



1999

Hart, Fuller, Dworkin, and Fragile Norms

Joseph Mendola

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Joseph Mendola, *Hart, Fuller, Dworkin, and Fragile Norms*, 52 SMU L. Rev. 111 (1999)
<https://scholar.smu.edu/smulr/vol52/iss1/15>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

HART, FULLER, DWORKIN, AND FRAGILE NORMS

Joseph Mendola*

THE separation thesis is perhaps the characteristic thesis of legal positivism. It denies that there is a necessary connection between law and morality. But there is ambiguity in this claim and a wide variety of possible alternative necessary connections between law and morality. We owe much of our knowledge of this variety to H.L.A. Hart's work and to the controversies it occasioned and continues to occasion. But there is more to know, and it is a mark of the continuing vitality of his work that this is so.

One necessary connection between law and morality was a key issue disputed between Hart and Fuller,¹ a dispute which it is perhaps the consensus that Hart won.² There are at least three such distinct conflicts at issue between Hart and Dworkin,³ and it is perhaps the consensus that these are largely unresolved. But if we are sufficiently careful in examining the nature of these theses and conflicts, the inferential relationships among them, and the evidence deployed in arguments about them, we may see things in a somewhat different light than the consensus view.

I. FULLER AND HART

Perhaps the simplest necessary connection that may be asserted between morality and the law is that there are no immoral laws, that an apparent law that is immoral is no law at all. What is interesting for our purposes is the way in which this very simple claim became more closely specified and clarified by the arguments Hart and Fuller deployed in their

* Professor of Philosophy, University of Nebraska-Lincoln. B.A., Haverford College; Ph.D. (Philosophy), University of Michigan.

1. See LON L. FULLER, *THE MORALITY OF LAW* (2d ed. 1969); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994); Lon L. Fuller, *Positivism and the Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter Hart, *Positivism and Separation*]; H.L.A. Hart, *Book Review* 78 HARV. L. REV. 1281 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

2. But see Phillip Mullock, *The Internal Morality of Law*, 84 ETHICS 327 (1974); Peter P. Nicholson, *The Inner Morality of Law: Fuller and His Critics*, 84 ETHICS 307 (1974).

3. See RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; HART, *supra* note 1; H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979) [hereinafter Hart, *Between Utility*]; H.L.A. Hart, *Law in the Perspective of Philosophy: 1776-1976*, 51 N.Y.U. L. REV. 538 (1976).

famous dispute. It is important to pay careful attention to the evidence they cited if we are to understand the exact nature of their claims.

At issue, you will recall, were the views of Gustav Radbruch, a German professor of jurisprudence.⁴ Prior to the Nazi regime he had been a legal positivist, who believed that the lawfulness of the law was independent of morality, at least in the sense that immoral laws, even deeply immoral laws, might still be laws.⁵ Later, he wrote in support of the German post-war legal practice of prosecuting informers, spies, and local war criminals for things they had done under the Nazi regime that were yet plausibly in accord with Nazi "law."⁶ He was repulsed by the way in which it was argued on behalf of people brought to trial in this way that their behavior under the Nazi regime had been perfectly legal by the laws of the day.⁷ In particular, he suggested that some Nazi stipulations, because immoral, were no laws at all and that some things not illegal according to Nazi "law" were yet properly forbidden by a kind of higher law, which it was entirely appropriate for post-war courts to consider binding even during the period of the Nazi regime.⁸

Hart urged, on the contrary, that there were really only two acceptable choices in such a situation: to let such people go unpunished, or for the legislature to enact frankly retroactive laws under which they would be punished.⁹ He argued that the practice of the German courts supported by Radbruch was a serious abuse of law and that it fostered and was fostered by an incorrect conception of what law in fact was.¹⁰ Fuller came to the limited defense of Radbruch and the postwar German courts.¹¹ While he and indeed Radbruch agreed with Hart that the adoption of frankly retroactive laws would have been preferable in such a situation, Fuller defended Radbruch's contention that the practice of the post-war German courts was appropriate and involved no confusion about the nature of law.¹²

What for our purposes is interesting in this debate is the kind of arguments these disputants gave and what light that sheds on the nature of the dispute among them, and hence, the nature of the claim at issue. A first relevant point is that it was granted by all that the immoralities involved were serious. That suggests a limitation on the question at issue to whether or not *seriously* immoral laws are laws. But the second relevant point is more interesting and complex. The evidence cited by both Hart and Fuller in their initial exchange was predominantly moral evidence, which suggests that what was at issue regarding the proper concept of law

4. See Hart, *supra* note 1, at 616; Fuller, *supra* note 1, at 651.

5. See Hart, *Positivism and Separation*, *supra* note 1, at 616.

6. See G. Radbruch, *Gesetzliches Unrecht and Übergesetzliches Recht*, 1 SÜD-DEUTSCHE JURISTEN-ZEITUNG 105 (1946).

7. See Hart, *Positivism and Separation*, *supra* note 1, at 616.

8. See *id.* at 617.

9. See *id.* at 619.

10. See *id.* at 619-20.

11. See Fuller, *supra* note 1, at 657-61.

12. See *id.*

was at least largely a moral issue. While it must be admitted that Hart and Fuller deployed some nonmoral arguments as well, such arguments were not predominantly stressed by the disputants and also suffered from grave unclarity and difficulties. This then left the issue between them primarily a moral one. This is important for our purposes because it suggests a connection among a pair of issues that are *prima facie* distinct and will eventually allow us to see that Fuller's contentions against Hart are more plausible than they have often seemed.

Let us begin by considering Hart's original arguments in his original *Harvard Law Review* article.¹³ Hart discussed in particular a case that involved prosecution of a woman who had informed on her husband for making critical remarks about the authorities during the war. The key evidence Hart cited is as follows:

Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case . . . would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.¹⁴

In other words, Hart endorsed Proposition One: *It is an evil, though perhaps an evil that is necessary to avoid a greater evil, to punish by legal sanctions in such a case, whether by a frankly retroactive law or in the manner adopted by the German courts.*

Hart then went on:

Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system This is surely untrue and there is an insincerity in any formulation of our problem which allows us to [so] describe the . . . dilemma.¹⁵

In other words, Hart also endorsed Proposition Two: *Adopting the view proposed by Radbruch would be insincere and hence morally analogous to lying.*

Moreover, Hart endorsed Proposition Three: *Adopting Radbruch's view would be a particularly pernicious form of insincerity or lying because of its particularly evil consequences in its particular situation, which would be a blunting of an important form of moral criticism and a corrupting of legal practice.* This is implied by his claims that:

[C]andour is not just one among many minor virtues of the administration of law [I]f we adopt Radbruch's view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral

13. See Hart, *Positivism and Separation*, *supra* note 1, at 618-19.

14. *Id.* at 619.

15. *Id.* at 619-20.

inequity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of . . . propositions of a disputable philosophy.¹⁶

There are many things going on in these argumentative passages. It is certainly worth working through some of the arguments slowly.

Insincerity and lying are clearly morally charged notions, but they have fairly determinate, concrete conditions of application. They require obfuscation. Why would it be that adopting the Radbruch alternative is supposed to be especially obfuscating, tantamount to lying? Why is Proposition Two correct? One thing Radbruch's proposal may be claimed to hide is the perhaps inevitable evil of punishing those who obeyed local laws at the time they acted. It might hide that alleged moral fact. But that depends on the truth of Proposition One, a moral claim. Another way in which it might be obfuscating is apparently non-moral. If Hart's conception of law is the correct one, then Radbruch's alternative would hide that fact. But of course the correctness of Hart's conception of law was the very thing at issue here. Another apparent implication of the passage cited is that Hart's view is closer to common sense and hence does not involve "disputable" philosophy, but of course we all know that all philosophy is disputable. There is another plausible thrust in the passages regarding Proposition Two, but it is, like Proposition One, clearly moral. In fact, it is moral in two ways. It is in fact Proposition Three, that the practice and terminology that Radbruch recommends will have *morally worse* consequences because it will hobble an important form of *moral* criticism and also corrupt legal practice. So it seems that if we boil down the discussion of Proposition Two, which by its invocation of the charged notions of lying and insincerity already has a moral tone, we find it rests largely on two moral claims, namely Propositions One and Three.

The primary arguments in these passages are quite clear. Hart did not appeal to some fixed and true concept of the law that determined the appropriate meaning of the term "law." Nor could he have done so consistently, for as a follower of Wittgenstein and J.L. Austin, he plausibly thought that concepts are often reflections of the uses of the words with which those concepts are expressed and that usage is often contingent and indeterminate at the edges. He rather made three moral claims, interrelated in the ways I have noted, mixed in with a variety of apparently non-moral arguments that turn out to more or less beg the question at issue.

16. *Id.* at 620-21.

Fuller's response was likewise by moral argument. Or, it is more accurate to say, while like Hart he implied that there were two sorts of grounds for the dispute, one involving theoretical grounds of intellectual clarity and another involving moral considerations,¹⁷ it is the second sort of consideration that was most plausibly developed in his discussion.

He reminded us that Radbruch was clearly aware that the sort of punishment adopted by the German courts was dangerous because potentially subject to abuse, but suggested that Radbruch reasonably held that in this instance it was not an evil.¹⁸ Fuller hence expressed a moral disagreement with Proposition One. He said that the moral dilemma proposed by Hart "has the verbal formulation of a problem, but the problem it states makes no sense. It is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves."¹⁹ There is no evil in punishment in this case; hence, Hart's first moral contention, Proposition One, is false.

In addition, the motivation for Radbruch and Fuller's practical proposals and conceptions of law was clearly moral. They in effect proposed that we adopt a concept of law that allows for punishment of evil-doers in such a manner as was pursued in Germany after the war, and hence also provides an additional incentive for resisting or at least failing to take advantage of seriously immoral "laws." Radbruch and Fuller's contentions depend on a way of assessing the morally relevant consequences of adopting various conceptions of laws that is different from that expressed in Hart's Proposition Three. Fuller held that obviously moral contention of Hart to be false.

We have traced Fuller's disagreement with Proposition One and Proposition Three. What about Proposition Two? Remember that Proposition Two rests most plausibly on Propositions One and Three. Let us be very clear. There need be no conceptual confusion involved if someone self-consciously decides to use "law" such that it applies only in cases in which so-called "legal" practices are not seriously immoral, nor engages in a practice of the form the German courts adopted after the war. What is at issue is the morally appropriate form of legal practice, whether the morally appropriate form of practice in such a tough situation may necessarily involve some evils, and also the morally preferable form of terminology for talking about and criticizing such practices. These are flatly moral issues.

Hart's more mature treatment of these matters in *The Concept of Law* explicitly introduced a new set of apparently non-moral considerations, and more clearly distinguished among different elements present in the earlier treatment, so we should also consider that later set of arguments.²⁰

17. See Fuller, *supra* note 1, at 631.

18. See *id.* at 655-57.

19. *Id.* at 656.

20. HART, *supra* note 1, at 209-212.

There Hart made essentially five points, which developed the considerations already noted and also added a few others.

First, he admitted that the issue is not one of the folk meaning of the word "law":

[T]he issue is ill presented as a verbal one. Neither side to the dispute would be content if they were told, 'Yes: you are right, the correct way in English (or in German) of putting that sort of point is to say what you have said.' . . . Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage.²¹

Next, he told us what *was* at issue, in his view:

For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.²²

Theoretical superiority is of course an apparently non-moral issue. So it is worth treating that matter at some length, and indeed quoting the sum of what Hart said about it. This is the third point he made. Recall that what was at issue was a wide conception of law that included Nazi law and a narrow conception that excluded it, and also recall that Hart's primary theoretical conception of the law was as a union of what he called "primary and secondary rules."

The wider of these two rival concepts of law includes the narrower. If we adopt the wider concept, this will lead us in theoretical inquiries to group and consider together as "law" all rules which are valid by the formal tests of a system of primary and secondary rules, even though some of them offend against a society's own morality or against what we may hold to be an enlightened or true morality. If we adopt the narrower concept we shall exclude from "law" such morally offensive rules. It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law. Nothing, surely, but confusion could follow from a proposal to leave the study of such rules to another discipline, and certainly no history or other form of legal study has found it profitable to do this. If we adopt the wider concept of law, we can accommodate within it the study of whatever special features morally iniquitous laws have, and the reaction of society to them. Hence the use of the narrower concept here must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules. Study of its use involves study of its abuse.²³

21. *Id.* at 209.

22. *Id.*

23. *Id.* at 209-10.

There are a number of argumentative claims suggested in this passage, though I am treating it all as at one level of abstraction a single argumentative point. Let me tease them out. There is perhaps the suggestion that any broader (reasonably plausible) conception of such a phenomenon as law is always to be preferred to a narrower one it “includes.” But notice that Hart could not properly deploy such an argument given his opposition to Radbruch’s in one sense wider conception of law, which included the “higher law” supposed binding during the Nazi regime, though unrecognized by Nazi “legal” practice.

Nor could it have plausibly been contended by Hart, though perhaps it is suggested by this passage, that he had discovered a true essence or nature of law in his notion of a union of primary and secondary rules, an essence that must be preserved without accretion or diminution in any proper conception of law. Hart’s own Wittgensteinian conception of his enterprise would have properly forbidden this. Concepts like that of law are a reflection of the use of terms that express those concepts. It may be that some terms, for instance “water,” are “natural-kind terms,” which properly aim to cut nature at its joints in such a way that it is plausible to claim that genuine understanding would be prevented by other uses of words, linguistic practices in which for instance cold water and hot water were called by completely dissimilar names. But “law” is not plausibly a natural-kind term. The study of law is not a natural science like chemistry, at least in that detail. Certainly it would be possible for two individuals, say Hart and Fuller, to agree completely about the concrete details of some institutional phenomenon, say a rule held binding in Nazi courts, and disagree about whether to call it a law. But it is far from obvious that there is then any issue of genuine truth between them. Perhaps one of the usages of “law” they propose would be truer to our own folk usage, but Hart suggested that as an inappropriate grounds for the debate.²⁴ Nor would it be appropriate for a Wittgensteinian, like Hart, to presume that the facts about folk usage are determinate about that anyway.

It is important to notice Hart’s own treatment of the case of international law because international law of course lacks a feature specified by his core analysis of law.²⁵ Hart said that it is properly called “law” despite the fact that it lacks one of the crucial features of his paradigm cases of law, where those paradigm cases meet his conception of law as a union of primary and secondary rules. It lacks secondary rules.²⁶ Perhaps Hart would be tempted to allow it appropriately to *extend* usage beyond central and paradigm cases but not to *restrict* it in the way Radbruch and Fuller seem to suggest. But there are two problems with this way of making sense of his argument. The first, as I have already noted, is that he did not want to extend usage in this way to “higher law.” The second is that we might reasonably wonder why it would not be appropriate to insist

24. *See id.* at 209.

25. *See id.* at 213.

26. *See id.* at 214.

that Nazi law is not a paradigm case of law, and hence not a proper target for central analysis. Is there any virtue to be had by insisting that slave-holding societies and Nazi Germany are among the central and paradigm cases reflected in the analysis of law? Even Fuller and Radbruch might have admitted that they were *non-paradigm* cases.

Hart claimed that his own account had explanatory and theoretical virtue.²⁷ But it is important to remember that this could not be explanatory virtue of quite the sort that a linguistic practice, which distinguished in some deep way between cold and hot water would lack, and that the prestige of natural science does not necessarily properly extend to the case under consideration. Hart's real theoretical claim was that his analysis provided illumination by stressing important features of the paradigm cases of legal systems. But it is far from clear that Fuller could not as plausibly have made exactly the same claim. Facts about importance and centrality are not always determinate. And certainly a Wittgensteinian should accept that.

There may be something else going on in these passages of Hart, the suggestion that there is nothing to be gained in a non-moral study by an exclusion on moral grounds. But of course Radbruch and Fuller were not denying that particular claim. They rather wanted to infuse the moral into jurisprudence. Another related suggestion of the passage is that if "laws" that are seriously immoral are taken to be no laws at all, then no discipline will study them, or at least not the same discipline as that which studies proper laws. But of course it is not an absolutely obvious fact that jurisprudence should study only law, as it is not obvious that political philosophy should not study anarchy.

So despite the fact that Hart quite explicitly deployed apparently non-moral arguments in his later treatment of these issues, on close examination those arguments largely evaporate. The primary issue remains a moral one. Indeed, Hart stressed even in *The Concept of Law* two moral points: first, the claim that there are no genuine practical and hence moral advantages in the procedures favored by Fuller, and second, the claim that there would be a kind of genuine moral loss.²⁸ These are the two points we have yet to examine.

First, why there are no advantages:

What then of the practical merits of the narrower concept of law in moral deliberation? In what way is it better, when faced with morally iniquitous demands, to think 'This is in no sense law' rather than 'This is law but too iniquitous to obey or apply'? Would this make men more clear-headed or readier to disobey when morality demands it? Would it lead to better ways of disposing of the problems such as the Nazi regime left behind? No doubt ideas have their influence; but it scarcely seems that an effort to train and educate men in the use of a narrower concept of legal validity, in which there is no

27. *See id.* at 209-10.

28. *Id.* at 210-11.

place for valid but morally iniquitous laws, is likely to lead to a stiffening of resistance to evil, in the face of threats of organized power, or a clearer realization of what is morally at stake when obedience is demanded. So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce.²⁹

In other words, the possible moral advantages to be gained by adopting Fuller's concept evaporate upon examination. In essence, this dispute between Fuller and Hart was a dispute about the actual consequences of adopting two forms of a concept, where it was obvious to both parties to the dispute that the nature of those consequences was morally significant. It was a dispute about what we might call "moral means," meaning not means that are moral but rather means to a moral end, a moral end that in this instance Fuller and Hart both endorsed. And it is a dispute in which it is not obvious that Hart won. For instance, we might worry that Hart ignored the possibility that Fuller's conception, while not plausibly generating a great deal of active resistance to immoral law, might at least foster a greater tendency not to take more or less optional advantage of it.

Remember that there were also supposed to be practical and hence moral advantages in adopting Hart's concept. Here is the first:

What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny. This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.³⁰

Again, this was a debate about the likely effects of adopting two alternative conceptual procedures, effects on the form of resistance to iniquitous laws and about means to that relevantly moral end. It is itself a dispute about non-moral facts, but facts of relevance only because of that moral goal Hart shared with Fuller. It is a dispute about moral means. Nor does this particular practical dispute, we should note, *obviously* resolve itself in Hart's favor. But Hart also claimed a second advantage for his proposal:

But perhaps a stronger reason for preferring the wider concept of law . . . is that to withhold legal recognition from iniquitous rules may grossly oversimplify the variety of moral issues to which they

29. *Id.* at 210.

30. *Id.*

give rise. Older writers who, like Bentham and Austin, insisted on the distinction between what law is and what it ought to be, did so partly because they thought that unless men kept these separate they might, without counting the cost to society, make hasty judgments that laws were invalid and ought not to be obeyed. But besides this danger of anarchy, which they may well have overrated, there is another form of oversimplification. If we narrow our point of view and think only of the person who is called upon to *obey* evil rules, we may regard it as a matter of indifference whether or not he thinks that he is faced with a valid rule of 'law' so long as he sees its moral iniquity and does what morality requires. But besides the moral question of obedience (Am I to do this evil thing?) there is Socrates' question of submission: Am I to submit to punishment for disobedience or make my escape? There is also the question which confronted the post-war German courts, 'Are we to punish those who did evil things when they were permitted by evil rules then in force?' These questions raise very different problems of morality and justice, which we need to consider independently of each other: they cannot be solved by a refusal, made once and for all, to recognize evil laws as valid for any purpose. This is too crude a way with delicate and complex moral issues.³¹

That is precisely my point; these are moral issues. Hart was specific about exactly what moral issues they were, and his discussion here repeats the suggestions of his law review article:

It may be conceded that the German informers, who for selfish ends procured the punishment of others under monstrous laws, did what morality forbade; yet morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbade. . . . If inroads have to be made on this principle in order to avert something held to be a greater evil than its sacrifice, it is vital that the issues at stake be clearly identified. . . . At least it can be claimed for the simple positivist doctrine that . . . this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made.³²

Again, there are certain significant moral evils, according to Hart, that attend either retroactive punishment or the natural law procedures adopted by the German courts even in the cases considered by Radbruch. There are not merely moral *dangers* or evil *possibilities* but clear and actual evil consequences of such practices. There is also the suggestion that the evils of the practice adopted by the German courts were significantly more severe than those that would have inevitably accompanied frankly retroactive laws. So the issues between Hart and Fuller were once again moral issues.

We have seen that there is a sense that is not characteristically noticed: even if Hart was right about nearly everything, that there is a crucial kind of necessary connection between law and morality. The proper concept

31. *Id.* at 210-11.

32. *Id.* at 210-12.

of law is at least partly determined by moral considerations. Disputes about the proper concept may involve disputes about moral means or moral ends. In particular, the central issue between Hart and Fuller was a moral dispute, a dispute in which Fuller's position may seem not so obviously untenable, especially after we review some other disputes in which Hart engaged.

II. DWORKIN AND HART

There are a number of disputes between Dworkin and Hart about law that involve morality. I will discuss three central ones. This will eventually put us in a better position to assess the dispute between Fuller and Hart, which was the concern of the preceding part.

First, Hart developed a particular picture of internal features of legal institutions as involving (1) a rule of recognition with clear, clean, and non-moral criteria for legal validity, (2) the general deployment of rules rather than alternative forms of norms like principles, and (3) an open texture of law which left a large place for judicial discretion.³³ Dworkin has criticized each of these features of Hart's conception. Indeed, he has done so in a plausible manner that seems to underwrite the general tendency of neo-positivists like Raz, MacCormick, Coleman, and Postema to abandon these details of Hart's proposals and incorporate Dworkin's specific suggestions.³⁴ Hart's own discussion of Dworkin in the posthumously-published appendix to the second edition of *The Concept of Law* seems to admit the merit of many of these adjustments.³⁵

The point for us in discussing this first dispute between Hart and Dworkin is this: it is important to clearly distinguish between beliefs about moral facts on the one hand and moral facts on the other, just as it is important to distinguish between people's beliefs about supernatural entities and the truth about them—what is believed is one thing, and what is true is another. That is how false belief is possible. The first dispute between Dworkin and Hart about the relationship between morality and law is about whether moral beliefs play a role in constituting legal institutions. But of course, the resolution of such a dispute in Dworkin's favor would not necessarily imply that moral facts are a part of what constitutes legal institutions. While it may be that Hart was mistaken in thinking moral beliefs are not a part of what makes up even paradigmatic legal institutions, nevertheless it is important to see that this admission in itself leaves untouched the perhaps central and guiding insight of legal positivism, which is the next point at issue between Dworkin and Hart.

The second dispute between Dworkin and Hart is another instance of the general type of dispute at issue between Fuller and Hart. But it is

33. See *id.* at 79-154.

34. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 3; NEIL MACCORMICK, H.L.A. HART (1981); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

35. HART, *supra* note 1, at 238-76.

important to see that there are differences between the two cases. Both Fuller and Dworkin hold positions that suggest that moral facts, and not merely moral beliefs, are necessarily constitutive of some of the phenomena that are crucial parts of legal institutions. However, Fuller's position does this in one way, and Dworkin's work suggests another.

Let us consider a very simple possibility. Perhaps moral beliefs are necessary for the existence of a legal system (in accordance with Dworkin's side of the first debate, which we just discussed), and yet the existence of moral beliefs in fact requires, despite the obvious surface distinctions we noted in the preceding paragraphs between moral beliefs and moral facts, the existence of moral facts. The kinds of phenomena that are constitutive of legal institutions, on such a conception, do not *directly* include moral facts in the manner of Fuller, but rather include things like moral beliefs, which themselves are constituted in such a way as to require the existence of moral facts. Moral facts are necessary for other things that are in turn necessary for legal institutions to exist, so moral facts are in a sense *indirectly* necessary for the existence of legal institutions.

Dworkin's own views about whether there are moral facts are perhaps too complex to discuss quickly and to fit easily into the simplest way of thinking about this point, so perhaps it will aid clarity to adopt for the moment a different foil. A number of philosophers have suggested that practices involving moral judgments cannot be exhaustively understood "from the outside," that one cannot even grant the existence of practices of moral judgment and belief that are too seriously in error. Some would even claim that *any* judgments at all, not merely about morality but about any topic, require the existence of some sort of normative fact. This is because beliefs and sentences incorporated in such judgments can be true or false, correct or incorrect, and also can play a role in correct or incorrect inferences. This correctness and incorrectness seem to some to be normative properties, so that the very existence of beliefs and meaningful sentences requires the existence of more or less moral facts. Davidson, McDowell, and Brandom are examples of philosophers who suggest views like these.³⁶

If such claims are correct, then there may be a second route to Fuller's claim that suitably immoral laws are no laws at all, or at least to the somewhat weaker claim that if there had been no moral facts at all then there would in fact have been no laws. A skeptic about the moral would then be a skeptic about the existence of law. Hart, on the other hand, clearly had a different view, that the law as an institution could exist even if there were no moral facts or other moral truths.³⁷

36. See ROBERT B. BRANDOM, *MAKING IT EXPLICIT* (1994); DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984); JOHN McDOWELL, *MIND AND WORLD* (1994).

37. See Hart, *Positivism and Separation*, *supra* note 1, at 606.

Despite the fact that there is a distinguished group of contemporary philosophers who disagree with Hart on this issue, and despite the fact that I think there is something to Fuller's particular way of arguing for the importance of moral facts as pre-conditions for the existence of legal institutions, this is a place where Hart seems to me quite clearly right. One way to see this is to bring out an ambiguity in the words "reason" and "rationality."

Some, for instance Davidson, say that we must attribute thoughts to persons and interpret their utterances under a constraint of "rationality," and that the facts about what thoughts they have and what their words mean are in fact constituted by the proper interpretation of them. For instance, they hold that it is necessary that thinkers and speakers, if they are indeed to *be* thinkers and speakers, rationally infer, say *P* and *Q* from *P* and from *Q*, and also move in a rational way from wanting *P* and believing that *Q* is a means to *P* to doing *Q*.³⁸ But rationality seems to involve reasons, and reasons introduce normativity of some sort.

But it is important to see that this sort of rationality is not "normative" in anything like the traditional sense appropriate to the good and right. If I think that it would have been rational, in the sense relevant to interpretation, for Hitler to invade England before he invaded the Soviet Union, I am not morally endorsing his invading England in any sense. I am not claiming that he had any moral justification for that. Rather than infer from his premises or act on his desire, I think he should have shot himself or gone back to painting. The "normativity" of the right and the good, which some people think cannot be constituted out of mundane concrete things, has nothing obvious to do with the rationality that allegedly constrains interpretation. We might call the second "rationality as coherence" rather than "rationality as justification."

Another way to see the point is this: if some irreducible normativity is alleged to be part of what constitutes some *X* to mean or believe what they do, bound as they are by rationality as coherence, then we still might conceive a non-normative concrete twin *Y* of *X*, who has all the dispositions for verbal behavior and neural states and other non-moral concrete properties of *X*, but who does not glow with value in the way presumed to be constitutive of meaning. This *Y* still has a proper interpretation, at least within a certain range of indeterminacy. Indeed, we would be hard pressed to argue that we are not in exactly the situation of *Y*. Those who speak of the normativity of meaning are in danger of building their theories on a bad pun.

This is a quick way with complex matters, and I have discussed them at more adequate length elsewhere.³⁹ The main point for now is that even if

38. Because people sometimes fail to make obvious inferences, it is perhaps better to say that we should ascribe to people thoughts and interpretations that make people come out as rational as possible and that only if they fail to a sufficient degree to be rational in this sense will they then lack thoughts and meaningful speech.

39. See JOSEPH MENDOLA, *HUMAN THOUGHT* 209 (1997).

we take Dworkin's side of the first dispute with Hart, so that for instance moral judgments are partly constitutive of legal institutions, that does not immediately and obviously imply that moral facts are also constitutive of them. This is because the second Hart-Dworkin dispute is at worst (at worst that is for Hart) unresolved.

There is yet a third dispute between Dworkin and Hart we should consider. It is an issue about the proper political morality, and hence about the proper bearing of morality on law if not directly on necessary, moral conditions for the existence of law. We know from our former discussion of Fuller and Hart that the dispute between them was in fact a moral dispute. It will shortly emerge that the third dispute between Dworkin and Hart is directly relevant to adjudicating the particular moral dispute between Hart and Fuller, and hence bears indirectly on the issue about the necessary connection between law and morality that engaged those disputants. The remainder of this Article addresses that issue. It will be useful to begin by discussing in a straightforward way the moral dispute between Dworkin and Hart without regard to its implications for the issues that will eventually concern us again.⁴⁰

Dworkin has been concerned to refine and revise traditional, utilitarian moral theory, at least according to Hart.⁴¹ Traditional utilitarianism, with its moral conception that the good is a summation of the satisfaction of individual preferences (or more generally a summation of individual goods), faces certain standard objections rooted in intuitive conceptions of moral rights.⁴² The utilitarian Bentham's insistence that talk of rights is "nonsense upon stilts"⁴³ seems to reflect an obvious moral implication of traditional utilitarianism, an implication that if enough satisfaction for others can be achieved by violation of traditional rights to bodily integrity, property, liberty, or even life, then a utilitarian is bound to hold such violations appropriate or even morally mandatory. Dworkin has sought to find in one of the traditional argumentative underpinnings for utilitarian moral theory, namely an interest in equality of concern and respect, a motivation for a modification of traditional utilitarianism that is more intuitive in these ways and respects such rights.⁴⁴

One diagnosis of this set of traditional problems with utilitarianism is that utilitarianism unfortunately allows other people's preferences about what one does, perhaps rooted in conceptions of morality or in tastes one does not share, to trump one's own preferences. The sum of individual satisfactions gained by others from restraining someone by law from ac-

40. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3; H.L.A. Hart, *Between Utility*, *supra* note 3; RONALD DWORKIN, RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 282 (1984) [hereinafter DWORKIN, RONALD DWORKIN] (containing a reply by Ronald Dworkin).

41. See Hart, *Between Utility*, *supra* note 3, at 837.

42. See *id.* at 828.

43. Jeremy Bentham, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM 489, 501 (1962).

44. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3, at 272-78.

tivity that is intuitively that individual's own business, which is intuitively their right, will yet be greater than the satisfaction that the individual will hence lose. Dworkin argues that equal concern and respect suggest a new form or modification of utilitarianism in which these preferences of others about oneself, which Dworkin calls "external preferences," are ignored in utilitarian calculation.⁴⁵ This is then supposed to yield some protection within this modified utilitarianism for intuitive rights.⁴⁶

Hart's important essay, *Between Utility and Rights*, was critical of this strategy.⁴⁷ Dworkin has responded.⁴⁸ But whatever the success of their various arguments, it is the overall conception of our current situation in moral theorizing as articulated in Hart's article that is of greatest immediate significance.

Hart said,

We are currently witnessing . . . a transition from a once widely accepted old faith that some form of utilitarianism . . . *must* capture the essence of political morality. The new faith is that the truth must lie not with a doctrine that takes the maximisation of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals. . . .⁴⁹

This contrast was developed in regard to space rather than time in Hart's later essay *Utilitarianism and Natural Rights*, in which he noted that the doctrine of basic human rights was expressed by the American Declaration of Independence at approximately the same time that in England Bentham announced utilitarianism to the world.⁵⁰ While Dworkin's position reflects the historical or American trend away from utilitarianism according to Hart, he also held that Dworkin's position is too close to utilitarianism to represent a complete transition, and hence is too close to utilitarianism to be a coherent alternative. One reason for this is that it is a *modified* utilitarianism, concerned merely to circumscribe the maximization of the good and modify the utilitarian core conception. But another reason is that Dworkin's position is developed in light of utilitarianism, in the sense of being merely motivated by standard objections to it. This problem, Hart believed, infected even Nozick's very anti-utilitarian conception of political morality articulated in *Anarchy, State, and Utopia*.⁵¹ In a key passage, Hart also pointed us further in the direction of what he took to be the coming faith:

I do not think a satisfactory foundation for a theory of rights will be found as long as the search is conducted in the shadow of utilitarianism, as both Nozick's and Dworkin's in their different ways are. For

45. *See id.* at 276.

46. *See id.* at 276-78.

47. Hart, *Between Utility*, *supra* note 3.

48. *See* DWORKIN, RONALD DWORKIN, *supra* note 40, at 282.

49. Hart, *Between Utility*, *supra* note 3, at 828.

50. H.L.A. Hart, *Utilitarianism and Natural Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 181-97 (1983).

51. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

it is unlikely that the truth will be in a doctrine mainly defined by its freedom from utilitarianism's chief defect . . . or in a doctrine resting, like Dworkin's . . . on . . . a barrier against an allegedly corrupt form of utilitarianism.⁵²

Hart clearly believed that there is a severe incoherence between the deep rationale behind utilitarianism, the very intuitive idea that the good should be maximized overall, and the proper and deep rationale for the coming correct theory of rights. Dworkin, at least on Hart's conception of him, believes that the proper conception of overall good can be adjusted to reflect the proper notion of equal concern and respect and hence in effect to incorporate rights of certain traditional sorts. He believes that a kind of reconciliation between a concern with rights and with the maximization of the good is possible. Dworkin is, we might say, a "reconciliationist," and Hart believed that a serious fault.⁵³

On this general issue, I believe that it is important to see that Dworkin is right, whatever the success of his particular moral theory. There are suggestions in some of Hart's writings that he is skeptical about the possibility of resolving moral disputes, and even with skepticism that there is a truth about them. But clearly he must have thought moral discourse and judgment sufficiently healthy to deploy moral arguments of the sort he deployed against Fuller. The moral theory that Hart's various remarks on morality and the law suggest is troubled by difficulties very close to the surface of his interesting paper *Between Utility and Rights*.⁵⁴ The next part elaborates this point.

III. UTILITY AND RIGHTS

Consider Scanlon's philosophically influential triad of "philosophical account of the foundations of morality."⁵⁵ These are general theories about the nature of the grounds of truth for moral claims, the proper moral epistemology, and the nature of the reasons that morality provides for us. Scanlon distinguishes intuitionism, philosophical utilitarianism, and contractarianism as theories of this sort.⁵⁶

Intuitionists in Scanlon's sense hold (1) that moral properties are *sui generis* non-natural properties, not constituted out of the ordinary natural properties of things common sense discerns or natural science discovers, (2) that we have special intellectual faculties to apprehend them, and (3) that they provide a special sort of *sui generis* motivation for those who are aware of them, that they function as a kind of universal cosmic catnip. Such claims are probably worth debunking, but the primary underlying concern for intuitionists has probably been to preserve the full range of intuitive moral judgments about the right, good, and just. And though it

52. Hart, *Between Utility*, *supra* note 3, at 846.

53. *See id.*

54. Hart, *Between Utility*, *supra* note 3.

55. T.M. Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 103 (Amartya Sen & Bernard Williams eds., 1982).

56. *See id.*

would take some argument to show this, it may be possible to see that the alternative philosophical explanations of morality can respect those intuitions in the attenuated sense that they can deliver intuitive moral judgments as applications, or at least can deliver something reasonably close to those key intuitive judgments on which we have the strongest consensus and the greatest intuitive certainty. Something like this argument has already been developed for the case of philosophical utilitarianism by Henry Sidgwick in *The Methods of Ethics*.⁵⁷ And contractarianism is widely held to be even more in accord with common sense intuition about particular cases than utilitarianism. It is not entirely unreasonable to hope, then, that the core motivation behind the intuitionist philosophical explanation of the nature of morality can be reconciled in this way with the other two explanations Scanlon delineates.

The other two philosophical explanations of the nature of morality Scanlon distinguishes are said to share a skepticism about the apparently extravagant metaphysical and epistemological resources of traditional intuitionism. Philosophical utilitarianism, as distinguished from utilitarianism as a first-order moral doctrine about what is right and wrong, is the thesis that the only fundamental moral facts are facts about individual well-being.⁵⁸ Such facts have obvious motivational significance because of our at least loosely sympathetic inclinations, and hence, sympathy is, according to philosophical utilitarianism, the primary moral motivation.

Scanlon's particular concern is to develop contractarianism as an alternative to philosophical utilitarianism.⁵⁹ He provides a contractualist account of the nature of moral wrongness according to which an "act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement."⁶⁰ The basic idea is that morality is a scheme of cooperation that should command the informed and uncoerced allegiance of all the reasonable, and it is supported by the desire to be able to justify one's actions to others on grounds that they could not reasonably reject.⁶¹ It is rooted not in benevolence but in a kind of reciprocity. This may well undergird rights of sorts that figure in traditional objections to utilitarianism. Let me explain.

Philosophical utilitarianism is not, according to Scanlon, a first-order moral doctrine, but it seems to have moral implications. If all that matters morally is individual well-being that seems to imply that we should maximize the sum of individual well-being, at whatever the cost to individual rights. Likewise, Scanlon argues that the contractarian conception may support more distribution-sensitive moral principles, since it natu-

57. HENRY SIDGWICK, *THE METHODS OF ETHICS* (7th ed. 1907).

58. See Scanlon, *supra* note 55, at 103.

59. See *id.* at 110.

60. *Id.*

61. See *id.* at 116.

rally directs our attention to those who would do worst under a possible system of moral rules. This is because if anyone has reasonable grounds for objecting to that system it is likely that she will.⁶² This in turn may allow rights a crucial place in our moral deliberations. A contractarian will be concerned to prevent the occurrence of social practices that, in some intuitive sense, maximize overall well-being and yet trample on the rights of individuals who hence would do very badly if those practices were to occur. Of course, not all intuitive rights are rights of the worst-off, but some of the most intuitively pressing rights, say the right not to be tortured for the general betterment, seem easily underwritten by the distribution-sensitivity that Scanlon argues is characteristic of contractarianism.

This connection between a concern for rights and contractarianism is something Hart himself drew out. Indeed, he plausibly held Rawls's contractarian conception of political morality, especially as articulated in *A Theory of Justice*,⁶³ to be the primary and crucial contemporary instance of the distinctively new, or at least distinctively American, concern with basic human rights, which he also held was partially expressed in the projects of Dworkin and Nozick.⁶⁴

The immediate point of concern to us is this: if both of these philosophical explanations of the nature of morality are present in our moral tradition, and if both are rooted in motivations, such as benevolence and reciprocity, to which most of us by training or nature are susceptible, then we seem to face a strain in our moral inheritance. It is a strain not unlike that between self-interest and morality, which Sidgwick discerned in our practical reason.⁶⁵ It may seem that the issue between, on the one hand, philosophical utilitarianism and a concern to maximize the sum of well-being, and, on the other hand, contractarianism and a concern with distribution and the state of the worst-off, cannot be rationally adjudicated. So some reconciliation of these disparate philosophical conceptions of morality would seem, if it were possible, desirable. If they both could be developed together into one consistent account that underwrites one consistent moral theory, especially one that could also deliver the central intuitive judgments in application on which intuitionists insist, that would eliminate the threat of a deep incoherence in our moral tradition and provide some argumentative support for that moral theory. Such a conciliation might be possible if the nature of individual well-being turned out to be such that the traditional utilitarian conception of a mathematical sum of well-being did not really make sense, and such that any meaningful summary evaluation of the overall state of well-being in an outcome reflected the distributional concerns underwritten by contractarianism. If this were so, both philosophical utilitarianism and contractarianism might

62. *See id.* at 123.

63. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

64. *See* H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534 (1973).

65. *See* SIDGWICK, *supra* note 57, at 496.

work in tandem to support one moral principle. This is in fact what I believe.

Let me put it this way: imagine that we are in a situation such that we must choose between benefiting A at the expense of B or B at the expense of A. One might hope to determine which outcome involves the greater sum of well-being for A and B, and choose that one. But it turns out that there is nothing to underwrite this in the sort of well-being that there happens to be in the world. It turns out that well-being does not have the sort of cardinal nature that would legitimate speaking of a sum of such a traditional sort. Well-being cannot be added and subtracted like money. So what, in such a situation, does reason demand of us? Treating like as like, I believe in this instance means preferring the outcome in which there is a lesser spread in the well-being of the two persons involved, so that the well-being of the worse-off of our two individuals receives primary consideration. While it may seem that there is a conflict between equity and justice on one hand, and the maximization of the good on the other, in fact justice conceived as equity helps form the proper relative evaluation of wholes that contain various individuals with different levels of well-being, in a manner that legitimates a certain class of distribution-sensitive modifications of utilitarianism.

There are a number of different, specific moral theories within this general class. One is Rawls's.⁶⁶ One is Dworkin's.⁶⁷ I favor a "maximin" principle applied to individual well-being, which is a kind of development of Rawls famous "difference principle," and yet still avoids the unintuitive consequences that some fans of maximin, like Rawls himself, are concerned to avoid by a more indirect application of such principles than that I favor. I develop this principle, argue for it properly, and explore its implications elsewhere.⁶⁸ Certainly there is no room for that here. But let me at least explain it a bit.

Maximin principles in general are those that direct us to maximize some minimum, in this instance the minimum well-being, the well-being of the worst off. The principle I favor in particular directs us to minimize the suffering of the worst-off, in accord with one traditional utilitarian conception of basic evils. Others may prefer principles that tell us to maximize the minimum amount of preference-satisfaction individuals enjoy, in accord with another branch of traditional utilitarianism that Dworkin embraces.

In this short space I cannot convince you of the propriety of my particular account of morality in general and political morality in particular. Nor can I even argue that my theory is in better accord with a concern both with rights and well-being than are Rawls's and Dworkin's alterna-

66. See RAWLS, *supra* note 63.

67. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 3, at 266-78.

68. See Joseph Mendola, *Objective States and Subjective Value*, 50 *PHIL. & PHENOMENOLOGICAL RES.* 695 (1990); Joseph Mendola, *An Ordinal Modification of Classical Utilitarianism*, 33 *ERKENNTNIS* 73 (1990); Joseph Mendola, *The Good and the Just* (forthcoming).

tives. The immediate point is merely that there is a range of reasonably plausible moral alternatives, including Dworkin's, that can claim, in various different ways, to reconcile what Hart holds to be the "old" utilitarian conception of morality and the "new" concern with rights. This is an advantage of such accounts, and not, as Hart claimed, a disadvantage.

Recall that Hart believed that such an attempt at reconciliation is a mistake.⁶⁹ It is his specific charge against Dworkin that he makes such an attempt. Hart unfortunately did not develop the new moral alternative he apparently favored, which ignores traditional utilitarian concerns to maximize the good more than Dworkin, Rawls, or I would recommend. But there are certain suggestions of the moral alternative he favored in the specific moral claims he made, to which this Article shortly returns. He also suggested, in a schematic way, that the "theory of basic individual rights must rest on a specific conception of the human person and of what is needed for the exercise and development of distinctive human powers."⁷⁰ This is reminiscent of the course that Rawls has pursued in the years following the publication of *A Theory of Justice*, partly in response to criticisms by Hart.⁷¹ But Rawls retains a sort of filial connection with utilitarianism, and it seems plausible to conclude on the basis of his negative claims about Dworkin and Nozick that Hart would have preferred a more resolutely rights-based alternative.

The main point, in any case, is that if Hart had succeeded in developing such an alternative, it would have faced, without the possibility of reconciliation, the "old" utilitarian conception rooted in the plausible idea that the good should be maximized, and there would have been no evident grounds for preferring it to that deeply grounded older conception. The point is that if Hart is right about the proper moral theory, there is a deep conflict within our tradition of moral thought. Utilitarianism is not simply an outmoded or merely English doctrine. Rather, it reflects the deeply natural idea that if things are good, then more of them are better. We cannot pretend that the well-being of all is not at all morally significant, as Hart in effect suggests that we should. So on this crucial moral issue Dworkin seems to have a clear argumentative advantage. At the very least, it is not obvious that the sort of moral conception Hart favored is to be preferred simply because it leaves traditional conceptions further behind, as is suggested by the rhetoric of his discussion of utility and rights.

IV. FRAGILE NORMS

Where are we? In Part I we saw that the dispute between Fuller and Hart was a moral dispute. First, they disputed about the practical effects on moral criticism and resistance to immoral law of adopting one concept

69. See Hart, *Between Utility*, *supra* note 3, at 846.

70. H.L.A. Hart, *Introduction*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 1, 6 (1983).

71. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

of the law rather than another, while agreeing about the moral significance of each of those particular effects. Second, they had some directly moral disagreements, for instance, regarding whether or not there was a genuine evil present in the practice of German courts after the war (though even on Hart's account somewhat balanced by corresponding moral gains). As I put it earlier, they had disputes about both moral means and moral ends. In Parts II and III we located one sort of dispute about moral ends that engaged Dworkin and Hart and saw that it was at least not clear that Hart had the better of that debate.

One tentative conclusion: while the Hart-Fuller debate turns partly on the practical consequences of adopting one sort of conception of the law rather than another, on issues of moral means it is still likely that the debate turns partly on the proper theory of political morality, an issue of moral ends. In this way, Hart's own arguments seem to point to at least one crucial necessary connection between law and morality. The proper conception of law must be determined at least partly on moral grounds, and hence the moral truth is relevant to that issue.

Let me elaborate a bit. Words like "law" and "moral" possess in our usage a certain inertia, a certain stability of usage over time and among individuals. A certain relative simplicity in at least the paradigm cases to which they are applied is helpful given our human cognitive limitations and the fact that these words play an important role in our institutions. In fact, it may seem that we would not even really need words like "law" and "morality" to mark off certain institutions if we could keep firmly in mind the concrete nature of all these institutions and all their possible differences and similarities. The words may seem a kind of necessary shorthand for the limited. But that in fact ignores what is perhaps the crucial feature of these words. The tags "law" and "morality" carry with us, trained as we are, a certain authority. They carry a large emotional and motivational charge. We fight over what the law is in even abstract discussions, like that of Fuller and Hart, partly because legality engages our concern. Even Hart's own arguments suggest this. This makes debates about the proper concept of law at least in part moral debates.

There is another conclusion that seems reasonable, though far from indubitable. If the account of moral truth comes out in something like the way that Part III has suggested, then it seems plausible to conclude that the proper usage of "law" and the proper concept of law may well be as Fuller suggests. Ironically enough, the more resolutely non-utilitarian moral theory towards which Hart leaned, while for that reason perhaps less plausible than what we called the "reconciliationist" views of authors like Dworkin, also suggests something like the same result, though that, of course, in the final analysis would turn on details of that account, which we do not possess.

Let me explain. Fuller and Radbruch's usage of "law," if established, would remove some of the authority that even clearly unjust or immoral legal rules now possess, and that might well be a good thing. It might be

a good thing even if Hart is right in his contention that this would not suffice to generate much active opposition. It might simply remove a temptation to use such legal rules to one's own ends. It would also provide a moral incentive for people to be at least somewhat sensitive to very important moral niceties during horrendous regimes, since they could be held accountable afterwards. This might be especially important (as long as it was circumscribed in quite particular ways) if the true moral theory were as Part III has suggested, or even as Hart apparently believed, though it may take a moment to see this.

It would be very important according to the class of reconciliationist moral theories sketched in Part III or Hart's own sketchy alternative that the use of "law" and the legal practices Radbruch and Fuller suggested be circumscribed in quite rigorously determinate ways, that the mechanisms they suggested be deployed only in a morally beneficial manner. For instance, it would be important that only what can be seen by a wide moral consensus as seriously immoral "laws," perhaps because they override those basic human rights both Hart and Dworkin think quite significant, are no laws at all. But that is just what a stable usage of Fuller's sort, if accomplished, could achieve. If such a usage could be successfully stabilized in that way, it is clear that a sensitivity to individual rights might make us reasonably inclined to adopt it. The kinds of moral arguments that Fuller and Radbruch deploy in support of their concept and the practices they favor seem to rest on a sense that individual rights are more important than traditionally utilitarian legal positivists admit, and that it is important to use all means available, even concepts of law, to provide protections against unjust uses of legal institutions.

There are, as I have said, a number of recognizably moral disputes at issue here. Hart disagrees with Fuller about the concrete consequences of adopting his or Fuller's usage.⁷² For instance, it really is an issue whether we could make more effective moral criticisms of legal institutions if one conception or the other were adopted. In addition, Hart cites but does not exactly endorse the traditional positivist worry about anarchy if a moral test for legality were imposed.⁷³ But his primary worry seems to be that the Radbruch-Fuller conception would encourage us to miss important moral facts, that there is a positive evil in the practice of the German courts after the war and some positive virtue even in obedience to Nazi law.⁷⁴ This suggests a position on moral ends that differs from that of Dworkin and other reconciliationists, and it is not really obvious that a more resolutely rights-based conception delivers these differences. But it may be that the moral theory towards which Hart leaned would have incorporated both a conception of basic human rights and these particular moral suggestions of his remarks about Radbruch in some coherent way. My suspicion is that such a theory would at that

72. See Hart, *Positivism and Separation*, *supra* note 1, at 620.

73. See *id.* at 598.

74. See *id.* at 620-21.

point be in even greater conflict with the concern for general well-being that reconciliationists can retain. But, in any case, about these particular moral claims of Hart's we may reasonably, with Fuller, be skeptical. For instance, Hart himself apparently wished to extend the authority of "law" to cover in a somewhat attenuated sense the less than paradigm case of international law.⁷⁵ But certainly that would be more than enough prestige for Nazi law to properly enjoy. There are other small-scale normative disagreements Hart had with Fuller, in particular a concern about the alleged lack of candor in German legal practice after the war, such as the lack of admitting the moral significance of the fact that those accused had acted in accord with contemporaneous Nazi legal statutes.⁷⁶ "Candor" of this sort was in Hart's eyes apparently an even more important virtue of legal systems than that they disallow slavery or avoid retrospective law. And put that way, it seems far from clear that Hart has the better of this frankly moral debate. Indeed, as I have suggested, the very moral theory towards which he seemed attracted may underwrite Fuller's moral contentions in these small-scale debates.

But let us leave these difficult to resolve moral matters at the side now, and review the abstract situation Hart's arguments seem to suggest. (1) "Law" carries a kind of motivational and at least quasi-moral force, at least for those with our training into legal obedience both internal to legal practice and outside it. But (2) there are many moral facts, presumably expressible by a properly fixed and first-order moral vocabulary, saying that certain things are better than others, *prima facie* dutiful, or more respectful of basic rights. (3) There are other "second order" moral or quasi-moral words with some motivational force and authority, so that moral arguments like those Hart and Fuller deployed, expressed perhaps in first-order moral vocabulary, may be relevant to their exact proper deployment. If philosophical utilitarianism is right, for instance, words like "duty" would be of this sort. (4) Along with "second order" terminology of the sort noted in (3), there is "third order" terminology for talk about practices of such second-order evaluation, for instance "law" as noted at (1). That terminology is also properly governed in the manner suggested for the case of second order terminology in (3), by the moral facts noted at (2).

Any moral theory that, like Dworkin's or Hart's, gives individual rights more heed than traditional utilitarianism, should make us sensitive to the possibility that grand and powerful institutions like law can be deployed to hurt individuals severely in violation of their rights, even though those institutions may continue to serve some recognizable general utility. Hence such theories should make us more prone than traditional utilitarianism to favor certain features in our higher-order moral terminology. We should expect the norms expressed in such higher-order terminology

75. See HART, *supra* note 1, at 213-214.

76. See Hart, *Positivism and Separation*, *supra* note 1, at 619-20.

to be properly and designedly fragile, collapsible, or breakable in a number of possible ways that work for the protection of individual rights.

There are four axes we might consider: (1) the particular term or type of term involved in the break or built-in fragility, (2) the location of the break, (3) the nature or implications of the break, and (4) the manner in which occasions for the break are circumscribed.

For instance, some term like "law" might break at a location within legal practice itself, or outside of that practice in the views of citizens subject to the law. The nature or implication of the break might be to allow a norm, say of duty, only *prima facie* weight, so that in the presence of alternative considerations it might be properly outweighed by those other considerations in forming overall moral judgments, but such that its violation still properly occasioned some remorse or restitution. Alternatively, the nature of the break might be that under such conditions the need for restitution or remorse would vanish. For a term like "law" the nature of the break, inside or outside of legal practice, might be to specify that certain quasi-legal phenomena not count as law, where "law" hence implies some *prima facie* legitimacy. Moreover, proper occasions for the breaks might or might not be circumscribed in various particular ways. It might be that only certain sorts of rigorously circumscribed moral considerations be given appropriate weight in generating a break, for instance count as reasons to discount something as a law.

Constitutions, *prima facie* duties, and principles, as opposed to rules, are only some of the most familiar of an enormous range of possible kinds of breaks or fragile norms. Fuller and Radbruch in effect propose another plausible form of break. One virtue of their proposal may be that it suggests other sorts as well, that it aids our moral imaginations in that way. Certainly it is appropriate to consider the nature of appropriate breaks or fragility when specifying or revising the meaning of higher-order moral terminology. Pre-determined breaks of various sorts might be fixed in usage to ensure that certain practices deploying such terminology or governed by it be constrained in certain ways, so that such a machine as law cannot be used to certain ends and retain its *prima facie* legitimacy, or even that such a machine would collapse when deployed to certain ends. It might be built into the way we think about law that such a generally beneficial mechanism should occasion resistance when attempts are made to use it in seriously evil ways. If it is at all likely, as it unfortunately is, that there may be attempts to use legal institutions to support things like slavery or various horrendous Nazi goals, then such institutions should be rigged to prevent that use, either by breaking in that particular use in a local way or in extreme cases by collapsing entirely. And one way to begin to do this may be to constrain the way we use the word "law" both internal and external to legal practice.