Legal Positivism and the Rule of Law: 
the Hartian Response to Fuller’s Challenge

by

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Abstract

This study analyses the way that legal positivists from HLA Hart onwards have responded to Lon L Fuller’s challenge to positivism from the idea of the rule of law. The main thesis is that Hart and contemporary legal positivists working in the Hartian tradition have yet to adequately respond to Fuller’s Challenge. I argue that the reason for this is the approach they take to dealing with Fuller’s principles of the rule of law, which either (i) proceeds on the basis of the positivist perspective without engaging with Fuller’s wider anti-positivist arguments, or else (ii) accepts Fuller’s claim that the rule of law is part of our concept of law but does not acknowledge any effect of this on what determines legal validity (the content of legal norms). In both cases, I argue that tensions and problems result from a lack of engagement with Fuller’s anti-positivism. On the one hand, positivists have failed to show why their account of the nature of law better reflects our understanding of law than Fuller’s. On the other, the concessions that positivists have made to Fuller’s arguments are often detached from other elements in their theories, raising the question of whether the positivist response to Fuller is coherent.
In addition, by closely analysing the major positivist accounts of the rule of law, this study challenges a number of orthodox interpretations that confuse our understanding of the positivist response to Fuller. I show that most positivists accept that there is something morally valuable about a legal system’s conformity to the principles of the rule of law, and that there is always some kind of at least minimal conformity to those principles in any legal system. By noticing what concessions positivists have made to Fuller’s understanding of the rule of law, I aim to both (i) shift the debate to the remaining disputes with the Hartian positivists, particularly on issues such as the ‘derivative approach’ and the ‘validity Social thesis’, and (ii) identify areas of fruitful engagement with Fuller, such as the question of judges’ moral obligations to law.
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Introduction

Legal Positivism and the Rule of Law: the Hartian Response to Fuller’s Challenge

Legal positivism is arguably the dominant theory of the nature of law in jurisprudence or analytical legal philosophy. The rule of law – also termed ‘legality’¹ – is the most discussed political ideal in jurisprudence. This study considers the relationship between them, in particular the way that contemporary positivists integrate the idea of the rule of law into their wider legal theories.

My main thesis is that legal positivists have responded to Lon L Fuller’s challenge from the rule of law by making concessions to Fuller, but that they have usually done so within the framework of their own positivist legal theories rather than engaging adequately with Fuller’s anti-positivist view. This means that tracing the path of the different legal positivist responses reveals as much about each theorist’s understanding of legal positivism as a theory of the nature of law as it does about their view of the ideal of legality. Although positivists have shown to their own satisfaction that Fuller’s principles of the rule of law can be integrated into their positivist positions, their failure to grapple with Fuller’s wider anti-positivist challenge has meant that their concessions to Fuller have caused problems and tensions within positivism. These arise due to the positivist failure to see how the concessions they have made may be inconsistent with those arguments that they wish to hold on to. I argue below that there are a number of points where contemporary anti-positivists working in the Fullerian tradition can push on these tensions to impugn the positivist position. Positivists will have to find ways to respond more fully to these critiques if they are to adequately defuse Fuller’s Challenge.

In addition to making good on this thesis, this study’s close analysis of the legal positivist tradition’s understanding of the rule of law is in itself also an important project, because at

¹I will usually use the terms ‘legality’ and ‘the rule of law’ as synonyms referring to the ideal that Lon L Fuller thinks is integral to the existence of law.
present that positivist understanding is contested and ambiguous. In order to understand the implications and problems that the positivists’ responses to Fuller’s Challenge cause for their legal positivist positions, it is necessary to understand exactly what each theorist says about the rule of law. Positivism is sometimes seen as championing the rule of law as the preeminent political ideal for the law. Certainly, the most famous account of the rule of law given by a positivist – Joseph Raz’s essay “The Rule of Law and its Virtue” – focuses on the relationship between a formal conception of the rule of law and his positivist concept of law. Yet, it is well known in jurisprudential circles that one of the main uses of the rule of law is to challenge legal positivism as the correct theory of law. This can be followed back, in modern jurisprudence, to the work of Lon L Fuller and his analysis of the internal morality of law.

In undertaking this project of clarifying positivism’s approach to the rule of law, I proceed by providing detailed discussions of the main positivist responses to Fuller. As I show below, Fuller’s statement of rule of law-based anti-positivism developed out of his early engagement with what would become the dominant form of legal positivism, namely that set out by HLA Hart. While Fuller had already been developing his ideas for a number of years, it was Hart’s 1957 Holmes lecture at Harvard Law School that began the long debate in which Fuller set out his views in their mature form. Fuller apprehended the power of Hart’s reformulation of legal positivism, but thought that, as announced by Hart, it failed to account for important features of law.

Fuller would spend the much of the rest of his jurisprudential career attempting to persuade legal positivists to give an account of the rule of law and our obligations of fidelity to law. In Fuller’s view, this would require positivism to see the errors of its ways, because one can only properly understand the rule of law as a moral ideal that is part of the very idea of law, which belies the positivist insistence that the law is a matter of social fact and has no intrinsic moral value. Despite legal positivism’s often dismissive criticisms, Fuller’s anti-positivism remains influential among a number of contemporary legal theorists.

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This study examines how legal positivists from Hart onwards have responded to Fuller’s Challenge for positivism to make sense of the rule of law as a central aspect of the nature of law. It does so by tracing the path of the Hart-Fuller debate through from their exchange in the 1958 Harvard Law Review and into the developed statements of their respective legal theories in their major books (Chapters 1 and 2). It argues that Hart’s analysis of Fuller’s principles of the rule of law was ultimately ambiguous, both in terms of the Relationship question – ‘what is the relationship between law and the rule of law?’ – and (especially) the Moral Value question – ‘is conformity to the rule of law principles of moral value?’ (Chapter 3). It then (Chapter 4) considers the important intervention of Raz, in his aforementioned article, and shows that his approach to the rule of law seems to clarify Hart’s more ambiguous positivist response to Fuller. However, there is still ambiguity in Raz’s argument, and it has been left to more recent analyses in the Hartian positivist tradition to clarify the different ways in which Fuller’s Challenge may be dealt with. I therefore examine the positions of the recent legal positivists who have devoted the most thought to the place of the rule of law in their concept of law (Chapters 5, 6 and 7). While there are some important areas of agreement between their positions, recent legal positivists take markedly different approaches to some of the key questions that Fuller’s Challenge raised.

Both of my main concerns – (i) to justify my thesis that the positivist engagement with the rule of law has not adequately answered Fuller’s Challenge, leading to tensions within positivism, and (ii) to provide a closer analysis of the often ambiguous positivist positions on the rule of law than is usually given – are foreshadowed in Jeremy Waldron’s important essay on Hart’s response to Fuller. In that essay, Waldron provided a close analysis of some of the ambiguities of Hart’s positivist position, and suggested some reasons internal to Hart’s positivism that explain why Hart found it difficult to respond to Fuller. The most significant of these reasons, for Waldron, is the positivist allegiance to the view that there is no necessary connection between law and morality – the legal positivist Separation or Separability thesis, which claims that law is in some way separate or separable from

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This thesis is often seen as claiming that there is no necessary connection between law and morality. Yet if there is a necessary relationship between law and the rule of law, and if the rule of law is of moral value, then there is a necessary connection between law and morality. Waldron argues that Hart’s ambiguities and contradictions concerning these two key points – the relationship between law and the rule of law, and the rule of law’s moral value – were caused by Hart’s apprehension that his answers might add up to a necessary connection between law and morality that he could not, as a legal positivist, accept.

Waldron’s analysis alerts us to the important questions concerning the legal positivist response to Fuller, namely how this response is affected by the self-understanding that positivism in the Hartian tradition has of its own key doctrines, and what problems or tensions the integration of Fuller’s Challenge might cause the positivist position. However, I differ from Waldron in both my view of what a close analysis of Hart and Raz’s accounts of the rule of law reveals about their positions, and, consequently, about the relevant tensions and problems that their positions on the rule of law cause for their positivism. In particular, instead of focussing on a ‘No Necessary Connection’ version of the Separability thesis, I will argue that the responses that positivists make to Fuller’s Challenge, and the way that they incorporate the idea of the rule of law into their legal theories, are determined by their understandings of the positivist Social thesis.

The Social thesis is understood differently by each theorist, but can be stated initially in generic form as follows: law is a social institution, and the explanation of its existence and its content must refer only to social facts, not moral reasons. I will show below that while many positivists take a wide-ranging approach to the Social thesis, others confine it essentially to a thesis about the determinants of legal validity – the content of legal norms. I argue that the Separability thesis that most recent positivists hold is not the wider No Necessary Connection version, but is essentially an implication of this narrow Social thesis, and states that the content of the law is not necessarily as morality requires it to be.

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4 I will use both terms, as ‘Separation’ was prevalent in earlier work and ‘Separability’ is more common in contemporary discussions. The basic idea is that there is some kind of separation or separability of law and morality; we will see exactly what this might mean as the discussion progresses.
I will show in the chapters that follow how the positions glossed over by these generic statements take different forms depending on which Hartian positivist we are dealing with. But as we trace through the different replies that Hartian positivists have made to Fuller’s Challenge, we will see that there is in fact no uniform response. Theorists differ on what they accept and reject from Fuller’s arguments, depending on how they understand the core tenets or doctrines of their own positivist positions. It is their self-understanding of legal positivism that drives them to analyse the rule of law in the particular ways they do, and this shows why the tensions and problems within those analyses arise. With Hart, Waldron argues, the problem is ambiguity born of dedication to a strong No Necessary Connection version of the Separability thesis: Hart is drawn to accept Fuller’s claims about the moral value of the rule of law and its necessary relationship with law, but he shies away from accepting Fuller’s Challenge to understand law as a moral idea.

I dispute Waldron’s ‘intellectual dishonesty’ account of Hart’s response to Fuller, in favour of a view that sees Hart as simply failing to see how profound Fuller’s Challenge was to legal positivism, and thereby failing to properly explain how it is possible to integrate Fuller’s principles into the positivist account of law. One of my main observations from my close analysis is that the story of recent legal positivist discussions of Fuller is about how they have either remained ambiguous, or have provided clarifications and refinements of the positivist response. In doing so they have jettisoned the strong Separability thesis – denying any necessary connection between law and morality – and instead their approaches to Fuller’s Challenge differ because of the particular conception of the Social thesis they hold. Their account of the Social thesis determines what concessions to Fuller relating to law’s relation to the rule of law and law’s moral value they think are consistent with their legal positivism, and this implies a narrower version of the Separability thesis that allows for certain necessary connections between law and morality.

One of the other main insights of this study, therefore, is that the debate between positivists and anti-positivists has shifted as positivists have responded to Fuller’s Challenge with concessions concerning the rule of law’s moral value and its connection to the rule of law. The way that positivists respond – the traditional dividing lines in jurisprudence that they are willing to cross – differs from theorist to theorist, and the reasons why each theorist makes
the concessions and takes the positions they take are highly illuminating of the state the legal positivist tradition. What this tells us about the self-understanding of legal positivism as a jurisprudential theory, and whether their concessions allow them to maintain a coherent legal positivist theory of law and the rule of law in the face of Fuller’s Challenge, are the questions relating to the main thesis of this study regarding positivists’ failure to adequately respond to Fuller, and which I analyse in detail in my concluding chapter (Chapter 8). The conclusion I draw is that although legal positivists have been able to deal with Fuller’s Challenge to their satisfaction, they do so in ways that either (i) fail to demonstrate why we should accept that the Fullerian view of legal validity is inferior to the positivist view, or (ii) make Fuller’s idea of legality central to their moral account of judicial obligation.

On the first point, positivists fail to demonstrate why their view of the nature of law is superior to Fuller’s because their concessions to Fuller are made on the basis of their own theories, rather than being developed through a close engagement with the anti-positivist context and foundations of Fuller’s Challenge. Alternatively where positivists accept a broadly Fullerian account of the nature of law, they still reject Fuller’s account of what determines legal content – his account of legal validity. This seemingly contradictory position is not well explained. I will argue in Chapter 8 that Jules Coleman’s recent analysis of the architecture of jurisprudence allows us to see more clearly why legal positivists take the positions that they do on these questions. But Coleman’s analysis also reveals more clearly the omissions of the positivist responses to Fuller’s Challenge, which will have to be remedied if that response is to be successful.

On the second point, I argue that the grounds of the debate between positivism and anti-positivism have shifted due to the positivist responses to Fuller’s Challenge. Even though positivists have remained wedded to some version of the Social thesis – particularly in respect to the determinants of legal validity – the fact that they accept that Fuller’s ideal of the rule of law is a key moral ideal for the law to live up to means that they can accept much of Fuller’s analysis of our obligations of fidelity to law. If positivists are to supplement their normatively inert theories of the nature of law by adopting Fuller’s analysis – and say that judges’ moral obligations to uphold legality require them to interpret and apply the law as
required by the rule of law – they will have to explain how they can remain positivists, rather than having essentially become Fullerian anti-positivists.

We will see how each of these arguments can be supported as I proceed through the discussion below. But first I will show how the topic of this study all began, in 1958, in the pages of a law journal.
Chapter 1: The 1958 Hart–Fuller debate

1.1 Introduction

The contemporary era of legal philosophy is often seen as beginning with the ‘Hart–Fuller debate’ in the pages of the 1958 Harvard Law Review, in which Hart and Fuller both set out in embryonic form the arguments that would later develop into their most celebrated jurisprudential works. In Hart’s contribution, we see a sketch of his later critique of John Austin’s command theory and the first stages of his own theory of primary and secondary rules.¹ In Fuller’s response, we see an initial analysis of the ‘internal morality of law’, the ideal on which he would base his own concept of law.² These important beginnings, as well as the seemingly sharp joinder of issue and the vigour of the arguments, have secured this debate’s jurisprudential influence.

Most importantly for this study’s purposes, the 1958 Hart–Fuller debate provides the first statement of what I call ‘Fuller’s Challenge’: Fuller’s attempt to get legal positivists to see that an adequate theory or concept of law must comprehend the necessary moral features of law. These features stem from an understanding of law as a product of human interaction and striving; in other words, the law is a kind of social order that can only be sustained through human effort directed to the achievement of certain moral ideals. Once law is understood this way, we are able to explain why there is an obligation of fidelity to law. Fuller’s Challenge is, therefore, an anti-positivist argument that claims that legal positivist accounts of law miss out a fundamental element of law, due to their blindness to the ideal of legality or the rule of law.

This chapter discusses this early stage in the Hartian legal positivist engagement with Fuller’s statement of the idea of the rule of law, arguing that at this point Hart has not yet

¹ HLA Hart “Positivism and the Separation of Law and Morals” (1957) 71 Harvard Law Review 593, at 602-603. This essay was reprinted in HLA Hart Essays in Jurisprudence and Philosophy (Oxford: Clarendon Press, 1983), but I prefer to cite to the Harvard Law Review article to highlight the context of the debate with Fuller.
recognised this ideal as an important element of the concept of law, though he does rely on two principles of legality in identifying certain moral elements in the law.

1.2 Hart’s Holmes lecture: the meaning of the separation of law and morals

1.2.1 Restating the positivist separation thesis

Hart’s essay was the text of a lecture that was the pinnacle of his year-long visit to Harvard – the invitation to give the 1957 version of the law school’s annual Oliver Wendell Holmes lecture.3 Hart’s aim was to provide a provocative defence of analytical legal positivism against the criticisms of American legal realism and natural law.4 Lon Fuller, a professor of jurisprudence at Harvard Law School, took Hart’s lecture as an attack on the brand of modern natural law that he had vigorously defended. Fuller would have recognized his position in the arguments that Hart was assailing; for example, in Hart’s reference to the view that “what is and what ought to be are somehow indissolubly fused”, which Hart cites to two of Fuller’s key works in general jurisprudence at that time.5 But Fuller was obviously unimpressed with Hart’s defence of positivism, for during the lecture he was observed wearing a “pained expression” and pacing “like a hungry lion” at the back of the hall.6 As was revealed in his written reply, Fuller thought that Hart’s arguments did not properly grapple with the aspects of the law that needed to be understood if one was to provide a complete picture of what goes into making a legal system, and to explain the obligation of fidelity to law.

Hart’s main aim in his lecture was to explain legal positivism’s position on the relationship between law and morals, specifically the positivist identification of a separation between them. Hart saw himself as responding to “contemporary voices”, such as Fuller, who argued that legal positivism was “superficial and wrong” in its insistence on the separation of law

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4 Lacey A Life of HLA Hart, above n 3, at 196-197.
5 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 594, citing Lon L Fuller The Law in Quest of Itself (Beacon Press, Boston, 1966) and Lon L Fuller “Human Purpose and Natural Law” (1953) 53 Journal of Philosophy 697.
6 Lacey A Life of HLA Hart, above n 3, at 197.
and morality, and who identified a number of different intersections between law and morality – between what law ‘is’ and what it ‘ought to be’. Hart thought that these criticisms of the separation of law and morality were often imprecise, and he sought to disentangle and lay bare the various claims involved, by answering the following questions: “What do these phrases mean? Or rather which of the many things that they could mean, do they mean? Which of them do ‘positivists’ deny and why is it wrong to do so?” The first task for Hart is, therefore, to clearly state the legal positivist argument concerning the separation of law and morality.

1.2.2 The ‘utilitarian distinction’

Hart explains the separation of law and morals by reference to a tradition of legal positivism that he traces back to the late 18th and early 19th centuries, in the work of the great utilitarian thinker Jeremy Bentham and his jurisprudential disciple John Austin. The fundamental insight of their legal positivism was the constant insistence “on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be”. This is the ‘separation’ between law and morals that provides the title and subject of Hart’s essay, and which he labels the ‘utilitarian distinction’. Bentham and Austin criticized natural law thinkers who blurred this crucial distinction by arguing that the law necessarily conforms to certain moral standards.

Yet, Hart observes that without more explanation, the positivist idea of a separation between law and morality is no more precise than the general natural law insistence on the connection between law and morality. Hart therefore seeks to clarify what Bentham and Austin’s ‘Separation thesis’ meant, and why they insisted on it. Hart quotes Austin’s famous statement that:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different

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7 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 594.
8 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 594.
9 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 594.
10 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 621.
11 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 594.
12 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 596.
13 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 596.
enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

Austin’s claim is that the existence of a norm as legally valid is independent of its moral virtue, so that the content of the law need not live up to whatever moral principles we think we ought to conform to. This idea is clearly evident in the other passages that Hart includes, in which Austin criticizes the English jurist William Blackstone for stating in his *Commentaries* that laws created by humans cannot be legally valid if they are contrary to the laws of God, so that “no human law which conflicts with the Divine law *is a law*…” 14 Austin’s reply is that we should not confuse the law “as it is” with the law “as morality would require it to be”. 15

Hart continues with a succinct discussion of Bentham’s legal positivism, interpreting Bentham as insisting on the same utilitarian distinction as Austin: the norms that are valid within a legal system (what law *is*) are not necessarily those that are required by morality (what the law *ought* to be). 16 Hart claims that for both thinkers the “prime reason for this insistence was to enable men to see steadily the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order.” 17 Hart recounts that Bentham thought that a failure to recognize the distinction between law and morality may mean that “law and its authority may be dissolved in man's conceptions of what law ought to be”, leading either to the danger of anarchy, where people disobey legal norms because they judge them morally obnoxious and therefore not law, or else to ‘quietism’ whereby people believe that just because rules are legal rules they must therefore be morally correct so that “the existing law … supplant[s] morality as a final test of conduct and so escape[s] criticism”. 18 In contrast, the utilitarian distinction tells us not to assume that the normative content of the law is as it morally ought to be, and instead to actively inquire into whether in any particular case the law’s standards for conduct conform to what morality requires. 19 Thus, Bentham’s “motto” for citizens, to obey the law

14 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 596.
15 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 597.
16 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 597.
17 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 597.
18 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 598.
19 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 597.
punctually while also censuring it freely, would at times be inapplicable, for there could be evil laws that the principle of utility would require the violation of or resistance to.\textsuperscript{20}

Once this relatively confined version of the ‘Separation thesis’\textsuperscript{21} is identified, Hart shows that the positivists’ utilitarian distinction does not require the denial of other connections between law and morality.\textsuperscript{22} First, the utilitarian Separation thesis does not mean that positivists must deny that “the content of many legal rules mirror[s] moral rules or principles”.\textsuperscript{23} Second, it does not prevent Bentham and Austin from recognizing that “by explicit legal provision moral principles might at different times be brought into a legal system and form part of its rules”.\textsuperscript{24} Third, Bentham acknowledged – though Austin did not – that moral requirements may even constrain how a legislature may create valid legal norms.\textsuperscript{25} Hart sees all of these connections between law and morality as consistent with the relatively limited Separation thesis that asserts “two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.”\textsuperscript{26}

\textbf{1.2.3 Legal positivism against natural law}

While Hart’s discussion of the legal positivist separation of law and morals focuses on the utilitarian distinction between law as it is and law as it ought to be, and accepts that this is consistent with certain connections between law and morality, his next move is to show that positivists should reject a number of natural law claims about other necessary moral elements in the law.

\textsuperscript{20} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 597. Bentham’s motto is found in the \textit{Fragment on Government} in JH Burns and HLA Hart (eds) \textit{A Comment On The Commentaries and A Fragment On Government} (Athlone Press, London, 1977) at 399. In fact, Bentham’s exhortation to obey punctually makes sense only if one assumes that Bentham thinks that utility will generally require obedience to law; for example, because the rulers generally attempt to respect utility, as noted in David Dyzenhaus “The Genealogy of Legal Positivism” 24 Oxford Journal of Legal Studies 39, at 42.

\textsuperscript{21} I use the term ‘Separation’ in this chapter as it is the term that Hart used; in later chapters I use the more recent term ‘Separability’ to describe the positivist view on the separation of law and morality. We will see below that the meaning of this thesis is contested.

\textsuperscript{22} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 598.

\textsuperscript{23} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 598.

\textsuperscript{24} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 599.

\textsuperscript{25} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 599.

\textsuperscript{26} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 599.
Hart first argues that certain natural law criticisms of positivism are ill-founded, because they failed to see that tradition as including three distinct aspects: the utilitarian Separation thesis; the analytical approach (studying “the meaning of the distinctive vocabulary of the law”); and the command theory. These elements of the utilitarian positivist tradition can be separated, so that the rejection of one need not warrant the rejection of another. Austin’s concept of law defined the law as the general command of a political superior (the sovereign) who is habitually obeyed by the members of his community. Whilst Austin’s command theory is mistaken, its inadequacies are not “sufficient to demonstrate the falsity of the separation of law and morals”. Hart denies the anti-positivist charge that Austin’s theory’s weakness was due to its omission of some necessary moral element of the law. Therefore, the rejection of the command theory does not require the rejection of the Separation thesis.

Hart agrees that the command theory should be rejected. Hart’s own explanation of the problems with Austin’s account of law is that its “simple trilogy of command, sanction, and sovereign” is “threadbare”, and is not capable of properly explaining the social institutions we understand as law. The command theory understands law as essentially the same thing as compulsion by an all-powerful and unlimited political superior. It analyses law as akin to the situation where a gunman orders you to hand over your money on pain of harm or death, the only difference being the number of people who habitually obey the gunman. “[L]aw surely is not the gunman situation writ large”, since, despite certain similarities between statutes and commands, such a concept of law “omits some of the most characteristic elements of law”.

Yet, as Hart explains, the things that distinguish law from the gunman situation are not moral elements that would refute the Separation thesis. The most important of the command theory’s omissions is its failure to see that the law-making power of the legislature is itself

27 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 601.
28 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 601.
29 John Austin Lectures on Jurisprudence or the Philosophy of Positive Law (John Murray, London, 1869) at 88-89.
30 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 602.
31 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603-604.
32 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
33 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
34 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
35 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
regulated and limited by “fundamental … rules specifying the essential lawmaking procedures”, rules which are accepted by the legal officials within the community.\(^36\) Hart’s point is that:\(^37\)

These fundamental accepted rules specifying what the legislature must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system, and what is most missing in the utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules. This notion, not that of a command as Austin claimed, is the “key to the science of jurisprudence”, or at least one of the keys.

While Austin’s command theory is inadequate to the task of explaining the concept of law, the remedy is not to refer to some necessary moral element in law, as natural law theories did, but to comprehend “the social acceptance of a rule or standard of authority”.\(^38\) This idea is the kernel of the concept of law that Hart would develop in later work, and it shapes his approach to jurisprudential analysis in the rest of his lecture.

Hart firstly uses this concept of law to analyze another common criticism of the command theory: that it cannot properly explain how certain kinds of legal rules are not commands, but instead protect rights or grant legal powers.\(^39\) This is the point that Hart would later characterize as concerning the ‘variety’ of laws that cannot be captured by the idea of a command.\(^40\) While some laws seem to conform to the idea of a command by requiring people to act or refrain from acting in certain ways, other legal rules have completely different functions – they provide powers or facilities for people to create new rights and duties; for example, to make contracts, wills, and trusts.\(^41\) Such rules are meant not to obstruct, but rather to enable, allowing people to “exercise powers, make claims, and assert rights”.\(^42\) While some positivists have sought to explain these rules as commands, this in Hart’s view demonstrates a “dogmatic determination” to obscure a feature of the law that is inconsistent with their reductive and inaccurate theories of law.\(^43\)

\(^36\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
\(^37\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
\(^38\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 606.
\(^39\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 604.
\(^40\) HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961) at Chapter 3.
\(^41\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 604.
\(^42\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 604.
\(^43\) Hart “Positivism and the Separation of Law and Morals”, above n 1, at 605.
In addition, some theorists had seen the variety of legal rules as showing a necessary link between law and morality; Hart reports that the jurist John Salmond thought that the existence of rights and powers meant that these kinds of rules must “necessarily be connected with moral rules or principles of justice”.  

However, Hart argues that we do not have to explain the variety of laws, including powers and legal rights, by reference to moral rights. Instead we should explain the existence of legal powers and rights by showing that they are valid according to the fundamental law-making rules accepted by the officials within the community.

The next criticism of legal positivism that Hart disputes highlights the use of purposive reasoning in resolving cases in which it is unclear whether a legal norm applies to a situation. Hart argues that while any rule will have “a core of settled meaning”, telling us which cases of actual behaviour are regulated by the rules, there will always be “a penumbra of debatable cases” in which the rule is “neither obviously applicable nor obviously ruled out”. Where the law is settled, judges have a legal obligation to apply that law without reference to their own or the community’s moral views on the matter. In such core cases no moral reasoning is required, only legal reasoning that applies the rule to the situation. In contrast, Hart admits that in cases which fall in the “penumbra of uncertainty [that] must surround all legal rules”, where the legal rules do not unequivocally determine the resolution of a dispute, decisions must be made in some “sound” manner in accordance with a judge’s view of what ought be decided from a moral or policy perspective. However, Hart denies that such cases show a necessary connection between law and morality, for two reasons.

First, judges’ decisions in penumbral cases need not be morally sound. The reasoned decisions judges make about how to resolve these difficult cases may be morally sound, or they may be morally obnoxious; under the Nazi regime, Hart suggests, judges may have decided cases in accordance with the purpose of maintaining the Nazis’ tyrannous reign.

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44 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 605.
45 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 605-606.
46 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 603.
47 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 607.
48 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 607.
49 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 607.
50 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 608.
51 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 613.
Therefore the existence of penumbral questions that cannot be decided according to settled law, and that require judges to exercise moral judgment in deciding the case, does not, therefore, threaten Bentham and Austin’s “distinction between law as it is and law as morally it ought to be” because these decisions may be made according to morally abhorrent reasoning.

Moreover, even where these cases are decided according to morally attractive reasoning, it is still incorrect to say that the moral principles on which the decisions were based are part of the law so that there is “some fused identity between law as it is and as it ought to be.” For it is wrong to say that the morally reasoned decisions that judges make in deciding such cases are legal decisions: “the various aims and policies in the light of which … penumbral cases are decided” should not be understood as part of the legal rules. The distinction between the core and the penumbra allows us to differentiate between the application of the law as it is in core situations where the settled meaning of the rule clearly applies (‘legal reasoning’) and reasoning according to some conception of what the law ought to be where it is unclear, in the penumbra of the rule – which is extra-legal, moral, political, or policy reasoning.

I will discuss Hart’s third argument later, because it leads nicely into Fuller’s reply. The final challenge to Bentham and Austin’s version of the Separation thesis that Hart discusses points to a variety of arguments that accept the utilitarians’ view that the content of particular legally valid rules is not necessarily in conformity with what morality requires. Instead, such arguments say that taken as a whole a legal system will necessarily have some kind of connection with morality. One such argument is the claim that there are certain needs based in human nature that every known legal system has protected to some minimal extent; for example, rules against violence that protect our physical integrity, and property rules that allow us to control certain material goods. Any working legal system will protect

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52 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 614.
53 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 615.
54 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 614.
56 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 621.
57 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 621-623.
these basic human needs, at least for some class of its citizens – even in a society that practices slavery and denies these protections to slaves, there will be minimal standards protecting the non-slave class.\textsuperscript{58} So this is a sense in which any legal system will always reflect basic moral requirements.

The other argument about some minimal moral content manifesting in legal systems as a whole is based on the idea of the generality of law: the fact that legal norms usually set out standing rules that apply to broad classes of actions and persons, rather than specifying individualized, one-off commands.\textsuperscript{59} The generality of the law means that like cases will be treated alike, at least according to the distinctions of likeness and difference that the rules themselves draw.\textsuperscript{60} Hart observes that treating like cases alike is one aspect of the concept of justice, which means that “there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.”\textsuperscript{61}

But although Hart accepts that both of these arguments allow us to talk of certain necessary connections between law and morality,\textsuperscript{62} he is adamant that this is not inconsistent with the Separation thesis, because the substantive content of the law may still not accord with what morality requires. The fact that a legal system satisfies the basic needs of some people within its jurisdiction and applies the legal rules with “pedantic impartiality” may coexist with general oppression of the population or of certain groups within it.\textsuperscript{63} These points of necessary contact with moral principles do not mean that the content of the law is morally sound, or morally obligatory.\textsuperscript{64} Hart thus draws a distinction between the connection of law and morality at the system-level, as opposed to the morality of legally valid norms – a distinction which will recur throughout this study, and which will assume an important role in later analysis.\textsuperscript{65}

\textsuperscript{58} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 624.
\textsuperscript{59} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 623-624.
\textsuperscript{60} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 624.
\textsuperscript{61} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 624.
\textsuperscript{62} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 624.
\textsuperscript{63} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 624.
\textsuperscript{64} Hart “Positivism and the Separation of Law and Morals”, above n 1, at 624.
\textsuperscript{65} See below in Chapters 6, 7 and 8.
1.2.4 Positivism in practice: Nazi Germany and its aftermath

I return now to the third criticism of the positivist separation of law and morals that Hart identifies, which he sees as more of a “passionate appeal” than a rationally convincing intellectual argument.66 Hart identifies this third criticism in the theory of the German jurist Gustav Radbruch, who Hart thought had converted from positivism to natural law after living through the terrible experience of life under the Nazi regime.67 Radbruch thought that positivism’s insistence on identifying “law as law” – law as anything laid down by the law-giver – without reference to any moral limits had allowed the Nazis to exploit their society’s subservience to the law.68 As Hart presents it, Radbruch’s view was that in light of this experience, we should acknowledge that where a rule reaches a certain extreme level of injustice, it is not only morally condemnable but also can be legally denounced as no longer being valid law at all.69 Hart summarizes Radbruch’s view as the doctrine:70

that the fundamental principles of humanitarian morality were part of the very concept of Recht or Legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality. … [I]t is clear that the doctrine meant that every lawyer and every judge should denounce statutes that transgressed the fundamental principles not as merely immoral or wrong but as having no legal character, and enactments which on this ground lack the quality of law should not be taken into account in working out the legal position of any given individual in particular circumstances.

This argument, Hart observes, directly challenges the utilitarian thesis, because it makes what the law is depend on a moral test: if a rule is extremely unjust, it cannot be legally valid.71 When faced with a highly unjust law, what the positivist considers to be a moral duty to disobey or not apply the law is understood on Radbruch’s anti-positivist conception of law as a legal and moral duty to disobey or not apply a norm that is not really law.

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66 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 615.
68 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 616-617.
69 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 616.
70 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 617.
71 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 616.
Hart followed the legal positivist tradition of Bentham and Austin, using their utilitarian distinction to reject such anti-positivist accounts of law. He preferred the view that legal validity – and, therefore, legal obligations – must be determined according to the rules actually recognized as legal by the officials in the particular legal order effective in the society. Therefore, Hart thinks that Radbruch’s argument does not allow us to describe the general legal and moral situation of unjust laws accurately. When faced with an unjust rule that is formally valid according to the rules of the legal system but which contravenes the basic requirements of morality, Hart would say that the rule is still law, but that morally it ought not be obeyed. Instead of saying with Radbruch that certain unjust laws are no laws at all, we should “speak plainly” and say that “laws may be law but too evil to be obeyed”. Hart thought that this approach, properly understood, would allow for the resistance of evil law because it showed that the statement “law is law” cannot answer the ultimate question of what one morally ought to do.

To further illustrate the differences between Radbruch’s approach and his own, Hart analyses an actual situation faced by post-World War Two courts. In these cases, people accused of crimes sought to avoid punishment by relying on Nazi laws that seemed to legally justify or absolve their actions. Such arguments were, so Hart thought, met by German courts with something like Radbruch’s argument that these Nazi laws could not help the defendants because they were in fact not law at all due to their fundamental contravention of morality. Hart refers to a case decided in West Germany in 1949 that was translated and published in the Harvard Law Review in 1951. A woman denounced her husband for insulting statements he had made to her about Hitler, which Hart understood as

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72 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618-621. There is much commentary on Hart’s suggestion that there are moral benefits from seeing law this way: Lacey A Life of HLA Hart, above n 3, at 198-199; Liam Murphy “Better to See Law This Way” (2008) 83 New York University Law Review 1088.
73 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
74 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 620.
75 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
76 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
77 Hart was mistaken about the reasoning in at least the case under discussion; see below at section 1.4.
78 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
in violation of certain Nazi statutes prohibiting statements detrimental to the regime.\textsuperscript{80} The husband was sentenced to death, but instead sent to the front.

After the war, the woman was prosecuted for illegally depriving her husband of his freedom, which was a crime under the 1871 German Criminal Code that had been in effect throughout Nazi rule.\textsuperscript{81} The wife pointed to the Nazi law as justifying her actions, because her husband had committed an act contrary to the statute outlawing statements detrimental to the Nazis. However, the court found that these laws were “contrary to the sound conscience and sense of justice” recognized by “all decent human beings”, and therefore she could not rely on them as legal justification for her actions.\textsuperscript{82} While this seems to be a good example of Radbruch’s natural law view that unjust rules cannot be law being vindicated in practice, Hart deems as a kind of “hysteria”\textsuperscript{83} the “unqualified satisfaction” with which this and other such decisions were greeted. Although we might applaud the moral end of punishing these informers, the natural law means used by the courts cloaked the true theoretical and moral nature of the problem.\textsuperscript{84}

The theoretical error in the natural law approach was that it treated the Nazi statute “established since 1934” as not law at all because of its wickedness, making the informers’ actions legally punishable under the 1871 code.\textsuperscript{85} This view is for Hart impugned by the fact that the Nazi statute was legally valid according to the fundamental rules of the legal system in force at the time.\textsuperscript{86} This meant that the woman’s conduct was legally justified by the Nazi statute, so that any punishment of her actions would have to be done through the creation of new retrospective law, “with a full consciousness of what was sacrificed in securing her punishment in this way”.\textsuperscript{87} Although this reaches “exactly the same result” of retrospectively punishing the informers, enacting legislation to create retrospective criminal punishment

\begin{footnotes}
\item[80] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618-619. As will be discussed below at section 1.4, this understanding has been shown to be mistaken.
\item[81] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619.
\item[82] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619.
\item[83] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619. Pappe pointed out that the decision under discussion “far from meeting with unqualified satisfaction, was immediately and severely criticised in Germany” HO Pappe “On the Validity of Judicial Decisions in the Nazi Era” (1960) 23 Modern Law Review 260, at 263.
\item[84] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619-620.
\item[85] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619-620.
\item[86] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619.
\item[87] Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619.
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would have “had the merits of candour” because it would “have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems”.  

88 This is the moral dilemma that is made clear by legal positivism, and obscured by natural law: choosing between the moral wrongs of (i) not punishing abhorrent conduct, and (ii) punishing people retrospectively.

1.3 Fuller’s response – the inner morality of law

Fuller was spurred into action by Hart’s defence of legal positivism and condemnation of natural law. Fuller’s reply was formulated quickly enough to be printed immediately following Hart’s essay in the Harvard Law Review. While acknowledging the power and clarity of Hart’s contribution to jurisprudence, Fuller argued that Hart had ultimately failed to vindicate the legal positivist viewpoint. The following section shows that Fuller understood Hart as moving legal positivism away from sterile definitional stipulations about law, and into direct confrontation with natural law theories, by providing a competing account of the obligation of fidelity to law. However, Fuller thought that Hart failed to carry through his argument, because his concept of law did not embody a moral ideal of legality that could explain this moral obligation. In making his arguments, Fuller also provides his own account of legality by reference to principles he thinks constitute the “internal morality of law itself”.  

1.3.1 Fidelity to law and the concept of law

Fuller thought that Hart’s positivist legal theory’s “cardinal virtue” was its account of “the issue of fidelity to law”.  

90 Hart’s lecture opened the way for a “profitable exchange of views” between natural law and legal positivism because it recognized that jurisprudence cannot usefully proceed as a competition between stipulated definitions of the true meaning of the word ‘law’, but instead must analyze competing accounts of law as spurs to practical reason and action: as “direction posts for the application of human energies”.  

91 Fuller says that Hart

88 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619.

89 Fuller “Positivism and Fidelity to Law”, above n 2, at 645.

90 Fuller “Positivism and Fidelity to Law”, above n 2, at 632.

91 Fuller “Positivism and Fidelity to Law”, above n 2, at 632.
took positivism a crucial step forward by accepting that the most important task of jurisprudence is that of explaining: 92

the ideal of fidelity to law. Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. … If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.

The idea of fidelity to law therefore refers to the moral and legal obligation to be faithful to the law that exists for different participants in a legal system, which can only be worked out by reference to an ideal of legality that tells us both what the law is and what it ought to be. 93 Jurisprudence is practical reasoning about what we ought to do in order to maintain the rule of law.

Despite discerning an account of fidelity to law in Hart’s lecture, Fuller ultimately saw Hart’s positivist concept of law as defective and incomplete. This was because Hart’s theory’s insistence on the separation of law and morals meant that it had no resources to explain the obligation of fidelity to law: Hart’s lecture’s “chief defect” was the failure to “perceive and accept the implications that this enlargement of the frame of argument necessarily entails”. 94 Fuller’s constant refrain is that while Hart addresses the ideal of fidelity to law, the “internal morality of law” is “almost completely neglected by Hart”. 95 Fuller’s point is that Hart has offered an account of the obligation of fidelity to law, but has ignored Fuller’s understanding of legality that tells us what law is and explains this obligation, namely the principles of the internal morality: “Hart’s thesis as it now stands is essentially incomplete and… before he can attain the goals he seeks he will have to concern himself more closely with a definition of law that will make meaningful the obligation of fidelity to law”. 96

The reason Hart’s concept of law cannot explain the obligation of fidelity to law is that it describes an “amoral datum” that includes no moral elements – its account of legality is not

92 Fuller “Positivism and Fidelity to Law”, above n 2, at 632.
93 Fuller “Positivism and Fidelity to Law”, above n 2, at 632.
94 Fuller “Positivism and Fidelity to Law”, above n 2, at 632.
95 Fuller “Positivism and Fidelity to Law”, above n 2, at 645.
96 Fuller “Positivism and Fidelity to Law”, above n 2, at 634-635.
a moral ideal of the rule of law. Hart’s shift from the command theory to an analysis of the fundamental rules of law-making might have grounded a proper understanding of fidelity to law, but it fails because Hart provides no analysis of the moral reasons for the acceptance of those fundamental rules. In particular, he shows no awareness that “they derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary”. 

In the absence of any ideal of legality, Fuller therefore presents legal positivism’s view of fidelity to law as simply telling the judge to apply rules as they are set out, the law “as it is”, without reference to what the law morally “ought to be” – to merely secure the rule of the rules that are valid according to the fundamental rules of the system. Positivism offers an account of fidelity to law that cannot help judges who see the law as an ideal of legality.

Is it not clear that it is precisely positivism’s insistence on a rigid separation of law as it is from law as it ought to be that renders the positivistic philosophy incapable of aiding our judge? Is it not also clear that our judge can never achieve a satisfactory resolution of his dilemma unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be [ie conforming to our ideal of legality]?

In contrast, Fuller’s morally-charged theory of law as legality or the rule of law leads to a very different ideal of fidelity to law than that derived from the positivist theory of law (which excludes any necessary moral elements), because it includes an obligation on judges to interpret the law in light of this ideal of legality. Until Hart takes on the task of developing a moral account of the positivist ideal of legality as the rule of rules – explaining the moral value of the rule of the enacted rules – he will be unable to explain his views of fidelity to law.

97 Fuller “Positivism and Fidelity to Law”, above n 2, at 634-635.
98 Fuller “Positivism and Fidelity to Law”, above n 2, at 639-641 and 642.
99 Fuller “Positivism and Fidelity to Law”, above n 2, at 639.
100 Fuller “Positivism and Fidelity to Law”, above n 2, at 647. See also the analysis in Dyzenhaus “The Grudge Informer Case Revisited”, above n 55, at 1018: “Judges must come to conclusions about the appropriate meaning of particular laws in light of their purposes; this requires attention to other relevant law and ultimately to the purposes of the legal order, including the principles of legality. Hence, Fuller claims that in interpretation, the judge cannot understand his duty to determine what the law is other than in terms of what law ought to be.”
1.3.2 Fuller’s conceptual scheme

In light of this discussion, I understand Fuller’s concepts of ‘fidelity to law’, ‘legality, and the ‘internal morality of law’, as follows.

By ‘fidelity to law’, Fuller refers to the moral and legal obligation to be faithful to the law, which applies, in different ways, to both ordinary citizens and legal officials such as judges. The content of the ideal of fidelity to law is contested, because different positions can be taken on what the ‘law’ is that one ought to be faithful to; the positivist concept of law is very different to Fuller’s own concept of law, which is a moral ideal of legality, otherwise known as the rule of law.

‘Legality’ refers simply to the property of being law, but in Fuller’s view one’s account of legality must always contain moral elements if it is to be part of a complete theory of law that explains fidelity to law. Thus, although Fuller frames his arguments primarily in terms of the obligation of fidelity to law in his reply, his arguments are clearly about the ideal of legality or the rule of law because it is only by reference to such an ideal that one can explain fidelity to law. For Fuller, the ideal of legality is explained by reference to the ‘internal morality of law’, which, as discussed below, is a set of principles or requirements that the law ought to fulfill.

Stated in these terms, Fuller’s critique of Hart’s legal theory, is that while the theory provides an account of fidelity to law, its account of law as an amoral datum is not an ideal of legality that can explain the existence of moral and legal obligations of fidelity to law, because it does not provide any key idea equivalent to Fuller’s internal morality that would explain the necessary legitimacy of the law.

1.3.3 The morality of law itself

Fuller’s own account of the ideal of legality that judges are aiming to make the law live up to when they attempt to serve fidelity to law is revealed when he turns to discuss “the morality of law itself”, an analysis that provides the kernel of his later arguments in The Morality of Law.101 Fuller argues that even to create a workable legal order – let alone a

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101 Fuller “Positivism and Fidelity to Law”, above n 2, at 644.
substantively good legal order – one must recognize that “the notion of order itself contains what may be called a moral element”. He illustrates this through the imagined example of an absolute monarch who seeks to rule his subjects with consideration only to furthering his own selfish aims. The selfish monarch does so by commanding his subjects to do his will; yet, because his attempt to direct his subjects’ behaviour fails to conform to the “morality of order”, he creates no order at all. For example, he fails to properly ascertain who has and has not conformed to his rules, and so “habitually punishes loyalty and rewards disobedience” and he utters his rules in such an ambiguous or inaudible manner so as to render them unintelligible. In doing so, he fails to create a workable order that can guide his subjects’ behaviour, and so cannot achieve his selfish goals.

Fuller claims that his fable illustrates how “Law, considered merely as order, contains, then, its own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law.” This is an ‘internal’ morality of law because in contrast to ‘external’ moral requirements relating to the acceptance of legal authorities as legitimate, the internal morality sets out moral principles that must be respected if any kind of legal order whatsoever is to be established. This is Fuller’s understanding of the moral ideal of legality. It is Hart’s neglect of the internal morality of law that leads him to treat law as:

a datum projecting itself into human experience and not as an object of human striving. When we realize that order itself is something that must be worked for, it becomes apparent that the existence of a legal system, even a bad or evil legal system, is always a matter of degree.

In contrast, because Fuller recognizes the necessity of respecting the internal morality of law, he is able to explain how law can be an object of human striving that can fall short of its ideal.

Fuller argues that his concept of law is superior to Hart’s in this respect because of his recognition of conformity to the internal morality principles as a necessary condition of the

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102 Fuller “Positivism and Fidelity to Law”, above n 2, at 644.
103 Fuller “Positivism and Fidelity to Law”, above n 2, at 644.
104 Fuller “Positivism and Fidelity to Law”, above n 2, at 644.
105 Fuller “Positivism and Fidelity to Law”, above n 2, at 645.
106 Fuller “Positivism and Fidelity to Law”, above n 2, at 645.
107 Fuller “Positivism and Fidelity to Law”, above n 2, at 645.
108 Fuller “Positivism and Fidelity to Law”, above n 2, at 646.
existence of law. The internal morality is part of the very idea of law, because law cannot exist as a workable order without conforming to the internal morality’s requirements. Our concept of law must refer to “a functioning order, and such an order has to be at least good enough to be considered as functioning by some standard”, which in the case of law is the “morality of order” that allows people to know the standards of conduct that their actions are governed by. In other words, a plausible concept of law must include a moral ideal of legality that explains the obligation of fidelity to law; this is what makes Fuller’s legal theory complete and morally attractive where Hart’s is not.

Fuller identifies aspects of Hart’s theory that could be developed into a competing ideal of legality, namely a more full explanation of the “fundamental rules that furnish the framework within which the making of law takes place” within the concept of law. Hart had made the existence of these fundamental rules of the legal system central to his critique of the command theory of law, but in Fuller’s estimation Hart had not gone far enough. Hart did not see that these rules only form part of a working legal system because they are generally accepted in a community, which depends on their being perceived as “right and necessary”; even a written constitution will only be effective if its provisions can generate “that willing convergence of effort we give to moral principles in which we have an active belief”. Fuller thereby suggests that if Hart had undertaken an analysis of these elements of law, he might have offered an ideal of legality that could explain our obligation of fidelity to law.

1.3.4 Fidelity to law and injustice

It is important to note that the obligation of fidelity to law is not an ‘all-things-considered’ obligation to obey any particular law. This is clear from Fuller’s discussion of Hart’s conception of fidelity to law as one factor contributing to the determination of whether or not such an obligation exists in particular circumstances: “Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the ideal of fidelity to law. Not that Hart believes that the Nazis’ laws

109 Fuller “Positivism and Fidelity to Law”, above n 2, at 644-645.
110 Fuller “Positivism and Fidelity to Law”, above n 2, at 639.
111 Fuller “Positivism and Fidelity to Law”, above n 2, at 639.
112 Fuller “Positivism and Fidelity to Law”, above n 2, at 642.
should have been obeyed”. Fuller would argue that, even if the concept of law or legality is such that the law will always create an obligation of fidelity that will provide moral reasons for applying the law in certain ways, the obligation of fidelity to law is not a conclusive moral reason for citizens to obey or judges to apply the law.

Fuller’s account of fidelity to law therefore recognizes that if governments rule through law there will be some reason to accord their rule some moral legitimacy; even if on balance we say that certain iniquitous ends directing the law require us to disobey or resist particular legal norms. If a wicked rule is law through its impeccable conformity with our account of legality, we have an obligation of fidelity to it. So if the Nazis had conformed to the internal morality principles, then Fuller would presumably have admitted that they had met the “morality of order” that we find in legal systems. This would not settle the moral question of obedience, but it would exhaust the legal resources for resisting the Nazi regime.

Fuller thought that such a combination of iniquitous ‘external’ morality and impeccable internal morality was unlikely, and that “legal morality cannot live when it is severed from a striving toward justice and decency”. But if such a situation actually did arise, it seems that Fuller would agree with Hart that one should sacrifice one’s obligation of fidelity to law for the sake of other pressing moral goals. The citizen’s disobedience of the unjust law would be a simpler moral matter than the judge’s non-application of the law, for it might be said that the very idea of being a judge requires faithful application of the law without exception. When the law is understood as a moral ideal of legality, it is easier to reconcile this stark obligation with morality, because the judge always has some moral resources with which to attempt to pull legal rules towards legality. But when those rules are impeccable from the perspective of legality and still unjust, the judges face a dilemma between their wider moral convictions and their obligation of fidelity to law.

113 Fuller “Positivism and Fidelity to Law”, above n 2, at 633.
115 Fuller “Positivism and Fidelity to Law”, above n 2, at 646.
116 Fuller “Positivism and Fidelity to Law”, above n 2, at 661. See also 645 “In the life of a nation these external and internal moralities reciprocally influence one another; a deterioration of the one will almost inevitably produce a deterioration in the other.”
1.3.5 Fidelity to law and the Nazi regime

Fuller thought that Hart’s discussion of the grudge informer situation reflected a lack of real understanding of legality and the obligation of fidelity to law. He observes that Hart recommends a retrospective criminal statute to punish the informers, while at the same time condemning the post-war West German courts for declaring the Nazi statutes void (that is, as no law at all). This, Fuller suggests, means that Hart’s position is essentially the same as Radbruch’s, because in both cases previously valid statutes are to be regarded as void, with the only difference being whether the courts or legislature “should do the dirty work”.

Here Fuller seems to misread Hart’s argument, which acknowledges these very points: Hart admits that under both his and Radbruch’s solution to the grudge informer problem, the Nazi statutes that protected the informers would be essentially made ineffective, achieving effectively “exactly the same result”. Hart also accepts that one might wonder why we should “dramatize the difference” between these two competing approaches, but he thinks it is crucially important how the punishment of the informers happens. Under his approach, legislation would be enacted to render the Nazi statutes ineffective as a defence against the relevant criminal charge. This makes it clear that at one point in time the grudge informers’ actions were not legally punishable, and now later we want to retrospectively make those actions punishable. Hart’s reasoning here is premised on the idea that the Nazi statutes were legal rules valid according to the fundamental rules of the legal system in force, which at the relevant time was the Nazi regime. In contrast, Radbruch’s natural law approach allows the courts to say, essentially, that the Nazi laws were never legally valid. The courts are therefore not retrospectively punishing the grudge informers, but merely applying the criminal law that was always in force during the Nazi era, and which the informers had no legal excuse for breaching. This is, for Hart, a dubious analysis, and intellectual and moral

117 Fuller “Positivism and Fidelity to Law”, above n 2, at 649.
118 Fuller “Positivism and Fidelity to Law”, above n 2, at 649.
119 Fuller “Positivism and Fidelity to Law”, above n 2, at 649.
120 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 620.
121 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 620-621.
122 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618-619.
candour would require us to say instead that the informer statutes were law, but “too evil to be obeyed”.123

It seems that even if this explanation makes Hart’s reasons for emphasizing the difference between his and Radbruch’s solution clearer, Fuller would still be dissatisfied with Hart’s claim that he has improved on Radbruch’s analysis; as Fuller points out, Radbruch also noted the moral dilemma involved in applying his own theory of law to these situations.124 In addition, Fuller argues that the very actions that seemed evil from substantive moral viewpoints usually could have been impugned for their violation of the internal morality, meaning that an appeal to higher law was unnecessary.125 Indeed, Fuller observed that the classical natural law quest for an authoritative pronouncement of the “higher law”, which sits above and judges human law, sets up a conflict between competing forms of positivism – competing accounts of the authoritative legal rules – that is wholly unnecessary if we are concerned with articulating legality in terms of the inner morality of law.126 For Fuller the search for a plausible modern natural law theory is vindicated by the identification of the internal morality of law – the principles of the rule of law – which provides an account of legality that gives the law at least some moral value and thereby explains our obligation of fidelity to the law.

Fuller, therefore, thought that his concept of law improved on both Hart’s positivism and Radbruch’s revival of certain doctrines of classical natural law. The idea of the internal morality of law allows us to properly analyze the breakdown of legal order under the Nazis, whereas all that Hart’s analysis can say is that the Nazis had a legal order, even if it was an evil one.127 Hart’s mistake, Fuller argues, is to think that any challenge to the status of Nazi law as law must be Radbruch’s challenge: “an unjust law is not a law”.128 This is because Hart does not have an account of legality that would allow him to challenge Nazi law from the perspective of fidelity to law. Fuller moves away from the ‘classical natural law’

123 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 620.
124 Fuller “Positivism and Fidelity to Law”, above n 2, at 656.
125 Fuller “Positivism and Fidelity to Law”, above n 2, at 661: “In other words, where one would have been most tempted to say, “This is so evil it cannot be a law,” one could usually have said instead, “This thing is the product of a system so oblivious to The Morality of Law that it is not entitled to be called a law.”
126 Fuller “Positivism and Fidelity to Law”, above n 2, at 660.
127 Fuller “Positivism and Fidelity to Law”, above n 2, at 646.
argument to one about Nazi compliance with his account of the ideal of legality – “the inner morality of law itself.” This allows us to inquire into: 

how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under Nazi rule, and what moral implications this mutilated system had for the conscientious citizens forced to live under it.

If we have in view the internal morality of law, we can say that governments that disregard these principles of legality cannot be said to be ruling through law. Such a breakdown of legality does not merely mean that the law is extremely bad, but that it is not law at all:

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

Just as a legal system that completely violates legality is not a legal order, a particular directive that utterly violates legality is not a law: “the invalidity of the statutes involved in the informer cases could have been grounded” on these considerations. Where such an adverse assessment is warranted, it is the judge’s legal and moral duty of fidelity to law to uphold legality by disregarding the directive.

Fuller applies his theory by using the internal morality of law as a critical ideal of legality with which to impugn the Nazi regime. For example, he notes that the Nazis commonly resorted to retrospective statutes to cure illegal actions, such as the legal validation of the murders during the Röhm purge. There were also rumours of secret laws, for example those authorizing the killings in concentration camps. Added to this was the disregard of the law by those charged with executing it – with the Nazis often acting “through the party in the streets” – and the perversion of the law by those interpreting it, with “the Nazi-

129 Fuller “Positivism and Fidelity to Law”, above n 2, at 650.
130 Fuller “Positivism and Fidelity to Law”, above n 2, at 646.
131 Fuller “Positivism and Fidelity to Law”, above n 2, at 650.
132 Fuller “Positivism and Fidelity to Law”, above n 2, at 660.
133 Fuller “Positivism and Fidelity to Law”, above n 2, at 654-655 and 659-660.
134 Fuller “Positivism and Fidelity to Law”, above n 2, at 661.
135 Fuller “Positivism and Fidelity to Law”, above n 2, at 650.
136 Fuller “Positivism and Fidelity to Law”, above n 2, at 651.
dominated courts … always ready to disregard any statute … if this suited their convenience”. 137 These are situations in which significant conformity to the internal morality is absent, so, in Fuller’s view, we can say that the Nazis failed to make law. If German jurisprudence had “concerned itself more with the inner morality of law, it would not have been necessary to invoke [‘higher law’ notions] in declaring void the more outrageous Nazi statutes”. 138

The jurisprudential approach required by his concept of law is illustrated, Fuller observes, by the very case that Hart discussed in his critique of Radbruch. As Fuller recounts the facts, a man had commented to his wife that Hitler was not fit to live. His disgruntled wife reported these remarks to the authorities, and the husband was sentenced to death and sent to the front. 139 After the war the woman was charged with illegal imprisonment of her husband. She argued that her actions were lawful because the actions of her husband were illegal according to a statute that prohibited, on pain of death, public statements inciting a refusal of service in the armed forces, or otherwise publicly seeking to “injure or destroy the will of the German people”. 140

Fuller’s discussion of this case goes into much greater depth than Hart’s, and shows that Hart’s account was factually inadequate in many ways, most significantly in suggesting that the Nazi law clearly validated the woman’s actions by making her husband’s conduct illegal. Fuller notes that the relevant statute referred to public statements, and another statute deemed private statements as public where the speaker knew or should have known that the statements would become public. 141 Neither of these statutes, interpreted properly, would have applied to the husband’s statements, which were made to his wife in the privacy of his home, and he would have surely been horrified by the thought of his wife making them public. Yet a military tribunal had used these private statements to condemn the husband to death – even though none of the statutes could plausibly be interpreted as warranting the

137 Fuller “Positivism and Fidelity to Law”, above n 2, at 650-655.
138 Fuller “Positivism and Fidelity to Law”, above n 2, at 659-660.
139 Fuller “Positivism and Fidelity to Law”, above n 2, at 653.
140 Fuller “Positivism and Fidelity to Law”, above n 2, at 653.
141 Fuller “Positivism and Fidelity to Law”, above n 2, at 654.
death penalty in these circumstances. In Fuller’s view, this is an example of the Nazi regime’s complete lack of conformity to the internal morality of law: 142

Can it be argued seriously that it would have been more befitting to the judicial process if the postwar courts had undertaken a study of ‘the interpretive principles’ in force during Hitler’s rule and had then solemnly applied those ‘principles’ to ascertain the meaning of this statute?

An affirmative answer to this question would be wrong, because it ignores the fundamental breakdown in legality engendered by the lack of congruence between the statute and the court’s decision. But because Hart does not comprehend the requirements of the internal morality, he is unable to properly judge the Nazi violations of legality and to therefore accurately state the problems of fidelity to law that the post-war West German courts faced.

In addition to showing the utility of the internal morality for making these judgments, Fuller also sought to show that there was something to Radbruch’s argument that the rejection of natural law in Germany had played a role in enabling Nazi terror. 143 Had lawyers, judges, and citizens understood their obligations of fidelity to legality, there may have been more resistance to violations of legality. 144 What Hart presented as a clear clash between law and morality is blurred by Fuller, who says that there will always be a legal and moral question of whether norms that seem to violate legality should be recognized as law at all. 145 Fuller therefore directly challenges Hart’s suggestion that positivism is not only theoretically correct, but also morally beneficial.

Hart responded to Radbruch’s version of this argument by noting that positivism’s Separation thesis does not tell people that they have a moral obligation of obedience to the law, but in fact tells them to question whether in any particular case morality requires obedience. 146 However, Fuller observes that a legal positivist theory that abjured any natural law theory of higher law standing above positive law was dominant in Germany before the war, so that to hold natural law views was considered “a kind of social disgrace”. 147 The Germans could not hold their logic “on a short leash”, and so they believed and acted on this

142 Fuller “Positivism and Fidelity to Law”, above n 2, at 655.
143 Fuller “Positivism and Fidelity to Law”, above n 2, at 658-659.
144 For discussion of this argument, see Paulson “Lon L Fuller, Gustav Radbruch, and the ‘Positivist’ Theses”, above n 67.
145 Fuller “Positivism and Fidelity to Law”, above n 2, at 660.
146 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
147 Fuller “Positivism and Fidelity to Law”, above n 2, at 657-659.
positivist concept of law.\textsuperscript{148} Because German legal positivism banned any reference to the substantive “moral ends of law” or the internal morality in the context of determining what the law required, German lawyers accepted anything created by the Nazi power-structure as legal – an attitude that was helpful to the Nazi cause.\textsuperscript{149} Ultimately, legal positivism rendered lawyers and judges incapable of challenging the Nazis’ “exploitation of legal forms” for their repugnant purposes; “[t]he first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.”\textsuperscript{150} While Fuller would have preferred to condemn a number of aspects of Nazi rule as contrary to the idea of legality,\textsuperscript{151} he agrees with Radbruch that a better concept of law as contrary to the idea of legality,\textsuperscript{151} he agrees with Radbruch that a better concept of law would have led to better legal practices – and keener resistance to Nazi tyranny.

1.4 Does Hart offer an account of fidelity to law?

Fuller’s interpretation of Hart’s lecture as giving voice to an account of fidelity to law is in some ways puzzling.\textsuperscript{152} While Fuller praises Hart’s “enduring contribution” of moving legal positivism onto the terrain of competing accounts of fidelity to law,\textsuperscript{153} Fuller rebukes him for failing to address the “implications that this enlargement of the frame of argument necessarily entails”.\textsuperscript{154} Fuller sees these arguments relating to fidelity to law as revealing a defect in Hart’s legal positivism, which posits an amoral concept of law and “bans … from the province of legal philosophy” the kinds of reasoning and consideration that allows us to formulate any account of legality or fidelity to law and plan for its realization.\textsuperscript{155} Hart’s positivist concept of law provides no resources to explain fidelity to law because it does not explain law as a moral ideal of legality; it therefore cannot help judges “who have responsible functions to discharge in the very order toward which loyalty is due” and who

\textsuperscript{148} Fuller “Positivism and Fidelity to Law”, above n 2, at 659.
\textsuperscript{149} Fuller “Positivism and Fidelity to Law”, above n 2, at 659.
\textsuperscript{150} Fuller “Positivism and Fidelity to Law”, above n 2, at 659.
\textsuperscript{151} Fuller “Positivism and Fidelity to Law”, above n 2, at 660.
\textsuperscript{152} This is also noted in Dyzenhaus “The Grudge Informer Case Revisited”, above n 55, at 1001-1002, although he argues that Hart did take part in a debate about fidelity to law.
\textsuperscript{153} Eg Fuller “Positivism and Fidelity to Law”, above n 2, at 632 and 672.
\textsuperscript{154} Fuller “Positivism and Fidelity to Law”, above n 2, at 632.
\textsuperscript{155} Fuller “Positivism and Fidelity to Law”, above n 2, at 642-643; the quote is from 643.
embrace their “responsibility for making law what it ought to be”.

Indeed Hart almost completely ignores the crucial element of the concept of law that allows Fuller to explain this obligation – the internal morality of law. So he clearly cannot share Fuller’s own view of legality and its consequent account of fidelity to law.

Furthermore, Hart’s concept of law lacks – at least self-consciously – any of its own moral elements that could be used to explain a competing conception of legality and fidelity to law. While Hart’s concept of law focuses on fundamental rules of a legal system in its explanation of law, it fails to see that these are not just facts of power or theoretical assumptions, but are moral rules that can only be explained by reference to “that willing convergence of effort we give to principles in which we have an active belief”.

So Fuller, therefore, thinks Hart’s positivist concept of law cannot possibly properly explain fidelity to law because it lacks a moral theory of legality, yet he also says that Hart proceeds to offer an account of fidelity to law: this is why Fuller’s sees Hart’s legal theory as incomplete and defective. But if Fuller is right, and Hart fails to provide the kinds of arguments within his concept of law that would be necessary to properly debate fidelity to law, what reason is there for saying that Hart’s lecture says anything about fidelity to law – let alone professing it as a high moral ideal for the law?

Fuller’s initial identification of Hart’s analysis of fidelity to law occurs, where he observes that Hart’s lecture had discussed “a ‘precious moral ideal,’ that of fidelity to law” because of Hart’s argument that judges do not merely have a legal obligation to apply Nazi law in the grudge informer situation, but also a moral one. However this is also the section of Hart’s essay that Fuller thinks raises questions about whether Hart is really examining the question of fidelity to law. Fuller believes it is unclear why Hart thinks that the decision to disobey the Nazi laws presented – as Fuller puts it – a “genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals”. Where, Fuller asks, does this moral reason to apply Nazi law come from, given that Hart also plainly

156 Fuller “Positivism and Fidelity to Law”, above n 2, at 646-647.
157 Fuller “Positivism and Fidelity to Law”, above n 2, at 645.
158 Fuller “Positivism and Fidelity to Law”, above n 2, at 642.
159 Fuller “Positivism and Fidelity to Law”, above n 2, at 630-631.
160 Fuller “Positivism and Fidelity to Law”, above n 2, at 649.
161 Fuller “Positivism and Fidelity to Law”, above n 2, at 633.
denies Radbruch’s suggestion that law is a moral ideal of legality, and argues that legal obligation cannot determine the question of what we morally ought to do?

The answer Fuller provides is found in Hart’s argument that there was a moral quandary to be faced; Fuller’s answer observes that there is some moral reason to apply the Nazi law to justify the informers’ actions – there is a moral reason pulling in the direction of application. Hart views the question of whether to punish the grudge informers as requiring a choice “between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems”, namely non-retrospectivity. Hart had earlier noted Bentham’s concern for “elements of the Rechtstaat” and principles of natural law, including such things as “the need that laws should be published and made widely known before they are enforced, … and the importance of the principle of legality, nulla poena sine lege”.

This requirement of non-retrospectivity is also linked to congruence, because it obliges judges to apply the norms of the law as they existed at the time of the person’s actions. Otherwise, the lack of congruence between judges’ decisions and the law would in effect constitute the retrospective application of a legal standard that did not apply at the time the action was performed – but in this case it is the judges who are creating the new legal standard retrospectively. On this basis, Hart argues that it was wrong for post-war judges not to recognize unjust Nazi laws as valid law, and Fuller takes this to mean that Hart identifies an obligation of fidelity to law on the part of the judges:

Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the ideal of fidelity to law. Not that Professor Hart believes the Nazis’ laws should have been obeyed. Rather he considers that a decision to disobey them presented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals.

Yet Fuller notes that Hart also thought a retrospective statute allowing for punishment of the informers by making the Nazi laws essentially void and inapplicable as a justification of the informers’ actions was the appropriate option in the circumstances, which puts into

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162 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 617.
163 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
164 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 619.
165 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 595-596.
166 Fuller “Positivism and Fidelity to Law”, above n 2, at 633.
“question whether the issue as presented by Professor Hart himself is truly that of fidelity to law”. Hart’s conception of fidelity to law, Fuller thinks, requires application by judges of the law as it is laid down, but fails to see that it is a very difficult question what the application of the law means when one is dealing with “legislative monstrosit[ies] … overlarded … by uncontrolled administrative discretion”, the disregard of the law by the Nazi regime, and a subservient judiciary perverting the law to serve the Nazis.

It should be noted that Fuller was right in saying that Hart’s understanding of this case and of the practice of the post-war West German courts in general was mistaken. Soon after the Hart–Fuller exchange, HO Pappe showed that the particular case discussed was not decided through the invalidation of the informer statutes, and that in a similar case the Federal Supreme Court had not used “higher, supra-positive, law to set aside the judgment of the court-martial” that had condemned a critic of the Nazis to death. Instead, it had focused on “questions of judicial interpretation and procedure”, pointing out the implausibility of the interpretation of the court-martial’s decision; it was on this basis that the post-war court attacked the legal justification for the woman’s actions. This incongruent application of the Nazi statute was reflective of the breakdown in the integrity of judicial decision-making under the Nazis, which saw the courts sanctioning Nazi actions despite the fact that they were often contrary to the Weimar Constitution, including its “unwritten established principles”, and the German legal tradition. Pappe also observes that the illegality of the decisions of the courts in the Nazi era was understood even by ordinary citizens. They knew that the judiciary were not acting as courts of law, but as “cog[s] in a vicious administrative regime”. So, any allegiance or support given to the Nazi regime was not based on a belief in its legality, but was given despite people’s knowledge that the Nazi regime was “arbitrary and violated law and order”.

167 Fuller “Positivism and Fidelity to Law”, above n 2, at 649.
168 Fuller “Positivism and Fidelity to Law”, above n 2, at 652-655.
Pappe’s discussion aids Fuller in his criticisms of Hart’s understanding of the grudge informer cases.\textsuperscript{176} It clearly refutes Hart’s claim that in these particular cases the rule valid according to the fundamental rules of the legal system was considered by the German courts to be not law at all because of its injustice. In fact, as Pappe shows, it was the Nazi judiciary that had gone beyond the law (according to Hart’s own theory), and was making decisions not according to law but in the service of the Nazi regime.\textsuperscript{177} However, because Hart declined to revisit the grudge informer situations based on his revised understanding of the facts, he obviously thought that his concept of law was not troubled by the accurate account of the case. Therefore we must return to Fuller’s critique to see whether Hart’s theory is a plausible explanation of law – or the lack of it – under the Nazi regime.

\textbf{1.4.1 Hart’s contradiction revisited}

Returning to the question of whether Fuller is right about Hart’s account of fidelity to law, we should remember that Fuller’s view is that while Hart has shifted positivism onto the terrain of fidelity to law, he has not yet delivered any explanation of how this obligation can arise, because he does not see law as a social institution that lives up to an ideal of legality.\textsuperscript{178} Fuller thinks, therefore, that Hart’s analysis of the grudge informer situation is as follows:\textsuperscript{179}

On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between those two duties. If this is the positivist position, then I have no hesitancy in rejecting it. The “dilemma” it states 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. I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. This obligation seems to be conceived as sui generis, wholly unrelated to any of the ordinary, extralegal ends of human life. The fundamental postulate of positivism – that law must be strictly severed from morality – seems to deny the possibility of any bridge between the obligation to obey law and other

\textsuperscript{176} Dyzenhaus “The Grudge Informer Case Revisited”, above n 55.


\textsuperscript{178} Fuller “Positivism and Fidelity to Law”, above n 2, at 632-633 (arguing that Hart’s concept of law cannot make sense of fidelity to law), 634-635 (arguing that Hart’s legal theory is incomplete without a concept of law that can explain fidelity to law), 642-643 (arguing that Hart’s concept of law prevents reflection on how to plan for the realization of fidelity to law), 644-647 (setting out the internal morality of law that is part of a concept of law that can explain fidelity to law), 656 (arguing that the positivist concept of law leaves the positivists without a way of explaining fidelity to law).

\textsuperscript{179} Fuller “Positivism and Fidelity to Law”, above n 2, at 656.
moral obligations. No mediating principle can measure their respective demands on conscience, for they exist in wholly separate worlds.

Fuller thinks that Hart sees the concept of law as completely separate from morality (“an amoral datum called law”), yet this position coexists with an account of fidelity to law, which, without reference to a moral ideal of legality, remains completely unexplained.

But does Hart – and legal positivism in general – have to accept Fuller’s diagnosis of this jurisprudential malady and his recommended cure? That question will recur throughout the following chapters, in which I investigate positivism’s understanding of legality in response and in contrast to Fuller’s; in later chapters I will discuss Hart’s subsequent engagement with Fuller in greater detail and consider whether his responses were adequate.

At this point, I will note that Fuller is wrong to see this moral reason in favour of applying the law as an unexplained account of fidelity to law that is unrelated to any moral principles – even if Fuller is right to say that it is not explained by a moral ideal of legality. Hart’s reason for treating the application of the valid legal norms as they existed at the time of informers’ actions as a precious moral principle is – while not explained by Hart in any detail – obviously related to moral principles; indeed Hart cites non-retrospectivity and ‘no punishment without law’ as principles that Bentham recognized as required by utilitarian morality. What differentiates Hart from Fuller is that Hart does not see these principles as legal principles that would allow judges to impugn the legal validity of the norms; they are not understood by Hart as elements of an ideal of legality. They are moral principles that will generally be relevant to a moral analysis of what one ought to do where law is involved, and they will usually weigh against punishment that is retrospective. This is what provides the dilemma: the clash between moral principles that tell us not to punish retrospectively, and the desire to punish morally reprehensible conduct that was not legally punishable at the time.

So the question of one’s moral obligation to law is determined not by some unexplainable (and hence “mimsy with the borogoves”) non-moral obligation of fidelity to law – fidelity to law as ‘the rule of rules’ – but by reference to what morality requires us to do. When Hart says that “[l]aw is not morality; do not let it supplant morality”, he is affirming that only

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180 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 596.
morality can tell us whether we have moral reasons to obey any particular legal norm. He joins the utilitarian positivists in speaking simply, by condemning Nazi laws as laws that are “too evil to be obeyed. This is a moral condemnation that everyone can understand and it makes an immediate and obvious claim to moral attention.” Our moral reasons for obeying the law are not drawn from some unintelligible void, but from our ordinary moral concepts as applied to the law. Setting out the rules in advance and not punishing people without reference to a law that mandates such punishment are for Hart principles that require adherence to the law as it is laid down, and to the degree that these principles secure morally beneficial results from the perspective of utilitarianism or in terms of liberty, they are moral reasons for judges to apply the law. If this moral value secured by adherence is outweighed by competing moral reasons not to apply the law, then a moral judgement must be made. But for Hart these are moral principles to apply the law of the legal system to people’s actions, not legal principles. These general moral reasons, which will usually weigh in favour of applying the law to people’s actions, do not stem from a moral ideal of legality, but are merely the implications that follow from the existence of any system of rules that are presented as guides for human conduct.

1.5 Conclusion: an exchange yet to become a debate on the rule of law

This chapter has presented Fuller’s Challenge in its original form, in his 1958 debate with Hart. In the following chapter I will discuss Hart’s response to Fuller in *The Concept of Law*, and will consider in detail Fuller’s arguments about Hart’s account of fidelity to law in the Nazi situation as set out by Fuller in *The Morality of Law*. At this point it is enough to note the main interpretive possibilities concerning Hart’s account of law, as found in this first round of the debate. Hart’s argument can be interpreted as Fuller reads it; a flawed attempt to discuss our obligations of fidelity to law, which is incomplete due to its lack of an ideal of legality and its neglect of the internal morality of law. Opposed to this interpretation is the view that Hart is not offering anything like Fuller’s account of fidelity to law, precisely because he does not think of law as a social institution that lives up to an ideal of legality.

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181 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 618.
182 Hart “Positivism and the Separation of Law and Morals”, above n 1, at 620.
His discussion of retrospectivity is instead a reflection on the moral analysis of a particular legal situation. If this latter interpretation is sound, then Fuller’s criticism of Hart’s failure to provide a concept of law that could explain the obligation of fidelity to law misses its mark, because Hart’s legal theory is not concerned with fidelity to law in Fuller’s sense. Hart does not accept that the mere existence of law creates “a moral duty to obey it” due to law’s necessary conformity to an ideal of legality or the rule of law, even if other moral reasons or obligations may sometimes outweigh this obligation of fidelity.\(^\text{183}\) As seen above, I favour this interpretation of Hart’s arguments.

Yet even if I am right to ultimately conclude that Hart does not at this stage engage in a debate with Fuller on fidelity to law, Fuller’s critique would then be that although Hart’s legal theory is basically coherent in excluding reference to moral elements of the law, it is for that reason even more utterly mistaken: it has not, in fact, made the profound theoretical advance that Fuller thought it had made. As I will show in the next chapter, this is essentially what Fuller argues after Hart makes clear his indifference to fidelity to law in *The Concept of Law*: in his book *The Morality of Law*, Fuller attempts to show that jurisprudence cannot be indifferent to the idea of the rule of law.

These observations allow for some reflection on some of the wider questions and themes to be covered in this study. Even if Hart can escape the charge of incompleteness in his Holmes lecture by saying that fidelity to law was outside of his immediate concerns, Fuller would say that he can do so only on pains of his legal theory being more thoroughly defective: it would be unable to explain either the connection between the rule of law and the concept of law, or the obligations of fidelity to law that flow from that ideal. While it seems clear Hart would say that he can avoid talking about the rule of law within his concept of law, and that he does not offer an account of fidelity to law in Fuller's sense, this does not mean that he can actually escape the complications that Fuller’s Challenge from the rule of law creates for positivist legal theory. As I will show in later chapters, in Hart’s subsequent work he is ultimately forced to concede that the rule of law plays at least some role in the concept of law, and it might be argued that he must, therefore, provide accounts of legality and fidelity

\(^{183}\) Fuller “Positivism and Fidelity to Law”, above n 2, at 656.
to law that would make sense of that admission. We will see that Hart never did provide such accounts.

Whether Hart and other legal positivists are able to provide a coherent positivist theory that makes sense of the rule of law – without accepting Fuller’s Challenge and setting out a moral ideal of legality and a related obligation of fidelity to law – is the wider question of this study. Fuller’s Challenge in its 1958 form exemplifies the continuing situation in modern jurisprudence, where theories of the nature of law tend to fall into two main styles: one that takes legality as central to explaining law and one that does not.\(^{184}\) For Fuller a key element of legal philosophy is setting out an ideal conception of legality. In contrast, Hart, Raz, and the positivists who follow in their tradition of legal positivism would not characterize their legal theory in this way. For the latter group, legal philosophy has a distinct aim of setting out an analytical or conceptual account of what law is, focusing on how a legal system is a distinctive kind of system of norms. The moral consequences that follow from what law is, or what our ideals for the law should be, is a secondary question that can only be answered after the primary analytical question ‘what is law’ is answered; positivists give an answer “to the question ‘What is law?’ and then [read] off their account of the rule of law from their answer”.\(^{185}\) This makes the idea of legality an ‘ideal’ for the law to live up to, which becomes relevant only after one has determined what the law is rather than being a necessary element of identifying and understanding legal orders. In contrast, when a theorist thinks that legality is not just a moral ideal that the law may or may not live up to, but a necessary element of legal orders, jurisprudential inquiry can only proceed by beginning with an account of legality, “for the question of what counts as a particular law can only be answered if one understands first what is involved in the qualities we attribute to legality”.\(^{186}\)

\(^{184}\)Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 114, at 33: “More basic to philosophy of law than a theory of adjudication is a theory of legality, the kind of theory Fuller articulated in his sketch of the internal morality of law. Put differently, the terrain on which engagement in legal philosophy should take place is not primarily one occupied by theories of adjudication but by theories of legality. … [I]t is increasingly the case that Dworkin and legal positivists alike see the importance of engagement with the idea of legality, precisely the engagement which Fuller from 1958 on argued was the issue for legal philosophy just because an ideal of fidelity to law is an ideal conception of legality.”

\(^{185}\)Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 114, at 4.

\(^{186}\)Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 114, at 4.
Positivists have a choice to make, therefore, about which style they will use to come to terms with the rule of law. One option is to proceed according to the first style, understanding law as conceptually distinct from – though obviously morally answerable to – the rule of law. As I will show below, this view has the support of Hart and Raz, and has remained popular in more recent positivist analyses. The other style of legal philosophy is to accept that one’s concept of law must be grounded on a moral conception of the rule of law, which means that jurisprudential debate would move to the terrain of political and moral argument, and would offer competing accounts of what law and legal institutions ought to look like. Perhaps surprisingly given the usual understandings of legal positivism, some contemporary legal positivists have embraced a more Fullerian approach to the rule of law. And even where positivists claim to hold the first view, there will always be some tension in their accounts of what law is (as distinct from a moral ideal of the rule of law). This is because even where positivists claim that they are merely theorizing a particular way of ordering human conduct according to rules or norms, they always concede that there is something about this very idea that they draw on Fuller’s account of the rule of law to explain. Their concessions to Fuller have caused ambiguities in their theories, as well as tensions within the context of their legal positivist positions, as I will discuss in the following chapters.

187 Although all the legal positivists discussed in this study have been forced to make concessions on this point, according to what I call the ‘derivative’ argument See below Chapter 4 at section 4.3 and Chapter 6 at section 6.4.
Chapter 2: Legality in The Concept of Law and The Morality of Law

2.1 Introduction

We have seen that Fuller’s 1958 reply attempted to persuade Hart to develop further his latent moral account of legality so that he could properly justify and explain his positivist understanding of the obligation of fidelity to law. Hart’s main opportunity to take Fuller’s jurisprudential advice was in his book The Concept of Law, published in 1961, which set out his legal theory in detail. Yet I will show that it is hard to detect in Hart’s general concept of law, or in his brief response to Fuller’s claims in his chapter on law and morality, any acceptance that Fuller’s criticisms had significantly troubled his positivist theory. Undeterred, Fuller responded by elaborating his criticisms in greater detail in lectures that were expanded into The Morality of Law, again faulting the basic outlook of Hart’s positivism for missing an essential element of law, namely the moral ideal of legality. In this book, Fuller sets out his internal morality principles clearly and systematically, now explicitly calling them the principles of legality or the rule of law.

Fuller’s account of the rule of law has become canonical in the literature: almost every serious discussion of the rule of law will make reference to Fuller’s principles before criticizing or developing them. But positivists have often not dwelt long enough on the fact that these principles are part of Fuller’s wider anti-positivist challenge to legal positivism that attempts to make positivists see that law should not be understood as separate from the rule of law. Hart’s contribution to the debate in The Concept of Law exemplifies this style of engagement with Fuller, and seems to orient many of the later positivist analyses of the rule of law. This lack of attention to Fuller’s Challenge as a whole has meant that the wider conceptual debate between legal positivism and Fuller’s anti-positivism has not been adequately addressed in the positivist response. The chapters that follow also show that legal positivists have often integrated Fuller’s rule of law principles into their positions in ambiguous ways, and have done so without dealing with the tensions and problems that their concessions to Fuller’s Challenge seem to cause the positivist position. Before I move to that
discussion, this chapter sets out Fuller’s Challenge in its most robust form, in *The Morality of Law* and the response to critics added to the revised edition. But prior to that, I will examine Hart’s response to Fuller’s 1958 reply.

### 2.2 Hart’s *The Concept of Law* and Fuller’s Challenge

Despite Fuller’s best efforts in the 1958 debate, Hart’s elaboration of his concept of law does not reveal any significant response to Fuller’s Challenge. Even after reading Fuller’s 1958 reply, Hart still did not think that the idea of the internal morality caused his theory any significant problems. He remarked in a letter to a fellow philosopher that “Lon Fuller has replied at enormous length and (I think) obscurity to my Holmes lecture. This piece of logomachy will appear in the *Harvard Law Review* shortly.”\(^1\) He also stated in an interview in 1988 that Fuller’s criticisms were not “fundamental”.\(^2\)

But one need not rely on Hart’s private correspondence to demonstrate his dismissive attitude towards Fuller’s arguments, because the lack of intellectual impact Fuller’s Challenge had on the theoretical framework of Hart’s concept of law is revealing enough. In *The Concept of Law* Fuller’s claims are still not dealt with in the place Fuller thought they were most important: in the discussion of the fundamental rules of law-making, or ‘secondary rules’ as Hart now calls them. Hart excludes any consideration of Fuller’s principles from this theoretical foundation stone of his position. Instead, Hart sees Fuller’s arguments as points about certain relatively insignificant moral connections between law and morality, rather than as observations that fundamentally challenge his concept of law. The lack of importance Hart places on these principles is also reflected by comparing the space he devotes to debating them with his discussion of two other natural law arguments, which take up the bulk of his key chapter on law and morality. Finally, the dismissive tenor of Hart’s half-page response to Fuller’s argument confirms the lack of significance Hart places on them. I will illustrate each of these points in detail below.

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2.2.1 Hart on the concept of law

In *The Concept of Law*, Hart draws on ideas from his Holmes lecture to set out his concept of law in a systematic manner. Again his aim is to reformulate the legal positivist perspective made popular by John Austin. While Austin’s command theory had served a useful purpose in reviving the fortunes of legal positivism, Hart thought that it was mistaken. One of his most telling objections is his claim – also found in the Holmes lecture – that Austin’s idea of a political sovereign neglects the fact that there are “legal limitations on legislative authority [consisting] not of duties imposed on the legislator to obey some superior legislator but of disabilities contained in rules which qualify him to legislate”. Austin’s theory, based in “the simple idea of orders, habits, and obedience, cannot be an adequate analysis of law. What is required instead is the notion of a rule conferring powers, which may be limited or unlimited, on persons qualified in certain ways to legislate by complying with a certain procedure”. The Austinian idea of the sovereign cannot explain the complex system of rules that make up modern ‘municipal’ legal systems, because the sovereign is understood as a fact of political power reflected in habitual obedience, rather than as a conclusion derived from the fundamental rules of the legal system. Austin’s theory therefore “failed to fit the facts” because the elements from which it is constructed cannot be used to understand the “idea of a rule”, which is essential to understanding the concept of law.

Hart replaced the sovereign’s coercive command with the idea of a complex system comprised of ‘primary’ rules governing human conduct that are themselves regulated by ‘secondary’ rules. Secondary rules have the purpose of controlling how the primary rules of a legal system are ‘recognized’ as authoritative norms in the community, how those rules are changed, and how adjudication concerning whether the norms apply to a situation

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3 HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961) at Chapters II-IV.
4 See Hart’s summary of his criticisms in Hart *The Concept of Law*, above n 3, at 77.
6 Hart *The Concept of Law*, above n 3, at 69.
7 Hart *The Concept of Law*, above n 3, at 75.
8 Hart *The Concept of Law*, above n 3, at 75-76.
10 Hart *The Concept of Law*, above n 3, at 78-79.
11 Hart *The Concept of Law*, above n 3, at 92-93.
12 Hart *The Concept of Law*, above n 3, at 93-94.
should proceed. Understanding the concept of law and the related legal concepts of “obligation, rights, validity and source of law, legislation and jurisdiction, and sanction” requires the insight that law is a union of primary and secondary rules, ideas that are “not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist”. This combination of rules, not the sovereign command, is the key to the science of jurisprudence.

Once we see that law is a complex system of rules, Hart thinks it becomes obvious that Austin’s command theory is mistaken due to its lack of comprehension of rules as obligations – as standards for behaviour that are understood and applied from the “internal point of view”. The internal point of view is one of the most important, and contested, elements of Hart’s concept of law. But at its heart is the simple observation that certain kinds of rules cannot be explained except by showing how particular people accept them as standards for the guidance of conduct. Because Hart thinks that legal systems are essentially systems of rules with a particular structure, we have to show how those rules are accepted as standards of conduct from the internal point of view if we want to properly explain law. It is not enough to provide an account from the perspective of the ‘extreme external’ view of human conduct, which merely “record[s] the regularities of observable behaviour” without explaining that behaviour as controlled by rules. This extreme external point of view cannot understand the way that rules function in the lives of those who use them as guides for their conduct – who take the internal point of view towards rules by

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13 Hart The Concept of Law, above n 3, at 94-95.
14 Hart The Concept of Law, above n 3, at 95.
15 Hart The Concept of Law, above n 3, at 96.
17 Hart The Concept of Law, above n 3, at 86.
18 Hart The Concept of Law, above n 3, at 87. Hart actually distinguishes between three points of view. The ‘internal’, where rules are accepted and used to guide conduct; the ‘external’, where an observer, who does not herself accept the rules, identifies the behaviour of others as guided by rules; and the ‘extreme external’, where the observer does not understand how rules are being used to guide conduct, and merely describes the conduct itself. Of these, the distinction between the extreme external perspective and the others is more crucial, because the external perspective relies on seeing that others take the internal perspective and allows one to explain the law as an affair of rules accepted from the internal point of view, whereas the extreme external perspective completely ignores this.
treating them as “common standards of official behaviour” and reacting critically to violations.19

The significance of Hart’s shift from Austin’s behavioural regularities – of habitual obedience to a political superior – to rules understood from the internal point of view is illustrated by the superior explanatory power of the idea of secondary rules. The explanation of the content of law shifts from the fact that rules have been commanded by the sovereign to the identification of rules as being valid under the “rule of recognition” that is “accepted and used for the identification of primary rules of obligation”.20 Although the rule of recognition is “seldom expressly formulated as a rule”, it can be identified by reference to the practices of legal officials who accept certain rules as obligatory.21 Legal validity can then be explained simply by saying that a particular rule passes the tests or criteria set out in the legal system’s rule of recognition.22

The rule of recognition provides the ultimate test of legal validity within a system. This means that explaining why a rule is legally valid proceeds according to progressively higher levels of legal authorization until one gets to the ultimate rule of recognition, for which “there is no rule providing criteria for the assessment of its own legal validity”.23 One cannot inquire into the validity of the rule of recognition because “it can be neither valid nor invalid but is simply accepted as appropriate” as a rule setting out the legal system’s ultimate criteria of validity.24 Its existence and content of is of an “essentially factual character” that can be shown in the complex “practice of judges, officials, and others”.25 Thus:26

The assertion that [a rule of recognition] exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense ‘exist’ even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.

19 Hart The Concept of Law, above n 3, at 88 and 113.
20 Hart The Concept of Law, above n 3, at 97.
21 Hart The Concept of Law, above n 3, at 98-99.
22 Hart The Concept of Law, above n 3, at 100.
23 Hart The Concept of Law, above n 3, at 103-104.
24 Hart The Concept of Law, above n 3, at 105-106.
25 Hart The Concept of Law, above n 3, at 106.
26 Hart The Concept of Law, above n 3, at 107.
The foundation of legal systems is a social rule practiced within the society, which determines what rules are legally valid. None of this, on the surface, gives any credence to Fuller’s Challenge and the principles of the rule of law.

2.2.2 Internal point of view as law’s moral foundation?

Yet Fuller might claim that there are inklings of a concession to his challenge, particularly his claim that one must explain the fundamental rules of the legal order as being moral foundations understood by ordinary citizens as justifying the legal system as “necessary, right and good”. Hart’s reference above to the practices of “private persons” implies that the actions of ordinary citizens are important to the existence and content of the rule of recognition, suggesting that Hart was following Fuller’s advice and turning his attention to the moral foundations of these fundamental legal rules. For if private persons are identifying the law according to these fundamental rules, must they not also think these rules are morally justified?

However, Hart soon clarifies that ordinary citizens need not “share, accept or regard as binding” the rule of recognition; in fact, in a “complex modern state” the reality is that many, or even most, ordinary citizens have no “general conception of the legal structure or of its criteria of validity”. The existence of a legal system, therefore, does not require that ordinary citizens know or accept the rule of recognition; all that is necessary is that the bulk of the population conforms to the laws that are valid under it most of the time. All that must be shown is that the legal system is effective in a territory.

In contrast, legal officials must accept the secondary rules from the internal point of view, “as standards for all to whom they apply”. Courts must regard the rule of recognition as a “public, common standard of correct judicial decision”; otherwise, no common standard of legal validity would exist, which would mean that there would be no unified legal system

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28 Fuller “Positivism and Fidelity to Law”, above n 27, at 639, where Fuller says that he thought Hart would have elaborated on the idea of the fundamental rules of law-making by accepting that “they seem to be rules, not of law, but of morality. They derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary. … Here, then, we must confess there is something that can be called a ‘merger’ of law and morality”.
29 Hart The Concept of Law, above n 3, at 111.
30 Hart The Concept of Law, above n 3, at 111.
31 Hart The Concept of Law, above n 3, at 111-112.
applying the same rules and norms as legally valid. The “two minimum conditions necessary and sufficient for the existence of a legal system” are therefore that private citizens generally obey the primary rules of obligation identified by the secondary rules of the system, and that legal officials accept the secondary rules as common public standards for the identification of primary rules. While in flourishing legal systems the citizens will know and accept the secondary rules and the primary rules valid under them as standards of conduct, only officials necessarily need to accept these secondary rules.

Yet even if citizens need not accept the fundamental rules of a legal system, it may still be that, as Fuller argued, the explanation of these rules must analyze the moral and political reasons for the officials’ acceptance and use of them from the internal point of view. As Fuller claimed in his reply, this would require Hart to explain the moral foundations of the legal order in a way that would move positivism onto the terrain of legality and fidelity to law. Fuller might, therefore, say that acceptance of rules from the internal point of view requires legal officials to think that their application of the rule of recognition and applying primary rules to people’s behaviour is morally sound.

However Hart also denies this, claiming that even officials who accept the secondary rules of the legal system need not think that it is morally binding to do so, but may accept the system based on self-interest, concern for others, tradition, or just because others want them to accept it. There is “no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so”.

Hart’s developed theory consequently still fails to join Fuller in seeing the idea of law as requiring explanation of the legal system’s moral foundations. In setting out his account of the basic elements of law, Hart still thinks that the explanation of the existence and content of the law is not necessarily required to make any reference to morality or the idea of the rule of law. Further, it becomes even clearer that Hart does not think of law as a moral ideal

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32 Hart The Concept of Law, above n 3, at 112-113.
33 Hart The Concept of Law, above n 3, at 113-114.
34 Hart The Concept of Law, above n 3, at 114.
35 See Chapter 1 above at section 1.3.
36 Hart The Concept of Law, above n 3, at 198.
37 Hart The Concept of Law, above n 3, at 198-199.
– as a moral conception of legality – when he turns to examining the implications of his theory for the connections between law and morality.

### 2.2.3 Classical natural law challenges to legal positivism

Hart devoted a chapter of his 1961 book to examining the implications of his concept of law for the relationship between law and morality. There, his dismissive discussion of Fuller’s arguments parallel his neglect of the moral foundations of fundamental rules in his main analysis, making it unmistakable that he rejected Fuller’s Challenge. Hart’s discussion of the internal morality is limited to merely half a page, in the context of discussing a number of arguments asserting a connection between law and morality.\(^{38}\) His general point in the chapter is that sometimes connections between morality and law that “few if any have ever denied” are taken to be “a sign of some more doubtful connexion, or even mistaken for it”.\(^{39}\)

As in his Holmes lecture, Hart seeks to disentangle the true claims about the connections between law and morality from the falsities. And again a key part of this disentangling is the clarification of the legal positivist Separation thesis, which he states here as “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so”.\(^{40}\) Although Hart only cites the work of Austin and Bentham at a later point,\(^{41}\) it seems clear that he is following the utilitarian Separation thesis that he discussed in his lecture: the substantive content of the laws is not necessarily the same as what morality would demand.

Because he holds this Separation thesis, Hart rejects the classical natural law claim that “there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid”.\(^{42}\) Hart argues that classical natural law visions of a rationally-derived higher law depended on a teleological account of certain fundamental and universal “human needs which it is good to satisfy”.\(^{43}\) Hart’s response is that all legal systems will contain rules that are conducive to peaceful interaction and human survival, because such rules are necessary given ‘truisms’ about human nature and the

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40 Hart *The Concept of Law*, above n 3, at 181-182.
41 Hart *The Concept of Law*, above n 3, at 206.
42 Hart *The Concept of Law*, above n 3, at 182.
43 Hart *The Concept of Law*, above n 3, at 187.
world, making such rules of conduct necessary if a social organization is to be viable in such circumstances.\textsuperscript{44} This reference to the necessity of the law providing basic protections for at least some people’s interests “is the form that we should reply to the positivist thesis that ‘law may have any content’”; besides conceptual analysis of law, we should also recognize the possibility of analysis that reveals truths about the necessary content of legal systems, when ‘necessary’ is understood as what is essential given the contingent facts about human nature and our world that exist at present.\textsuperscript{45}

Hart thus spends half of his chapter on law and morality discussing the way in which these teleological classical natural law themes may be acknowledged within the framework of legal positivism. This focus is presumably due to the long-standing tradition of classical natural law in legal thought, which Hart believes is put into question by the modern secular worldview. But, given that dominant worldview, it may seem like Hart is flogging a dead horse, and that he would have been better off spending more time dealing with the more recent arguments asserting a connection between law and morality that share a non-theological basis.

\subsection*{2.2.4 Modern natural law challenges}

Hart does spend the other half of the chapter discussing such secular and non-teleological arguments asserting a necessary connection between law and morality, and reiterating many of the points that he had made in his Holmes lecture about the influence of morality on law and the use of moral reasoning in legal interpretation.\textsuperscript{46} Yet, he again neglects the issues on which Fuller based his criticisms; within this analysis, Hart spends most of his time discussing whether the legal positivist Separation thesis – in the form of the utilitarian distinction between law as it is and as it ought to be that he emphasized in his lecture – is inferior to natural law positions in its ability to aid our practical moral deliberations about what one ought to do, and he does so without any indication that he recognizes that Fuller’s argument about the principles of the rule of law was concerned with these issues.

\begin{flushright}
\textsuperscript{44} Hart \textit{The Concept of Law}, above n 3, at 188.
\textsuperscript{45} Hart \textit{The Concept of Law}, above n 3, at 195.
\textsuperscript{46} Hart \textit{The Concept of Law}, above n 3, at 199-201.
\end{flushright}
The general practical problem he focuses on is the moral problem raised by laws that satisfy the legal system’s criteria of validity but are obviously “morally iniquitous”. In general, the view that follows from the utilitarian Separation thesis is not the natural law view that such unjust laws cannot be law at all, but the simpler and more candid view that they are law, but too iniquitous to be applied or obeyed. We should not be tempted by the “moral implications latent in the vocabulary of the law” to say that iniquitous law is not law. This is not a question of linguistic usage, but of the comparative merits of classifying or conceptualizing certain kinds of rules so as to “assist our theoretical deliberations, or advance and clarify our moral deliberations, or both”.

Hart’s view is that it is theoretically unsound to exclude rules that are valid according to a system’s secondary rules from the concept of law just because they are iniquitous. What, he asks, could be gained, theoretically speaking, from saying that rules that otherwise exhibit all of the complex characteristics of the social phenomenon of law should be excluded from our concept of law? This distinction would just split our study of rules according to whether they are iniquitous or not, and in doing so would overlook the main reason for studying certain kinds of rules together: because they form a specific method of social control.

Similarly, Hart also thinks there is no practical moral benefit in holding a concept of law that excludes iniquitous rules, for it is unlikely that, when faced with such iniquitous rules, a natural law concept allowing us to say that they are not law is going to lead to better moral results than a positivist concept that says they are law but too iniquitous to be obeyed:

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 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.

47 Hart The Concept of Law, above n 3, at 203.
48 Hart The Concept of Law, above n 3, at 203.
49 Hart The Concept of Law, above n 3, at 203-204.
50 Hart The Concept of Law, above n 3, at 204-205.
51 Hart The Concept of Law, above n 3, at 205.
52 Hart The Concept of Law, above n 3, at 205.
53 Hart The Concept of Law, above n 3, at 205.
54 Hart The Concept of Law, above n 3, at 205.
In fact, Hart thinks the legal positivist view – telling us that “the certification of something as legally valid is not conclusive of the question of obedience”, and that the law’s demands “must in the end be submitted to a moral scrutiny” – will best allow people to understand the implications of the abuse of legal power. Bentham’s threat of ‘quietism’, noted by Hart in his Holmes lecture, looms large here; surely, Hart suggests, the problem of blind obedience to the law is heightened when people are accustomed to think that iniquitous rules cannot be legally valid, for if this is the case then anything that is law cannot be iniquitous. In contrast, “[a] concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them”.

2.2.5 Revisiting the Nazi example

Hart illustrates his arguments by reference to the Nazi regime. The positivist position would identify laws valid according to the fundamental rules of the legal system as legally valid despite their wickedness, while emphasizing that these laws did not determine the moral question of what one ought to do. Hart’s arguments here repeat the points that he made against Gustav Radbruch in the Holmes lecture. While he notes in a footnote the criticism made by Pappe showing that his understanding of the case was mistaken, Hart does not think that causes any problems for his positivist position on this question. He does, however, develop his argument further.

In his earlier analysis, Hart did not explicitly recognize any option for resolution of the grudge informer situation through judges declining to apply the wicked Nazi law, and he instead focused on retrospective legislation. This has led to the criticism that Hart’s legal theory cannot help the judge who is faced with wicked law, without the benefit of the legislative intervention. In this case it seems that the judge cannot just say, as did the citizen,

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55 Hart The Concept of Law, above n 3, at 206.
56 Hart “Positivism and the Separation of Law and Morals”, above n 5, at 598.
57 Hart The Concept of Law, above n 3, at 206.
58 Hart The Concept of Law, above n 3, at 207.
59 Hart “Positivism and the Separation of Law and Morals”, above n 5, at 618.
60 Hart “Positivism and the Separation of Law and Morals”, above n 5, at 615-620.
61 Hart The Concept of Law, above n 3, at 204 footnote 1 text (on 254-255), noting that “Dr. Pappe’s criticism is well founded and the case as discussed by Hart should strictly be regarded as hypothetical.”
‘this law is so wicked that I will not obey it’, because it seems that the very idea of a judge is to apply the law. Fuller states that:

So far as courts are concerned, matters certainly would not have been helped if, instead of saying, “This is not law,” they had said, “This is law but it is so evil we will refuse to apply it.” Surely moral confusion reaches its height when a court refuses to apply something it admits to be law[.]

Fuller thinks, therefore, Hart’s positivist concept of law provides no counsel to judges faced with precise and clearly applicable immoral laws, because then the judge’s positivist obligation of fidelity to law requires the faithful application of the wicked norms.

This is because, unlike citizens, who can choose to disobey wicked laws, judges are obliged by their role to apply these laws; Fuller’s critique is that Hart’s account of fidelity to law cannot make sense of the proper response by judges to breaches of Fuller’s ideal of legality, because Hart’s account seems to require judges to uphold these breaches in the service of the ‘rule of rules’ – with the proviso that if the content of the law reaches a certain level of injustice, judges have a moral obligation to go against their legal obligation. But because Hart’s argument is not an account of fidelity to law in the sense of fidelity to an ideal form of law understood as legality/the rule of law, it is not an account of legal obligation. It does not tell judges how to make the law as it ought to be; it says that when judges are faced by law as it is, they have certain moral reasons to apply that law but that these reasons may compete and therefore sometimes be outweighed by other moral considerations.

In contrast, Fuller’s account of legality is grounded in the ideal of the rule of law, and leads to an obligation of fidelity to law that requires judges to interpret the law so as to try to make it what it ought to be – to live up to the aspirations of legality. Fuller’s claim is that Nazi law is not just morally iniquitous, therefore requiring moral decisions about whether to apply it or not, but legally defective from the perspective of legality – which for Fuller means the internal morality of law. This means that we should not see judges as required to weigh their obligation of fidelity to law against their moral duty not to apply it, but as obliged to

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63 Fuller “Positivism and Fidelity to Law”, above n 27, at 655.
consider how their duty of fidelity to law including all of the elements of legality requires them to interpret the law.\textsuperscript{64}

But in The Concept of Law Hart has still not seen fit to respond to Fuller’s criticisms. Instead of seeing his idea of a judge deciding not to apply the law as a problem, Hart now makes explicit that this is the consequence of his theory. He observes that positivism’s counsel to the “unfortunate official or private citizen who was called on to apply or obey” iniquitous law is a “simpler, more candid” analysis that would “bring into focus far better, every relevant intellectual and moral consideration: we should say, ‘This is law; but it is too iniquitous to be applied or obeyed’”.\textsuperscript{65} This makes it clear that Hart now considers the option of judicial non-application of iniquitous law, sitting alongside legislative retrospective invalidation. The only difference between Hart and Radbruch on this point is that Hart thinks his way of stating the dilemma – whether judges ought not to apply valid but iniquitous law – is theoretically and morally better than Radbruch’s statement that such a law is not legally valid.\textsuperscript{66} Hart either does not see the criticism noted above that judges cannot refuse to apply what they recognize as law without ceasing to be judges and undermining the legal order, or else he does not accept it. If the latter, Hart’s analysis would likely be that while judges apply the relevant secondary rules from the internal point of view in order to identify the iniquitous norms as legally valid, this is not theoretically inconsistent with them coming to the conclusion that to apply those norms would be so morally unsound that they ought refuse to do so, despite this being their legal obligation.

In addition to further disclosing Hart’s self-consciously positivist concept of law, it is significant that the discussion of Radbruch is relatively detailed compared to his discussion of Fuller’s criticisms. The sense of the relative importance of the various natural law or anti-positivist critiques of positivism that one gets from Hart’s discussion is that the classical teleological natural law, which identifies fundamental human ends or goods to which the law must give effect, is the most important theory to be addressed, followed by Radbruch’s modified classical natural law that denies legal validity to extremely unjust norms. Whereas the bulk of Hart’s discussion of law and morality is taken up in long discussions of these

\textsuperscript{64} Dyzenhaus “The Grudge Informer Case Revisited”, above n 62, at 1023-1027.
\textsuperscript{65} Hart The Concept of Law, above n 3, at 203.
\textsuperscript{66} Hart The Concept of Law, above n 3, at 205-207.
arguments, Fuller’s key argument about the inner morality of law warrants only half a page of analysis amongst a number of other ‘sundry’ points relating to the connection between law and morality. It is obvious that Hart does not agree with Fuller’s analysis of the rule of law as a profoundly important element of the concept of law; rather, it is a peripheral argument that can be accommodated within the framework of his theory with only the most cursory of glances.

2.2.6 Hart’s discussion of Fuller’s internal morality of law

Hart’s discussion of Fuller’s principles is brief enough to set out here in full: 67

Further aspects of this minimum form of justice which might well be called ‘natural’ emerge if we study what is in fact involved in any method of social control – rules of games as well as law – which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have the ability and opportunity to obey. Plainly these features of control by rule are closely related to the requirements of justice which lawyers term the principles of legality. Indeed one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connexion between law and morality, and suggested that they be called “the inner morality of law”. Again, if this is what the necessary connexion between law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.

This passage’s meaning and implications, and especially that of the final sentence, are much debated. 68 I will discuss these interpretive debates in detail in the next chapter, which analyses Hart’s view of the moral value of the rule of law. What is of most interest presently is how Hart responds to the arguments Fuller makes in reply to Hart’s Holmes lecture.

Fuller’s reply argued that a failure to conform to his inner morality principles would mean that no order at all could be achieved, because those persons who are supposed to obey the directions of the selfish monarch would be unable to do so because of lack of knowledge of the rules. 69 To the degree that such self-directed obedience to the rules by citizens was

67 Hart The Concept of Law, above n 3, at 202.
69 Fuller “Positivism and Fidelity to Law”, above n 27, at 645 and 660.
necessary for the selfish monarch’s aims to be achieved, non-compliance would frustrate his aims.70

Hart makes similar points. He identifies certain features of control by rule that must be in place if people are going to apply and follow the rules themselves; namely intelligibility, possibility of compliance, and non-retrospectivity.71 Like Fuller, Hart thinks that rule through “general standards of conduct communicated to classes of persons” cannot function without conformity to these principles of legality.72 This is because lack of conformity to these principles would prevent the rules from being communicated to people in a way that makes it possible to obey them. So Hart’s first point is that for a system of rules that are meant to guide and be applied to people’s actions by those people themselves, at least in the first instance, some kind of conformity to these principles is necessary.

Hart’s other point is that these requirements are closely related to certain principles of justice termed the ‘principles of legality’ by lawyers. While his argument here is not completely clear, by linking the requirements he is discussing with principles of justice Hart seems to agree with Fuller that these principles are morally valuable. This is because they give people a fair warning of the standards of conduct that apply to their actions, so that “those who are eventually punished for breach of the rules will have the ability and opportunity to obey”.73 While this may be accepted as a necessary connection between law and morality, this is a connection consistent with Hart’s positivist concept of law, for it is “unfortunately compatible with very great iniquity”.74 For example, a system of slavery or racial segregation might set out its iniquitous norms clearly and in advance. While conformity to the principles of legality makes it possible for people to obey these norms, and thus to plan their lives to take into account the obligations the law sets out, legality can coexist with evil substantive norms. Yet Hart’s dismissive tone creates ambiguity; is Hart saying that because conformity to legality is consistent with iniquity, it is not really moral? I will provide a full analysis of the various interpretive options in the next chapter, when I draw together all of Hart’s arguments relating to the moral value of conformity to legality.

70 Fuller “Positivism and Fidelity to Law”, above n 27, at 645.
71 Hart The Concept of Law, above n 3, at 202.
72 Hart The Concept of Law, above n 3, at 202.
73 Hart The Concept of Law, above n 3, at 202.
74 Hart The Concept of Law, above n 3, at 202.
That is all Hart says about Fuller’s argument in *The Concept of Law*. Hart plainly did not accept Fuller’s Challenge: he does not admit that his concept of law is faulty due to its lack of focus on certain fundamental rules and principles that stand behind any legal regime, and which, as Fuller argues, “derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary”.\(^{75}\) Despite Fuller’s prompting, these issues are still not part of Hart’s analysis of secondary rules, which focuses on describing how legal officials’ practices of following certain rules is constitutive of law,\(^{76}\) without those officials even having to think that the law is morally sound.\(^{77}\) While Hart now makes a brief mention of Fuller’s internal morality principles, he does not see it necessary to incorporate them into his general theory of law. The only impact Fuller’s critique had made is to prompt Hart to make a set of confined observations about certain features of control by rule that are necessary if it is going to be effective in guiding conduct, along with an ambiguous statement about the moral value of conformity to these principles. Hart’s low estimation of the power of Fuller’s criticisms had clearly not changed during the writing of his book.

### 2.3 Fuller’s rejoinder – the morality of law

Hart’s cursory rejection in *The Concept of Law* of Fuller’s Challenge must have been extremely disappointing for Fuller, especially given the effort he had plainly expended in his response, and the friendly correspondence that had developed between the two scholars after their exchange.\(^{78}\) In his most famous book, *The Morality of Law*, Fuller presented his challenge anew, making his arguments in much greater detail and directly criticizing Hart’s position in *The Concept of Law*. Fuller clearly saw that his reply to the Holmes lecture had not impressed Hart, because his major criticism of *The Concept of Law* is that its “whole analysis proceeds in terms that systematically exclude any consideration” of the internal morality of law.\(^{79}\) Fuller observes that “Hart’s view that problems of legality deserve no more than casual and passing consideration” does not “by any means reveal itself solely” in

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\(^{75}\) Fuller “Positivism and Fidelity to Law”, above n 27, at 639.

\(^{76}\) See Hart *The Concept of Law*, above n 3, at Chapters 5 and 6, especially at 104-107 and 111-113.

\(^{77}\) Hart *The Concept of Law*, above n 3, at 197-199.

\(^{78}\) Lacey *A Life of HLA Hart*, above n 1, at 200-201.

\(^{79}\) Lon L. Fuller *The Morality of Law* (Rev ed, Yale University Press, New Haven, 1969) at 133.
Hart’s overly brief analysis of the moral value of the principles of the inner morality of law, but “permeates his book as a whole”. 80 Fuller notes further that although Hart does deal in detail with “substantive” natural law arguments, he fails to accord the same concern to the rule of law: “while Hart recognizes in passing that there exists something that may be called an internal morality of the law, he seems to consider that it has no significant bearing on the more serious concerns of jurisprudence”. 81 I will describe below how Fuller amplified and expanded his 1958 reply in order to restate his challenge to legal positivism.

2.3.1 Law as a moral ideal

As I noted in the introduction to this chapter, when Fuller’s claims in The Morality of Law are considered in jurisprudential analyses, his principles of legality are often detached from his general framework of thought. Put differently, legal positivist engagements with Fuller’s analysis of the rule of law usually do not respond fully to Fuller’s Challenge. For positivists overlook Fuller’s anti-positivist conviction that the law must be explained by reference to moral ideas that relate to the purposive nature of legal systems. Just as in his reply to Hart’s Holmes lecture, 82 in The Morality of Law Fuller takes legal positivists including Hart to task for failing to understand law as a moral ideal that reflects human purposive striving. 83 For Fuller the basic problem with positivism is its failure to see that law must be “viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals”. 84 Positivists mistakenly insist that “law must be treated as a manifested fact of social authority or power, to be studied for what it is and what it does, and not for what it is trying to do or become”. 85

In contrast, Fuller understands law as a purposive activity, the “enterprise of subjecting human conduct to the governance of rules”, 86 and therefore a legal system is “the product of

80 Fuller The Morality of Law, above n 79, at 154-155.
81 Fuller The Morality of Law, above n 79, at 155.
82 Fuller “Positivism and Fidelity to Law”, above n 27, at 646 and 632: Positivists present their theory of legal order as entirely descriptive, rather than as an enterprise that is an object of “human striving … something that must be worked for”, and which sets “direction posts for the application of human energies”.
84 Fuller The Morality of Law, above n 79, at 145.
85 Fuller The Morality of Law, above n 79, at 145.
86 Fuller The Morality of Law, above n 79, at 106, and also 122-130.
a sustained purposive effort”. 87 Like other legal positivists, Hart “makes too little of purpose; he suffers from the positivist delusion that some gain – unstated and unanalyzed – will be realized if only we treat, insofar as we can, purposive arrangements as though they served no purpose”. 88 Fuller’s challenge is more profound than simply pointing out that there are principles of legality that the law must live up to – he claims that these principles form part of the necessary moral basis for any flourishing legal order.

Fuller’s critique continues by claiming that this positivist failure to understand law as a purposive enterprise prevents legal positivists from comprehending the need to explain the social and moral foundations of legal orders. His claim is that positivist legal philosophy draws a bright line between “the purposive effort that goes into the making of law and the law that in fact emerges from that effort”. 89 Positivists concentrate their attention on the law as a “manifested fact of social power”, 90 “the fact of an established law-making authority”. 91 They study flourishing legal systems without asking why they flourish; without explaining how a workable legal order comes into existence and sustains itself over time and how it comes to have power and authority over its subjects. 92 From this perspective, Hart’s reliance on the idea of the rule of recognition without any sustained reflection on how that rule emerges or is maintained allows him to “give neat juristic answers to questions that are essentially questions of sociological fact”. 93 The relevant sociological facts are the purposes that people are aiming at when they participate in the life of the law – the values and ideals that legitimate the law and which induce people to act in ways that sustain the law’s power and authority. To understand how legal order gains its strength and acceptance in a society, one must examine the purposes of those people who participate in the enterprise of legal

87 See also Fuller The Morality of Law, above n 79, at 110: positivism “abstracts from the purposive activity necessary to create and maintain a system of rules”.
88 Fuller The Morality of Law, above n 79, at 190; see also 147: positivism “pretends to abstract from the purpose of law and to treat law simply as a manifested fact of social power” and therefore “cannot be supported except through a falsification of the reality on which it purports to build.”
89 Fuller The Morality of Law, above n 79, at 193. See the very similar formulation earlier: “on the order imposed by law in abstraction from the purposive effort that goes into creating it”: Fuller The Morality of Law, above n 79, at 107. See also 117-118.
90 Fuller The Morality of Law, above n 79, at 147.
91 Fuller The Morality of Law, above n 79, at 147-148.
92 Fuller The Morality of Law, above n 79, at 148-149. See also Fuller “Positivism and Fidelity to Law”, above n 27, at 642-644.
93 Fuller The Morality of Law, above n 79, at 141.
order: “We cannot understand properly the self-understanding of those whose actions sustain the enterprise of law if we do not refer to their own purposes in sustaining the law.”

Fuller thus sees legal order as created and sustained through a relationship between the law-giver (including governmental and legal officials) on one side, and ordinary citizens on the other. It is the self-understanding that citizens have of the purposes of law, and the ideals to which it aspires, that secures their support and engagement with the legal order. The power and authority that the law has is dependent on its fulfilling a purpose valued by citizens, and thus creating “an interplay of purposive orientations between the citizen and his government” that secures legal power for the government and autonomy for the citizen. 95 As Fuller repeatedly emphasizes, the law is not a “one way projection of authority”, but the product of “tacit cooperation between lawgiver and citizen”. 96 Without such reciprocity, people will disengage from the enterprise and be reluctant to do the “things essential for its success”. 97 But because of his lack of understanding of law as a purposive enterprise, Hart’s analysis includes no recognition “that maintaining a legal system in existence depends upon the discharge of interlocking responsibilities – of government toward the citizen and of the citizen toward the government”. 98

The final piece in the argument is that the purposes towards which people are striving when they engage with that institution point towards a moral ideal of legality or the rule of law. 99 In Fuller’s view, these purposes that law-givers must strive towards if they want to encourage their subjects to participate in the enterprise of legal order include the internal

94 Fuller The Morality of Law, above n 79, at 149: “The scholar may refuse to see law as an enterprise and treat it simply as an emanation of social power. Those whose actions constitute that power, however, see themselves as engaged in an enterprise and they generally do the things essential for its success. To the extent that their actions must be guided by insight rather than by formal rule, degrees in the attainment of success are inevitable.” See also Lon Fuller The Anatomy of Law (Frederick A Praeger, New York, 1968) at 115: the positivist attempt to understand the law by excluding reference to its purpose is futile: “Law is a product of human effort, and we risk absurdity if we try to describe it in disregard of what those who brought it into being were trying to do.”
95 Fuller The Morality of Law, above n 79, at 204. See also Fuller The Problems of Jurisprudence (Foundation Press, Brooklyn, 1949) at 701-702.
96 Fuller The Morality of Law, above n 79, at 192 and also see 138-140.
97 Fuller The Morality of Law, above n 79, at 149.
98 Fuller The Morality of Law, above n 79, at 216 and also 138-140
99 See also Fuller “Positivism and Fidelity to Law”, above n 27, at 632.
morality of law – the principles of the rule of law.\textsuperscript{100} The legal positivists’ lack of concern with the purposiveness of legal order means that no analysis of the ideal of the rule of law can proceed, for without reflection on law’s purposes we have “lost wholly any standard for defining legality. If law is simply a manifested fact of authority or social power, then … we can no longer talk about the degree to which a legal system as a whole achieves the ideal of legality”.\textsuperscript{101} It is unsurprising then that one “searches in vain their writings for any recognition of the basic principle of the Rule of Law”.\textsuperscript{102} Only by breaking the tradition of failing to deal “in more than a perfunctory way with the general problem of achieving and maintaining legality” can the positivist neglect of the rule of law be rectified.\textsuperscript{103} And if it does, it will no longer be a positivist theory, for it will accept the ideal of the rule of law as constituting the necessary moral element of the concept of law.

Looking back to the conceptual terminology I introduced in Chapter 1, we can see how Fuller’s argument from ‘Positivism and Fidelity to Law’ has been developed and expanded. In the earlier essay, Fuller does not use the terms ‘legality’ or ‘the rule of law’, instead referring to these ideas by talking about ‘fidelity to law’; in \textit{The Morality of Law} he switches to the former terms, which he uses interchangeably with his account of the ‘internal morality’ or ‘legal morality’.\textsuperscript{104} Instead of focusing on fidelity to law – which he now associates primarily with the citizen’s obligation to the law\textsuperscript{105} – Fuller talks about the aspiration and responsibility towards legality, with legality being understood in terms of the internal morality of law.\textsuperscript{106} Having failed to convince Hart that these concepts must be central to the analysis of law and the obligation of fidelity to law in the grudge informer situation in particular, Fuller moves to clarifying the conception of legality/the rule of law that drives his analysis, to which I now turn.

\begin{flushright}
\textsuperscript{100} Fuller \textit{The Morality of Law}, above n 79, at 148-151. See also 196-197, where Fuller criticizes ‘analytical jurisprudence’ for not discerning ”as an essential element in the creation of a legal system any tacit cooperation between law-giver and citizen”, and for not recognizing the “social dimension” of legal order, the “lawgiver and citizen in interaction with one another” and that “the creation of an effective interaction between them is an essential ingredient of the law itself.”
\textsuperscript{101} Fuller \textit{The Morality of Law}, above n 79, at 147. See also 198.
\textsuperscript{102} Fuller \textit{The Morality of Law}, above n 79, at 214.
\textsuperscript{103} Fuller \textit{The Morality of Law}, above n 79, at 242.
\textsuperscript{104} Fuller \textit{The Morality of Law}, above n 79, at 98.
\textsuperscript{105} Fuller \textit{The Morality of Law}, above n 79, at 39-41.
\textsuperscript{106} Fuller \textit{The Morality of Law}, above n 79, at 41-42 and 93.
\end{flushright}
2.3.2 The principles of the rule of law

One of Fuller’s main aims in *The Morality of Law* is to elaborate in detail the principles of the internal morality of law. By setting these principles out explicitly, Fuller hopes to bring to the surface the key elements of legality that are often passed over in accounts of law as too obvious to warrant comment, and which are thereby systematically neglected in jurisprudence. This will allow legal theory to give a more nuanced analysis of the various requirements of the internal morality and how they go together to make an ideal of legality or the rule of law, and it will also reveal the ideal to which the law, as a purposive activity, must always be understood as striving.

To begin, Fuller recounts and expands the story, from his earlier article, about the absolute monarch – who he now names King Rex. Rex began his reign “filled with the zeal of a reformer” keen to reform a legal system which was filled with cumbersome and expensive procedures, archaic language, and slovenly and sometimes corrupt judges. But far from being a great law-giver, Rex was never able to make any law at all, so pervasive were his failures to comply with the internal morality of law.

Rex’s first action was to repeal all existing laws, so as to begin his reign with a clean slate. Unfortunately, he soon found himself unable to write the new code of law due to his inability to make any generalizations about what people ought to do; he failed to make any general rules. Undeterred, Rex took a crash-course to fortify his skills in generalization and then again set about drafting a legal code. Now he was successful in drafting general rules, but he was still self-conscious about his efforts. Therefore he announced that henceforth people’s actions would be governed by his legal code, but that its contents would remain secret until he could be sure that it was not defective. When his subjects complained that being required to comply with law that is kept secret from them was an unpleasant situation, Rex went back to the drawing board. He now decided that if his preliminary efforts in law-giving were to be made public, he would judge all controversies

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107 Fuller *The Morality of Law*, above n 79, at 98.
108 Fuller *The Morality of Law*, above n 79, at 33-34.
109 Fuller *The Morality of Law*, above n 79, at 34.
110 Fuller *The Morality of Law*, above n 79, at 34.
111 Fuller *The Morality of Law*, above n 79, at 34-35.
that had occurred in the previous year at the beginning of the next year; this would lead to better law, because it was easier to judge cases in hindsight.\(^{112}\) To this his subjects replied that they needed to know in advance what the rules that would apply to their actions were, if they were going to be able to guide their actions according to them.\(^{113}\)

Rex now accepted that he must create a legal code that made public the general rules that would apply to his subjects’ future conduct, and he set about drafting it. But when it was finally published it was found to be a “masterpiece of obscurity”, filled with incomprehensible provisions.\(^{114}\) Now Rex commissioned the foremost experts to make his code understandable. After they had finished, the code was crystal clear; unfortunately, now everyone could see that it was shot through with contradictory commands, and his subjects now picketed the palace with signs reading “This time the king has made himself clear – in both directions”.\(^{115}\) By this time Rex was sick of his subjects’ complaints, and sought to ‘teach them a lesson’ by making his code’s requirements much more onerous – for example, making it a crime to cough or sneeze in front of him, and cutting the time which a subject was given to report when summoned to the throne to ten seconds, when it had previously been ten days.\(^{116}\) This harder line backfired and was met with near revolution, as Rex’s subjects protested that rules requiring the impossible can have no purpose but instilling fear and confusion.\(^{117}\)

Chastened, Rex again set about changing the rules. To his dismay, he found that many of his original rules had been overtaken by political and economic changes and no longer served their purposes; he was forced to make new amendments daily.\(^{118}\) Again his subjects resisted. Finally, after observing that many of his problems had been due to the work of experts, Rex decided that taking over judicial power would allow him to make decisions that his subjects would approve of. He began deciding cases, and was surprised to find that he could make useful generalizations and lay down rules for future conduct. Unfortunately, when the printed reports of his judgments were published, it was found that Rex’s decisions bore no

\(^{112}\) Fuller *The Morality of Law*, above n 79, at 35.  
\(^{113}\) Fuller *The Morality of Law*, above n 79, at 35.  
\(^{114}\) Fuller *The Morality of Law*, above n 79, at 36.  
\(^{115}\) Fuller *The Morality of Law*, above n 79, at 36.  
\(^{116}\) Fuller *The Morality of Law*, above n 79, at 36.  
\(^{117}\) Fuller *The Morality of Law*, above n 79, at 36.  
\(^{118}\) Fuller *The Morality of Law*, above n 79, at 37.
relation to the rules he had previously laid down.\textsuperscript{119} The disappointments of failed law-making had by now taken their toll, and Rex died. He was succeeded by Rex II, whose solution to these problems was to place the powers of government “in the hands of psychiatrists and experts in public relations. This way, he explained, people could be made happy without rules”.\textsuperscript{120}

2.3.3 The Principles Explained

The tale of King Rex is used by Fuller to illustrate eight different ways in which law-making may fail. It does so by reminding us of the usually tacit aspects of the law that our concept of law takes for granted. Rex’s missteps show that laws must be: “(1) general; (2) [promulgated]; (3) prospective, not retroactive; (4) clear and understandable; (5) free from contradictions; and they should not (6) require what is impossible; (7) be too frequently changed; finally (8) there should be congruence between the law and official action.”\textsuperscript{121} A total failure to conform to these principles “does not simply result in a bad system of law; it results in something that is not properly called a legal system at all”\textsuperscript{122}. Citizens might remain faithful to the government despite its failure to respect legality, but:\textsuperscript{123}

A mere respect for constituted authority must not be confused with fidelity to law. Rex’s subjects … remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any.

Any moral obligation of fidelity to law cannot apply to norms that fail to conform to these principles.\textsuperscript{124} Again, this is the duty aspect of the internal morality – the minimum below which a legal system must not fall. In contrast, the aspiration aspect of these requirements must be discussed in an overall analysis of how the various principles relate to one another; for example, where there must be trade-offs between particular principles in order to better achieve legality as a whole.\textsuperscript{125}

\textsuperscript{119} Fuller \textit{The Morality of Law}, above n 79, at 38.
\textsuperscript{120} Fuller \textit{The Morality of Law}, above n 79, at 38.
\textsuperscript{121} As stated by HLA Hart \textit{Essays in Jurisprudence and Philosophy} (Clarendon Press, Oxford, 1983) 347.
\textsuperscript{123} Fuller \textit{The Morality of Law}, above n 79, at 41.
\textsuperscript{124} Fuller \textit{The Morality of Law}, above n 79, at 39.
\textsuperscript{125} Fuller \textit{The Morality of Law}, above n 79, at 104 and 44-46.
Generality flows from the very idea of guidance by rules, because if a ruler does not lay down general norms applying on more than one occasion, he is not making rules but merely issuing situation-specific commands. Fuller says that this does not prevent rules applying to particular individuals or classes of people, because the internal morality only requires that there be rules, not that the rules be fair as between different people. In other words, Fuller does not consider generality of address as part of legality. This distinguishes him from a number of previous theorists of the rule of law. Fuller also notes that very few normative systems will fall short of the duty that this requirement places on them. This is because the use of general rules to guide behaviour is indispensable for the governance of any society larger than a small face-to-face kinship group; it would be extremely time-consuming for a ruler to go around directing her subjects’ every move, even through agents. In terms of aspiration, at its most extreme generality would demand the elimination of any government conduct through particular commands rather than general rules. Fuller later argues that so long as government plays a role in economic affairs that requires decisions about allocation of rights and resources, such decisions cannot be held to the discipline of the internal morality of law. However, the aspiration of generality does not mean that no principles or standards – which require decision-makers to exercise judgment to apply them; for example, ‘reasonableness’ or ‘fair rate’ – should be created, because, so long as judges are applying the general standards faithfully, what is being applied is still a general standard applicable to all relevant situations, and not the judge’s own view of what should occur or a situation-specific command.

Promulgation or ‘publication’ refers to the rule being communicated to citizens, especially those it directly affects. Fuller argues that unlike the other principles, this principle has an obvious level of duty that the ruler should meet: the law should be published somewhere accessible so that people directly affected by it have the opportunity to learn what it requires.

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126 Fuller The Morality of Law, above n 79, at 46.
127 Fuller The Morality of Law, above n 79, at 47.
129 Fuller The Morality of Law, above n 79, at 48.
130 Fuller The Morality of Law, above n 79, at 46-47.
131 Fuller The Morality of Law, above n 79, at 170-177.
of them.\textsuperscript{132} Even if only one person in a hundred actually reads the laws relevant to them, the law should be available for them to do so; and those who do not directly read the law will gain knowledge of its contents from those who have done so.\textsuperscript{133} When we turn to the requirements of aspiration, Fuller argues that the marginal utility principle applies, for it would be “foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him”.\textsuperscript{134} Promulgation does not require that every person knows what every law requires, which would be the most extreme requirement. We must decide how much education should be provided about the content of law relevant to an individual, making a judgment about when the benefit of further resources dedicated to this instruction does not outweigh the additional small gains in knowledge of the law. Where the law conforms to commonly held social norms – Fuller here points to the common law in general as an example – publication is less urgent, because people will generally conform to what the law requires even if they are not guided by specific knowledge of its provisions.\textsuperscript{135} However, it does not usually extend to the explanation of the common law, or even free access to legal cases.

Non-retroactivity or ‘prospectivity’ requires rules to apply only to conduct that occurs subsequent to the creation of the rules. Fuller notes that taken out of all context “a retroactive law is truly a monstrosity” because law is about governing human conduct through rules, and rules that apply from today to conduct that happened yesterday cannot possibly guide human behaviour.\textsuperscript{136} However, the aspiration of this principle does not rule out all retrospective statutes. Even accepting that norms should generally be prospective, we will find that there are some cases in which the cause of legality will be better served by retroactive laws.\textsuperscript{137} This will occur only where retroactive laws are not directed towards guiding behaviour, but towards curing prior mishaps in legality. Where there has been some kind of ‘shipwreck’ relating to one or more of the other principles of legality, a retroactive statute may be the best remedy.\textsuperscript{138} Fuller’s example is where a little-known legal

\begin{itemize}
  \item \textsuperscript{132} Fuller \textit{The Morality of Law}, above n 79, at 43.
  \item \textsuperscript{133} Fuller \textit{The Morality of Law}, above n 79, at 51.
  \item \textsuperscript{134} Fuller \textit{The Morality of Law}, above n 79, at 49.
  \item \textsuperscript{135} Fuller \textit{The Morality of Law}, above n 79, at 50.
  \item \textsuperscript{136} Fuller \textit{The Morality of Law}, above n 79, at 53.
  \item \textsuperscript{137} Fuller \textit{The Morality of Law}, above n 79, at 53.
  \item \textsuperscript{138} Fuller \textit{The Morality of Law}, above n 79, at 53.
\end{itemize}
requirement for a valid marriage – a certain stamp – is systematically overlooked by the person officiating the marriage, or in fact is impossible to satisfy because of technical problems in producing the stamps, leading to all the marriages conducted over a certain period being legally invalid. In this situation retroactive validation cures the violation of promulgation of the requirement to those affected and the ‘impossibility’ of satisfying the requirements. This is an example of how one principle may sometimes need to be violated to uphold another principle.

Fuller also notes that in some cases, judges will be called upon to make a decision about a controversy in which the relevant law does not clearly favour a decision for either party. If the judge decides the case, she must make one party lose even though there was no clear rule that required this result. This constitutes an element of retrospectivity, and this is even clearer in the case where previous rules are overruled. This is the price that we pay for flexibility in our law, but Fuller argues that in the case of crimes, a rule should not be applied to a person if it was unclear at the time of the action whether it was captured by the rule. Finally, through a discussion of a statute that changes the tax payable on the basis of actions done in the past, Fuller shows that determining what counts as retroactive is sometimes controversial.

Clarity refers to the relatively obvious point that the law must be intelligible enough that people can know what it demands of them. Fuller does not discuss what this requires in any detail, except to argue that relatively vague standards such as ‘good faith’ or ‘fairness’ are not necessarily contrary to clarity, so long as they are used to incorporate into the law “common sense standards of judgment that have grown up in the ordinary life lived outside legislative halls”. In contrast, vague standards that do not refer to an existing set of social norms in the area that the general standard is regulating will lead to a lack of clarity, with affected people having to wait and see what decision-makers will see as ‘fair’. In terms of clarity’s aspirations, Fuller earlier discussed the trade-off between extreme clarity and

139 Fuller The Morality of Law, above n 79, at 54.
140 Fuller The Morality of Law, above n 79, at 56.
141 Fuller The Morality of Law, above n 79, at 57.
142 Fuller The Morality of Law, above n 79, at 58.
143 Fuller The Morality of Law, above n 79, at 59-62.
144 Fuller The Morality of Law, above n 79, at 64.
145 Fuller The Morality of Law, above n 79, at 64-65.
coherence in the rules – where law is drafted so any layman can understand it – can only be attained with the cost of “those systematic elements … that shape its rules into a coherent whole and render them capable of consistent application by the courts”.\textsuperscript{146} This indicates that clarity itself does not aim so high as to allow every person to understand every law. As with the requirement of promulgation, here lawyers and other translators of the law – for example, popular books – play an essential role in ensuring that this principle of clarity is satisfied.

Non-contradiction or ‘consistency’ requires that the law not be contradictory in its requirements; for example, requiring certain conduct and punishing that same conduct.\textsuperscript{147} Such a contradiction will usually be inadvertent. Contrary legal rules contained in different statutes are often resolved by the concept of implied repeal, with the later rule being applied.\textsuperscript{148} However, Fuller gives the example of a single statute with one provision that requires factory inspectors to ask for permission for a factory inspection, and another that makes it an offence to refuse that permission.\textsuperscript{149} In such cases, the court will have to decide how to resolve the contradiction, and favouring one provision and nullifying the other will create the element of retrospectivity noted above.\textsuperscript{150} The aspiration of coherence does seem to be, with promulgation, an absolute goal, for there seems to be no reason why we should not aim for a legal system completely free of contradictions.

Possibility requires the law-maker to make sure that compliance with the rules is within the powers of those to whom they apply.\textsuperscript{151} This seems a simple principle: do not require the impossible. It may seem futile and inexplicable to contravene this principle, yet there are some familiar rules of law that do fall foul of it; for example, Fuller argues that any legal liability that attaches to conduct that a person did not intend means that the law “in effect holds a man [responsible] for violating a command, ‘This must not happen,’ which it was impossible for him to obey”.\textsuperscript{152} Further, standards that include reference to the abilities of the ‘reasonable man’ may place impossible demands on people who lack the education,

\textsuperscript{146} Fuller \textit{The Morality of Law}, above n 79, at 45.
\textsuperscript{147} Fuller \textit{The Morality of Law}, above n 79, at 66.
\textsuperscript{148} Fuller \textit{The Morality of Law}, above n 79, at 68-69.
\textsuperscript{149} Fuller \textit{The Morality of Law}, above n 79, at 65-68.
\textsuperscript{150} Fuller \textit{The Morality of Law}, above n 79, at 69.
\textsuperscript{151} Fuller \textit{The Morality of Law}, above n 79, at 70.
\textsuperscript{152} Fuller \textit{The Morality of Law}, above n 79, at 71.
intelligence, or abilities to conform to what is considered reasonable.\textsuperscript{153} However, rules of strict liability are justified because rather than requiring the impossible, they attach special liabilities to certain dangerous activities that one can choose to engage in or not.\textsuperscript{154}

\textit{Stability} or relative constancy through time is, Fuller notes, difficult to formulate as a clear rule, but the principle behind it is similar to that of non-retroactivity: to secure a relatively stable system of laws that allow people to plan their lives, and to be able to rely on their plans.\textsuperscript{155} The example of King Rex changing the law every hour or day obviously prevents people from being able to plan their lives according to those rules, violating the morality of duty. But from the perspective of the morality of aspiration, even law that changes every few years would lead to the frustration of people’s long term planning. Fuller therefore suggests that major changes in the law be indicated well in advance, so that people have sufficient time to adjust their plans.\textsuperscript{156}

\textit{Congruence} between official action and the law is both obviously important in the abstract and complex in practice. It is obvious that the law laid down should be accurately applied to people’s actions, for this seems to be inherent in the very idea of government by rules.\textsuperscript{157} But in practice, congruence can be violated in a number of ways, including mistaken application of the law, inaccessibility of the courts, and by “bribery, prejudice, indifference, stupidity, and the drive toward personal power”.\textsuperscript{158} The attempt to ensure congruence has resulted in doctrines of ‘natural justice’ and ‘due process’, which seek to prevent officials from doing anything other than trying to faithfully apply the law.\textsuperscript{159} The most difficult aspect of congruence is provided by the need for interpretation of the law, for it is up to judges to give meaning to complex rules.\textsuperscript{160} But there are different views on what form the interpretation process should take; for example, how we should use ideas of legislators’ intentions or

\begin{footnotesize}
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\item \textsuperscript{153} Fuller \textit{The Morality of Law}, above n 79, at 71-72.
\item \textsuperscript{154} Fuller \textit{The Morality of Law}, above n 79, at 75.
\item \textsuperscript{155} Fuller \textit{The Morality of Law}, above n 79, at 80.
\item \textsuperscript{156} Fuller \textit{The Morality of Law}, above n 79, at 80.
\item \textsuperscript{157} Fuller \textit{The Morality of Law}, above n 79, at 81.
\item \textsuperscript{158} Fuller \textit{The Morality of Law}, above n 79, at 81.
\item \textsuperscript{159} Fuller \textit{The Morality of Law}, above n 79, at 81.
\item \textsuperscript{160} Fuller \textit{The Morality of Law}, above n 79, at 82-83.
\end{enumerate}
\end{footnotesize}
purposes to resolve difficult questions.\textsuperscript{161} Congruence will, therefore, as an aspirational ideal, be controversial in its exact content.

### 2.3.4 The Internal Morality as Duty and as Aspiration

Having set out the fable of Rex and further analyzed the eight principles of the internal morality of law, Fuller draws a connection to his earlier discussion of the moral distinction between categorical duties and aspirations of excellence.\textsuperscript{162} His fable is supposed to show certain understandings that we have of legal systems that would otherwise remain implicit and unstated, by showing how our concept of law is challenged when these principles are violated. The principles of the internal morality on the one hand mark out “routes to failure” where the lack of conformity prevents the norms from achieving legality: they specify a minimal level of conformity that constitutes the “indispensable conditions for the existence of law at all”.\textsuperscript{163} This is the internal morality’s duty aspect, below which there is a failure of law-making. As Fuller makes clear, the morality of law has both a duty aspect and an aspiration aspect, which require us to specify at what point “the pressure of duty leaves off and the challenge of excellence begins”.\textsuperscript{164}

Below a certain level of conformity to legality, a normative system is not law at all; above that level, further conformity is regulated by the morality of aspiration. Setting out the aspirational goals of legality is difficult, just as any analysis of the highest level of human excellence in a given area is difficult.\textsuperscript{165} In part this is, as Fuller notes, because of the trade-offs between individual principles that often must be made.\textsuperscript{166} The various principles “do not lend themselves to anything like separate and categorical statement. All of them are means toward a single end, and under varying circumstances the optimum marshalling of these means may change”.\textsuperscript{167} A legal system’s overall moral worth on the scale of legality will not be maximized by the greatest conformity to each principle. Fuller observes that absolute

\begin{itemize}
  \item \textsuperscript{161} Fuller \textit{The Morality of Law}, above n 79, at 83-88.
  \item \textsuperscript{162} Fuller \textit{The Morality of Law}, above n 79, at Chapter 1.
  \item \textsuperscript{163} Fuller \textit{The Morality of Law}, above n 79, at 41.
  \item \textsuperscript{164} Fuller \textit{The Morality of Law}, above n 79, at 42.
  \item \textsuperscript{165} Fuller \textit{The Morality of Law}, above n 79, at 10-13.
  \item \textsuperscript{166} Fuller \textit{The Morality of Law}, above n 79, at 104 and 42-46. As Kramer observes “[i]n no legal system is each of the eight principles ever perfectly fulfilled. Perfect compliance with each of them is a will-o’-the-wisp” Matthew Kramer \textit{Objectivity and the Rule of Law} (Cambridge University Press, Cambridge, 2007) 165.
  \item \textsuperscript{167} Fuller \textit{The Morality of Law}, above n 79, at 104.
\end{itemize}
conformity to the internal principles is neither possible nor desirable: “the utopia of legality cannot be viewed as a situation in which each desideratum of the law’s special morality is realized to perfection”.168 This means that sometimes a departure from one principle of the rule of law may have to be addressed through the departure from another principle, and one can only determine what the rule of law requires by combining the various requirements together to best achieve law’s purpose in the particular case.169

Here Fuller returns to an analogy he made earlier, between the higher levels of the morality of aspiration and the economic concept of marginal utility.170 At the higher levels of compliance with the internal morality, more conformity to a particular principle will not yield more legality, for it may detract from another principle. For example, stability and possibility might conflict where “rapid changes in circumstances, such as those attending an inflation, … render obedience to a particular law, which was once quite easy, increasingly difficult, to the point of approaching impossibility” meaning that we should recognize that the aspirational aspect of legality requires “some impairment of both desiderata”.171 Fuller also provides examples of clarity conflicting with congruence,172 and between non-retrospectivity and possibility.173 These examples could, Fuller suggests, be multiplied, and this demonstrates the anti-utopian point that while more conformity is generally better, complete conformity to each principle is impossible.

Further, the requirements of the internal morality of law are relatively imprecise and vague, so that while a total failure clearly renders a system non-legal,174 it is hard to specify the line below which lack of conformity leads to the judgment that a duty has been violated.175 He identifies an exception to this point in the principle of publicity, for this requirement can be easily ‘formalized’ into a rule that can be straightforwardly applied to particular factual

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168 Fuller The Morality of Law, above n 79, at 45; see also 41. Kramer Objectivity and the Rule of Law, above n 166, at 105-109.
169 Fuller The Morality of Law, above n 79, at 104.
170 Fuller The Morality of Law, above n 79, at 44.
171 Fuller The Morality of Law, above n 79, at 45.
172 Fuller The Morality of Law, above n 79, at 45.
173 Fuller The Morality of Law, above n 79, at 53-54.
175 Fuller The Morality of Law, above n 79, at 42-44. This point is discussed in detail by Peter Nicholson “The Internal Morality of Law: Fuller and his Critics” (1974) 84 Ethics 307, at 308-310.
events. It is not hard to envisage a constitution including such a requirement, and the courts effectively applying it as a “legal requirement for making law”. Similarly, the requirement of non-retrospectivity is easily formulated into a rule that would be simple to apply, though Fuller here says that such a blanket prohibition would disserve legality in certain cases. But beyond these principles, it is not obvious how the principles would translate into clear duties. Because it is hard to specify a constitutional standard to which law must live up to, Fuller suggests, we cannot think of legality as a morality of duty that could be applied by judges.

Yet even if there is no ‘bright line’, such judgments must be made if we are to say that there has been a failure of legality. Fuller himself makes such a judgment about Rex (and in his reply to Hart’s Holmes lecture, about the Nazis): because of Rex’s lack of fidelity to the internal morality, he made no law. A morality of duty sets out minimum standards of conduct necessary for social living ‘below’ which conduct should not be allowed to fall: the principles of legality are “at the lowest level … indispensible conditions for the existence of law at all”. If legality “embraces a morality of duty and a morality of aspiration”, then we do have to “draw the boundary below which men will be condemned for failure”. Thus, Fuller claims that there cannot be law without a certain minimum level of conformity to legality. What makes his theory stridently anti-positivistic is his further claim that such conformity is of moral value.

2.4 The Moral Value of Formal Legality

2.4.1 An internal morality of law?

Just as he did in his earlier article, Fuller characterized these rule of law principles as an ‘internal morality’. This phrase signifies two things. On one hand, by speaking of an ‘internal’ morality, Fuller was pointing out that his principles are morally neutral in respect

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176 Fuller The Morality of Law, above n 79, at 43.
177 Fuller The Morality of Law, above n 79, at 43.
178 Fuller The Morality of Law, above n 79, at 44. For an example of a case where retrospectivity would be required by the rule of law, see Fuller The Morality of Law, above n 79, at 53-54.
179 Fuller The Morality of Law, above n 79, at 38-41 and 107; Fuller “Positivism and Fidelity to Law”, above n 27, at 646 and 650-652.
180 Fuller The Morality of Law, above n 79, at 41.
181 Fuller The Morality of Law, above n 79, at 42.
of many substantive moral and political ends.\textsuperscript{182} By speaking of the ‘internal morality’ Fuller indicated that these principles are morally valuable. I will address each of Fuller’s points in turn.

The internal morality is, “over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of aims with equal efficacy”.\textsuperscript{183} This is because a variety of substantive goals can be achieved through law that conforms to the internal morality: the term ‘internal’ refers to a contrast between the formal requirements of legality derived from an understanding of law’s intrinsic nature and purpose, and the ‘external’ moral requirements derived from one’s more general understanding of what morality requires.\textsuperscript{184} Fuller’s position implies that people who disagree on substantive moral issues that make up the external morality to which law aspires should be able to agree about the requirements of legality, the morality internal to the idea of law itself.

Fuller uses access to contraception as an example of this distinction. He notes that the principles of legality do not tell us whether or to what extent the law should regulate people’s access to contraception, so that a legal system could respect legality whether its substantive aim was to prohibit or encourage the use of contraception.\textsuperscript{185} What legality does tell us, for example, is that if the prohibition on the supply of contraception is kept on the books as a symbolic statement, when in reality this prohibition is not enforced, this may impair legality through the violation of congruence and a resulting disrespect of the law.\textsuperscript{186} This means that although legality is neutral with respect to many substantive (‘external’) moral issues, it will speak up where a policy does have implications for the internal morality. We should therefore not be misled “into believing that any substantive aim may be adopted without a compromise of legality”.\textsuperscript{187} An example of this, Fuller argues, is that the internal morality condemns statutes that make legal rights depend on one’s race, as they did in Apartheid-era South Africa, because the attempt to define people based on race will, in his

\textsuperscript{182} Fuller The Morality of Law, above n 79, at 153.  
\textsuperscript{183} Fuller The Morality of Law, above n 79, at 153.  
\textsuperscript{184} Fuller The Morality of Law, above n 79, at 96.  
\textsuperscript{185} Fuller The Morality of Law, above n 79, at 153.  
\textsuperscript{186} Fuller The Morality of Law, above n 79, at 153.  
\textsuperscript{187} Fuller The Morality of Law, above n 79, at 153.
view, inevitably violate the principle of clarity due to the incoherence of the very idea of racial classification.\textsuperscript{188}

Additionally, Fuller also argued that there was another connection between internal and external morality, reiterating an argument he made in his reply to Hart that violations of substantive morality go together with violations of the internal morality, and vice-versa.\textsuperscript{189}

In response to Hart’s response that compliance with legality can accompany great iniquity, Fuller asks:\textsuperscript{190}

\begin{quote}
Does Hart mean merely that it is possible, by stretching the imagination, to conceive the case of an evil monarch who pursues the most iniquitous ends but at all times preserves genuine respect for the principles of legality? … Does Hart mean to assert that history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare?
\end{quote}

Fuller thinks Hart’s arguments here are mistaken because, despite their separateness, there is some interaction between the internal and external moralities of law, and the logical assertion that painstaking respect for one can coexist with carelessness for or repudiation of the other has no real implications for the analysis of any known legal reality.\textsuperscript{191} Fuller finds it hard, therefore, to see why a ruler who has substantively unjust aims, or who is merely indifferent to the aims and interests of his subjects, would have any reason to conform to legality.\textsuperscript{192}

The interaction of internal and external moralities is also illustrated by reference to the requirement of promulgation. Fuller argues that publicity will generally push the law towards substantive goodness, because governments will not want to be seen to be acting unjustly.\textsuperscript{193} This will result not only from the pressure of the public on the law-makers, but also from the conscience of the law-makers themselves, for they will act “more responsibly

\begin{footnotes}
\item[188] Fuller \textit{The Morality of Law}, above n 79, at 159-162.
\item[189] Fuller “Positivism and Fidelity to Law”, above n 27, at 661: “legal morality cannot live when it is severed from a striving towards justice and decency.”
\item[190] Fuller \textit{The Morality of Law}, above n 79, at 154.
\item[191] Fuller \textit{The Morality of Law}, above n 79, at 154.
\item[192] Fuller \textit{The Morality of Law}, above n 79, at 154. This point is also made by John Finnis \textit{Natural Law and Natural Rights} (Clarendon Press, Oxford, 1980) at 273-274. However, Fuller’s acknowledgement that there are efficacy reasons for conforming to the principles of legality weakens his argument here.
\item[193] Fuller \textit{The Morality of Law}, above n 79, at 157-159.
\end{footnotes}
if [they] are compelled to articulate the principles on which [they] act”. 194 Here there is a causal mechanism by which the internal morality has a beneficial effect on law’s compliance with external morality.

### 2.4.2 The moral value of the rule of law

More important than all of these arguments about the relationship between external morality and legality is Fuller’s discussion of how conformity to the internal morality itself promotes the moral value of autonomy, for this is what justifies Fuller’s explanation of legality as an internal morality. The reason is that although the principles of legality are neutral as between many external moral purposes, they do create moral value related to the internal morality’s ultimate purpose. 195 The key passage reads as follows: 196

> I come now to the most important respect in which an observance of the demands of legal morality can serve the broader aims of human life generally. This lies in the view of man implicit in the internal morality of law. I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.

The basic moral idea is respect for human autonomy, secured by restricting the legitimate scope of governmental interference and sanction to comprehensible rules laid out in advance. This is what the ‘internal morality’ principles are meant to achieve. They are therefore morally valuable because they maintain “a kind of reciprocity between government and the citizen … Government says to the citizen in effect ‘These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.’” 197 Law is an enterprise that respects people’s dignity as self-

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194 Fuller The Morality of Law, above n 79, at 159.
195 Fuller The Morality of Law, above n 79, at 162.
196 Fuller The Morality of Law, above n 79, at 162.
197 Fuller The Morality of Law, above n 79, at 39-40. For further discussion of the idea of reciprocity along similar lines, see Christine Korsgaard Creating the Kingdom of Ends (Cambridge University Press, Cambridge, 1986) 189: “For holding one another responsible is the distinctive element in the relation of adult human beings. To hold someone responsible is to regard her as a person – that is to say, as a free and equal person, capable of acting both rationally and morally. It is therefore to regard her as someone with whom you can enter the kind of relation that is possible only among free and equal rational people: a relation of reciprocity”.

The basic principle of the rule of law is that “the acts of a legal authority towards the citizen must be legitimated by being brought within the terms of a previous declaration of general rules”.\textsuperscript{199} The law is, for Fuller, a framework for human planning, allowing people to autonomously choose their own course of life. This is part of what grounds the moral obligation of fidelity to law, and where this reciprocity is absent the obligation to obey loses much of its force.\textsuperscript{200} Autonomy is a deceptively complex idea, especially when applied to practical questions, as Fuller discussed in his essays on freedom.\textsuperscript{201} But in its basic form, autonomy is the idea that Fuller uses to explain the moral value that conformity to the principles of legality secures.

### 2.5 Fuller’s Critique of Hart and his reply to critics

#### 2.5.1 The critique of Hart

In thinking about the development of the Hart-Fuller debate and the implications of Fuller’s Challenge for the positivist conception of the rule of law, it is instructive to compare the lines of argument in \textit{The Morality of Law} with Fuller’s reply to Hart’s Holmes lecture. In Fuller’s reply, his main claim was that although Hart recognized an obligation of fidelity to law, his concept of law contained no moral idea of legality or the rule of law that could explain such an obligation; this is why Hart’s theory is defective and incomplete. Fuller’s proposed solution was for Hart to recognize that the fundamental rules of law-making are accepted by participants in the legal system because they are regarded as good and right, and then to explain why this is so – allowing Hart to provide his own positivist account of legality. But in addition, Fuller thought that one of the key reasons why the law is understood as right is that it conforms to the principles of the inner morality of law – the rule of law. However, as discussed in the first section of this chapter, Hart’s position in \textit{The Concept of Law} did not take up Fuller’s suggestions: he treated the rule of law as merely an

\textsuperscript{198} Fuller \textit{The Morality of Law}, above n 79, at 207.
\textsuperscript{199} Fuller \textit{The Morality of Law}, above n 79, at 214.
\textsuperscript{200} Fuller \textit{The Morality of Law}, above n 79, at 40.
incidental aspect of law, rather than constituting the central moral ideal that law must necessarily live up to.

As discussed above, in *The Morality of Law* Fuller again argues that the law must contain moral elements that explain why participants accept its fundamental rules. Now, however, he explains this idea by emphasizing that law is a social enterprise that must be understood by reference to the aims and purposes of those whose activities and efforts sustain it. So whereas the positivist focuses only on analyzing the workings of flourishing legal systems, Fuller’s concept of law seeks to explain how legal systems come to flourish, what efforts are required to sustain them, and what purposes and ideals are being aimed at. Fuller’s claim is that the ideal of legality is the key purpose or ideal that must be the object of human striving and achievement if a legal system is to exist.

Fuller’s detailed critique of Hart’s *The Concept of Law* can, therefore, be understood as a continuation of the arguments that Fuller made in his reply to the Holmes lecture. His internal morality is the foundation of a natural law theory that is not a ‘higher law’ specifying the substantive moral principles that human law should replicate, but what he calls a procedural natural law that specifies “the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”. 202 Fuller argues that the positivist tradition has generally exhibited either complete ignorance or casualness about the demands of the internal morality, and that even most natural lawyers have only dealt with the principles in an incidental and piecemeal way. 203 This is demonstrated by Hart’s idea of secondary rules of recognition, which Fuller thinks is faulty because its focus on power-conferring rules means that these fundamental rules cannot have limitations built into them, including tacit limits on legislative power. 204 In other words, Hart’s distinction between powers and duties compels him to say that “lawmaking authority cannot be lawfully revoked”. 205

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203 Fuller *The Morality of Law*, above n 79, at 98.

204 Fuller *The Morality of Law*, above n 79, at 137.

Fuller thinks this theoretical fault is a symptom of the deeper mistake that runs throughout Hart’s theory of law, namely its lack of understanding of law as a purposive activity sustained by the efforts and striving of individuals to give effect to an ideal of legality:

[Hart] is applying to the attitudes that bring into being and support a legal system juristic distinctions that can have no meaning in this application. There is no doubt that a legal system derives its ultimate support from a sense of its being ‘right.’ However, this sense, deriving as it does from tacit expectations and acceptances, simply cannot be expressed in such terms as obligations and capacities.

Fuller thinks, therefore, that what Hart characterizes as fundamental secondary legal rules – specifying how we recognize the law, how we change it, and how adjudication is to proceed – are not legal rules at all, but fundamental principles of political morality that are accepted within the community, even if that acceptance is usually tacit.

This interpretation is confirmed by Fuller’s later discussion of Hart’s idea of the rule of recognition. Fuller views with scepticism Hart’s identification of the rule of recognition in the English legal system as giving sovereignty to the Queen in Parliament. Fuller argues that this cannot really be a clear rule that is evident in the practice of government officials, for it cannot be said to “summarize and absorb all the little rules that enable lawyers to recognize law in a hundred different special contexts”, unless Hart is to admit that his rule actually covers so much shifting and complex practice that it loses its target. Indeed, when we look at particular societies we will see that the foundational basis for legal authority and legislative power is often a shifting set of political and moral understandings.

This is Fuller’s direct criticism of Hart in The Morality of Law, and it is very similar to the critique set out in his reply to the Holmes lecture: in a nutshell, Hart fails to see that law answers to a moral ideal of legality/the rule of law that brings with it a conception of fidelity to law. What is new is the emphasis on Hart’s lack of understanding of law as a purposive enterprise that is dependent on the action of a variety of participants to secure its power and achieve its aims, which is the wider argument that frames Fuller’s account of legality in his book. But although this is Fuller’s main criticism of Hart, it is in the reply to critics he added to the revised edition where his objections to Hart’s theory are stated in their clearest form.

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206 Fuller The Morality of Law, above n 79, at 138.
207 Fuller The Morality of Law, above n 79, at 140.
208 Fuller The Morality of Law, above n 79, at 141.
using the concept of managerial direction to clarify the differences between positivism and Fuller’s modern natural law.

2.5.2 The reply to critics

While *The Morality of Law* constituted a response to Hart’s implicit rejection of Fuller’s approach in his reply to the Holmes lecture, it was itself quickly beset by harsh criticisms. In the revised edition, Fuller included a reply to critics that further illustrates Fuller’s general views about the concept of law. This reply is not concerned with additionally clarifying the content of the rule of law ideal, but to defend the moral character of Fuller’s principles, and also to speculate on the tacit assumptions that motivate both his own theory and legal positivism.\(^{209}\) I have incorporated Fuller’s observations on the latter question into the discussion above of the purposes of the law; Fuller here merely expands on his view that the positivist perspective systematically overlooks the fact that law is an enterprise with its own purposes that manifest in “elements of tacit interrelatedness” in any flourishing legal order.\(^{210}\) Fuller thus reiterates the basic problem with the legal positivist perspective:\(^{211}\)

> The positivist recognizes in the functioning of a legal system nothing that can truly be called a *social dimension*. The positivist sees law at its point of dispatch by the lawgiver and again at the point of its impact on the legal subject. He does not see the lawgiver and citizen in interaction with one another, and by virtue of that failure he fails to see that the creation of an effective interaction between them is an essential part of law itself.

Most of Fuller’s analysis in his reply is concerned with defending his view that the rule of law principles are morally valuable. Fuller’s arguments about the moral value of legality were quickly met with critical reviews, including one by Hart published in the *Harvard Law Review*.\(^{212}\) Fuller summarized the critics’ arguments as claiming that:\(^{213}\)

> The notion of an internal morality of law betrays a basic confusion between efficacy and morality. Some respect for the eight principles of legality is essential if law is to be effective, but that does not mean that these principles are moral in nature, any more than holding a nail straight in order to hit it right is a matter of morality. You won’t drive the

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\(^{209}\) Fuller *The Morality of Law*, above n 79, at 189.

\(^{210}\) Fuller *The Morality of Law*, above n 79, at 190-192.

\(^{211}\) Fuller *The Morality of Law*, above n 79, at 193.


\(^{213}\) Fuller *The Morality of Law*, above n 79, at 200.
nail properly if you don’t hold it straight and so also you won’t achieve an effective system of law unless you give heed to what I have called principles of legality. Neither of these exercises of common prudence has anything to do with morality.

This seems to be the basis for Hart’s criticism that the classification of the principles of legality as a form of morality “breeds confusion”, because these principles are “what is necessary for the efficient execution of … guiding human conduct by rules”.214 Hart’s crucial objection to the terminology of ‘morality’ being applied to these principles is that:215

… it perpetuates a confusion between two notions that it is crucial to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has internal principles. … But to call these principles of the poisoner’s art ‘the morality of poisoning’ would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.

Exactly what Hart meant by this argument is a matter of debate – as will be discussed in detail in Chapter 3 – but Fuller and most interpreters take him to be attempting to refute Fuller’s suggestion of a connection between law and morality, by saying that the “principles of legality represent nothing more than maxims of efficiency for the attainment of governmental aims”.216 In other words, the principles of effectiveness, or ‘efficacy’, that allow the law to better serve whichever purpose to which it is being put. Conformity to legality makes the law more effective at guiding conduct, rather than necessarily making it more morally sound.

Fuller had himself noted this efficacy aspect of the principles of legality in *The Morality of Law*, because he stated that “some minimum adherence to legal morality is essential for the practical efficacy of law”.217 Without such minimal adherence to legality, even a dictator bent on brutal purposes would fail to achieve those purposes, because the enterprise of guiding conduct by rules will fail. Fuller provides the analogy of a good carpenter, who “has learned his trade well and keeps his tools sharp” and could be equally effective in building an orphanage or a thieves’ hangout.218 The efficacy of a carpenter in building depends on conformity to the principles of good carpentry, and this is a precondition for good buildings, whatever other purpose those buildings are put to. The analogy to law is that the principles

216 Fuller *The Morality of Law*, above n 79, at 214
217 Fuller *The Morality of Law*, above n 79, at 156.
218 Fuller *The Morality of Law*, above n 79, at 155.
of legality are necessary if effective law is to be created, irrespective of the intended purpose of the law. If a dictator wants to use law to achieve her aims, she must comply with the principles of legality; if not, “power may be so inceptly or corruptly exercised that an effective legal system is not achieved”.\textsuperscript{219} So there is a clear sense in which legality does increase the efficacy of the law.

Despite this acknowledgement, Fuller thought that the critics of his book had gone too far by characterizing the principles of legality as merely making the law more effective.\textsuperscript{220} As Kristen Rundle has revealed through study of his private correspondence, Fuller was indignant at his critics’ interpretation of this mention of craftsmanship as if it destroyed the morality of his principles and therefore constituted “a kind of admission … that the whole thing is a matter of ‘efficacy’”.\textsuperscript{221} So although there is a sense in which Fuller accepts that non-compliance with the internal morality will often frustrate a law-giver’s aims, and compliance aid them, this does not reduce these principles to matters of efficacy only, for there is still an irreducibly moral aspect to the principles of legality.

\textbf{2.5.3 Managerial order and legal order}

Fuller attempted in his ‘reply to critics’ to show the faults of his detractors’ arguments about efficacy by clarifying this moral value. He does so by setting out a distinction between \textit{law} and \textit{managerial direction}.\textsuperscript{222} Both of these concepts relate to the control and direction of human behaviour by an authority, yet there are subtle differences between them that show that legality is not just about effective rule over persons, and that it also makes a moral difference. Under a managerial form of social order, people are required to follow the directives of their superior in order to fulfill the purposes of the superior or the organization.\textsuperscript{223} In a legal order, people follow legal rules in the course of conducting their own affairs – in the service of their own ends and aims – and this self-directed and self-interested compliance with legal rules serves the interests of society as a whole;\textsuperscript{224} in a legal order the rules “normally serve the purpose of setting the citizen’s relations with other

\begin{footnotes}
\footnote{219 Fuller \textit{The Morality of Law}, above n 79, at 157.}
\footnote{220 Fuller \textit{The Morality of Law}, above n 79, at 200-201.}
\footnote{221 Kristen Rundle \textit{Forms Liberate} (Hart, Oxford, 2012) at 107.}
\footnote{222 Fuller \textit{The Morality of Law}, above n 79, at 207.}
\footnote{223 Fuller \textit{The Morality of Law}, above n 79, at 207.}
\footnote{224 Fuller \textit{The Morality of Law}, above n 79, at 207-208.}
\end{footnotes}
citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed”.

With this distinction set out, Fuller proceeds to discuss how the principles of legality work in each of these contexts, and what this means for their moral value. Fuller’s basic point is that while some of the principles of the internal morality are applicable to the managerial context because they are indispensable for a superior who aims to create effective managerial order, three of the principles – generality, congruence, and prospectivity – are not. The other five principles must be fulfilled if effective control by rules is to occur: if a superior wants the subordinate to effectively contribute to the superior’s goals, she will have to promulgate her orders in a clear way, without contradiction, and they should not be impossible to perform nor change too frequently. Failure to conform to these principles “may seriously impair the ‘efficacy’ of the managerial enterprise”. So far the critics have a point that Fuller is happy to accept, continuing his prior acknowledgement of legality’s contribution to efficacy.

However, Fuller argues that the distinctive moral value of legality is revealed by the fact that the other three principles do not have an unvarying application in the managerial context. In managerial order the principles are adhered to because they allow the superior to better use the subordinate to achieve their purposes, which means that where a violation would better achieve their purposes there is no reason not to violate legality. They are not a necessary condition of effectiveness, because their violation may sometimes make the managerial order more effective. Even if most of the time there may be reasons for conformity to these other three principles, no ruler motivated by self-interest alone would need to conform all of the time. This means, Fuller argues, that consistent conformity to these principles of legality must be motivated by moral values. For example, generality will in many situations be valuable from the perspective of effectiveness, as making standing orders is likely to be less onerous for the superior than constantly having to give specific orders. But sometimes particular orders are more effective, even if they depart from the rules previously laid down; therefore strict and unwavering compliance with congruence is not necessary for

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225 Fuller The Morality of Law, above n 79, at 207-208.
226 Fuller The Morality of Law, above n 79, at 208.
227 Fuller The Morality of Law, above n 79, at 208.
228 Fuller The Morality of Law, above n 79, at 208.
229 Fuller The Morality of Law, above n 79, at 208.
effectiveness. Finally, while it is generally futile to order someone to do something yesterday, it may sometimes be useful to do so in the interests of disciplining or instilling terror in the population, by frightening them “into impotence”.

What Fuller is attempting to illustrate here is that in a managerial order “[i]nsofar as the principles of legality … are here applicable they are indeed ‘principles of efficacy’; they are instruments for the achievement of the superior’s ends”. From the managerial perspective, the reason for conforming to legality is to better achieve the superior’s ultimate goals. Once one “thinks of law in terms of the managerial model”, law appears as management and legality appears as mere efficacy. The legislator will be thought of as complying with the principles in terms of whether such compliance is efficacious in the particular circumstances, and Fuller shows how non-compliance will often benefit the legislator with this mindset. The fundamental failure of his critics, Fuller suggests, is due to the “main ingredients” of their analysis being drawn not from the concept of law, but from that of managerial direction. This is particularly the case with respect to Hart, whose concept of law is “based essentially on the managerial model”, which explains Hart’s understanding of the principles of legality as merely matters of efficacy.

In contrast, a proper understanding of legal order requires the comprehension that “the existence of a relatively stable reciprocity of expectations between law-giver and subject is part of the very idea of a functioning legal order”. The law is not a means for a superior to achieve their goals through the actions of their subordinate, but “furnishes a baseline for self-directed action”:

… if the law is intended to permit a man to conduct his own affairs subject to an obligation to observe certain restraints imposed by superior authority, this implies that he will not be told at each turn what to do; law furnishes a baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives. … [L]aw is not,

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230 Fuller The Morality of Law, above n 79, at 208-209.
231 Fuller The Morality of Law, above n 79, at 209.
232 Fuller The Morality of Law, above n 79, at 40.
233 Fuller The Morality of Law, above n 79, at 209.
234 Fuller The Morality of Law, above n 79, at 212.
235 Fuller The Morality of Law, above n 79, at 212-214.
236 Fuller The Morality of Law, above n 79, at 214.
237 Fuller The Morality of Law, above n 79, at 215.
238 Fuller The Morality of Law, above n 79, at 209.
239 Fuller The Morality of Law, above n 79, at 210.
like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another.[.]

In a legal order the internal morality principles are adhered to because they allow the law to serve its purpose of creating a secure framework for autonomous planning and human interaction, so that the only reason that a law-giver should violate a principle would be in order to prevent a worse violation of another principle. So while in a managerial context the principles are regarded solely from the instrumental perspective – as “counsels of expediency”\textsuperscript{240} – in the legal context they are primarily understood as moral limitations on law-making:\textsuperscript{241}

The twin principles of generality and faithful adherence by government to its own declared rules cannot be viewed as offering mere counsels of expediency. This follows from the basic difference between law and managerial direction; law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.

Congruence is the principle of the utmost importance, because it is the “very essence” of legality that the rules laid down are actually applied to people’s actions; “If the Rule of Law does not mean this, it means nothing”.\textsuperscript{242} Similarly, without generality, a person will find themselves ordered to do specific things, rather than planning their own course of life according to standing rules.\textsuperscript{243}

This discussion shows that while Fuller accepted that the principles of the internal morality could be viewed from a managerial perspective as often achieving more effective governance “as a matter of expediency”,\textsuperscript{244} from the perspective of a ‘law-giver’ concerned to set up a system of rules that facilitates self-directed planning on the part of citizens, the principles are requirements for the satisfaction of a moral value of human autonomy, which must always be respected. This, Fuller thinks, means that his critics have failed to reduce legality to efficacy only, and that he was right to speak of the internal morality of law. For Hart and the other critics were not speaking of legal order at all; their concepts are of

\textsuperscript{240} Fuller \textit{The Morality of Law}, above n 79, at 212.
\textsuperscript{241} Fuller \textit{The Morality of Law}, above n 79, at 212.
\textsuperscript{242} Fuller \textit{The Morality of Law}, above n 79, at 210.
\textsuperscript{243} Fuller \textit{The Morality of Law}, above n 79, at 210.
\textsuperscript{244} Fuller \textit{The Morality of Law}, above n 79, at 208.
managerial order, not law. Our understanding of the principles of legality as morally valuable is very different from the view that casts them as efficacy principles of managerial order.

2.6 Conclusion

This chapter has analyzed the second stage of the Hart-Fuller debate, which took place in the two important jurisprudential books that Hart and Fuller produced in the years after their exchange in 1958. It revealed that Hart’s response to Fuller’s critique of his Holmes lecture was dismissive, because Hart’s comprehensive analysis of the concept of law in his book still shows an almost complete lack of appreciation of the internal morality of law (Fuller’s conception of legality or the rule of law) as an important aspect of the nature of law. This was further provocation for Fuller, whose own key statement of his ideas again takes aim at Hart’s positivism, this time analyzing in far greater detail the requirements of the internal morality of law and the reason for their central place in any plausible account that can make sense of law as a purposive activity. Each of Fuller’s principles was discussed in detail, as well as the moral value that he identified as secured by conformity to them. Because Fuller’s account of the internal morality has become the canonical statement of the rule of law that is used as the basis for discussion of that concept in jurisprudential analysis and which Hart, Raz, and other recent positivist conceptions primarily engage with, it was important to set out the developed form of Fuller’s views, and the ways in which he clarified his ideas in response to critics. Fuller’s considered view remained that law is a purposive enterprise of guiding human conduct by rules, and that the ideal of legality or the rule of law that he identified in the principles of the internal morality were both intrinsic to that enterprise, and gave it a necessary moral element due to those principles’ contribution to human dignity and autonomy. This is Fuller’s Challenge to legal positivism from the perspective of the rule of law.

This chapter, along with the last one, provides the foundation for the rest of this study by laying out Fuller’s Challenge to Hart’s legal positivism, in the context of their famous debates. In the chapters that follow, I will show how Hart and other positivists who have followed in his tradition of thought have grappled with Fuller’s Challenge by making
concessions to his view that the rule of law is of moral value and that conformity with its principles it is part of the nature of law. I will argue that Hartian positivists have often been ambiguous, and that their differing responses contain a variety of tensions and problems that have not been satisfactorily resolved – which is the main thesis of this study. While Fuller failed to persuade Hart of the importance of the rule of law as a moral foundation for law – and thus the importance of Fuller’s Challenge to the positivist perspective – recent legal positivists have engaged more closely with the full extent of Fuller’s theory. As we will see below, some have even come to accept the basic Fullerian standpoint. However, I will argue in later chapters that even where a more substantial engagement with Fuller has occurred, positivists have still failed to come to terms with the implications of their concessions to Fuller’s Challenge. Remember that my main thesis in this study is that Fuller’s Challenge still remains a potent critique of positivism in the Hartian tradition, and that the attempts that positivists have made to defuse that critique have revealed both (i) a clearer view of the self-understanding of the main claims of contemporary legal positivism, including major differences of position, and (ii) further problems and tensions that positivists are still yet to resolve. With this in place, we will be able to see how the positivist/anti-positivist debate concerning the rule of law should proceed in the future. But before we can see this, I must set out Hart and the other key positivists’ responses to Fuller’s Challenge, in the next five chapters.
Chapter 3: The Rule of Law in Hart’s Review and Later Writings

3.1 Introduction

This chapter sets out Hart’s ultimate position in response to Fuller’s Challenge, as revealed in the various places where he discussed Fuller’s conception of the rule of law. It builds on the discussion in the previous chapter, and argues that Hart does not grapple with Fuller’s Challenge as a fundamentally different account of law that impugns the positivist perspective; instead, Hart simply evaluates Fuller’s arguments according to his own concept of law. As part of this approach, Hart takes a ‘divide and conquer’ strategy, by splitting his analysis of Fuller’s rule of law principles into two discrete questions: (i) the moral value of those principles, and (ii) the relationship between the rule of law and the concept of law. Beyond demonstrating his clear rejection of Fuller’s general anti-positivist challenge, this chapter shows that Hart’s analysis is ambiguous on these questions, because his arguments can plausibly be interpreted in a number of different ways. This ambiguity can be seen as either an attempt to gloss over the problems and tensions that Hart recognized were caused by his attempt to deal with Fuller’s Challenge, or as simply due to Hart’s failure to discuss Fuller’s arguments in greater detail, motivated by his view that the challenge was unimportant.

3.2 Hart on the moral value of the rule of law

Hart is usually understood as clearly denying Fuller’s claim that the rule of law is of moral value. For example, in the most detailed recent analysis of this issue, Jeremy Waldron concludes that in the places in his writings where he confronted Fuller’s moral claims about the rule of law, Hart “denies that the principles of legality have any particular moral significance”.¹ From this perspective, Hart’s argument is that the so-called “internal morality” is not morally valuable at all, and instead Fuller’s rule of law principles are

requirements that contribute merely to the efficacy of the law. Similarly, Andrei Marmor understands Hart’s response as holding that:  

> these virtues of the rule of law are merely functional values, not moral ones. Just like the sharpness of a knife, which makes the knife a good one, so the rule of law virtues make the law good, but only in terms of its functioning as a means of social control. Functional good, Hart … argued, must not be confused with moral value.

On this interpretation, Fuller’s principles are merely principles that increase law’s effectiveness in achieving whatever goal the law is being used for, rather than serving any moral values. Fuller himself thought that Hart and other critics were “intent on maintaining the view that the principles of legality represent nothing more than maxims of efficiency for the attainment of governmental aims”. This is what I will call the ‘Standard’ interpretation of Hart’s position on the rule of law’s moral value.

Yet this analysis of Hart’s argument may be contested, because it overlooks the fact that what Hart says about Fuller’s principles of legality is ambiguous. I agree with NE Simmonds that, far from clearly and consistently saying that Fuller’s principles achieve nothing of moral value, Hart makes a number of arguments that suggest he accepts that conformity to Fuller’s principles is morally valuable.

Waldron also observes the variety of claims Hart makes, but argues that Hart is deliberately equivocal on the rule of law’s moral value. Waldron’s view is that Hart’s discussion of Fuller’s principles aims primarily at negating Fuller’s critique of legal positivism, meaning that, if what is necessary to refute Fuller in one discussion is inconsistent with what is necessary to refute Fuller in another context, Hart seems to rest his hopes of prevailing on the fact that many of his readers will be more interested in Fuller’s discomfiture than in the (in)consistency of Hart’s refutation.

Waldron thus portrays Hart as moving back and forth between accepting and denying the moral value of Fuller’s principles, depending on what view suits his own immediate

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5 Waldron “Positivism and Legality”, above n 1, at 1157.
concerns, without unequivocally admitting that Fuller’s arguments were true. This is the ‘Equivocal’ interpretation, which sees Hart making inconsistent claims at different points and attempting to mask this with ambiguity.

Yet it may be argued, in contrast, that Hart’s ambiguity is unintentional, and that it hides the fact that he does accept Fuller’s argument that conformity to the principles of legality is of moral value. Rather than sometimes denying this moral value, Hart’s criticisms are directed against what he sees as Fuller’s view that these principles are a unique ‘morality of law’ – a morality derived from the very idea of law itself. This would mean that Hart is not equivocal in the sense of making contrary arguments at different points – Waldron’s argument – but that his arguments are ambiguous. For it is possible to construct an interpretation of Hart as accepting that conformity to Fuller’s principles is of moral value at the same time as he argues that these principles of legality are not themselves “a morality”; I will explain the distinction between these claims below. I will call this the ‘Alternative’ interpretation.

Hart makes a number of arguments about Fuller’s principles of the rule of law in his writings, and in this section I will draw these together to analyse his position. To begin with, I will examine the work in which Hart focuses most closely on Fuller’s arguments: his review of *The Morality of Law*. As noted above, there are important recent analyses that deal with this issue in depth. As I will demonstrate below, Waldron supports the Equivocal interpretation, Simmonds supports the Standard interpretation while noting the arguments that give rise to the Equivocal interpretation, and John Gardner interprets Hart in a way similar to the Alternative interpretation. I will refer to these secondary accounts of Hart’s arguments in order to illustrate and analyse the cogency of these three interpretive approaches. I agree with these secondary analyses that it is not possible to give a compelling interpretation that disambiguates Hart’s various arguments on this point.

### 3.3 Hart’s review of *The Morality of Law*

#### 3.3.1 The Standard interpretation: efficacy, not morality

I have already shown that the Standard interpretation sees Hart as denying that Fuller’s principles are of any moral value, in themselves. Hart’s discussion of Fuller’s conception of
the rule of law in his review of The Morality of Law is usually seen as the clearest statement of this critique of Fuller. Hart is said to argue that Fuller’s principles of the rule of law are of no moral value, being merely principles that make the guidance of human conduct more efficient or effective.

Hart clearly states that the various principles of the internal morality that Fuller identifies should be understood as deriving from reflection on what makes the law more efficient for the purpose of guiding conduct. Although Fuller is right to identify his eight principles as “forms of legal excellence”, he is wrong to call these principles a morality, because they are actually:6

derived, not from principles of justice or other “external” moral principles relating to the law’s substantive aims or content, but are reached solely through a realistic consideration of what is necessary for the efficient execution of the purpose of guiding human conduct by rules. We see what they are by occupying the position of the conscientious legislator bent on this purpose, and they are essentially principles of good craftsmanship. Indeed, they are compared by the author to principles (he says, “natural laws”) of carpentry. They are independent of the law’s substantive aims just as the principles of carpentry are independent of whether the carpenter is making hospital beds or torturers’ racks.

Because these principles are derived from reflection on how rules can more effectively guide human conduct, Hart thinks that to call them the ‘internal morality’ of law “breeds confusion”, and therefore he prefers to adopt what he thinks is the more conventional designation – the “principles of legality”.7 Hart therefore criticizes Fuller’s failure to distinguish between purposive activity and morality: we should not call the set of internal principles that best allow an instrument or practice to achieve its purposes “a morality”, for then we would have to accept that there was an internal morality of, say, poisoning.8 In other words, we should not confuse the existence of internal principles guiding the efficacious achievement of a purpose with morality.

The Standard interpretation takes this argument as claiming that conformity to Fuller’s principles of legality is of no moral value.9 This interpretation comports with Hart’s clear

6 HLA Hart Essays in Jurisprudence and Philosophy (Clarendon Press, Oxford, 1983) at 347. Here I cite to the reprinted essay rather than the Harvard Law Review article, because the essay is the version that Simmonds cites to.
7 Hart Essays in Jurisprudence and Philosophy, above n 6, at 347.
8 Hart Essays in Jurisprudence and Philosophy, above n 6, at 350.
statement that the principles can be seen as instrumental principles of efficacy that are “independent of the law’s substantive aims”;\(^\text{10}\) that they are not in themselves a morality aiming at a value of ultimate importance in human life, and that speaking of them as a morality only causes confusion.\(^\text{11}\) The Standard interpretation argues that if these principles of legality are not themselves a morality, and should instead be understood as the principles that make the law more efficacious in achieving its purpose, then it must follow that Hart thinks that conformity to these principles is not of moral value.

### 3.3.2 An Alternative interpretation

It is arguable, on the Alternative interpretation, however, that Hart does not make this objection that conformity to the formal procedural principles is only of efficacy value and therefore of no moral value. On this account, the Standard interpretation does not accurately reflect Hart’s main claim: rather than denying that conformity to the principles of rule of law is morally valuable, Hart is taking issue with what he sees as an inapt characterization of the principles of the rule of law as being principles that constitute a morality.\(^\text{12}\) (I will come back to what Hart means by ‘a morality’ shortly). Hart uses an analogy with poisoning:\(^\text{13}\)

Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. (“Avoid poisons however lethal if they cause the victim to vomit,” or “Avoid poisons however lethal if their shape, color, or size is likely to attract notice.”) But to call these principles of the poisoner's art “the morality of poisoning” would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.

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\(^{10}\) Hart *Essays in Jurisprudence and Philosophy*, above n 6, at 347.

\(^{11}\) Hart *Essays in Jurisprudence and Philosophy*, above n 6, at 347.


\(^{13}\) Hart *Essays in Jurisprudence and Philosophy*, above n 6, at 347.
The principles that allow us to more efficiently or effectively construct structures, poison people, or guide human conduct, are not, from this perspective, moral principles. As such, they are serviceable for immoral ends as well as moral ones, and thus they give rulers prudential reasons for compliance. This is what Hart means by his assertion that what Fuller labels an “inner morality” is “necessary for the efficient execution of the purpose of guiding human conduct by rules”.

To this point, the Alternative interpretation diverges little from the Standard interpretation, for both interpretations see that Hart’s main argument is that Fuller’s principles are principles that make the law more effective in its function of guiding conduct. The difference between the interpretations is the implications that are drawn from this argument. Hart’s problem with the designation “internal morality of law” is that “it perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality.” The Standard interpretation of this point is that Hart is saying that the principles of the rule of law are in no way morally valuable; they do not “have anything to do with morality”, as Fuller puts it.

Yet Simmonds has noted that “Hart’s remarks can be read more than one way”:

He could be taken as saying that Fuller has not offered any good reason for regarding the eight requirements as moral, having simply relied upon the confusion between “purpose” and “morality”. The example of the poisoner may be intended simply to remind us that not all purposes are moral purposes. If we read Hart this way we must take him to be saying that Fuller’s argument is inconclusive rather than false. On the other hand, Hart could be read as claiming that Fuller’s eight requirements are simply principles of efficacy, the value of which is entirely dependent upon the goals that they are put to serve.

Simmonds’ latter option is the Standard interpretation; the former option is the Alternative interpretation, which would claim that the point Hart is making, ‘Fuller’s principles are purposive principles, and are not “a morality”’, does not entail that ‘conformity with these principles is of no inherent moral value.’ Hart is ambiguous on this point, because one may interpret his arguments as either making both arguments, or making only the former argument and not the latter.

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14 Hart Essays in Jurisprudence and Philosophy, above n 6, at 347.
15 Hart Essays in Jurisprudence and Philosophy, above n 6, at 350.
16 Fuller The Morality of Law, above n 3, at 200.
The ambiguity of Hart’s position is not aided by his choice of poisoning as the example through which to make his point because, as Simmonds observes:  

[i]t is unclear whether Hart intends his ‘morality of poisoning’ example to illustrate his (surely uncontroversial) thesis that we cannot infer the morality of an activity from its purposive nature, or whether he is suggesting that Fuller’s eight desiderata of legality are in fact simple principles of efficacy that are devoid of moral status.

So Hart here is far from his ideal of clarity in jurisprudence. The Standard interpretation of his arguments is that he thinks that Fuller’s principles are only of efficacy value, and not moral value. But the Alternative interpretation can argue that Hart’s position does not mean that Fuller’s principles are of no moral value, in addition to their efficacy value.

3.3.3 The moral value of legality?

When we turn from the purposive argument and the poisoning example to Hart’s other relevant arguments in his review, we seem to find evidence that favours the Alternative interpretation. Most significantly, one can see an acceptance by Hart that it is generally of moral value to conform to the instrumental principles in the way he disputes Fuller’s argument that positivists cannot explain why retrospective laws are wrong or why legal rules are normally general. Hart asks:

What can such accusations mean? Why, to take the simplest instances, could not writers like Bentham and Austin, who defined law as commands, have objected to a system of laws that were wholly retroactive on the ground that it could make no contribution to human happiness and so far as it resulted in punishments would inflict useless misery? Why should not Kelsen or I, myself, who think law may be profitably viewed as a system of rules, not also explain that the normal generality of law is desirable not only for reasons of economy but because it will enable individuals to predict the future and that this is a powerful contribution to human liberty and happiness?

In this passage Hart seems perturbed by Fuller’s suggestion that if one did not understand the legality principles as an “internal morality of law”, one would have no moral objection to violations of those principles. He clearly thinks that a lack of conformity to the principles of legality causes misery, and that conformity to them contributes to liberty and happiness. Therefore this passage is out of place in an argument that is supposed to show that

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18 Simmonds Law as a Moral Idea, above n 4, at 76-77.
19 Hart Essays in Jurisprudence and Philosophy, above n 6, at 356-357.
20 Hart Essays in Jurisprudence and Philosophy, above n 6, at 356.
conformity to these principles is not morally valuable, because it is inconsistent with that argument.

The Standard interpretation might explain this by taking Hart’s lack of explicit use of ‘moral’ as indicating that he does not think his explanation of what is ‘wrong’ with lack of conformity to legality is about moral wrongness. However, given Hart’s general views on morality, this does not seem a very persuasive argument. While Hart does not use the word ‘moral’ in this passage – instead using the terms ‘object’ and ‘desirable’ – it is clear from the review and his other work that liberty, happiness and equality are his touchstones for moral evaluation.21 As Waldron observes, “though [Hart] does not state so explicitly, he intimates” that an account of what would be wrong with a system that violated legality “would be firmly located within the realm of the moral”.22

Therefore, if one accepts that in the passage above Hart is indicating the moral problems of a lack of conformity to legality and the moral benefits of conformity, then the only way to make Hart’s review internally consistent is to accept that the Alternative interpretation of Hart’s arguments about the purposive nature of Fuller’s principles is correct. This would mean that Hart says that although these principles should be understood as contributing to the purposive efficacy of the law, they are also morally valuable due to their contribution to human liberty and happiness. Hart refrains from calling Fuller’s principles ‘a morality’ not because conformity to them is not of moral value, but because they are not in themselves a morality.23

3.3.4 Only instrumental?

Yet the Standard interpretation has an additional reply to the argument that Hart accepts the moral value of Fuller’s principles. It can be said that Hart’s mention of the moral value of conformity to the instrumental principles is merely ‘instrumental moral value’: it is merely

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22 Waldron “Positivism and Legality”, above n 1, at 1155.
23 Gardner “Hart on Legality”, above n 12, at 16: “for the reason stated, viz. that the principles of the rule of law ‘are not valued [by Hart] … for their own sake.’ That Hart does not value them for their own sake we already know. He values them as instruments of maximal freedom against what would otherwise be the oppressive might of the law. And that – maximal freedom – counts as a ‘moral aim’ because freedom, unlike the rule of law, is presumably something that Hart does indeed value ‘for [its] own sake’.”
the moral value secured by the achievement of morally good substantive aims of the law, and it does not exist in all cases of conformity because the substantive aims of the law may be iniquitous. This is the ‘Instrumental argument’. This interpretation seems to be supported by the passage where Hart says that:24

The difference between the author and those he criticizes in this matter is that the activity of controlling men by rules and the principles designed to maximize its efficiency are not valued by the latter for their own sake, and are not dignified by them with the title of “a morality.” They are valued so far only as they contribute to human happiness or other substantive moral aims of the law.

This can be read by the Standard interpretation as another of Hart’s denials of legality’s moral value, by interpreting it as “denying the possibility that the principles of legality could derive their moral value from anything other than a ‘substantive’ aim”.25 In other words, conformity to the instrumental principles is only valuable in the contingent circumstance that it makes the achievement of some substantive morally valuable aim (for example, preventing crime) more effective; there is nothing of necessary moral value in conformity to these principles; as one recent interpreter put it, Hart “argued that the rule of law is only instrumentally morally valuable, valuable when and to the extent that a legal system is used to pursue morally valuable ends”.26 Hart thus might be interpreted as saying that the moral value arises purely because of the law’s more efficient achievement of its good substantive moral aims, supporting the Standard interpretation.

However, the Alternative interpretation would not read Hart as saying that the instrumental principles are morally valuable only if they make the law more effectively achieve morally valuable goals or aims: that would be merely ‘instrumental’ moral value that comes from their furthering of substantive moral aims, rather than ‘non-instrumental’ moral value that inheres in the very conformity to the principles.27 The Alternative view would emphasize that Hart’s point in the passages set out above is that conformity to Fuller’s principles has non-instrumental moral value in addition to an instrumental value, which stems from the fact

24 Hart Essays in Jurisprudence and Philosophy, above n 6, at 357.
25 Simmonds Law as a Moral Idea, above n 4, at 73. Simmonds interprets Hart in this way based on an ‘exegesis’ of two passages where Hart uses the word ‘substantive’. However, Simmonds places too much weight on his close exegesis of particular words, and not enough on the actual arguments Hart was making. If one focuses on the latter, Simmonds’ argument is far less powerful.
26 Murphy “Lon Fuller and the Moral Value of the Rule of Law”, above n 9, at 239.
27 This distinction is made by Murphy “Lon Fuller and the Moral Value of the Rule of Law”, above n 9, at 246-261.
that conformity to the instrumental principles “will enable individuals to predict the future” and prevent the legal system from failing to guide human conduct, which will create “a powerful contribution to human liberty and happiness”. These references to liberty and happiness show that conformity to law’s instrumental principles itself creates non-instrumental moral value – independent of any instrumental moral value it secures. But his lack of direct statement that Fuller’s principles are of moral value means that Hart is again unclear: after upbraiding Fuller for labelling his principles ‘a morality’, Hart should have been explicit if he aimed to say that conformity to them is of moral value, as the Alternative interpretation claims.

The passages and argument discussed above are the evidence from Hart’s main discussion of Fuller in his review, in terms of the moral value of legality. While it has shown that the Standard interpretation ignores passages and arguments that complicate Hart’s position on Fuller’s principles’ moral value, it has also suggested that Hart’s lack of clarity also poses problems for the Alternative interpretation, and thereby leads some to hold the Equivocal interpretation. Which of the Standard, Equivocal, or Alternative interpretations are correct depends on three things. First, the accuracy and plausibility of the interpretation of the text itself; this is to be judged by the reader who assesses the possible interpretations against the text and comes to their own view of their accuracy. Second, the consistency of the interpretation with Hart’s other discussions of the principles of legality. And third, the coherence of both interpretations with Hart’s legal theory in general. Unfortunately, ambiguities also plague Hart’s discussions in each of these areas. I will discuss the last point later, when I examine Hart’s general theory of law and discuss how the principles of legality fit within it. Presently, I will turn to the second factor: the other discussions of Fuller’s principles that Hart provides.

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28 Hart Essays in Jurisprudence and Philosophy, above n 6, at 356-357.
3.4 Hart’s other discussions of the morality of legality

3.4.1 The Concept of Law

Further discussion of the moral value of Fuller’s principles of legality is found in the passage from The Concept of Law quoted and briefly discussed in the previous chapter.29 Under the heading “principles of legality and justice”, Hart admits that it “may be said that … a minimum of justice is necessarily realized whenever human behaviour is controlled by general rules publicly announced and judicially applied.”30 Thus, to the degree that rules are applied in like cases without partiality, and in compliance with the principles of natural justice, “though the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice.”31 Hart calls this “justice in the application of the law”. He further observes that when a method of social control is used that involves people following rules through application of the law to themselves – with official intervention only in case of breach or dispute – the rules used must “satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective[...] ... This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey.”32

Hart follows these observations with his famously subdued and ambiguous conclusion:33

Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality. Indeed one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality, and suggested that they be called ‘the inner morality of law’. Again, if this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.

The meaning of this statement is highly contested.34 The Standard interpretation says that Hart is being ironic or Equivocal in his statement, because although he admits that “if this is what the necessary connection of law and morality means, we may accept it”, he follows this

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29 See above Chapter 2 at section 2.2.6.
30 Hart The Concept of Law, above n 21, at 206.
31 Hart The Concept of Law, above n 21, at 206.
32 Hart The Concept of Law, above n 21, at 206-207.
33 Hart The Concept of Law, above n 21, at 207.
34 Compare Waldron “Positivism and Legality”, above n 1, at 1159 and Simmonds Law as a Moral Idea, above n 4, at 70-77, with Gardner “Hart on Legality”, above n 12, at 3-4 and 16-18.
immediately with the observation that this is “unfortunately compatible with very great iniquity”. This statement is clearly dismissive of Fuller’s arguments, as if this supposed connection between the principles of legality and morality is of little interest for jurisprudence. Simmonds presents Hart’s acceptance of a connection between law and morality is ironic rather than being a genuine concession to Fuller. Thus, this passage is often taken to indicate that Hart denies that the principles of legality have any moral value, supporting the Standard or Equivocal interpretations.

Yet again Hart’s analysis is ambiguous, because the Alternative interpretation would say that Hart is actually accepting Fuller’s claim of moral value. Simmonds notes that the plain meaning of Hart’s statement is an acceptance of Fuller’s arguments about the rule of law’s moral value:

Hart acknowledges that Fuller has succeeded in identifying a necessary connection between law and morality, and seeks to resist only those misguided parts of Fuller’s argument where he claims that observance of the principles of legality will confine the law to relatively just purposes and prevent the pursuit of wicked goals.

Simmonds himself provides a cogent argument to show that the view that ‘iniquity in the content of the law means that conformity to legality is of no moral value’ is mistaken; just because one can identify or imagine legal systems in which law that complies with Fuller’s principles is iniquitous in its substance, this does not mean that the rule of law is not of moral value. As Simmonds argues, “the fact that a set of characteristics is compatible with great iniquity [does] not show that those characteristics are not constitutive of genuine moral virtue”. This seems to be an accurate analysis. Just because a legal system fails on one measure of moral value does not mean it does not excel on another measure.

However, the obvious strength of this argument seems to weaken Simmonds’ view that Hart held a contrary position; the Alternative interpretation would say that Hart in fact does hold the correct view set out by Simmonds above. The Alternative interpretation makes sense of “compatible with great iniquity” not as an immediate retraction of Hart’s acceptance of

35 Waldron “Positivism and Legality”, above n 1, at 1152.
36 Simmonds Law as a Moral Idea, above n 4, at 70-75.
37 Waldron “Positivism and Legality”, above n 1, at 1159; Simmonds Law as a Moral Idea, above n 4, at 70.
38 Simmonds Law as a Moral Idea, above n 4, at 77.
39 Simmonds Law as a Moral Idea, above n 4, at 74-75.
40 Simmonds Law as a Moral Idea, above n 4, at 74.
legality’s moral value, but as an observation that conformity to legality does not guarantee that the substantive norm content of the law is morally sound. On this view, all Hart is saying is that while conformity to legality secures moral value through allowing people to be guided by rules, that can coexist with the judgment that the law’s substantive content is wicked. This is also seen as correct by Waldron, who argues that “a person who believes that legality has moral significance need not also believe that legality conclusively determines the issue of the moral quality of a given law … conformity to the principles of legality always makes things better, even though it is not necessarily capable of rescuing law from the gross iniquity of its content”.

This seems to be the sound analysis that theorists think Hart should have provided. In fact, it conforms to the most obvious interpretation of what he said; a view that Simmonds accepts and Gardner concurs with. However, Hart’s statement is not entirely clear, which means that the Standard interpretation has become orthodox. Whether it should be read as supporting the Equivocal or Alternative interpretations again depends on one’s view of the best interpretation of Hart’s words and their coherence with his other statements.

3.4.2 Hart’s encyclopaedia article

In an encyclopaedia entry on the philosophy of law, published two years after his review of The Morality of Law, Hart included a relevant discussion of the “criticism of law” or “evaluative” jurisprudence. Within this discussion there is a short analysis of procedural justice, and the idea of the rule of law. Hart observes that failing to observe certain procedural standards or requirements for the law may “cause both injustice and misery”. The requirements he describes are essentially Fuller’s formal principles of legality, as well as procedural principles of natural justice, which, combined, “define the concept of the rule of law”. Hart described the dual perspectives from which Fuller’s principles can be viewed:

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41 Waldron “Positivism and Legality”, above n 1, at 1161-1162.
43 Hart Essays in Jurisprudence and Philosophy, above n 6, at 88.
44 Hart Essays in Jurisprudence and Philosophy, above n 6, at 114.
45 Hart Essays in Jurisprudence and Philosophy, above n 6, at 114.
46 Hart Essays in Jurisprudence and Philosophy, above n 6, at 114-115.
These requirements and the specific value which conformity with them imparts to laws may be regarded from two different points of view. On the one hand, they maximize the probability that the conduct required by the law will be forthcoming, and on the other hand, they provide individuals whose freedom is limited by the law with certain information and assurances which assist them in planning their lives within the coercive framework of law.

In other words, the rule of law principles have an instrumental or efficacy value for the lawmaker that sits alongside a planning value for the citizen; they are both requirements of efficacious governance by rules, and at the same time of “advantage” to those subject to those rules. Hart elucidates “this combination of values” through the example of the requirement of generality:

\[G\]eneral rules clearly framed and publicly promulgated are the most efficient form of social control. But from the point of view of the individual citizen, they are more than that: they are required if he is to have the advantage of knowing in advance the ways in which his liberty will be restricted in the various situations in which he may find himself, and he needs this knowledge if he is to plan his life.

The Alternative interpretation would say that Hart here recognizes the moral value in subjecting human conduct to the governance of rules that conform to the formal-procedural principles: it allows people to plan their future, and to rely on the rules they use to do so. This is similar to Fuller’s reciprocity argument.

In reply the Standard interpreter might say that Hart’s reference to the principles being an “advantage” and an unspecified “value” is a carefully chosen means of avoiding referring to moral value of such conformity, and that Hart’s use of the phrase ‘the principles of legality’ rather than Fuller’s phrase ‘the internal morality of law’ further indicates his reluctance to speak of moral value.

However, the Alternative interpretation would say that there are a number of reasons weighing against these claims. First, Hart is explicitly focussed in this section on dealing with the question of evaluating the law – the “criteria which distinguish good law from bad”, which is a matter of moral judgment. Although he does not use the word ‘moral’ or ‘morality’ in his discussion of the legality principles, he makes it clear that lack of conformity to legality will cause “injustice and misery”, and that conformity will allow

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47 Hart Essays in Jurisprudence and Philosophy, above n 6, at 115.
48 This suggestion was put to me by David Dyzenhaus.
49 Hart Essays in Jurisprudence and Philosophy, above n 6, at 111.
people to plan their lives.\textsuperscript{50} It is clear that questions of justice, freedom, and happiness are the things that Hart believes can give the law moral value.\textsuperscript{51}

The other relevant passage concerns the moral conclusions we should draw from the above analysis:\textsuperscript{52}

Care must be taken not to ascribe to these arguments more than they actually prove. Together they amount to the demonstration that all men who have aims to pursue need the various protections and benefits which only laws conforming to the above requirements of … procedure can effectively confer. For any rational man, laws conferring these protections and benefits must be valuable, and the price to be paid for them in the form of limitations imposed by the law on his own freedom will usually be worth paying. But these arguments do not show, and are not intended to show, that it will always be reasonable or morally obligatory for a man to obey the law when the legal system provides him with these benefits, for in other ways the system may be iniquitous: it may deny even the essential protections of law to a minority or slave class or in other ways cause misery or injustice.

The Alternative perspective would read this as Hart claiming that conformity to rule of law principles is morally valuable to any person who values autonomy – who has “aims to pursue” – but that they do not constitute the only moral standards against which we evaluate law, and thus do not settle the question of moral obligation to law.

Further, that conformity to Fuller’s principles is of moral value is suggested by Hart’s caveat that although conformity to the principles of legality has this ‘benefit’, it does not show that a legal system that provides these benefits is morally obligatory or sound.\textsuperscript{53} If conformity to legality is of no moral value, why would Hart have to say that a legal system may still be morally iniquitous despite its conformity to legality? If Hart does not think that legality is of moral value in increasing human freedom and happiness, there is no basis on which to think that it may be “morally obligatory” to obey the law when it provides these benefits.\textsuperscript{54} Waldron has suggested that this argument is the correct understanding of the rule of law’s moral value and its relationship to questions of obedience, and that Hart – as a symptom of

\textsuperscript{50} Hart \textit{Essays in Jurisprudence and Philosophy}, above n 6, at 114-115.
\textsuperscript{51} Hart \textit{Essays in Jurisprudence and Philosophy}, above n 6, at 116-117; Hart \textit{The Concept of Law}, above n 21, at Chapter 8, esp 153-163 and 179; Hart \textit{Punishment and Responsibility}, above n 21, at 44-45; see also at 174 and 177-185.
\textsuperscript{52} Hart \textit{Essays in Jurisprudence and Philosophy}, above n 6, at 115-116.
\textsuperscript{53} Hart \textit{Essays in Jurisprudence and Philosophy}, above n 6, at 115-116.
\textsuperscript{54} Hart \textit{Essays in Jurisprudence and Philosophy}, above n 6, at 116.
his inconsistency – failed to make it. Yet if the Alternative interpretation of Hart’s arguments is correct, Waldron’s reading and his claim of inconsistency miss their mark, because Hart does give the correct analysis.

Still, the Standard interpretation might argue that Hart does not explicitly say that the value of the benefits of knowing in advance the rules that apply to ones actions is a moral value, especially given how Hart seems to talk in a prudential manner about the ‘price’ to be paid in limiting one’s actions by law. In order to maintain the Standard interpretation of Hart as not accepting that legality is of moral value, one must say that (i) Hart’s analysis here takes pains to avoid speaking of legality’s moral value, and that (ii) even though Hart’s analysis is concerned with evaluative questions and focuses on the ability of people to plan their lives and to satisfy their needs and desires (conducing to their happiness), the value of this is not of moral value, despite Hart’s general views on justice and morality. The Alternative interpretation avoids these problems, and can make sense of Hart’s claims in the way discussed above.

3.4.3 Legality in Punishment and Responsibility

Though it does not refer to Fuller, Hart’s most sustained discussion of certain principles of the rule of law is found in Punishment and Responsibility. Here, Hart’s arguments seem to support the Alternative interpretation; they are where Hart argues most clearly that conformity to at least one principle of the rule of law is of moral value. Among the many themes of Hart’s analysis of the criminal law is that one of its major justifying aims is to increase human freedom in the face of the state’s coercive punishment, by ensuring that people have the ability to plan to avoid committing offences and being punished. While

55 Waldron “Positivism and Legality”, above n 1, at 1161-1162: “I have said a number of times that a person who believes that legality has moral significance need not also believe that legality conclusively determines the issue of the moral quality of a given law. Certainly, he need not believe that legality conclusively determines the political obligation implied by such a law. Thus, while Hart does seem to believe that conformity to the principles of legality is compatible with great iniquity, this claim could survive an affirmative answer to (2) – that legality does have moral significance – if, for example, that significance was just one among a number of factors that might enter into a law’s overall moral value. Indeed, this position would be consistent with quite a strong version of (2a): We might say that conformity to the principles of legality always makes things better, even though it is not necessarily capable of rescuing a law from the gross iniquity of its content.”
this argument seems to implicate the other principles of the rule of law that allow people to plan their lives according to law, the particular rule of law requirement at stake is the possibility of compliance.

The major implication of this justifying aim for the content of criminal law is the importance of requiring a mental element of intention as a condition of criminal responsibility, including the allowance of excuses based on mental conditions, for without these elements a person has not chosen to perform the action that is covered by the offence. These elements of the criminal law reflect “a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it”. The moral value of this mental element in criminal responsibility is supported by “nearly universal ideas of fairness or justice and of the value of individual liberty”. Without it, we would lose the ability “to predict and plan the future course of our lives within the coercive framework of the law”.

Hart therefore insists that even if we could prevent more crime by doing away with the mental elements of offences – in effect making the criminal law a system of ‘strict liability’ – this would be morally wrong. The law should not be a system of threats of punishment that goads people into certain actions; it should be a ‘choosing’ system that guides behaviour and allows people to make choices about conformity to the law.

If we were to base our views of criminal responsibility on the doctrine of the economy of threats, we should misrepresent altogether the character of our moral preference for a legal system that requires mental conditions of responsibility over a system of total strict liability[.] … Consider the law not as a system of stimuli but as what might be termed a choosing system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. This done, let us ask what value this system would have in social life and why we should regret its absence. … [T]he conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals’ choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.

58 Hart *Punishment and Responsibility*, above n 21, at 44-45; see also 174, 177-185.
59 Hart *Punishment and Responsibility*, above n 21, at 174. Hart also notes that “in most western morality ‘ought’ implies ‘can’ and a person who could not help doing what he did is not morally guilty”: at 177. See also 226.
60 Hart *Punishment and Responsibility*, above n 21, at 181.
61 Hart *Punishment and Responsibility*, above n 21, at 181.
62 Hart *Punishment and Responsibility*, above n 21, at 43-47.
Conceptualising law in this way leads to the view that individuals should be excused from criminal responsibility where their actions were in some way not intentional or freely chosen.\(^63\)

By attaching excusing conditions to criminal responsibility, we provide each individual with benefits he would not have if we made the system of criminal law operate on the basis of total ‘strict liability’. First, we maximize the individual’s power at any time to predict the likelihood that sanctions of the criminal law will be applied to him. Secondly, we introduce the individual’s choice as one of the operative factors determining whether or not these sanctions shall be applied to him. … Thirdly, … we provide that, if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law.

These intention requirements and excusing conditions may, Hart admits, be contrary to the general efficacy of the criminal law considered from a purely utilitarian perspective, but they are “regarded as of moral importance because they provide for all individuals alike the satisfactions of a choosing system.”\(^64\) This is not an insignificant consideration.\(^65\)

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

This is Hart’s most significant discussion of the moral importance of rule of law principles – in this case, possibility of compliance.

Furthermore, because Hart thinks that this element of the rule of law is of high moral importance, he argues that even in a legal system in which substantive content of the law is ‘bad’, the fact that a mental element is required is a source of moral value that to some minor extent mitigates this:\(^66\)

In South Africa, Nazi Germany, Soviet Russia, and no doubt elsewhere, we might be thankful to have [the laws’] badness mitigated by the fact that they fall only on those who have obtained a satisfaction from knowingly doing what they forbid.

This is a significant statement for the Alternative perspective, because it provides further evidence for the view that Hart did not think that the coexistence of bad substantive law with conformity to the rule of law meant that the latter was not of moral value. In other words, it

\(^{63}\) Hart *Punishment and Responsibility*, above n 21, at 46-47.

\(^{64}\) Hart *Punishment and Responsibility*, above n 21, at 49.

\(^{65}\) Hart *Punishment and Responsibility*, above n 21, at 49.

\(^{66}\) Hart *Punishment and Responsibility*, above n 21, at 47.
suggests that Hart was not being ironic about the moral value that is secured by conformity to Fuller’s principles of legality, even in an otherwise bad regime. While Hart focuses on the requirement of ‘possibility’, it is clear that the other principles of the rule of law must be respected if the law is to guide behaviour and form a framework of planning and prediction that allows people to be ‘choosing beings’. And it is clear that Hart here recognizes that this is of great moral value in its contribution to human liberty.

Yet the Standard interpretation would likely say that despite these arguments providing evidence for the Alternative interpretation, all of this is only tenuously linked with Hart’s analysis of the moral value of the rule of law. The arguments about law being a choosing system that allows people a maximum of liberty in circumstances in which they are constrained by coercive rules, and the rejection of strict liability crimes on this basis, requires much development before it can be presented as Hart accepting Fuller’s assertions of the moral value of the principles of legality.

### 3.4.4 Conclusion on the rule of law’s moral value

This section has argued that one of the key perceived responses by Hart to Fuller’s Challenge is far more ambiguous than it is usually presented. The Standard interpretation, that Hart denies the moral value of conformity to the principles of the rule of law, cannot stand unchallenged. Although Hart’s arguments on this topic are often not clear, there is enough evidence that he, at some points, accepts the moral value of Fuller’s principle to support at least the Equivocal interpretation. Further, depending on how one interprets his ambiguous arguments, it may even be claimed that Hart’s considered position does accept this moral value, which is the Alternative interpretation. Unfortunately, the uncertainty concerning how to interpret Hart’s position remains, because in the various places in which he deals with this question, he does not spell out his position in language that would remove the possibility of differing interpretations. In the following section, I will argue that similar ambiguity afflicts the other main part of Hart’s response to Fuller’s Challenge – his account of the relationship between law and the rule of law. But before I do so, I will note below the connection between these two questions.
3.4.5 Placing the Moral Value question and the Relationship question

The Standard interpretation of Hart’s response to Fuller’s Challenge from the rule of law is that Fuller’s principles, far from being principles of morality, are in fact instrumental principles derived from reflection on what makes the law most effectively achieve its purpose of guiding human behaviour. Legality is of no moral value, which means that the legal positivist approach to dealing with Fuller’s claims is to deflate their moral pretensions, revealing the (Fuller thinks purportedly “tough-sounding” and “clear-eyed”) strategic, efficacy-derived nature of the principles.

That reading accords with the common idea that legal positivists deny that there is any necessary connection between law and morality. If Hart admits that Fuller’s principles are of moral value, he runs the risk of having to admit that there is a necessary connection between law and morality. Hart’s position on the moral value of the rule of law is often seen as driven by the desire to keep his positivism pure by rejecting any necessary moral aspect of the law.

As noted above, Waldron interprets Hart’s writings discussed in this chapter above as equivocal – he says that at some points Hart accepts (as per the Alternative interpretation) and at others rejects (as per the Standard interpretation) Fuller’s moral claims about legality, and that Hart therefore “seems to be motivated by a desire to say nothing more than is necessary to dispatch Fuller’s critique”.68 This is for Waldron a “shabby episode” in Hart’s jurisprudence, because Hart dishonestly “seems to rest his hopes of prevailing [in the debate] on the fact that many of his readers will be more interested in Fuller’s discomfiture than in the (in)consistency of Hart’s refutation”.69 Hart’s concern, Waldron claims, is to avoid causing problems for “the distinctive positivist thesis of the separability of law and morality” by obscuring the fact that “one of the criteria for calling something a legal system has genuine moral significance”.

This analysis of why Hart couches his views on the moral value of legality in ambiguous terms is supported by Simmonds, who thinks that Hart’s acceptance that legality’s moral value is a necessary connection between law and morality

67 Fuller The Morality of Law, above n 3, at 204.
68 Waldron “Positivism and Legality”, above n 1, at 1157.
69 Waldron “Positivism and Legality”, above n 1, at 1157.
70 Waldron “Positivism and Legality”, above n 1, at 1159.
and should be read ironically because it is “at odds with his legal positivism” which involves “the denial of any necessary connection between laws and morals”.71

If this account of Hart’s motivation is right, it is easy to see why Hart refrained from providing a clear analysis of the rule of law’s moral value: his ambiguity allowed him to provide an analysis of Fuller’s principles without explicitly conceding that there was any necessary connection between law and morality. As Simmonds puts it, “One senses that Hart saw the dangers ahead and hesitated”.72 This argument, with which Waldron agrees, is that Hart was deliberately ambiguous, “tak[ing] care” to obscure the implications of his analysis, and “hoping that we do not notice” that he has effectively recognized a necessary moral element of the law.73 This is the ‘conspiracy theory’ of Hart’s ambiguity; one that is all the more damning in light of Hart’s professed desire to tell the truth clearly.74

Yet this account can be challenged for that very reason; even if we must admit that Hart was not clear, there is no conclusive reason to think that he was intentionally ambiguous in an attempt to dishonestly hide what he recognized was the truth about the moral value of Fuller’s principles. A more charitable interpretation would observe that Hart did not, for whatever reason, deem it necessary to discuss Fuller’s claims in any detail. This would explain why Hart’s analysis is not as clear and exhaustive as his other analysis of law. Further, if the Alternative interpretation is accepted, Hart is not equivocal because none of his discussion of Fuller’s principles denies that conformity to legality is of moral value. This would mean that although Hart is ambiguous and fails to live up to his own standards of clarity, he is not equivocal in the sense of making inconsistent arguments in different places about legality’s moral value.

3.5 The relationship between law and legality

One might say that if Hart can be read as agreeing with Fuller on legality’s moral value, he contributes nothing distinctive to the debate about legality. However, if Hart agrees with

71 Simmonds Law as a Moral Idea, above n 4, 70.
72 Simmonds Law as a Moral Idea, above n 4, 78.
73 Waldron “Positivism and Legality”, above n 1, at 1159-1160.
74 His friend and collaborator Tony Honore says in a short biography that “Hart’s main aim as a lecturer and writer was to tell the truth and be clear.” http://www2.law.ox.ac.uk/jurisprudence/hart.htm
Fuller on legality’s moral value, then Hart’s understanding of the relationship between law and the rule of law – the ‘Relationship question’ – becomes the more important topic in the positivist response to Fuller’s Challenge. In this section I argue that it is again not possible to give a definitive account of Hart’s position on the relationship between law and the rule of law. I will argue in later chapters that this ambiguity is something that recent legal positivists have explained with more clarity, developing Hart’s responses into concessions to Fuller.

Hart’s general concept of law seems to require a denial that the rule of law is a necessary condition of the existence of valid law or a legal system – especially if understood as a moral ideal. In other words, Hart rejects the premise of Fuller’s Challenge: that law must be understood as a purposive institution, dependent on the moral ideal of legality for its vitality and strength. This seems contrary to Hart’s sober analysis of the law as essentially a complex system of rules. Yet Hart’s specific discussions are ambiguous concerning the relationship between law and the rule of law. Hart’s core doctrine of the union of primary and secondary rules seems to require that the law lives up to the rule of law to some significant degree, for reasons explained below. There is also an argument that if Hart holds a functionalist view of law, as some have argued, such conformity is similarly required for law to perform its function of guiding human behaviour.

What is clear, however, is that Hart does not think that the rule of law is a necessary part of the test for valid law or part of the legal obligation of a judge. In Chapter 8, I will examine whether Hart and recent positivist thinkers (who I argue hold similar views) can plausibly claim that the rule of law has no necessary connection with the content of valid legal norms, in particular whether this is consistent with a view that law’s existence depends on conformity to the rule of law.

3.5.1 Hart’s general conceptual position

Considering Hart’s general concept of law, the position that we might assume he holds is that conformity to Fuller’s principles of the rule of law is not a necessary aspect of the existence of law. The reason is because Hart begins from a view that law is a particular kind of social institution governing human conduct that has certain specified existence conditions, and which does not have any other necessary social or moral requirements, such as
conformity with the rule of law. This is the Social thesis that is often seen as the hallmark of the legal positivist position, and it will recur in the following chapters of this study, and frame the overall analysis of positivism and the rule of law in Chapter 8.

We have seen from the initial discussion of his concept of law in Chapter 2 that Hart’s main idea is that law is simply a particular kind of normative system characterized by a union of primary and secondary rules. The law need not “measure up to some moral or other standard”. He claims that nothing is to be gained “in the theoretical or scientific study of law as a social phenomenon” by adding other social or moral requirements to our concept of law.

Hart’s Social thesis also extends to his account of legal validity – the determination of the content of the law. As discussed in Chapter 2, for Hart the legal validity of norms is determined by their being part of a system of rules validated by an ultimate rule of recognition. The content of that rule of recognition is a matter of social fact, namely the practices of officials using particular rules to determine legal validity within the system. There is no necessary link between the criteria of legal validity that exist within a legal system and the rule of law, whether understood as a moral criterion or not.

Thus, Hart’s concept of law seems to lead to the view that conformity to the rule of law is not an essential attribute of a legal system or of a valid legal norm. As Waldron observes, Hart’s concept of law stands in contrast to Fuller’s, which insists that “[o]bservance of the principles of legality is among the necessary criteria for the application of the concepts law and legal system”. In contrast, Hart’s position is that “[w]hether a system of rule counts as a legal system is determined independently of whether or to what extent that system...

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75 See above Chapter 2 at section 2.2.1.
76 Hart The Concept of Law, above n 21, at 113.
78 Hart The Concept of Law, above n 21, at 205.
79 See above Chapter 2 at sections 2.2.1 and 2.2.2.
80 Waldron “Positivism and Legality”, above n 1, at 1040.
observes the principles of legality”.\footnote{Waldron “Positivism and Legality”, above n 1, at 1141.} This follows from Hart’s reluctance to say that there are any further necessary features of a legal system beyond the union of rules.

However, as Waldron also notes, there are reasons to think that Hart’s account of the relationship of law and the rule of law cannot be quite so clear cut, for he makes specific arguments about Fuller’s ideal of legality that can be interpreted as agreeing with Fuller, to at least some degree, about the connection between law and the rule of law.\footnote{Waldron “Positivism and Legality”, above n 1, at 1141: “in different places, Hart adopts both of these positions.”} In addition, Hart’s very doctrine of the union of rules requires a certain level of conformity to the principles of the rule of law for law to be in force. These arguments can be seen as concessions to Fuller’s Challenge that Hart is forced to make due to his lack of analysis of the rule of law in his main account of the concept of law; as we will see in later chapters, they are the points that later legal positivists have developed further and disagreed amongst themselves on. But before I discuss this, I will set out the particular arguments Hart makes that put questions around the simple answer to the Relationship question.

\subsection*{3.5.2 Legality as a condition of law’s effectiveness}

One argument Hart makes that recognizes a connection between law and legality is that conformity to Fuller’s principles is required if the law is to guide human conduct efficiently or effectively. As Fuller mentioned in his reply to critics, this was the point that Hart and others often seized upon to mount their critiques: the principles of legality are, as Hart put it, derived from reflection on “what is necessary for the efficient execution of the purpose of guiding human conduct by rules.”\footnote{Hart Essays in Jurisprudence and Philosophy, above n 6, at 347.} This was also Hart’s main point in his review of The Morality of Law. Fuller thinks it obvious that some minimum adherence to legal morality is essential for the “practical efficacy of law”.\footnote{Hart Essays in Jurisprudence and Philosophy, above n 6, at 156.} This is a connection that Hart acknowledges between law and its purposive principles: legality is necessarily related to the law in that law is a system of rules, and in order to guide human conduct through rules most efficiently, the law must conform to these principles.
But one might argue that we do not yet have a necessary connection between law and rule of law, in the sense that one cannot have law without conformity to the rule of law. For it can be said that law that ineffectively or inefficiently guides conduct is still law. It is just ineffective law. So it might still be argued that Hart thinks that there is nothing wrong with saying that a legally valid norm is in substantial violation of certain principles of the rule of law; it will be less effective in guiding conduct, but it will be law nonetheless.

### 3.5.3 The rule of law and the existence of norms

However, there is an argument that further draws out the above considerations and identifies a necessary connection between the existence of law and conformity to the principles of the rule of law. Fuller argued that a significant departure from his principles would result in a situation where there was no law at all, because people would be completely unable to guide their conduct by the purported norms. There would be a failure to create any system of norms at all, because there would be no norms that could be applied by the enforcement agencies and the courts. Just on the basis of Hart’s central doctrine that “the union of primary and secondary rules is at the centre of a legal system”, therefore, one might argue that Hart should acknowledge, to a far greater extent than he seemed to, the necessity of conformity to Fuller’s principles of the rule of law for the existence of law.

Yet this argument may not prove much, because it might be said that the level of conformity necessary to create a basic system of norms is minimal, and is therefore not the same as the substantial conformity that is required to live up to the ideal of the rule of law. I will show below that Raz makes this argument. A legal system might be comprised of norms that are intelligible only to a select class of legal experts, or which are constantly changing, or which are kept secret from most of the population. This legal system would violate our ideal of the rule of law, while still being a system of norms due to its minimal compliance with Fuller’s principles. This would allow Hart to say that his concept of law does not require fulfillment of the ideal of the rule of law as a prerequisite of a legal system’s existence.

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86 See above Chapter 2 at section 2.3.
87 Hart The Concept of Law, above n 21, at 96, and see generally 76–78 and 95–96 for the union of rules argument.
88 See below Chapter 4 at section 4.3.3.
3.5.4 The rule of law and law’s being in force

There is another argument that makes a stronger case that Hart’s concept of law requires substantial fulfillment of the rule of law principles for a legal system to exist. The reasoning is as follows. One of Hart’s conditions for the existence of law is that it is efficacious in a territory: the legal system is in force there. There cannot be a general disregard of the rules of the legal system: the rules must be “generally obeyed”. This would mean that the existence of a legal system necessarily depends on its conformity to the principles of the rule of law, because those principles ensure that people whose conduct is regulated by the law can know what the law demands of them, and this seems to be a precondition for their intentionally conforming to it (as opposed to their actions conforming to the law by chance). If the law as a system completely or substantially violates one or more of the principles of the rule of law, it is hard to see how people could conform to it, which puts into doubt the law’s efficacy in terms of being in force.

However, this argument might meet the reply that these efficacy considerations justify only the relatively weak connection between law and legality noted above, because in fact what is necessary for a legal system to be in force is merely that rules exist and are applied to people’s conduct by the enforcement agencies and courts, not that the rules guide the behaviour of the general population effectively. The argument would be that it is not true that the rules must be able to guide ordinary people’s conduct because of their substantial conformity to the rule of law so long as they are applied by the courts to people’s conduct. In this case, all that is required is that there are rules at all, not that those rules are intelligible, promulgated, or possible for the general population to comply with. Ordinary

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89 Note that efficacy is used here in a different sense than it is used above to discuss the contribution of conformity to the rule of law to the efficacy/effectiveness or efficiency of law’s purpose of guiding human conduct through rules.
90 Hart The Concept of Law, above n 21, at 100-101.
91 Hart The Concept of Law, above n 21, at 113.
people would only find out what the law required of them if and when they were drawn into the processes of enforcement.\footnote{For some similar observations see Michael Guidice “Normativity and Norm-Subjects” (2005) 30 Australian Journal of Legal Philosophy 102, at 108-114.}

Indeed, one might illustrate this view by saying that actually existing legal systems are examples of systems of rules that clearly exist and are in force but which do not conform to the rule of law and do not, in fact, guide most people’s conduct through their knowledge of the content of the law. For the content of the law is contained in legislation and case law that only a minute fraction of the population ever reads or comprehends the actual content of. Ordinary people do not have much idea about the myriad areas and rules of law that apply to their conduct; they may not even know that certain conduct is legally regulated.\footnote{David Luban “The Publicity of Law and the Regulatory State” (2002) 10 Journal of Political Philosophy 296.} Even if they do know the area is legally regulated, they usually do not have any detailed knowledge of these rules in advance of or during the time that they are doing the things regulated by the rules. They will usually only get such detailed knowledge if a dispute or problem arises, and if they inquire further or engage a lawyer to advise them of what the law says about their situation – giving them ‘indirect epistemic’ access to the rules.\footnote{Scott J Shapiro “Law, Morality, and the Guidance of Conduct” (2000) 6 Legal Theory 127 at 152.} However, given the costs involved, it is not economically possible for most people to achieve an adequate level of knowledge of the law. The lack of knowledge that most people have of the law is perhaps one of the most pressing problems of upholding the rule of law in complex modern societies.

This example illustrates the line of argument that Hart might take on the necessity of compliance with the rule of law for law’s existence. Clearly there must be some minimal compliance with Fuller’s principles for rules to exist. The rules must be intelligible enough that lawyers advising clients and those enforcing the law can recognize them as rules; they cannot be incomprehensible. However, this minimal conformity to rule of law principles does not mean that most ordinary people know what the law demands of their behaviour in advance, and they will not guide their actions according to its requirements.\footnote{Brian Tamanaha A General Jurisprudence of Law and Society (Oxford University Press, Oxford, 2001) 131-132 and 107-120; see generally Brian Tamanaha Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law (EJ Brill, Leiden, 1993).} Once these
rules exist, so long as the government is powerful enough to enforce them, they are in force in the territory.

This would be an interpretation that accords with Hart’s approach that looks for the minimal sufficient conditions for a legal system to exist – it is comparable with his view that a legal system in which the rules are not accepted from the internal point of view by the bulk of the population is still a legal system:  

The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.

Hart was thus concerned to show only what was conceptually necessary for any legal system, no matter how deplorable, to exist. The weak interpretation says this is also true of conformity to the rule of law – Hart would accept a connection only to the most minimal level necessary for the union of primary and secondary rules to exist, as suggested by the arguments above, and would say that we can have law without substantial fulfillment of the rule of law. 

We will see in the following chapter that Raz provided such an argument, distinguishing between minimal conformity to Fuller’s principles necessary for law’s existence and the substantial conformity that is necessary if the rule of law ideal is to be fulfilled.

This response is possible, but it is not clear that it is one that Hart would make, for he did not discuss the issue in any detail. The position is merely an interpretation of other aspects of his theory, in an attempt to give an answer to a question he did not consider. It is again left to later positivists to discuss this issue in detail; however, as we will see, there has not been much progress.

### 3.5.5 The rule of law and law’s function

An argument that gives a stronger connection between law and legality would say that Hart actually recognizes that our concept of law is such that it is, in fact, essential for the law to effectively guide conduct; the reason being that this is law’s function. This goes beyond the argument above, which says if the law is to be effective in guiding behaviour it must

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97 Hart *The Concept of Law*, above n 21, at 114.
98 Gardner “Hart on Legality, Justice and Morality” above n 12, at 8.
conform to legality; the present argument is that to be law it *must* so conform if it is to be law, because it is the function of law to effectively guide human behaviour. If a legal system does not substantially conform to the principles of the rule of law and in doing so guide behaviour, it is not just, as the previous argument recognized, ineffective in guiding conduct; it is not a legal system at all.

Does Hart accept such an argument as showing a necessary connection between the law and the rule of law in the places where he explicitly considers the rule of law? Again, it is not clear. What Hart says along these lines in *The Concept of Law* is that any system of social control that operates by setting out general rules for the population to apply to their own conduct could not function unless the rules were intelligible, possible to obey, and non-retrospective. Hart’s point is that the law must conform to legality to some degree if it is to function through guiding conduct; Fuller’s principles apply to:


100 Hart *The Concept of Law*, above n 21, at 202.

101 Hart *The Concept of Law*, above n 21, at 201.

any method of social control – rules of games as well as law – which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey.

In addition, Hart recognizes that general rules must be provided if a society is to be governed by law; the giving of particular legal orders by officials cannot be “the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do. … Legal control is therefore primarily, though not exclusively, control by directions which are … *general.*”

These statements show that Hart accepts that certain principles of the rule of law must be fulfilled to some degree if the law is to be effective at guiding conduct through rules – effective at functioning as law should. The standard way that law functions is through general rules communicated to people in advance, and these rules must be able to guide
people’s conduct, which will only be possible if they conform to the principles of the rule of law.

Whether Hart actually holds an account of law that includes reference to law’s function is controversial. Some say that Hart does not distinguish law by reference to its function, or that he is ambiguous. Others say that he does recognize that law has a function, as he put it in his “Postscript” to *The Concept of Law*, to provide “guides to human conduct”. For example, Scott Shapiro thinks that Hart thought that it was the function of law to guide human behaviour – the law’s “primary function is to epistemically guide the conduct of its ordinary citizens via its primary rules[.]. . . . To be guided by a legal rule in an epistemic fashion . . . is to learn of one’s legal obligations from the rule and to conform to the rule because of that knowledge” – and he builds his exclusive legal positivism on this insight, arguing that moral deliberation within the law would make it impossible for law to perform this function.

In addition to Hart’s remark in the Postscript, the idea that law’s function is to guide human conduct is reflected in the passages noted above, which say that a functioning and effective legal system must conform substantially to the principles of the rule of law. Hart’s position is interpreted as saying that it is not enough to have just a minimal level of conformity that would allow us to say some rules exist, however opaque, hidden, and unintelligible they are to those whose action they are meant to guide. Instead, this interpretation takes Hart’s admission that to be effective the law must conform substantially to legality, and combines it with the view that ineffective law cannot function as the law is supposed to function, and therefore is not law in its central sense.

Seeing law as a functioning system of conduct-guiding norms is also similar to Hart’s thought in *Punishment and Responsibility*, set out above, that we should “[c]onsider the law not as a system of stimuli but as what might be termed a choosing system, in which

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104 Hart “Postscript”, above n 77, at 249.
106 Ibid.
107 See above at section 3.5.4.
individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.”

If the law is to be a choosing system – which it must be to come within our understanding of law – it must conform substantially to legality so that people can guide their conduct according to it. It is not enough for the rule to be applied to people’s conduct by officials; the rules must actually be effective in guiding conduct and people must comply with the law because they are being guided by it and are able to apply it to their own actions, rather than merely being held to account for breaches of the law after they have acted.

If this interpretation is accepted, Hart’s analysis is far closer to Fuller’s concept of law, because substantial conformity to the principle of the rule of law will be seen as necessary for the existence of a legal system due to the law’s guidance function. Whether this interpretation is accepted will depend on how the interpreter thinks that Hart’s statements about the law being a choosing system should be weighed against his general reluctance to place further requirements on the existence and content of a legal system.

As with the previous argument, this is a difficult matter of textual and conceptual interpretation, and it does not take place on the basis of substantial analysis of these issues by Hart himself. As on a number of other issues relating to the rule of law, Hart’s reluctance to analyse that ideal in any depth means that his fleeting discussions must remain ambiguous, subject to competing interpretations that cannot be conclusively adjudicated. It has, therefore, been left to later legal positivists to attempt to develop a clear position on this issue, whether or not they claim that they are being faithful to Hart.

3.5.6 Conclusion

This section shows that, despite Hart’s general view of law as essentially a particular kind of social phenomenon that he does not understand in relation to the requirements of the rule of law, and his express denials that the law should be understood as living up to any particular moral ideal, some of Hart’s more specific arguments about legality seem to accept that there is a necessary connection between law and legality. There seems to be in these arguments an

109 Hart Punishment and Responsibility, above n 21, at 44.
112 Hart The Concept of Law, above n 21, at 204-205.
acceptance that Fuller’s arguments were more compelling than Hart’s critique of them in his review of *The Morality of Law* suggests. If this is the case, Hart would have to explain how his concessions to Fuller’s Challenge do not lead to the abandoning of legal positivism. However, these connections between Hart’s concept of law and Fuller’s are not fully developed in Hart’s work. As with the other aspects of positivism’s engagement with Fuller’s Challenge, we must wait for later theorists’ discussions before these issues are addressed in detail and with clarity.

### 3.6 Conclusion

This chapter’s aim has been to show how Hart ultimately situates the idea of the rule of law within his positivist legal theory, when we bring together the writings where he reflected on it in detail. The main claim I have advanced is that over many aspects of this topic, Hart’s arguments are ambiguous and do not clearly show how legal positivism can come to terms with Fuller’s Challenge from the rule of law. Instead, Hart’s strategy in dealing with Fuller’s Challenge is to divide his analysis between two topics that accord with the positivist way of seeing the issue, and to find the appropriate response to Fuller’s claims on that basis. This divide and conquer approach to Fuller’s Challenge is contrary to Fuller’s aim of showing the inseparability of the various strands of his legal philosophy. As I will show in later chapters, this strategy is common amongst positivists who attempt to integrate Fuller’s principles of legality into their theories.

In the wider context of this thesis, although Hart’s discussion of the rule of law was ambiguous, the arguments he made provide the basis for, and recur in, all later legal positivist analyses of the rule of law and Fuller’s Challenge – as do the tensions between Hart’s concessions and his legal positivism. With regard to the Moral Value question, Hart’s Instrumental argument is the basis for Raz’s analysis, and Hart’s arguments concerning human autonomy and happiness are also evident in all other positivist discussions. Similarly, Hart’s arguments concerning the relationship between law and the rule of law, as undeveloped and unfocused as they are, recur in greater detail and clarity in later discussions.
Whether positivists are wise to follow Hart’s lead depends on whether Hart’s concessions can be explained to be consistent with legal positivism. The concessions that Hart makes to Fuller at different points cause a problem for Hart’s positivism if one reads him as dedicated to the No Necessary Connection Separation thesis, as Waldron does. The moral value that Hart identifies in conformity to the rule of law, and the necessary connections between law and Fuller’s principles that seem to be the implication of Hart’s theory, are seen by Waldron as impugning Hart’s self-professed positivism. Waldron’s view is that Hart understood these problems that Fuller’s Challenge caused his theory, and sought to hide them. But instead of seeing Hart as wilfully ambiguous, I read him as simply having failed to dwell long enough on the implications of Fuller’s Challenge and the precise nature and extent of his concessions to Fuller: a failure of intellectual rigour rather than intellectual dishonesty. My view is that Hart did not see the problems that Waldron identifies, and therefore did not see fit to respond more fully to Fuller’s arguments. Furthermore, if legal positivism is not committed to the No Necessary Connection Separation thesis, then its concessions to Fuller on this score do not threaten it – removing Hart’s motivation.

However, we can still see things in the above analysis that provide evidence to justify my argument that Hart’s discussions of the rule of law reveal a failure of intellectual rigour in responding to Fuller’s Challenge. While later positivists have built on and clarified Hart’s response, remedying much of this failure, I argue below that there is still insufficient attention paid to Fuller’s wider anti-positivist arguments concerning the rule of law. Hart and all of the other legal positivists discussed in this study accept that there is some relationship between law and the rule of law, but they differ on what this relationship is and what kind of concessions to Fuller’s Challenge they are making. But, in general, they do not devote enough time to explaining their positions clearly and analysing how they fit within their legal positivism. As we will see, in general the various legal positivist responses to Fuller’s Challenge still do not focus on the fundamental differences between Fullerian anti-positivist and positivist understandings of law, but merely integrate Fuller’s insights into the positivist framework. Most recent positivists still fail to explain their preference for a positivist approach that makes the rule of law a peripheral element of the social institution we understand as law, and the nature of legal validity. I will also argue that their accounts of
law and the rule of law are primarily driven by each positivist's particular view of the Social thesis.
Chapter 4: Raz’s conception of the rule of law

4.1 Introduction

Around two decades after Hart had made his main contributions to the debate with Fuller, Joseph Raz provided another important legal positivist analysis of the rule of law. In contrast to Hart’s sparing and unsystematic discussions of the idea, primarily made in response to Fuller’s arguments, Raz devoted an entire article to analyzing the meaning of the ideal of the rule of law, setting out its various ‘virtues’, and showing its relationship to the concept of law. His position is in essence very close to Hart’s. Raz builds on Hart’s analysis by expanding on some of the ambiguous claims Hart made about Fuller’s principles. Like Hart, Raz uses the divide and conquer strategy to deal with Fuller’s Challenge, understanding it according to his own legal positivist conception of law and then splitting Fuller’s anti-positivist account of law into (i) the question of the rule of law’s moral value, and (ii) its relationship with the existence of law. In the course of his argument, Raz makes some concessions to Fuller; however Raz also follows Hart in failing, at least in his discussion of the rule of law, to explain why he rejects Fuller’s very different concept of law.

Because Raz does not attempt to connect his discussion of the rule of law with a wider analysis of the reasons for preferring the legal positivist position on law, I will focus in this chapter on setting out how he analyzes the rule of law itself. Despite his more focussed discussion, Raz’s analysis is still almost as ambiguous as Hart’s. On the question of the moral value of Fuller’s principles, Raz on the one hand seems to agree with Fuller that conformity to the principles of the rule of law is of moral value; on the other hand, Raz also follows Hart in saying that Fuller’s principles are of instrumental value, making the law better fulfill its function of guiding human conduct. When Raz turns to considering the relationship between law and the rule of law, he says at one point that the law must minimally conform to Fuller’s principles if a legal system is to exist, while at another point he says that a legal system may fail to conform to the ideal of the rule of law.

As with Hart, it is necessary to look closely at Raz’s arguments in order to provide an interpretation of his ultimate position on the rule of law’s moral value and its relationship...
with the concept of law, and to determine to what extent he makes concessions to Fuller’s Challenge – and to what extent he rejects it. What is most important for my wider thesis is the clear, self-conscious rejection by Raz of Fuller’s anti-positivist theory of law, which seems to sit uneasily with his acceptance that a minimal level of conformity to the principles of the rule of law is necessary if a legal system is to exist. How these two arguments go together is a difficult question, and I explain below how I think Raz fits them together. I argue further that Raz’s position is complicated by his other major claim in general jurisprudence: that law claims legitimate authority, and that this means the content of legal norms is not determined by moral facts – the strong Social thesis (or ‘Sources thesis’).1 As I argue below and expand upon in Chapter 8, Raz’s inclusion of this further necessary feature of institutionalized normative systems that are law both (i) draws Raz’s theoretical exclusion of the rule of law from his concept of law into question, and (ii) arguably requires him to admit that substantial conformity to the rule of law is necessary is a condition for law’s existence.

Thus, my analysis of Raz fits with the wider thesis of this study, which, we should remember, is that positivists in the Hartian tradition have all made some concessions to Fuller’s Challenge relating to the rule of law’s moral value and its connection with the idea of law, while at the same time clinging to the key positivist Social thesis in some form. The way in which each theorist does this reveals their self-understanding of legal positivism, which allows us to better understand the nature of the positivist/anti-positivist debate concerning the nature of law; it also allows us to better see areas where fruitful engagement between these perspectives might occur, for example on the question of moral obligations to law. We will see this further as I move through the different positions in the next few chapters, and I will draw together these observations in my concluding chapter.

Before I move to his analysis of the two main questions relating to the positivist analysis of the rule of law, we should note that Raz, like Hart, broadly accepts Fuller’s principles as setting out the content of that ideal.2 Raz identifies a similar list of key elements of the rule of law early in his essay: it requires that law should be prospective, public, clear, and

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1 See below at section 4.4.1.
relatively stable, and particular (non-general) laws should be made only on the basis of laws that conform to these requirements. These principles of the rule of law all derive from the view that the function of law is to guide human behaviour – they specify what is necessary if the law is to be able to guide conduct effectively. Essentially, people must be able to know what the law demands of their conduct. These principles “require that the law should conform to standards designed to enable it to effectively guide action”.

Raz adds to Fuller’s list certain procedural and institutional elements “designed to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it.” These requirements include the existence of unbiased, independent courts that follow proper procedures and are accessible to all those who wish to test or vindicate their legal rights, that the police do not pervert the workings of the legal system, and that the courts are empowered to enforce the requirements of the rule of law. This second set of requirements might be seen as implicit in Fuller’s requirement of congruence, which required faithful application and enforcement of the law to particular cases.

### 4.2 Raz on the moral value of the rule of law

Raz’s arguments regarding the rule of law’s moral value are difficult to interpret conclusively. For, like Hart, Raz seems to be equivocal: it seems that he accepts and denies, at different points in his article, Fuller’s claim that conformity to the principles of the rule of law is of moral value. Yet most writers take his equivocations to mean that Raz denies that conformity to Fuller’s principles of the rule of law is of any moral value. In other words, Raz is thought to hold the same position that the Standard position ascribes to Hart. In the

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3 Raz The Authority of Law, above n 2, at 214–215.
4 Raz The Authority of Law, above n 2, at 214 and 218.
5 Raz The Authority of Law, above n 2, at 218.
6 Raz The Authority of Law, above n 2, at 218.
7 Raz The Authority of Law, above n 2, at 218.
most detailed recent discussion of Raz’s account of the moral value of legality, Colleen Murphy observes that:9

For Raz the rule of law is not morally valuable in itself. … Raz rejects the claim that the rule of law has non-instrumental moral value. … Absent some such connection with a morally important purpose, the function facilitated by the rule of law, namely, guiding behavior, remains itself morally indifferent.

I will explain the distinction between instrumental and non-instrumental moral value below, but what Murphy is claiming is that Raz thinks there is nothing of moral value achieved by conformity to Fuller’s rule of law principles in itself. However, this interpretation is unsatisfactory, because it cannot explain a number of other arguments in Raz’s article that are very similar to Fuller’s arguments about the rule of law’s moral value. Raz is, therefore, at least Equivocal, in the same sense as Hart. In addition, the ambiguities in his arguments mean that it is also possible to interpret Raz along the lines of the Alternative interpretation of Hart, as accepting the rule of law principles’ non-instrumental moral value.

4.2.1 The moral value of legality?

What, then, is the evidence that Raz agrees that the rule of law is of moral value? The relevant passages are found in the section of his essay entitled ‘The value of the rule of law’.10 Raz notes that conformity to the rule of law does not prevent all manifestations of arbitrary power;11 nor does it ensure that other morally relevant values are fulfilled: the rule of law does not secure democratic government, nor the respect for human rights.12 The rule of law is “just one of the virtues which a legal system may possess”, and if we want to know what value the rule of law does have, we must not confuse it with other ideals and moral requirements for the law.13

Raz’s main arguments about the moral value that the rule of law does secure are very similar to Fuller’s being based on the concern for human autonomy. He first observes that we value the ability to choose our way of life, which involves directing our energies towards the goals

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10 Raz The Authority of Law, above n 2, at 219.
11 Raz The Authority of Law, above n 2, at 219.
12 Raz The Authority of Law, above n 2, at 211.
13 Raz The Authority of Law, above n 2, at 211.
that we regard as good.\textsuperscript{14} Our ability to conduct actions that aim to fulfill our plans and goals depends on knowing about any frameworks of rules that enable or constrain our efforts in a particular area, and the law is often the most important such framework. Law will only assist us in planning our lives to achieve our goals if it is “a stable and safe basis for individual planning”, which it will be only if it conforms to the principles of the rule of law identified by Fuller.\textsuperscript{15} Raz argues that these principles, by securing a predictable framework of rules, increase our freedom by allowing us to see what our options for action are.\textsuperscript{16}

Yet Raz places more emphasis on his view that conformity to the rule of law principles is:\textsuperscript{17}

necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people’s dignity includes respecting their autonomy, their right to control their future.

Law that is otherwise respectful of human dignity might violate it through lack of conformity to legality.\textsuperscript{18} Such violation of the principles of legality will result in either (a) uncertainty (where people cannot know the content of the law and are thus unable to plan their lives in accordance with it), or (b) the disappointment of expectations (where expectations of stability or congruence of enforcement of the content of the law are “shattered by retro-active law-making or by preventing proper law-enforcement, etc”).\textsuperscript{19} While uncertainty prevents planning for the future and allows for arbitrary power, the evils of disappointment of expectations are greater:\textsuperscript{20}

Quite apart from the concrete harm [that frustrated expectations] cause they also offend dignity in expressing disrespect for people’s autonomy. The law in such cases encourages autonomous action only in order to frustrate its purpose. When such frustration is the result of human action or the result of the activities of social institutions then it expresses disrespect. … A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations.

\textsuperscript{14} Raz \textit{The Authority of Law}, above n 2, at 220.
\textsuperscript{15} Raz \textit{The Authority of Law}, above n 2, at 220.
\textsuperscript{16} Raz \textit{The Authority of Law}, above n 2, at 220.
\textsuperscript{17} Raz \textit{The Authority of Law}, above n 2, at 221.
\textsuperscript{18} Raz \textit{The Authority of Law}, above n 2, at 221.
\textsuperscript{19} Raz \textit{The Authority of Law}, above n 2, at 222.
\textsuperscript{20} Raz \textit{The Authority of Law}, above n 2, at 222.
A legal system that fails to conform to the rule of law violates human dignity in these ways, whereas one that does conform respects human dignity in at least these respects. This is why “general conformity to the rule of law is to be highly cherished”.21

There is a marked, but unacknowledged, similarity between Raz’s arguments and Fuller’s view that “[e]very departure from the law’s inner morality is an affront to man’s dignity as a responsible agent”, as a “self-determining center of action”.22 In this part of his article, Raz seems to substantially agree with Fuller that conformity to Fuller’s principles has moral value, for essentially the same reasons.

4.2.2 The instrumental argument

Given that Raz affirms the rule of law’s moral value, it may seem strange that many commentators have attributed to him the opposite position. However, the reason is relatively clear: later in his essay, Raz makes what I will call the ‘Instrumental argument’, which portrays conformity to the principles of legality as an instrumental virtue. This creates the impression that Raz is equivocal, having made two inconsistent arguments in the same essay – that the rule of law is morally valuable, and that it is only of non-moral instrumental value.

The Instrumental argument is found near the end of Raz’s essay. In order to understand the argument it is crucial to note exactly what Raz is seeking to demonstrate. Raz’s aim in this part of the essay is to deny that all legal systems must necessarily conform to the ideal of the rule of law, as an existence condition of being legal systems. Raz is recognizing an argument “which establishes an essential connection between the law and the rule of law”, but which still does not “guarantee any [moral] virtue to the law”.23 This seems to aid the Standard interpretation of Raz on the rule of law’s moral value.

But the Alternative interpretation would say that it is important to see that Raz is primarily discussing the Relationship question, not the Moral Value question. His reference to whether this relationship guarantees moral virtue to the law is premised on his earlier acceptance that conformity to the rule of law is of moral value. What he is asking is whether law must

21 Raz The Authority of Law, above n 2, at 222
23 Raz The Authority of Law, above n 2, at 224.
necessarily live up to the ideal of the rule of law, or whether there is any other essential connection between them.

Raz makes two key claims about the existence of a necessary connection between law and the rule of law. The Instrumental claim is that conformity to the rule of law is necessary if the law is to be effective in guiding conduct, and therefore effective in achieving whatever purposes one is seeking to achieve through law. Conformity to the rule of law is necessary if the people who are supposed to be obeying the law are to be able to know the content of the law and guide themselves by it. Raz’s point here is the same as Hart’s admission of a necessary connection between law and the rule of law: the law can only be effective in guiding human behaviour if it conforms to the principles of legality.

Because it makes the law more effective in achieving its purpose of guiding human conduct in the service of the legislator’s ultimate goals, Raz argues that from this perspective the rule of law can be seen as an instrumental virtue. The principles of legality make the law better perform its function of guiding behaviour and make the law a better instrument for pursuing whatever ends it is used to pursue. The Instrumental argument is found in the following passage:

Regarding the rule of law as the inherent or specific virtue of law is a result of an instrumental conception of law. The law is not just a fact of life. It is a form of social organization which should be used properly and for the proper ends. It is a tool in the hands of men differing from others in being used for a large variety of proper purposes. As with some other tools, machines, and instruments a thing is not of the kind unless it has at least some ability to perform its function. A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.

Here we see Raz’s statement that the rule of law is “not a moral virtue”. His argument is that because the law is an instrument for guiding behaviour, the rule of law can be seen as the virtue that allows that instrument to fulfill its function efficiently, that is, that makes law good in the instrumental sense. But ‘virtue’ here means the ‘good-making’ property of an

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24 Raz *The Authority of Law*, above n 2, at 224.
25 Raz *The Authority of Law*, above n 2, at 225.
26 See Chapter 3 at section 3.5.2.
27 Raz *The Authority of Law*, above n 2, at 226.
instrument, which allows the instrument to efficiently fulfill its function; such virtue is not moral virtue.\textsuperscript{28} Raz is essentially denying that Fuller’s principles are necessarily used for morally attractive ends when they are used to make the law more effective in guiding conduct, and that therefore they are not, in that sense, intrinsically moral. A government may conform to the rule of law for these instrumental reasons, with the aim of better achieving an evil end through the guidance of human conduct: “conformity to the rule of law also enables the law to serve bad purposes”.\textsuperscript{29}

As noted above, this argument is usually interpreted as the Instrumental objection to the view that the rule of law is morally valuable. Murphy argues that “Raz rejects the claim that the rule of law has non-instrumental moral value.”\textsuperscript{30} Similarly, Marmor argues in his discussion of the rule of law that Raz responded to Fuller’s argument about the moral value of the rule of law by saying “that these virtues of the rule of law are merely functional values, not moral ones. Just like the sharpness of a knife, which makes the knife a good one, so the rule of law virtues make the law good, but only in terms of its functioning as a means of social control.”\textsuperscript{31} Raz is therefore understood to make two contradictory claims in his essay. His first claim, in part 3 of his essay, is the rule of law should be valued for moral reasons relating to human dignity and autonomy. But the Instrumental argument in part 4 denies that the rule of law is a moral virtue.

Raz is aware of these two claims, because in the paragraph that introduces the Instrumental argument, he reiterates that in part 3 he had shown that “conformity to the rule of law is one among many of the moral virtues which the law should possess”; whereas his point now is that from the Instrumental perspective it is “not merely a moral virtue”.\textsuperscript{32} If the Alternative interpretation is correct, Raz is not denying that conformity to the rule of law is of moral value, because he is not discussing that question in the relevant part of his essay. Instead, he is answering the Relationship question by arguing that another aspect of such conformity is that it allows the law to better guide conduct. Therefore, as with Hart, it is possible to argue that Raz’s seemingly equivocal position on the moral value of the rule of law is actually an

\textsuperscript{28} Raz \textit{The Authority of Law}, above n 2, at 226.  
\textsuperscript{29} Raz \textit{The Authority of Law}, above n 2, at 225.  
\textsuperscript{30} Murphy “Lon Fuller and the Moral Value of the Rule of Law”, above n 9, at 248.  
\textsuperscript{31} Marmor “The Rule of Law and its Limits”, above n 8, at 48.  
\textsuperscript{32} Raz \textit{The Authority of Law}, above n 2, at 225.
ambiguous attempt to support Fuller’s claims about moral value, while emphasizing the instrumental value that the rule of law also secures. Part 3 demonstrates the rule of law’s moral value, and part 4 its instrumental value.

But again the way that Raz understands the interaction of these virtues is not clear, and later commentators have not found a way of making sense of both of his claims, with most seeing Raz joining Hart in denying any non-instrumental moral value in conformity to Fuller’s principles. One can use this conclusion in two ways. The first is to say it is important for this study’s purposes that the Standard interpretation of Raz is that the Instrumental argument shows that conformity to the rule of law is not of non-instrumental moral value, because this study aims to show the arguments that more recent legal positivists have made concerning the rule of law; Raz is almost always understood as denying that the rule of law is of moral value, because it is merely a non-instrumental virtue. The other way to use this conclusion is to say that the Alternative interpretation, like Hart’s, demonstrates another position that legal positivists might take on the moral value of the rule of law – namely, admitting that conformity is of moral value, but also emphasizing that this moral value sits alongside instrumental value.

4.3 Raz on the relationship between law and the rule of law

4.3.1 Challenging Fuller’s concept of law

As we have already seen, in part 4 of his essay Raz discusses the relationship between law and rule of law. Part of his aim in that part is to dispute Fuller’s claim that “the principles of the rule of law … are essential for the existence of law”. But Raz’s own analysis proceeds on the basis of his general legal positivist conceptual framework, which sees law as a particular kind of social institution – essentially an institutionalized normative system that claims ultimate authority to regulate human conduct in a territory. On that the view, living up to any moral ideal such as the rule of law is not an existence condition of law. Raz claims that the rule of law is a moral ideal to which law ought to conform, but one that a

33 Raz The Authority of Law, above n 2, at 223.
34 Joseph Raz Practical Reason and Norms (2nd ed, Oxford University Press, Oxford, 1999) at Chapter 5; Raz The Authority of Law, above n 2, at Chapters 2, 3, 5 and 6.
35 Raz The Authority of Law, above n 2, at 223.
legal system could violate “radically and systematically” without ceasing to be law.\textsuperscript{36} And although the rule of law allows the law to better perform its function of guiding human behaviour, this merely indicates that the rule of law describes the specific excellence of law, rather than being necessary for the existence of law, or being the only ideal that law aspires to. In short, one can have law without having the rule of law.

Raz sets out to critique Fuller’s very different understanding of law, which sees conformity to the rule of law as an existence condition for the law, one that that makes the law necessarily moral. Thus, Raz observes that:\textsuperscript{37}

Fuller, while allowing that deviations from the ideal of the rule of law can occur, denies that they can be radical or total. A legal system must of necessity conform to the rule of law to a certain degree, he claims. From this claim he concludes that there is an essential link between law and morality. Law is necessarily moral, at least in some respects.

Fuller’s argument for a necessary moral element of the law would, Raz admits, be crucial to our understanding of the relationship between law and morality, if it were correct.\textsuperscript{38} Raz seeks to challenge Fuller’s answer on the Relationship question, and to thereby challenge Fuller’s method of showing that law necessarily has moral value. Yet despite the general position outlined in the paragraph above, which says that conformity to the rule of law is not a necessary requirement for the existence of law, Raz’s answer is not entirely clear.

\textbf{4.3.2 Raz’s position on the law/rule of law relationship}

Raz’s position on the relationship between law and the rule of law in his essay is, at first glance, a flat denial of Fuller’s claim that a legal system, as Raz puts it, “must of necessity conform to the rule of law to a certain degree”.\textsuperscript{39} Raz says that conformity to the rule of law “may fail to become a reality” in a legal system.\textsuperscript{40} Again, this is because Raz sees Fuller as making the claim that the rule of law is a moral ideal to which the law must conform to be legal (to be law at all). Law is a particular kind of social institution that is not identified or defined by reference to any normative or moral concept. This is Raz’s Social thesis, which

\textsuperscript{36} Raz \textit{The Authority of Law}, above n 2, at 223.
\textsuperscript{37} Raz \textit{The Authority of Law}, above n 2, at 223.
\textsuperscript{38} Raz \textit{The Authority of Law}, above n 2, at 223.
\textsuperscript{39} Raz \textit{The Authority of Law}, above n 2, at 223.
\textsuperscript{40} Raz \textit{The Authority of Law}, above n 2, at 224.
he identifies as central to legal positivism in his other major writings.\textsuperscript{41} Because law is simply a kind of social institution, no moral requirements are part of the conceptual requirements for its existence. This is a clear rejection of Fuller’s Challenge in its widest formulation.

However, Raz’s actual position is more complicated than this, because he does accept that some minimal conformity to Fuller’s principles is necessary if a legal system is to exist: “most of the principles” of the rule of law cannot be “violated altogether by any legal system”.\textsuperscript{42} This seems to be a concession to Fuller’s Challenge, and it is this combination of claims that creates ambiguity, because they seem contradictory: legal systems need not necessarily conform to the rule of law, but the rule of law principles cannot be completely violated – which seems to mean they must be minimally conformed to.

So, on the Relationship question, Raz is again ambiguous in the way that he lays out his arguments: he is either equivocal, or else thinks that law can exist without conforming to the rule of law. Which view is correct depends on whether any conformity to Fuller’s principles – no matter how minimal – should be understood as conformity to the ideal of the rule of law. This depends on whether it makes sense to distinguish between (i) conformity to Fuller’s principles (that is, minimal, and so not a fulfilment of the rule of law), and (ii) substantial conformity to those principles that constitutes the fulfilment of the rule of law. If there is a difference between minimal compliance with Fuller’s principles and minimal compliance with the rule of law – which requires more than minimal compliance with Fuller’s principles – Raz’s claims are consistent: he can say that minimal compliance with Fuller’s principles is necessary for a legal system to exist, but that this does not constitute compliance with the ideal of the rule of law.

On close analysis, Raz does seem to draw this distinction. He observes that, from the point of view of positivist legal theory, a number of Fuller’s principles of the rule of law must be at least minimally fulfilled before a legal system exists. This is because the two important ‘requirements’ of the legal positivist concept of law – that officials apply the secondary


\textsuperscript{42} Raz \textit{The Authority of Law}, above n 2, at 223.
rules, and citizens obey the primary rules—require some minimal satisfaction of the formal principles. For example, Raz notes that legal systems must have at least some general and prospective rules of recognition and adjudication, which must also be relatively clear. If rules are to exist, they must therefore satisfy the principles of legality at least minimally.

This, Raz accepts, might be mistaken as a concession to Fuller’s wider anti-positivist position: because the rule of law is morally valuable, and because some minimal conformity to Fuller’s principles is necessary for law to exist, it might be thought that “considerations of the kind mentioned [are] sufficient to establish that there is necessarily at least some moral value in every legal system”. But Raz insists that this minimal necessary level of conformity does not vindicate Fuller’s argument, because “the extent to which generality, clarity, prospectivity, etc., are essential to the law is minimal and is consistent with gross violations of the rule of law.”

This is further evidence of the distinction noted above: Raz does not think the existence of a legal system requires the kind of substantial conformity to principles of legality that is necessary in order to fulfill the rule of law. A legal system’s existence requires merely enough conformity to Fuller’s formal principles for there to be rules. Raz’s point is that this minimal conformity to Fuller’s formal principles is insufficient to constitute the situation that is created by substantial conformity — as required by the rule of law ideal — but it is nonetheless sufficient for there to be law.

A further specific example of this reasoning can be seen in another of Raz’s essays, where he states that:

> secret laws are possible provided they are not altogether secret. Someone must know their content some of the time. They are publicly ascertainable and they guide the behaviour of the officials to whom they are addressed or who are charged with their enforcement by being so.

Here Raz says that there can be laws that significantly violate the principle of promulgation or publicity. When these laws are applied to the actions of people who cannot know their content, this is an egregious violation of the rule of law. However, the minimal conformity

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43 HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 113. See the discussion above relating to Hart’s concept of law in Chapter 2 at section 2.2.
44 Raz *The Authority of Law*, above n 2, at 223.
45 Raz *The Authority of Law*, above n 2, at 224.
46 Raz *The Authority of Law*, above n 2, at 223-4.
47 Raz *The Authority of Law*, above n 2, at 51 fn 9.
to publicity that is necessary for a rule to exist – “Someone must know their content some of the time” – is satisfied, so we can say that a law exists. A complete violation of promulgation – a norm that remains limited to the norm-creator’s mind only, for example – would mean that no law at all could be said to exist. But because there is a minimal promulgation to those who are enforcing the law, it does not matter to the law’s existence that the bulk of the population knows nothing of the law’s content. This supports Raz’s contention that the minimal compliance with Fuller’s principles that is necessary for a legal system to exist is not enough for us to say that the ideal of the rule of law is fulfilled.

Raz’s distinction between the minimal compliance necessary for the existence of a legal system, and the substantial compliance constitutive of the rule of law,\(^48\) is also reflected in the way that he does not speak in his essay of minimal compliance with Fuller’s principles as constituting minimal conformity to the rule of law. A system that violates the rule of law ‘radically and systematically’, while still managing to be an affair of rules by complying at least minimally with the formal principles, is not a system that is minimally ‘conforming to the rule of law’. It is one that may be in “gross violation” of the rule of law.\(^49\)

### 4.3.3 Does this minimal conformity create minimal moral value?

The importance of seeing the distinction between Raz’s account of the rule of law’s moral value and understanding his position on the relationship between law and the rule of law is also evident in Raz’s next argument. Raz claims that the minimal compliance with Fuller’s that he does accept is necessary for law to exist does not mean that “there is necessarily at least some moral value in every legal system”.\(^50\) This argument is motivated by Raz’s aim of evaluating Fuller’s claim that the law is necessarily moral due to its connection with the rule of law. For after Raz has argued in part 3 of his essay that the rule of law is morally valuable, it may seem that the minimal conformity to Fuller’s principles that Raz admits in part 4 is necessary for law to exist means that the law is always in some way necessarily

\(^{48}\) Matthew Kramer *In Defense of Legal Positivism* (Oxford University Press, Oxford, 1999) at 51. In Matthew Kramer *Objectivity and the Rule of Law* (Cambridge University Press, Cambridge, 2007), Kramer makes a distinction between the rule of law as the morally-neutral existence conditions for any legal system, and the rule of law as the moral ideal that becomes possible in benign legal systems 101-103. See also Fuller *The Morality of Law*, above n 22, at 41 for a similar formulation.

\(^{49}\) Raz *The Authority of Law*, above n 2, at 224.

\(^{50}\) Raz *The Authority of Law*, above n 2, at 224.
moral. But his argument here seems to confirm the interpretation above, that minimal conformity to Fuller’s principles does not constitute conformity to the full moral ideal of the rule of law.

In rejecting Fuller’s claim that his principles show that every legal system has some moral value, Raz introduces his ‘negative virtue’ argument. This argument is quite difficult to understand, and is sometimes being read as an additional argument against the moral value of the rule of law.\(^{51}\) Raz says that the rule of law is a negative virtue because “conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself.”\(^{52}\) He then provides an analogy to honesty defined as the avoidance of deceit in acts of communication; he says that “only a person who can deceive can be honest. A person who cannot communicate cannot claim any moral merit for being honest.”\(^{53}\)

It is not immediately clear how this argument and the analogy serves Raz’s purpose of showing that the minimal conformity to Fuller’s principles necessary for a legal system to exist does not mean that that legal system necessarily has some moral value. Marmor takes Raz to be claiming that because the value of the rule of law is the avoidance of evil, this is not really morally valuable; he replies that “the fact that a properly functioning legal system cannot sanction certain forms of arbitrary force or violation of human freedom and dignity… is simply good, even if it is true that the law does not deserve moral credit for it”.\(^{54}\) But one might say that Raz completely agrees with Marmor here because, according to the above distinction, Raz’s point is not that conformity to the rule of law is not of moral value, but that the minimal conformity to Fuller’s principles that is necessary for the law to exist is not the substantial conformity necessary for the rule of law ideal to be fulfilled. Just because the principles of legality must be minimally conformed to if law is to exist, this does not mean that such minimal conformity secures any necessary moral value in a legal system. This is because these principles must be substantially fulfilled in order to constitute the moral ideal

\(^{51}\) Raz *The Authority of Law*, above n 2, at 224. For an interpretation see Marmor “The Rule of Law and its Limits”, above n 8, at 39–41. Michael Sevel observes that “The distinction that Raz introduces between positive and negative virtues is unusual and is not argued for in the course of his argument.” Michael Sevel “Legal Positivism and the Rule of Law” (2009) 34 Australian Journal of Legal Philosophy 53 at 60.

\(^{52}\) Raz *The Authority of Law*, above n 2, at 224.

\(^{53}\) Raz *The Authority of Law*, above n 2, at 224.

\(^{54}\) Marmor “The Rule of Law and its Limits”, above n 8, at 40.
of the rule of law and therefore to avoid the vices of arbitrary power and violations of freedom and dignity. The conformity necessary for law to exist allows there to be law, but it does not mean that the law is not “unstable, obscure, retrospective, etc., and thus infringing people’s freedom and dignity”;\(^{55}\) in other words, minimal conformity to Fuller’s principles does not mean the moral ideal of the rule of law is instantiated.

The knife analogy may be used to illustrate this point, and it seems that Raz does use it for this purpose, for he says that “a thing is not of the kind unless it has at least some ability to perform its function. A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently.”\(^{56}\) Expanding the analogy: to be a knife at all, an object has to be able to perform the function of cutting, and therefore must have a minimal level of conformity to the things that make up the instrumental virtue of sharpness. The object must have an edge that is thin enough and hard enough to separate another object’s molecules. Objects that lack such an edge (batons, sticks), or hardness (silicon spatulas) are not knives, because they cannot cut the other objects at all. To be a knife, there must be \(\textit{minimal conformity to the functional virtues}\) of thinness and hardness. However, just being a knife does not mean that the object is sharp. An object’s minimal conformity to the attributes that make up the knife’s instrumental virtue of sharpness means that the object can exist as a knife, but it does not mean that it is a sharp knife.

Putting this analysis back into its context, it seems that the above distinction can explain Raz’s negative virtue argument. Raz’s point seems to be that what is necessary for a legal system to exist is only this minimal conformity to the instrumental principle or attributes: minimal conformity to Fuller’s principles is necessary if there is to be a legal system at all. This minimal conformity allows a legal system to exist, which brings with it the possibility of \(\textit{the law}\) creating arbitrariness (that is, rather than arbitrariness existing without taking legal form). This seems to me to be the meaning of Raz’s statement that the rule of law is a negative virtue, in that “conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself”:\(^{57}\) minimal conformity to Fuller’s principles allows law to exist, which brings with it

\(^{55}\) Raz \textit{The Authority of Law}, above n 2, at 224.

\(^{56}\) Raz \textit{The Authority of Law}, above n 2, at 226.

\(^{57}\) Raz \textit{The Authority of Law}, above n 2, at 224.
possibility of the evil of non-compliance with the rule of law. Just by minimally complying with Fuller’s principles enough to be a legal system does not mean that the system lives up to the rule of law, which requires substantial conformity to Fuller’s principles.

This idea can also be seen in Raz’s statement that “that the law cannot sanction arbitrary force or violations of freedom and dignity through total absence of generality, prospectivity, or clarity is no moral credit to the law”. 58 Just because the law has conformed enough to these principles to ineffectively guide conduct – ruling out the total rule-less arbitrariness of those with power – does not mean that it has secured the value that the rule of law secures. In fact, such conformity, in allowing the law to exist as a system that is supposed to guide behaviour effectively and allow people to rely on that guidance being honoured, has created the dangers of violation of the rule of law that Raz noted in his analysis of the rule of law’s moral value: only when there are rules can those rules be incapable of guiding human conduct, or can people’s expectations be frustrated. 59

Another way of putting the point is that there is a continuum of conformity to Fuller’s principles. Only a well-ordered set of rules that substantially conforms to Fuller’s principles has the virtue that Raz identifies as the rule of law ideal. Conforming to the principles only enough to guide behaviour in ways contrary to the rule of law – for example, by only guiding certain sections of the population through secret or unintelligible law – is not a fulfilment of the ideal of the rule of law, because it is only when law exists that the dangers of law’s arbitrariness come into being. Only the substantial conformity to Fuller’s principles that fulfills the rule of law ideal will avoid the new possibility of evil that is created when a legal system exists.

4.3.4 Does Raz successfully refute Fuller?

I have noted that part of Raz’s purpose in this part is to challenge the anti-positivist claim that he takes Fuller to be making: that there is an “essential link between law and morality” because (i) the rule of law must be substantially satisfied before we can say that we have

58 Raz The Authority of Law, above n 2, at 224.
59 Raz The Authority of Law, above n 2, at 221–222.
law, and (ii) substantial satisfaction of the rule of law is a moral good.\(^{60}\) That is Fuller’s Challenge, read through the positivist divide and conquer lens. It may seem that Raz’s distinction between minimal compliance to Fuller’s principles that is necessary for law to exist, and substantial compliance that constitutes the moral ideal of the rule of law, has refuted this challenge.

However, the close analysis above shows that Raz’s arguments do not refute Fuller, because he posits a different concept of law – his own legal positivist one – which rejects Fuller’s Challenge, and only requires the rule of law to be minimally fulfilled for a legal system to exist. It is because Fuller thinks that the rule of law must be substantially conformed to that he thinks there is a connection between law and morality. Raz, after succinctly stating that argument, takes a detour around it by cleaving to his positivist concept of law. In other words, Raz’s argument – that Fuller is wrong because Hart or Raz’s concepts of law do not require substantial fulfilment of the rule of law – is no argument against Fuller at all, for it is those positivist concepts that Fuller rejects. In a footnote, Raz admits that he is relying on his own concept of law, and thus is not directly assessing “Fuller’s own claims”.\(^{61}\) Therefore, Raz does not in his famous essay deal with Fuller’s Challenge, because he does not explain why he prefers his understanding of law to Fuller’s.

In addition, Raz does not provide any argument to refute Fuller’s Challenge’s other major claim about the relationship between the rule of law and law: namely, that the rule of law is a consideration in the determination of legal content – that it is part of the criteria of legal validity in any legal system.\(^{62}\) Raz states that courts should have review power over governmental action and legislation, to ensure conformity to the rule of law.\(^{63}\) But that does not mean that they always have such power in any existing legal system, or that this makes the rule of law a determinant of legal content. However, the argument for Raz’s position is not set out in this essay, although it is found in The Authority of Law and other writings, as I will discuss in the next section. The particular Social thesis relating to legal validity that Raz sees as a core tenet of his legal positivist perspective claims that morality conceptually


\(^{61}\) Raz The Authority of Law, above n 2, at 223 fn 11.

\(^{62}\) See above Chapter 1 at section 1.3 and Chapter 2 at section 2.3.

\(^{63}\) Raz The Authority of Law, above n 2, at 217.
cannot determine the content of legal norms. As Raz views Fuller’s idea of the rule of law as a moral ideal, he would include this moral consideration among those conceptually excluded from the criteria of legal validity.

So ultimately Raz’s arguments on this point work within his own positivist framework, rather than demonstrating why that framework is superior to that set out in Fuller’s Challenge. While Raz cannot be faulted for analyzing the rule of law within his own framework, it is only by focussing on the reasons why he works within that framework that we can explain why he rejects Fuller’s Challenge, and such a discussion is not provided in his major analysis of Fuller’s idea of the rule of law.

Within the wider context of this study, Raz’s analysis shows the positivist understanding of how to respond to Fuller’s Challenge, through dividing Fuller’s claims into discrete questions that can be answered within the positivist framework. Fuller is not understood as making anti-positivist claims that positivists cannot incorporate into their own positions. The core tenets of legal positivism found in the Social thesis, in its various forms, are the basis for the analysis of the rule of law, rather than being threatened by Fuller’s analysis. In the next part I show how some legal positivists have pressed on parts of Raz’s own version of legal positivism in order to argue that he must in his own theory recognize that substantial conformity to the rule of law is necessary for law to exist. These arguments have similarities with some of the arguments in the previous chapter concerning Hart’s concept of law.

4.4 Minimal conformity and the authority of law

Raz’s argument that only minimal conformity to the rule of law principles is necessary for law to exist is further illustrated by his account of authority and an argument that challenges the minimal conformity position.

4.4.1 Raz’s concept of authority

Raz’s account of a legal system is, like Hart’s, based on the view that law is a particular social institution with certain features. He argues that the Social thesis – that a
jurisprudential theory must identify the content of the law and its existence by reference to social facts of human behaviour, without engaging in moral evaluation or argument – “has always been at the foundation of positivist thinking about the law”.66 This is so because positivists have always recognized that law is a particular kind of social institution – namely one whose tests for law’s identity and existence refer only to certain social conditions obtaining in a society.67 The basic features of a legal system are, Raz accepts, laid down by Hart’s idea of law being essentially a union of primary and secondary rules including the rule of recognition.68 To this Raz adds his own further analysis, primarily through placing the idea of law within a wider framework of practical reasoning, and distinguishing legal systems from other normative systems by reference to the idea of authority.69

Raz’s final chapter in *Practical Reason and Norms* sets out what distinguishes law from other kinds of institutionalized normative systems, namely the special relationship that legal systems have with these other systems, which is “best illuminated by attending to the spheres of human activity which all legal systems by their nature regulate or claim authority to regulate.”70 Legal systems are comprehensive in that they “claim authority to regulate any type of behaviour”, whatever the subject matter.71 They also claim to be the supreme normative system in a society, which any other normative system must defer to.72 Finally, they are also open: meaning they contain norms that give binding force to (i) norms of other systems, although those norms do not thereby become part of the legal system and (ii) norms created by the use of powers conferred by the system; for example, legal contracts.73 If we accept these three features of law’s authority as those that distinguish them from other normative systems – as Raz thinks our “general knowledge” of the law requires us to – then our conclusion will be that where a human society has law, the law will be the most important institutionalized normative system in that society:74

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66 Raz *The Authority of Law*, above n 2, at 41.
67 Raz *The Authority of Law*, above n 2, at 42.
69 Raz *Practical Reason and Norms*, above n 34.
70 Raz *Practical Reason and Norms*, above n 34, at 149.
71 Raz *Practical Reason and Norms*, above n 34, at 150.
72 Raz *Practical Reason and Norms*, above n 34, at 151-152.
73 Raz *Practical Reason and Norms*, above n 34, at 152-154.
74 Raz *Practical Reason and Norms*, above n 34, at 154.
The law provides the general framework within which social life takes place. It is a system for guiding behaviour and for settling disputes which claims supreme authority to interfere with any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself as the supreme guardian of society.

In his recent work, Raz affirms his view that law’s claim of comprehensive and supreme authority over its subjects is part of the idea of law. This means that the organs of a political community that create and enforce the law “claim legitimate moral authority”.

This position – that the law claims legitimate moral authority over its subjects – and the way that he develops it and analyzes its implications is one of Raz’s central contributions to legal theory. Raz’s sources thesis and his exclusive legal positivist position gain support from this idea, though he also thinks that the sources thesis is supported by other aspects of our ordinary understanding of the law as a social institution. Raz views authority as the normative power to create a first-order reason for action that is ‘protected’ from other first-order reasons by an exclusionary reason. Law thus claims that its own reasons are, in the scheme of practical reason, compelling: they provide a second-order reason for performing an action that overrides the ‘all things considered’ weighing of reasons that would have gone on independent of them. Put differently, law’s claim is not merely to provide reasons to be weighed against other reasons for action, but to provide second-order reasons requiring us to act or refrain from acting on the basis of certain first-order reasons.

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76 Raz Between Authority and Interpretation, above n 75, at 104.
77 Raz Practical Reason and Norms, above n 34, at 149-154; Raz The Authority of Law, above n 2, at 30-33.
78 Raz The Authority of Law, above n 2, at Chapter 3; Raz Ethics in the Public Domain, above n 41, at Chapter 9.
79 Raz The Authority of Law, above n 2, at 50-51. See also Raz The Concept of a Legal System, above n 68, at 216, the argument in favour of the sources thesis is that the “common conception of law prevalent in our society is consistent with the sources thesis. Furthermore, the sources thesis explains many fundamental beliefs about law current in our society”.
80 Raz The Authority of Law, above n 2, at 17-19. See also Raz Practical Reason and Norms, above n 34, at 62-65.
81 Raz The Authority of Law, above n 2, at 30: “law claims that the existence of legal rules is a reason for conforming behaviour. … Suppose that on balance (excluding the existence of law from the balance) one ought not to perform the required act[,] … Failure to perform the act in such circumstances is a breach of the law. Does this mean that the law requires action against reason? No, it merely means that the law holds itself, i.e. the existence of the relevant legal rule, to be a reason which tips the balance and provides a sufficient reason for the required act.”
82 Raz The Authority of Law, above n 2, at 30. See also Raz Practical Reason and Norms, above n 34, at 35-48.
In holding itself out as containing authoritative second-order reasons for action that are meant to trump all other reasons derived from other alternative normative systems in the territory, “[t]he law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority.”

This claim of legitimate moral authority is a necessary moral element of the concept of law, which Raz readily admits but says that this does not mean that any legal system will actually be morally legitimate. As he says in his most recent book, “it is essential to the law that it recognizes that its use of power is answerable to moral standards and claims to have reconciled power and morality.” Legal institutions exert power over people, and they “take their activities to impose and enforce real, morally binding, rights and duties, and they refer to them in the usual normative language familiar from moral discourse.”

Yet Raz emphasizes that law’s moral claim to authority does not mean that the law is in fact morally justified. Law only necessarily claims moral authority; it does not always make good on that claim by actually having justified moral authority to the extent it claims. To understand law we must see that it aspires to this ideal, and that it can fail to live up to it. Whether the law’s claim to authority is justified is another question. Such authority is justified in a particular way that Raz labels “instrumentalist”, and which in the past he labelled the ‘service’ conception of authority. In short, law has authority if persons conforming to the law thereby better conform to the non-legal reasons that apply to them; in other words, law has authority if it allows us to better conform to the dictates of practical reason than we would have been able if we had tried independently to conform to them.

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83 Raz The Authority of Law, above n 2, at 33. See also Raz Practical Reason and Norms, above n 34, at 149–152.
84 Raz The Authority of Law, above n 2, at 128 and 131; Raz Ethics in the Public Domain, above n 41, at 199.
85 Raz Between Authority and Interpretation, above n 75, at 1.
86 Raz Between Authority and Interpretation, above n 75, at 2.
87 Raz Between Authority and Interpretation, above n 75, at 128 and 131; Raz Ethics in the Public Domain, above n 41, at 199.
88 Raz Between Authority and Interpretation, above n 75, at 103.
89 Raz Between Authority and Interpretation, above n 75, at 104.
90 See Joseph Raz The Morality of Freedom (Oxford University Press, Oxford, 1986) Chapters 2 and 3 (Raz refers to the “service conception” at 56) and Raz Between Authority and Interpretation, above n 75, at Chapter 5.
ourselves.\textsuperscript{91} Only by determining whether this is the case can we find out whether the law lives up to its claims, but in any case the law will still be law.

Now we are able to see more clearly why Raz holds the position he does in ‘The Rule of Law and Its Virtue’ on the relationship between law and the rule of law. Because law is a kind of institutionalized normative system, it must have certain norms that set up its institutions and regulate people’s conduct. This is why Raz admits that some minimal conformity to Fuller’s principles is necessary if a legal system is to exist: if there was a substantial failure of conformity to these principles, there could not be any rules, including the secondary rules that legal positivists such as Hart and Raz see as foundational of any legal system.\textsuperscript{92} However, Raz does not follow Fuller in saying that the law must by necessity effectively live up to its basic purpose of guiding human conduct, and so Raz does not think that the substantial conformity to Fuller’s principles that is necessary to fulfill the ideal of the rule of law is part of the concept of law itself. Like Hart, Raz thinks that including this further requirement for the existence of law is unnecessary – it is just not a necessary feature of the social institution of law. For law:\textsuperscript{93}

is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, enjoying such effective authority. One may think that there is much more that can be said about the sort of social institution that law is. … But when elaborating a general test for existence and identity for law one probably should not go beyond this bare characterization.

Raz also believes that one should not place moral conditions on what can be law except insofar as there are moral elements inherent in the particular social institution that is law.\textsuperscript{94} The extent to which there must be conformity to Fuller’s principles if a legal system is to exist is, Raz thinks, minimal, and “consistent with gross violations of the rule of law”\textsuperscript{95}. Thus, for Raz, conformity to the ideal of the rule of law is simply not a necessary part of the concept of law.

\textsuperscript{91} Raz \textit{Ethics in the Public Domain}, above n 41, at 198–199.
\textsuperscript{92} Raz \textit{The Authority of Law}, above n 2, at 223.
\textsuperscript{93} Raz \textit{The Authority of Law}, above n 2, at 43–44.
\textsuperscript{94} Raz \textit{The Authority of Law}, above n 2, at 45.
\textsuperscript{95} Raz \textit{The Authority of Law}, above n 2, at 224.
4.4.2 **Doubts about Raz’s minimal conformity position?**

Remember that one of Raz’s key arguments about law is that it claims authority. This is one of the main reasons for Raz’s Sources thesis, which says that moral reasoning cannot be part of the law itself.\(^{96}\) Because law claims authority, it must be capable of having authority in the sense that it must have the non-moral prerequisites of authority.\(^{97}\) One of these prerequisites is that the law must pre-empt the practical reasoning of subjects by telling them what they should do in specific circumstances.\(^{98}\) It must be possible, therefore, to identify the content of the law without referring to the reasons on which it adjudicates.\(^{99}\) Raz thus concludes that if the law is to be capable of having the authority it necessarily claims, it cannot include moral arguments within its normative standards.

It might, therefore, be thought that Raz should recognize that substantial conformity to the rule of law is just as much a prerequisite of authority as the avoidance of moral considerations in the content of legal norms. For if there is no significant compliance with the rule of law, the law will be less effective in guiding behaviour, and its claim to authority will be suspect due to its failure to set out norms that citizens actually use to determine what they ought to do.

Anton Fagan has made such an argument, claiming that Raz’s arguments concerning authority and the Sources thesis should lead him to accept that the law must live up to the requirements of the rule of law.\(^{100}\) Fagan’s main argument for rule of law compliance being necessary for law to exist is found in the following passage:\(^{101}\)

> Why does acceptance of the sources thesis, based on the argument from moral intelligibility, commit one also to accept formal requirements [Fuller’s principles of the rule of law] for law? Well, according to the argument from moral intelligibility, a proper understanding of law must render intelligible the beliefs of law’s participants regarding it. This means that a proper understanding of law must render intelligible the belief that law is morally binding. The latter belief is intelligible only if it is at the very least possible that people do better by following the law than they do by following their own judgment. …

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\(^{96}\) Raz *The Authority of Law*, above n 2, at chapter 3; Raz, *Ethics in the Public Domain*, above n 87, chapter 9.

\(^{97}\) Raz *Ethics in the Public Domain*, above n 41, at 200–201.

\(^{98}\) Raz *Ethics in the Public Domain*, above n 41, at 198.

\(^{99}\) Raz *Ethics in the Public Domain*, above n 41, at 203–204.


\(^{101}\) Fagan “Delivering Positivism From Evil”, above n 100, at 104.
This possibility will not obtain unless the law has certain formal characteristics. Hence, law must be understood as possessing such formal characteristics.

Where non-compliance with Fuller’s principles reaches a certain threshold, a directive will not be law because it cannot guide people’s behaviour. This is a Razian way of saying that without conformity to the rule of law – substantial conformity to Fuller’s principles – law cannot exist.

4.4.3 Raz’s response?

To my knowledge Raz has not directly responded to arguments along these lines. However, we might conjecture at what Raz’s reply would be, in light of his other work. The main strategy would, I think, be to argue that there is a difference between (i) the lack of capability of having authority that results from directing people to engage in their own moral reasoning and (ii) the ineffectiveness of the guidance of human conduct that results from breaches of the rule of law – but which does not destroy the conceptual capability of law to have authority.

Remember that Raz would accept that a legal system’s total failure to conform to one of Fuller’s principles would mean that there was no law, because this would mean there were no norms or rules at all. However, once there are rules that set up law’s institutions and its rules for its subjects, it does not matter that the law is unstable, obscure, or retrospective; the legal system is still law. The conformity to Fuller’s principles necessary for a legal system to exist is minimal – it only needs to be able to guide someone’s action, and “the point at which a directive cannot function to guide any legal actor … no matter how slightly, will be quite a low threshold”. Any further rule of law conformity that allows the law to effectively guide human conduct only shows where the particular legal system stands on the spectrum of compliance. So, when Raz says “[t]he law to be law must be capable of guiding behaviour, however inefficiently”, this interpretation would say this shows that inefficient behavioural guidance caused by violation of the rule of law is compatible with the existence

102 Fagan “Delivering Positivism From Evil”, above n 100, at 108.
103 Raz The Authority of Law, above n 2, at 223.
104 Raz The Authority of Law, above n 2, at 224.
106 Raz The Authority of Law, above n 2, at 226.
of a legal system, because what is required is that the law is capable of guiding behaviour, not that it is effective or efficient in doing so.

Another argument that strengthens this response is that, for Raz, the minimal compliance to Fuller’s principles concerns only the secondary rules of a legal system setting up legal institutions.\(^{107}\) For Raz’s concession that a legal system cannot completely violate Fuller’s principles is based on the observation that legal systems are “based on judicial institutions”, and those institutions cannot exist “unless there are general rules setting them up”, which means that “at least some of the rules of recognition and of adjudication of every system must be general and prospective”.\(^ {108}\) One might say that if at least these secondary rules are in existence, it is of no consequence to the existence of a legal system that rules valid under those secondary rules are in fundamental violation of the rule of law.

Another argument in defence of Raz might be that only the legal system as a whole needs to comply with the principles of legality in order for law to exist.\(^ {109}\) It is arguable that Fuller agrees with Raz on this point, with his focus being on whether a legal system as a whole conforms to the rule of law, and his emphasis on the frequent necessity to balance the various principles against each other in particular cases, which may lead to a violation of a principle in one law in order to better conform to the rule of law overall.\(^ {110}\) This would mean that while overall a legal system must guide human conduct in the territory, there may be certain rules or parts of the system that do not effectively do so. Such violations of the rule of law neither threaten the status of the system nor the particular norm as law.\(^ {111}\) The example above of secret laws is again apposite: while secret laws cannot guide the behaviour of anyone who is not privy to their content, they are still the laws of a legal system so long as the system exists and they guide the officials.

So I think that Raz’s response to the above argument would be that, unlike in the case of the inclusion of moral reasoning in the law, failure to substantially conform to the principles of

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107 McDonald “Positivism and the Formal Rule of Law” above n 105, at 115–116.
108 Raz The Authority of Law, above n 2, at 223.
110 Fuller The Morality of Law, above n 22, at 52–53; See also Himma “HLA Hart and the Practical Difference Thesis”, above n 109, at 31 and McDonald “Positivism and the Formal Rule of Law” above n 105, at 122.
111 McDonald “Positivism and the Formal Rule of Law” above n 105, at 123.
the rule of law does not destroy law’s capability to be authoritative, except in the most extreme cases in which one cannot know the content of the legal norm at all. In contrast, the inclusion of moral argument prevents the law from guiding conduct completely, because the law has not settled on any particular norm by which to resolve the dispute, and citizens have to work out for themselves what they ought to do in particular circumstances. The conceptual point concerning the failure of capability of having authority is illustrated by saying that “a set of propositions about the behaviour of volcanoes” cannot have practical authority, and that “trees cannot have authority over people”.\textsuperscript{112} Attributing the capability of having authority in these examples constitutes a conceptual mistake about what authority is.\textsuperscript{113} In contrast, the law’s ineffectiveness in guiding behaviour does not conceptually disqualify it from having authority (although a complete lack of ability to guide behaviour clearly would do so), and so non-compliance with the rule of law does not threaten the existence of law. Where there is not substantial conformity to the rule of law, but only the minimal level necessary for norms to exist, provided that those norms meet the other prerequisites for having authority there is nothing in their failure to comply with the rule of law substantially that prevents them from being capable of having authority.

\section*{4.5 Conclusion}

This chapter has argued that, like Hart’s, Raz’s discussion of the rule of law is ambiguous concerning the two main questions that positivists have focussed on; the moral value of the rule of law and the connection between law and the rule of law. The first section argued that despite Raz being seen as an opponent of the view that the rule of law principles are of moral value, due to his instrumental virtue argument, he also makes the inconsistent claim that the rule of law contributes to one aspect of ensuring that the law respects human dignity and autonomy. Because the latter claim is usually said to be overshadowed by the former claim, the usual understanding of Raz is that he thinks that conformity to the principles of the rule of law will be of moral value only when the law is being made to better achieve morally good substantive goals, and that such conformity will be morally bad when it facilitates the achievement of bad substantive goals. This is certainly how he is interpreted in

\begin{footnotes}
\item[112] Raz \textit{Ethics in the Public Domain}, above n 41, at 201.
\item[113] Raz \textit{Ethics in the Public Domain}, above n 41, at 201.
\end{footnotes}
the literature, and anyone reading his analysis will be struck by the ambiguity and seeming equivocality of his position. This is a major problem for those who seek to develop the legal positivist response to Fuller’s Challenge, and for those attempting to understand Raz’s position.

In the second section I analyzed Raz’s arguments in his essay concerning the relationship between law and the rule of law. It demonstrates that Raz thinks that legal systems need not live up to the ideal of the rule of law – which requires substantial conformity to Fuller’s principles – and instead can radically violate that ideal while still being legal systems. Raz admits that legal systems must minimally conform to the principles that make up the rule of law ideal if they are to be systems of rules, but this minimal conformity does not rule out “gross violations of the rule of law”. As discussed above, this means that Raz distinguishes between (i) minimal conformity to Fuller’s principles necessary for the existence of rules and (ii) the substantial conformity necessary for the ideal of the rule of law to be satisfied, and the moral value it creates to be secured. The rule of law is not part of the existence conditions of law, even if minimal conformity to Fuller’s principles is.

However, Raz does, like Hart, acknowledge a different necessary connection between law and the rule of law, namely that conformity to the rule of law is necessary if the law is to guide human conduct and secure the purposes of the law. This is the Instrumental argument, which shows that conformity to legality is an effectiveness condition for the law. Raz’s discussion of the relationship between law and the rule of law is consistent with one interpretation of Hart’s view on this issue: the rule of law is not an existence condition of law, but it is an effectiveness condition. This is another point at which the Fullerian would push Raz on his allegiance to legal positivism, by arguing that the effectiveness of law cannot be separated from the very nature of law; this is Fuller’s position, arguing that we cannot understand law in isolation from its purpose.

That point leads on to the argument in the third section, where I set out Raz’s minimal conformity argument and related it to his wider theory of law and authority. I considered an

114 Raz The Authority of Law, above n 2, at 223–224.
115 Raz The Authority of Law, above n 2, at 224–225.
116 Remember that Raz thinks that the minimal conformity to Fuller’s principles that is necessary for a legal system to exist does not mean that the rule of law is minimally present in the legal system.
argument by Fagan that says Raz should accept that a more-than-minimal conformity to the principles of the rule of law is necessary for a legal system to exist. However, I suggested that Raz would resist the suggestion that his theory of authority requires that substantial conformity to the principles of the rule of law is necessary for law to exist, because this is necessary if the law is to be capable of guiding behaviour. It is not clear what Raz’s response to this development of Fuller’s Challenge would be. I take two points from this analysis for the purposes of this study.

First, once Raz adds the idea of a necessary claim of moral authority to the basic legal positivist idea of law as an institutionalized normative system, questions arise as to why he does not add further requirements to the law, such as conformity to the rule of law. He would likely reply that the latter is not a conceptual requirement of the nature of law, but that position is contested by the Fullerians. But the fact that Raz is willing to include some necessary moral aspect to law shows that he is not wedded to a concept of law that eschews any reference to moral ideas. So if it could be shown that in our society and legal culture we think of law as necessarily living up to Fuller’s principles of the rule of law, Raz seems to be able to accept such a necessary moral element in the law: he is not motivated to keep the theory of law separate from moral concepts. All he needs to say in order to hold on to his key Social thesis is that it is not the case that the content of the law meets any particular moral standard: legal validity is determined by the rules of the legal system, which do not make morality a condition of legality. This point – the importance of the validity Social thesis – will become more important as we consider later positivist responses to Fuller and the concessions they make to Fuller at the level of legal systems.117

Second, the argument that substantial conformity to Fuller’s principles is necessary for the law to be capable of having authority is similar to an argument made by Scott Shapiro, one of the other major legal positivist commentators on the rule of law discussed in this study. Shapiro has provided arguments with a similar structure to that which Fagan makes about Raz and the rule of law, claiming that in order for law to fulfill one of its conceptual functions, it must substantially conform to Fuller’s principles. I will discuss Shapiro’s development of this argument below, in Chapter 7. That one of the most prominent

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117 See Chapters 6, 7 and 8 below.
contemporary positivists supports something like Fagan’s argument lends support to the argument that Raz needs to address more fully the relationship between law’s authority and conformity to the rule of law – to show why his theory does not succumb to Fuller’s Challenge

While Raz provides the seminal focussed legal positivist analysis of the rule of law’s value and its relationship with law, in that analysis he does not justify his rejection of Fuller’s anti-positivism, instead breaking Fuller’s Challenge into two claims that are then dealt with from within the positivist framework. The concessions that Raz makes to Fuller – the rule of law is a moral ideal, and there are two kinds of relationship between law and Fuller’s principles – are analysed according to Raz’s positivist concept of law, which is based on his own version of the Social thesis. In all of these ways, Raz follows in the footsteps of Hart’s engagement with Fuller’s Challenge, which makes only the concessions that are consistent with the main claims of legal positivism. Putting this in terms of my main thesis, Raz makes concessions to Fuller’s Challenge without accepting the basic anti-positivist perspective that Fuller thinks is required in order to come to terms with the place of the rule of law in our understanding of the nature of law. Raz therefore does not see the rule of law as impugning any thesis that legal positivism holds dear, and does not see Fuller’s analysis a causing problems for positivist legal theory. He therefore does not grapple with the fundamental questions that arise from Fuller’s Challenge, such as why we should accept a positivist view of law as a social institution that need not conform to the rule of law, and how one can exclude that central moral ideal from determinations of the content of valid legal norms. I will argue further against the success of this dismissive approach to Fuller’s Challenge in Chapter 8, where I present my analysis of why positivists such as Raz think they can separate the rule of law from their accounts of the nature of law.
Chapter 5: Recent Legal Positivism on the Rule of Law’s Moral Value

5.1 Introduction

This chapter and those following it consider how legal positivists writing since Hart and Raz’s seminal analyses of the rule of law have attempted to incorporate and manage Fuller’s Challenge within the framework of their positivist concepts of law. The previous chapters provide the foundation for this discussion, by (i) setting out the basics of Hart’s legal positivist concept of law, on which the legal positivist positions discussed in this study are based, (ii) laying out Fuller’s Challenge to Hart’s positivist concept from the perspective of the rule of law, in both of its main stages, and then (iii) moving on to show how Hart ultimately attempted to respond to this challenge through his analysis of the rule of law and how Raz built on Hart’s response in his own analysis of the rule of law.

My conclusion on both Hart and Raz in previous chapters was that they provide ambiguous accounts of the rule of law. On the Moral Value question, sometimes they say it is of moral value and other times they emphasize its instrumental value; on the Relationship question, sometimes they admit that it is a necessary element of the concept of law, and other times they say it is an ideal that the law need not fulfill. Whether their lack of clarity hides a coherent position, rather than a set of equivocations meant to preserve their positivism against Fuller’s Challenge, is highly contested in contemporary discussions. While there may be interpretations of these various arguments that seek to make them both internally coherent and consistent with core legal positivist commitments, it is only with the next generation of legal positivists that we finally see how more clear and coherent positivist positions on the rule of law can be developed. Whether recent legal positivist discussions of the rule of law are entirely clear, internally coherent, and consistent with the more general claims of legal positivism are the questions addressed in the next four chapters of this study.

The next two chapters discuss how four theorists working in the tradition of Hartian legal positivism have used and developed Hart and Raz’s analyses of the rule of law. I consider how these recent legal positivists have dealt with two of Fuller’s key claims as dissembled
by Hart: Fuller’s view that his principles of the rule of law are of moral value, and his assertion of a necessary connection between law and rule of law. In doing so, the structure of my analysis reflects the recent positivist acceptance of Hart and Raz’s divide and conquer approach, which splits Fuller’s Challenge into claims that are tractable within the positivist framework of analysis. It is only in Chapter 8 that I focus on why positivists think they can maintain this divide and conquer approach to Fuller’s Challenge.

The discussion in this and the following chapters is important because it is sometimes said that the lack of attention to Fuller’s account of the rule of law is one of contemporary legal positivism’s major failures. Jeremy Waldron – one of the thinkers I will discuss in this chapter – has criticized legal positivists working in the Hartian tradition for failing to address Fuller’s Challenge to Hart, by not properly answering the questions of the moral value of the rule of law and the relationship between the law and the rule of law. Waldron argues that while many tentative and equivocal lines of argument can be found in Hart’s work, Hart and his followers never developed those starting points into a coherent approach to the rule of law:¹

It is a pity that Hart did not himself explore any of this. Just in reviewing his work, we have uncovered an array of possibilities that would generate an interesting and nuanced set of relations – affirmative and negative – between the principles of legality and the positivist thesis of the separability of law and morality. Hart’s work is suggestive of all these possibilities, and it would have been very helpful had he or his followers seen fit to pursue them.

Yet the recent discussion of the rule of law amongst legal positivists is not as barren as Waldron suggests (much of it has been published since Waldron wrote this passage). The next two chapters show that there has in fact been some attempt by legal positivists to analyze and develop the “array of possibilities” for responding to Fuller’s Challenge. The legal positivists who have recently undertaken analyses of the rule of law discussed in this chapter are Matthew Kramer, John Gardner, and Andrei Marmor; in addition, Waldron himself may be thought of as holding certain positivist views. These four theorists are

highlighted because they have written the most on the Fullerian idea of the rule of law from a broadly Hartian legal positivist perspective.\(^2\)

In setting out how recent legal positivist analyses understand the rule of law, I will show that they have often taken clear stands on the claims that are dealt with equivocally by Hart and Raz, and are thus not ambiguous in their views about how they view the moral value of the rule of law. Marmor, Gardner, and Waldron clearly claim that the rule of law is morally valuable, whereas Kramer vehemently argues that it is not intrinsically moral. At other times some of them have, however, remained ambiguous despite their attempts to clarify the Hartian position on legality; this is especially so in respect of the relationship between the concept of law and the rule of law. After setting out their positions, Chapter 8 will explain why, on the positivist framework – and particularly in relation to the Social thesis – these theorists have taken those positions on the Relationship question. I will also show that there is a splintering of different approaches to integrating Fuller’s insights about the rule of law within recent legal positivism compared with the quite similar positions espoused by Hart and Raz. In other words, the development of the legal positivist answer to the relationship question has gone in three different directions, as I will show in the next chapter.

There is a significant deliberate omission from the following two chapters. The theorist who has developed a legal positivist conception of the rule of law with the greatest length, detail, and coherence is Scott Shapiro, in his book *Legality*. I will discuss Shapiro’s book and his conception of legality in a separate chapter, because his work is the most comprehensive of the recent statements of legal positivism, as well as exemplifying many of the themes that can be seen in the other recent post-Hartian conceptions of the rule of law. Of further importance is Shapiro’s attempt to show that his exclusive legal positivist version of legality has practical implications for our understanding of legal validity and how judges ought to determine the content of the law in hard cases – something that many legal positivists have kept separate from their concept of law, as will be shown in the following three chapters. I will also argue that despite his clear statement of his position, Shapiro still fails to properly

\(^2\) I group Raz outside my discussions of ‘recent legal positivism’ because his major discussion of the rule of law was written many years ago, and it has become a canonical positivist analysis of the rule of law that other positivists build upon.
engage with Fuller’s Challenge to Hart to set out an account of the rule of law that could inform and explain a moral ideal of fidelity to law.

5.2 Recent legal positivism on the rule of law’s moral value

5.2.1 A typology of moral value

The first part of my inquiry into recent positivist conceptions of the rule of law sets out the views of four Hartian legal positivist theorists on whether conformity to Fuller’s principles of the rule of law is of moral value. Before I turn to discussing each theorist’s arguments, I will briefly set out the kinds of moral value that are discussed.

The first is that identified by almost all participants in the debate: a legal system that conforms substantially to the rule of law allows people to ‘know where they stand’ in terms of the exercise of government coercion, because the rules are effective in guiding behaviour and the government refrains from extra-legal coercion. People therefore know when they are breaking the rules and when they are not, and can plan their lives accordingly. Knowing where you stand allows you a certain measure of freedom regardless of whether a legal regime’s rules are liberal or paternalistically controlling in specifying which courses of action are possible. I will call this the ‘autonomy’ moral value. As discussed in Chapter 2, this is the main argument that Fuller uses to show that his principles are morally valuable, and it is also affirmed in at least some parts of Hart and Raz’s discussion of Fuller.

The second kind of moral value that may arise from a legal system’s substantial conformity to the rule of law is derived from the instrumental value of legality, namely that it makes the guidance of behaviour more effective and therefore has a contingent moral value that arises where the legal regime achieves morally good social goals through the law. I will call this the ‘instrumental’ moral value.³

This instrumental moral value has a flipside; if the government better achieves morally bad social goals through its conformity to the rule of law, this is an instance of moral disvalue caused by the rule of law. It is this moral disvalue in wicked or iniquitous legal regimes that

³ See also Colleen Murphy “Lon Fuller and the Moral Value of the Rule of Law” (2005) 24 Law and Philosophy 239 at 246-249.
is often seen as Hart and Raz’s main criticism of Fuller’s assertions of the rule of law’s moral value. After all, if conformity to the rule of law sometimes leads to morally worse situations than a situation of lesser conformity or major violations, then it seems that the moral value of Fuller’s principles reveals only a contingent, not a necessary, connection between law and morality. I will call this the ‘instrumental disvalue’.

5.2.2 Marmor and Gardner’s acceptance of moral value

While Hart and Raz’s arguments on the rule of law’s moral value are ambiguous, three of the recent legal positivists who have commented in detail on this question accept that conformity to Fuller’s rule of law principles does secure something of moral value.

Andrei Marmor has written two major articles on the rule of law, in which he claims that by “complying with [the] conditions [of the rule of law] the law attains something morally good”. Although he thinks that conformity to the principles of the rule of law is of instrumental value, it also secures morally valuable results: “it is arguable that the rule of law virtues, though essentially functional, promote other goods that we value independently of, or in addition to, the function they serve in enabling the law to guide human conduct.” Marmor rejects the view, associated with Hart and Raz, that the rule of law generates no (non-instrumental) moral value, because:

most virtues of the rule of law, though essentially functional, are also moral-political virtues. In addition to the fact that the conditions discussed are necessary for law to function as a means of social control in guiding human conduct, they also enhance certain goods which we have reasons to value in addition to their functional merit. If the law fails on these conditions, it would not only fail in guiding its putative subjects’ conduct, but it would also fail morally.

In addition to being instrumental, the principles of the rule of law are of moral value in various ways. Some of these elements of moral value do relate to the value of autonomy that was a feature of the analyses of Fuller, Raz and Hart – for example, the principles of non-retroactivity and possibility of compliance prevent certain violations of human dignity and

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4 Murphy “Lon Fuller and the Moral Value of the Rule of Law”, above n 3, at 246-249.
freedom. But Marmor also notes other kinds of moral value that the rule of law secures. For example, publicity is not just a requirement of law’s ability to guide human conduct, because:

the publicity of law is good in many other respects as well. Making laws public renders them politically transparent and open for public scrutiny and criticism. It enables the law’s subjects to form opinions about the content of the law, and about those who enact the laws. Publicity of law is, generally speaking, an essential ingredient of political accountability. Therefore, whatever functional values promulgation of laws have, it also has moral-political value that is conducive to the maintenance of a well ordered democratic regime.

Marmor also explains how the principle of generality of the law safeguards against favouritism. His contribution to recent legal positivism’s understanding of the rule of law thus adds a number of additional elements to the analysis of what moral value is secured by conformity to the rule of law, because Hart and Raz focussed mainly on the value of autonomy. Marmor rejects, therefore, the orthodox view that conformity to the rule of law principles simply makes the law more effective in guiding conduct, rather than having any moral value.

Marmor also argues against Raz’s characterization of the rule of law’s value as a “negative virtue”. Marmor argues that even if a legal system cannot fail to conform to the rule of law to some degree, this does not mean that this conformity is not of moral value, even if “the law does not deserve moral credit” for doing something that it necessarily must do. There are things that conformity to rule of law principles secures that are “positively good” rather than just being the avoidance of evil:

To the extent that there is something positively good about a culture of open, public deliberation about the common goals of society, and to the extent that compliance with some of the rule of law conditions is at least conducive to such a culture, there may well be something positively good, not just avoidance of evil, that is promoted by compliance with the rule of law.

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8 Marmor “The Rule of Law and its Limits”, above n 6, at 20 and 32.
10 Marmor “The Rule of Law and its Limits”, above n 6, at 11.
11 See the discussion of what is taken to be Hart and Raz’s account of the moral value of the rule of law in Chapter 3 at section 3.4 and Chapter 4 at section 4.2.
12 See above Chapter 4 at section 4.2.
He also argues that the very fact that law exists can be seen as morally valuable in some way (though in exactly which way, he does not specify), which he thinks challenges Raz’s point that the evils that the rule of law prevents are only created by the law’s existence.\textsuperscript{15}

So Marmor agrees with Hart and Raz that the rule of law principles are functional virtues that make law better able to guide human conduct, but for Marmor this does not mean that conformity to them does not have moral merit. Instead, the instrumental value and the moral value of conformity to rule of law principles exist at the same time, whenever the rule of law principles are observed. This is consistent with the Alternative interpretation of Hart and Raz on the rule of law’s moral value; Marmor is one of the recent positivists who has made clear this approach is an option for the analysis of the rule of law’s moral value.

However, it must be noted that Marmor begins to analyze the moral complexity of conformity to Fuller’s principles, because he qualifies his claim that conformity to the rule of law is morally valuable. Like Hart and Raz, he argues that the rule of law can enable bad purposes to be effectively pursued: \textsuperscript{16}

\begin{quote}
When the law is profoundly corrupt, it might be better if it also failed in its ability to guide conduct, and therefore, violations of the rule of law virtues may actually do more good than harm. But it is very difficult to generalize. Sometimes, even in a profoundly corrupt legal system, the fact that the law also violates some rule of law virtues, say, in that it is kept secret, or haphazardly applied, may be an additional iniquity over and beyond the law’s substantive injustice. It all depends on specific circumstances.
\end{quote}

Put differently, where a regime using law to secure its purposes has substantively unjust aims that are facilitated by people being guided by the law, the facilitation of those iniquitous aims through the rule of law will outweigh the moral value of guiding behaviour in this way.

John Gardner’s position is similar to Marmor’s. In ‘The Legality of Law’, Gardner argues that there are a variety of generally applicable moral norms and ideals to which the law should conform, for example justice, kindness, and prudence. \textsuperscript{17} The rule of law is an additional, particular set of moral norms, which laws and legal systems should live up to “only because they are laws and legal systems, norms which add up to constitute a

\textsuperscript{15} Marmor “The Rule of Law and its Limits”, above n 6, at 14-15.
\textsuperscript{16} Marmor “The Rule of Law and its Limits”, above n 6, at 39.
distinctive ideal of legality, also known as the rule of law. They are norms requiring that laws be made clear, prospective, open, general, etc”. These are the special moral norms, to which the law – and thus the officials whose practices and actions constitute the law – should conform:  

\[\text{It is a bad reflection on me as a law-maker that the legal norms I make are not announced or clarified to those whose actions they purport to regulate. … It is a morally bad reflection because legal norms typically have morally significant implications for those whose actions they purport to regulate, and being able to resort to these norms for guidance in advance typically enables these people to control the implications (normally, by avoiding actions that would fall foul of the norms).}\]

We should note that Gardner’s focus here is not on discussing why the rule of law is of moral value; he is making a connection between the rule of law and the law, namely that anyone who hasn’t grasped that law ought to conform to that idea does not properly understand law. Similar observations apply to some of his other discussions of legality, and I will consider his arguments concerning the relationship or connection between law and the rule of law in the following chapter. But although he does not spell out his reasons for thinking so in these discussions, it is clear from his discussion that Gardner thinks that conformity with the rule of law is of moral value.

However, Gardner’s most extensive discussion of the moral value of the rule of law is found in his introduction to the second edition of Hart’s book *Punishment and Responsibility*, commenting on Hart’s own important analysis. Gardner there sets out the ideal of the rule of law as follows:

\[\text{According to the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans. These are all different ways of expressing much the same understanding of the ideal. It is easy to see how retroactive, secret, and vague laws, constantly changing laws, laws that are enforced in a partisan way, and so forth, fall foul of the rule of law so understood. They make it impossible for one to factor the legal position reliably into one’s thinking about what to do.}\]

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18 Gardner “The Legality of Law”, above n 17, at 179.
The moral value of conformity to the rule of law is that it allows us to plan our lives: to avoid “the unfreedom of unexpectedly finding ourselves in violation of the legal rules and unexpectedly bearing the legal consequences of that violation.”23 In different words, the rule of law is an “instrument of individual freedom”.24 Gardner emphasizes, therefore, that we must understand the rule of law as not only of instrumental value in that it makes the law more effective in guiding conduct,25 but as also of moral value in its contribution to individual freedom.

This is, like some of Marmor’s arguments, a version of the autonomy argument noted in my initial discussion of the various types of moral value and disvalue identified by Hartian legal positivists. Like Marmor, Gardner discusses the moral complexity of the rule of law. In some situations, conformity to the rule of law might cause a result contrary to some other moral norm; for example, if conformity to the rule of law would allow an obnoxious aim to be more effectively achieved, then a lesser level of conformity to the rule of law would be morally required. Gardner does not provide any further discussion of this. However, as I will now argue, Waldron has clarified the moral complexity of the rule of law mentioned by Marmor and Gardner.

5.2.3 Waldron on the moral complexity of the rule of law

Waldron’s major discussion of the moral value of the rule of law occurs in his article ‘Why Law – Efficacy, Freedom, or Fidelity?’. Waldron notes that Fuller’s argument is usually seen as showing a connection between the rule of law and individual liberty.26 This is the autonomy argument, which says that:27

by requiring power to be exercised on a basis that is clear and constant, [the rule of law] promotes a social environment in which individuals know where they stand and what they can count on, so that they have a fair possibility of autonomously organizing their lives. Whatever substantive ends are being pursued, if they are pursued through law, they define a predictable space in which individuals can plan and act freely.

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27 Waldron “Why Law?”, above n 26, at 266.
Waldron notes that Fuller also supported something like this argument in *The Morality of Law*.\(^{28}\)

However, Waldron observes that there are trade-offs between conformity to the rule of law and other moral values, as well as trade-offs between the principles themselves.\(^{29}\) Freedom may be on both sides of the trade-off: one kind of freedom might need to be constrained in order to better satisfy another kind.\(^{30}\) Waldron concludes, therefore, that unwavering conformity to the rule of law will not always be conducive to maximal liberty in society: liberty is not a ‘categorical’ reason for always observing it.\(^{31}\) Instead, Waldron thinks that the particular value that can only be secured through the rule of law is fidelity to law, which is essentially a relationship of reciprocity between the government and the citizens.\(^{32}\)

For the purposes of this study, what is important is that Waldron’s arguments accept that Fuller’s principles generally do contribute to the maximization of freedom. In an article emphasizing the contestability of the ideal of the rule of law, Waldron argues that “the lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful.”\(^{33}\) It is clear, therefore, that he agrees with Fuller that moral value relating to human freedom is secured through conformity to the rule of law principles.

However, Waldron is not content to leave his analysis there, as Marmor and Gardner for the most part are. In his work on Hart’s understanding of the rule of law, Waldron notes the importance of the Instrumental critique and the view that, in certain situations, conformity to Fuller’s principles may make things morally worse – for example, in a iniquitous regime where the instrumental value is exploited to achieve iniquitous goals more effectively.\(^{34}\)

However, this does not mean that the moral value of autonomy is destroyed in such situations; instead, it is a moral consideration that competes with the moral disvalue of

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\(^{28}\) Waldron “Why Law?”, above n 26, at 267. Waldron argues that because Fuller’s conception of the rule of law is a matter of aspiration, it is not “presented as something that people have a right to”, which it would have to be if it set out the essential conditions for respecting human liberty.

\(^{29}\) Waldron “Why Law?”, above n 26, at 268.

\(^{30}\) Waldron “Why Law?”, above n 26, at 268.

\(^{31}\) Waldron “Why Law?”, above n 26, at 259.


\(^{34}\) Waldron “Positivism and Legality”, above n 1, at 1162.
facilitating iniquity: “legality contributes to the moral quality of the law in some ways and detracts from the moral quality of the law in other … ways”.\textsuperscript{35} Therefore, the search for a system of law that maximises liberty will not require maximal conformity to the rule of law, but will involve trading the liberty that comes through the certainty the rule of law provides for the liberty or other good that is secured by the particular departure from the rule of law. These values coexist, and the moral value of the rule of law is not destroyed by an iniquitous legal regime having prudential reasons for conform to Fuller’s principles:\textsuperscript{36}

Of course, a ruler may have reasons of his own for trying to guide the conduct of his subjects … and those reasons need not themselves involve moral respect for the dignity of human agency. No one is denying that rulers may have nonmoral reasons for abiding by the principles of legality. But that does not mean that their criterial connection with law is purely a result of rulers’ characteristic opportunism. Law itself may be an enterprise unintelligible apart from the function of treating humans as dignified and responsible agents capable of self-control; unscrupulous rulers must make what they can of that fact when they decide, for reasons of their own, to buy into the “legal” way of doing things.

Put differently, Waldron’s claim is that even if there are non-moral instrumental reasons to engage in the enterprise of governing according to the rule of law, this does not mean that the moral aspects of conformity to Fuller’s principles are somehow negated or contradicted by the fact that a wicked regime may seek to exploit the rule of law for its own purposes.

Waldron’s identification of the various elements of moral and instrumental value that conformity to Fuller’s principles brings to a legal system provides an overall assessment of the moral value of conformity to the rule of law. In doing so, he shows how positivist discussions of these various elements can be clarified and synthesized to provide a coherent account of Fuller’s principles.\textsuperscript{37}

5.3 Kramer’s resistance to the moral value thesis

Matthew Kramer is the only prominent legal positivist discussed in this study who today defends the view that conformity to the principles of the rule of law is not intrinsically of moral value. Kramer’s argument is therefore important because it is contrary to the orthodoxy amongst recent positivists – and as I argued in the two previous chapters, a claim possibly found, in ambiguous form, in the work of Hart and Raz – that conformity to the

\textsuperscript{35} Waldron “Positivism and Legality”, above n 1, at 1162–1163.
\textsuperscript{36} Waldron “Positivism and Legality”, above n 1, at 1167.
\textsuperscript{37} Waldron “Positivism and Legality”, above n 1, at 1168–1169.
principles of the rule of law is morally valuable for autonomy reasons. Kramer rejects this, arguing that the autonomy argument does not show that conformity to Fuller’s principles is intrinsically of moral value. In doing so, Kramer provides the clearest statement of the instrumental argument.

5.3.1 Kramer’s initial critique of Fuller’s moral value claims

Kramer’s first major analysis of the moral value of the rule of law came during a discussion of Fuller’s legal theory, in which Kramer provides three arguments to support his rejection of the rule of law’s moral value.38

The first argument denies that substantial conformity to the rule of law is always required in order to create the conditions for maximal individual autonomy or liberty under a legal regime, or to secure the morally best outcome. Like the theorists discussed above, Kramer observes that there are situations in which violations of the rule of law principles are morally required. I will call this the ‘Moral Deviations’ argument. For example, a level of uncertainty about whether the government will enforce the law, Kramer argues, may in some circumstances allow for greater individual autonomy than if citizens are certain that the government will enforce the law. In a highly interventionist legal regime, in which the law stifles human freedom, lax compliance with the rule of law will provide some further leeway for citizens to act contrary to the suffocating regulation of their lives.39 Here, if the government does not scrupulously enforce its interventionist laws – which contravenes the rule of law requirement of congruence – the citizens’ liberty to perform the action ostensibly controlled by the rule is increased.40 Therefore Kramer claims it is wrong to say that, just because law that complies with the rule of law gives citizens secure expectations of which rules the government will enforce, this substantial conformity is necessarily required to maximize liberty in the legal regime so that it secures the best moral outcome.41 In certain legal regimes, violations of congruence would create more liberty.

39 Kramer In Defense of Legal Positivism, above n 38, at 54–55.
40 Kramer In Defense of Legal Positivism, above n 38, at 54-55.
41 Kramer In Defense of Legal Positivism, above n 38, at 55.
Kramer makes his point that less conformity to Fuller’s principles actually can be morally better than more substantial conformity to them, by comparing two legal regimes that violate the human rights of their citizens, one of which doing so while complying with the rule of law and the other through breaching the rule of law. 42 He asks us to imagine a series of governments where the law ranges from good law (respecting human rights) to evil law (violating human rights), and that have either no deviations from Fuller’s principle of congruence, or else malign or benign deviations. 43 By ‘deviations’, Kramer is focusing mostly on deviations from congruence: a malign deviation means an official applies a worse rule than the one ‘on the book’, whereas with a benign deviation they apply a better rule. Kramer argues that we can thus compare a legal system with good law but malign deviations (system ‘A’) with a system of good law and no deviations (‘B’) or a system of bad law with benign deviations (‘C’). System A is clearly worse than B, but probably better than C, depending on the extent of the respective malign and benign deviations. 44

Kramer’s point is that determining which legal system is morally better than the others does not depend solely on its conformity to the rule of law – sometime rule of law conformity makes a legal system worse, morally speaking. A legal system might be made better through benign deviations that constitute a breach of Fuller’s principle of congruence, whereas if the substantive content of the law is strictly enforced there will be worse moral outcomes. 45 Our judgment about which legal regime is morally better or worse than another should therefore not be based “on the bare fact of a regime’s adherence or lack of adherence to Fullerian precepts”, because the moral differences between them are actually determined by the “substantive tenor of the deviations” (whether they are benign or malign) or the “substantive tenor of the enacted law” (whether it is good or evil). 46 In sum, violations of the rule of law can be judged morally good or bad depending on the substantive impact of those violations on liberty or other moral values; there is nothing intrinsically moral about conformity or non-conformity to Fuller’s principles. 47

42 Kramer In Defense of Legal Positivism, above n 38, at 56.
43 Kramer In Defense of Legal Positivism, above n 38, at 56.
44 Kramer In Defense of Legal Positivism, above n 38, at 56.
45 Kramer In Defense of Legal Positivism, above n 38, at 56.
46 Kramer In Defense of Legal Positivism, above n 38, at 58.
47 Kramer In Defense of Legal Positivism, above n 38, at 58.
The second argument Kramer provides against the inherent moral value of the principles of the rule of law is his rejection of what he sees as the Fullerian idea that reciprocity and respect for human dignity are an intrinsic feature of a legal regime’s recognition that humans have decision-making agency.\(^48\) I will call this the ‘Agency Respect’ argument. In particular, Kramer objects to Fuller characterizing the very act of acknowledging the fact of “each citizen’s capacity for autonomous decision-making” as reflecting a morally valuable decision to make demands that people are meant to follow through their own deliberate and autonomous choices and actions.\(^49\) The act of issuing commands that rely on the fact that people are rational and will factor them into their decision-making does not contain anything intrinsically moral – for example, this can be said of the robber’s statement ‘your money or your life’, which provides the agent with a choice between courses of action that will presumably motivate the rational choice to voluntarily hand over his money.\(^50\)

Kramer’s point is that the recognition of human agency does not in itself carry with it any moral force, and to “presume otherwise is to conflate the notion of agency or autonomy \textit{qua} cognitive fact with the notion of agency or autonomy \textit{qua} moral/political ideal.”\(^51\) The acknowledgement of any person’s ability to rationally make choices does not necessarily bring with it a commitment to allow that person to decide according to their own will how they will act and live their lives.\(^52\) Legal rules will usually exploit the cognitive fact of agency by presenting certain requirements to people who are meant to be able to follow them, but legal systems need not respect the moral/political ideal of agency or autonomy, for they may “stiflingly constrict the civil and political liberties of citizens” and “establish harsh penalties” for disobedience, which will prevent people from choosing their own plan for their lives.\(^53\) This means, Kramer concludes, that “the law’s general acknowledgement of each citizen’s agency does not carry any intrinsic moral force”.\(^54\)

\(^{48}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 58.
\(^{49}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 58–59.
\(^{50}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 59.
\(^{51}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 59.
\(^{52}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 59–60.
\(^{53}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 60.
\(^{54}\) Kramer \textit{In Defense of Legal Positivism}, above n 38, at 60.
5.3.2 Prudential reasons for compliance

The third argument that Kramer makes against the moral value of the rule of law is that a government’s compliance with Fuller’s principles is not necessarily motivated by moral reasons, because there are good prudential or self-interest reasons for any government to rule in accordance with rule of law. I will call this argument the ‘Prudential Reasons’ argument. This is the argument that has been most contested by defenders of Fuller’s moral value claim.

Kramer argues that although adherence to the rule of law requirements will often “rest on moral underpinnings and partake of moral significance”, so that “a government can abide by the principles of legality for moral reasons and in furtherance of moral ideals”, this is not necessarily the case.55 Because prudential reasons for conformity exist, conformity to the principles of the rule of law “does not have any intrinsic moral significance” because a legal regime may be motivated by “purely prudential reasons”.56 Instances of conformity to the rule of law cannot be adjudged necessarily moral, because:57

a steady adherence to [the] requirements [of the rule of law] can commend itself to monstrous regimes on purely prudential grounds. Such adherence and such requirements, accordingly, do not partake of any intrinsic moral significance. Evil officials can exhibit a genuine commitment to Fuller’s precepts for self-interested reasons[.]

Why does Kramer think that there are good prudential reasons for conformity to the principles of the rule of law? He points to the need for regimes to motivate citizens to do those things that will achieve the regime’s aims, and this will require guiding citizens’ conduct by rules meant to contribute to those aims.58 There are two reasons for this: ‘followability’ and incentives. The followability reason develops the basic observation that people need to know what the law requires of them if they are to comply consciously and deliberately with it.59 Therefore, the requirements of the rule of law that ensure people can follow the law – promulgation, clarity, non-contradiction, and so on – is “essential for the steering of behaviour”.60 Fuller himself noted that these principles are related to the

55 Kramer In Defense of Legal Positivism, above n 38, at 60.
56 Kramer In Defense of Legal Positivism, above n 38, at 65.
57 Kramer In Defense of Legal Positivism, above n 38, at 71.
58 Kramer In Defense of Legal Positivism, above n 38, at 67.
59 Kramer In Defense of Legal Positivism, above n 38, at 67–68.
60 Kramer In Defense of Legal Positivism, above n 38, at 67.
effectiveness of the direction of human conduct, and Hart and Raz analyzed this feature of Fuller’s principles as the instrumental value of the rule of law. This followability reason for the rule of law’s prudential value is, therefore, a relatively uncontroversial point.

The incentives reason that Kramer provides is more controversial. Kramer argues that Fuller was wrong to say that the requirements of generality, prospectivity, and congruence are not also related to the effectiveness of the guidance of human conduct. He argues that generality is in the self-interest of any regime that governs a large territory over an indefinite time period, which requires the creation of general, prospective norms. For without generality, the regime would have to issue a vast plethora of particular commands, which would be unduly time-consuming.

Rulers similarly have purely prudential reasons to accord with the requirement of congruence, because “if people often undergo punishment even when they have conformed closely to the prevailing legal norms, or if they often do not undergo any punishment even when they have plainly violated those norms, the inducements for them to abide by those norms will be markedly sapped”. Legal regimes have reason not to punish compliance or fail to punish non-compliance, because if the people who comply with the law are punished their incentive to comply is diminished: they are not much better off complying with the evil regime’s laws than not complying with the same laws. Where a legal system avoids extra-legal punishment, and there is a high probability of detection and punishment of those who violate the law, the citizen’s incentives for compliance with the law are maximized. Kramer summarizes his argument as follows:

62 See above Chapter 3 at section 3.3 and Chapter 4 at section 4.2.2.
63 NE Simmonds Law as a Moral Idea (Oxford University Press, Oxford, 2007) at 84.
64 Kramer In Defense of Legal Positivism, above n 38, at 68; For Fuller’s argument see Fuller, above n 75, at 208–209.
65 Kramer In Defense of Legal Positivism, above n 38, at 68–69.
66 Kramer In Defense of Legal Positivism, above n 38, at 69.
[T]here will be strong prudential reasons for a high level of compliance with Fuller’s principles by evil officials who are concerned solely to entrench their own power and to sustain the effectiveness of their exploitation of the people whom they govern. Among those prudential reasons is the tendency of the rule of law to maximize punishment-centred incentives for obedience by citizens to the officials’ oppressive behests as formulated in legal directives. Because a legal system with its regularized operations will usually give rise to a high probability of punishments for people who contravene its mandates, it will foster apt punishment-centred incentives for people to heed those mandates. So I have argued, in support of the proposition that the rule of law does not partake of any inherent moral significance.

This argument was initially made in response to the claims of John Finnis and Simmonds that an evil regime has no reasons to comply with the principles of the rule of law. But it is extended in Kramer’s later work, in response to further criticisms from Simmonds.

This chapter is not the place to discuss their debate in detail, but we should be aware of it because it is the main remaining argument against the rule of law’s moral value. The dispute question boils down to whether there are in fact, as Kramer argues, prudential reasons for an evil regime to abide by each of Fuller’s principles. Simmonds claims that wicked legal systems do not have prudential reasons to comply with congruence by refraining from extra-legal violence, which means that if we are to make sense of why institutions that conform to the rule of law are established, this “must be understood in terms of impersonal moral or political values”. Simmonds has summarized his main argument as follows:

My argument focuses in particular upon the requirement of congruence between the declared rule and official actions, and it takes that requirement to include a prohibition upon the use of violence against those who have broken no rules. A wicked regime would, I argued, have no good reason for restricting their use of violence to circumstances where a rule has been breached. This is because the use of extra-legal violence is an enormously effective tool in suppressing opposition, particularly by rendering opponents of the regime invisible to each other, and by discouraging any activities aimed at impeding the regime’s pursuit of its objectives. Hence, wicked regimes would exhibit an extensive failure to comply with the requirement of congruence between the declared rule and the official action. … [A] wicked regime, unmotivated by moral considerations, would have no good reason to observe the rule of law. … The only good reasons for observing the rule of law are moral reasons.

Kramer’s response is that extra-legal violence will sap the punishment-centred incentives for compliance with the law, meaning that evil regimes do have reason to comply with Fuller’s

69 Kramer In Defense of Legal Positivism, above n 38, at 65.
principle of congruence.\textsuperscript{72} In a regime that commonly deploys both legal and extra-legal violence, where the probability of extra-legal violence is high, Kramer claims, citizens will have less incentive to comply with the law because they will likely be punished whether they comply or not.\textsuperscript{73} This is ultimately an empirical question that Kramer and Simmonds think they can resolve through analysis of what would happen in practice.\textsuperscript{74} However, in lieu of sufficient real-world examples to prove one view correct, they still do not agree on the appropriate economic model for analyzing this question. Whether Kramer is right – that wicked regimes have prudential reasons to conform to Fuller’s principles – is likely to remain debatable.

\textbf{5.4 A resolution? Identifying the moral and instrumental value of the rule of law}

We can make progress on the moral value question, however, without solving the empirical question of whether wicked regimes have prudential reasons for conforming to the requirement of congruence. This is because all positivists – even Kramer – accept that conformity to the rule of law is generally of moral value for autonomy reasons. While they also claim that conformity to the rule of law can have morally bad results, Waldron’s discussion of the moral complexity of the rule of law shows how conformity to Fuller’s principles may in certain circumstances “work both ways”, in that “the very same conformity” may both mitigate injustice in some ways and aggravate it in others.\textsuperscript{75} Whether the mitigation of injustice outweighs the aggravation of injustice in a given circumstance is a matter of weighing these aspects of moral value and disvalue in order to decide “how things … fall out overall.”\textsuperscript{76}

If the moral complexity of conformity to the principles of the rule of law is accepted, any given analysis of a situation must discuss each of the three kinds of moral value and disvalue set out in my introduction. There is moral value due to the autonomy argument – that is the
main reason why the rule of law is seen as of moral value, being accepted by Fuller and Simmonds, equivocally noted by Hart and Raz, and being clearly accepted by Marmor, Gardner, and Waldron. There is moral disvalue when the instrumental function of Fuller’s principles is used to further wicked goals; the flipside of this is that there is moral value where the principles facilitate morally good goals. So for any particular instance where a legal regime conforms to the rule of law, we must ask whether that conformity makes a positive or negative moral impact, on balance, after thinking about the moral value and disvalue it creates. This ‘moral complexity’ answer is the most plausible solution to this debate.

This may be a plausible way of opposing Kramer’s claim that Fuller’s principles are not intrinsically morally valuable, but it does not deal with the question of how we should morally evaluate the situation where a wicked regime does conform to the rule of law principles relating to the guidance of conduct to a lesser extent, in order to facilitate its wicked aims. In such a situation it seems that both the moral and instrumental virtues of the rule of law are in place, because people are being effectively guided by legal norms, allowing them autonomy of knowing where they stand and also giving them incentives to comply with the wicked regime’s commands.

In my previous discussion of Hart and Raz’s analysis of this question, I noted that one way of disambiguating their arguments takes a similar form to the above resolution. Despite the focus that has been placed on Hart and Raz’s instrumental argument concerning Fuller’s principles, on the Alternative interpretation they both also acknowledge that there is something of moral value in compliance with the rule of law. Therefore, in one interpretation of their work, Hart and Raz agree with Waldron that there is something of moral value in compliance to the rule of law even if that compliance is motivated by prudential reasons. On this account, their position would be that compliance with Fuller’s principles is of both moral value and instrumental value, so that this moral value would exist despite the law being used to secure morally problematic goals, even if ultimately we say that this compliance is morally wrong. In other words, conformity to Fuller’s rule of law principles secures the moral value of freedom through ‘knowing where you stand’ or autonomy, but this is counterweighed in a wicked legal system by the moral disvalue of such
compliance making the law more effectively achieve its goals, through more effective guidance of human behaviour – beneficial instrumental value.

That both of these elements of moral evaluation are at play is suggested by Hart most clearly in his encyclopaedia article, where he says that conformity to the requirements of the rule of law should be “regarded from two different points of view”: both “maximiz[ing] the probability that the conduct required by the law will be forthcoming” and “provid[ing] individuals whose freedom is limited by the law with certain information and assurances which assist them in planning their lives within the coercive framework of the law”.77 The requirements of the rule of law are not only instrumental – “the most efficient form of social control” – but are also valuable to the individual liberty through their allowing people to plan their lives.78 Putting to the side other interpretive issues, here Hart claims that the instrumental value of Fuller’s principles exists in parallel to their moral value, which suggests that he would support Simmonds’ position above.

A similar argument can be seen in Hart’s argument in relation to South Africa and Nazi Germany in Punishment and Responsibility. His argument was that the mens rea requirement in the criminal law – itself an aspect of Fuller’s rule of law, being related to the possibility of compliance – is valuable in such repressive regimes, whose “badness [is] mitigated by the fact that they fall only on those who have obtained a satisfaction of knowingly doing what they forbid”.79 Gardner explains Hart’s argument as showing that conformity to the rule of law in repressive regimes “protects us against the extra unfreedom” that such a regime using law can place on us.80 However, Hart’s only brief analysis of a real situation along these lines does not address this issue, because in saying that under a repressive regime such as Apartheid-era South Africa or Nazi Germany there is still moral value in knowing where you stand (in his example, by including the mens rea requirement for criminal conviction), Hart does not address the fact that the rule of law requirements may make for more effective repression. Hart’s analysis is therefore deficient in drawing out the

78 Ibid, at 115.
80 Gardner “Introduction”, above n 22, at xxviii.
clash of moral considerations that occurs where the rule of law exists in a wicked legal regime.

Yet, Raz’s arguments seem to lay stronger foundations for a nuanced analysis of the moral value of conformity to Fuller’s principles by a wicked legal regime. Because Raz identifies the two different kinds of virtue in conformity to the rule of law principles, it seems that he would say that the moral virtue of rule of law compliance – knowing where one stands – is accompanied in a wicked legal regime by the instrumental value that would further the wicked goals. 81 The moral analysis would therefore be a matter of gauging the moral benefits of compliance according to the moral virtue and the moral deficits of the instrumental virtue for wickedness, and making an ultimate moral judgment about whether the moral benefits outweigh the deficits or vice-versa. But even if one said that it was ultimately a moral deficit for the wicked regime to conform to Fuller’s principles, it seems clear that one would still have to accept that there was a countervailing, but less weighty, moral benefit in this conformity. Still, in judging the wicked regime’s actions of compliance, we might still say with Kramer that their actions should not be given any moral credit: their conformity is motivated by self-interest, not a moral concern.

Whether or not one agrees with this interpretation of Hart and Raz’s various claims on these issues, what is important is whether contemporary legal positivism can use these arguments that Hart and Raz make at various points about the moral and instrumental value of the rule of law in order to construct a plausible response to Kramer’s rejection of that moral value. In the next section I will discuss whether such an argument has been developed by recent legal positivists.

### 5.5 The moral complexity approach in the other recent positivists

The approach I am describing says that in any legal system, even a wicked one, conformity to the principles of the rule of law is valuable in allowing us to know where we stand, and to be able to avoid situations where one is subject to the arbitrary will of another. Kramer’s response, we have seen, is to say that there are prudential reasons for a wicked regime to

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comply with Fuller’s principles, and such compliance can often make things morally worse by making the law more effective. The moral complexity response replies that instrumental moral disvalue exists alongside the moral value of autonomy that rule of law-compliant law still secures. The present question is whether Marmor, Gardner, and Waldron agree that the autonomy moral value generated by conformity to Fuller’s principles is invariably negated by Kramer’s argument. After all, ever since Hart and Raz pointed it out in their influential articles, the legal positivist understanding of the rule of law has been associated with the instrumental critique of Fuller. Can these more recent legal positivists so easily jettison the instrumental argument in favour of the Fullerian moral value argument?

I believe that they can and in some cases explicitly do. The argument that seems to be held by the recent legal positivists, apart from Kramer, is that despite the instrumental value of conformity to Fuller’s principles – which may make them serviceable for a wicked regime’s achievement of its ends – there is still something of moral value secured by such conformity.

Gardner deals with this issue in the following passage:82

The rule of law is not only an instrument of individual freedom. It is also an instrument of the law’s own effectiveness. These sources of value in the rule of law do not wax and wane together. Arguably … the rule of law has its highest value as an instrument of individual freedom when it is observed by an (otherwise) repressive legal system. Here the freedom to stay out of the clutches of the law, or at least to be able to plan for one’s encounters with it, may be particularly desirable.

Gardner’s striking claim that the autonomy moral value of the rule of law may be greater in a wicked regime – which develops Hart’s related argument about the importance of mens rea in a repressive regime83 – is contrary to Kramer’s general assertion that under a wicked regime such conformity is not of moral value. Yet Gardner follows this idea with an observation that aids Kramer, arguing that, by contrast with the rule of law’s moral value being maximized in a repressive regime;84

the rule of law has its highest [moral] value as an instrument of legal effectiveness when it is observed by a morally upstanding legal system. The more awful a legal system, the less effective we should want it to be. So perhaps the rule of law gains value as an instrument of freedom just as it loses its [moral] value as an instrument of legal effectiveness.

82 Gardner “Introduction”, above n 22, at xlii.
83 Hart Punishment and Responsibility, above n 79, at 47.
84 Gardner “Introduction”, above n 22, at xlii.
It is clear from the context that Gardner is speaking of moral value – which is why I included it in the quote in brackets. Gardner is not denying that the rule of law is always instrumentally valuable, but is instead concerned with specifying when conformity to Fuller’s principles will be morally valuable due to their instrumental value. His point is that if the substantive aims of the law are morally good, then the instrumental effectiveness of the law that is promoted by the rule of law will be a good thing; conversely, where a repressive legal system is using the rule of law to more effectively achieve its wicked goals, the instrumental value of the rule of law is morally problematic. That is the Instrumental consideration outlined by Hart and Raz and developed by Kramer.

But Gardner does not put his two observations together to say how we should deal with Kramer’s challenge. If the rule of law has its highest moral value in the ‘knowing where you stand’ sense of freedom in a repressive regime, but under such a regime also has negative moral value in its instrumental value sense, then what are we to make of the moral situation?

The solution that Gardner’s position should provide, it seems, is that under a wicked regime there is moral value in conformity to Fuller’s principles due to their contribution to human autonomy, but this is countered by the moral disvalue that stems from the rule of law’s instrumental contribution to the effectiveness of the repressive regime’s goals. What one thinks about the ultimate moral value of conformity to the rule of law in this situation depends on a judgment about the balance of moral value and moral disvalue generated, and this judgment will have to be made after inquiring in more detail into “how exactly the rule of law serves as an instrument of legal effectiveness” and whether in fact it is an aid or an obstacle to a repressive regime’s goals. For it may be that despite Kramer’s arguments about human behaviour, non-compliance with the rule of law would more effectively achieve a wicked regime’s aims, which are, as Gardner suggests, facilitated by “reigns of terror, revelling in arbitrariness, exploiting human weaknesses, and triggering conditioned responses”.

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85 Gardner “Introduction”, above n 22, at xlii, fn 43.
86 Gardner “Introduction”, above n 22, at xlii.
87 Gardner “Introduction”, above n 22, at xli.
While Marmor does not go into this detail or even address the wicked regime challenge, his response would, I believe, be similar to Gardner’s. Marmor specifically identifies the dual value that conformity to Fuller’s principles secures – moral value through various contributions to human freedom, and instrumental value in making law effective in guiding human conduct. Marmor rejects the view that the instrumental value of the rule of law means that there is no moral value in compliance; these two kinds of value exist at the same time when the rule of law principles are complied with.

Waldron also does not address Kramer’s wicked legal system situation in detail, but his analysis of moral complexity does provide insights that are useful in considering this point, and which suggest that he would agree that the instrumental value of the rule of law does not necessarily negate its moral value. Waldron says that “a person who believes that legality has moral significance need not also believe that legality conclusively determines the issue of the moral quality of any given law.”88 This means, Waldron argues, that Hart’s claim that conformity to Fuller’s principles being compatible with great iniquity does not mean that such conformity is not of positive moral significance, just that it is one of a number of factors that must be contemplated in considering the law’s moral value.89 Where a repressive legal regime does substantially fulfill Fuller’s principles, those “iniquitous legal systems would have been even worse had the principles of legality not been observed”.90

But Waldron also goes beyond this, because he countenances the claim that substantial conformity to the rule of law principles may be of instrumental value to iniquitous legal regimes; in some cases it may “aggravate injustice” by allowing the regime to more effectively oppress people.91 Waldron notes that Hart seemed to hold this view: “legality contributes to the moral quality of the law in some ways and detracts from the moral quality of the law in other (often very similar) ways – and there is no telling how things will fall out overall.”92 This is essentially the Alternative interpretation of Hart’s (and Raz’s) position on the rule of law’s moral value, as set out above. The moral value of the rule of law is that people know where they stand, but this sits alongside the instrumental value that allows

88 Waldron “Positivism and Legality”, above n 1, at 1161.
89 Waldron “Positivism and Legality”, above n 1, at 1161.
90 Waldron “Positivism and Legality”, above n 1, at 1162.
91 Waldron “Positivism and Legality”, above n 1, at 1162.
92 Waldron “Positivism and Legality”, above n 1, at 1162–1163.
legal regimes to more effectively achieve their aims. If those aims are iniquitous the rule of
law will cut both ways: moral value of knowing where one stands will have to be weighed
against the disvalue of the regime’s more effective oppression.

5.6 Conclusion

This chapter has set out the views of four recent legal positivists on the Moral Value
question. In terms of the wider concerns of this study, it has primarily focussed on providing
a closer analysis than is usually given of the positivist response to Fuller’s Challenge. It has
argued that recent legal positivist analyses have usually accepted Fuller’s claim that
conformity to the rule of law is of moral value. But while Gardner, Marmor, and Waldron all
essentially agree with Fuller that this moral value stems from knowing where one stands –
knowing what the law demands of you, and that the government will not interfere with your
liberty except according to the law – only Waldron discusses the complexity of this moral
value in any detail. Waldron does so because his analysis of the rule of law’s moral value
attempts to make sense of Hart and Raz’s instrumental argument, and therefore he must
show how this instrumental aspect of compliance with Fuller’s principles can coexist with a
morally valuable aspect. In showing the moral complexity of compliance with the rule of
law, he provides some of the arguments necessary for dealing with Kramer’s objections to
the claim that the rule of law is intrinsically morally valuable. As discussed in detail above,
Kramer thinks that the instrumental aspect of the rule of law negates any necessary moral
value in conformity to Fuller’s principles. However, most of the recent legal positivists resist
Kramer’s conclusions, and instead to uphold the view that even where conformity to the rule
of law allows wicked goals to be effectively achieved, such conformity generates at least
some moral value in allowing people to know where they stand.

As I have already suggested, Waldron’s view of the moral complexity of conformity to the
rule of law principles provides the best legal positivist account of the moral value of Fuller’s
principles. It combines the insights noted by each of the theorists whom I have considered in
this chapter and the foregoing ones – Fuller himself, Hart, Raz, the recent positivists, and
Simmonds – and uses the various aspects of moral value and moral disvalue in an attempt to
provide the most accurate account possible. Whatever reason a government conforms to the
rule of law, there seems to be some moral value in such conformity, even if we might not want to say that the government has acted morally. If an evil government complies with the rule of law in the furtherance of its evil goals – purely for instrumental, prudential reasons – even if we do not think that the government has acted out of moral considerations, we can still say that there is some moral value secured by the legal system. The reason for this moral value is the followability of law point, which Marmor and Gardner emphasize in setting out the rule of law’s moral value. In the terms I introduced above, the autonomy argument for conformity to the rule of law’s moral value seems to exist despite Kramer’s Moral Deviations and Agency Respect arguments. Even if the substantive law is evil, and conformity of that law with the principles of the rule of law was motivated by such conformity’s prudential contribution to evil aims, the very fact that people know what the law requires of them, and can plan their lives on that basis, creates some moral value in the legal system.

If this is the position that legal positivists should and do take on the Moral Value aspect of Fuller’s Challenge, the question that flows naturally is where the debate between positivists and anti-positivists on the rule of law will head, now that there is agreement on the moral value of conformity with Fuller’s principles. If it is accepted that the rule of law is morally valuable for non-instrumental reasons, one of the key parts of Fuller’s Challenge has been conceded. The question then becomes how positivists will continue to distinguish their positions from Fullerian anti-positivism. Waldron argues that this concession seems to fall foul of legal positivism’s aversion to necessary connections between law and morality.93 Yet, as shown in the discussions of Hart and Raz, this is only the case if conformity to the rule of law is a necessary aspect – an existence or identification condition – of law. If one can have the law without the rule of law, then the moral value of legality does not create a connection between law and morality. I will discuss in the following chapter whether the recent Hartian legal positivists take up this response.

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93 I argue below that the No Necessary Connection version of the Separation thesis is not held by most contemporary positivists: see Chapter 6 at section 6.6.1.
Chapter 6: Recent Legal Positivism on the Relationship Question

6.1 Introduction

This chapter shifts my focus to considering how contemporary legal positivists think of the ‘Relationship question’: what is the conceptual relationship between law and the rule of law? In answering this question we cannot ignore the discussion of the Moral Value question given in the previous chapter, for, as noted at the end of that chapter, if the recent legal positivists now accept that Fuller’s principles of the rule of law are of moral value, they must explain how this moral value is consistent with their understanding of legal positivism.

This continuing importance of the Moral Value question in the context of the Relationship question can be seen by looking back to Jeremy Waldron’s argument, noted at the end of the previous chapter, which states that if Hart accepts both that Fuller’s principles are morally valuable and that there is some necessary connection between those principles and the very idea or concept of law, then this combination “looks likely to cause problems for the distinctive positivist thesis of the separability of law and morality, because it implies that one of the criteria for calling something a legal system has genuine moral significance.”¹ Waldron therefore premises his own analysis on the idea that Hart and other legal positivists are wedded to the view that the law does not have any inherent moral value – that there is no necessary connection between law and morality.² If they admit the moral value of Fuller’s principles, they must therefore deny the necessary connection between law and the rule of law to maintain the No Necessary Connection Separation thesis.

But this chapter shows that the No Necessary Connection Separation thesis has a different role in recent legal positivist discussions of the Relationship question; namely, it is a thesis that positivists, bar Kramer, reject. Positivists are thereby forced to clarify the core thesis or

² Waldron “Positivism and Legality”, above n 1, at 1158. See also NE Simmonds Law as a Moral Idea (Oxford University Press, Oxford, 2007) at 65 and 70–78. Simmonds says at 70: “Legal positivism is frequently taken to involve the denial of any necessary connection between law and morals”.

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claim of their position, and which version of the Separation thesis flows from it. The answer they give is that the Social thesis is the core tenet of the positivist tradition, and the Separation thesis that flows from it is not the wide No Necessary Connection thesis. Positivists then also must make sense of the Relationship question aspect of Fuller’s Challenge in a way that conforms to their understanding of the Social thesis.

This chapter will also show, in line with this study’s aim of providing a close analysis of legal positivism’s account of the rule of law, that there are a variety of legal positivist views on the relationship between law and the rule of law, and that it is not enough to say whether or not the particular theorist recognizes an important and necessary connection between law and the rule of law. One has to specify clearly what that relationship is. In this way, we can see that the concessions that recent positivists make to Fuller’s Challenge are arrayed along a spectrum, running from the minimal concessions noted by Hart and Raz in their divide and conquer analysis of the rule of law, through to approaches that essentially accept Fuller’s claims that law is a social institution that lives up to a moral ideal.

This chapter is also central in terms of my main thesis concerning the coherence of legal positivism in light of the concessions that positivist theorists make in response to Fuller’s challenge. My discussion sets out the concessions that positivists make to Fuller, which, I argue, bring into question their allegiance to a distinctively legal positivist position. This is due to their seeming capitulation to Fuller on the Relationship question at the level of legal systems – their acceptance that conformity to Fuller’s principles is necessary if a legal system is to exist. However, positivists do not regard this to be a complete capitulation. Some see their concessions to Fuller as simply a derivative aspect of their own concept of law, rather than an acceptance of Fuller’s account. And those who do accept Fuller’s account of law as including conformity to the ideal of the rule of law as a central element do not fully accept Fuller’s Challenge because they still hold tightly to the Social thesis at the level of legal validity.

The question that then arises, discussed further in Chapter 8, is why positivists think they are justified in making the validity Social thesis the core claim of legal positivism, in the face of their acceptance of Fuller’s Challenge at the level of legal systems. Stated alternatively, the question is how positivists can insulate their acceptance of Fuller’s claims at the systemic
level from threatening their Social thesis at the validity level. This question causes tensions within positivism to different degrees, depending on what approach to the Relationship question the particular positivist takes. This argument will be developed further below, but to illustrate the point initially, I will set out the Fullerian anti-positivist approach to the Relationship question, which highlights these tensions.

### 6.2 The Fullerian and anti-positivist view: law as legality

I have already set out in detail Fuller’s position on the relationship between law and the rule of law, but I will summarize his key points and outline its development in recent Fullerian anti-positivism as a point of contrast with the positivists’ positions discussed below. Fuller argues that we should not see law as merely the product of a powerful sovereign or state fiat, but as a “purposeful enterprise” that can only proceed on the basis of reciprocal expectations on the part of the government and ordinary citizens. Citizens will only have reason to engage in the activities and dispositions necessary for a legal order to exist if the law-giver abides by the principles of the rule of law.

Therefore we cannot separate an understanding of the existence of law from an examination of “the purposive effort that goes into the making of law and the law that in fact emerges from that effort”. An adequate concept of law must give a normative and sociological account of the moral norms and understandings that constitute the reciprocal relationship underpinning the law and sustaining its power and authority; it must recognize “that maintaining a legal system in existence depends upon the discharge of interlocking responsibilities – of government toward the citizen and of the citizen toward the government.” The moral ideal of the rule of law is the central norm to which the law-giver must give effect, if she is to play her role in creating a legal order: it is the moral standard of legality to which putative legal orders must conform, and which they must always strive to better instantiate. Fuller’s answer to the relationship question is, therefore, that we cannot

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3 See above Chapter 2 at sections 2.3 through 2.5.
5 Fuller *The Morality of Law*, above n 4, at 193. See the very similar formulation earlier: “on the order imposed by law in abstraction from the purposive effort that goes into creating it”: at 107; see also 117-118.
6 Fuller *The Morality of Law*, above n 4, at 216 and also 138-140.
properly understand law if we separate it from the ideal of the rule of law: the relationship is really equivalence, for the rule of law and law are just different ways of talking about the same idea.

This position, arguing for an inseparability of law and the ideal of the rule of law, is evident in a number of recent anti-positivist theorists. The Fullerian challenge is therefore to provide a morally-charged account of law and legal validity that shows how “the basic values of human dignity and individual autonomy” are intrinsic to law, so that “[l]egal obligation is … a species of moral obligation” and the identification and interpretation of legal content is always dependent on our understanding of the rule of law.\(^7\) The rule of law should be understood as a key principle or doctrine underlying the fundamental rules of legal order, and should be given effect in determining legal obligations;\(^8\) “the judicial task is one of fidelity, not to a rule of recognition, but to the idea of law itself”.\(^9\) For Fullerians, this obligation is both legal and moral.\(^10\)

An official or citizen who believes that he has a moral obligation to obey the law, as the law of his society, made and enforced by legal institutions whose legitimacy he accepts, must reject as law – deny the legally obligatory character of – rules whose iniquity places them beyond the constitutional bounds that his allegiance to the law implies.

The moral principles of the rule of law are “necessarily embedded in the law” so that it is always part of judge’s legal obligation to uphold them, because “[n]ot only … are such principles legal as well as moral; they are also, as it were, the constitutional principles of any legal order.”\(^11\) When a judge confronts an order or rule that derogates from legality, he is not just faced with an immoral rule, but “a legal pathology”.\(^12\) For legality is:\(^13\)

\begin{quote}
the idea that there are principles … immanent in legal order towards which judges and other legal officials must adopt an internal point of view. These principles are normative in that they must be accepted by judges and other legal officials as authoritative, as the correct standards to adopt in determining what counts as the law of their legal order. In other words, law is such when and only when it is legal – that is, it complies with the
\end{quote}

\(^9\) Simmonds Law as a Moral Idea, above n 2, at 157.
\(^10\) Allan Constitutional Justice, above n 7, at 218.
\(^11\) Dyzenhaus Hard Cases in Wicked Legal Systems, above n 8, at 251.
\(^12\) Dyzenhaus Hard Cases in Wicked Legal Systems, above n 8, at 167-168.
\(^13\) Dyzenhaus Hard Cases in Wicked Legal Systems, above n 8, at 173.
requirements of legality. The law of a legal order is thus the law determined in accordance with such requirements, which will include both the requirements of legality that any legal order has to instantiate, and the more contingent requirements that come out of that legal order’s particular history.

Fullerian anti-positivists admit that different theorists will take alternative positions on the political conception of law – an ideal of fidelity to law – that determines their theory of adjudication. But a full or complete account of law must include all of these features.

This view seems to be in stark contradiction of the legal positivist perspective, which says that the law is merely a social institution that need not conform to any moral ideal. However, as will be discussed below, all of the recent Hartian legal positivists considered in this study think that the anti-positivists are right to say that there is a necessary connection or relationship between law and the rule of law, although they differ on the reason for and the extent of that relationship, and in particular challenge the idea that the rule of law determines legal validity.

6.3 Waldron’s normative positivism

Of the recent positivists I will discuss, Waldron’s views on the relationship between law and the rule of law are closest to the Fullerian anti-positivist position. He agrees with Fuller that law is a political concept that cannot be properly understood other than by reference to the value of the rule of law. Waldron accepts that it is simply part of our idea of law that it lives up to Fuller’s principles, and he thereby joins with Fuller in rejecting any form of legal positivism that would exclude the rule of law from the very concept of law.

6.3.1 Law as a moral idea

To understand Waldron’s answer to the relationship question, we must begin with his general view of the proper methodology of jurisprudence – inquiry into the nature of law – into which he fits his more specific claims about the relationship between law and the rule of law. His position is set out in detail in his essay on “Legal and Political Philosophy”, and in his argument for a legal positivist theory based in normative considerations in “Normative

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14 Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 8, at 172.
(or Ethical) Positivism”. In these writings, Waldron argues that an adequate concept of law must be “suffused with normative understanding” because the ideas that we deploy to talk about and understand the law and legal concepts such as law, legal system, validity, and legal obligation simply are evaluative moral and political concepts. They should not be understood as “uncontaminated” by normative considerations, and can be answered only by taking positions on questions of political philosophy.

Legal philosophers, therefore, cannot leave the discussion of normative questions to political or moral philosophers. Jurisprudential concepts can only be understood by reference to the purposes or values inherent in them. Waldron claims that our ordinary understanding sees the law as a mode of governance with important differences from other modes of governance, and that the law’s unique features have a moral quality to them. Put differently:

the very concept of law is normative, and one cannot use or understand that concept apart from participation in a form of life that sorts political practices in various ways – for example, finding some point in distinguishing ... between rule by law and other forms of governance.

In order to understand our concept of law, one has to understand how ‘we’ – people who share a cultural view in a particular society – see law as a morally valuable institution distinguished from others.

Different positions in jurisprudence are, for Waldron, based on competing accounts of law’s normative value. Disputes about our concept of law must thus be resolved by reference to “why law is seen as an importantly distinct mode or aspect of governance”. Waldron considers the idea that this intrinsic value of law is justice, as the classical natural lawyers

16 Waldron “Legal and Political Philosophy”, above n 15, at 369.
17 Waldron “Normative (or Ethical) Positivism”, above n 15, at 419; Waldron “Legal and Political Philosophy”, above n 15, at 357.
18 Waldron “Legal and Political Philosophy”, above n 15, at 370.
19 Waldron “Legal and Political Philosophy”, above n 15, at 371.
20 Waldron “Normative (or Ethical) Positivism”, above n 15, at 421.
21 Waldron “Normative (or Ethical) Positivism”, above n 15, at 426.
22 Waldron “Normative (or Ethical) Positivism”, above n 15, at 420.
suggest. But he prefers the value inherent in the law, which is primarily studied in jurisprudence because it is thought to be the moral value central to our understanding of law. Specifically, Fuller’s idea of the rule of law is such a value, because Fuller’s principles “are themselves strictly legalistic values” that also embody respect for moral values. In other words, Fuller’s principles mark out the moral value that we recognize as internal or inherent in the very idea of law.

Waldron presents some of these arguments fairly tentatively, as a position in jurisprudential methodology that may be plausible, rather than as being obviously correct. However, in later work specifically dealing with the relationship between law and the rule of law, he is more strident in his support for this normative-evaluative methodology for jurisprudence. This puts into question his standing as a legal positivist on some accounts of what legal positivism is: Waldron himself wonders, after setting out his position, whether it forms “the basis of a positivist account of law.” But as can be seen in his essay on normative positivism, ultimately Waldron does not think that policing a distinction between natural law and positivist theories is a useful exercise, and if the “hoary and threadbare” debates that revolve around these labels should be jettisoned by his normative positivism, all the better: “If the dichotomy between positivism and natural law goes out the window, so be it.”

**6.3.2 The concept and the rule of law**

Waldron’s recent article ‘The Concept of Law and the Rule of Law’ directly addresses the topic of the relationship between law and the rule of law, posing the following question:

> Suppose for a moment that the Rule of Law does represent a more or less coherent political ideal. How central should this be to our understanding of law itself? What is the relation between the Rule of Law and the specialist work that modern analytic philosophers devote to the concept of law, and to the precise delineation of legal judgment from moral judgment and legal validity from moral truth?

Waldron’s answer is that “we cannot really grasp the concept of law without at the same time understanding the values comprised in the Rule of Law.” He notes the view that we

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23 Waldron “Legal and Political Philosophy”, above n 15, at 371.
24 Waldron “Legal and Political Philosophy”, above n 15, at 372.
25 Waldron “Legal and Political Philosophy”, above n 15, at 372.
28 Waldron “Normative (or Ethical) Positivism”, above n 15, at 418.
should first seek to understand law independently of the ideal of the rule of law, in order to prevent the contamination of our descriptive conceptual inquiries into law by a normative-evaluative inquiry into the values that law should serve.\(^{31}\) This is wrong, Waldron argues, because the very concept of law is an evaluative, moral ideal, so that even “to describe an exercise of power as an instance of law-making or law application is already to dignify it with a certain character”.\(^{32}\) He objects, therefore, to the “casual positivism” prevalent amongst mainstream legal positivists, which fails to see that law just is an evaluative concept that applies to any system that “calls itself a legal system”.\(^{33}\) Because modern legal positivists look only for an institutionalized normative system, they would recognize as law systems that fail to conform to certain “structural” elements that Waldron thinks are requirements of law and legal systems.\(^{34}\)

In contrast, Waldron argues that a number of requirements or prerequisites related to the ideal of the rule of law – general public norms created by humans and at least purporting to promote the public good, built into a coherent system of norms, and applied by courts – must be comprehended to understand the central case of law.\(^{35}\) Normative systems that fail to live up to that ideal can only be understood as law in an attenuated sense.\(^{36}\) While it is common in practice to refer to any effective institutionalized normative order dominant in a territory as law, those who understand that law must live up to the requirements that Waldron identifies will look askance at that description:^^37\)

\(^{31}\) Waldron “The Concept and the Rule of Law”, above n 27, at 11.
\(^{32}\) Waldron “The Concept and the Rule of Law”, above n 27, at 11.
\(^{35}\) Waldron “The Concept and the Rule of Law”, above n 27, at 37.
\(^{36}\) Waldron “The Concept and the Rule of Law”, above n 27, at 37.
\(^{37}\) Waldron “The Concept and the Rule of Law”, above n 27, at 37.
Waldron’s answer to the relationship question is therefore that the idea of law cannot be understood without seeing that law must, to a certain extent, satisfy the requirements he identifies, which he thinks “are morally motivated criteria”. This is because: they define something worth treasuring as well as something worth studying. We have noted various ways in which these characteristics define a mode of governance that takes people seriously as dignified and active presences in the world – persons with lives of their own to lead, with points of view about how their lives relate to the interests of others, and with reason and intelligence to exercise in grasping their society’s system of order.

It follows that understanding a legal system of law is of practical importance: the elements of the rule of law that Waldron identifies have a “definitional connection with law [that] is not just a semantic point; it is a substantive moral thesis.”

6.3.3 Threshold and aspiration

Waldron elucidates the relationship question in further detail by distinguishing between the satisfaction of his various requirements for the existence of law on one hand, and the fuller satisfaction of the ideal of the rule of law. This is similar to Fuller’s view that the rule of law has aspects of both duty and aspiration. Waldron argues that:

one can understand these two sets of criteria – for the existence of law and for the Rule of Law – as two perspectives on the same basic idea. The very idea of law is a demanding concept, and there are two ways of thinking about its demanding-ness. We can think of the demands as being incorporated into the meaning of law itself, placing limits on our use of this term. Or we can think of the demands as being aspirations embodied in an ideal associated with the operation of a legal system – the Rule of Law.

Waldron counts Fuller’s legal theory as the theoretical counterpoint to casual positivism, showing how violations of the rule of law lead to a situation where the “legal enterprise” breaks down altogether. He seems to agree with Fuller’s assessment that in Nazi Germany the Nazis “systematically undermined the formal and procedural condition associated with the very existence of a legal system”. While Waldron’s own account of the essential features of law does not slavishly follow Fuller’s principles of the rule of law, after setting

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38 Waldron “The Concept and the Rule of Law”, above n 27, at 40.
40 Waldron “The Concept and the Rule of Law”, above n 27, at 41.
41 See above Chapter 2 at section 2.3.4.
42 Waldron “The Concept and the Rule of Law”, above n 27, at 45.
44 Waldron “The Concept and the Rule of Law”, above n 27, at 17.
45 Waldron “The Concept and the Rule of Law”, above n 27, at 18.
them out he observes that Fuller’s “defining characteristics of law are also among the most prominent requirements” of the rule of law.\footnote{Waldron “The Concept and the Rule of Law”, above n 27, at 44.}

As noted above, the rule of law can be seen as both specifying the existence conditions for law and as setting out the aspirations for law:\footnote{Waldron “The Concept and the Rule of Law”, above n 27, at 45.}

A legal system can be in better or worse shape [in terms of its conformity to the rule of law], but after a point it can be in such bad shape that it does not satisfy the criteria for being a legal system at all. But even if it is recognizable as a legal system, we may still demand more from that system on any or all of these dimensions. The fact that we work with a roughly defined threshold for a system of governance to count as law does not mean that we rest satisfied with these minimal credible achievements. There is always room for improvement, and there is also danger of deterioration.

When we criticize legal regimes and exhort them to conform more to the rule of law, we may do so by saying that there is such a failure to so conform that there is a danger that the system may no longer be a legal system; where there is clearly a legal system and no danger of falling below the threshold, we will usually phrase our criticisms in terms of the ideal of the rule of law.\footnote{Waldron “The Concept and the Rule of Law”, above n 27, at 45.} But in both cases, the ideal that we are talking about is the same, namely the evaluative ideal of the rule of law that is inherent in our ordinary understandings of the concept of law.

\subsection*{6.3.4 Conclusion}

Waldron’s position on the relationship question is very close to that found in Fuller’s Challenge. While he does not use exactly the same concepts – Fuller places more emphasis on law’s ‘purposiveness’ \footnote{See the discussion in Chapter 1 at section 1.3 and Chapter 2 at section 2.3.} than its status as a normative concept – Waldron’s methodological arguments show that he agrees with Fuller that law is a normative-evaluative concept, and that the analysis of law requires the elucidation of the moral ideal to which that social institution aspires. We should, therefore, reject the casual positivism that deems any effective normative order as legal, and reserve the concept of law for orders that conform to the rule of law. To do otherwise would be to mistake the concept of law for a non-evaluative idea, rather than seeing it as a moral and political ideal that can only be elucidated through a normative-evaluative analysis. This is not so much a mere concession to Fuller as a
thorough-going acceptance of his anti-positivist position. Instead of just seeing Fuller’s principles as certain necessary elements of a social institution understood in a positivist fashion, Waldron accepts Fuller’s anti-positivist claim that law must live up to a moral ideal. However, as I will argue below, Waldron detaches or insulates this acceptance of Fuller at the level of the identification of systems as legal from his account of legal validity. In this respect his concessions to Fuller are less than complete, and his place in the positivist tradition seems more secure. I will note the tensions that arise from this combination of positions in the last section of this chapter, and then in Chapter 8 I will analyse how and why Waldron and the other positivists discussed in this study have come to embrace this combination of responses to Fuller’s Challenge, and what it tells us about the self-understanding and cogency of contemporary legal positivism. But before then, I will discuss the other recent positivists’ views of the Relationship question.

6.4 Derivative necessary conformity: Marmor and Kramer

The recent legal positivists who most clearly oppose Waldron’s broad embrace of Fuller’s perspective on the Relationship question are Marmor and Kramer. They argue against seeing law as understood by reference to the political ideal of the rule of law; as Marmor puts it, our concept of law “need not take a stance on any particular moral or political issues, nor is it committed to any moral or political evaluations”.50 For Marmor and Kramer, law is not a moral ideal – it is merely a particular kind of social institution, the existence and content of which is a matter of social fact.

Marmor and Kramer’s answer to the Relationship question, however, is complicated by their acknowledgement that the social facts that make up the law cannot exist unless there is a minimal level of conformity to Fuller’s principles. That minimal conformity is what is necessary for there to be any rules that can guide human conduct at all, and such rules are required for the existence of law. On this basis Kramer says that the rule of law “amounts to nothing more and nothing less than the fundamental conditions that have to be satisfied for

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the existence of any legal system”, and Marmor says that “wherever there is law (that is, some legal system in force), the conditions of the rule of law are actually met, at least to some minimal extent”. These statements seem to be concessions to Fuller, because they admit that his ‘conditions’ or principles must be satisfied – at least minimally – if a legal system is to be in existence.

Yet this does not mean Marmor and Kramer agree with Fuller’s analysis of the Relationship question, as Waldron does, for they do not think that the law is a moral ideal; they believe that existing systems of norms that fail to have that kind of moral value should be considered law. Instead, like Hart and Raz, they say that Fuller’s principles are necessary for there to be norms or rules at all. How these two positions on the Relationship question can be consistent may seem perplexing, but an explanation can be given through a close analysis of their arguments.

### 6.4.1 The derivative approach

One way of understanding Marmor and Kramer’s position is by making their distinction analogous to Raz’s distinction in *Practical Reason and Norms* between the “definitional” – I will call ‘conceptual’ – and “derivative” approaches to the connection between law and morality. Raz rejects the conceptual approach, which states that it is part of the nature of law that it lives up to some moral property or evaluative characteristic to which all law must conform. This is wrong because law for Raz is merely a “special sort of social institution” that can be studied regardless of its moral value. However, Raz thinks that the derivative approach to the law’s moral value is plausible, because it accepts that the law is a particular kind of social institution; it just observes further that law “if it is in force in a human society, has, of necessity, moral worth”. The idea is as follows:

The moral properties that all legal systems possess depend on their non-moral properties. … If every legal system in force in some society has, in virtue of its identifying features,
or in virtue of the conditions which must obtain if it is to be in force, certain moral 
attributes, then the derivative approach is successful in establishing a necessary link 
between law and morality. [emphasis added].

Said another way, on the derivative approach there is no conceptual view that it is the nature 
of law that it is in some way necessarily moral; instead, “[t]he question is whether the 
identifying features of legal systems or the conditions necessary for them to be in force 
entail that such systems always possess some moral worth”. 58

The analogy here is between seeing the connection between law and conformity with the 
rule of law principles in the same way as the derivative approach to the moral worth or 
properties of law. Raz is focussing on how the derivative approach can be taken to law’s 
necessary moral value. But this approach also explains Raz’s view of the connection 
between law and the rule of law, which can be seen by substituting ‘conformity to the rule of 
law’ for ‘moral worth’. It is not that the law is conceptualized in a way that makes the rule of 
law a central element of law, but that it is a condition of an institutionalized normative 
system’s existence that it conforms to some degree with Fuller’s principles. Positivists begin 
from the position that law is a form of social organization that does not require substantial 
conformity to the rule of law as one of its defining features: this is simply not an essential 
aspect of legal systems as social institutions, according to our concept of law. But once we 
have identified the kinds of social institutions legal systems are, we can then notice that such 
institutions must live up to the rule of law in some way – in Raz’s view, to only a minimal 
extent necessary for rules to exist. The difference between the conceptual and derivative 
approach may seem inutile – why does it matter that the rule of law is not part of the very 
idea of law if it is entailed by the nature of law – but as I discuss below, the derivative 
position is both the view that most positivists see as superior to Fuller’s, and it has 
implications for the content of legal norms.

Looking back at Raz’s actual analysis of Fuller’s claim, 59 he says that Fuller’s principles 
cannot be “violated altogether” by a legal system, because that would mean that no general 
rules could exist. 60 As Raz observes, this presupposes his own positivist concept of law,
rather than engaging with Fuller’s account of law. So Raz sees Fuller’s discussion as a relatively insignificant part of understanding the nature of law – identifying the requirements that constitute the limit condition of the existence of rules – rather than as a moral ideal that is central to the concept of law. That these principles also secure some kind of moral value is irrelevant to the Social thesis, because it does not affect the identification of law as a particular social institution, except as a limit condition – and as explained in Chapter 4, even then he denies that conformity to the rule of law, as opposed to minimal conformity with Fuller’s principles, is a necessary condition of law’s existence.

Thus, Raz clearly argues that explaining how law morally ought to live up to Fuller’s principles is something that we should discuss after we have understood what kind of social institution the law is – the rule of law is not part of the existence conditions of law. ‘After’ here does not mean chronologically after, but conceptually after: our initial identification of law does not involve the imposition of rule of law conditions for the law to live up to, but understanding law as a social institution that aims to guide or plan conduct entails that Fuller’s principles must be substantially conformed to.

All that the derivative approach claims is that the law is a particular kind of social institution, and that social institution cannot exist, or cannot be effective, without minimal compliance with the rule of law principles. Hartian positivists therefore maintain their difference with Fullerian anti-positivism despite their affirmation that the rule of law is a necessary condition of law’s existence, because Fuller’s Challenge sought to show positivists that there was a more profound relationship between law and the rule of law – that law was simply a social institution that cannot be understood in isolation from the idea of the rule of law.

Reading Marmor and Kramer’s arguments with this distinction in the background reveals the reason for their answer to the Relationship question, and shows how it differs from Waldron and Fuller. For Waldron and Fuller hold versions of the conceptual approach: the rule of law is just part of the concept of law because law is a social institution that necessarily – by its

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61 Raz The Authority of Law, above n 60, at 223 fn 11.
62 See the distinction identified above in Raz, between conformity with the ideal of the rule of law and minimal conformity to Fuller’s principles – not amounting to the rule of law – that is necessary for law to exist: Chapter 4 at section 4.3.3.
nature – lives up to a moral ideal. In contrast, as I will argue below, Marmor and Kramer take a derivative approach to the relationship between law and the rule of law, because their position is that law is a particular institutionalized system of norms that is meant to guide human conduct, and therefore we must recognize that Fuller’s principles are conditions for it doing so. Law is necessarily related to the rule of law not because law just is the moral ideal of the rule of law, but because a condition of law performing its function of guiding human conduct is that it conforms to Fuller’s rule of law principles.

6.4.2 Marmor

Marmor’s discussion is the briefer of the two, but it is not straightforward. Marmor argues that “legal positivism, as a general theory about the nature of law, is basically descriptive and morally neutral”. Law is a particular kind of instrument of social control, and it is essentially “a social phenomenon, … a social institution, and therefore, what the law is, is basically a matter of social facts.” Marmor makes it clear that “‘social’ is used here somewhat stipulatively to exclude moral, and other evaluative-normative facts”. Law is not, then, a political ideal like justice or democracy; in other words, it is not an “evaluative-normative” or “appraisive” concept.

This means that one need not engage in moral argument to determine what the law is; all that is required is a description of the social institution of law:

A descriptive account of a social practice, or any other type of theory about practical reasoning, need not rely on any particular views about the moral merit or worth of the functions or purposes that would make sense of the practice in question[,] … [W]e can make sense of a social practice, render its rationale intelligible, without forming a moral or other evaluative judgment about the merit of the functions or purposes that render the practice rational for the participants.

Similarly, the content of valid legal norms is not determined by conformity to any moral ideal. Marmor argues that when we are discussing “the concept of legal validity, and the conditions of legal validity”, we should understand that:

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64 Marmor “Legal Positivism”, above n 50, at 686.
65 Marmor “Legal Positivism”, above n 50, at 686.
66 Marmor “Legal Positivism”, above n 50, at 703. Marmor Philosophy of law, above n 60, at 133.
67 Marmor “Legal Positivism”, above n 50, at 697.
legality, or legal validity, is basically a phase-sortal concept: Norms are either legally valid, or not; they either belong to the law or they don’t. Legal validity is not a kind of achievement that one can attain or fail to attain to a higher or lesser degree.

While Marmor admits that one cannot understand the law as a particular kind of social practice without understanding its functions and purposes in our society – “what it is there for, [and] what is it that it is supposed to do”69 – he argues that this does not make law a social institution that necessarily conforms to a moral ideal or that one must engage in moral argumentation in determining the existence and content of the law.

However, things become more complicated when Marmor focuses his attention on the rule of law. In ‘The Ideal of the Rule of Law’, he argues that the rule of law “must capture something that is essential to legalism, per se; if there is something good about the rule of law, it has to be a kind of good that derives from certain features that law, as such, possesses.”70 It seems Marmor is saying that the idea of the rule of law provides some necessary connection between the existence of law and the satisfaction of some kind of moral value. This seems to be confirmed by his later statement that:71

> the ideal of the rule of law is basically the moral-political ideal that it is good to be ruled by law. The general idea is that whatever else is the case, including, crucially, whatever the content of the law is, it is always better to be governed by a system of laws than by some other system of governance or social control.

But it is important to see how Marmor gets to the position that governance by a legal system is better than some other kinds of governance.72 He begins by reflecting on the basic idea of law, then derives certain necessary requirements (the rule of law) from that basic idea, and only then discusses what is morally valuable about that kind of legal governance (compared to other forms of governance). In other words, Marmor begins by saying that law is a particular kind of institution of governance, rather than beginning from the idea that law is a moral ideal or for some other reason is conceptually related to the rule of law. Like Raz, Marmor does not define law by reference to an ideal of the rule of law, but first gives an independent account of law and then derives the conditions of the rule of law as

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68 Marmor “Legal Positivism”, above n 50, at 703.
69 Marmor “Legal Positivism”, above n 50, at 687–688; Marmor Philosophy of Law, above n 60, at 113–114.
70 Marmor “The Ideal of the Rule of Law”, above n 52, at 2.
71 Marmor “The Ideal of the Rule of Law”, above n 52, at 2.
72 Marmor “The Ideal of the Rule of Law”, above n 52, at 3.
requirements that must be in place if law is to exist. This is the derivative approach discussed above.

Marmor lays his argument out in clear steps:\(^{73}\)

1. Whatever else the law is, at the very least, and necessarily so, law purports to guide human conduct by generally prescribed norms.

2. Generally prescribed norms can only guide human conduct if they meet certain conditions. Call these: the conditions of the rule of law. Thus, the conditions of the rule of law are functionally necessary for law to guide human conduct.

3. Therefore, wherever there is law (that is, some legal system in force), the conditions of the rule of law are actually met, at least to some minimal extent.

Taking each point in turn, he begins with the basic truism that “governance by law is regulation of human conduct by general norms”.\(^{74}\) We can then identify the necessary functional requirements of any form of governance by general norms – the conditions “law has to meet in order to function as law”.\(^{75}\) Marmor observes that these include at least minimal conformity to Fuller’s principles.

Therefore, Marmor’s claim is that there is “at least to some minimal extent” a relationship between the existence of law that performs its function and the conditions of the rule of law. Because the law purports to guide conduct by general norms, it must comply, at least minimally, with the functionally necessary conditions of such guidance. As he puts it in his other key essay:\(^{76}\)

> there are many ways in which one can fail to make law. There are certain conditions that the law has to meet in order to be able to fulfill its pivotal function of guiding human conduct. Law’s ability, as a social instrument, to guide human conduct necessitates certain features the law must possess in order to fulfill such a function, regardless of its specific contents.

This is Marmor’s answer to the Relationship question: because the law must be able to guide conduct, it must conform to Fuller’s principles. It is not the nature of law as a moral ideal or as a social institution that it substantially conforms to the rule of law, but we can derive the requirements of the rule of law as the functional existence conditions of law.

\(^{73}\) Marmor “The Ideal of the Rule of Law”, above n 52, at 7.

\(^{74}\) Marmor “The Ideal of the Rule of Law”, above n 52, at 4.

\(^{75}\) Marmor “The Ideal of the Rule of Law”, above n 52, at 5.

We saw in the previous chapter that Marmor also thinks that conformity to Fuller’s principles is of moral value. This means that Marmor’s answer to the Relationship question entails a necessary relationship between law and the rule of law; he admits that his analysis leads to an affirmative answer to the question of why it is “good to be ruled by law”,77 and that there is some necessary moral value achieved whenever law exists. This can be seen clearly in the next steps in his argumentative sequence:78

4. Any form of governance that meets the conditions of the rule of law necessarily promotes certain things that we morally value; that is, by actually complying with these conditions the law attains something morally good.

5. It follows that just by having law, we have attained something good; we have attained a form of governance that is good in some moral sense. Therefore, it is good to be governed by law.

As discussed in the previous chapter, Marmor defends point 4 against the instrumental/functional argument,79 and he also defends point 5 against Raz’s negative value argument.80 Marmor’s conclusion is that the minimum conformity to Fuller’s principles that is necessary for a legal system to perform its function of guiding behaviour is what explains why it is good to have law as a form of government: wherever you have law, that system will have a certain minimum moral value due to its conformity to the ideal of the rule of law.

According to the analysis of such arguments provided by Waldron and Simmonds, this amounts to a violation of the positivist Separation thesis, because it shows that there must be some necessary moral value in any legal system.81 This may be seen as a break from the tradition of legal positivism – as a capitulation to Fuller’s anti-positivist challenge – because Marmor denies that the law can exist without achieving something of moral value.

Marmor is aware of all of this, and is unconcerned, for “[t]he truth of legal positivism is simply not at stake here.”82 This is because, in Marmor’s view, legal positivism’s key argument is the Social thesis relating to the content of legal norms: “[t]he main insight of legal positivism is that the conditions of legal validity are determined by social facts.”83 For

77 Marmor “The Ideal of the Rule of Law”, above n 52, at 2.
78 Marmor “The Ideal of the Rule of Law”, above n 52, at 7.
79 Marmor “The Ideal of the Rule of Law”, above n 52, at 8–11.
81 Waldron “Positivism and Legality”, above n 1; Simmonds Law as a Moral Idea, above n 2.
82 Marmor “The Ideal of the Rule of Law”, above n 52, at 41.
83 Marmor “The Ideal of the Rule of Law”, above n 52, at 41.
post-Hartian positivism, these social facts are that legal officials’ social practice of using particular secondary rules determines whether a norm is legally valid in the system.\textsuperscript{84} The Social thesis does battle with the natural law argument, shared by Fuller, Dworkin, and contemporary anti-positivists, that there are necessary moral aspects to determining what norms are valid in any legal system.\textsuperscript{85} The rejection of that argument concerning legal validity is the main thesis that Marmor thinks should be seen as the core of legal positivism.

As Marmor thinks the Social thesis is the defining position in legal positivism, he claims that he is not forced to support a positivist Separation thesis in its strongest form – asserting that there is no important necessary connection between law and morality. The Separation thesis need only be put forward in its more limited form, separating “what the law is, and what the law ought to be” only in the way that the Social thesis requires: the content of valid law is not determined by morality.\textsuperscript{86} Those who say that the Separation thesis should extend to a denial of any necessary good or moral value inherent in the law have, Marmor argues, overstated this thesis.\textsuperscript{87} Thus:\textsuperscript{88}

the Separation Thesis does not entail the falsehood of the assumption that there is something necessarily good in the law. Legal positivism can accept the claim that law is, by its very nature or its essential functions in society, something good that deserves our moral appreciation.

There may be something inherently good or morally valuable about law that is consistent with the claim that the conditions of legal validity in legal systems do not depend on morality. Because the Separation thesis on Marmor’s account is essentially just another way of describing the Social thesis that pertains only to legal validity, it is consistent with claims that the law necessarily has moral value, such as Fuller’s arguments about the internal morality of law.\textsuperscript{89}

Looking at both of Marmor’s arguments on the Relationship question, it is necessary to explain how they go together. Marmor’s first argument rejects Waldron’s embrace of Fuller, by denying that the law is an evaluative-normative concept. But Marmor’s second argument

\begin{itemize}
\item \textsuperscript{84} Marmor “The Ideal of the Rule of Law”, above n 52, at 42.
\item \textsuperscript{85} Marmor “The Ideal of the Rule of Law”, above n 52, at 42.
\item \textsuperscript{86} Marmor “The Ideal of the Rule of Law”, above n 52, at 42.
\item \textsuperscript{87} Marmor “The Ideal of the Rule of Law”, above n 52, at 42.
\item \textsuperscript{88} Marmor “The Ideal of the Rule of Law”, above n 52, at 42–43.
\item \textsuperscript{89} Marmor “The Ideal of the Rule of Law”, above n 52, at 43.
\end{itemize}
admits that the rule of law is a necessary element of law’s existence, and that it gives the law a necessary moral element. The consistency of these arguments is easily explained by using Raz’s conceptual/derivative distinction. The first argument denies that law is a normative-evaluative concept that requires moral or political analysis to understand: it denies the conceptual answer to the Relationship question. But this does not rule out that the law has some necessary moral value, as is asserted by the wide No Necessary Connection Separation thesis. And, as Marmor explains, it is a necessary feature of law that it is able to guide human conduct, and from that function we can derive the further insight that to do so it must conform to Fuller’s principles. This is Marmor’s affirmative answer to the Relationship question. Further, because conformity to those principles is of moral value, there is some necessary moral value in any legal system.

One could regard this explanation in at least two ways. The first is that works – it is a coherent and plausible position in jurisprudence. The second is that it is a weak and forced final attempt to hang on to positivism in the face of the concessions Marmor makes to Fuller’s Challenge. Which view one takes likely depends on one’s general stance on the positivist / anti-positivist debate, because all depends on whether the Social thesis is seen as a stipulation about the nature of law that serves only to maintain some last difference from anti-positivism such as Fuller’s, or as the foundational ground for the legal positivist approach to law.

Positivists, many of whom would support Marmor’s derivative approach and his rejection of the No Necessary Connection version of the Separation thesis, will say that Marmor’s analysis is correct. The nature of law is that it must live up to Fuller’s principles to some degree, and this conformity to Fuller’s principles secures something of moral value, which does not threaten legal positivism because no important legal positivist has subscribed to the No Necessary Connection Separation thesis. We saw in Chapter 4 that this is similar to Raz’s view, and I show below that it is also Gardner’s. Similar points are made in Chapters 7 and 8 in relation to Shapiro and Jules Coleman – two other key legal positivists.

The anti-positivist will be more sceptical of the claim that positivism does not hold the No Necessary Connection Separation thesis, and of the idea that one can make a plausible distinction between the conceptual and derivative approaches to the Relationship question.
Why should we distinguish between the claim that it is part of the nature of law that it lives up the rule of law (the conceptual relationship), and the claim that the nature of law is not determined by reference to the rule of law, but that some level of conformity to Fuller’s principles is necessary if law is to exist as a system of rules (the derivative relationship)? The distinction works best if what is entailed or derived from law’s nature is something different from that which positivists deny is part of the concept of law: it seems odd to say that conformity to the rule of law is not part of the nature or concept of law if it is entailed or derived from the nature of law. But if what is derived from the nature of law is conformity to Fuller’s principles to a level that does not equate to conformity to the rule of law, it is easier to see why the distinction is important and useful. This would be the case if positivists agreed with Raz’s view, set out in Chapter 4, that the necessary conformity to Fuller’s principles derived from the concept of law is not as high as the conformity that we associate with the ideal of the rule of law.

With this in mind, we can see how different Marmor’s position is from Waldron’s. Marmor’s argument is that because law has a particular function, it must meet certain requirements, and then he observes that those requirements are of moral value – the derivative argument. Waldron’s position, however, is that law is an evaluative-normative or political concept defined by the rule of law – the conceptual argument. The debate is between two views of the nature or concept of law; one which sees the idea of law as bound up with the idea of the rule of law (the conceptual approach to the Relationship question), and the other saying that the law is a social institution that need not significantly live up to the rule of law as part of its nature, but which must comply to a certain extent with each of Fuller’s principles if it is to exist as a system of rules.

These are very different reasons for giving an affirmative answer to the Relationship question, and they show that despite the shared affirmative answer, fundamental differences remain between legal positivists who follow Hart and Raz’s lead and Fuller’s anti-positivism. As I will discuss below, the most significant practical difference between these two approaches to the Relationship question is that legal positivists remain convinced that legal validity is determined solely by official practices, whereas anti-positivists believe that the moral ideal of the rule of law contributes to the determination of legal validity. Although
the legal theorist can observe the derivative relationship between law and the principles of the rule of law, this does not make the rule of law a necessary determinant of the content of valid law in any particular legal system. Furthermore, even those positivists who accept the Fullerian view of the connection between the rule of law and the existence of legal systems – Waldron and Gardner – also hold the positivist line on legal validity. Fuller’s Challenge for positivism to see that the rule of law is a necessary part of the identification of legally valid norms is, I will thus show, rejected in favour of holding on to the Social thesis at the level of legal validity.

### 6.4.3 Kramer

The usefulness of Raz’s conceptual/derivative distinction is also illustrated by an analysis of Kramer’s affirmative answer to the Relationship question, for he has also developed the positions of Hart and Raz that conformity to the principles of the rule of law is necessary for the existence of law. From his first major discussion of Fuller’s legal theory, Kramer accepts that positivists should perceive Fuller’s principles of the rule of law as “conceptual or constitutive conditions for the existence of a legal regime.”

This is because, as he later put it,

> [w]hen the defining enterprise of law (the enterprise of subjecting human conduct to the governance of rules) is seen as involving the direct presentation of legal demands and prescriptions to citizens for their compliance, Fuller’s eight principles are related to that enterprise not only instrumentally but also integrally. Though various departures from each precept may not in themselves mark the demise of a legal system (even if they detract from the efficacy of its functioning as a regime of operative rules), a thorough-going failure to satisfy one or more of the precepts will result not in an inefficient legal system but in the outright absence of such a system. If a mode of governance is based on general rules not at all or hardly at all, for example, then it is not governance by law. Much the same can be said in connection with the rest of Fuller’s principles.

Kramer therefore regards conformity to Fuller’s principles as “conceptually derivable preconditions” for the existence of law. Put differently, Kramer accepts that Fuller’s principles are “integrally” related to law because a “thorough-going failure” in conformity to them “mark[s] the demise of a legal system”. Therefore he answers the Relationship

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91 Kramer In Defense of Legal Positivism, above n 90, at 51.
92 Kramer In Defense of Legal Positivism, above n 90, at 53.
question in the affirmative: one cannot have law without some threshold of conformity to Fuller’s principles.

Kramer’s view that the level of conformity to the rule of law principles required for law to exist is minimal is confirmed in his later analysis in his book *Objectivity and the Rule of Law*. However, in this new analysis, Kramer has a more complex argument, because he distinguishes between the satisfaction of the principles of the rule of law necessary for the existence of a legal system, and that which is necessary for the fulfilment of a liberal political ideal. On one hand, the rule of law is “the set of conditions that obtain whenever any legal system exists and operates … as a general juristic phenomenon, it amounts to nothing less than the fundamental conditions that have to be satisfied for the existence of any legal system”. However, in this guise the rule of law principles are morally neutral. On the other hand, when the rule of law exists in liberal-democratic societies, it is “a morally cherishable expression of commitments to the dignity and equality of individuals.”

The difference between the levels of compliance required by Kramer’s two views of the rule of law can be further explained by considering the following passage:

Each principle articulates a condition that must be substantially satisfied within a legal system, rather than a condition that must be invariably or comprehensively satisfied. In no legal system is each of the eight principles ever perfectly fulfilled. Perfect compliance with each of them is a will-o’-the-wisp and is in any event unnecessary for the existence of a legal system. Although conformity with the precepts of legality is essential for the existence of any such regime, the conformity only needs to meet or exceed a threshold level; that threshold level for each of the precepts is quite high, but it falls some way short of perfection. … [T]he existence of a legal system presupposes that the satisfaction of each Fullerian principle of legality is not below some threshold level, but it only contingently involves the satisfaction of any of the Fullerian principles above that level. Every vibrant legal system will conform to those principles well above the threshold point for each of them, but the heightened degree of conformity is a matter of the system’s vibrancy rather than of its very existence as a regime of law. [Emphasis added].

In short, for a legal system to exist there must be conformity to each of Fuller’s principles above some threshold level. That threshold is defined by the way in which the particular principle contributes to the existence of “the minimally effective guidance of human

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94 Kramer *Objectivity and the Rule of Law*, above n 48, at 102.
95 Kramer *Objectivity and the Rule of Law*, above n 48, at 102.
96 Kramer *Objectivity and the Rule of Law*, above n 48, at 105.
conduct”, which is what Kramer thinks is required for law to exist, just because the law’s function is to guide conduct. Kramer’s analysis then goes on to examine in detail the particular level of conformity to each principle that is needed. He notes that the minimum level of compliance is “quite high”.

In order to see how close Kramer’s analysis is to Marmor’s, we must observe that despite Kramer’s agreement with Fuller that there must be some threshold level of conformity to Fuller’s principles if a legal system is to exist, Kramer holds this view for very different reasons than Fuller – and for the very same reasons as Marmor. Kramer sees Fuller as arguing that law is a social institution that by its nature lives up to a moral ideal of the rule of law (the conceptual argument). Kramer does not agree with Fuller’s claim that systems of governance that should be considered law must live up to this moral ideal. He rejects natural law theories as holding “unduly moralized conception[s] of law”, and contrasts this with his view that “[i]f any regime governs in accordance with rule-of-law requirements to a significant extent, then [it is] a central case of legal institutions.” Yet he accepts that law must live up to Fuller’s principles to a significant extent, if the law is to be a system of rules at all; therefore “[p]ositivist denials of necessary connections between law and morality are perfectly consistent with the view that the central function of law is to subject human conduct to the governance of rules”. Like Marmor, Kramer derives the principles of the rule of law as requirements for the existence of a system of rules that is able to guide human conduct – the derivative approach.

But because of Kramer’s embrace of the wider No Necessary Connection version of the Separation thesis, he argues that this necessary conformity to the rule of law does not guarantee any moral value in the law. His reasons were discussed in Chapter 5. His conclusion is that although this function or purpose of law means that the rule of law must be substantially conformed to for a legal system to exist, such conformity is not necessarily morally valuable. Kramer therefore accepts that one can derive certain

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97 Kramer Objectivity and the Rule of Law, above n 48, at 132.
98 Kramer Objectivity and the Rule of Law, above n 48, at 124.
99 Kramer In Defense of Legal Positivism, above n 90, at 239.
100 Kramer In Defense of Legal Positivism, above n 90, at 49.
101 Kramer In Defense of Legal Positivism, above n 90, at 51.
102 Kramer In Defense of Legal Positivism, above n 90, at 53–71. See above Chapter 5 at section 5.3.
necessary conditions for the existence of law from reflection on law’s purpose of guiding conduct, but argues, against Marmor and Hart, that this necessary connection between law and the rule of law does not mean that there is any necessary moral value in a legal system.

### 6.4.4 Conclusion

This section has argued that although Marmor and Kramer share, in essence, the same position on the Relationship question as Waldron – one cannot have law without Fuller’s principles being conformed to – their answer is in fact very different to Waldron’s. In Raz’s terms introduced above, they dispute Fuller’s conceptual claim that law is a moral ideal or that the nature of law must be understood by reference to Fuller’s principles, but they agree for derivative reasons that a certain level of conformity to Fuller’s principles is necessary if the social institution that is law can be said to be in existence. Their analysis is complicated by their focus on responding to Fuller’s claim that law is a moral ideal, a view that they reject outright; this comes at the detriment to their explanation of the difference between their derivative approach and the conceptual view that significant conformity to Fuller’s principles – not understood as a moral ideal – is part of the nature of law.

Yet despite these problems, this position is also that which I argued is held by Hart and Raz. If my interpretation of these four positivists is correct, it seems justified to regard the general analysis described above as the orthodox legal positivist position on the Relationship question. Waldron’s embrace of Fuller’s ‘law as a moral ideal’ argument would then be seen as an outlier, and – depending on what one thinks about the relationship between legal positivism and the No Necessary Connection Separation thesis – perhaps not even a legal positivist position at all, given that it asserts that the law is necessarily moral in some way. Yet it may be that Waldron is not a lonely outlier, for John Gardner has developed his own self-consciously legal positivist theory in a way that allows him to also embrace the Fullerian claim that the rule of law understood as a moral ideal is necessarily related to the existence of law. However, as I will argue in the next section, Gardner’s position does not offer clear-cut support for Waldron or for Marmor and Kramer, because he seems to embrace both the derivative and conceptual positions on the Relationship question.

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103 See above Chapter 3 at section 3.5 and Chapter 4 at section 4.3.
6.5 Gardner’s core and limit views of law and legality

John Gardner’s position on the Relationship question has two main parts. The first is the claim that the existence of the law does not depend on its conformity to the ideal of the rule of law. The second is the claim that the rule of law is the specific moral value of the law, such that we can say that law that violates the rule of law is ‘illegal’, even if it is still law. These two positions may seem contradictory; I will discuss below why Gardner thinks they are true and how he thinks they interrelate.

6.5.1 Legal validity as independent from the rule of law

The first point is that Gardner’s embrace of the legal positivist perspective means that, like Marmor and Kramer, he thinks that the existence of a legally valid norm of a legal system depends only on the fact that certain agents (legal officials) “announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it”. Gardner thinks that it is not true to say that norms cannot be law unless they pass a moral test, such as conformity to the moral ideal of legality. The existence and content of legal norms are determined by their source in the social practices of rule creation and recognition that exist in a particular legal system. We do not identify the law by considering the merits of a norm. Gardner argues that the problem with what I call the conceptual approach – the approach of Fuller, Waldron, and the anti-positivists mentioned above – is that the ideal of legality is not an existence condition of law, but a key way of evaluating things that we have already identified as law. Gardner argues that the ideal of the rule of law applies to law because it is law. It is not that it is law because it lives up to the ideal. If it were not law, to put it another way, it would not be held up to the ideal of legality in the first place and so could not be found wanting relative to that ideal. … So it cannot be the case that if it is found wanting relative to that ideal, it is not law.

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Gardner thus objects to the view that if law does not live up to the ideal of the rule of law, it is not law at all. There are laws that are contrary to the rule of law, but they are no less law in the positivist sense for that reason.\textsuperscript{108}

[A] legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law, is no less valid qua legal, than one that is prospective, admirably certain, and perfectly general.

In terms of Raz’s distinction, Gardner’s point here is that he thinks the conceptual approach to the relationship between law and the rule of law is unsound at the level of the identification of the validity of legal norms – and this despite his embrace of the conceptual approach for the other sense of legality. This seems to cause tensions in Gardner’s legal theory, as discussed below.

There is also some indication that Gardner would agree with the derivative approach to showing a relationship between law and the rule of law principles, because he does agree that legal positivists must accept some necessary conformity to Fuller’s principles; for example, Hart’s view that legal rules must have a “built-in element of generality”.\textsuperscript{109} But Gardner makes it clear that the conformity to Fuller’s principles necessary for rules to exist is less than is necessary to fulfill our ideal of the rule of law:\textsuperscript{110}

the minimal generality required to achieve “rulishness” clearly falls well short of the measure of generality expected by any credible version of the rule-of-law ideal. One cannot congratulate oneself on having conformed to the generality clause of the rule of law merely by virtue of the fact that the norm one made was a rule.

Legally valid norms can minimally conform to Fuller’s principles at the same time as they fall short of the required standard necessary for living up to the ideal of the rule of law.

Gardner here seems to follow Raz’s similar claim that the extent to which conformity to Fuller’s principles is “essential to law is minimal and is consistent with gross violations of the rule of law”.\textsuperscript{111} Some minimal conformity to Fuller’s principles is necessary if rules are to exist, but the level of conformity necessary for rules to exist is far lower than what is

\textsuperscript{108} Gardner “‘Legal Positivism”, above n 104, at 209.
\textsuperscript{109} Gardner “‘Legal Positivism”, above n 104, at 209.
\textsuperscript{110} Gardner “‘Legal Positivism”, above n 104, at 209, fn 24.
\textsuperscript{111} Raz The Authority of Law, above n 60, at 224.
necessary if the ideal of the rule of law is to be satisfied.\textsuperscript{112} This is the derivative approach, as seen also in the positions of Kramer and Marmor.

6.5.2 \textit{The rule of law as a second sense of ‘legality’}

Yet Gardner makes a further argument that claims that understanding the rule of law is an essential part of properly understanding law. The argument is that one does not understand law properly if one does not see that it ought to conform to the ideal of the rule of law: the rule of law is a special ideal for the law – a specifically legal ideal. This means that we can think of the rule of law as providing another way of talking about law’s legality:\textsuperscript{113}

Law, then, is always legal in one sense (it always forms part of some legal system) but it can be more or less legal in another sense. It is not an oxymoron, therefore, to speak of illegal law. Its being law is determined without moral argument, just by looking to the agent by whom and the way in which it was made. Its being illegal in the relevant sense is, however, a moral judgment that one can make about it once one accepts that it is law.

Gardner thus distinguishes two senses of our concept of legality. The first is legality in terms of his positivist view of legal validity, and this is not determined by the rule of law principles – whereas the second sense is legality in terms of Fuller’s principles.

Gardner emphasizes that the identification of a second sense of legality refers to a set of moral norms that:\textsuperscript{114}

laws and legal systems should conform to only because they are laws and legal systems, norms which add up to [and] constitute a distinctive ideal of legality, also known as the rule of law. They are norms requiring that laws be made clear, prospective, open, general, etc. These norms do not take any priority over the many other non-specialised moral norms by which laws and legal systems may be judged. … Nevertheless laws and legal systems should live up to this ideal of legality \textit{inter alia}, in a way that other arrangements need not.

Legal norms and legal systems that fail to conform to these moral principles are ‘illegal’ in Fuller’s sense, but that does not affect their validity within the particular legal system in the aforementioned sense of legality.

Gardner’s idea is, therefore, that there are two senses of ‘legal’, one which refers to a norm or normative order being legal in the positivist sense, and the other referring to a particular

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} See above Chapter 4 at section 4.3.
\item \textsuperscript{113} Gardner “Law and Morality”, above n 105.
\end{itemize}
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set of specifically legal virtues to which the law ought to conform, which were clearly identified by Fuller. Gardner claims that Hart himself inaugurated this distinction in *The Concept of Law*, where Hart pointed out that many European languages had two terms that made clear this distinction between the ‘genre of law’ in a positivist sense (‘lex’; ‘Gesetz’; ‘loi’) and the narrower genre that conformed to the moral ideal for law (‘ius’; ‘Recht’; ‘droit’). Whether or not these non-English words do mark the exact distinction that Gardner is arguing for, he claims that they show that a distinction does exist between law (in his own legal positivist sense) and *legal* law (in the sense of conforming to Fuller’s ideal of the rule of law). And in the move that arguably further distances Gardner from Hart and Raz, he says that we should “perhaps” not say that this idea of *legal* law is a different concept of law at all.

Perhaps it is better to say that there are specialised moral norms that are partly constitutive of law as a genre. Anyone who hasn’t picked up that legal norms ought to be open, prospective, clear etc. hasn’t fully understood the genre.

In a later discussion, Gardner has doubts about whether Hart would agree with this analysis. But Gardner makes it clear that this is his view – that there is “a conceptual connection between law and the ideal of legality”.

there is just one concept of law, but with central cases (ius) as well as limit cases (lex that is not ius). And it seems to me, but apparently not to Hart, that one doesn’t fully grasp lex at the limit unless one understands that it ought, by its nature as lex, to be ius. In other words a full mastery of the concept of law requires an understanding of law complete with its built-in aspiration of legality.[]

It is important to see that Gardner’s acceptance that the ideal of the rule of law is part of our concept of law is not an acceptance that this ideal determines the content of the law. In terms of Raz’s distinction, Gardner is not embracing the conceptual approach in terms of legal validity. As a legal positivist, Gardner’s main allegiance is to the Hartian and Razian idea that the rules determining valid legal norms in a particular legal system are determined by the practices of legal officials. He denies, therefore, that legal validity is based on conformity to a moral ideal of legality.

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This point is important in the context of this study, because it illustrates the move that most positivists seem to have made: the detachment or insulation of their concessions to Fuller’s Challenge at the level of the existence of legal systems from their account of what determines the content of law, the criteria of legal validity. Gardner remains a legal positivist in his own terms because he thinks that the most important thesis of legal positivism concerns legal validity – and claims that whether a given norm is legally valid in a particular legal system depends on the norm’s sources, not its moral merits. In other words, this is one of the foundational conceptual claims Gardner thinks positivists make about the nature of law. On this basis, we must first determine what norms are valid in a legal system without reference to the moral ideal of the rule of law, and only then should we consider whether those norms conform to that moral ideal. That is why Gardner says in the key passage quoted above that the property of being law in terms of being legally valid within a legal system is determined by looking at the source of the norm – who made it and how – whereas judging its illegality in the rule of law sense is a moral judgment about something that is accepted as law in the positivist sense.

However, he also thinks that one does not understand the idea of law if one does not see that it is supposed to conform to the rule of law. In other words, even though it is not a necessary part of the existence of law that it conforms to the rule of law, one cannot properly understand law without knowing that it is supposed to do so. Gardner says that the existence of the rule of law as an ideal “makes fully intelligible the superficially oxymoronic proposition that some laws are illegal”. This is because some norms that are legally valid according to his legal positivist conception of law – and which are thus “artefacts of the genre law” – may nevertheless fail in their conformity to the moral ideal of legality that we call the rule of law, which the law should by its nature live up to. Again, this shows that the determination of what is valid law runs along traditional legal positivist lines, even

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119 Gardner “Legal Positivism”, above n 104, at 199.
120 Gardner “Law and Morality”, above n 105, at 10.
121 Gardner “Law and Morality”, above n 105, at 10.
though Gardner then goes on to say that we must also see whether the valid law is ‘illegal’ from the perspective of the rule of law: 124

It is not an oxymoron, therefore, to speak of illegal law. Its being law is determined without moral argument, just by looking to the agent by whom and the way in which it was made. Its being illegal in the relevant sense is, however, a moral judgment that one can make about it once one accepts that it is law.

What are the implications of seeing the principles of legality as a distinctive moral ideal for the law? Gardner approaches this question from two angles. If those who are charged with making law for a community violate the principles of the rule of law, it reflects badly on them because “the various functions that legal norms exist to serve … are by and large better-served to the extent that those whose actions the legal norms regulate are able to resort to those legal norms for guidance in advance.” 125 This is the same point made by Hart and Raz in terms of the instrumental virtue of the rule of law: its principles allow it to be more effective in achieving whatever aim the law is being used to achieve, because people will be able to know the demands of the law and guide their conduct by these demands. 126 But more importantly from the moral perspective, Gardner observes that violation of the rule of law is a “morally bad reflection” on the law because the law has important implications for people’s lives that people cannot have control over if they cannot guide their conduct by legal norms. 127 Again, this is the point that Hart and Raz made in terms of the moral value of conformity to the principles of the rule of law.

So Gardner has followed both Hart and Raz’s arguments concerning the instrumental virtue and the moral value of the rule of law. However, he says something different about the relationship between the very concept of law and the ideal of the rule of law – thereby making a complete concession to Fuller’s Challenge at the level of the existence of legal systems. Further, as noted above, he insulates or detaches this from his account of legal validity, holding tight to the positivist Social thesis at that level. The question is why Gardner makes these different arguments, and whether they are coherent. I will analyse these questions further in Chapter 8, but here I will briefly address them in the following section.

126 Joseph Raz The Authority of Law (2 ed, Oxford University Press, Oxford, 2009) at 224-226; see also the discussion above Chapter 4 at section 4.2.2
6.6 Mapping the positions on the Relationship question

What is most significant about the above discussion is that the recent positivist analyses of the rule of law each accept that there is some important relationship between law and the rule of law, such that if there is a complete failure to live up to a condition of the rule of law, law will not exist. If Fuller’s Challenge was aimed at getting legal positivists to concede that one cannot have law without conformity to his principles, he has now clearly been proved successful.

Yet in another sense there are still some question marks. We have gone from a set of ambiguous and seemingly equivocal claims in the work of Hart and Raz to a set of equally equivocal claims in recent legal positivism – albeit now the equivocation is mainly due to the splintering of the positivist position. Waldron agrees with Fuller and the other anti-positivists that law is a political concept that must be understood according to some normative conception of the rule of law. Marmor and Kramer develop the line of argument that seemed to be introduced by Raz, which says that conformity to Fuller’s principles is necessary for the existence of rules or norms that can guide human conduct, and these are the foundation of any legal system. Gardner provides something of a halfway house between these positions, saying that although it is not the case that a norm or normative system that fails to live up to the rule of law is not law, it is clear that law ought to conform to Fuller’s principles.

So despite the agreement that there is some kind of important relationship between law and the rule of law, it is important to see how different Waldron and Gardner’s understanding of that relationship is from Marmor and Kramer’s. The most important insight to note is that for Kramer and Marmor the relationship is only that there must be some minimal conformity to Fuller’s principles if legal rules that are capable of guiding human conduct are to exist, which is necessary for there to be a legal system at all.128 Kramer and Marmor therefore do not agree with Fuller, Waldron, and the anti-positivists that the law is a moral ideal defined by the ideal of the rule of law. If there is a complete violation of one of Fuller’s principles,

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128 Marmor “The Ideal of the Rule of Law”, above n 5; Kramer In Defense of Legal Positivism, above n 90; Raz The Authority of Law, above n 60, at 223–224.
there can be no law at all because there will be no rules, and the Hartian legal positivist conception of law is that it is a union of certain kinds of rules.¹²⁹

In contrast, Waldron and Gardner join the anti-positivists in saying that the concept of law includes reference to the moral ideal of the rule of law. Gardner claims that “a full mastery of the concept of law requires an understanding of law complete with its built-in aspiration of legality”,¹³⁰ and Waldron identifies Fuller’s principles as “elementary requirements for a system of rule to qualify as a legal system.”¹³¹ Positivism has therefore splintered not only along the lines suggested in Hart and Raz’s earlier analyses, but also from another perspective some positivists have broken away from the positivist tradition through their acceptance of Fuller’s claim that law has an intrinsic aspiration to the ideal of the rule of law. This is a significant concession to Fuller’s Challenge.

The ambiguity of the legal positivist response to Fuller has been decreased by the splintering of recent positivism into relatively clear alternative positions, but this has led to a different ambiguity in the form of equivocality of the positivist approach: the approach of Hart and Raz has been replaced by a cacophony of views. Further, there are still silences and ambiguities concerning the theoretical reasons that motivate each positivist to take their particular position. I will argue in the following chapter that despite his reflection on these theoretical issues, Shapiro is also ambiguous about what drives his positivist response to Fuller’s Challenge, and what his position on Fuller actually is. I will discuss these issues further when I consider the self-understanding of legal positivism in Chapter 8. But in the following sections, I consider these underlying theoretical reasons that motivate recent positivists’ responses and concessions to Fuller’s Challenge.

### 6.6.1 Concerns about the Separation thesis?

Remember that Waldron is sceptical about mainstream legal positivism’s ability to accommodate Fuller’s insights about the moral value of the rule of law, and its necessary relationship with law, within the Hartian positivist tradition. In this and the previous chapter we have seen that no legal positivist who has devoted significant effort to the question today

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argues that there is no relationship between law and the rule of law, and that only Kramer
argues that conformity to the principles of the rule of law is not intrinsically of moral value.
In Waldron’s discussion of Hart, he argues that if conformity to the rule of law is morally
valuable and that such conformity is necessary if a legal system is to exist, it follows as a
matter of logic that there is something of moral value in every legal system: “the
combination of these two positions … looks likely to cause problems for the distinctive
positivist thesis of the separability of law and morality, because it implies that one of the
criteria for calling something a legal system has genuine moral significance”.132 Waldron
thus thinks that a central tenet of legal positivism is a wide Separability, or Separation, thesis
that says there are no important necessary connections between law and morality.

However, of the other three recent legal positivists discussed in these two chapters, only
Kramer holds that No Necessary Connection is a defining thesis of the legal positivist
tradition.133 Raz did not make a wide Separation thesis central to his arguments,134 and it has
been plausibly claimed that Hart also did not support that wider view – an analysis that
requires close analysis and interpretation of Hart’s texts.135 Marmor expressly rejects the
wide No Necessary Connection version of the Separation thesis, because he thinks that legal
positivism’s key thesis is the Social thesis: the criteria of legal validity within a legal system
are determined by social facts about what criteria are used by officials.136 Waldron sees law
as a moral ideal, and does not care what that means for the Separability thesis. Whether the
wide Separability thesis is a central tenet of the positivist tradition, as Kramer claims, is
therefore subject to debate, and depends on whether one sees contemporary positivism as
stemming from Hart or from earlier theorists.137

John Gardner has similarly denied that the claim there is no necessary connection between
law and morality is a characteristic legal positivist thesis. In his important paper ‘Legal
Positivism: 5 ½ Myths’, he treats legal positivism as committed to one key proposition (LP):

132 Ibid at 1159.
134 Raz Practical Reason and Norms, above n 53, at 166; Raz The Authority of Law, above n 60, at 38–39 and
103–104.
of Law and Morality”, above n 136.
136 See above Chapter 5 at section 5.2.2 and Chapter 6 at 6.6.1
137 See the discussion of this question in Dyzenhaus Hard Cases in Wicked Legal Systems, above n 8, at
Chapter 8.
“In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits”.  

As I will explain further in Chapter 8, this is a version of the positivist Social thesis – the law is a matter of social fact – applied to the question of legal content. Gardner argues that this is the one claim that all of the thinkers commonly understood as part of the legal positivist position subscribe to, and that the No Necessary Connection thesis is false and is rejected by a number of legal positivists, because there are a number of necessary connections between law and morality that positivist theorists have identified in the course of their inquiries into the nature of law.

If Gardner is correct, no significant implications follow from recent legal positivists choosing to abandon the No Necessary Connection version of the Separation thesis. Legal positivists are united by the thesis that what is legally valid in a system is determined by social facts about what officials of the system recognize as valid. In addition to providing a distinctive unifying position that distinguishes positivism from anti-positivism, the thesis concerning the social basis of legal validity has important practical implications, as I will now discuss.

6.6.2 Agreement that LP rules out legal obligation to rule of law

At least for Gardner, Marmor, and Kramer, the derivative relationship they identify between law and the rule of law does not entail that conformity to the rule of law is part of determining the valid norms of the legal system. The content of legally valid norms depends solely on the rules that are used by officials in that particular legal system to determine

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138 Gardner “Legal Positivism”, above n 104, at 199.

139 Gardner “Legal Positivism”, above n 104, at 223. Remember that Gardner also thinks there is a sense in which law must live up to the rule of law: see above at section 6.5.2.

140 Gardner “Legal Positivism”, above n 104, at 222-223.

which norms are valid, rather than being necessarily determined by a moral ideal of the rule of law. We see this in the following statements from each of these theorists:\(^{142}\)

In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits. … [I]n any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it. [Gardner]

In every society there are certain social rules that determine what the law is, how it is to be identified, created and modified, and those social rules basically determine what the law in that society is. … [W]hat the law is basically depends on the social rules that prevail in the relevant society. [Marmor]

[Positivists submit that the endeavors of officials in ascertaining the existence and contents of legal norms are not necessarily guided by any moral assumptions. [Kramer]

Legal positivism has as one of its defining theses the idea that the content of the law is determined by certain social facts about how the officials of the system identify norms as legally valid. Waldron’s discussion of the Relationship question does not make it clear whether he thinks that the necessary connection between law and the rule of law means that legal validity is determined by reference to the rule of law. His focus is mainly on the question of whether we judge institutionalized normative systems as legal systems, by evaluating whether as systems they live up to the ideal of the rule of law; his analysis seeks to show whether and how the failure to conform to the requirements of the rule of law “would decisively disqualify a system of rule from being regarded as a legal system”.\(^{143}\)

However, it is arguable that Waldron agrees with the other recent positivists that the rule of law is not a necessary element of determining the content of valid law, because his normative positivism depends on the assumption that the validity of legal norms is not necessarily determined by moral argumentation.\(^{144}\)

There are differences within legal positivism on how to further understand this point. Marmor and Gardner are exclusive legal positivists, meaning that they claim that conformity to a moral ideal such as the rule of law could never affect the legal validity of a norm – it could only allow officials to apply extra-legal norms.\(^{145}\) Kramer is an inclusive legal

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\(^{143}\) Waldron “The Concept and the Rule of Law”, above n 27, at 19.

\(^{144}\) See below Chapter 8 at section 8.4.1.

\(^{145}\) Gardner “Legal Positivism”, above n 104, at 201; Marmor Philosophy of Law, above n 6, at 92-97.
positivist, which means that he thinks that it is possible that “consistency with a moral principle can be a necessary condition for the status of a norm as a legal norm”. In either case, moral reasoning is not a necessary part of determining the content of legal norms. This is another way in which the positivist Social thesis can be maintained: at the level of legal validity or the determination of the content of legal norms, morality is not (or not necessarily) an aspect of the law. In Chapter 8 I will discuss why legal positivists think they can take this further divide and rule strategy, by detaching or insulating their general account of the nature of law at the ‘system’ level from their accounts of legal validity at the ‘validity’ level. I will argue there that Waldron and Gardner’s accounts of law and the rule of law contain the greatest tensions in this respect, due to their acceptance of Fuller’s Challenge at the system level.

6.6.3 Normative Inertness

All the Hartian positivists discussed in this chapter bar Waldron hold the Normative Inertness thesis, either explicitly or implicitly. This means that they say that the content of valid law is normatively inert: the simple fact that a valid legal norm applies to a dispute does not morally warrant any particular action by judges or anyone else, though by definition it does legally warrant this. This is because:

[p]ositivism is first and foremost a theory purporting to reveal our conceptual and theoretical commitments with respect to the social practice we call ‘law’. Despite the claims of its sharpest critics, positivism is not a theory about how judges should decide cases … any more than it is a theory about our moral obligations under law.

Gardner seems to have coined the term ‘normative inertness’ as applied to legal theory. His view is that the validity Social thesis that unites legal positivists – that legal validity is not necessarily determined by morality – is in itself “normatively inert”: “[i]t does not provide any guidance at all on what anyone should do about anything on any occasion.” Legal norms are not necessarily morally obligatory in any way:

146 Kramer Where Law and Morality Meet, above n 142, at 17.
that a norm is legally valid is not incompatible with holding that it is entirely worthless and should be universally attacked, shunned, ignored, or derided. There are substantive moral debates to be had – independently of the normative inert [validity Social thesis] – about the attitude one should have to legally valid norms.

Marmor has also expressed the claim that legal positivism does not contain doctrines about what judges ought to do.\(^{150}\)

Legal positivism is not a theory about the moral duty of judges. Whether judges have a moral duty to apply the law in any given case is a moral question that can only be answered on moral grounds. Furthermore, no legal positivist of whom I am aware has ever suggested that judges need to set aside morality in their official judicial roles.

Normative inertness thus extends to the question of how judges should adjudicate.\(^{151}\) It is widely thought that judges are under a role-based moral obligation to decide cases only according to legal norms.\(^{152}\) But recent positivists all agree that because of the existence of “gaps” where the law is indeterminate, judges will sometimes have to decide cases according to the merits of the case before them, not just according to the law.\(^{153}\) Furthermore, it is not even the case that legal positivists are committed to the view that judges morally ought, if possible, to decide cases only according to source-based legal norms; positivism “leaves completely open the vexed questions of whether and when judges should only apply legal norms”.\(^{154}\) As Marmor argues, even though legal positivists say that in hard cases where the law is indeterminate and judges have to decide cases according to their moral judgment, it does not follow that:\(^{155}\)

> when the law is clear, judges have a moral duty to apply it. They may trivially have a legal duty, but the question of whether there is a moral duty to follow a legal obligation is always open, even for judges, and should normally be determined on moral grounds.

Similarly, Kramer affirms that “the mere status of norms as laws does not confer any moral legitimacy, even prima facie moral legitimacy, on officials’ enforcement of the norms”.\(^{156}\) Gardner too thinks it is “a mistaken assumption that judges, while they remain judges, owe all their loyalty to law”.\(^{157}\) In fact, he argues that the main puzzle about law is how judges

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\(^{150}\) Marmor *Philosophy of Law*, above n 6, at 114.

\(^{151}\) Gardner “Legal Positivism”, above n 104, at 211.

\(^{152}\) Gardner “Legal Positivism”, above n 104, at 211.

\(^{153}\) Gardner “Legal Positivism”, above n 104, at 212.

\(^{154}\) Gardner “Legal Positivism”, above n 104, at 213.

\(^{155}\) Marmor *Philosophy of Law*, above n 6, at 115.

\(^{156}\) Kramer, *In Defense of Legal Positivism*, above n 90, at 23. See also 21.

\(^{157}\) John Gardner “Law and Morality” available at [http://users.ox.ac.uk/~lawf0081/pdfs/lawmoralityedited.pdf](http://users.ox.ac.uk/~lawf0081/pdfs/lawmoralityedited.pdf), at 8.
can be “morally permitted or required to apply legal norms.” Judges and other legal practitioners are bound to act morally in doing their work, because morality always applies to their actions. But this just highlights a moral problem of why they should defer to legal norms. And this moral problem cannot be resolved just by reference to the legal positivist conception of law, because it does not contain any ideal of legality or the rule of law that would explain why we have a moral obligation of fidelity to law; this is the critique offered by Fuller (although Fuller identified a latent ideal of legality and view of fidelity to law).

### 6.6.4 The Motivation for and Coherence of Recent Positivism’s Responses

The above three parts of this section have laid out the differences that recent legal positivists still maintain as compared with Fullerian anti-positivist accounts of the rule of law – after they have accepted that conformity to the rule of law is a necessary condition for law to exist, and that conformity to Fuller’s principles is of moral value. Kramer and Marmor take the derivative approach to the Relationship question, whereas Waldron and Gardner take the conceptual approach. While they all – bar Kramer – take essentially affirmative positions on Fuller’s two key claims about the rule of law, they do so for reasons differing from both Fuller and each other. Given the diversity of positions, the question is whether recent positivists simply increase the ambiguity of the positivists’ response to Fuller’s Challenge by introducing distinctions that are meant to salvage some core positivist thesis, or have their arguments productively moved the debate further along?

Put differently, in terms of the main thesis of this study, recent legal positivists have either made clear the lines of argument from Hart and Raz that suggested concessions to Fuller’s Challenge on both the Moral Value and Relationship questions (Kramer and Marmor), or have made more significant concessions to Fuller’s Challenge by accepting that it is part of the concept or nature of law that it lives up to the rule of law (Waldron and Gardner). The question is what positivism still offers as a tradition or position in legal philosophy after it has accepted Fuller in this way. One answer discussed above is that positivists take the derivative approach to the Relationship question, rather than the conceptual approach. This may look like a distinction that makes little difference; however, the positivist use of the

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158 Gardner “The Legality of Law”, above n 114, at 177.
159 Gardner “The Legality of Law”, above n 114, at 177.
160 See above at Section 6.4.1.
derivative approach is connected with the point about legal validity above. The derivative fact that law must live up to Fuller’s principles does not make those principles definitive of what law is. Instead, necessary conformity with these principles is derivative of what law is. Whereas if one accepts Fuller’s view that law is conceptually defined in terms of conformity with the rule of law principles, it seems more obvious that identifying the content of legally valid norms depends in part on reference to the rule of law. This is still the most significant difference between the legal positivist position and the Fullerian anti-positivist position in contemporary legal philosophy.

Thus, while it seems that positivists like Gardner and Waldron have fully capitulated to Fuller, this can be challenge by reference to the two points above that have replaced the No Necessary Connection Separability thesis as the core of the positivist tradition: the validity Social thesis and the Normative Inertness thesis. But the question is how Gardner and Waldron can hold these two theses and at the same time accept Fuller’s account of the nature of law as including reference to the idea of the rule of law. I will provide a further explanation of this question in Chapter 8, by reference to the recent work of Jules Coleman.

But here I will initially state the problem that seems to arise for legal positivism. Positivists all make concessions to Fuller’s Challenge from the rule of law. In doing so, they accept – bar Kramer, and arguably Hart – that the necessary relationship between rule of law and law means that there is a necessary connection between law and morality. In doing so, positivists split between the conceptual and derivative answer to the Relationship question. Yet they all agree that this connection between law and the rule of law does not mean that there is any necessary connection between the content of law – legal validity – and the principles of the rule of law. So the positivist concession to Fuller operates only at the level of the existence conditions of legal systems – rules must comply with Fuller’s principles to be rules, and therefore to be law – rather than being a concession that the rule of law is a necessary determinant of the content of valid legal norms within any particular legal system.

Put differently, recent positivists all do something similar to Gardner’s splitting the idea of ‘legality’ qua conformity to the rule of law from having any necessary effect on what determines the ‘legality’ of norms as valid within a legal system. As I will discuss in Chapter 8, this seems to be motivated by a desire to maintain the positivist Social thesis at
the level of legal validity, after it has been abandoned at least to some extent at the level of legal systems as a whole, due to the acceptance by recent positivists of the necessary connection between law and the rule of law. The Social thesis is now accepted as the core claim of legal positivism, but it breaks down into two main claims: it is the nature of law that it is a social institution of rules of a particular kind (the systemic Social thesis), and that the content of those rules is ultimately determined by social facts (the validity/legal content Social thesis).

Fuller’s Challenge has forced concessions on the first claim, whereby positivists accept that the social institution of law must conform to the rule of law in some way. Either they take the derivative approach, or agree with Fuller that law is a social institution that substantially conforms to the rule of law. But they insulate these concessions from their validity Social thesis: they do not admit that determining the content of legal norms necessarily includes reference to the rule of law. Positivists thus cling tightly to the validity Social thesis—it is the key remaining thesis that distinguishes positivism from anti-positivism. The question that the above analysis raises is what their justification is for holding on to the validity Social thesis as their foundational claim. That claim is exactly what Fuller and Fullerian anti-positivists seek to dislodge with their observations of the centrality of the rule of law not only to the existence of legal systems, but as a determinant of the validity of norms within those systems. The cogency of the positivists’ positions hinges on what justifies the validity Social thesis. I will return to this question in Chapter 8, where I discuss in more detail the self-understanding of legal positivism in light of Fuller’s Challenge.

6.7 Conclusion

This chapter and the previous one have mapped out and discussed the theories of the rule of law provided by the four recent legal positivists who have analyzed that ideal in the greatest depth. While the previous chapter demonstrated a majority position that accepts that conformity to Fuller’s principles is generally of moral value, the present chapter showed that there is more diversity on the Relationship question, with three main views identified. Looking more closely, we can see that Gardner maintains a hybrid position between Waldron’s embrace of Fuller’s account of the law as a moral ideal, and Marmor and
Kramer’s insistence that law is a particular kind of social institution that need not fully instantiate our ideal of the rule of law. Gardner integrates these two perspectives, but in a way that shows that there may be two Relationship questions. However, even on Gardner’s explanation, the treatment of law as answering to a moral ideal does not lead to a position that the rule of law is an element of determining legal validity. On that important question, Gardner joins Kramer and Marmor against Fuller and contemporary anti-positivists. Furthermore, it is not clear that Waldron holds a contrary position, for his arguments seem to be directed more towards the view that only certain forms of social order should be regarded as legal, rather than as claiming that legal validity is somehow determined by reference to the rule of law.

Therefore, although legal positivists uniformly accept that law cannot exist if there is a thorough-going failure to conform to one or more Fuller’s principles, only Waldron unequivocally states that this is because the law necessarily answers a moral ideal of the rule of law, so that law breaching this ideal is not law at all. Kramer and Marmor believe that one can have law that does not live up to our ideal of the rule of law, because only a lesser level of conformity to Fuller’s principles is needed for rules – and therefore legal systems constituted by those rules – to exist. Gardner seems to have a foot in both camps. The majority of the recent post-Hartian legal positivists, therefore, base their answer to the Relationship question on the same basic point that Hart and Raz each set out in their discussions: unless there is a sufficient level of conformity to Fuller’s principles, we cannot have rules at all.

This chapter also looked back to the analysis contained in Chapter 5, and argued that the fact that something of moral value is secured by conformity to the principles of the rule of law combined with the claim in this chapter that some conformity is necessary for law to exist is not seen by recent positivists as a problem. For the claim that this violates a wide ‘no necessary connection’ version of the legal positivist Separability thesis is argued above to be inconsistent with the more prevalent conception of legal positivism’s core commitment to the Social thesis, which states only that the content of valid law is not necessarily determined by morality. We can therefore see how the concessions made in the previous
chapter have defused one part of the debate between positivist and anti-positivists, allowing the focus of the debate to shift to ground that is still contested.

I will argue in Chapter 8 that the debates between positivists and anti-positivists on Fuller’s Challenge from the rule of law will continue, but will focus more closely on the reasons why positivists hold to the Social thesis at the level of legal validity, even while they accept that there is some necessary relationship between law and the (morally valuable) rule of law at the level of legal systems, either on the derivative approach or on the more Fullerian conceptual approach. My main thesis in this study is that positivists since Hart have not adequately dealt with the anti-positivist implications of Fuller’s Challenge, and that their concessions to Fuller have caused tensions between their accounts of law and the rule of law. Fullerians will thus continue to identify problems and tensions in the positivist detachment of legal validity from the rule of law, and positivists will hopefully respond to these criticisms to demonstrate how they think they can resolve these problems. But before I discuss these conclusions in more detail, I will set out how Fuller’s Challenge is dealt with in the most prominent recent statement of legal positivism: Shapiro’s *Legality.*
Chapter 7: Legal Positivism and the Rule of Law in Shapiro’s *Legality*

7.1 Introduction

Scott Shapiro’s book *Legality* is the most recent and important comprehensive statement of the analytical legal positivist approach to law. Unrivalled in its system and breadth, it is likely to shape debates about legal positivism for many years. It also provides another legal positivist analysis of the rule of law, and further illustrates a number of themes that have been touched on in this study’s discussion of the other legal positivist responses to Fuller’s Challenge, themes which – as I argue in the chapter that follows – constitute the key differences between positivist and Fullerian anti-positivist conceptions of the rule of law: the positivist starting position in the Social thesis, the rejection of the wide Separation thesis, and the Normative Inertness thesis.

As with the other positions discussed in this study, identifying Shapiro’s understanding of Fuller’s principles tells us as much about his conception of legal positivism and the nature of jurisprudence as it does about the rule of law. I will argue that Shapiro makes interesting concessions to Fuller, but also rejects many of Fuller’s claims in a cursory fashion, without adequately demonstrating why Fuller’s account of law is incorrect. However, because Shapiro sets out his understanding of legal positivism and the nature of jurisprudence in such detail, his wider analysis does provide us with a good sense of his position. In light of my main thesis – about the consistency of theorists’ concessions to Fuller with the Hartian tradition of positivism – how Shapiro’s arguments about Fuller and the rule of law cohere with claims to hold a positivist theory of law is one of the important questions for the chapter. Because of its systematic and lucid nature, Shapiro’s account helps us to see how the debate between Hartian positivism and Fullerian anti-positivism might proceed, on the basis of a clear understanding of what from Fuller’s Challenge is accepted and rejected by positivists. In the following chapter I will draw together Shapiro’s insights with those gleaned from the close analysis of other positivists in the previous chapters, to (i) show what concessions to Fuller still seem to cause tensions and problems within positivism, and (ii)
identify how the debate should proceed once the positivist account of legality is properly understood.

But before I can do that, in this chapter I first give a brief account of the main elements of Shapiro’s theory of law as planning. I then set out his approach to dealing with Fuller’s Challenge, and show that he follows the majority of other recent legal positivists in accepting that Fuller’s principles are necessary conditions for law’s existence, and that conformity to those principles is morally valuable. The third section sets out Shapiro’s unique theory of legal interpretation, illustrating how he develops it in engagement with Dworkin and other theorists, and its relation to his core Planning Theory. This leads on to a discussion of a further point about this theory of legal interpretation, namely that it does not tell us how judges ought to interpret and apply the law, from a moral perspective. Finally, I discuss Shapiro’s general methodology and contrast it with Fullerian anti-positivism’s very different approach.

### 7.2 Legality as planning

For Shapiro, the key to jurisprudence is the insight that law is a kind of social planning: “legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality.”¹ His first task, then, is to explain planning. Shapiro argues that plans are ubiquitous in everyday life, for “we are planning creatures”.² He goes into his analysis of plans in great detail,³ but it is sufficient here to set out his key observations. Plans are decisions to act in a certain way in future situations, in order to organize our behaviour over time so as to best achieve our goals.⁴ Planning facilitates our achievement of complex ultimate goals by dividing them into sub-plans.⁵ It also allows us to pre-empt deliberation about what to do in particular situations by settling on a plan in advance. For once we have accepted a plan, we have given

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¹ Scott Shapiro *Legality* (Belknap Press, Cambridge, MA, 2011) at 171, italics removed. On the circumstances of legality, see also 337.
² Shapiro *Legality*, above n 1, at above n 1, at 119.
³ Shapiro *Legality*, above n 1, at Chapter 5.
⁴ Shapiro *Legality*, above n 1, at 122.
⁵ Shapiro *Legality*, above n 1, at 123-224.
ourselves a norm that relieves us from having to decide what to do in the relevant situation: instead, we just follow our plan.\(^6\) In addition to this decisional function in individual planning, plans are required if shared activities are to proceed through a division of responsibility and the coordination of action between the various participants.\(^7\)

How, then, does Shapiro translate this commonplace idea of planning into a theory of law? Shapiro provides a methodical account over two chapters, which I will only summarise.\(^8\) His view is that the myriad norms of a legal system comprise a coordinated, dense network of social planning that settles questions of how we should act.\(^9\) Where a society has many moral problems that have complex, contentious, and arbitrary answers,\(^10\) and which are ineffectively dealt with through non-legal means of social ordering (for example, custom or consensus), the “circumstances of legality” obtain.\(^11\) In these circumstances, the most effective means of reducing the costs and risks of shared social action is a hierarchical and compulsory system of social planning that specifies the general and public plans for people’s conduct.\(^12\) On Shapiro’s account, law is just this special kind of shared social planning.

One of Shapiro’s other important claims is that law’s fundamental moral aim is to resolve the moral problems that stem from the circumstances of legality in an efficient manner.\(^13\) This is the Moral Aim thesis: “The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.”\(^14\) Where communities face the circumstances of legality, the costs of leaving conflicts to private bargaining or spontaneous order will be high; whereas the law is “a highly nimble and durable method of social planning” that is

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\(^6\) Shapiro *Legality*, above n 1, at 127-129.

\(^7\) Shapiro *Legality*, above n 1, at 129–133.

\(^8\) Shapiro *Legality*, above n 1, at Chapters 6 and 7.

\(^9\) Shapiro *Legality*, above n 1, at 161–170.

\(^10\) “Arbitrary” in the sense that “individual preferences that all act on a certain solution can always be ‘flipped’ to some other solution simply by changing the background behavioral assumption: if everyone prefers that everyone act on some combination of choices (because almost everyone acts in this way), everyone would prefer that everyone act on some different combination under the supposition that almost everyone acts on some different combination instead. For example, preferences for everyone riding on the right could always be changed to the left if it were supposed that almost everyone rides on the left instead.” Shapiro *Legality*, above n 1, at 109.

\(^11\) Shapiro *Legality*, above n 1, at 170-171.

\(^12\) Shapiro *Legality*, above n 1, at 171–173 and 213.

\(^13\) Shapiro *Legality*, above n 1, at 213.

\(^14\) Shapiro *Legality*, above n 1, at 213.
suited to resolving these moral problems.\textsuperscript{15} This is not just an observation that the law \textit{can} be useful in co-ordinating social action and resolving moral disputes, which would be accepted by any legal theorist; instead, it is a conceptual claim that these moral features are “part of the nature of law”.\textsuperscript{16} “If we want to explain what makes the law \textit{the law}, we must see it as necessarily having a moral aim[,] … [I]t is part of the identity of law to have a moral mission”.\textsuperscript{17} If a regime is to be law, Shapiro argues, it \textit{must} have this general moral aim.

Despite arguing for this necessary moral aim of law, Shapiro claims that his Planning Theory is steadfastly positivist.\textsuperscript{18} For his Moral Aim thesis is fairly limited, not only because it does not provide any specific substantive moral end for the law, but more importantly because Shapiro denies that the law must actually achieve its moral aim.\textsuperscript{19} This latter qualification to the Moral Aim thesis follows from the rest of Shapiro’s legal theory, which he observes is “a positivistic account that ultimately grounds the law in social facts alone”.\textsuperscript{20}

From the perspective of the Planning Theory, it is just a self-evident truth about law – a “\textit{truisms}”\textsuperscript{21} – that its existence and content is determined solely by social facts, namely its validity according to a master plan that has been adopted and accepted by certain people.\textsuperscript{22} The plans that the law sets out for the community to follow are themselves created according to the ‘master plans’ that specify who has legal authority to create, change and apply the community’s plans.\textsuperscript{23} The master plan of a legal system is a shared plan, the content of which is determined by looking to social facts about whether legal officials accept a public plan; no moral analysis is required to determine its existence and content.\textsuperscript{24}

\begin{enumerate}
\item{"\textsuperscript{15} Shapiro \textit{Legality}, above n 1, at 213.} \item{"\textsuperscript{16} Shapiro \textit{Legality}, above n 1, at 391.} \item{"\textsuperscript{17} Shapiro \textit{Legality}, above n 1, at 215.} \item{"\textsuperscript{18} Shapiro \textit{Legality}, above n 1, at 178, 239 and 382–383.} \item{"\textsuperscript{19} Shapiro \textit{Legality}, above n 1, at 214.} \item{"\textsuperscript{20} Shapiro \textit{Legality}, above n 1, at 239.} \item{"\textsuperscript{21} Shapiro \textit{Legality}, above n 1, at 13-16.} \item{"\textsuperscript{22} Shapiro \textit{Legality}, above n 1, at 119.} \item{"\textsuperscript{23} Shapiro \textit{Legality}, above n 1, at 165–167 and 177–180.} \item{"\textsuperscript{24} Shapiro \textit{Legality}, above n 1, at 177.} \end{enumerate}
Shapiro argues further that the very idea or “logic” of planning requires that law be understood in exclusive legal positivist terms.\textsuperscript{25} The content of shared plans must be determined by social facts alone, because otherwise plans would not fulfill their function to “guide and coordinate behaviour by resolving doubts and disagreements about how to act”.\textsuperscript{26} For a general feature of planning is that if a putative plan requires moral reasoning to apply then it is not really a plan at all.\textsuperscript{27}

Shared plans must be determined exclusively by social facts if they are to fulfil their function. … [S]hared plans are supposed to guide and coordinate behaviour by resolving doubts and disagreements about how to act. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. … Only social facts, not moral ones, can serve this function.

This fact about planning is especially important in relation to those master plans that resolve contentious questions of who should have legal authority in the system.\textsuperscript{28} The master plans’ content is determined by the social fact of acceptance and adoption by officials, without moral argument.\textsuperscript{29} Otherwise the basic question of how plans should be made and developed for the community will remain unsettled.\textsuperscript{30}

Because reasonable (and unreasonable) people can have doubts and disagreements about which social problems to pursue and who should be trusted to pursue them, it is essential to have a mechanism that can settle such questions[.] … To seek or discover the existence or content of such a mechanism by looking to moral philosophy, as the natural lawyer recommends we do, would frustrate the function of the master plan.

Legal authority is therefore constituted by (i) master plans that empower certain people or groups to create plans for the community,\textsuperscript{31} and (ii) the community being, on the whole, disposed to following the plans set down for them by the legal authorities, rather than being founded on moral reasoning such as judgments of moral legitimacy.\textsuperscript{32} This means that “the master plan … may be morally illegitimate and hence not capable of imposing a moral

\textsuperscript{25} Shapiro \textit{Legality}, above n 1, at 177 and 274–277.
\textsuperscript{26} Shapiro \textit{Legality}, above n 1, at 177.
\textsuperscript{27} Shapiro \textit{Legality}, above n 1, at 177.
\textsuperscript{28} Shapiro \textit{Legality}, above n 1, at 178.
\textsuperscript{29} Shapiro \textit{Legality}, above n 1, at 178.
\textsuperscript{30} Shapiro \textit{Legality}, above n 1, at 178.
\textsuperscript{31} Shapiro \textit{Legality}, above n 1, at 179–181.
\textsuperscript{32} Shapiro \textit{Legality}, above n 1, at 184–192.
obligation on anyone to obey”.

If the planning theory of law is correct, it “guarantees the truth of legal positivism”, because from the claim that:

the existence and content of plans are never determined by moral facts, it follows that the existence and content of the master plan that grounds all law cannot be determined by moral facts either. Moreover, since the identity of this plan as a legal plan does not depend on its moral legitimacy ... it follows that all law is grounded in a norm whose existence, content, and identity are determined by social facts alone.

Shapiro thus supports the legal positivist view that the existence and content of legal norms can be explained without reference to morality.

This, briefly stated, is Shapiro’s understanding of the nature of law. It is notable that in the three central chapters in which Shapiro lays out the nature of law, he says nothing about Fuller’s principles of the rule of law. In setting out his account of legality, Shapiro has remained squarely within the legal positivist framework, and does not see it necessary to engage with Fuller’s Challenge. Even at this stage, it seems clear that Shapiro’s account of the rule of law follows Hart, Raz, Marmor, and Kramer in understanding law as a particular kind of social institution that need not live up to our ideal of the rule of law. However, when we finally see Shapiro’s response to Fuller’s Challenge, his position replicates the (at first glance) bewildering set of arguments found in some of the other positivist positions discussed in this study.

### 7.3 Legality and the rule of law: Shapiro's response to Fuller's Challenge

#### 7.3.1 The relationship question

How, then, does Shapiro’s legal theory cope with Fuller’s Challenge? The previous four chapters of this study provide the context in which Shapiro’s positivist approach to the rule of law appears, and detailed the concessions made, and the consequent tensions caused, by the legal positivist responses to Fuller. So what does his conception of the rule of law contribute to this debate?

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33 Shapiro *Legality*, above n 1, at 182.

34 Shapiro *Legality*, above n 1, at 178.
The Planning Theory seems rooted in the post-Hartian legal positivist tradition of responses to Fuller’s Challenge, because Shapiro’s discussion of the rule of law follows the derivative approach to the Relationship question. In other words, the starting point for the analysis is that any reference to the ideal of the rule of law comes theoretically after we have understood the nature of law as a particular kind of social institution – which in Shapiro’s case is explained through the Planning Theory.\(^\text{35}\) Again, this is not a chronological claim, but a claim that our concept of law’s central elements do not include reference to Fuller’s principles, and certainly that the nature of law is not defined in terms of a moral ideal of the rule of law. Law’s nature is as a social institution of planning that seeks to resolve moral questions in the circumstances of legality; it is only after we have understood that this is law’s nature that we can observe that the rule of law is a condition of law’s existence.

Just like Hart and Raz – and more recently Marmor and Kramer – Shapiro understands Fuller’s principles as merely an implication of his legal positivist concept of law, to be commented on once the major parts of the theory are in place. He explicitly rejects Fuller’s suggestion that the rule of law is part of an anti-positivist challenge that positivism cannot deflect, because he does not agree with the view that the nature of law is that it necessarily lives up to the moral ideal of the rule of law. Yet he accepts the derivative relationship between law and the rule of law, because conformity to Fuller’s principles is necessary for the existence of planning. In addition, he provides a different account of the rule of law as focussed on ensuring congruence between the Planners’ plans and judges and other legal officials’ implementation of those plans. I will explain each of these points further below.

When he discusses the rule of law, Shapiro notes that Fuller provided one of the most famous arguments against legal positivism, and that his challenge was based on the observation that legal positivists ignored “the connection between the nature of law and the Rule of Law”.\(^\text{36}\) Fuller’s argument, as summarized by Shapiro, is that “[b]y insisting that the existence of law is independent of moral facts, positivists fail to see that a regime would not

\(^{35}\) Shapiro *Legality*, above n 1, at 8-10.

\(^{36}\) Shapiro *Legality*, above n 1, at 392.
be law if it consistently flouted the moral principles that constitute the Rule of Law”.\(^{37}\) Shapiro illustrates this argument by providing a concise and orthodox description of Fuller’s fable of King Rex and the jurisprudential significance of the principles of the rule of law that flow from that account.\(^{38}\)

In evaluating Fuller’s arguments, Shapiro’s main claim is that Fuller’s argument that “the existence of the law … depend[s] on moral facts” is unsuccessful, and that it is not true that his rule of law principles are “moral principles whose satisfaction is necessary for law to exist”.\(^{39}\) Shapiro does not think that Fuller’s principles trouble the legal positivist claim that the existence and content of law depends solely on social facts,\(^{40}\) because while Shapiro accepts Fuller’s claim that the existence of law depends on conformity to the rule of law principles, he argues that they are not in themselves moral principles.\(^{41}\)

Shapiro thus claims that conformity to the rule of law should be understood as a non-moral condition for the existence of rules or plans, rather than as part of a moral ideal of legality: “The positivist … can agree with Fuller that observance of his eight principles is necessary for the existence of a legal system and yet deny that the existence of law depends on moral facts.”\(^{42}\) Legal systems cannot fail to be legal systems due to their failure to observe “moral principles whose satisfaction is necessary for law to exist”, because the existence of law simply does not depend on moral principles or facts in this way.\(^{43}\) This is, of course, consistent with Shapiro’s positivist understanding of law. But one might ask how he comes to this conclusion, given that he explicitly sets to the side Fuller’s argument that the principles of the rule of law are moral principles. It may seem that Shapiro is avoiding the argument, by merely stipulating that Fuller’s principles are not moral. So how does Shapiro make his argument?

\(^{37}\) Shapiro *Legality*, above n 1, at 392.
\(^{38}\) Shapiro *Legality*, above n 1, at 392–394.
\(^{39}\) Shapiro *Legality*, above n 1, at 394.
\(^{40}\) Shapiro *Legality*, above n 1, at 176–178.
\(^{41}\) Shapiro *Legality*, above n 1, at 395.
\(^{42}\) Shapiro *Legality*, above n 1, at 395.
\(^{43}\) Shapiro *Legality*, above n 1, at 394.
Shapiro provides only a very brief discussion of his reasons for not treating Fuller’s principles as moral principles.\(^{44}\) Essentially, he argues that the requirements of the rule of law are best characterized as being derived from the very idea of social planning, rather than indicating that the law is a moral ideal.\(^{45}\) For Shapiro this means that a failure to conform to the principles of the rule of law means that a legal system does not exist, but this has “nothing to do with its inability to generate certain moral goods”.\(^{46}\) Instead, a regime’s systematic violation of these principles simply means that the regime is “not engaged in social planning” at all.\(^{47}\) If a system of plans failed to conform to Fuller’s principles, it would be unable to guide behaviour, and could therefore not actually plan anyone’s actions, and would therefore not be “engaged in the basic activity of law”.\(^{48}\) What is missing in regimes that violate Fuller’s principles is not the satisfaction of some principle of morality, but the satisfaction of basic requirements for the existence of social planning – and it is the latter that prevents them from being law.

### 7.3.2 The derivative approach

In considering in more detail Shapiro’s argument that Fuller’s principles are necessary conditions for the existence of law, we must remember the point seen in earlier chapters, that the commonly-held positivist view that Fuller’s principles of legality are essentially the conditions of law performing its function of guiding conduct is controversial and ambiguous.\(^{49}\) Fortunately, Shapiro provide some further explanation of his position. His argument is that Fuller’s principles are “derivable from the Planning Thesis”.\(^{50}\) Generality and publicity are requisites of planning because legal planning is a social activity of planning, as explained in Chapter 6 of his book;\(^{51}\) as Shapiro puts it, “legal planning is social in the sense that it regulates the bulk of communal activity via general, publically accessible

\(^{44}\) Shapiro *Legality*, above n 1, at 394.
\(^{45}\) Shapiro *Legality*, above n 1, at 394.
\(^{46}\) Shapiro *Legality*, above n 1, at 394.
\(^{47}\) Shapiro *Legality*, above n 1, at 394.
\(^{48}\) Shapiro *Legality*, above n 1, at 394.
\(^{49}\) See above Chapter 3 at section 3.5; Chapter 4 at section 4.3, and Chapter 5 at section 5.4.
\(^{50}\) Shapiro *Legality*, above n 1, at 394.
\(^{51}\) Shapiro *Legality*, above n 1, at 394–395; see Chapter 6 for the discussion of law as a shared activity of planning.
Without general, public norms it is impossible to create the dense network of social plans that are meant to regulate a society that has complex and contentious moral problems. Next, Shapiro explains that the requirements of clarity, consistency, non-retrospectivity, possibility of compliance, and stability derive from the fact that “planning is characterized by a set of associated dispositions”, namely that:

planners are disposed to fill in their plans over time, to render plans that are consistent with one another and with their beliefs and to resist reconsidering their plans absent compelling reasons to do so.

Lastly, the requirement of congruence is explained by the simple fact that if the judges do not apply the plan created by legislators, they would no longer be participating in the same legal system as specified in the relevant shared plan. Each of Fuller’s principles must be conformed to by a legal system, because non-conformity would prevent planning that constitutes the law from occurring.

Shapiro therefore claims that in Fuller’s fable, King Rex’s regime failed to be law not because he was “unjust” in his violations of morality, but because his failures to conform to the rule of law principles meant that he was “not a social planner at all”.

Rex failed to be a social planner because he “simply lacked the dispositions that human beings, as planning agents, normally possess.” Therefore, Shapiro concludes, Fuller’s principles are necessary existence conditions for social planning – and therefore law.

At this point it should be noted that this argument about the Relationship question is similar in its structure to the one that I attribute to Hart, Raz, and the recent legal positivists (except Waldron and Gardner). As most clearly exemplified in Raz and Marmor’s discussion of the relationship question, this argument is that Fuller’s principles set out the necessary conditions for the existence of law, but these should not be seen primarily as moral

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52 Shapiro *Legality*, above n 1, at 394–395.
53 Shapiro *Legality*, above n 1, at 161–173.
54 Shapiro *Legality*, above n 1, at 395.
55 Shapiro *Legality*, above n 1, at 395.
56 Shapiro *Legality*, above n 1, at 395.
57 Shapiro *Legality*, above n 1, at 395.
58 Shapiro *Legality*, above n 1, at 395.
Instead, they are conditions for the law doing what it needs to do to be law: in Raz and Marmor’s case, guiding conduct; in Shapiro’s case, engaging in the activity of social planning. I will discuss the structure and implications of this approach further in the course of my general analysis of the positivist answers to the Relationship question in Chapter 8.

### 7.3.3 The Moral Value question: four kinds of benefits

Having explained the relationship between law and the rule of law – and having, in the course of that argument, claimed that Fuller’s principles should not be regarded as moral principles – Shapiro turns to identifying the rule of law’s moral value. This may seem a contradictory exercise, because Shapiro suggests earlier in the analysis that Fuller’s principles are not “best characterized as moral”. That was the basis of his claim above that the existence of a legal system does not depend on the rule of law understood as the satisfaction of certain moral principles, but as the requirements of planning. But is difficult to understand what Shapiro means by saying that Fuller’s principles are not best characterized as moral, especially when he then proceeds to discuss the moral value of conformity to Fuller’s principles.

Irrespective of how these earlier claims are best explained, Shapiro clearly goes on to identify four ways in which conformity to the rule of law principles generates moral value, which he divides into two categories. Shapiro explains ‘autonomous’ benefits of conformity as being those that arise “from the mere observance of the principles”, without any regard for the particular end or aim that the rules of the legal system seek to achieve. In contrast, instrumental benefits arise only when Fuller’s principles allow morally worthy ends to be achieved.

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59 See above Chapter 4 at section 4.3 and Chapter 6 at section 6.4.2.
60 Shapiro *Legality*, above n 1, at 395.
61 Shapiro *Legality*, above n 1, at 394.
62 Shapiro *Legality*, above n 1, at 395.
63 Shapiro *Legality*, above n 1, at 395.
64 Shapiro *Legality*, above n 1, at 395.
The two autonomous benefits most commonly identified in the literature are first, that conformity to the principles enables people to predict what officials will do and allows them to plan their lives accordingly, and second, that such conformity also constrains officials and prevents arbitrary action. These are identified by almost all commentators as meaning that conformity to Fuller’s principles is of moral value, and Shapiro says little more about them. His only further comment is to note that plans that conform to Fuller’s principles promote “predictability and accountability” because we can know what the official plans are and rely on them being applied to our conduct. To these commonly identified benefits, Shapiro adds the third autonomous benefit that flows directly from his view of law as planning, which is the huge “cognitive energy” that is conserved by the law’s planning for the community, relieving us from both having to continuously think about how to best live our lives and to convince others about this as well.

Shapiro thinks that in contrast to these well-understood benefits of the rule of law, the fourth benefit is neglected by Fuller and other theorists. This is an instrumental benefit, but it is not the same as that first identified by Raz and followed by a number of other legal positivists; it does not refer simply to Fuller’s principles allowing norms to guide behaviour effectively. That, as I discussed above, is an instrumental benefit in the sense that it allows the law to achieve whatever purposes the law-giver is aiming at, and is not in itself a moral benefit. In contrast, Shapiro’s instrumental benefit is a moral benefit. It is based on the idea that the rule of law simply describes what is necessary for the law to fulfill its moral aim to solve moral problems that are complex and contentious, by providing authoritative plans for our lives. Without substantial conformity to the rule of law, social planning cannot achieve

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65 Shapiro *Legality*, above n 1, at 395-396.
66 Shapiro *Legality*, above n 1, at 396.
67 Shapiro *Legality*, above n 1, at 396.
68 Shapiro *Legality*, above n 1, at 396.
69 See above Chapter 4 at 4.2.2 and 4.3, and Chapter 5 at 5.2.2.
70 Shapiro *Legality*, above n 1, at 396.
its own goal of authoritatively planning for the community.\textsuperscript{71} This is another relatively difficult argument to understand, so I will set out Shapiro’s claim in his own words:\textsuperscript{72}

The Rule of Law is valuable not only because it allows us to plan our lives, but because it enables the law to plan our lives. The law is morally valuable … because we face numerous and serious moral problems whose solutions are complex, contentious, and arbitrary. The only conceivable way for us to address these moral concerns is through social planning. … If a regime did not normally produce standards that were general, promulgated, clear, prospective, consistent, satisfiable, and stable, and then did not apply them to cases that arose, it would not provide the guidance, coordination, and monitoring we need to solve the problems we ought to solve.

Put differently, Fuller’s principles are of value in that they allow the law to better do what it is meant to do, namely to resolve moral disputes that cannot be solved adequately by non-legal means.\textsuperscript{73}

From this instrumental perspective, the rule of law’s value is derived “entirely from the benefits that social planning generates” and will be achieved best when the legal system maximizes these benefits of planning.\textsuperscript{74} However, because there are debates about the optimal form of social planning that is best for a particular community – for example, between those who favour top-down centralized planning on one hand, versus those who prefer bottom-up customary planning on the other, and between “judicial review and parliamentary supremacy” as styles of institutional design – there will be continuing political disputes about the rule of law.\textsuperscript{75} Nevertheless, Shapiro says that these differences should not be seen as a dispute concerning the basic content of the rule of law ideal, because each party agrees that the rule of law is an ideal concerning what is necessary for rational social planning to be effective.\textsuperscript{76} Put differently, Shapiro argues that there is agreement about what the rule of law is basically about – allowing the law to be an effective system of planning – but dispute about exactly what that ideal requires.

\textsuperscript{71} Shapiro \textit{Legality}, above n 1, at 396–397.
\textsuperscript{72} Shapiro \textit{Legality}, above n 1, at 396.
\textsuperscript{73} Shapiro \textit{Legality}, above n 1, at 171.
\textsuperscript{74} Shapiro \textit{Legality}, above n 1, at 396.
\textsuperscript{75} Shapiro \textit{Legality}, above n 1, at 397–398.
\textsuperscript{76} Shapiro \textit{Legality}, above n 1, at 397.
This extension of the value of the rule of law into general questions of how best to make authoritative plans for the community seems to be a foray into a substantive account of the rule of law that many recent jurisprudential discussions have sought to avoid.\textsuperscript{77} For one’s account of the instrumental value of the rule of law depends for Shapiro on controversial judgments about “how to balance the needs for guidance, predictability, and constraint … against the benefits of flexibility, spontaneity, and discretion on the other”.\textsuperscript{78} These are substantive judgments of political morality and “optimal institutional design”,\textsuperscript{79} and we might therefore suppose that here Shapiro is importing a substantive normative philosophy into his conception of the rule of law.

But contrary to this reading, Shapiro’s instrumental benefit argument is better understood as merely what follows from (i) his general theory of law and legal interpretation (which will be discussed in section 7.4 below), combined with (ii) the Fullerian rule of law requirement of congruence, or as Shapiro puts it the requirement “that official apply the rules enacted”.\textsuperscript{80}

The rule of law’s instrumental benefit is that it allows the law to plan our lives according to a particular account of the rule of law that is already embedded in the legal system; one that is evident in the way that the legal system apportions interpretive power to different legal actors. This is the link with Fuller’s idea of congruence, which requires that the law laid down actually be applied.\textsuperscript{81} What Shapiro’s instrumental benefit of the rule of law requires is that legal officials faithfully implement the plans of the legal system:\textsuperscript{82}

\begin{quote}
the Rule of Law is served only when those who engage in legal interpretation are faithful to the vision of the Rule of Law that the legal system presupposes and embodies. For it would undermine the role of law as a system of social planning if interpreters relied on their own ideas about how to balance freedom versus constraint when construing authoritative legal texts. … The Rule of Law flourishes, therefore, only when legal interpreters possess a great deal of self-discipline.
\end{quote}

\textsuperscript{77} Joseph Raz \textit{The Authority of Law} (2 ed, Oxford University Press, Oxford, 2009) at Chapter 11.

\textsuperscript{78} Shapiro \textit{Legality}, above n 1, at 398.

\textsuperscript{79} Shapiro \textit{Legality}, above n 1, at 397.

\textsuperscript{80} Shapiro \textit{Legality}, above n 1, at 396.

\textsuperscript{81} Lon L Fuller \textit{The Morality of Law} (Revised ed, Yale University Press, New Haven, Connecticut, 1969) at 81-91.

\textsuperscript{82} Shapiro \textit{Legality}, above n 1, at 398.
Upholding the rule of law does not mean imposing our own views about the appropriate interpretive methodology for legal interpreters, but giving effect to the legal system’s own plans about how the law ought to rule.\textsuperscript{83} The rule of law’s flourishing therefore requires that legal interpreters are faithful to the law’s point of view about the rule of law;\textsuperscript{84} this point of view is revealed through reflection on the economy of trust manifested in the individual legal system.\textsuperscript{85} Yet because many legal systems are extremely complex, rival meta-interpretive arguments – about the manifest economy of trust, and the consequent appropriate interpretive methodology – may be plausible, so that there may be no “rational resolution to certain theoretical disagreements”.\textsuperscript{86} It is, therefore, inevitable that there will be on-going debate concerning exactly what the rule of law requires.

This is a very different conclusion concerning the content of the rule of law from that drawn by the other legal positivists considered in this study, because it fills out the principle of congruence with Shapiro’s theory of the legally required methodology for interpreting and developing the law. Shapiro’s rule of law therefore goes far beyond the fairly succinct and orthodox statement of Fuller’s principles that is often provided by legal positivists, and requires conformity to the interpretive methodology that Shapiro believes is immanent in the plans of each legal system – although each legal system’s required methodology will be slightly different. Therefore, to properly understand Shapiro’s conception of the rule of law, his theory of legal reasoning must be set out, as is done in the next section.

\textbf{7.3.4 Conclusion}

This identification of moral value seems contrary to Shapiro’s claim that Fuller’s principles are not best characterized as moral. Perhaps Shapiro is making what I think is Hart and Raz’s main point on this issue: that we can identify Fuller’s principles by reflecting on the requirements necessary for law to serve its function, and that these principles should not \textit{themselves} be regarded as moral principles, even if conformity to them is morally valuable.\textsuperscript{87}

\begin{footnotes}
\item[83] Shapiro \textit{Legality}, above n 1, at 398.
\item[84] Shapiro \textit{Legality}, above n 1, at 398.
\item[85] Shapiro \textit{Legality}, above n 1, at chapters 12 and 13.
\item[86] Shapiro \textit{Legality}, above n 1, at 397.
\item[87] See above Chapter 3 at section 3.4 and Chapter 4 at section 4.2.
\end{footnotes}
In other words, the very idea of clarity, or generality, should not be seen as a moral principle: what makes conformity to that requirement morally valuable is that it serves some other moral value, such as liberty or autonomy. That seems to be the only way to make Shapiro’s arguments consistent. Unfortunately for our understanding of Shapiro’s point, he does not elaborate on his thinking here or situate his position in relation to Hart, Raz, or the other positivists who have made similar points.  

Save for the possible inconsistency created by his initial denial that Fuller’s principles are moral principles, Shapiro provides a relatively clear analysis of his answers to Fuller’s Challenge. On the Relationship question, he argues that conformity to the rule of law is required for law to fulfill its necessary function of guiding behaviour according to plans. And on the Moral Value question, he argues that there are a number of morally valuable results of conformity to Fuller’s principles. However, the brevity of his analysis of Fuller’s Challenge – especially in comparison with Shapiro’s extended engagement with Dworkin’s legal theory – indicates that Shapiro thinks that Fuller’s Challenge is not particularly challenging at all; Fuller’s principles are easily understood and incorporated into the planning theory of legal positivism.

As can be seen by looking back over Chapters 3–6 of this study, Shapiro’s analysis of Fuller’s anti-positivist account of the rule of law follows a long tradition of legal positivist dismissals of Fuller’s ‘internal morality of law’ as a plausible anti-positivist challenge. In responding to Fuller, positivists usually divide Fuller’s insights into manageable theses that can be either rejected on the basis of the positivist concept of law, or else incorporated into it.  

This is one of Shapiro’s similarities with the other legal positivists discussed in this thesis bar Waldron: the rule of law is, for them, an idea that need only be mentioned after the main work of analyzing the nature of law has been done.

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88 This is consistent with Shapiro’s aim to provide a clear, uncluttered analysis that can be read by those new to the subject; but it also indicates that Shapiro does not think that this is an important or controversial argument.

But, as I have observed, Shapiro’s conception of the rule of law is more responsive to Fuller’s Challenge, in the sense that it provides an alternative positivist account of how the ideal of the rule of law requires judges to reason according to the law. This is because Shapiro thinks that there is a legally required interpretive methodology that can be found in each legal system, and judges would violate the principle of congruence if they did not practice that methodology. The rule of law requires judges to legally reason according to that methodology; Shapiro’s account of what law is at the system level has implications for the content of legal norms at the validity level, as I will now discuss.

7.4 Legality and interpretive methodology

7.4.1 The planning theory’s practical implications

As I have already suggested, the major difference between Shapiro’s analysis of the rule of law and that offered by the legal positivists discussed previously is Shapiro’s developed account of interpretive methodology. Shapiro’s view is that fidelity to the rule of law requires those attempting to give effect to the plans of their legal system to work out in detail how judges and other legal actors should interpret those plans – an analysis that, he claims, has “profound practical implications” for legal practice. In his own terms, Shapiro provides an answer to the question of what “interpretive methodology” different legal officials legally ought to use in making decisions.

Shapiro argues that the rule of law mandates that legal actors must give effect to the interpretive approach that is evident in the legal system’s own plans – “the vision of the Rule of Law that the legal system presupposes and embodies”, which can only be determined by examining the structure and norms of the legal system. This claim needs further analysis, because Shapiro is using ‘the rule of law’ differently than it is used throughout this study (as referring to Fuller’s principles). Shapiro is essentially using ‘vision of the rule of law’ to refer to the economy of trust embedded in the legal system’s rules to which legal actors are meant to give effect to. One way of explaining this is that Shapiro is taking Fuller’s principle

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90 Shapiro Legality, above n 1, at 27.
91 Shapiro Legality, above n 1, at 398.
of congruence and fleshing it out with his own theory of legal content and the legally-required interpretive methodology.

However, Shapiro does not believe that the connection between law and the rule of law noted above means that Fuller’s principles are a necessary part of the criteria of legal validity. While the principle of congruence requires that the law be faithfully applied, for Shapiro, Fuller’s principles are not a necessary determining factor in legal validity, or a guiding legal ideal that judges are legally bound to give effect to in their decisions. Shapiro subscribes to the legal positivist view that the content of valid legal norms is a matter of social fact: the content of the law of a particular system is determined only by social facts about the official practices of recognizing (i) certain plans as setting out the fundamental rules of the legal system, and (ii) the lower-level plans that form norms or rules that are valid under those fundamental rules. The principles of the rule of law will only be determinants of legal content if the power for judges to interpret the law in light of those principles is evident in the economy of trust of the particular legal system. If not, judges will not be legally obliged to interpret the law so as to make its content better conform to the principles of the rule of law. This view is evident in the way Shapiro founds his interpretive theory of legal content on the rejection of Ronald Dworkin’s theory of law.

7.4.2 Shapiro’s response to inclusive legal positivism

Shapiro begins by arguing that Dworkin’s early criticism of legal positivism, based on the existence of moral principles in the law, can be easily defused by legal positivists. But Shapiro argues against the inclusive positivist response to Dworkin. While inclusive positivists think that the determinants of legal validity are ultimately social facts, in the sense that the criteria of legal validity are determined by a social rule of recognition, they accept that those criteria can refer to moral properties. Dworkin’s argument concerning moral principles is neutralized by saying that such moral principles can be law if they are so

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92 Shapiro *Legality*, above n 1, at 177.
93 Shapiro *Legality*, above n 1, at Chapter 9.
94 Shapiro *Legality*, above n 1, at 269–270.
according to the rule of recognition of the particular legal system, which is a matter of social fact, namely whether the officials of the system follow that rule.\textsuperscript{95}

In comparison, exclusive legal positivists deal in a different way with the fact that moral principles are applied by judges as binding standards, because they see law as determined exclusively by social facts.\textsuperscript{96} Legal rules can include moral concepts such as ‘unconscionable’ and ‘reasonable’, but this merely means there is a legal obligation to “reach outside the law and apply the norms of morality instead”.\textsuperscript{97} Shapiro argues that even where judges are bound to apply morality in making decisions, this does not mean that morality is incorporated into the law.\textsuperscript{98}

Shapiro argues that although both the exclusive and inclusive variants of legal positivism can accommodate Dworkin’s criticisms adequately, inclusive legal positivism is inconsistent with the logic of planning:\textsuperscript{99}

If the law is to guide conduct in the manner of plans, then it follows that its existence and content cannot be determined by facts whose existence the law aims to settle. … Call this the “Simple Logic of Planning” argument[.] SLOP: The existence and content of a plan cannot be determined by facts whose existence the plan aims to settle. … The problem with inclusive legal positivism is that it too violates SLOP. If the point of having law is to settle matters about what morality requires so that members of the community can realize certain goals and values, then legal norms would be useless if the way to discover their existence is to engage in moral reasoning.

This is not a problem for exclusive legal positivism, which determines the content of the law exclusively by reference to social facts, without any reference to morality.\textsuperscript{100} Where the law refers to morality, the exclusivist says that the law’s plan is to leave moral reasoning to judges.\textsuperscript{101} So the Planning Theory agrees with the exclusivist that legal reasoning – reasoning concerning the normative content of the law – is amoral, referring only to social facts to determine the existence and content of the law.\textsuperscript{102}

\textsuperscript{95} Shapiro \textit{Legality}, above n 1, at 270–271.
\textsuperscript{96} Shapiro \textit{Legality}, above n 1, at 269.
\textsuperscript{97} Shapiro \textit{Legality}, above n 1, at 269.
\textsuperscript{98} Shapiro \textit{Legality}, above n 1, at 272–273; Raz \textit{The Authority of Law}, above n 77, at 45–46.
\textsuperscript{99} Shapiro \textit{Legality}, above n 1, at 275.
\textsuperscript{100} Shapiro \textit{Legality}, above n 1, at 275.
\textsuperscript{101} Shapiro \textit{Legality}, above n 1, at 276.
\textsuperscript{102} Shapiro \textit{Legality}, above n 1, at 276-277.
both legal reasoning and judicial reasoning about morality, which means that the
phenomenon of judges being legally bound to apply moral principles is fully explainable by
the Planning Theory.

7.4.3 **Shapiro’s response to Dworkin’s theoretical disagreement argument**

Although Shapiro thinks Dworkin’s argument from legal principles is easily dismissed by
reference to the explanation above, he acknowledges the power of Dworkin’s critique based
on the pervasiveness of theoretical disagreements in legal practice. Dworkin’s argument
in *Law’s Empire* is that many disagreements about the content of the law are not just
disputes about whether a proposition of law is true according to the uncontroversial
fundamental rules of the legal system. Instead, they are theoretical disagreements about
the law – disputes about what makes a proposition a valid legal proposition. Dworkin
claims that legal positivism cannot comprehend theoretical disagreements because it is
committed to the ‘plain fact’ view that Hart’s rule of recognition is determined by official
consensus, and any disagreement about the content of the rule of recognition would destroy
this consensus. Such disagreements can only be resolved through political arguments
about which particular interpretation of the law is best from the perspective of political
morality. Shapiro accepts that such theoretical disagreements are “absolutely
commonplace in many modern legal systems”, and that the existing legal positivist
explanations of them are unsatisfactory.

Before setting out his own strategy of dealing with this critique, Shapiro outlines Dworkin’s
theory that theoretical disagreements are resolved through reflection on the moral
foundations of the law. Dworkin’s theory has been discussed exhaustively elsewhere,
suffice to say for Shapiro’s purposes, it requires theoretical disagreements about the grounds of law to be resolved through “intensively abstract and relentlessly philosophical” argument about what fundamental rules best fit and morally justify the practice of law in a community. Dworkin’s preferred meta-interpretive approach – his view of how we should determine the appropriate interpretive methodology – is contrary to the logic of planning, because choosing between interpretive methods requires a comprehensive philosophical analysis of the moral attractiveness of varying conceptions of law and their interpretive methods. Furthermore, Dworkin’s own favoured interpretive method – law as integrity – requires us to determine what the law of the legal system is by upholding the rules that figure in the morally best justification of the existing legal materials in one’s community. The Planning Theory sees this interpretive methodology as untenable, because it:

defeats the purpose of law. Having to answer a series of moral questions is precisely the disease that the law aims to cure. Dworkinian legal interpretation thus ends up reinfecting the patient after the contagion has been neutralized.

Dworkin’s theory violates the logic of planning, which requires that the content and interpretation of a plan not be determined by moral facts, because the very purpose of a plan is to settle moral questions.

Of course, as Shapiro acknowledges, violating SLOP would not concern Dworkin because his theory of law is completely different to that of the Planning Theory, and does not make the same assumptions about planning that Shapiro does. Shapiro’s next argument, therefore, criticizes Dworkin from within, by arguing that it is implausible for Dworkin to suggest that those who created the American legal system intended Constructive


\[112\] Shapiro *Legality*, above n 1, at 296.

\[113\] Shapiro *Legality*, above n 1, at 302.

\[114\] Shapiro *Legality* 309-310. For Dworkin’s constructive interpretation approach see Dworkin *Law’s Empire*, above n 104, esp Chapters 1-3.

\[115\] Dworkin *Law’s Empire*, above n 104, at Chapters 6 and 7.

\[116\] Shapiro *Legality*, above n 1, at 310.

\[117\] Shapiro *Legality*, above n 1, at 311.

\[118\] Shapiro *Legality*, above n 1, at 312.
Interpretation as the appropriate meta-interpretive approach.\textsuperscript{119} Because Dworkin requires legal interpreters to conduct such extensive abstract philosophical analysis of moral and political concepts, his interpretive methodology is only appropriate in legal systems that are “inhabited by extremely trustworthy individuals”.\textsuperscript{120} Shapiro provides historical evidence that the American legal system’s founders were fearful of giving government too much power, and after the revolution they constructed constitutional systems that minimized the power of various branches of government.\textsuperscript{121} This is at odds with the wide discretion Dworkin’s theory gives to legal officials to make philosophical inquiries into the moral and political justifications for the legal system, on the basis of which they determine the content of legal standards within the system.\textsuperscript{122} In sum, “the distrust pervading the American legal system … gives the lie to Dworkin’s claim that creators of legal systems necessarily intend that interpretive methodology be determined by a ‘best-lights’ analysis”.\textsuperscript{123}

7.4.4 \textit{Shapiro’s own interpretive methodology}

This critique of Dworkin reflects the importance of Shapiro’s view that plans are “sophisticated devices for managing trust or distrust”.\textsuperscript{124} The Planning Theory:\textsuperscript{125}

entails that the attitudes of trust and distrust presupposed by the law are central to the choice of interpretive methodology. Roughly speaking, the Planning Theory demands that the more trustworthy a person is judged to be, the more interpretive discretion he or she is accorded; conversely, the less trusted one is in other parts of legal life, the less discretion one is allowed. Attitudes of trust are central to the meta-interpretation of law … because they are central to the meta-interpretation of plans – and laws are plans[.]

Plans can only play their role as managers of trust if the interpretive methodology respects the economy of trust that is evident in those plans.\textsuperscript{126} If the master plans of the legal system evince low trust and a desire to give the plan-applier little ability to interpret the plans in new ways, the required interpretation will be one that hews close to the text of the plan;

\begin{itemize}
\item[119] Shapiro \textit{Legality}, above n 1, at 313.
\item[120] Shapiro \textit{Legality}, above n 1, at 312.
\item[121] Shapiro \textit{Legality}, above n 1, at 313-324.
\item[122] Shapiro \textit{Legality}, above n 1, at 325-326.
\item[123] Shapiro \textit{Legality}, above n 1, at 329.
\item[124] Shapiro \textit{Legality}, above n 1, at 334.
\item[125] Shapiro \textit{Legality}, above n 1, at 331.
\item[126] Shapiro \textit{Legality}, above n 1, at 335.
\end{itemize}
conversely, if the master plans show trust in the officials’ ability to develop and interpret it, they should be interpreted in a way that allows for this.\textsuperscript{127} Thus: \textsuperscript{128} 

Systemic attitudes of trust … must play an important role in meta-interpretation if legal systems are to manage issues of trust. If the proper interpretive methodology for a particular legal system fails to harmonize with its economy of trust, the system will be unable to compensate for lack of trustworthiness and to capitalize on its existence.

To faithfully carry out the plans that constitute the legal system, we must defer to the economy of trust embodied in the master plans.

Shapiro observes that the importance of the economy of trust to interpretation has not gone unnoticed in legal theory. Lawyers and legal theorists often utilize ideas of trust and distrust in their analyses of how the law should be interpreted, as exemplified by statements from Justices Antonin Scalia and Richard Posner.\textsuperscript{129} Their views on interpretation are meta-interpretive, because they are arguments for particular interpretive methods based on an assessment of the trustworthiness of legal officials.\textsuperscript{130} But Posner and Scalia differ significantly for Shapiro’s purposes because in making these assessments Posner relies on his personal (‘God’s-eye’) view of trustworthiness, whereas Scalia analyzes the view of trustworthiness held by the ‘Planners’ of the legal system – the people who designed the basic plans of the system.\textsuperscript{131} Shapiro argues that God’s-eye perspective is inconsistent with the logic of planning because the system’s Planners had their own views on the economy of trust, which mandates a particular interpretive methodology.\textsuperscript{132} Further, where the Planners are legitimate moral authorities, the God’s-eye approach also breaches their right to rule by preventing their social plans from being carried out through faithful application.\textsuperscript{133}

Yet these reasons against the God’s-eye view of meta-interpretation do not mean we should always give effect to the initial Planners’ views. Shapiro explains that the Planning Theory’s meta-interpretive direction is to “defer to the trust attitudes presupposed by the rules”, which

\textsuperscript{127} Shapiro Legality, above n 1, at 335-336.
\textsuperscript{128} Shapiro Legality, above n 1, at 340.
\textsuperscript{129} Shapiro Legality, above n 1, at 342-343.
\textsuperscript{130} Shapiro Legality, above n 1, at 343-344.
\textsuperscript{131} Shapiro Legality, above n 1, at 344-346.
\textsuperscript{132} Shapiro Legality, above n 1, at 346-347.
\textsuperscript{133} Shapiro Legality, above n 1, at 349.
requires an analysis of why current participants, such as legal officials, accept the rules that plan for authority and interpretive power within the legal system.\textsuperscript{134} If the legal officials take the Planners’ views of the economy of trust as authoritative, those views should determine the meta-interpretive analysis.\textsuperscript{135} In contrast, in an opportunistic system in which officials accept the rules because in their own judgment they view them as setting out a good economy of trust – and not because they defer to the Planners’ authority – then it is the present officials’ views of distrust and trust that matter.\textsuperscript{136} The reason for this difference is based on the idea that legal officials are adopting plans and seek to interpret and fill in the plans so as to fulfill the aims of the plans.\textsuperscript{137} This means that if one thinks the initial Planners had special moral legitimacy or expertise, one will attempt to fulfill their understanding of the plans, and if one thinks that just the plans themselves achieve morally good results regardless of the Planners’ intentions, then one will look only to the economy of trust evident in the plans.\textsuperscript{138}

Once the relevant economy of trust that should be implemented is identified, the next meta-interpretive step is to ask, for each different official role, what the relevant economy of trust says about the competence and character that people in that role are likely to have.\textsuperscript{139} Once this is ascertained, we can then decide what kind of interpretive methodology is appropriate for that particular interpreter – for example, strict application of the plain meaning of the text (textualism); going beyond textualism to apply the purpose (purposivism); a protective attitude towards rights, minorities, or democracy; or giving effect to legislative intent.\textsuperscript{140} Again, the selection of interpretive methodology is determined by the general attitudes of trust or distrust in the particular interpreter that are presupposed and evident in the basic plans of the legal system. The interpretive methodology that gives effect to these plans is what is legally required, and this provides the Planning Theory’s practical prescriptions for legal interpretation: interpret the legal text according to the interpretive methodology

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{134} Shapiro \textit{Legality}, above n 1, at 357 and 350.
\item\textsuperscript{135} Shapiro \textit{Legality}, above n 1, at 357.
\item\textsuperscript{136} Shapiro \textit{Legality}, above n 1, at 305 and 357.
\item\textsuperscript{137} Shapiro \textit{Legality}, above n 1, at 195-200.
\item\textsuperscript{138} Shapiro \textit{Legality}, above n 1, at 350-351.
\item\textsuperscript{139} Shapiro \textit{Legality}, above n 1, at 359.
\item\textsuperscript{140} Shapiro \textit{Legality}, above n 1, at 369.
\end{enumerate}
\end{footnotesize}
determined by the meta-interpretive inquiries. Notice how Fuller’s principles have dropped out of the analysis: they are simply not a part of the interpretive methodology that Shapiro thinks is legally required.

**7.4.5 Conclusion**

With Shapiro’s arguments concerning the methodology for the interpretation of the law, we see an important development in legal positivist jurisprudence: the articulation of a legally binding interpretive methodology concerning how judges ought to decide cases. Shapiro observes that earlier positivists, notably Hart, thought that the appropriate interpretive methodology in a legal system depended on the contingent social practices of officials, rather than being evident in the structure of the legal system. But for Shapiro, the rule of law requires that we look in more detail at the law’s own plans for planning. While legal officials’ practices still determine the appropriate interpretive methodology, in Shapiro’s theory this is due to their role in developing the fundamental plans of the legal system. The economy of trust evident in these master plans is key to determining the legally required interpretive methodology, and the economy of trust is in Shapiro’s view a matter of social fact. Shapiro’s interpretive theory is the most comprehensive and theoretically developed account of how judges legally ought to interpret the law in post-Hartian jurisprudence, which means that his theory of legality does, as he claims, have profound practical implications for judicial practice. However, the fact that Shapiro does not see Fuller’s rule of law principles as the key element of his practical prescriptions means that his acceptance of those principles as a necessary condition of law’s existence does not mean that they are part of the determinants of legal validity. This detachment of the rule of law at the level of legal systems from the account of legal validity is a consistent theme in legal positivism, as I will discuss further in Chapter 8.

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141 Shapiro *Legality*, above n 1, at 254.
7.5 Shapiro on moral obligations to legality

7.5.1 Normatively inert?

Despite the fact that Shapiro’s account of legality does take a stand on the interpretive methodology by which judges legally ought to decide cases, this does not mean that he has provided an account of what they morally ought to do. The reason for this is found in Shapiro’s observation that “[l]egal positivism … is predicated on the conceptual distinction between legal and moral obligation”.¹⁴² Shapiro’s argument thus illustrates another of the main shared positions of post-Hartian legal positivists, namely the Normative Inertness thesis. As discussed in the previous chapter, this thesis claims that legal positivism’s theory of legal validity has no practical implications from a moral point of view.¹⁴³

Placing Shapiro in the normative inertness camp may seem contrary to his claim about his theory’s profound practical implications. But it is crucial to see that these claims are highly circumscribed, in a way that brings them within the Normative Inertness thesis. This is because Shapiro’s position is that his conclusions concerning how judges ought to decide cases according to the planning theory of law are only what they legally ought to do. As such, they are not moral oughts – they are not practical requirements in the wider sense of practical reasoning about what we ultimately ought to do.¹⁴⁴ However, as we will also see, some of the things that he says seem to suggest positions on what judges morally ought to do, rather than just what they are legally bound to do.

7.5.2 Legal interpretation based on social facts

As outlined above, Shapiro’s approach to the legally binding interpretive methodology for the law is based solely on social facts concerning the economy of trust evident in the Planners’ view of the plans (in an authority system), or evident in the plans as understood by

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¹⁴² Shapiro Legality, above n 1, at 256.
present legal officials (in an opportunistic system). Political morality does not determine how judges legally ought to decide cases. Determining the legal system’s evident economy of trust, and therefore its own plans about how planning should proceed, is not an “exercise in moral and political philosophy” but “seeks social facts”. As Shapiro elaborates:

That some set of goals and values represents the purposes of a certain legal system is a fact about certain social groups that is ascertainable by empirical, rather than moral, reasoning. Proper interpretive methodology is established by determining which methodology best harmonizes with the objectives set by the planners of the system in light of their judgements of competence and character.

In other words, the proper interpretive methodology – the legally required approach to interpreting and developing the law – is determined by social facts about what the plans require. This is another example of Shapiro’s positivism, for as he says:

this account of legal interpretation is positivistic in the most important sense, namely, it roots interpretive methodology in social facts. That a legal system has a certain ideology is a fact about the behavior and attitudes of social groups.

Shapiro is at pains to emphasize that his focus on social facts is not motivated by a “fanatical desire to save positivism at all cost”, but is just what is required if we are to respect the logic of planning. The proper interpretive methodology is selected based on the meta-interpretive aim of respecting the logic of planning, by not undermining the economy of trust set out in a previously decided set of plans.

This is, therefore, a contrast with the Fullerian anti-positivist perspective, in which the proper methodology of legal interpretation depends mainly on the content of the moral ideal of the rule of law, and meta-interpretive disagreements are moral-political arguments about different conceptions of the best understanding of the rule of law. In illustrating this contrast, Shapiro focuses on Dworkin’s articulation of the view that “law does not and

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145 Shapiro Legality, above n 1, at 350-351.
146 Shapiro Legality, above n 1, at 382.
147 Shapiro Legality, above n 1, at 382.
148 Shapiro Legality, above n 1, at 382.
149 Shapiro Legality, above n 1, at 382.
150 Shapiro Legality, above n 1, at 382-383; also 357 and 398-399.
cannot rest on social facts alone, but is ultimately grounded in considerations of political morality.”

This applies to the Fullerian anti-positivist account as well, although Fuller is focussed on the more orthodox ideal of the rule of law in his principles of legality, rather than on general moral and political justifications for the law. But on the Fullerian account, as with Dworkin, interpretive conclusions follow naturally from one’s moral-political conception of legality, because it is the obligation of the judge to interpret the law so as to best live up to the ideal of legality. In making their legal decisions, judges and other legal officials have a unified legal-moral obligation to push the reality of the law closer to the ideal. On this account, the idea of separating a judge’s moral and legal obligations is difficult to comprehend, because their legal obligation is to further a moral ideal of law.

7.5.3 The practical implications of wicked plans

The difference between Shapiro’s and the Fullerian approaches in terms of their moral attractiveness is clear when we consider their operation in wicked legal systems. On Shapiro’s theory, judges are legally required to do what the plans of the particular legal system entail in terms of interpretive methodology. In a wicked legal system, it may be that, applying Shapiro’s theory, the judge is legally obliged to interpret the law in the way that best reflects pernicious aims and values, rather than in the way that best reflects the moral ideal of legality. This will be true where the legal system is an authority system, and the designers of the system clearly constructed a system of plans that aims to fulfill their iniquitous aims. Under these assumptions, Shapiro sees judges’ legal obligation as being to interpret the law using the interpretive methodology that best harmonizes with its wicked goals and values; as he observes, the Planning Theory.

152 Shapiro Legality, above n 1, at 283.
155 Shapiro Legality, above n 1, at 350–352 and 357.
156 Shapiro Legality, above n 1, at 382.
… takes a regime’s animating ideology as its touchstone [and] may end up recommending an interpretive methodology based on a morally questionable set of beliefs and values. The legal system in question, for example, may exist in order to promote racial inequality or religious intolerance; it may embody ridiculous views about human nature and the limits of cognition. Nevertheless, the positivist interpreter takes this ideology as given, and seeks to determine which interpretive methodology best harmonizes with it.

Legal positivists have often argued that their clear-headed view of legal interpretation allows them to say that a judge has a discretion in hard cases, one that they should exercise in conformity to morality, allowing them to counter wicked ideologies in the law. But Shapiro’s understanding of law and legal reasoning requires judges to resolve hard cases using the interpretive method that best reflects the ideology of those who created the legal system; in the case of a legal system that has evidently racist master plans, for example, the interpretive method would be to further racism. Hard cases about how the law should be interpreted are no longer left to the moral discretion of judges, but must be determined by deferring to the economy of trust or other political ideology of those who created the plans of the legal system, which is a matter of social fact.

Assuming that those currently in power share the ideology of those who created the master plans, this position is very similar to what Dyzenhaus calls the ‘plain fact’ approach to interpretation, in which judges interpret statutes in the way that furthers the moral ideology of those who hold political power. Of course, if the legal system’s basic plans reveal morally benign ideologies, or if the relevant economy of trust allows interpreters to make their own decisions about morality, a judge’s obligation may be to make wicked statutes more benign. For example, the master plans of the legal system may include a bill of rights or common law protections that provide resources for judges to claim that they are trusted to limit the power of the legislature to offend against the rule of law. These would be situations where Shapiro’s views would accord with the Fullerian view of proper legal interpretation, but this is entirely contingent on that particular interpretive method being the one reflected in the actual plans of the legal system, rather than existing wherever there is law.

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158 That is, unless the fundamental plans of the system included requirements for judges to constrain legislative injustice.
159 Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 151, at 48.
This illustration of Shapiro’s interpretive arguments is striking because it shows that legal obligation can diverge markedly from interpreters’ moral obligation (assuming that interpreting wicked law in a way that advances wickedness is morally wrong). It also exposes a weakness in Shapiro’s claim that his theory tells us what judges and other legal interpreters should do. Shapiro promises that his theory of legality has “profound practical implications”, through its explanation of who has legal authority, what plans they have approved, and how to appropriately interpret the texts that set out the plans. But according to his theory, these are only accounts of legal obligation; they say little about how judges ultimately ought to decide cases, from the perspective of morality. While Shapiro explains in detail what judges’ legal obligations are and tells us that they are “rationally criticisable” if they violate a plan they have accepted, namely the master plan of the legal system, all that this means is that it is generally considered irrational to violate a plan that one has adopted.

A theory of law that promises to have practical implications must provide an analysis of what judges morally ought to do; as Raz argues, people do things because they think them good or valuable, so that “principles of adjudication will not be viable … unless they can reasonably be thought to be morally acceptable”. If legal reasoning according to Shapiro’s theory is what judges ought to do, then it must be morally justifiable.

7.5.4 Professing normative inertness

When he expressly reflects on this question, Shapiro does say that his analysis eschews moral evaluation and prescription. His account of legal obligation and reasoning leads to the conclusion that “there is no reason to think that the master plans of every possible legal system will be morally legitimate” or morally obligatory. While statements of what is legally required or prohibited are statements of what is morally required or permitted from the perspective of the legal system, they will “carry no moral implications” unless they are

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160 Shapiro Legality, above n 1, at 22-30.
161 Shapiro Legality, above n 1, at 183.
163 Raz Ethics in the Public Domain, above n 162, at 318.
164 Shapiro Legality, above n 1, at 184.
actually justified by moral analysis.\textsuperscript{165} Put differently, the legal system’s view of our moral obligations, expressed in its legal obligations, may be contrary to what our true moral obligations are.

So while it is a conceptual necessity that legal officials represent the law as having moral aims – “as an activity that is supposed to solve moral problems and should be obeyed for that reason”\textsuperscript{166} – the legal point of view does not necessarily tell us what morality actually requires.\textsuperscript{167} As such, legal obligation does not determine what a judge morally ought to do:\textsuperscript{168}

… even in systems where judges are legally obligated to apply the law come what may, legal positivism does not claim that judges are thus morally required to apply the law come what may. To the contrary, this inference is mandated by natural law theory. Legal positivism, as we have seen, is predicated on the conceptual distinction between legal and moral obligation and denies that there is always a moral obligation to obey the law. A good positivist judge, therefore, would not confuse the constitutionality of [wicked] laws with [their] moral validity and would resist the authoritarian demand to heed the law simply because the law said so.

This is a clear declaration of normative inertness; but it poses more questions than it answers: it merely lays out the fundamental practical question that judges must face, ‘how does morality require me to decide cases’? When faced with an unjust law, what is the judge morally supposed to do? Are they to recuse themselves, resign, refuse to apply the law because it is unjust, or somehow lie and say that the law does not require the injustice? Furthermore, the more likely scenarios are far more difficult to understand from the perspective of moral obligation; for example, where a judge is faced with lesser injustice in a democratic society – or is faced with a law that offends against fundamental moral principles of legality – and must decide whether to uphold that infringement of the rule of law or to nullify or mitigate it.

For Shapiro these are not legal questions that his theory is equipped to answer. The practical implications of his legal theory are only within the legal perspective, and they are normatively inert with regard to the ultimate perspective of practical reason and moral

\textsuperscript{165} Shapiro Legality, above n 1, at 185-186; see also 231-232.
\textsuperscript{166} Shapiro Legality, above n 1, at 217.
\textsuperscript{167} Shapiro Legality, above n 1, at 231-232.
\textsuperscript{168} Shapiro Legality, above n 1, at 256.
obligation. In contrast, theories based in Fullerian rule of law anti-positivism answer these ultimate questions naturally, because one’s obligation to law is to a moral ideal of the rule of law, and not just to give effect to the contingent plans of the jurisdiction. For his positivist theory to have the same level of practical significance as that of anti-positivist theories of the rule of law and legality, Shapiro would have to supplement his theory of legality and legal reasoning with a moral theory of judicial obligation.

What, then, does Shapiro say about the moral reasons that apply to a judge deciding any case before them? Unsurprisingly, given his claims of his theory’s Normative Inertness, he refrains from explicitly telling us anything about how judges should morally resolve a situation such as when various moral reasons weigh in different directions. Once one accepts that it is necessary to provide a theory of how judges morally should decide cases, the Planning Theory’s aversion to moral reasoning must be jettisoned. Even if the logic of the law prevents judges from reasoning according to their own account of moral facts in determining what the law is – as this would violate the logic of planning – Shapiro’s affirmation that this legal obligation in itself carries no moral obligations means that the law’s prescriptions do not tell judges or anyone else what they morally ought to do.

7.5.5 Shapiro’s moral theory of legality?

Furthermore, it may be argued that this claim of normative inertness is incoherent with Shapiro’s other main claims. For despite generally focussing exclusively on legal obligations, there are lines of argument in Legality that could form the beginnings of a moral theory of what judges ought to do. Although Shapiro maintains normative inertness in a number of places, he also makes arguments that suggest how he might devise a moral theory of judicial obligation.

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170 In this vein, Dworkin and Finnis have argued that, contrary to its claims of normative inertness, positivism contains its own implicit moral ideal of the rule of law that would tell judges to decide cases in particular ways: Dworkin Law’s Empire, above n 104, at Chapter 4; John Finnis Natural Law and Natural Rights (Clarendon Press, Oxford, 1980) at 358-359. See also Dyzenhaus Hard Cases in Wicked Legal Systems, above n 151. Shapiro notes Dworkin’s argument at Shapiro Legality, above n 1, at 296-298.
The first set of concerns relate to the ability to carry out large-scale social projects. One of the benefits of law is that it makes possible collective social projects that require ‘massively shared agency’, and which could not effectively proceed without legal infrastructure. If judges do not faithfully apply and interpret the law, these social projects may not succeed; the sub-plans created to achieve the overall goal might no longer mesh together properly if judges make their own decisions about how people should act, rather than just applying the Planners’ decisions. If such projects seek morally attractive goals, there would be a moral failure on the part of judges if they did not give effect to the plan faithfully. This argument depends squarely on the attractiveness of the goals being pursued; where the goals are morally unattractive or wicked it is harder to see that interpreters have a moral obligation to play their part in serving such goals. In fact, it seems that morality requires them to ‘throw a spanner in the works’ of these projects by frustrating these plans or mitigating their morally dubious requirements.

Second, there are predictability and rule of law reasons that would weigh in favour of a moral obligation to apply the law. If judges do not hold people responsible to the legal point of view of what they are morally supposed to do, then it would not be a secure basis for planning: “Without a method for assuring trustworthy actors that their participation and forbearance won’t be exploited, this distrust could be corrosive and thwart possibilities of cooperation.” Law’s moral aim of ensuring social cooperation in the circumstances of legality is in part achieved through managing trust so that people can trust each other, laying the basis for social cooperation. So there are rule of law concerns that legally require judges to conform to their legal obligations. As we have seen, Shapiro elaborates on these rule of law reasons for faithful application of legal rules in his discussion of Fuller. Conformity to the rule of law, including the principle that legal officials must apply the enacted rules, allows people to plan their lives based on the plans and to know that officials

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171 Shapiro *Legality*, above n 1, at 143-153.
172 Shapiro *Legality*, above n 1, at 349.
173 Shapiro *Legality*, above n 1, at 337.
174 Shapiro *Legality*, above n 1, at 338. See also Brand-Ballard *Limits of Legality*, above n 169, at 118-119.
175 See Shapiro’s argument to this effect in Scott Shapiro “Judicial Can’t” (2001) 11 Philosophical Issues 530. See also Brand-Ballard *Limits of Legality*, above n 169, at 116-117.
will be constrained to apply those plans to their behaviour, rather than using force in an arbitrary (non-plan-governed) manner. However, given that Shapiro admits that questions of faithful application of the legally required interpretive methodology are likely to be indeterminate in the sense of reasonable arguments being plausible for a number of positions, his theory will often do no better than a Dworkinian account on the certainty aspect of the rule of law.

A third argument is the instrumental benefit claim discussed above. Because the law is supposed to resolve moral problems in the circumstances of legality, if judges failed to apply and interpret the law in accordance with the planning theory, then the law would fail to settle these moral problems in the way intended by the plans of those authorized to plan for the community. The law would be unable to fulfill its function of planning our lives. This includes the plans concerning the level of decision-making discretion that legal interpreters, including judges, are given by the rules of the legal system. Therefore:

[...] the Rule of Law flourishes ... only when legal interpreters possess a great deal of self-discipline. They must ... resist the impulse to take legal interpretation as an invitation to philosophize about the great moral and political questions of their time. Instead, they must suspend moral judgment and show fidelity to the legal point of view.

This statement reads like a full-blooded moral statement of judicial obligation. So it seems incongruous with the denial that legal obligation is the judge’s moral obligation in the quotation above, where Shapiro says that the rule of law requires judges to make the decision that accords with the conceptions of political morality that the rules of the legal system presuppose and embody, even if they think these are morally flawed and could be improved by a different decision. Shapiro’s explicit statement on this is that a judge’s legal obligation does not determine their moral obligation, but the statement above leaves us wondering whether he actually believes this is a moral obligation as well, in some or most legal systems.

176 Shapiro Legality, above n 1, at 395-396.
177 Shapiro Legality, above n 1, at 399.
178 Shapiro Legality, above n 1, at 396.
179 Shapiro Legality, above n 1, at 398.
180 Shapiro Legality, above n 1, at 398.
This confusion is exacerbated by Shapiro’s argument that legal interpreters ought to allow “the authorities to enjoy the powers they have a right to exercise.”\textsuperscript{181} It seems that Shapiro thinks that the interpreters’ legal obligation transforms into a full-blooded moral obligation when the authorities are legitimate and have a right to rule – and only then. If a legal interpreter fails to conform to Shapiro’s account of interpretation, they are frustrating the social planning of those who have a moral right to rule.\textsuperscript{182} Where those with legal authority do have this moral right to rule, it seems that interpreters, including judges, have a moral obligation to the law.

Yet this argument further demonstrates how moral and legal obligation must come apart under Shapiro’s theory, because none of this applies to legal authorities that do not have the moral right to rule, or whose moral authority is limited. In these cases, it is clear that his account of legal obligation simply cannot be an unqualified account of moral obligation. A judge or legal interpreter cannot rely on this account to determine what they ought to do. To provide such practical advice, Shapiro would – according to his positivist viewpoint – have to bite the bullet and make the jump from ‘analytical’ to ‘normative’ jurisprudence, and tell us what the moral obligations of interpreters are. The Planning Theory may have interesting things to say about this. But the moral obligations outlined in \textit{Legality} are hard to discern, because they are strictly speaking off-limits of the main questions of general jurisprudence, and are only seen implicitly in some of Shapiro’s arguments.

These are the moral reasons for conforming to one’s legal obligation in interpreting and applying the law that would likely be part of Shapiro’s account of what judges and other legal interpreters morally ought to do. As may be expected, given that Shapiro purposefully refrains from any more sustained analysis, they do not add up to a coherent and developed view. Shapiro’s promise to provide a deeply practical account of law deals almost exclusively in legal ‘oughts’. The more important practical questions of how we morally ought to engage with the law are dealt with only by implication, not express argument. Because Shapiro emphasizes at so many points that legal obligation is distinct from moral

\textsuperscript{181} Shapiro \textit{Legality}, above n 1, at 399.
\textsuperscript{182} Shapiro \textit{Legality}, above n 1, at 349.
obligation, his theory is highly ambiguous as to how judges ought to decide cases: emphatic
that he has determined the correct methodology of legal interpretation, but unable to address
what judges morally ought to do. Shapiro’s reply is that it was never his intention to analyze
these moral questions – that they are outside the province of legality. This would leave to
others the task of answering the pressing moral/practical questions of jurisprudence. But that
response seems to only strengthen the Fullerian position, because anti-positivists have
always sought to understand law as necessarily answering to moral ideals, and jurisprudence
as the study of the moral implications of the law and the obligation of fidelity to law. A
positivist account of fidelity to law (judges’ moral obligations to law) must be given if
positivism is to be a complete theory of law – a theory that provides a moral account of
law’s significance in our practical reasoning – but it will have to be worked out through a
close engagement with Fullerian accounts of the rule of law; no such full theory is evident in
any of the theorists discussed in this study, although there are some lines of argument that
may be developed into such a theory.

7.6 Choosing between competing views of the nature of law

Shapiro’s lack of adequate engagement with Fuller’s Challenge reflects a general problem
with *Legality*: instead of taking Fuller’s legal theory as a whole, positivists usually just
incorporate Fuller’s principles into their own views on the nature of law, without showing
why their view is better. While it is open to him to present his own account of law as correct,
it is incumbent on him to deal with all major challenges to that view – especially given the
time he spends dealing with Dworkin’s critique. In this way, Shapiro’s characterization of
anti-positivist theories does not adequately address the fact that they advocate a completely
different account of law, which sees law as an aspirational ideal that any existing legal order
must be judged against and be guided by. Fuller’s Challenge to legal positivism is based on
the view that it is in the nature of law that it exists only where the rule of law obtains. That is
the conceptual claim about the nature of law that must be disputed if legal positivists are to
be shown to be correct. It does not suffice for legal positivism to discuss Fuller’s Challenge
from within their framework, because it is that framework that Fuller is rejecting.
Shapiro does provide a clear discussion of his own jurisprudential aim: to explain the fundamental nature of law, meaning its identity or “what it is to be that thing”. 183 His philosophical methodology is conceptual analysis, involving gathering together self-evident truths (“truisms”) about the nature of law held by people who have a good understanding about how legal institutions work in the relevant community. 184 One’s theory of law explains what law is, given that such truisms apply to it. The rest of *Legality* illustrates this conceptual methodology, with theories that can be shown to be inconsistent with truisms being rejected or reformulated until the correct view – the Planning Theory – is arrived at.

Shapiro’s account proceeds on the basis of his view of the nature of law and the truisms it is based on. In itself, this is unremarkable; but it becomes problematic when we remember that other legal philosophers start from very different truisms about the law. While they may share many truisms – law is a kind of social institution, law comprises of norms (standards for the guidance of conduct), law should be morally justifiable – they also disagree on certain important truisms. So while Shapiro provides some evidence that these are truisms within his own legal culture – for example, his historical narrative 185 and his demonstration that legal theorists think in terms of the economy of trust 186 – he does not deal adequately with competing anti-positivist accounts of law’s truisms; for example, those evident in Fuller’s alternative account of law’s nature, as described in earlier chapters. 187

This is one of the key themes of this study: despite their concessions to Fuller’s Challenge, legal positivists still hold a different view of the nature of law than Fuller and other anti-positivists. Since Hart and Raz, positivists have responded to Fuller in ways that have placed the rule of law more centrally in their concepts of law, to the extent that all the recent positivists discussed in the previous two chapters accept a necessary relationship between law and the rule of law. But they still base their position on the Social thesis, which means that when they look at Fuller’s principles and the idea of the rule of law from the context of

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183 Shapiro *Legality*, above n 1, at 8.
185 Shapiro *Legality*, above n 1, at 313-324.
186 Shapiro *Legality*, above n 1, at 340-345.
187 See above Chapter 1 at section 1.3 and Chapter 2 at section 2.3.
their own framework, they see the rule of law in very different ways. This helps to explain the way that positivists have used the derivative approach to deal with Fuller’s Challenge, rather than conceding wholeheartedly to the anti-positivist explanation of the rule of law. The question I will discuss further in Chapter 8 is whether legal positivists have an adequate explanation of their reasons for cleaving to their positivist framework in the Social thesis, and whether the attempt to deal with Fuller’s Challenge within that framework causes problems or tensions that positivists cannot adequately neutralize.

Fuller – along with Dworkin and Finnis – claims that the relevant truisms show that law is a moral ideal. Wherever there is law, there is some kind of legitimacy or moral value that exists due to the law’s necessary conformity to the moral ideal of legality or the rule of law. On this Fullerian account, legal systems that deviate from the principles of the rule of law are in that way less legal than systems that do conform; as Dyzenhaus puts this point:

> Natural law theories do not rule out the possibility of evil legal systems. Rather … they focus on what is wrong with such systems legally speaking. It is true that they might deem some systems that a legal positivist would characterize as legal to be not a legal system at all. But that is because the particular wickedness of these systems results in a dramatic failure to be legal.

From this point of view, law is a moral ideal, and the failure to live up to that ideal impugns the legality of a regime.

It is important to note that Shapiro agrees with Fullerian anti-positivism to some extent concerning what makes law legal. Both Shapiro and Fuller focus on the rule of law as determining whether the law is legal, and whether a failure to be legal has occurred. This is another aspect of law – perhaps a truism. Unlike Dworkin and Finnis, who posit certain substantive moral conditions of legality, Shapiro and Fuller think that identifying what is legally wrong with a regime or legal system is found by evaluating it against the rule of law.

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188 Dworkin *Law’s Empire*, above n 104, at 93; Fuller *The Morality of Law*; Simmonds *Law as a Moral Idea*, above n 151, esp Chapter 4; Allan *Constitutional Justice*, above n 151, esp Chapters 1-3; Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 151, at esp Chapters 7 and 9.

189 Simmonds *Law as a Moral Idea*, above n 151, at 130-143; Dworkin *Law’s Empire*, above n 104, at Chapter 3.

Despite this similarity, differences obviously remain between Shapiro’s account of legality and Fuller’s. One of these is Shapiro’s starting point in the planning theory, compared with Fuller’s foundation in the idea of the rule of law. This leads to the other main difference: their accounts of a judge’s interpretive obligations to uphold the rule of law. For Fuller, one cannot understand legal order without understanding the moral ideal of the rule of law, and therefore one cannot understand what proper legal reasoning is without seeing that reference to the moral ideal of the rule of law must be central to it.¹⁹¹ This view of law is unacceptable to Shapiro, because it is contrary to his “plan positivism”,¹⁹² and the logic of planning. These are just things that Shapiro thinks follow from the network of truisms about the law that determine its nature.¹⁹³ He admits that when confronted with an alternative view and the truisms on which it is based “conceptual analysis seems to provide no way to adjudicate between rival intuitions”, except if it can be shown that one of the rival theories better accommodates our entire network of truisms about the law.¹⁹⁴ If certain things we take to be truisms about the law on further reflection do not fit with all the rest of the truisms we believe exist, then we will have to decide which truism to jettison.¹⁹⁵

The problem for Shapiro is that this jurisprudential methodology does not lead inexorably to preferring legal positivism; for this is the same strategy that Nigel Simmonds recently deployed in Law as a Moral Idea in defence of a Fullerian anti-positivist position.¹⁹⁶ Simmonds’ view is that the “idea of governance by law is a lofty moral aspiration … is a well-established feature of our ordinary pre-theoretical outlook” and that this “aspirational view of law embodied in our settled beliefs represents truth rather than the fruit of error.”¹⁹⁷

The competing visions of law come with their own set of truisms. As Fuller observed in his initial debate with Hart, such differences in viewpoint can seem impossible to resolvable, because “When we reply, ‘But it doesn’t look like that to me,’ the answer comes back,
‘Well, it does to me.’ There the matter has to rest.”\textsuperscript{198} To refute the Fullerian concept of law, Shapiro would have to show why the truisms that suggest that the law is a moral ideal are the product of error, and this would require a far deeper engagement with anti-positivism than provided in \textit{Legality}.

This problem of competing truisms is exemplified in Shapiro’s discussion of evil legal regimes, where he says that it is a truism that evil regimes can have law, and observes that some natural lawyers would say that they cannot.\textsuperscript{199} Here Shapiro is noting that the two basic positions in legal philosophy have fundamentally different understandings of the identity of law. Anti-positivists recognize that under wicked regimes, a social situation that satisfies the positivist concept of law may exist, but they reject the positivist view of this situation as not reflecting our settled understandings about the law because it does not see law as necessarily meeting a moral ideal of legality.

Fullerian anti-positivists therefore engage in a different kind of analysis than Shapiro, because they seek to explain the truism that law is always in some sense legitimate and morally obligatory because of its necessary conformity to a moral ideal of legality. They require, therefore, a full concept of law to articulate both the things that determine whether a proposition of law is true, and an analysis of when true propositions of law can justify coercion.\textsuperscript{200} Such questions are, for Shapiro, beyond the bounds of inquiry into the nature of law and legal interpretation. The puzzle of conceptual impasse remains, for it is not clear how a positivist who sees law as a social institution could argue with or convince an anti-positivist who thinks law is a moral aspiration. It may be that these projects of legal philosophy are so different in aim that they can be reconciled, but in \textit{Legality} Shapiro claims positivism’s superiority over anti-positivism without adequate engagement with the Fullerian perspective on legality.

\begin{footnotesize}
\textsuperscript{198} Lon L Fuller “Positivism and Fidelity to Law–A Reply to Professor Hart” (1957) 71 Harv L Rev 630 at 631.
\textsuperscript{199} Shapiro \textit{Legality}, above n 1, at 391–392.
\textsuperscript{200} Dworkin \textit{Law’s Empire}, above n 104, at 110.
\end{footnotesize}
7.7 Conclusion

Post-Hartian legal positivism – including its account of the rule of law – is developed systematically by Shapiro in *Legality*. While he gives a cursory account of why we should reject Fuller’s wider anti-positivism, Shapiro’s account exemplifies and illustrates further many of the common positions that have been identified in the previous two chapters considering the recent positivist responses to Fuller’s Challenge – the way in which the rule of law is integrated into the positivist framework and concessions made to Fuller’s arguments. Fuller’s principles of the rule of law are accepted as necessary conditions for the existence of law, and are of moral value due to their achievement of beneficial results. Like Marmor, Waldron, and Gardner, Shapiro’s response to Fuller’s Challenge is to isolate and accept its two main elements, and to show how those elements can be incorporated into the framework of legal positivism without capitulating to Fuller’s anti-positivism. Also like Marmor and Gardner, Shapiro thinks this is possible without abandoning legal positivism’s central tenets because the wide No Necessary Connection Separation thesis discussed in Chapter 6 is not among those tenets. Shapiro thus rejects the view noted by Waldron and supported by Kramer, which says that legal positivism rejects all necessary connections between law and morality. Instead, Shapiro’s view tallies with Marmor and Gardner’s arguments for a narrower Separation thesis, focussed on the social character of the criteria of legal validity.

This narrow Separation thesis is consistent with the claim that there is a necessary connection between law and morality due to the moral character of Fuller’s principles. What it rules out is that legal validity necessarily depends on morality, as Fullerian anti-positivism does claim. In fact, Shapiro’s prescribed interpretive methodology for the application and development of the law requires legal officials to focus solely on social facts, rather than morality, in determining how they ought to give effect to the plans that make up the legal system. This is why despite Shapiro’s claims of profound practical implications, his theory does not provide an account of what legal officials, including judges, morally ought to do in deciding cases. Like a number of other legal positivists, Shapiro’s theory of law and the rule

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201 See above Chapter 6 at section 6.6.1.
of law does not provide a theory of judges’ moral obligations, and is in that sense normatively inert.

Shapiro’s account of legal positivism confirms the suggestion in the previous chapter that there is an orthodoxy concerning legal positivism and the rule of law that is forming around the work of Marmor and Gardner. This orthodoxy considers arguments made in more ambiguous form in the work of Hart and Raz and takes clearer positions on them. This allows us to see how the majority of the recent legal positivists discussed in this study respond to Fuller’s Challenge – and also to see the view of legal positivism that they subscribe to. In this way, studying the response to Fuller’s Challenge reveals much about recent legal positivism’s self-conception and understanding of the nature of general jurisprudence – the reflection on the nature of law. Further, the differences between Shapiro and the orthodoxy on one hand, and the various arguments of Kramer, Waldron, and the Fullerian anti-positivists on the other, allow us to use the debate concerning the principles of the rule of law to lay out the other main options in contemporary general jurisprudence. Yet, like Raz, Shapiro uses a moral concept as a central feature of his account of the nature of law, which brings up the question of why he thinks we should reject Fuller’s wider moral theory of law: if it is simply the nature of law, as we understand it, that it has certain moral features, why not say with Fullerians that one of these features is conformity to the ideal of the rule of law. I will discuss these points in detail in the next chapter, which draws conclusions about the coherence of positivist responses to Fuller’s Challenge, and sets out how the debate between Hartian positivists and Fullerian anti-positivists should proceed given the way that positivists now understand the rule of law within their legal theories.
Chapter 8: Conclusion
Fuller’s Challenge and the Self-Understanding of Contemporary Legal Positivism

8.1 Introduction

8.1.1 Explaining the positivist response to Fuller’s Challenge

We have seen that Hart and Raz, in their seminal analyses of Fuller’s Challenge, see fit to respond to Fuller’s Challenge by essentially integrating observations about Fuller’s rule of law principles into their positivist framework, without fully grappling with its anti-positivist setting. In doing so, they recognize that some concessions to Fuller have to be made: Fuller’s principles of the rule of law do constitute features that necessarily must be found in any legal system, to some degree. Further, on one interpretation, they concede in ambiguous fashion that conformity to the rule of law achieves something of moral value. As Waldron’s discussion of Hart has highlighted, in making such arguments Hart and Raz separated out two key elements of Fuller’s Challenge – claims about the moral value of the rule of law, and about the relationship between law and the rule of law – and pushed them through their own theoretical framework. This is the divide and conquer response to Fuller’s Challenge,¹ which produced concessions to Fuller’s claims about the rule of law that Hart and Raz understood as both true and not inconsistent with their legal positivism. Despite their ambiguity, Hart and Raz accept that Fuller’s principles have to be addressed and incorporated into legal positivism’s analysis of the law. But they do not provide any further reflection on the reasons why their positivist concept of law required – and allowed – them to make those concessions, or why they rejected the rest of Fuller’s anti-positivist theory.

In the last three chapters, I have discussed how recent legal positivist analyses of the rule of law have developed and clarified the reply to Fuller’s Challenge found in Hart and Raz’s

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early responses, so that we now can see which of the possible strands of argument set out in ambiguous terms in the earlier critique of Fuller that each theorist actually supports. In this concluding chapter, I argue that we should understand this part of the development of recent legal positivism as the story of different attempts to move beyond Hart and Raz’s responses to Fuller, and towards further conceding that the rule of law is a central aspect of the concept of law, without self-consciously jettisoning the core claims of positivism and capitulating to anti-positivism. Recent positivists each do so by making some concession to Fuller’s claim that the rule of law is an aspect of the legality of law – that it captures a necessary aspect of the particular kind of institutionalized normative system that we understand as law.

In this way, Fuller’s Challenge and its renewal in recent Fullerian anti-positivism have now played a similar role in the development of legal positivism as Dworkin’s did in the last quarter of the 20th century: Fuller’s Challenge has forced legal positivists to reflect on the core tenets of the Hartian tradition’s understanding of law and to choose whether, where, and how, to make concessions to Fuller’s account of the rule of law. In this chapter, I draw together the analysis and conclusions from the previous chapters to support my main thesis in this study, which is that positivists’ concessions to Fuller’s Challenge have not been accompanied by an adequate analysis of how these concessions fit within the positivist tradition, and of why Fuller’s anti-positivism should be rejected. My view, set out below, is that legal positivist responses to Fuller are constrained by their particular accounts of the Social and Separability theses, but that this is usually not clearly explained. Understanding why positivists take these positions allows us to see more clearly the causes of the problems and tensions that Fullerian anti-positivists still perceive in the positivist analysis of the rule of law.

8.1.2 Shifting the ground of the debate

I will also argue that the grounds for the debate have shifted from the long-standing controversies over the rule of law’s moral value to more fundamental questions about the nature of law. This is because, as I argue in section 8.2 below, recent positivists have
accepted Fuller’s moral claims for the rule of law, and do not consider them to be contrary to any central tenet of legal positivism.\(^2\)

Instead of focussing on the Moral Value question, the main continuing controversy between recent legal positivists and Fullerian anti-positivists, and within legal positivism, is how Fuller’s Challenge relates to the positivist Social thesis. I discuss how best to make sense of the various positivist positions in sections 8.3 through 8.5. I argue that legal positivists make a distinction between the Social thesis at two levels – (i) the level of legal systems, and (ii) the level of the validity of legal norms – and that this explains their responses to Fuller, including their divide and conquer strategy and what I call the ‘Derivative’ approach to the rule of law held by most legal positivists, as discussed in more detail in Chapter 6.\(^3\)

In section 8.5 I argue that Coleman’s recent essay on the architecture of jurisprudence explains and exemplifies the ‘two views of the Social thesis’ approach, but I also show the perceived deficiencies and tensions that the system-validity distinction creates from the Fullerian perspective. I argue further that in general Coleman’s analysis provides the foundations for an adequate explanation of the positivist response to Fuller’s Challenge, and also makes clear the issues on which positivists and anti-positivists should focus on in debating the coherence and cogency of the positivist account of law and the rule of law. Finally, in section 8.6, I claim that positivists have not accepted Fuller’s anti-positivist account of legal validity and legal obligation. However, this does not mean that they reject Fuller’s analysis of the moral obligations of fidelity to law – in fact, as I argue, legal positivists seem to be amenable to much of the Fullerian view, so long as it is understood as disclosing judges’ moral obligations, rather than their legal obligations. This is another example of the divide and conquer strategy that detaches or ‘disintegrates’ Fuller’s Challenge to legal positivism.

\(^2\) As seen in Chapter 5, even Kramer accepts that conformity to the rule of law is generally of moral value. See above at 5.3.

\(^3\) See Chapter 6 at section 6.4.1.
8.2 Agreement on Moral Value

The self-understanding of contemporary recent positivism allows the debate on the rule of law to shift away from questions about its moral value, because they have been resolved in Fuller’s favour. As seen in Chapter 5, recent positivists have clearly supported Fuller’s claim that conformity to these principles is of moral value, because the relative certainty about one’s obligations that the rule of law creates means that the law contributes to and respects human dignity and autonomy. While recent legal positivists also accept Hart and Raz’s arguments about the rule of law’s instrumental value, they do not think this negates the moral value that they identify as being served by conformity to its principles. Even Kramer, who uses the instrumental argument to show that less conformity to Fuller’s principles may be morally required in some situations, accepts that generally such conformity is of moral value. This is a major concession to Fuller, at least from the ambiguous starting point found in Hart and Raz.

We should note that this may seem to be contrary to the positivist Separability or Separation thesis in its No Necessary Connection’ form, as discussed in Chapter 6. This is because there are two necessary connections between law and the rule of law that all positivists accept. First, positivists accept the instrumental argument, which says that the rule of law principles are conditions of law’s effectiveness in guiding conduct. Second, they accept that Fuller’s principles are existence conditions for law, in the sense that without a certain minimal level of conformity to Fuller’s principles, one cannot have the kind of system of general norms regulating people’s conduct that accords with our conception of a legal system. Put differently, Fuller’s eight principles are “fundamental conditions … for the existence of any legal system”. So while Hart and Raz’s responses to Fuller are ambiguous,
most positivists working in the Hartian tradition today accept Fuller’s two main arguments concerning the principles of the rule of law.

Taken together, these two points mean that there is a necessary connection between law and morality, because the rule of law principles must be complied with if law is to exist, and such compliance is of moral value. Waldron and Simmonds present the debate between positivists and Fullerian anti-positivists as revolving around this point, because they believe that it is a central tenet of legal positivism that there are no necessary connections between law and morality.\(^\text{10}\)

However, of all the theorists in this study only Kramer supports this No Necessary Connection Separability thesis.\(^\text{11}\) Hart is again the most ambiguous of the positivists on this point – as can be seen in the difference between those who disagree about whether he holds the No Necessary Connection thesis.\(^\text{12}\) But, rather than supporting the No Necessary Connection thesis, the other positivists discussed in this study generally identify the Separability thesis (the idea that law is separable from morality) with whatever separation of law and morality is entailed by the particular understanding of the social nature of law they hold. Positivists claim that they need not deny that law always has some moral value; all they claim is that this moral value must be consistent with the Social thesis that I argue drives the positivist responses to Fuller’s Challenge: the view that law is a social institution, the existence and content of which is determined by social facts.

Raz exemplifies this perspective: in all his major writings he has accepted the possibility that there are necessary connections between law and morality, thereby claiming that the No Necessary Connection Separability thesis is not a core tenet of legal positivism. Although legal theory must begin from “the primacy of the social”,\(^\text{13}\) legal systems may have

\(^{10}\) See above Chapter 5 at sections 6.1 and 6.6.1.
\(^{11}\) See above Chapter 5 at section 5.3.
\(^{12}\) See below in this section.
\(^{13}\) Joseph Raz *The Authority of Law* (2 ed, Oxford University Press, Oxford, 2009) at 103 and 104.
necessary moral features deriving from the (non-moral) properties that identify them as social institutions.\textsuperscript{14} Thus:\textsuperscript{15}

Even if the law is essentially moral – the cautious positivist would argue – it is clear that establishing the moral merit of a law is a different process relying on different considerations, from establishing its existence as a social fact. To the positivist the identification of the law … is a matter of social fact. The question of its value is a further and separate question. … [O]ne may know what the law is without knowing if it is justified[.]

On this account, neither the Fullerian claim about the rule of law’s moral value (the Moral Value thesis), nor the combination of that thesis with an affirmative answer to the Relationship question, can be said to be contrary to the positivist Social and Separability theses. Positivism has – bar Kramer – abandoned Hart’s reluctance to accept that the law has any necessary moral value.

It is not clear whether this should be regarded as a concession to Fuller’s Challenge that constitutes the abandonment of legal positivism, or as merely a better statement of the narrower Separability thesis that has always been central to legal positivism. This depends on how one conceives of the legal positivist tradition, for example whether we begin with Hobbes, Bentham, Austin, or Hart;\textsuperscript{16} it also depends on whether one reads Hart as holding the wider Separability thesis.\textsuperscript{17} What is clear is that the battleground between Fullerian anti-positivism and legal positivism has thereby moved away from disputes about the Moral Value question. As compared with the agreement on that question, recent positivist answers to the Relationship question have diverged markedly, with theorists accepting Fuller’s assertions of a necessary relationship between law and his rule of law principles in very

\textsuperscript{14} Raz \textit{The Authority of Law}, above n 13, at 104: “the assumption of the primacy of the social … does not mean that legal systems do not also have other characteristic features. They may, for example, have certain moral features. It may be a necessary truth that all legal systems conform to some moral values and that a system which violates those values cannot be a legal system. My claim is merely that if this is indeed the case then these necessary moral features of law are derivative characteristicsof law. If all legal systems necessarily possess certain moral characteristics they possess them as a result of the fact that they have other properties which are necessary for them to fulfil their unique social role.”

\textsuperscript{15} Raz \textit{The Authority of Law}, above n 13, at 158.

\textsuperscript{16} Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at Chapter 8.

\textsuperscript{17} Compare Matthew Kramer “On the Separability of Law and Morality” (2004) 17 Canadian Journal of Law and Jurisprudence 315, with Gardner and Marmor, who deny that this thesis is a core claim of any contemporary legal positivist, including Hart: see Chapter 5 above at section 5.2.2 and Chapter 6 at 6.6.1.
different ways. As I will argue in the next three sections, the positivist responses to Fuller should be understood as premised on their allegiance to the Social thesis.

8.3 The Relationship question and the Social thesis

One of Fuller’s prominent claims in his debate with Hart is that his rule of law principles are part of our idea of law or legal order, so that derogation from them means a normative system is less legal and that, at a certain level, a system should not be seen as law at all.\(^{18}\) Put differently, Fuller claims that the rule of law tells us about the law’s legality, because the rule of law is an existence condition for law. Hart and Raz respond to Fuller’s claim in a dismissive way: they do not accept that substantial conformity to the rule of law is a necessary condition for the existence of a legal system.\(^{19}\) There is a difference between governance through law and legal governance that conforms to the rule of law.

However, Hart and Raz’s positions contain problems and tensions caused by the claims they make in attempting to answer Fuller’s Challenge and to account for the rule of law within the positivist framework of their theories. For, as noted in the previous section, positivists either claim that a minimal conformity to Fuller’s principles is necessary for law to exist (Hart, Raz, Marmor),\(^{20}\) or else move closer to Fuller by acknowledging that significant conformity is needed (Kramer).\(^{21}\) Both of these strategies attempt to ‘integrate’ Fuller’s principles into the positivist framework. In contrast, some recent legal positivists have completely embraced Fuller’s approach to the Relationship question (Waldron and Gardner).\(^{22}\) This is the ‘acceptance’ of, or concession to, Fuller’s concept of legality. But tensions arise in both the integration and acceptance approaches to Fuller’s Challenge, because once one accepts that the rule of law is necessary for the law to exist, or that it is part of the very idea of law, it is difficult to make such acknowledgements consistent with the legal positivist Social thesis – or, more accurately, various aspects or versions of the Social thesis – as I will discuss in this section.

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\(^{18}\) See above Chapter 1 at section 1.3 and Chapter 2 at section 2.3.

\(^{19}\) See above Chapter 3 at section 3.5 and Chapter 4 at section 4.3.

\(^{20}\) See above Chapter 3 at section 3.5, Chapter 4 at section 4.3, and Chapter 6 at section 6.4.2.

\(^{21}\) See above Chapter 6 at 6.4.3.

\(^{22}\) See above Chapter 6 at sections 6.3 and 6.5.
8.3.1 The Positivist response to Fuller’s Challenge

Legal positivists naturally read Fuller’s Challenge through the lens of their own theory. They understand him as making the traditional natural law claim that there is some moral aspect of the law that legal positivism can neither comprehend nor explain.23 So their answer to the Relationship question is shaped by their apprehension that Fuller is positing not only a relationship between law and the rule of law, but between law and a moral ideal of the rule of law. However, one might also state Fuller’s Challenge as the simple contention that the social institution we understand as law is one that substantially conforms to the rule of law principles, whether or not we consider them a moral ideal. We should, therefore, not only set out legal positivists’ reasons for rejecting the rule of law as a moral ideal, but also for rejecting substantial conformity as part of our idea of legal order that we apply to social institutions.

Hart and Raz’s response is to concede only a connection between law and the rule of law in the two forms noted above – conformity to the rule of law is necessary for law’s effectiveness, and minimal conformity to Fuller’s principles is necessary for a system of rules to exist. They do not accept that this demonstrates that Fuller’s Challenge is well founded, because they still deny that Fuller is right that law by its nature substantially lives up to rule of law principles – whether these are considered a moral ideal or not – and that determining legal validity is in part a matter of making norms better live up to the rule of law. In my terms, they have integrated Fuller’s principles into their own understanding of law, but have not accepted his account of law.

The question is why Hart and Raz think they can take this position. The confusion concerning their positions on the relationship question can be avoided by seeing that they understand both the question and their own answers according to their own positivist framework, including their versions of the Social thesis. Hart and Raz respond by integrating the claim that there is a necessary relationship between law and the rule of law, but not

through an acceptance of Fuller’s characterization the law as inseparable from a moral ideal of the rule of law, or even by accepting that the rule of law is a non-moral conceptual precondition for law. Instead, it is Hart and Raz’s allegiance to the Social thesis (which I will discuss further below) that drives both their analysis of the necessary relationships between law and the rule of law and their objections to Fuller’s account of that relationship. They do not think that the law is a social institution that necessarily lives up to the rule of law to a substantial extent.

Yet although Hart and Raz essentially agree on this approach, recent legal positivism in the Hartian tradition has fractured, with Waldron and Gardner each accepting Fuller’s claim about the relationship between law and the rule of law conceived as a moral ideal. It is in relation to these positivists that we must question whether positivism has begun to accept Fuller’s Challenge in its complete form. To properly understand how and why each of the Hartian legal positivists accepts or rejects Fuller’s account of the relationship between law and the rule of law, we must comprehend their self-understanding of legal positivism and its central Social thesis.

### 8.3.2 The Social thesis

The legal positivist Social thesis has many forms, but the core idea is that ultimately the existence and content of law is a matter of social fact concerning what humans do in society. Julie Dickson’s recent survey essay on legal positivism argues that what unites contemporary legal positivists is the view that law has a “fundamentally social nature: it is a human artefact that has been socially constructed”, and more specifically, that “the existence and content of valid legal norms is ultimately to be determined by reference to social sources, and not by reference to the merits of the norms in question”.

As Raz puts it, “[i]n the most general terms the positivist social thesis is that what is law and what is not is a matter of social fact.”

Law is simply a particular kind of social institution, and the content

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25 Raz The Authority of Law, above n 13, at 38.
of valid legal norms is not ultimately determined by morality. It is important to see that this claim is not just that law is a social institution, which anti-positivists and natural lawyers also recognize as a truism about law. Anti-positivists simply add that law, properly understood, is a social institution that by its nature lives up to certain moral goals. So there must be some further distinctive claim about law being a social institution that the Social thesis makes which unites legal positivism and distinguishes it from anti-positivism.

In fact, as Raz recognizes, his general statement of the Social thesis was “crude” and does not reflect the variety of elaborations and refinements of that position. There are two distinctive claims that legal positivists make about the social nature of law, and they must be distinguished to properly understand the various claims that can fall under the label ‘the Social thesis’. In Raz’s own analysis, we see that at the level of legal systems as a whole, “law is a social institution of a certain type”; at the level of legally valid norms, “the existence and content of every law is fully determined by social sources”. These different aspects of the Social thesis can also be seen clearly in the arguments of the prominent positivist Jules Coleman, who has made this distinction an important part of his account of contemporary jurisprudence. In The Practice of Principle he states that “no claim is more central to legal positivism” than the Social thesis: “the grounds of the criteria of legality in every community that has law are a matter of social fact. … [P]ositivists are committed to the view that legality is ultimately a matter of fact, not value.” The legality of norms is a social fact because “the criteria of legality in a particular community are conventional”, depending “on their being practiced” by certain members of the community. This is what I

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26 For a brief discussion of the difference between exclusive and inclusive legal positivism, see below at 8.4.1.
27 Raz The Authority of Law, above n 13, at 38.
28 Raz The Authority of Law, above n 13, at 43.
29 Raz The Authority of Law, above n 13, at 46.
31 Coleman The Practice of Principle, above n 30, at 75.
33 Coleman The Practice of Principle, above n 30, at 153.
call the ‘validity Social thesis’, concerning the social foundations of the criteria of legal validity: their content is ultimately determined by reference to social facts, not by morality.\textsuperscript{34}

The other version of the Social thesis that Coleman identifies applies at what I call the systemic\textsuperscript{35} or system level. Coleman argues against the natural law view that “among the necessary or essential features of law are certain properties that necessarily orient the analysis of the concept towards principles of political morality.”\textsuperscript{36} Legal philosophy is not a political or evaluative argument, showing the ideal of law in its best moral light;\textsuperscript{37} it is the study of a social institution. This does not mean that law cannot be shown to be of some necessary moral value – it just means that any such moral value must be identified by reference to the essential features of law that constitute it as a social institution, the nature of which are not determined by their moral value.\textsuperscript{38} As Raz puts it, “[t]he claim that what is law and what is not is purely a matter of fact still leaves it an open question whether or not those facts by which we identify the law or determine its existence do or do not endow it with moral merit.”\textsuperscript{39} The point is that even if there is some necessary moral merit in any legal system, this does not controvert the view that law is simply a particular kind of social institution that is not itself defined, even in part, by a moral ideal.

Thus, in trying to understand the Social thesis as the central tenet of legal positivism, we should distinguish between the validity Social thesis – ‘the legal validity of norms in a particular legal system are a matter of social fact’\textsuperscript{40} – and the systemic Social thesis – ‘the nature of law is not determined by morality’. I will argue in the following section that the

\textsuperscript{34} Inclusive positivists affirm this view, because they say although morality may determine legal content, that is a contingent fact about the social facts constituting the criteria of legality in the particular society.

\textsuperscript{35} Joseph Raz \textit{Between Authority and Interpretation} (Oxford University Press, Oxford, 2010) at 175-176.

\textsuperscript{36} Coleman \textit{The Practice of Principle}, above n 30, at 179 and 186. We will see that Coleman has changed his view on the system-level Social thesis in recent work.


\textsuperscript{38} See below at section 8.2.

\textsuperscript{39} Raz \textit{The Authority of Law}, above n 14, at 38-39.

\textsuperscript{40} This statement glosses over the difference between (i) exclusive legal positivist positions that say for conceptual reasons that the content of law cannot be determined by morality, and (ii) inclusive legal positivist positions that say that the law can be determined by morality, but whether it is or not is determined by social facts about the criteria for validity within the particular legal system. I discuss these distinctions in more detail below at section 8.4.1.
validity Social thesis is the core claim that unites all legal positivists discussed in this study, because Fuller’s Challenge has revealed major differences within this tradition with respect to the systemic Social thesis. Furthermore, Fuller’s Challenge, and its continued existence in the work of Fullerian anti-positivists, reveals tensions between (i) positivists’ acceptance of the relationship between law and the rule of law at the system level and (ii) their rejection of the rule of law as a determinant of legal content at the validity level, as I will discuss below. For once the distinction between the systemic and validity Social theses is made clear, we can see that legal positivists do not provide a satisfactory analysis of how they can detach their accounts of law at each of these levels, in the face of Fuller’s Challenge to see law as answering to an ideal of legality/the rule of law that operates across both levels.

8.3.3 Complications in the Social thesis

Some Hartian legal positivists discussed in this study, namely Hart, Marmor, and Kramer, evidently accept both versions of the Social thesis. They hold both the systemic Social thesis – legal systems are constituted by social facts, not moral ideals – and the validity Social thesis that the content of the law is not, or at least not necessarily, determined by morality. However, Fuller’s Challenge has caused fault-lines to open in legal positivism as various theorists begin to concede that the rule of law is an existence condition for law at the system level.

These fault lines must be understood against the background of other deviations from the systemic Social thesis, which begin with various positivist theorists’ claims that the concept of law includes moral ideas or concepts. For example, although Raz and Shapiro both affirm the two levels of the Social thesis, they complicate things at the system level by claiming that the law necessarily makes moral claims to authority (Raz), and that it necessarily has

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41 They would agree with Marmor’s running together of both of the levels of the Social thesis in his statement that the “main insight of legal positivism has been labelled the social thesis. According to the social thesis, law is a social phenomenon, it is a social institution, and therefore, what the law is, is basically a matter of social facts.” Andrei Marmor “Legal Positivism: Still Descriptive and Morally Neutral” (2006) 26 Oxford Journal of Legal Studies 683–704 at 686.
42 Marmor “Legal Positivism”, above n 41, at 687.
43 Marmor “Legal Positivism”, above n 41, 689.
44 See above Chapter 4 at section 4.4.
the aim of remedying moral problems (Shapiro).\footnote{See above Chapter 7 at section 7.2.} If a legal system fails to make these claims, or to have this moral aim, it is not a legal system. This may seem inconsistent with the system-level Social thesis, which states that the law is simply a particular kind of social institution that is not identified by its living up to any particular moral value or ideal. But both Raz and Shapiro claim that their views are consistent with the Social thesis because these moral aims or claims can exist without the legal systems actually living up to those aims or claims or because the relevant aims or claims in the particular legal system may be morally repugnant. Put differently, they argue that the avowed moral posture of legal systems might not be fulfilled in practice: a legal system may not have moral authority, and it may not satisfy its moral aims, but it will still be a legal system nonetheless.

Raz and Shapiro’s inclusion of these necessary moral elements in their concept of law, which seems to go beyond the systemic Social thesis, causes a tension in their positivism that is heightened by their responses to Fuller’s Challenge. The moral aspects of the nature of law that they introduce may not, on their view, mean that any legal system must actually live up to those moral claims/aims; but their decision to include such moral elements in their concepts of law is exactly the kind of shift in theoretical perspective that Fuller is attempting to get positivists to make with respect to the rule of law.

This is the tension: if Raz and Shapiro are willing to go beyond the systemic Social thesis – by reference to authority or its moral aim – why do they reject the Fullerian approach to the relationship between law and the rule of law and only answer that question according to their own positivist concept, just like Hart, Kramer, and Marmor do? Once one goes beyond the simple ‘law as an institutionalized normative system’ view of law, it seems incongruent not to include substantial conformity to the rule of law as one of the other essential features of any legal system, whether or not one accepts that it is a moral ideal. In other words, why do Raz and Shapiro refrain from taking the more wholehearted plunge into the Fullerian approach to the relationship question and accept Fuller’s claims at the level of legal systems, as Waldron and Gardner do? We can answer these questions satisfactorily only after
examining why the positivists generally give the derivative answer to the Relationship question.

Remember that all legal positivists discussed in this study are forced to concede that Fuller’s principles of the rule of law must be at least minimally complied with if a legal system is to exist, and must be significantly fulfilled if the legal system is to be effective in guiding conduct. This may on first glance seem to contradict the austere systemic or system-level Social thesis that claims that the law is a particular social institution that need not live up to a moral ideal. Hasn’t legal positivism at this point capitulated to Fullerian anti-positivism due to its acceptance of the rule of law as a necessary aspect of the existence of law, so that jurisprudence should proceed according to the Fullerian framework rather than that announced by Hart?

There are two reasons why this is an inaccurate characterization, at least from the perspective of the positivist self-understanding. The first reason, discussed in this section, is that the majority of positivists discussed in this study do not think their acceptance of necessary connections between law and the rule of law requires them to accept Fuller’s full anti-positivist account of that relationship. They hold to the distinction between the derivative and conceptual approaches to the Relationship question. Accepting the Fullerian account of the relationship between law and the rule of law at the level of legal systems is unique to Waldron and Gardner. Yet, as I will discuss in a later section, even Waldron and Gardner, who accept Fuller’s account of the relationship question at the level of legal systems, do not accept Fuller’s anti-positivist account of legal validity. This is the second reason that positivism does not collapse into Fullerian anti-positivism, on its own understanding of the rule of law.

8.3.4 The derivative approach to the rule of law

Most positivists discussed in this study hold the derivative approach to the relationship between law and the rule of law that is based on the systemic Social thesis. Hart, Raz, Kramer, Marmor, and Shapiro all respond to Fuller’s Challenge by beginning with their
view of law as set out in the Social thesis, and then seeing whether any necessary connection with the rule of law can be derived from that concept of law.

I discussed the derivative approach briefly at 6.4 above. According to that view, the question ‘is there any connection between law and the rule of law?’ should be answered on the basis of the positivist concept of law as a particular mode of social organization, one that does not make substantial conformity to the rule of law a conceptual aspect of law – an intrinsic part of the nature of law. Positivists understand that Fuller’s analysis was meant to show how the positivist concept of law must rely on his principles of the rule of law, but they also see that his challenge was for positivists to realise that law is a moral ideal. This is what positivists generally reject – the claim that they must abandon the systemic Social thesis and embrace anti-positivism because there is a necessary relationship between law and substantial conformity to Fuller’s principles that constitutes the rule of law ideal. Positivists accept that there is a necessary relationship between law and the rule of law principles, but that is only because those principles have some connection with the existence and effectiveness of law as understood from the perspective of Hartian positivism – and not because law necessarily lives up to the full idea of the rule of law.

Instead of accepting Fuller’s Challenge, Hartian positivists accept only those of Fuller’s claims that can be derived from their own concepts of law. For example, from the fact that law is a system of rules, or that its function is to guide human conduct, we can say that Fuller’s principles must be manifested to some degree if these features of law are to exist. Conformity to a moral ideal – or the social fact – of the rule of law principles does not determine the nature and identity of law; it derives from a necessary element of the social institution we have already identified as law, without including the rule of law within that concept. As discussed in section 6.5, Raz’s analysis of natural law and his main essay on the rule of law show how this derivative approach works in relation to Fuller’s principles. This characterization of the difference has been identified by Fullerian anti-positivists:
Dyzenhaus argues that the difference between the positivist and Fullerian accounts of the rule of law is that:

The positivists … seem to proceed by giving an answer to the question ‘What is law?’ and then reading off their account of the rule of law from that answer. Fuller, in contrast, proceeds by asking what is legality or the rule of law, because for him the question of what counts as a particular law can only be answered if one understands first what is in involved in the qualities we attribute to legality.

For Fuller, the rule of law marks out an ideal of legality that operates at the system level by saying that the nature of law is determined “by reference to an understanding of what it takes to rule through law, ie what a commitment to legality entails”. But for most legal positivists, the rule of law is something that derives from their account of what is law as a particular kind of social institution — an account that excludes any necessary reference to substantial conformity to the rule of law.

For example, Kramer and Marmor stay close to Raz’s articulation of the derivative approach. They regard Fuller’s Challenge as a claim that law is a moral ideal, and they each deny this. But from the conceptual position that governance by law is about guiding human conduct by norms, we can derive minimal conformity to the rule of law principles. Subjecting human conduct to the governance of rules simply cannot happen if there is a failure to respect one or more of Fuller’s principles. This means that the rule of law specifies a set of requirements that are “conceptually derivable preconditions” for law to exist. A legal system must conform to the rule of law principles at least to the level that allows “the minimally effective guidance of conduct”. Kramer and Marmor see that position as consistent with their positivism because their account is derived from the view that law is simply a particular kind of social institution. The conformity to the rule of law necessary for a legal system to exist is not determined by such conformity being an independent conceptual feature of law, but only by the requirements for governance by rules to exist.

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46 Dyzenhaus Hard Cases in Wicked Legal Systems, above n 1, at 4.
47 Dyzenhaus Hard Cases in Wicked Legal Systems, above n 1, at 4.
48 See generally Chapter 6.
49 See above Chapter 6, and particularly section 6.4.
50 Kramer In Defense of Legal Positivism, above n 23, at 53.
51 Kramer Objectivity and the Rule of Law, above n 9, at 132
Shapiro essentially follows Raz’s derivative lead, but substitutes his planning-based variant of exclusive legal positivism as the theory of law into which Fuller’s insights must be integrated.\(^{52}\) Shapiro dismisses Fuller’s assertion of a necessary connection between the nature of law and a moral ideal of the rule of law.\(^{53}\) He denies that Fuller’s principles are “moral principles whose satisfaction is necessary for law to exist”.\(^{54}\) For, just like Raz, Shapiro views Fuller’s principles as things that must be in place if the basic building blocks of law are to exist.\(^{55}\) Fuller’s principles should not, therefore, be understood as constituting a moral ideal that is part of the concept of law, but instead as requirements that are derivable from the idea of legality as planning.\(^{56}\)

As between each of these derivative approaches, there are only minor differences. One is that Hart, Raz, and Marmor seem to hold a much lower threshold of conformity to the rule of law principles for law to exist than Kramer and Shapiro. This makes their account of the Relationship question much less of a concession to Fuller: they think that the level of conformity to Fuller’s principles is far less than would be required if we would be able to say that the ideal of the rule of law has been complied with. That was Raz’s main argument on this point in his famous essay,\(^{57}\) whereas for Kramer and Shapiro the derivative relationship with the rule of law requires a much more substantial conformity to Fuller’s principles for the law to be the kind of social institution – of human governance, or of planning – that it is. But again, this is not because law is a moral idea, or because it otherwise must conform to the rule of law as part of the concept of law; substantial conformity is only necessary for governance by rules to exist. While this means, for all positivists bar Kramer, that there is something of moral value in any legal system secured by this necessary conformity to the rule of law principles, this moral value derives from the social requirements of governance by law, not from the law being considered a social institution that lives up to a moral ideal – a point I expand upon below.

\(^{52}\) See the discussion above Chapter 7 in sections 7.2 and 7.3; Shapiro *Legality*, above n 23, at 392–396.

\(^{53}\) Shapiro *Legality*, above n 23, at 392.

\(^{54}\) Shapiro *Legality*, above n 23, at 394.

\(^{55}\) Shapiro *Legality*, above n 23, at 394.

\(^{56}\) Shapiro *Legality*, above n 23, at 394.

\(^{57}\) See above Chapter 4 at section 4.3.3.
8.3.5 *The significance of the derivative approach?*

Understanding the difference between the legal positivist and Fullerian anti-positivist accounts of the relationship between law and the rule of law is necessary if one is to understand the debate as it presently stands. If we just asked whether these theorists recognize a necessary connection between the law and the rule of law, we would get a resounding ‘yes’ from each of them. It would seem as if the line between positivism and anti-positivism has been erased, perhaps in a way that represents the positivists capitulating to Fuller’s anti-positivism. But once we see that the derivative positivist approach is very different from Fuller’s, the dividing line must be maintained. While Hartian positivists have accepted what they take as Fuller’s two main claims about the rule of law, they have not (bar Waldron and Gardner) accepted his challenge to understand law as a moral ideal. Law is a social institution that must live up to the principles of the rule of law to some extent, and the rule of law is a moral ideal, this does not mean that law should be seen as a social institution that conforms to a moral ideal. Put differently, while they accept that Fuller’s principles have a derivative relationship with the existence and effectiveness of law, and that they are of moral value, positivists do not take up Fuller’s Challenge to understand law as answering more substantially to the rule of law, either as a moral ideal or a non-moral conceptual feature of the nature of law.

Comprehending this is not simply useful for mapping the range of views on the nature of law in contemporary legal philosophy; it also has important implications for practical questions of legal validity. Fullerian anti-positivists argue that the view that law is a moral ideal or otherwise necessarily substantially conforms to the rule of law constitutes not only the rejection of the system-level Social thesis, but also the rejection of the validity Social thesis. This is because, as noted in section 6.2 above, the anti-positivist argues that systemic claims about law entail conclusions about legal validity and interpretive methodology. As we have seen, especially with Shapiro’s arguments in Chapter 7, legal positivists often agree. Our conception of law at the system level will, on these accounts, lead to a consistent view of the content of valid law.
The choice between the positivist derivative approach and the Fullerian challenge’s anti-positivist approach thus has an effect on the content of valid law – on our legal obligations. If the connection is derivative and the rule of law is just a set of requirements for rules’ existence, or principles of law’s effectiveness, it does not seem to follow that those requirements are necessary determinants of legal validity or factors in legal interpretation. For those requirements are merely derivative features of the social institution we understand as law, rather than part of what determines legal validity within legal systems. In contrast, if the rule of law tells us whether and to what extent a system of rules is legal, it seems to follow that legal obligation is to interpret the rules that one finds so as to make them more legal – to push them towards the ideal of the rule of law. It is no surprise that legal positivists and Fullerian anti-positivists generally split not only over the derivative approach, but over the relationship of the rule of law to legal validity.

8.3.6 Moving away from the derivative approach?

But before I consider this in further detail, I will contrast the derivative approach with that of the positivists who reject the systemic Social thesis and who wholly embrace Fuller’s approach to the relationship between law and the rule of law – understood as a moral ideal – at the system level.

We saw in Chapter 6 that contrary to the above derivative views of the relationship between law and the rule of law, Waldron has taken up the methodology of the Fullerian anti-positivists most markedly. At the system level, he argues that law aspires to the ideal of the rule of law. The idea of law is “suffused with normative understanding”58 because law can only be understood as an “importantly distinct” kind of governance by reference to the unique goals and moral value that law secures.59 So in contrast to Raz, Waldron thinks that when we identify a particular social institution of governance as legal, we make use of a

concept of law that includes significant conformity to the rule of law. This is why Waldron thinks that “we cannot grasp the concept of law without at the same time understanding the values comprised in the Rule of Law”. This is the Fullerian view of law at the system level.

Gardner takes a similar line to Waldron, arguing that the central case of law lives up to the ideal of the rule of law. In this sense, Gardner thinks the legality of a legal system – its claim to be fully legal – depends on its conformity to Fuller’s principles. One does not fully understand law unless one sees that it ought to live up to the central case of law – that it has a “built-in aspiration of legality”. Like the Fullerian anti-positivists, he and Waldron insist that we should not conceive of regimes that do not substantially live up to the rule of law as legal systems – this is the argument against ‘casual positivism’ in Waldron’s terms. However, this does not mean that legal systems that violate the rule of law significantly are not legal systems at all; they are merely not legal in the core sense of the idea of law. Gardner may seem to be sitting on the fence here, and his approach depends on his view that there are two senses of ‘legality’, one that refers to the idea of an institutionalized normative system and the other that refers to the ideal of the rule of law. This allows him to say that systems that breach the rule of law are still legal on the first sense of legality, while they are not legal on the second sense. But from another perspective, Gardner’s position may be said to be a lesser concession to Fuller’s Challenge than it initially seems. For, as I will show below, his two concept approach allows him to detach his account of legal content from the idea of the rule of law. I will also argue that, perhaps more surprisingly given his lack of

60 See Chapter 6 at section 6.3.
62 See Chapter 6 at section 6.5. Raz Between Authority and Interpretation, above n 35, at 103. “Whether the law of any political community has value depends on its content, and the circumstances of the community. I am neither asserting nor denying that just because they are law all legal systems have some value. That question cannot be addressed here. What is clear is that any legal system can fail to live up to the ideal, and in as much as it falls short of the ideal it lacks value which it should have. To understand the nature of law is to understand, among other things, the ideal which the law should live up to, and also to understand that it can fail to live up to that ideal.”
63 See Chapter 6 at section 6.5.
such a distinction between different meanings of legality, Waldron too detaches his account of legal validity from his system-level account of the rule of law.

It is therefore not clear that any of the recent positivists make anything like a full concession to Fuller’s Challenge, which also operates at the level of legal validity. Waldron and Gardner do accept that at the system level, law is just a concept that includes reference to substantial conformity to the rule of law; in fact, they agree with Fuller even further, and claim that we should understand the rule of law as a moral ideal for law. The legality of law depends on conformity to the rule of law not only to a minimal level as with Raz, or at a more significant level but not as a moral ideal as with Kramer and Shapiro; for Waldron and Gardner our understanding of law is such that it is just the case that the legality of a legal system depends on it living up to the rule of law.

The question then becomes whether this is contrary to the positivists’ systemic Social thesis, but ultimately such questions do not concern Waldron or Gardner; Waldron does not care whether he is understood as a positivist or anti-positivist, and Gardner does not believe that an austere system-level Social thesis that denies that the law must necessarily live up to the rule of law to be legal is a core tenet of legal positivism. But although this is not a problem, I will argue in the next two sections that the major tension within Waldron and Gardner’s positions is how they can detach their concessions to Fuller at the system level from their accounts of legal validity.

8.3.7 Conclusion

While all recent legal positivists in the Hartian tradition concede there is some connection between law and the rule of law, I have argued in this section that to see their continuing differences with Fullerian anti-positivism we must understand how positivists come to that conclusion, and how it is consistent with their Social thesis – the claim that law is a matter of social fact. Further, it also demonstrates that one of the main divides within contemporary legal positivism is due to varying views of the Social thesis. Legal positivists say that whether law exists relies on identifying social facts relating to systems of social rules; they do not think the nature of law is that it is understood by reference to the rule of law. This
requires a rejection of Fuller’s claim that we cannot analyze legal systems without showing how they aspire to the rule of law as moral ideal. It is only by showing a derivative connection between (i) the features that positivists do identify as constituting law as a social phenomenon and (ii) the principles of the rule of law that can we explain the relationship between law and the rule of law.

Because they go beyond the derivative connection that the other legal positivists accept, Waldron and Gardner’s contributions show the different positions one can take on the Social thesis. Gardner’s position, discussed in Chapter 6.4.2, shows that one can hold the Social thesis concerning the validity of legal norms, and still claim that a legal system may be less legal in another sense due to its violations of the ideal of the rule of law. Waldron even more clearly holds the view that the idea of law is an evaluative moral-political idea, and he is the Hartian thinker who supports Fuller’s anti-positivist views most strongly; he is also indifferent about his standing as a legal positivist, for he rejects the importance of the positivist/anti-positivist distinction. Fuller’s Challenge to Hart has required positivists to become clearer about their view of the rule of law, in the course of which they have revealed commitments that often differ markedly from those of their fellow positivists. In doing so, the Hartian positivist response to Fuller’s Challenge has splintered into an already diverse set of positions.

We also might not be surprised if other legal positivists begin to move closer to Waldron in abandoning the system-level Social thesis. For, as Gardner puts it, legal positivism’s validity Social thesis is “not a whole theory of law’s nature”.66 It is compatible with other theses about the nature of law, including those that build certain moral elements – or further social elements – into the system-level Social thesis. Along these lines, Jules Coleman has recently attempted to reconceptualize legal positivism, and has concluded that it “need not endorse the separability thesis as a claim about constraints on the possibility conditions of law”, because the better view is that “what is distinctive of governance by law is that it embodies or expresses certain moral ideals”.67 As we have seen, these may include the claim that law

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necessarily makes moral claims or has a moral aim, that as an institution a legal system must conform to the requirements of the rule of law (the derivative answer to the relationship question), or that law is an evaluative ideal of the rule of law (the conceptual acceptance of Fuller’s Challenge at the system level). After setting out the legal positivist approach to legal validity in the next section, I will use Coleman to explain why the positivists hold these positions, and set out the Fullerian anti-positivist critique of this explanation: that detaching the various positivist claims about the rule of law from one another is unsound.

8.4 The Rule of Law and Legal Content

8.4.1 The validity Social thesis

As discussed above, the reconfiguration of Hartian legal positivism to accept Fuller’s account of the rule of law at the systemic level raises new questions and tensions concerning positivism’s account of legal content at the validity level. As seen in Chapters 1 and 2 and section 6.2, Fuller’s Challenge to Hart’s positivism sees the ideal of legality leading directly to an account of legal validity and interpretation, specifying how the rule of law is a necessary element of true propositions of what the content of law is. This account also defines judges’ moral obligations: it is a unified moral and legal theory of fidelity to law.

This is another of Fuller’s theses that Hartian positivists generally reject. All Hartian positivists hold the validity Social thesis, and say that legal validity is either (i) not necessarily or (ii) necessarily not determined by moral reasoning. Inclusive positivists say that whether morality determines the content of law depends on the practices of officials in each particular legal system. In contrast, exclusive positivists say that morality can never determine the content of law – for conceptual reasons, law can only require judges to decide according to morality. The validity Social thesis was discussed with regard to recent Hartian


69 Coleman The Practice of Principle, above n 30, at 151–153; Waluchow, Inclusive Legal Positivism, above n 68, at 112.
legal positivists in Chapter 6,\footnote{See above Chapter 6 at section 6.6.2.} and in relation to Shapiro in Chapter 7.\footnote{See above Chapter 7 at sections 7.4 and 7.5.2.} Putting aside the inclusive/exclusive debate, the validity Social thesis is a well-entrenched and uncontroversial doctrine among legal positivists, and it is the thing that most positivists point to when they seek or are required to produce a claim that unites their tradition.\footnote{For example, see Raz \textit{The Authority of Law}, above n 14, at 319. Andrei Marmor \textit{Philosophy of Law} (Princeton University Press, Princeton, 2011) at 4-5; Gardner “Legal Positivism: 5 ½ Myths”, above n 66, at 199-202; Shapiro \textit{Legality}, above n 23, at 25-27 and 269-273.}

One might think that holding (or denying) the Social thesis at the system level seems to lead to holding (or denying) the Social thesis at the level of legal validity, because what law is as a conceptual matter seems to lead to an account of what the law is as a matter of legal content. Fullerians certainly reject the Social thesis at both levels. But, as I noted above, in fact this is not the position of those discussed in this study. While Gardner accepts Fuller’s claims about the relationship between law and the rule of law at the system level, he rejects the Fullerian anti-positivist account of legal validity. As an exclusive positivist, he argues that legal validity cannot depend on a norm’s merits, and as such cannot be dependent on conforming to the principles of the rule of law.\footnote{See above Chapter 6 at section 6.6.2.} Gardner claims that legal norms can contravene Fuller’s principles, because “a legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law, is no less valid qua legal, than one that is prospective, admirably certain, and perfectly general”.\footnote{Gardner “Legal Positivism: 5 ½ Myths”, above n 66, at 209.} He therefore detaches his system level acceptance that the rule of law defines the legality of law from his validity level claims about the content of legal norms, which are driven by his other account of legality as referring to an institutionalized normative order. As I noted above, this is consistent with his two concept approach to legality; but the question then becomes whether that approach is itself coherent internally. Below I will discuss why Gardner and others think the detachment approach plausible and correct, and raise the question whether this approach has adequate answers to the anti-positivist critique of detachment.
Waldron also takes a Fullerian anti-positivist position on the relationship between law and the rule of law at the system level. But like Gardner, he does not think that our determination of legal content is dependent on the rule of law, as anti-positivists claim. Waldron’s normative positivism assumes that “it is not the case … that legal judgments necessarily depend on moral judgments”.75 He thus begins from the position that the criteria of legal validity can exclude moral argument, including argument about the rule of law. Waldron distinguishes his normative account of the ‘wholesale’ or system level claims about the moral aims and importance of law from the ‘retail’ level of the validity of legal norms: we can identify “what the law is (of any given jurisdiction on any given subject)” in a way that is “not contaminated by the exercise of moral judgment”.76 Put differently, retail statements of legal validity can be “insulated” from ‘wholesale’ normative judgments about law’s systemic moral value.77 It follows that the rule of law is for Waldron not a necessary aspect of determining legal validity.

8.4.2 The Fullerian critique

Thus the validity Social thesis remains the other fundamental difference between legal positivism and Fullerian rule of law anti-positivism. As noted above in 6.2, Fullerians argue that the content of legal norms is always determined to some extent by the ideal of the rule of law that is part of the nature of law at the system level. This is a claim about the way that law exists in our legal culture, including the practices of judges, other officials, and citizens. If judges are not interpreting legal content in a way that gives effect to the rule of law, they

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75 Waldron “Normative (or Ethical) Positivism”, above n 59, at 413–414. Waldron’s arguments about the inclusive/exclusive debate are misleading. His arguments presuppose inclusive positivism, because they claim that morality can determine the content of legal norms. The exclusive positivist would say that morality can only be made legally binding, by the law directing judges to apply what morality requires. Whether the law should direct judges to apply morality is a completely different question. So an exclusive legal positivist could either be a normative positivist on Waldron’s terms, or could reject that normative position. Either way, her position would not be determined by her concept of law. All that exclusive positivism tells us is whether morality can be part of the law; it does not claim that morality cannot be legally binding due to the law referring to it. It is misleading to say that normative positivism is premised on inclusive (in Waldron’s words ‘negative’) positivism but prescribes exclusive positivism (414), because that does not capture Waldron’s normative claim – that morality should not be made legally binding – and because this normative claim is consistent with both inclusive or exclusive positivism.

76 Waldron “Normative (or Ethical) Positivism”, above n 59, at 415.

77 Waldron “Normative (or Ethical) Positivism”, above n 59, at 418.
are not faithfully complying with their legal obligations. Legal positivists deny that legal validity is necessarily determined or affected by rule of law considerations. Inclusive legal positivists say that the rule of law can only affect legal validity if the social practices that fix the criteria of legal validity in the legal system refer to such considerations. Exclusive positivists say that the rule of law cannot determine the content of legal norms. As noted above, these positions are held even by those legal positivists who take a more favourable approach to Fuller’s Challenge at the system level, such as Waldron and Gardner.

So the legal positivist response to Fuller does not budge on the positivist commitment to matters of legal validity being determined by social fact, according to the Social thesis at the validity level. The question of legal validity remains the basic point of difference between positivists and Fullerians. As I will argue in the section 8.6.2 of this chapter, this doesn’t necessarily lead to any practical difference in their theories of adjudication – what judges morally ought to do. But before I do so, I will comment on the tension that seems to arise between system-level acceptance of the rule of law’s necessary relationship with law, and validity-level denial that legal content is determined by rule of law principles.

From the Fullerian anti-positivist perspective, the fact that Waldron and Gardner accept that Fuller’s account of the rule of law is part of the very idea of law should lead them to accept that the rule of law principles have a legal role to play in identifying and developing the content of valid legal norms. If the rule of law is what makes an institutionalized normative system a legal order, then it seems to follow that part of the criteria of legal validity must require conformity of norms to that very idea of legality. Not only does the rule of law tell us what law is at the system level, but “questions about what ‘the law’ requires must be answered in such a way that the answers are consistent with the commitment [to the rule of law], and, hence, the content of law is conditioned or determined in part by the principles of legality.”78 Fullerian anti-positivists say that the rule of law is an ideal of legal order to which judges must be faithful in identifying and interpreting the content of valid law. So, the tension we find in at least some contemporary Hartian positivists is that they try to keep apart the system-level and validity-level accounts of the Relationship question.

78 Dyzenhaus *Hard Cases in Wicked Legal Systems*, above n 1, at 4.
8.4.3 The detachment of (systemic) legality and validity

Why is this? The reason provides another explanation of the continuing differences between Fullerian anti-positivists and Hartian positivists. From the inclusive positivist perspective, the reason is simply that legal positivism holds tightly to the validity Social thesis: the view that legal content is valid because it is identified by reference to the particular criteria of validity of each legal system, and the content of these criteria is a matter of social fact relating to what its officials recognize as valid law.

The validity Social thesis is usually contrasted with the view that morality is a necessary part of determining legal validity in any legal system. But the claim that positivists must also deny is that even if we take the rule of law not as a moral ideal but as simply a feature of our concept of law, the rule of law is not a necessary element of determining the content of, and applying, the law in all legal systems. The positivist validity Social thesis leads to the position that rule of law principles are only part of determining legal validity if that is revealed in the practices of officials of the legal system; the rule of law requirements are not an intrinsic part of any legal order’s criteria of validity. Similarly, from the exclusive positivist perspective, the rule of law cannot determine a norm’s legal validity, if understood as a moral ideal. As Gardner argues, from an exclusive positivist perspective “the law’s living up to the rule-of-law values … cannot be among the conditions for the legal validity of any norm”. 79

The tension identified above is the incongruence between positivists’ systemic and validity Social theses. How can the validity Social thesis that is so central a part of legal positivism be sustained in the face of the positivists’ chipping away or rejection of the system-level Social thesis through their various concessions to Fuller’s Challenge? The reason is simple on the positivist self-understanding: the validity Social thesis is the cornerstone of legal positivism. Along with some version of the system-level Social thesis, this is what makes legal positivism a tradition of jurisprudential thought. Yet it is also clear that some positivists are altering their understanding of the system-level Social thesis by modifying it

to incorporate moral concepts, including the rule of law, without requiring them to give up on the validity Social thesis.

This can be seen in general by reference to Raz’s ‘claim of authority’ thesis, Shapiro’s moral aim thesis, and in Waldron and Gardner’s claims that the rule of law is part of our understanding of law. Each of these system-level Relationship views posits a moral concept that is part of law’s nature. As I will show below, Coleman explains that the reason that these claims must be insulated from the validity Social thesis is either because this is required by these positivists’ system-level moral claims, or else because the validity Social thesis is seen as the foundational or core claim of the contemporary positivist tradition.\textsuperscript{80} Put differently, the validity Social thesis is either an implication of a more general conceptual or normative positivist account of law, or the inclusive legal positivist claim that social facts determine the criteria of legal validity.\textsuperscript{81} I will explain Coleman’s analysis further below.

The validity Social thesis not only says that moral values are not necessarily part of the criteria of legality, but also that rule of law considerations \textit{understood as social requirements} are not necessarily part of those criteria, because there can be legal systems that do not use them to determine legal validity. So whether positivists accept the rule of law as a necessary aspect of the social institution we consider law, or as a moral ideal to which the law must aspire, they do not think that these systemic claims have any effect at the validity level. Of course, the question here is whether the insulation of the rule of law at the systemic level from the legal validity Social thesis is merely an unjustified last-ditch attempt to maintain positivism against Fuller’s Challenge, or whether it is the core claim of positivism that is justified by their wider theories of law.

This creates a tension between the two positivist Social theses, and Fullerian anti-positivists will not accept that the necessity of preserving the validity Social thesis is any reason for insulating it from the full impact of Fuller’s arguments. What is required is an explanation of how Hartian positivists can prevent their system-level account of the rule of law from threatening their validity Social thesis. The short answer to this question is that this is how

\textsuperscript{80} Coleman “The Architecture of Jurisprudence”, above n 30, at 72-75.
\textsuperscript{81} Coleman “The Architecture of Jurisprudence”, above n 30, at 73.
many recent positivists think the nature of law is: a social institution with necessary moral aspects or aims, but which has a normative content that is not determined by morality. The long answer explains the theoretical reasons for which each positivist takes this view of law; in each case these relate to the positivist’s own understanding of the meaning and different elements of the Social thesis. In what follows I will revisit their arguments to show how they explain the detachment of their acceptance of Fuller’s Challenge at the level of legal systems from their accounts of legal validity that exclude reference to Fuller’s principles of the rule of law.

Before I explain how positivists think they can maintain this position, I will note another feature of this situation. For those who take the derivative approach to the system-level relationship (Hart, Raz, Marmor, Kramer, Shapiro), their validity Social thesis – and not some wider conceptual claim – is the driving force of their exclusion of rule of law considerations from the determinants of legal validity. It is those who take a conceptual approach to the system-level relationship (Waldron and Gardner) who seem to experience the greatest tension with their claims that valid legal content is not determined by the rule of law. For Waldron, this is due to his normative positivism, which requires that the content of law not be determined by morality. This seems to be in tension with his system-level affirmation of the rule of law’s conceptual relationship with law, as Fullerians argue. There needs to be further explanation of the detachment or insulation of the system-level concessions to Fuller’s Challenge from the maintenance of the validity Social thesis. Similarly for Gardner, it is not clear what drives or explains this insulation, apart from his claim that these are just accurate and separate theses about the nature of law, consistent with his ‘two concept’ view of legality. In the next section, I attempt to show why positivists detach their system-level acceptance of Fuller’s claims from their validity level claims about the determinants of legal content. I will also argue that Raz and Shapiro’s departures from a strict system-level Social thesis create further problems for their exclusion of the rule of law from the very idea of law.
8.5 Explaining and criticizing positivism on the rule of law

Contemporary legal positivist responses to Fuller’s Challenge have varied significantly, according to the positions taken on how to integrate the rule of law, based on fundamental differences in how to understand the positivist Social thesis. The term legal positivism is actually misleading if it is taken to mean that these theorists agree on anything more than some version of the system-level and validity Social theses, because their responses to Fuller’s Challenge take different forms due to their higher-level or ‘meta-theoretical’ understandings of what legal positivism and jurisprudence is about. Fuller’s Challenge thus not only focuses our attention on the place of the rule of law in jurisprudence, but highlights the fault lines along which different legal positivist theories split. To properly account for these differences in the self-understanding of analytical legal positivism in the Hartian tradition would require a comprehensive meta-theoretical analysis concerning the wider questions of why contemporary positivists take the positions that they do. A detailed analysis of this is beyond the scope of this study, but I will give an initial account of how the different ways in which positivists respond to Fuller’s Challenge are motivated by their theoretical commitments. I will do so by applying Coleman’s recent articulation of a new framework for jurisprudential analysis. 82

8.5.1 Coleman’s architecture of jurisprudence

Coleman argues that our current framework of analysis is confused and mistaken, particularly in its focus on the attempt to distinguish jurisprudential views based on their denial or acceptance of conceptual connections between law and morality. 83 In his view, the foundational question in jurisprudence is ‘what determines legal content?’, a question previously understood in terms of the conditions of legal validity. 84 He claims that we can better understand competing positions in jurisprudence – inclusive and exclusive positivism, and the various anti-positivist theories – by identifying how each theory understands “the metaphysics of legal content: the facts that give law the content that it

has”.\textsuperscript{85} These may be (i) social facts, concerning matters of individual or group behaviour or attitudes, or (ii) normative facts – evaluative or moral facts – or (iii) both kinds of facts.\textsuperscript{86} But Coleman claims that it is crucially important to realize that there is a further question concerning what determines the facts that determine the content of the law. He argues that inclusive legal positivism is actually the thesis that “[o]nly social facts determine which facts contribute to the law having the content it does”.\textsuperscript{87} It competes with the view on the one hand that normative facts determine which facts contribute to legal content, and on the other hand that conceptual truths about the nature of law determine this.\textsuperscript{88} To fully explain various legal positivist positions, one must explain what the theorist thinks at both of these levels, the “object level” of what facts determine legal content, and the “metalevel” of why it is that those facts, and not others, that do this.\textsuperscript{89}

For example, Coleman argues that at the object level, Raz and Shapiro both hold that only social facts determine legal content, and they say this because of conceptual reasons about the nature of law – Raz’s view that law claims a particular kind of authority and Shapiro’s claim that law pursues a particular moral aim through the means of planning.\textsuperscript{90} Hart’s inclusive positivist view that social facts determine what kinds of facts determine legal content is itself, Coleman argues, based on a conceptual claim about an essential feature of the nature of law, namely the rule of recognition being a social practice.\textsuperscript{91} Coleman also notes that Raz’s conceptual arguments about the nature of law are ultimately based on an account of authority that is normative, meaning that the determinants of legal content are themselves ultimately determined by normative facts.\textsuperscript{92}

But it is significant for my purposes that although he distinguishes between two levels of the metaphysics of legal content, these positions are treated by Coleman as separable from claims about the “existence conditions of legal systems”, including those that assert that

\textsuperscript{86} Coleman “The Architecture of Jurisprudence”, above n 30, at 62.
\textsuperscript{87} Coleman “The Architecture of Jurisprudence”, above n 30, at 65.
\textsuperscript{89} Coleman “The Architecture of Jurisprudence”, above n 30, at 72.
\textsuperscript{90} Coleman “The Architecture of Jurisprudence”, above n 30, at 73.
\textsuperscript{91} Coleman “The Architecture of Jurisprudence”, above n 30, at 73-74.
there are “moral principles or ideals that are constitutive of law or distinctive of governance by law”.  
He thus deals with these aspects of the nature of law in a way detached from his analysis of legal validity. While legal positivism at the validity level rules out some claims about necessary moral elements in the law – those claims incompatible with the validity Social thesis – it does not rule out the claim that “part of what is distinctive of governance by law is that it embodies or expresses certain moral ideals” – and Coleman refers here to Fuller’s Challenge as an example. Understanding the various possible positions in jurisprudence requires us to distinguish between claims about the existence conditions of law and claims about the determinants of legal content, and to see that these types of claims are not necessarily related.

The detachment of Coleman’s account of law (the level relating to my ‘systemic’ Social thesis) from his account of legal content (relating to my ‘validity’ level Social thesis) is demonstrated by the fact that while Coleman himself believes that the existence of law depends on such moral ideals, he does not think that this affects inclusive legal positivism’s account of what facts determine the content of binding legal standards. The reason for this is that inclusive legal positivism is merely a view about what determines legal content, and is not part of any wider theory of law:

Exclusive legal positivism is part of (or flows from) a comprehensive picture of the law and of its place in the normative landscape. Not so inclusive legal positivism. From the outset inclusive legal positivism or incorporationism has always been much more a view about the nature of legal positivism than about the nature of law. I first introduced it as a way of meeting Dworkin’s objection to Hart that positivism lacks the resources adequate to explain how moral principles could be binding legal standards. … Without a defense of it as flowing from essential features of law or of law’s place in the normative landscape, inclusive legal positivism will always remain – in my view at least – ‘unanchored’ as a jurisprudence.

Coleman claims that inclusive legal positivism – the view that social facts determine what kinds of facts determine the content of the law – is a way of characterizing positivism, and is not “a necessary truth about law”. While other theorists do answer questions about what

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facts determine the facts that determine legal content by reference to such wider concepts of law – for example, Raz and Shapiro – Coleman’s inclusive positivism does not. Like “almost all” inclusive legal positivists, Coleman deliberately “fail[s] to anchor the theory” of what determines the facts that determine legal content “in any fundamental claims about the nature of law”.  

Although this shows that Coleman consciously detaches his account of legal validity from his account of the existence conditions of legal systems, we do not get an explanation of why this disjointed position is jurisprudentially justifiable. The only explanation to be found is in the claim that the validity Social thesis is the most important foundation of jurisprudence: “Our aim is to construct an architecture with a sturdy foundation. That foundation is the metaphysics of legal content”. In other words, the positivist tradition is founded on the claim that it is the nature of law that its content is a matter of social fact (exclusive positivism) or that what determines the content of law is a matter of social fact (inclusive positivism). Coleman is claiming that the core claims distinguishing natural lawyers from inclusive positivists, and both of them from inclusive legal positivists, are claims about the metaphysics of legal content – about what determines the content of valid law. The particular answer Coleman gives is an inclusive legal positivist one, and, as his unanchored foundation of his jurisprudence, it is a condition for evaluating claims about the existence conditions of legal systems, rather than being derived from any wider account of the nature of law. In this way, it differs significantly from Raz, Shapiro, and Fuller’s accounts of legal content, which do make their metalevel analysis part of their wider theories of the nature of law.

### 8.5.2 The architecture and the rule of law

But what has this to do with legal positivism’s understanding of the rule of law? My claim is that applying Coleman’s theory to legal positivism’s answers to Fuller’s Challenge from the

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100 Coleman “The Architecture of Jurisprudence”, above n 30, at 75.
rule of law is highly revealing, because it shows how different positivists see the relationship between their accounts of law at the system level and their accounts of legal content, and this distinction allows us to better analyse their views on the relationship between law and the rule of law.

I have noted that Coleman claims that Shapiro and Raz do embed their answer to the validity level relationship between law and moral principles – including the rule of law – within wider theories of the nature of law, which in Shapiro’s case claims to be a purely conceptual theory, and in Raz’s case is a combination of conceptual (law claims authority) and normative elements (the actual theory of authority). The rule of law cannot be part of the facts that determine legal content (validity) according to their theories so long as it is understood as Fuller presents it – as a moral ideal. For this would contravene Raz and Shapiro’s object-level exclusion of normative facts from determining legal content, which flows from metalevel conceptual positions that are tied in with their wider accounts of the nature of law.

We can also see how their general theories of law relate to the connections between law and the rule of law that they do draw: some necessary conformity to Fuller’s principles is required if the elements that make up their accounts of the nature of law are to be fulfilled. Applying Coleman’s framework, we see that this is merely the derivative approach, because neither Raz or Shapiro in their wider theory of the nature of law make living up to the principles or ideal of the rule of law an essential feature of law; the minimum conformity to Fuller’s principles necessary for law to exist is merely entailed by other things that are essential to law. Because it is not part of the nature of law on their theories, they do not give the rule of law any significant role in their metalevel conceptual approach, nor the object-level account of legal content that it leads to. Reading their arguments through Coleman’s framework can thus help us make sense of what are otherwise a perplexing set of claims about the relationship between law and the rule of law that flow from Raz and Shapiro’s derivative approaches. The distinctions between (i) the meta- and object level of legal content, and (ii) between legal content and one’s wider concept of law, allow us to see the positions these positivists take on each element of their legal theory. However, this
explanation of the positivist self-understanding is not yet a justification for understanding the law in this way, as I will comment further on below.

It is also useful to consider Fuller through Coleman’s framework. Coleman would say that Fuller also holds his object-level view of legal validity due to a metalevel view of law that is integrated into his concept of law and its existence conditions; just in Fuller’s case, law is a normative concept that requires that legal content be determined by social facts (about what political actors, legal officials, and citizens do) and normative facts (facts about how those actors should make the law live up to the ideal of legality). So while Fuller agrees with Raz that we should take a normative/conceptual account at the metalevel, he disagrees with Raz about the nature of that account, and therefore also at the object level, where he thinks normative facts are part of what determines legal content. In both Fuller and Raz’s theories, their general accounts of what law is are bound up with their metalevel approach to legal content.

This analysis can be applied to the other Fullerian anti-positivists, who fall within the normative/conceptual camp at the metalevel, and this determines their anti-positivist accounts of legal content. Waldron also falls within the same general framework, because he believes that his object level ‘political positivism’ argues in favour of a prescriptive version of exclusive legal positivism – normative facts ought not determine legal content – based on a normative metalevel view of the rule of law.

Some of the other theorists discussed in this study are harder to place. Coleman argues that Hart’s inclusive positivism – which allows for a variety of positions at the object level based on the metalevel idea that what determines the determinants of legal content is contingent on the practices of legal officials in particular legal systems – is itself based on a conceptual account of the nature of law: that law is a system of rules grounded in a rule of recognition that is a social rule. We might ask why Hart does not build the rule of law into his

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103 On a different reading, Fuller makes a conceptual claim that part of the nature of law is its significant conformity to the rule of law; because this claim does not present the rule of law as a moral ideal, this is a claim that positivists could accept as consistent with their systemic Social thesis.

conceptual account of law, but it is clear that he does not – he only sees the relationship between law and Fuller’s principles as derived from the essential features of law. Kramer seems to take a similar approach, although his insistence on the wide No Necessary Connection Separability thesis seems to be an additional conceptual feature of law that leads to his account at the object level.

The key point to grasp is that all of the theorists discussed so far obtain their object level accounts of legal content from metalevel positions that are, in turn, bound up in and determined by their general theories of the nature of law. The rule of law is, or is not, part of our general understanding of law and our account of legal content. However, as noted above, not all legal positivists link all of these elements of their legal theory together into a coherent account of law: some seek to disengage their wider reflections on the nature of law from both their meta- and object-level accounts of legal content.

Gardner is a good example of this, and his complex view of the relationship between law and the rule of law can be usefully mapped according to Coleman’s framework. His exclusive positivism seems to stem from Razian considerations about the nature of law: conceptual reasons for saying that the law cannot be determined by moral facts. But Gardner does not match this account of law’s content with all of his claims about law, because he agrees with Finnis that to properly understand the nature of law, one must see that it aspires to an ideal of legality that marks out law’s central case – and this ideal is Fuller’s rule of law. The tension that arises in Gardner’s jurisprudence is how he can detach his claim that the central case of law conforms to the rule of law from the metalevel conceptual position that drives his exclusive legal positivism. In this respect, Gardner is like Coleman, who does not make his wider account of law’s nature part of his metalevel view of what determines the facts that determine legal content. But Gardner’s position seems harder to maintain than Coleman’s, because Gardner’s account of what determines legal content is not an

unchanched acceptance of inclusive legal positivism, but a conceptual position that leads to exclusive legal positivism at the object level. Despite his frequent claim that his legal positivism is based in the validity Social thesis, which is not a complete account of law’s nature, the reason he holds that thesis seems to be driven by the same metalevel concerns that motivate exclusive legal positivism more generally.

While Coleman’s theory allows us to explain Gardner’s position, it does not show us why Gardner thinks he can hold that position. The question that therefore results is why Gardner thinks his conceptual position can determine that exclusive legal positivism is correct at the object level, while at the same time his normative rule of law account of the central case of law does not affect the object level. It may be that Gardner agrees with Coleman that we should detach questions about the existence of legal systems from the fundamental question of the determinants of legal content, but again there is no justification in Gardner’s relevant discussions of why we should prefer this approach to the coherent Fullerian anti-positivist approach to the nature of law and legal content. In the absence of such a justification of the detachment approach, these positivist positions seem forced, and weak in the face of the Fullerian attack. I will consider further the reasons behind the detachment approach after considering further the explanatory power of Coleman’s framework.

8.5.3 The explanatory power of Coleman’s framework

Coleman’s analysis thus explains how positivists attempt to maintain this disjointed view of jurisprudence, by breaking up jurisprudence into general accounts of the nature of law and the meta- and object-level accounts of the determinants of legal content. These distinctions allow us to see (a) why some positivists take the derivative approach to the rule of law, and (b) how those who accept Fuller’s claim that the rule of law is a central aspect of our concept of law think they can detach this from their positions on legal validity.

Taking the first point, Coleman’s framework can be used to observe that most positivists take a view of the nature of law that does not make the rule of law a central part of their concept of law – instead preferring the ideas of the rule of recognition, planning, or authority. This means that their account of the rule of law is derived from their conceptual
approach, rather than being the concept that explains what law is. This ‘derivative positivist’ position (Hart, Raz, Kramer, Marmor, and Shapiro) begins from a general concept of law that does not include reference to the rule of law. Once that is in place, we can say that the rule of law principles derive from this account of the nature of law.

The second point is that this derivative explanation of the rule of law need not be related to the positivists’ metalevel account of what determines the social facts that determine legal content. On Coleman’s analysis, it is only one’s account of what law is on the conceptual or normative metalevel approach that determines what social facts determine the content of the law. Thus, because the rule of law is not for the derivative positivists a central part of their concept of law that translates into their positions at the metalevel of legal content, they do not make the rule of law a necessary moral aspect of determining legal content in all legal systems.

Taking the positivists of the second type (Waldron and Gardner), Coleman’s analysis allows us to see that even where positivists build the ideal of the rule of law into their concept of law, this general position on the nature of law can be understood as detached from their accounts of legal content at both the meta- and object-levels. Like Coleman, Waldron and Gardner build a moral concept into their existence conditions for law – in their case, the rule of law – but their metalevel accounts of legal content are driven by conceptual or normative claims that require the exclusion of reference to the rule of law from the object-level determinants of legal content.

8.5.4 Clarifying the Fullerian challenge

However, none of these theorists are clear about how this detachment of theoretical elements is to be explained. Even Coleman does not provide any discussion of how we might choose between competing metalevel positions, nor any justification of detaching the nature of law from the determinants of legal content. We can clarify the criticism of the positivist approaches to the rule of law, as explained by Coleman’s framework, by considering how that framework looks from the Fullerian anti-positivist perspective.
Using recent Fullerian anti-positivist theories, we can, like Coleman, take a theoretical step back and observe how jurisprudential theories operate at different levels: judgments about what determines the content of the law (the ‘doctrinal’ level) are based on normative political theories about the law’s aim or purpose (the ‘fundamental’ level).\footnote{Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 194-198, and see generally Chapters 7-9; TRS Allan \textit{Constitutional Justice: A Liberal Theory of the Rule of Law} (Oxford University Press, Oxford, 2003) at 61-77 and 218; NE Simmonds \textit{Law as a Moral Idea} (Oxford University Press, Oxford, 2007) at 191.} Fuller’s account of law at the fundamental level sees the rule of law as the moral ideal to which law aspires, and this has the effect of making rule of law requirements part of determining legal content at the doctrinal level.\footnote{Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 248 “moral principles of legality condition the content of the law, so that the question of what the law is must be answered by reference to moral considerations and arguments”; Allan \textit{Constitutional Justice}, above n 107, at 6 and 61-77; Simmonds \textit{Law as a Moral Ideal}, above n 108, at 164-165.} Dyzenhaus observes that positivists such as Hart and Raz do not explicitly base their accounts of legal content on a normative approach at the fundamental level.\footnote{Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 242-244.} But unlike Coleman, Dyzenhaus and the other Fullerian anti-positivists argue that the attempt to detach the different elements of one’s legal theory ends up in incoherence and puzzlement.\footnote{See generally Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 178-179, 223-228 and 240-249; Allan \textit{Constitutional Justice}, above n 107, at 61-77; Simmonds \textit{Law as a Moral Ideal}, above n 107, at 170-171.} On the recent Fullerian anti-positivist approach, the derivative and the detachment approaches both go wrong in failing to connect their acceptance of the rule of law at the systemic level from their accounts of legal validity; a failure that creates tensions within the positivist responses to Fuller’s Challenge that can only be resolved by recognizing that the rule of law plays a more significant role at both levels of legal order and legal validity.

In this vein, the tension that Dyzenhaus uses his fundamental/doctrinal framework to identify is found in Hart and Raz’s accounts of the rule of law is that their concession that law must minimally live up to the rule of law is not accompanied by an understanding that the rule of law operates at the fundamental level and determines legal content at the doctrinal level.\footnote{Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 257.}
Legal positivists find the rule of law a puzzle. On the one hand, they concede that law to be law must at least minimally comply with legality, including the principle that there should be independent review of official action to see whether it complies with law. On the other hand, as long as there is judicial review, they do not require that purely formal rule of law principles be in play for legality to be maintained. As a result, they are able to avoid the conclusion that law necessarily has a moral quality to it because law, to be such, must be answerable to legality.

Put differently, legal positivists treat the rule of law as operating as a constraint on the fundamental level of what law is – in Coleman’s terms this is a conceptual claim. But this does not have any necessary role for positivists at the legal content/doctrinal level. Positivism’s claims about the law at the fundamental conceptual level seem out of kilter with their claims about the content of the law. It is only by detaching the fundamental level acceptance that the rule of law is a necessary condition for law to exist from the doctrinal level account of legal content that positivists can avoid a complete capitulation to Fullerian anti-positivism. Simmonds characterises the positivists approach as follows: 112

The first step towards an adequate analysis, they suggest, is to see that the question ‘what is law?’ is misleading, for there are in fact several different issues here, which need to be separated. In particular, questions above the nature of law as a distinct type of social institution need to be distinguished from questions about the content of law within a particular jurisdiction; and both of these questions need to be distinguished from inquiry into the political value that we call ‘the rule of law’.

And Fuller and other Fullerian anti-positivists encourage positivists to resolve their tensions by doing just that. The problem is that the positivist acceptance that the rule of law is necessary for law to exist does not go along with an acceptance at the fundamental level that the rule of law is the necessary moral element in law. In other words, Fullerian anti-positivism pushes the positivists to explain why they don’t accept Fuller’s normative account of law at the fundamental level, if they gesture towards this by admitting some necessary conformity to the rule of law is necessary for law to exist.

8.5.5 The defence of detachment?

So while he gives us some tools to explain the modern debates in jurisprudence, including those about the rule of law, Coleman’s theory is still quite different from a Fullerian perspective, which is the cause of its flaws. This can be seen clearly in the way that Coleman

112 Simmonds Law as a Moral Ideal, above n 107, at 21-22.
maintains a detachment between the different elements of jurisprudence. In Coleman’s terms, a legal positivist’s general account of the nature of law may or may not tie in with one’s metalevel view of legal content. And those metalevel accounts need not include reference to the rule of law.

This is obvious in the case of Coleman’s own freestanding inclusive positivism, which does not rely on conceptual or normative claims that could include reference to the rule of law. Although his analysis of legal validity or legal content usefully draws attention to the distinction between the metalevel and the object level of determining legal content, this is still something that can be detached from his views on the existence conditions of law, which are part of a wider theory of law’s nature.

For Coleman argues that among the existence conditions of a legal system are moral constraints: there are moral principles or ideals that are constitutive of law, or there are moral ends that governance by law necessarily achieves or aims to achieve. Coleman says this is so, because law is a system of accountability that applies a set of moral concepts relating to responsibility and rational autonomous action. But this position is, for an unexplained reason, unrelated to Coleman’s inclusive positivist account of legal content, which is freestanding – not based on any “comprehensive picture of the law”. Inclusive legal positivism is “a way of characterizing positivism, not … a necessary truth about law”. It is just the claim that the facts that determine legal content are themselves determined by social facts, not by the concept of law or a normative theory of law.

But the Fullerian response would be to question whether Coleman and other positivists can get away with this detachment, especially when he does offer an account of the nature of law that includes reference to moral concepts. This question of detachment of different parts of one’s theory from other elements is the tension that we find in other positivists. A claim that the existence conditions of law include moral aims, principles, or concepts seems to lead to a

conceptual or normative metalevel approach, rather than a freestanding one. Coleman clearly thinks that there are aspects of the nature of law that can be detached from one’s metalevel and object-level accounts of the “metaphysics of legal content”. The particular detachment we find in a number of recent legal positivists is between their acceptance of the importance of the rule of law to law’s existence, and the determination of legal content. This detachment approach is another symptom of the divide and conquer strategy of responding to Fuller’s Challenge. But this strategy fails to see that Fuller’s Challenge is for positivists to provide full theories of law in which all of these elements are integrated, as Fullerian anti-positivists also emphasize.

In this respect it is interesting that Coleman makes the “metaphysics of legal content” the foundation for his jurisprudence. This accords with Dyzenhaus’s observation that legal positivists characteristically start their positions from an account of legal content, rather than an account of the rule of law. In his terms, positivists think we can determine what the law is at the doctrinal level, in a way detached from a normative concept of the rule of law at the fundamental level. But from the Fullerian anti-positivist perspective one could not say at the fundamental level that conformity to the rule of law is a conceptual or normative condition of the existence of law without also accepting that this must have an effect at the doctrinal level. Translated back into Coleman’s terms, Fullerian anti-positivists see the rule of law as the central element of law at the meta-level (the fundamental level), which has clear implications for the object level of legal content. The question is whether it is plausible for Hartian positivists to take a conceptual or normative approach to law at the metalevel that does not make the rule of law a central part of law.

This is where the debate and argument about legal theory and the rule of law should focus as it proceeds in coming years. Fullerian anti-positivists will keep pressing these points about the tensions in legal positivism’s response to Fuller’s Challenge, and demanding that positivists explain how they can make their answers at the level of the nature of law consistent with their accounts of legal validity. Positivists will hopefully explain their

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118 Dyzenhaus Hard Cases in Wicked Legal Systems, above n 1, at 179.
reasons for the positions they take on the rule of law in greater detail, and in doing so will further our understanding of legal positivism. The differences will, I predict, continue, based on the primacy of the validity Social thesis in legal positivism – the fact that positivists see law as a social institution that contains norms that are not necessarily determined by morality. However, I also think there will be an increasing recognition that positivists can agree with much of the Fullerian account of how judges should decide cases, as I argue in the following section.

8.6 Agreeing on a rule of law-based ‘fidelity to law’?

This section argues that the most likely possibility for a fruitful dialogue between Hartian positivists and Fullerian anti-positivists is about the questions of judicial moral obligation – the moral theory of adjudication. While all positivists hold some version of the validity Social thesis, denying that the rule of law is necessarily a determinant of legal validity within particular legal systems, it seems clear that they agree with anti-positivists that upholding the rule of law is at least part of judges’ moral obligations. Put differently, positivists can say that although Fuller was wrong about the rule of law’s place in determining what the law is at the validity level, they can agree with him that our moral obligations of fidelity to law necessarily include the duty to make the law better conform to Fuller’s principles.

This is an important point to grasp. For it might be thought that Hartian legal positivism’s denial that the rule of law or any moral ideal is a necessary aspect of the criteria of legal validity in any legal system means that positivism holds a theory of fidelity to law that requires judges to give full effect to legal norms, whatever their content, without reference to the rule of law. At least, that would be the case if the common view that judges morally ought to apply law and nothing else was correct. Remember that this was Fuller’s view: he characterized Hart’s concept of law as including a distinctive positivist account of fidelity to
law, and thought Hart’s claim was that Nazi law morally ought to be applied to the grudge informers’ actions just because it was law.119

But Hartian positivists uniformly deny that a legal norm’s existence determines what anyone morally ought to do. While Hart is not entirely clear in his reasoning regarding the morality of the grudge informer situation, his criticism of Radbruch was in fact premised on the idea that the answer to what morally ought to happen is not found merely by reference to what the law requires.120 This thought is amplified in The Concept of Law, where Hart makes it clear that this idea applies to judges as well as ordinary citizens.121 Hart did not make the moral theory of adjudication a central part of his work, because he did not think it an essential part of his project of inquiring into the nature of law. Normative Inertness does not mean that the fact that a norm is a legal norm makes no moral difference to whether it should be followed or upheld by a judge. All it means is that our appraisal of moral reasons for and against upholding it – relating, for example, to human rights, justice, democracy, political fairness, or the rule of law – are not built in to our understanding of law, and the criteria of legal validity in all legal systems. This, as already noted, follows from Hart’s version of the systemic and validity Social theses: the law is simply a particular system of rules, and judges’ moral obligations depend on how it was created and its substantive content.

This has been recognized by recent Fullerian anti-positivists. The claim that Hartian positivism’s account of the nature of law and systemic legal validity should be interpreted as an account of judge’s moral obligations often goes with an awareness that legal positivists do not see their theories in this way. Hartian positivism deliberately does not include a political doctrine of judicial responsibility.122 Positivists reject Dworkin’s view that they must be understood as holding a political doctrine that “judges must respect the established legal conventions of their community except in rare circumstances”,123 and positivists

119 See above Chapter 1 at section 1.3.5.
120 See Chapter 1 at sections 1.2.4 and 1.4.
121 See Chapter 2 at section 2.2.5.
122 Dyzenhaus Hard Cases in Wicked Legal Systems, above n 1, at 15 and 32.
disown the ‘plain fact’ approach often attributed to them, by which judges must give effect to statutes according to the intentions of those who created them. Hartian legal positivists instead subscribe to the Normative Inertness thesis, which states that the fact that an action is required by legal norms does not mean that that action is morally required or that judges morally ought to apply those legal norms. A number of other legal positivists have agreed with this view over the years.

8.6.1 Waldron and the contribution of political positivism

Hartian positivists generally do not set out systematic accounts of judges’ moral obligations, and if they seek to do so they will need to engage heavily with Fullerian anti-positivist accounts of fidelity to law, including reference to the rule of law. Waldron is the main exception to the theorists discussed in this study on the normative question, because he joins a number of other recent Hartian positivists in embracing political positivism. Political positivists are varied in their views, but their basic position is that from a moral or political perspective we should ensure that legal systems do not include legal standards that require judges to engage in moral reasoning, and that judges ought to make their decisions according to the law – understood from a positivist perspective – and not according to morality. Or as Waldron puts it, the “separability of legal judgment and moral judgment, is a good thing … and certainly something to be valued and encouraged”. Waldron’s general normative positivism argues that the law should not include moral predicates that require judges to make moral judgments in applying the law – and the implication is that judges are then morally required not to decide cases according to their own moral views rather than the law. He also argues against the practice of judicial review of legislation in

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124 Dyzenhaus Hard Cases in Wicked Legal Systems, above n 1, at 171.
127 Waldron, “Normative (or Ethical) Positivism”, above n 59, at 411.
128 Waldron, “Normative (or Ethical) Positivism”, above n 59.
liberal democratic societies, on the grounds that the legislature is the more legitimate place for debating and settling moral issues relating to rights, rather than the courts.\footnote{Jeremy Waldron \textit{Law and Disagreement} (Clarendon Press Oxford, 1999); Waldron, “The Core of the Case” above n 126.}

Thus, Waldron and others’ political positivism follows the positivist tradition of Jeremy Bentham in providing a normative account of judicial moral obligations of fidelity to law that does compete with that put forward by the Fullerian anti-positivists.\footnote{David Dyzenhaus “Positivism’s Stagnant Research Programme” (2000) 20 Oxford Journal of Legal Studies 703; Frederick Schauer “Positivism Before Hart” (2011) 24 Canadian Journal of Law and Jurisprudence 455; Leighton McDonald “Positivism and the Formal Rule of Law: Questioning the Connection” (2001) 26 Australian Journal of Legal Philosophy 93.} Political positivism is often presented as a competing normative account of the rule of law: it “may be best thought of as a particular, democratically inspired, interpretation of the rule of law as both are justified by reference to substantially the same set of normative reasons.”\footnote{Lon L Fuller “Positivism and Fidelity to Law–A Reply to Professor Hart” (1957) 71 Harv L Rev 630 at 632.}

Political positivism therefore constitutes a version of the full response to Fuller’s Challenge: a Hartian legal positivist account of the nature of law, combined with a particular democratic moral and political theory about how the law ought to be created and how judges ought to apply and interpret it.\footnote{For present purposes I will not deal with the difficult interpretive question of how Waldron’s political positivist is consistent with his Fullerian anti-positivist view of law; there seems to be a tension between them, which might be resolved by saying that the rule of law is a limit on political positivism. But then this provides further fuel to the Fullerian fire, because Waldron’s detachment of his political positivism and his support of the validity Social thesis from his Fullerian account of the nature of law at the system level is even more confusing.}

However, for the purposes of this study there is not much that can be made of this, because political positivist arguments are fairly confined in their scope, in a number of ways. First, they apply only to democratic, liberal societies – the democratic legislation of value judgments that are broadly liberal is a condition of their theory’s applicability.\footnote{Waldron, “The Core of the Case”, above n 126, at 1361-1366. Campbell \textit{The Legal Theory of Ethical Positivism}, above n 126.} Second, and relatedly, political positivist theories are not about fidelity to law per se, but fidelity to law in particular legal systems. Political positivism is, therefore, not a general account of the rule of law and fidelity to law applying whenever there is law. Whatever one thinks of political positivism as an account of the rule of law and fidelity to law, the core claims of
Hartian legal positivism discussed in the earlier sections of this chapter do not require allegiance to political positivism.

So while political positivism relies on the truth of Hartian positivism – because it must be possible to determine the content of law without reference to morality, if that is to be our normative prescription – it is not necessary for Hartian positivists to accept the political positivist view of the rule of law and fidelity to law. Thus, it is correct to say that “the preferable conception of the rule of law is a matter of substantive political morality and cannot simply be derived from a jurisprudential commitment to … legal positivism”.134 There is no necessary connection between Hartian legal positivism and any particular view of the rule of law or judicial (moral) obligation.135

8.6.2 The rule of law in a moral theory of adjudication

I have argued that legal positivists in the Hartian tradition have not attempted to provide a developed moral theory of adjudication. The Social and the Normative Inertness theses mean that positivism’s answer to its main question – ‘what is the nature of law?’ – does not hold the answer to what judges morally ought to do. Hartian positivism does not “attempt to single out a specific mode of adjudication as especially estimable”.136 It distinguishes between its theory of what law is and theories of judges’ moral obligations and how they should adjudicate.137 Inquiries into the nature of law do not require or entail allegiance to any particular moral theory of adjudication. In itself, therefore, legal positivism is not inconsistent with a rule of law-based account of fidelity to law – because positivism’s main thesis does not include any claim about judges’ moral obligations.

Of course, this does not mean that what judges morally ought to do is not an important philosophical question. Being a legal positivist doesn’t prevent one from offering a theory of

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134 McDonald “Positivism and the Formal Rule of Law” above n 130, at 94.
what judges morally ought to do; in fact, positivists must provide such a moral theory if they are to offer answers to all the important questions in jurisprudence. As Green observes:¹³⁸

No legal philosopher can be only a legal positivist. A complete theory of law requires also an account of … what role law should play in adjudication (should valid law always be applied?)[.] … Legal positivism does not aspire to answer these questions, though its claim that the existence and content of law depends only on social facts does give them shape.

However, legal positivists in fact have often not focussed on the ‘extra-legal’ analysis of how judges morally ought to deal with the law – at least not as much as anti-positivists, who routinely make such inquiries part of their accounts of law and systemic validity. Coleman’s recent observations in this respect are relevant: he observes that Hartian legal positivism focuses on “which institutions, acts, and activities are distinctively legal and why”, in contrast to the focus of the anti-positivists, which has been inquiry into the moral “difference law … makes or is capable of making in normative space”.¹³⁹ The moral difference law makes, and specifically the moral reasons that apply to judges as people who have taken on a fundamental role within legal systems, is not for Hartian positivists an essential aspect of explaining the existence and content of law.

It might be said that this refusal to provide a moral theory within their general theory of law means that there is a lacuna in legal positivism: there is a large gap where a moral theory of adjudication should be that is filled in by anti-positivist theories of legality. Shapiro’s theory of proper interpretive methodology might be seen as such a moral theory of legal obligation, as suggested in Chapter 7, but his explicit comment on this is to deny that his account of legal obligation is morally justified.¹⁴⁰ It has been suggested that legal positivism bans legal philosophers from inquiring into these questions – as Fuller argued, “What disturbs me about the school of legal positivism is that it not only refuses to deal with [these] problems … but bans them on principle from the province of legal philosophy.”¹⁴¹

¹³⁸ Green, “Legal positivism”, above n 125.
¹³⁹ Coleman, “Beyond Inclusive Legal Positivism” at 362–363.
¹⁴⁰ See above Chapter 7 at section 7.5.4.
¹⁴¹ Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart”, above n 27, at 643. See also Gerald Postema Legal Philosophy in the Twentieth Century: The Common Law World (Springer, Dordrecht, 2011) at 582.
But in reply to this thought, Green defends the Hartian positivists by arguing that “[i]n truth, there are no such bans; positivists simply believe there to be more than one province in the empire of legal philosophy.”  

This is a plausible initial response from within positivist perspective, which claims that that sorting out the nature of law is a worthwhile task, even if it does not automatically produce a moral theory of adjudication. Furthermore, Green is claiming that such an account is not beyond the ‘empire’ of legal philosophy, but merely outside the positivist account of the nature of law. Positivists may thereby inquire into and make claims about what obligations judges (and other people) morally owe to the law, but it does not claim that these obligations are legal. Such a moral theory of adjudication obviously depends on an account of the nature of law, because one cannot determine the moral questions of an area without a sense of how the relevant aspects of that area work. As Hart said in the Postscript to The Concept of Law, one needs to provide a description before one can conduct an evaluation. If, as legal positivism claims, that is true, then we cannot fault positivists for aiming to give a descriptive or conceptual analysis of law. We can only fault them if they do not then turn to explaining what implications the law has for our moral obligations.

When legal positivists turn to this moral question about the law, they will undoubtedly have to engage with and draw on the significant anti-positivist analyses of this question. While denying that Fullerian anti-positivism’s account of fidelity to law describes judges’ legal obligations, positivists can agree with the general tenor of that account as a description of judges’ moral obligations. This position was put forward in a clear form by David Brink, and it is consistent with Hart’s view that the natural law jurisprudence of Finnis and Fuller was complementary to his theory of law.

As Brink elucidates, Hartian legal positivists can both deny that Fullerian anti-positivists have the correct theory of legal validity, and say that they have the correct moral theory of

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143 Hart “Postscript”, above n 57, at 239-240.
adjudication (or at least present theories in the right ballpark).\textsuperscript{146} The positivist account of validity and the anti-positivist account of judges’ moral obligations are not only complementary (non-contradictory), but also true.\textsuperscript{147} While Brink identifies Dworkin’s legal theory as a mistaken account of legal validity and an essentially correct account of judicial moral obligation,\textsuperscript{148} it is likely that the positivists considered in this study would make the ideal of the rule of law an essential element of their theory of adjudication. For they each – even Kramer – argue that the rule of law secures something of moral value, which presumably means that the ideal must be one of moral reasons relevant to a judge deciding what their legal obligations require them to do, morally speaking. If this suggestion is correct, this would be another concession to Fuller, and a major one at that: although Fuller’s theory does not specify judges’ legal obligations, it does provide the basis for the positivist theory of fidelity to law that includes rule of law considerations at its heart.

8.6.3 A ‘legal’ obligation to the rule of law?

But it might be thought that at this point, there really is no reason for maintaining the distinction between Hartian and Fullerian approaches to the rule of law. When it comes to setting out a moral account of adjudication, “judges are under a duty to adopt the kind of theory of adjudication manifested in the practice of common law judges, and advocated by both Fuller and Dworkin”.\textsuperscript{149} If the only difference is that judicial obligation to the rule of law is understood by positivists as moral only, and not legal also, as anti-positivists claim, the differences seem to be theoretical (how should we understand the situation) rather than practical (what ought judges do). And if we couch this obligation in terms of ‘legality’, and like Waldron and Gardner say it is part of the very idea of law at the system level, the Hartian positivist view looks strange to the Fullerian anti-positivist. For example, Dyzenhaus notes that:\textsuperscript{150}

\begin{quote}

it would be open to Hart to respond to my analysis of his sketch of the judicial virtues by saying that the duty of judges to display these virtues is a moral duty but not a legal duty.
\end{quote}

\textsuperscript{146} Brink “Legal Positivism”, above n 144, at 364–365.
\textsuperscript{147} Brink “Legal Positivism”, above n 144, at 364–365.
\textsuperscript{148} Brink “Legal Positivism”, above n 144, at 383–384.
\textsuperscript{149} Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 178.
\textsuperscript{150} Dyzenhaus \textit{Hard Cases in Wicked Legal Systems}, above n 1, at 178.
Even if it is the case, that is, that judges who display such virtues make a positive moral difference to the law of their legal orders, the duty to do so comes from a correct understanding of what morality requires of them, but should not be considered to be entailed in the concept of law. And this is so despite the fact that we would expect such virtues to be displayed in judges in any conceivable legal order, just because they should strive to ensure the legality of their order.

What seems strange to Dyzenhaus is this: if what Fullerian anti-positivists articulate as their account of fidelity to law is what judges morally ought to do by virtue of their role as judges in any legal order, then it seems odd to say that this is just a moral obligation and not a legal obligation. This criticism seems especially telling in regard to Waldron and Gardner, who identify a sense in which one’s moral obligations to the rule of law are legal obligations – obligations to make the law conform better to a legal ideal of the rule of law. Their acceptance of the rule of law as a determinant of legality at the system-level causes the following tension at the validity level: between the legal obligation to apply the valid norms of the system according to its rule of recognition, and the legal (and moral) obligation to make the law live up to the ideal of legality. This tension will manifest in any legal theory that makes concession to Fuller’s Challenge at the system level but attempts to remain positivist at the validity level. Fullerian anti-positivists will keep pressing on this tension in aid of their own understandings of law and legal validity.

In sum, the major Fullerian critique of a positivist embrace of the rule of law as defining (at least in part) the moral obligations of judges, and to the claim that this is, in one sense, a legal obligation, is less of an objection to that position as puzzlement as to why positivists still consider themselves positivists, rather than having conceded everything to Fuller’s Challenge. If judges’ moral obligations to law are determined by a moral ideal of the rule of law, and there is a sense in which these obligations are legal because they make the law live up to an ideal that is part of its nature, what is the point of adding that there is another sense of law and legal obligation that does not refer to the rule of law? This also relates to the criticism of the detachment or insulation approach: if positivists claim that making the law conform to the rule of law is part of judge’s moral obligations, the detachment of their concessions to Fuller at the system level from their validity Social thesis seem even more contrived. From the perspective of judges and others who want to know the practical
implications of legal philosophy, it is the former understanding of law and legal obligation that is most important;\(^{151}\) the latter observations about what the norms of an institutionalized normative system require are relevant to this question, but they are of secondary importance from the ultimate perspective of what judges and others morally ought to do. This is the criticism of Shapiro in section 7.5 generalized. From the Fullerian anti-positivist perspective, any positivist embrace of the rule of law as a determinant of judges’ moral obligations would indicate an almost complete capitulation to Fuller’s Challenge, bar the positivists clinging to their validity Social thesis.

But from the positivist perspective, the distinction they draw between legal validity defining judges’ legal obligation and the ideal of the rule of law determining judges’ moral obligation by requiring them to decide according to that ideal must be maintained for theoretical accuracy’s sake. It is the nature of law that it is a social institution whose normative concept is determined by social facts. There is nothing gained by failing to distinguish between the criteria of legal validity within a particular instance of the social phenomenon of law, and the universal moral requirements associated with the rule of law, which might not be incorporated into those criteria of validity. Again we see the fundamental difference in standpoint coming to the fore, because Fullerian anti-positivists contest the idea that the requirements of the rule of law are not also a judicially enforceable aspect of determining the content and interpretation of legally valid norms in any legal system.

In the end, the debate as to whether the validity Social thesis is true comes down to how the different traditions understand the relevant world – namely how the concept of law operates in our legal culture. The positivists have one concept of law, the Fullerian anti-positivists another. In each case the theorists are providing a description of how an idea/concept works in our culture - how it performs a role in regulating social life and helps us understand what happens in our societies. The Fullerian anti-positivist Simmonds tells us that “An account of the nature of law must be judged by its ability to yield insight and make coherent sense of

\(^{151}\) Allan \textit{Constitutional Justice}, above n 107, at Chapter 3; Simmonds \textit{Law as a Moral Ideal}, above n 107, at Chapter 4.
our more settled understandings and beliefs about law.”

Yet this seems on a par with Hart’s view that he was simply drawing out certain important features of a concept of a certain social institution – the ‘municipal legal system’ – he thought was understood and used by most ordinary ‘educated’ people. Similarly, the view that legal philosophy explains the concept of law shared in a community is evident in Raz’s repeated reference in *The Authority of Law* to “[w]idely shared”, “generally agreed” views, and to “our conception of the law”, “our normal view”, “our common knowledge of intuitively clear instances of municipal systems”. Most recently, this conceptual approach has been found in Shapiro’s reliance on ‘truisms’ about law that we share. The problem for jurisprudence is the same as that identified by Fuller in his debate with Hart: there are competing views of the thing – law – that claim to show how it is understood by the relevant society and culture.

What Fuller did with his challenge to positivism is exactly what the protagonists in the debate must always do to move the argument forward: point to obvious facts or truisms about law, and claim that one’s own theory makes better sense of those facts than one’s opponents. This study has shown that positivists have made many concessions to Fuller, without self-consciously capitulating to Fuller’s way of looking at law. It has also suggested that the tensions between what they concede and what they hold on to need to be better understood and dealt with. Using the critique mounted by recent Fullerian anti-positivists, and Coleman’s recent framework for jurisprudence, I have attempted to show how positivists make certain concessions to Fuller but do not make others. However, until positivists attend more to the tensions highlighted by the recent Fullers, they will not have adequately dealt with the challenge that Fuller provided at the birth of contemporary legal positivism.

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152 Simmonds *Law as a Moral Ideal*, above n 107, at 55.
153 Hart *The Concept of Law*, above n 23, at 3-5.
155 Raz *The Authority of Law*, above n 14, at 43.
156 Raz *The Authority of Law*, above n 14, at 48.
157 Raz *The Authority of Law*, above n 14, at 49.
158 Raz *The Authority of Law*, above n 14, at 111.
8.7 Conclusion

Recent legal positivism in the Hartian tradition has acknowledged that Fuller’s idea of the rule of law is an indispensable part of explaining the existence of legal systems, and that his conformity to its principles is of moral value. Some of the main debates in the rule of law literature have thus, for the most part, been defused. This is one of the main conclusions from my close analysis of the positivist positions discussed in this study. But this chapter has shown that Fullerian anti-positivism still stands in opposition to Hartian positivism on the main questions of Hartian legal philosophy: the nature of law as a social institution and the basis of legal validity. Coleman’s analysis can be used to clarify the positions that legal positivists hold on the relationship between law and the rule of law as a matter of the general concept of law and from the perspective of legal content. But the analysis provided in this concluding chapter also supports my main thesis that positivists have yet to adequately respond to Fuller’s Challenge by showing how their concessions to Fuller are consistent with a legal positivist position. Coleman’s discussion, along with the arguments that positivists have made about the relationship between law and the rule of law, is a start; but my conclusion is that positivists need to provide a more comprehensive response to Fuller’s anti-positivism in order to show how their positivist positions can cope with or eliminate the tensions and problems that Fullerian anti-positivists diagnose. There seems little likelihood that these fundamental differences in jurisprudential positions and starting points will be resolved any time soon. Progress will only be made when legal positivists make clear why they hold their disjointed views concerning the nature of law and the determinants of legal validity.

Yet, once it is recognized that the main claims of Hartian legal positivism are normatively inert and do not resolve questions of the moral obligations of judges, the dialogue and debate between positivists and anti-positivists becomes tractable and fruitful. Hartian positivists can join the debate about how judges ought to apply and interpret the law, and can use the ideal of the rule of law as discussed exhaustively by anti-positivists – as well as the challenges to this view from political positivists – as a springboard for their own discussions of this question. Once this is recognized, the debate on the place of the rule of law in the theory of
fidelity to law can be engaged in by all traditions of modern jurisprudence. The necessity of shifting this debate is the programmatic conclusion of this study.
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