What is Law?

An introduction to the question

via sources compiled by Professor Ronald J. Colombo,

Maurice A. Deane School of Law at Hofstra University.

Reading 1

Law - Introduction, in PHILOSOPHY OF LAW 1-2 (Joel Feinberg & Hyman Gross, eds., 2d ed. 1980)

[the reading follows this page]

PART 1 LAW

The question "What is law?" seems at first glance hardly to deserve a philosopher's attention. Ask a lawyer about the law: if he or she is unable to give an answer on the spot, such a professional knows where to look it up, or at least where to get the ingredients for a reliable opinion. Statutes, judicial opinions, administrative regulations, constitutional provisions are all official pronouncements of law. When these texts leave the matter ambiguous, a lawyer knows the appropriate techniques to resolve the ambiguity, and in aid of that consults scholarly works of interpretation and other sources of authoritative opinion. The question "What is law?" then seems simply a request for a general definition that covers all those, and only those, items of official pronouncement that lawyers finally treat as law. It is true that even the best dictionary may leave us unsatisfied, for something more informative than a mere guide for word use is wanted. Still, at first sight nothing in the question appears to need the fine grinding of the philosopher's mill, and we conclude that we are adequately acquainted with the notion of something as familiar as law, only details remaining to be filled in.

Our simple belief is shattered not only by philosophical reflection but also by the common experience of those who use and are subject to the law. Professor H. L. A. Hart, whose work now dominates Anglo-American legal philosophy, has described this illusion of understanding in this way. "The same predicament was expressed by some famous words of St. Augustine about the notion of time. 'What then is time? If no one asks me I know: if I wish to explain it to one that asks I know not.' It is in this way that even skilled lawyers have felt that, though they know the law, there is much about law and its relations to other things that they cannot explain and do not fully understand. Like a man who can get from one point to another in a familiar town but cannot explain or show others how to do it, those who press for a definition need a map exhibiting clearly the relationships dimly felt to exist between the law they know and other things."[1]

1. *The Concept of Law* (1961), pp. 13-14.

What then are the further questions left unanswered by simple definitions, and what is their importance? In theories of law, three different interpretations have been given to the question "What is law?" These different versions of the question are not always clearly distinguished, but an analogy may serve to clarify the difference.

Suppose the question were "What is a postage stamp?" One interpretation would call for a statement of *what counts as* a postage stamp, or, putting it another way, *what deserves to be called* a postage stamp. The answer would distinguish postage stamps from, and relate them to, revenue stamps, Christmas seals, postage meter imprints, postal privilege franks, and postage due stamps. A second way of viewing the question is as a request for information about *what is properly given effect* as a postage stamp. What counts as a postage stamp is not at issue, but it is recognized that a seriously torn or blemished stamp will not be treated as valid for postage, nor will a counterfeit stamp, one withdrawn from use, or a foreign stamp; and so *criteria of validity* are sought. Finally, a third way of interpreting the question stresses *the nature* of postage, requiring an explanation of the postal system of which stamps are a part and a description of the role of stamps in it. Turning to the far weightier question about law, we notice first that law is the ultimate social resource of civilized people when claims are in conflict. There are many other standards to which people may and often do turn in regulating their affairs, but when these fail, standards bearing the authority of the state are the last resort. It is important, therefore, for the citizen as well as for the judge weighing his or her claim to be able to tell exactly what is law, so that the force of law is not given to lawlike things of other sorts, such as standards of customary practice, moral precepts, by-laws and private regulations.

Once items that are properly called laws are distinguished from other lawlike pronouncements how do we distinguish those that are valid from those that are not? Invalid licenses, arguments, coupons, and orders are not properly given effect, and neither are invalid laws (though it is important to note that in all these cases invalidity does not affect the *kind* of thing it is). What then in general supports the claim that a law may not be given effect? Suppose it is regularly disobeyed and unenforced? Suppose it is hideously unjust? Suppose it is the product of a political regime that is clearly illegitimate? Suppose there are no means for enforcing or changing the law? Here the issue is whether moral, social, or political standards of validity that are (in the first instance, at least) outside the law must be met if a law is to be valid.

A third range of questions concerns the nature of law, and particularly its relation to morality. At every turn lawyers, judges, legislators, and citizens grapple with moral questions: What is fair, who is to blame, what rights does one have, what is wrong with doing that? To make sure the law reflects the lives we live as moral creatures, we need to understand the relation between our law and our morals. In addition, another aspect of the nature of law raises questions about its formal properties: Are laws rules or standards of some other sort? And just what difference is there between what is included as an item of law and other expressions of the same form that are not part of the law?

Reading 2

2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 995 [I-II, Q 90, Art. 4] (Fathers of the English Dominican Province trans., Christian Classics 1920) (c. 1265-1274) (bracketed numbers added)

> "Law is nothing else than [1] an ordinance of reason [2] for the common good, [3] promulgated [4] by him who has the care of the community."

Reading 3

AUGUSTINE, ON FREE CHOICE OF THE WILL bk 1, §5, at 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (c. 400 AD) (cited in Jules L. Coleman, *The Architecture of Jurisprudence*, 121 Yale L.J. 2, 11 n.11 (2011))

"an unjust law is no law at all"

Reading 4

Hart, H.L.A, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-621 (1958) (excerpted in LAW, JUSTICE AND THE COMMON GOOD 179-184 (Sidney Hyman ed. 1988))

[the reading follows this page]

H. A. L. HART: POSITIVISM AND THE SEPARATION OF LAW AND MORALS

Professor Hart's prodigious intellectual feats in the province of jurisprudence include his defense and redemptive criticism of the concepts of "legal positivism" associated with the work of Jeremy Bentham and John Austin. In Hart's own writing during the latter part of the 1960's, he seemed to modify his earlier insistence on the separation of law and morals in the Bentham-Austin tradition, and tried to formulate a sociological basis for a "minimum content" for a "natural law" at the point of its intersection with the "positive law" of a legal system. In the extract below, however, taken from an extended *Harvard Law Review* article he wrote in 1958, Hart defended the case of the "legal positivists" against the challenge of post-war jurists who shared Radbruch's anguish.

The third criticism of the separation of law and morals is of a very different character, it certainly is less an intellectual argument against the utilitarian distinction than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience. For it consists of the testimony of those who have descended into Hell, and, like Ulysses or Dante, have brought back a message for human beings. Only in this case the Hell was not beneath or beyond earth, but on it; it was a Hell created on earth by men for other men.

This appeal comes from those German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system. One of these thinkers, Gustav Rad-

bruch, had himself shared the "positivist" doctrine until the Nazi tyranny, but he was converted by this experience and so his appeal to other men to discard the doctrine of the separation of law and morals has the special poignancy of a recantation. What is important about this criticism is that it really does confront the particular point which Bentham and Austin had in mind in urging the separation of law as it is and as it ought to be. These German thinkers put their insistence on the need to join together what the utilitarians separated just where this separation was of most importance in the eyes of the utilitarians; for they were concerned with the problem posed by the existence of morally evil laws.

Before his conversion Radbruch held that resistance to law was a matter for the personal conscience, to be thought out by the individual as a moral problem, and the validity of a law could not be disproved by showing that the effect of compliance with the law would be more evil than the effect of disobedience. Austin, it may be recalled, was emphatic in condemning those who said that if human laws conflicted with the fundamental principles of morality then they cease to be laws, as talking "stark nonsense."

The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death: if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.

These are strong, indeed brutal words, but we must remember that they went along—in the case of Austin and, of course, Bentham—with the conviction that if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience. We shall see, when we consider the alternatives, that this simple presentation of the human dilemma which may arise has much to be said for it.

Radbruch, however, had concluded from the case with which the Nazi regime had exploited subservience to mere law—or expressed, as he thought, in the "positivist" slogan "law as law" *(Gesetz als Gesetz)*—and from the failure of the German legal profession to protest against the enormities which they were required to perpetrate in the name of law, that "positivism" (meaning here the insistence on the separation of law as it is from law as it ought to be) had powerfully contributed to its horrors. His considered reflections led him to the doctrine that the fundamental principles of humanitarian morality were part of the very concept of *Recht* or Legality and that no positive enactment of 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. This doctrine can be appreciated fully only if the nuances imported by the German word *Recht* are grasped. But it is clear that the doctrine meant that every lawyer and 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. The striking recantation of his previous doctrine is unfortunately omitted from the translation of his works, but it should be read by all who wish to think afresh on the question of the interconnection of law and morals.

It is impossible to read without sympathy Radbruch's passionate demand that the German legal conscience should be open to the demands of morality and his complaint that this has been too little the case in the German tradition. On the other hand there is an extraordinary naiveté in the view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality. Rather this terrible history prompts inquiry into why emphasis on the slogan "law is law," and the distinction between law and morals acquired a sinister character in Germany, but elsewhere, as with the utilitarians themselves, went along with the most enlightened liberal attitudes. But something more disturbing than naiveté is latent in

Radbruch's whole presentation of the issues to which the existence of morally iniquitious laws give rise. It is not, I think, uncharitable to say that we can see in his argument that he has only half digested the spiritual message of liberalism which he is seeking to convey to the legal profession. For everything that he says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this once declared was conclusive of the final moral question: "Ought this rule of law to be obeyed?" Surely the truly liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is, "Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."

However, we are not left to a mere academic discussion in order to evaluate the plea which Radbruch made for the revision of the distinction between law and morals. After the war Radbruch's conception of law as containing in itself the essential moral principle of humanitarianism was applied in practice by German courts in certain cases in which local war criminals, spies, and informers under the Nazi regime were punished. The special importance of these cases is that the persons accused of these crimes claimed that what they had done was not illegal under the laws of the regime in force at the time these actions were performed. This plea was met with the reply that the laws upon which they relied were invalid as contravening the fundamental principles of morality. Let me cite briefly one of these cases.[43]

In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front. In 1949 the wife was prosecuted in a West German court for an offense which we would describe as illegally depriving a person of his freedom

(rechtswidrige Freiheitsberaubung). This was punishable as a crime under the German Criminal Code of 1871 which had remained in force continuously since its enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since to quote the words of the court, the statute "was contrary to the sound conscience and sense of justice of all decent human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. The unqualified satisfaction with this result seems to me to be hysteria. Many of us might applaud the objective—that of punishing a woman for an outrageously immoral act—but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will

encourage the romantic optimism that all the values we cherish ultimately will fit into a single system that no one of them has to be sacrificed or compromised to accommodate another.

This is surely untrue and there is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of an ordinary case.

It may seem perhaps to make too much of forms, even perhaps of words, to emphasize one way of disposing of this difficult case as compared with another which might have led, so far as the woman was concerned, to exactly the same result. Why should we dramatize the difference between them? We might punish the woman under a new retrospective law and declare overtly that we were doing something inconsistent with our principles as the lesser of two evils; or we might allow the case to pass as one in which we do not point out precisely where we sacrifice such a principle. But candour is not just one among many minor virtues of the administration of law, just as it is not merely a minor virtue of morality. For if we adopt Radbruch's view, and with him the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the denial of the utilitarian distinction is the one that the utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.

[Hart, H.A.L., *Positivism and the Separation of Law and Morals*, (Harvard Law Review, 593, 1958) pp. 615–621]

Reading 5

Fuller, Lon L., *Positivism and Fidelity to Law: A Reply to Hart*, 71 H. 656-657 (1958) (excerpted in LAW, JUSTICE AND THE COMMON GOOD ed. 1988))

[the reading follows this page]

LON L. FULLER: POSITIVISM AND FIDELITY TO LAW—REPLY TO PROFESSOR HART

Professor Lon Fuller's reply to Professor Hart also took the form of a 1958 extended article published in the *Harvard Law Review*. The extract reproduced below focuses on the dilemma faced by Gustave Radbruch and other like-minded German legal scholars after the Second World War in their conceptual struggle to rescue German jurisprudence from the perversions of the late Nazi regime. Fuller, in contrast to Hart, came to the support of Radbruch's attempt to formulate an "international morality of law," and to use it as a standard for discrimination between order per se and good order. To Professor Fuller, a fidelity to law also embraces the responsibility for making law what it ought to be.

The Problem of Restoring Respect for Law and Justice after the Collapse of a Regime that Respected Neither

After the collapse of the Nazi regime the German courts were faced with a truly frightful predicament. It was impossible for them to declare the whole dictatorship illegal or to treat as void every decision and legal enactment that had emanated from Hitler's government. Intolerable dislocations would have resulted from any such wholesale outlawing of all that occurred over a span of twelve years. On the other hand, it was equally impossible to carry forward into the new government the effects

of every Nazi perversity that had been committed in the name of law; any such course would have tainted an indefinite future with the poisons of Nazism.

This predicament—which was, indeed, a pervasive one, affecting all branches of law—came to a dramatic head in a series of cases involving informers who had taken advantage of the Nazi terror to get rid of personal enemies or unwanted spouses. If all Nazi statutes and judicial decisions were indiscriminately "law," then these despicable creatures were guiltless, since they had turned their victims over to processes which the Nazis themselves knew by the name of law. Yet it was intolerable, especially for the surviving relatives and friends of the victims, that these people should go about unpunished, while the objects of their spite were dead, or were just being released after years of imprisonment, or, more painful still, simply remained unaccounted for.

The urgency of this situation does not by any means escape Professor Hart. Indeed, he is moved to recommend an expedient that is surely not lacking itself in a certain air of desperation. He suggests that a retroactive criminal statute would have been the least objectionable solution to the problem. This statute would have punished the informer, and branded him as a criminal, for an act which Professor Hart regards as having been perfectly legal when he committed it.

On the other hand, Professor Hart condemns without qualification those judicial decisions in which the courts themselves undertook to declare void certain of the Nazi statutes under which the informer's victims had been convicted. One cannot help raising at this point the question whether the issue as presented by Professor Hart himself is truly that of fidelity to law. Surely it would be a necessary implication of a retroactive criminal statute against informers that, for purposes of that statute at least, the Nazi laws as applied to the informers or their victims were to be regarded as void. With this turn the question seems no longer to be whether what was once law can now be declared not to have been law, but rather who should do the dirty work, the courts or the legislature.

But, as Professor Hart himself suggests, the issues at stake are much too serious to risk losing them in a semantic tangle. Even if the whole question were one of words, we should remind

ourselves that we are in an area where words have a powerful effect on human attitudes. I should like, therefore, to undertake a defense of the German courts, and to advance reasons why, in my opinion, their decisions do not represent the abandonment of legal principle that Professor Hart sees in them. In order to understand the background of those decisions we shall have to move a little closer, within smelling distance of the witches' caldron, than we have been brought so far by Professor Hart. We shall have also to consider an aspect of the problem ignored in his essay, namely, the degree to which the Nazis observed what I have called the inner morality of law itself.

Throughout his discussion, Professor Hart seems to assume that the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman. This assumption is, I think, seriously mistaken, and Professor Hart's acceptance of it seems to me to render his discussion unresponsive to the problem it purports to address. . . .

During the Nazi regime there were repeated rumors of "secret laws." In the article criticized by Professor Hart, Radbruch mentions a report that the wholesale killings in concentration camps were made "lawful" by a secret enactment. Now surely there can be no greater legal monstrosity than a secret statute. Would anyone seriously recommend that following the war the German courts should have searched for unpublished laws among the files left by Hitler's government so that citizens' rights could be determined by a reference to these laws?

The extent of the legislator's obligation to make his laws known to his subjects is, of course, a problem of legal morality that has been under active discussion at least since the Secession of the Plebs. There is probably no modern state that has not been plagued by this problem in one form or another. It is most likely to arise in modern societies with respect to unpublished administrative directions. Often these are regarded in quite good faith by those who issue them as affecting only matters of internal organization. But since the procedures followed by an administrative agency, even in its "internal" actions, may seriously affect the rights and interests of the citizen, these unpublished, or "secret," regulations are often a subject for complaint.

But as with retroactivity, what in most societies is kept under

control by the tacit restraints of legal decency broke out in monstrous form under Hitler. Indeed, so loose was the whole Nazi morality of law that it is not easy to know just what should be regarded as an unpublished or secret law. Since unpublished instructions to those administering the law could destroy the letter of any published law by imposing on it an outrageous interpretation, there was a sense in which the meaning of every law was "secret." Even a verbal order from Hitler that a thousand prisoners in concentration camps be put to death was at once an administrative direction and a validation of everything done under it as being "lawful."

But the most important affronts to the morality of law by Hitler's government took no such subtle forms as those exemplified in the bizarre outcroppings I have just discussed. In the first place, when legal forms became inconvenient, it was always possible for the Nazis to bypass them entirely and "to act through the party in the streets." There was no one who dared bring them to account for whatever outrages might thus be committed. In the second place, the Nazi-dominated courts were always ready to disregard any statute, even those enacted by the Nazis themselves, if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure "above."

This complete willingness of the Nazis to disregard even their own enactments was an important factor leading Radbruch to take the position he did in the articles so severely criticized by Professor Hart. I do not believe that any fair appraisal of the action of the postwar German courts is possible unless we take this factor into account, as Professor Hart fails completely to do.

These remarks may seem inconclusive in their generality and to rest more on assertion than evidentiary fact. Let us turn at once, then, to the actual case discussed by Professor Hart.

In 1944 a German solder paid a short visit to his wife while under travel orders on a reassignment. During the single day he was home, he conveyed privately to his wife something of his opinion of the Hitler government. He expressed disapproval of *(sich abfBllig geäussert über)* Hitler and other leading personalities of the Nazi party. He also said it was too bad Hitler had not met his end in the assassination attempt that had occurred on July 20th of that year. Shortly after his departure, his wife, who

during his long absence on military duty "had turned to other men" and who wished to get rid of him reported his remarks to the local leader of the Nazi party, observing that "a man who would say a thing like that does not deserve to live." The result was a trial of the husband by a military tribunal and a sentence of death. After a short period of imprisonment, instead of being executed, he was set to the front again. After the collapse of the Nazi regime, the wife was brought to trial for having procured the imprisonment of her husband. Her defense rested on the ground that her husband's statements to her about Hitler and the Nazis constituted a crime under the laws then in force. Accordingly, when she informed on her husband she was simply bringing a criminal to justice.

This defense rested on two statutes, one passed in 1934, the other in 1938. Let us first consider the second of these enactments, which was part of a more comprehensive legislation creating a whole series of special wartime criminal offenses. I reproduce below a translation of the only pertinent section:

> The following persons are guilty of destroying the national power of resistance and shall be punished by death: Whoever publicly solicits or incites a refusal to fulfill the obligations of service in the armed forces of Germany, or in the armed forces allied with Germany, or who otherwise publicly seeks to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies.[21]

It it almost inconceivable that a court of present-day Germany would hold the husband's remarks to his wife, who was barred from military duty by her sex, to be a violation of the final catch-all provision of this statute, particularly when it is recalled that the test reproduced above was part of a more comprehensive enactment dealing with such things as harboring deserters, escaping military duty by self-inflicted injuries, and the like. The question arises, then, as to the extent to which the interpretive principles applied by the courts of Hitler's government should be accepted in determining whether the husband's remarks were indeed unlawful.

This question becomes acute when we note that the act applies only to *public* acts or utterances, whereas the husband's

remarks were in the privacy of his own home. Now it appears that the Nazi courts (and it should be noted we are dealing with a special military court) quite generally disregarded this limitation and extended the act to all utterances, private or public. Is Professor Hart prepared to say that the legal meaning of this statute is to be determined in the light of this apparently uniform principle of judicial interpretation?

Let us turn now to the other statute upon which Professor Hart relies in assuming that the husband's utterance was unlawful. This is the act of 1934, the relevant portions of which are translated below:

> (1) Whoever publicly makes spiteful or provocative statements directed against, or statements which disclose a base disposition toward, the leading personalities of the nation or of the National Socialist German Worker's Party, or toward measures taken or institutions established by them, and of such nature as to undermine the people's confidence in their political leadership, shall be punished by imprisonment.
>
> (2) Malicious utterances not made in public shall be treated in the same manner as public utterances when the person making them realized or should have realized they would reach the public.
>
> (3) Prosecution for such utterances shall be only on the order of the National Minister of Justice: in case the utterance was directed against a leading personality of the National Socialist German Worker's Party, the Minister of Justice shall order prosecution only with the advice and consent of the Representative of the Leader.
>
> (4) The National Minister of Justice shall, with the advice and consent of the Representative of the Leader, determine who shall belong to the class of leading personalities for purposes of Section 1 above.

Extended comment on this legislative monstrosity is scarcely called for, overloaded and undermined as it is by uncontrolled administrative discretion. We may note only: first, that it offers no justification whatever for the death penalty actually imposed on her husband, though never carried out; second, that if the wife's act in informing on her husband made his remarks "public," there is no such thing as a private utterance under this statute. I should like to ask the reader whether he can actually

share Professor Hart's indignation that, in the perplexities of the post-war reconstruction, the German courts saw fit to declare this thing not a law. Can it be argued seriously that it would have been more beseeming to the judicial process if the postwar courts had undertaken a study of "the interpretative principles" in force during Hitler's rule and had then solemnly applied those "principles" to ascertain the meaning of this statute? On the other hand, would the courts really have been showing respect for Nazi law if they had construed the Nazi statutes by their own, quite different, standards of interpretation? Professor Hart castigates the German courts and Radbruch, not so much for what they believed had to be done, but because they failed to see that they were confronted by a moral dilemma of a sort that would have been immediately apparent to Bentham and Austin. By the simple dodge of saying, "When a statute is sufficiently evil it ceases to be law," they ran away from the problem they should have faced.

This criticism is, I believe, without justification. Matters certainly would not have been helped if, instead of saying, "This is now 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, and Professor Hart does not recommend any such "facing of the true issue" by the courts themselves. He would have preferred a retroactive statute. Curiously, this was also the preference of Radbruch. But unlike Professor Hart, the German courts and Gustav Radbruch were living participants in a situation of drastic emergency. The informer problem was a pressing one, and if legal institutions were to be rehabilitated in Germany it would not do to allow the people to begin taking the law into their own hands, as might have occurred while the courts were waiting for a statute.

As for Gustav Radbruch, it is, I believe, wholly unjust to say that he did not know he was faced with a moral dilemma. His postwar writings repeatedly stress the antinomies confronted in the effort to rebuild decent and orderly government in Germany. As for the ideal of fidelity to law, I shall let Radbruch's own words state his position:

> We must not conceal from ourselves—especially not in the light of our experiences during the twelve-year dictator-

> ship—what frightful dangers for the rule of law can be contained in the notion of "statutory lawlessness" and in refusing the quality of law to duly enacted statutes.

The situation is not that legal positivism enables a man to know when he faces a difficult problem of choice, while Radbruch's beliefs deceive him into thinking there is no problem to face. The real issue dividing Professor Hart and Radbruch is: How shall we state the probem? What is the nature of the dilemma in which we are caught?

I hope I am not being unjust to Professor Hart when I say that I can find no way of describing the dilemma as he sees it but to use some such words as the following: 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 moral obligations. No mediating principle can measure their respective demands on conscience, for they exist in wholly separate worlds . . .

[Fuller, Lon L., *Positivism and Fidelity to Law: A Reply to Hart,* (71 Harvard Law Review, 630, 1958), pp. 640–643, 656–657]