevertheless, the judges remain under a duty to interpret the law so as to make it most consistent with the aspirations of legality. There is, in short, a judicial duty to enforce strictly the inner morality of law when one is in the realm of the morality of duty. But there is also a judicial duty to make law live up to the aspirations of the inner morality when one moves out of that realm.

How the duty pans out in particular situations cannot be specified in advance. For example, judges should find legislative efforts to specify, circumscribe or even exclude natural justice/due process requirements such as the right to a fair hearing more problematic the more important the individual interest is that is affected by the public official's decision. Thus, the interest in liberty, or in not being deported to face possible torture, should attract far more due process than the interest in securing a building permit. As both Hobbes and Fuller emphasized, this kind of issue will be a matter of interpretation. But that it is a matter of interpretation does not, as Hartians suppose, expel it from legal philosophy to some other domain of inquiry. Rather, it is an issue that arises as a matter of legal duty for judges because of the legality proviso at whatever point in the continuum they find themselves on. Moreover, as this last example vividly illustrates, the principles of legality do not operate in a normative vacuum. They are intricately connected to the individual interest in liberty and equality.¹⁰⁰

The second reason for complexity has to do with the impression to which my focus on judges might seem to give rise--that judges cognizant of the ethos of their calling are able effectively to act as guardians of legality, and thus of the particular morality of legality, under any circumstances. However, my focus on judges is not part of an argument for the

legitimacy of constitutional judicial review, nor is it part of an argument that judges in the absence of an entrenched bill of rights may perform the function of judges who are explicitly given the task of protecting such rights. Rather, exactly as in Raz's work though with very different results, the judicial role is considered a worthy focus because of the insight it gives us into the nature of law, in my account an insight into the way in which the law is answerable to legality. Hence, my account is not meant to answer questions such as what kind of judicial review is best. It is also fully open to arguments that institutions other than judicial review might be necessary to uphold legality, and might prove better suited to upholding legality in particular contexts. However, in line with the comment made in regard to the first reason, it is the case that on my account these questions are properly within the province of philosophy of law and thus not to be expelled to some other domain of inquiry.¹⁰¹

An implication of this line of thought is that legal orders might well be immature in the sense in which Hersch Lauterpacht argued that the international legal order was immature in that it lacked the institutions to enforce legality.¹⁰² An equivalent example in the domestic setting is the extent to which the exercise of the prerogative remains effectively unreviewable in common law legal orders.¹⁰³ In both cases, we find the possibility, even the actuality of illegal acts with legal force or illegal laws that the legal order at least for the time being is incapable of curing. These are acts or laws that are close to the duty end of the continuum of legality. But because of the kind of authority law claims, there is an intrinsic or internal normative drive to find an institutional solution to the problem.

Put differently, the Identity Thesis cannot always be vindicated. But this is not a problem for my account in the way that it is for Kelsen's, which as an allegedly scientific account it is susceptible to falsification by this category of legal 'facts'.¹⁰⁴ It is not a problem

precisely because in my account the Identity Thesis is an explicitly value-laden or normative thesis, so that problematic facts do not falsify but rather demand attention from all those charged with maintaining the legal order in good shape, legally speaking.¹⁰⁵

An interesting variation of this kind of problem arises when a political decision is taken to permit illegal laws. Consider section 33 of the Canadian Charter of Rights and Freedoms that permits legislatures to override for a set period of time a class of judicial decisions that a statute enacted by the legislature is constitutionally invalid.¹⁰⁶ Or consider section 4 of the United Kingdom Human Rights Act (1988) that permits a court to make a declaration that a statute is incompatible with the rights protected by the European Convention on Human Rights if the court is unable, in terms of section 3, to find an interpretation that is compatible. However, section 4(6) declares that such a declaration ‘does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given ... is not binding on the parties to the proceedings in which it is made’, while section 10 gives the government the authority to amend legislation that has been found to be incompatible.

With both section 33 of the Canadian Charter of Rights and Freedoms and section 4 of the UK Human Rights Act, the democratic legal order of a quite enlightened democracy specifically permits an otherwise illegal statute to remain in force and democratic legitimacy compensates for the fact that the statute is problematic from the perspective of legality. In contrast, in the cases in which illegality persists in the legal order because there is no institution capable of responding to the illegality, there is what we can think of a double legitimacy deficit, since it is likely only the legislature that has the capacity to create a solution to the problem, and is thus failing in its own obligation of fidelity to maintaining the rule of law by omitting to rectify the problem.

The way in which democracy either compensates for a deficit in legality or makes the deficit worse is illuminating. In the case where the deficit is made worse, judges can still serve legality by making very explicit in their judgments the nature of the problem. This amounts to an informal version of the declaration of incompatibility envisaged by section 4 of the Human Rights Act and brings to public attention a problem that any rather enlightened democracy will want to address in a process of reasoned deliberation. In the case where democracy compensates for the deficit, the only difference is that there is a formalized duty on judges to make the declaration and a formalized expectation that the responsible political institutions will respond. And on this basis, though I know a lot more work has to be done, I venture that we could draw at least the following conclusions:¹⁰⁷

1. The principle of publicity is part of what we might think of as the morality of democracy as well as of legality;
2. principles of legality such as the requirement of congruence are important not only to ensuring that public officials act according to law, but also that they act in accordance with their democratic mandate;
3. both democracy and law have at their core an ineradicable tension between the virtue of setting disputes, the principle of settlement, and the principle of argumentation that requires that such settlement be responsive to argument on the basis of reasons and evidence;
4. these commonalities arise from the fact that the authority of both democracy and law is ultimately sourced in the authorization of those who are at the same time subject to authority;

5. that presupposes a particularly legalistic conception of political community, one that is first formulated by Hobbes in an attempt to understand the relationship between ruler and subject in terms of reciprocity;
6. it is the case for such a community that there is such a thing as ‘a moral legislature with competence to make and change morals’ and it is the task of legal and political philosophy in tandem to show why that idea is crucial not, as Hart thought, repugnant to morality;
7. in this task, Kelsen’s idea of justified normativity is central, but it has to be reunited with its natural law roots, though these must be conceived (as Hobbes and Fuller argue) as the formal or structural principles of a legal order that is constructed in the service of the individual’s interest in liberty and equality;
8. such principles are rightly viewed as procedural in nature but it is important to see that they are not merely procedural since they are intricately connected to the interest in liberty and equality.¹⁰⁸

¹ Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992, Bonnie Litchewski Paulson and Stanley L Paulson, trans.), 99-103.

² See Lars Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007) 45-50. As Vinx recognizes (see note 68 at 49), this is not an uncontroversial reading of Kelsen, and he cites Stanley Paulson, ‘The Weak Reading of Authority in Hans Kelsen’s Pure Theory of Law’ (2000) 19 *Law and Philosophy* 131; Paulson demonstrates a deep ambivalence in Kelsen’s thought on this issue and I will in this paper be exploring a similar ambivalence in English legal positivism.

³ Carl Schmitt, *Constitutional Theory* (Durham and London: Duke University Press, 2008; trans. Jeffrey Seitzer), 187.

⁴ *Ibid*, 183-4.

⁵ *MB v. Secretary of State for the Home Department* [2006] EWHC 1000 (Admin), paragraph 103.

⁶ For relevant criticism of my work on emergencies and the rule of law, see François Tanguay-Reynaud, ‘The Intelligibility of Extralegal State Action: A General Lesson for Debates on Public Emergencies and Legality’ (2010) 16 *Legal Theory* 161. Tanguay-Reynaud uses an attempted demolition of my argument as a launching pad for a critique of Kelsen’s Identity Thesis. The main problem he poses for both Kelsen and me is in the interesting argument that sometimes it is both desirable and necessary to attribute legal wrongdoing to the state, that is, to hold some arm of the state responsible for breaking the law rather than particular individuals. The other problems he finds arise only if one presupposes the correctness of Hartian positivism, and I find it striking in this regard that Tanguay-Reynaud finds himself compelled to locate authority in a quasi-Schmittian, extra-legal idea of political community. See, *ibid*, 183-4.

⁷ See HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, 2nd edition).

⁸ Joseph Raz, ‘Authority, Law, and Morality’ in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) 194.

⁹ *Ibid*.

¹⁰ *Ibid*, 198.

¹¹ *Ibid*, 195.

¹² Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 *Oxford Journal of Legal Studies* 1, translated by B Litchewski Paulson and S L Paulson

¹³ H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Clarendon Press, 1982) at 153-61, 263-68

¹⁴ See Joseph Raz, 'Kelsen's Theory of the Basic Norm' in Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983) 122, 142-3.

¹⁵ *Ibid.*, 143.

¹⁶ *Ibid.* See further, Raz, 'Legal Validity', in Raz, *The Authority of Law*, 146, 158-9.

¹⁷ Hart, *The Concept of Law*, 201-3.

¹⁸ See Jeremy Waldron, 'Authority for Officials' in Lukas Meyer, Stanley Paulson and Thomas Pogge, eds., *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003) 45.

¹⁹ Raz, 'Kelsen's Theory of the Basic Norm', 145.

²⁰ Joseph Raz, 'The Problem about the Nature of Law' in Raz, *Ethics in the Public Domain*, 179, at 189-90. Notice that there is an ambiguity here between 'the existence of which can be determined' and the content of which can be determined'. I think that Raz means both and will come back to this point in the text below.

²¹ Except for Polish, it seems.

²² Hart, *The Concept of Law*, 208.

²³ Raz, 'The Problem about the Nature of Law', 180.

²⁴ *Ibid.*, 181-3.

²⁵ HLA Hart, 'Positivism and the Separation of Law and Morals', in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49, 53-4.

²⁶ Hart, *The Concept of Law*, 211.

²⁷ Ibid.

²⁸ See Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 656 and Ronald Dworkin, 'A Reply' in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) 247, 259.

²⁹ Hart, 'Positivism and the Separation of Law and Morals', 77. For my detailed discussion of the debate between Hart and Fuller on this issue, see David Dyzenhaus, 'The Grudge Informer Case Revisited' (2008) 83 *New York University Law Review* 1000.

³⁰ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, revised edition), 33-8.

³¹ Ibid, 42.

³² Ibid, 5ff.

³³ Ibid, 42-4.

³⁴ Ibid, 92.

³⁵ Thus, as Jeremy Waldron has effectively showed, Hart's response to Fuller consists of a strategy that divides Fuller's argument into two separate components: first, the argument that law to be such must be answerable to principles of legality, that is, the failure substantially so to comply will render a particular law or a whole legal order illegal or not law; secondly, the argument that compliance with legality makes a positive moral difference to legal subjects. Waldron traces how Hart, as seemed convenient, adopted two inconsistent responses. On the one hand, Hart conceded that law must be answerable to legality but affirmed that such answerability is not only compatible with great iniquity but can actually exacerbate iniquity. On the other hand, he conceded that answerability to legality makes a

positive moral difference, but affirmed that law need not be so answerable. Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York Law Review* 1135.

³⁶ And also, of course, of Dworkin.

³⁷ Joseph Raz, 'The Rule of Law and its Virtue' in Raz, *The Authority of Law*, 223.

³⁸ FA Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994) 80.

³⁹ Raz, 'The Rule of Law and its Virtue', 223.

⁴⁰ Ibid, 223.

⁴¹ Ibid, 211.

⁴² Ibid, 228-9.

⁴³ Ibid, 214, his emphasis.

⁴⁴ Ibid, 225-6.

⁴⁵ Ibid, 224.

⁴⁶ Hart, *The Concept of Law*, 210.

⁴⁷ For criticism of my position on the possibility of illegal law, see Tanguay-Reynaud, 'The Intelligibility of Extralegal State Action'.

⁴⁸ Lon L. Fuller, 'Freedom as a Problem of Allocating Choice' (1968) 112 *Proceedings of the American Philosophical Society* 101, 105-6. I am grateful to Kristen Rundle for alerting me to this passage, and for discussions of its more general significance. The central point Fuller makes in his essay is that freedom is always a matter of social arrangements that both open and restrict choice. In order to understand this phenomenon, Fuller argued, we have to place at the center of the stage the concept of 'institutional role' because we have to answer the question: 'Who shall make the allocation and by what standards shall he be guided?' Ibid,

103-4. At 103, Fuller dwells on a phrase, apparently from a correspondent of John Stuart Mill which suggests that the point of law is ‘making arrangements for the freedom of a man’.

⁴⁹ (London: Frank Cass, 1969), Ferdinand Tönnies, ed., 51.

⁵⁰ Richard Tuck, ed. (Cambridge: Cambridge University Press, 1997).

⁵¹ As Michael Oakeshott put it, for Hobbes the laws of nature make up the content of *ius*:

But they should not be seen as independent principles which, if followed by legislators, would endow their laws with a quality of ‘justice’; they are no more than an analytic break down of the intrinsic character of law, ... the *jus* inherent in genuine law which distinguishes it from a command addressed to an assignable agent or a managerial instruction concerned with the promotion of interests.

Oakeshott, ‘The Rule of Law’ in Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999) 129, 173. For my own attempts to elaborate this idea, see David Dyzenhaus, ‘Hobbes’s Constitutional Theory’ in Ian Shapiro, ed., *Leviathan* (New Haven: Yale University Press, 2010), 453 and ‘How Hobbes met the ‘Hobbes Challenge’’ (2009) 72 *Modern Law Review* 488.

⁵² Raz, ‘Authority, Law, and Morality’, 196-7.

⁵³ Even if the positivist considerations do not determine an answer, the parties are still bound to abide by the decision and the judge is under a duty to render one, though he will be deciding on the basis of his own views of the rights and wrongs of the matter precisely because, or so Hartians suppose, the law provides no determinate answer.

⁵⁴ Hobbes, *Leviathan*, 108-9.

⁵⁵ *Ibid*, 108.

⁵⁶ *Ibid*, 109.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Raz almost gets to the point of seeing this in ‘Authority, Law, and Morality’, 196.

⁶⁰ I adapt here the illuminating argument in Kenneth Winston, ‘Introduction’, to Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart Publishing: Oxford, 2001), 25, at 36-7.

⁶¹ Hobbes, *Leviathan*, 190-1.

⁶² Ibid, 95-6.

⁶³ Ibid, 194.

⁶⁴ Lon L. Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 632.

⁶⁵ For Hobbes’s account of the rule of recognition, see *ibid*, 189. Those who think that Hobbes regarded the sovereign as legally unlimited rely on Hobbes’s insistence that the sovereign is ‘not Subject to the Civill Lawes’, *ibid*, 184:

For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himselfe only, is not bound.

Compare the similar passage at 224. But they fail to see that for an artificial person to be free ‘when he will’ he has to *will* publicly, that is, to express himself in a way that is publicly accessible and recognizable to his subjects as an expression of will. They also fail to notice

that in the passage at 224 Hobbes emphasizes that the sovereign is subject to the laws of nature.

⁶⁶ Ibid, 106.

⁶⁷ Mario A. Cattaneo suggests that the logical conclusion of Hobbes's argument is that the death penalty should be outlawed because of its deep irrationality; 'Hobbes's Theory of Punishment' in K.C. Brown, ed., *Hobbes Studies* (Oxford: Basil Blackwell, 1965) 275.

⁶⁸ Hobbes, *Leviathan*, 98.

⁶⁹ Ibid, 151.

⁷⁰ For the passage, see Hart, 'Positivism and the Separation of Law and Morals', 73. Hart, it should be noted, quoted this passage with evident approval in his vehement critique of Radbruch.

⁷¹ He may also be so entitled in Austin's example, as the punishment is clearly disproportionate to the crime, and Hobbes is clearly concerned with the issue of proportionality in his discussion of punishment.

⁷² Hobbes, *Leviathan*, 147.

⁷³ The third way in which the quality of the space of civic liberty differs from mere negative liberty is that individuals are enabled both to create juridical relations for themselves and, more generally, to act as just men. Ibid, 103-4.

⁷⁴ I will not here go into why I think that sovereignty by institution, in contrast to the alternative method of acquiring sovereignty described by Hobbes--sovereignty by acquisition, is paradigmatic.

⁷⁵ Hobbes, *Leviathan*, 108, emphasis removed.

⁷⁶ Ibid, 107, emphasis removed.

⁷⁷ Ibid.

⁷⁸ Ibid, 9.

⁷⁹ Ibid, 221.

⁸⁰ Ibid, 101-2.

⁸¹ I am aware that a new generation of legal positivists created an ‘inclusive’ version of legal positivism, according to which moral standards incorporated by the positive law could be said legally to determine answers to questions about what the law requires and that Hart suggested in the Postscript to the second edition of *The Concept of Law*, 250-4, that he endorsed this version, rather than the ‘exclusive’ one propounded by Raz. Seen from one perspective, inclusive legal positivism is a complete capitulation to Dworkin, since it accepts that his interpretive account of law is true in the family of legal orders with which those involved in the debate are familiar. From another perspective, it is no different from exclusive legal positivism since both hold that the moral criteria are, as it were, contingently imported into law from the outside.

⁸² John Gardner has gone a long way to acknowledging this point, see ‘Legal Positivism: 5 ½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199. At 226 he says:

There are indeed two inflexions of ‘legally valid’, and they correspond to two senses of ‘legal’. Legal positivists need not deny that there is a moralized notion of law captured in the second term of each of these pairs. They need not deny that in some sense contexts ‘legality’ accordingly names a moral value, such that in the second moralized sense of ‘valid law’, laws may be more or less valid depending on the extent to which they exhibit legality, and hence depending on their merits. ... Maybe

the ideal of the rule of law, for example, does represent a moral ideal distinctively for law, such that one does not fully understand the nature of law until one understands that at least part of its success ... would lie in conformity to this ideal.

Gardner continues at 227: 'To be exact, legal positivism explains what it takes for a law to be legally valid in the thin *lex* sense, such that the question arises of whether it is also legally valid in the thicker *ius* sense, i.e. morally binding *qua* law'.

⁸³ Hart, *The Concept of Law*, 205, his emphasis.

⁸⁴ Ibid, his emphasis.

⁸⁵ Who took the term from Goethe.

⁸⁶ Thus I think there is much to Jürgen Habermas's thought that the 'idea of the rule of law sets in motion a spiraling self-application of law, which is supposed to bring the internally unavoidable supposition of political autonomy to bear'; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1996) 39.

⁸⁷ Raz, 'The Rule of Law and Its Virtue', 211.

⁸⁸ Hart, *The Concept of Law*, 175–78, at 177.

⁸⁹ They are also in some tension with Raz's own list of the principles of legality (Raz, 'The Rule of Law and Its Virtue', 214-19) all laws should be prospective, open and clear; laws should be relatively stable; the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of the other principles; the courts should be easily

accessible; the discretion of the crime-preventing agencies should not be allowed to pervert the law. See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010), chapter 9, especially 240-49. In various essays, including those cited in the notes to this paper, John Gardner has claimed that it is absurd to attribute to Hart the view that there is no necessary connection between law and morality, given Hart's focus on the normativity of law. But this focus does not make it the case that it is absurd to attribute to Hart a view that he defended above all other. Rather, it points to the ambivalence in Hartian positivism that is the subject of this paper.

⁹⁰ Raz, 'The Rule of Law and Its Virtue', 216.

⁹¹ Fuller, *The Morality of Law*, 169.

⁹² Dyzenhaus, *Hard Cases in Wicked Legal Systems*.

⁹³ As I show in *Hard Cases in Wicked Legal Systems*, the majority of the judges adopted a 'plain fact' approach to adjudication, one that is best understood as the kind of approach judges of a legal positivist mindset must adopt in order to meet the rule of law requirement that they must show that their decisions are fully determined by legal reasons.

⁹⁴ Robert Alexy, *The Argument From Injustice—A Reply to Legal Positivism*, Bonnie Litchewski Paulson and Staley L. Paulson, trans. (Oxford: Clarendon Press, 2002) 36.

⁹⁵ Ibid. John Gardner has argued that Alexy makes a mistake in constructing his example here because Alexy thinks that the problem in the example is that the law claims to be morally correct. Gardner, following Raz, argues that the law claims to moral authority; John Gardner, 'How Law Claims, What Law Claims', <http://ssrn.com/link/abstract=1299017>. At 19-21, Gardner discusses a statement by Lord Goff in a case where Goff clearly thought that prior decision was 'unjust or inappropriate' but did not think that he could legitimately

depart from the principle it stated. For Gardner this illustrates the gap between a claim to moral authority and a claim to moral correctness: ‘moral authority is such that abiding by it is morally correct even though the exercise of it was morally incorrect’. However, as Gardner sees, the judge still has to regard himself as morally correct in submitting to the moral authority. It follows that the law’s claim is not to moral correctness but to moral authority. Gardner is, in my view, right though it is not clear to me that Alexy would differ on this point. But what is strange about Gardner’s position is that he supposes, against the grain of legal positivism, that the law’s moral authority in this example is based on principles of legality. He says, *ibid*: ‘It is because legal officials often speak as Goff LJ speaks, and accept that they are morally bound by some prior exercise of the law’s authority – a statute or a previous judicial decision -- while challenging the justice or other moral merit of the exercise of authority in question’. Contrast in this regard Hart, *Essays on Bentham*, 152-3, where Hart criticizes Dworkin for making this sort of claim.

⁹⁶ Supreme Court Act 59 of 1959, s10(2)(a).

⁹⁷ See my analysis of the Group Areas Act, *Hard Cases in Wicked Legal Systems*, 69-73, 233-35.

⁹⁸ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) 115-16.

⁹⁹ Hobbes, *Leviathan*, 125-27.

¹⁰⁰ As I point out in *Hard Cases in Wicked Legal Systems*, 237-38, the example Hart takes over from Austin of the man convicted of a crime punishable by death when the act he did was in fact trivial or even beneficial shows, completely contrary to their claims on the basis of this

example, that there is a deep connection between our understandings of what is legally speaking appropriate and the interests we take law to serve.

¹⁰¹ For further exploration of these issues, see David Dyzenhaus, ‘The Very Idea of a Judge’ (2010) 60 *University of Toronto Law Journal* 61.

¹⁰² Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958) 158.

¹⁰³ See Thomas Poole, ‘Judicial Review at the Margins: Law, Power, and Prerogative’, (2010) 60 *University of Toronto Law Journal* 81 and Mark Walters, ‘The Law behind the Conventions of the Constitution: Reassessing the Prorogation Debate’ (2011) 5 *Journal of Parliamentary and Political Law* 127.

¹⁰⁴ Kelsen, unsurprisingly, was not inclined to find his account falsified.

¹⁰⁵ See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) 270 and also Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

¹⁰⁶ Section 33 states:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after

it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

¹⁰⁷ For pioneering work in this regard see Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1 and Waldron, 'Can There Be a Democratic Jurisprudence?' <http://ssrn.com/abstract=1280923>. I do not of course claim that Waldron would endorse all that follows the colon.

¹⁰⁸ For criticism of Raz's view of authority from a proceduralist perspective, see Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 *Legal Theory* 201 and see further Hershovitz, 'The Role of Authority', (2010) *Philosophers' Imprint*, forthcoming, in which he takes an important step towards conceiving of authority as a matter of official roles as well as procedures.